



International
Labour
Organization

100
1919 • 2019

ILO700

LAW for
SOCIAL
JUSTICE

Edited by

George P. Politakis

Tomi Kohiyama

Thomas Lieby

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International Labour Office
Geneva 2019

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First published 2019

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ISBN 978-92-2-134086-7 (print)

ISBN 978-92-2-134087-4 (web PDF)

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Code: DTP-WEI-SEP

PREFACE

As the International Labour Organization's centenary year draws to its close, this commemorative volume arising from the 'ILO100 – Law for Social Justice' academic conference, which took place in April 2019, recalls the indelible mark of law in the Organization's life and action. The rich contributions show that the ILO remains a captivating research field for the academic community as well as a powerful vehicle for advancing social justice globally.

Law can help normative institutions like the ILO to guarantee institutional continuity as well as to lead change when needed. The publication bears testimony to this. All the important choices made by the ILO during its first hundred years link the past, the present and the future of the Organization in varying degrees. Law has played its part in this process.

In this spirit, the ILO Centenary Declaration for the Future of Work – adopted at the Centenary Session of the International Labour Conference in June 2019 – is an instrument which reaffirms the ILO's values and priorities and steers it in the context of the realities of the 21st century. The concept of a human-centred approach to the future of work, which is at the core of the Declaration, translates in contemporary terms, the commitment to 'humane conditions of labour' set out in the original Constitution of the ILO. The ILO's responsibility for maintaining a clear, robust, up-to-date body of international labour standards is reaffirmed together with the fundamental importance of adopting, promoting, ratifying and supervising those standards. Likewise, the call for full, equal and democratic participation of constituents in ILO's tripartite governance is recognized as a precondition for the realization of social justice everywhere.

The Centenary Declaration is not meant to be merely a manifesto of good intentions. What matters first and foremost is that it should serve as a catalyst for action by the ILO's constituents and the multilateral system. It is significant that a little more than three months after its adoption, the

UN General Assembly adopted a resolution encouraging its implementation. As the UN Secretary General stated, ‘the ILO Centenary Declaration is much more than a statement of wishes or intent. It proposes a shift in the paradigm of how we look at development [...] This is an ambitious Declaration, but setting ambitious goals and achieving them is part of the ILO’s history [and] thanks to [our] efforts, it will also be part of its future’.

This collection of essays offers a wealth of expert knowledge on the ILO, international labour law and the broader human rights framework. It confirms our common responsibility to help shape the international rules and institutions of the multilateral system of tomorrow based on the unwavering conviction that universal and lasting peace can be established only if it is based upon social justice.

Guy Ryder
DIRECTOR-GENERAL



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INTRODUCTION

Anniversaries often serve, among other things, as a pretext for a certain amount of self-congratulation. The intention behind this publication, however, is to present the state of current thinking about the role and function of law in managing the fortunes of international organizations in general, and of the International Labour Organization in particular. Paying homage to the legal minds that have accompanied the Organization in the pursuit of its ‘wild dream’ is certainly befitting but is only meant to serve as a source of inspiration, not as an opportunity for complacency.

Three unique characteristics make the ILO a fascinating case study in legal experimentation;¹ first, its longevity and resilience face to adversity and crisis;² second, its standard-setting mandate and the impressive record of human rights treaties produced thus far;³ and third, the unparalleled institutional architecture with all its complexities.⁴

These circumstances have created the space – and the need – for legal ingenuity and pioneering originality. Theorizing about the inadmissibility

¹ See Wilfred Jenks, ‘The International Labour Organization as a subject of study for international lawyers’ (1938) *Journées du droit international du travail*, University of Liège.

² Historians seem to agree that the ILO’s ‘survival’ following the demise of the League and the advent of the United Nations was more the result of skilful legal manoeuvring than a foregone political conclusion; see Daniel Maul, *The International Labour Organization – 100 Years of Global Social Policy* (De Gruyter 2019) 129-130, 139. No less skilful has been the ILO’s repositioning at the time of the debate around the social dimension of globalization; see Kari Tapiola, *The Teeth of the ILO – The Impact of the 1998 Declaration on Fundamental Principles and Rights at Work* (ILO 2018) 19-38. See also Francis Maupain, ‘L’OIT, la justice sociale et la mondialisation’ (1999) 201 *Recueil des cours* 262-269.

³ With a total of four hundred normative instruments to date, the ILO ‘mill’ leads confidently global lawmaking in the human rights field. Apart from the creation of those instruments *per se* and the challenges of consistent legal crafting in the course of a century, it is the array of legal questions – and ingenuous answers – relating to reservations, interpretation, revision, and supervision of standards that make the ILO norms repository one of unfathomable richness.

⁴ See Wilfred Jenks, ‘The Significance for International Law of the Tripartite Character of the International Labour Organisation’ (1936) 22 *Transactions of the Grotius Society* 45.

of reservations to conventions adopted by a tripartite constituency; breaking new ground in PCIJ oral proceedings by securing the participation of workers' and employers' organizations; setting up a monitoring and complaints mechanism for unratified conventions on freedom of association; preserving the normative 'acquis' at the time of sweeping decolonization – these are just a few of the instances where legal thinking seems to have shaped the ILO's identity and showed the direction for its future development.⁵

'Law for Social Justice' is a reminder of the role law can play in translating moral aspirations into coherent normative frameworks, giving shape to stable yet flexible rules, steering the Organization in times of crisis, resisting pushbacks and unlocking impasses among the tripartite constituents through creative thinking. Often compared to a Sisyphean task, ILO's action in pursuit of social justice calls for constant adaptation to new needs and law has been serving the Organization's noble ideal with rigour and boldness.

Back in 1999, the former ILO Legal Adviser, Francis Maupain, had expressed the view that *'l'OIT n'est en effet ancienne que parce qu'elle a survécu à diverses crises et, pour survivre, elle a dû profondément se transformer. Dans cette transformation, le droit a eu une place essentielle'*.⁶ There are indeed numerous examples of major ILO institutional reforms which have been devised and operationalized through appropriate legal engineering, mostly for the reinforcement of its system of standards and their supervision or in support of the Organization's singular tripartite structure.

In one of his more recent writings, Francis Maupain asked rhetorically – 'A second century for what?'⁷ Articulating convincing and compelling

⁵ For more on the legal doctrinal debates in the formative years of the Organization, see Dzovinar Kévonian, 'Les juristes et l'Organisation internationale du travail 1919-1939. Processus de légitimation et institutionnalisation des relations internationales' (2010) 12 *Journal of the History of International Law* 227.

⁶ Francis Maupain, 'Gardien du patrimoine juridique ? Le rôle du Conseiller juridique d'une organisation internationale face au changement' in *Collection of Essays by Legal Advisers of International Organizations and Practitioners in the Field of International Law* (UN 1999) 261.

⁷ Francis Maupain, 'A Second Century for What? The ILO at a Regulatory Crossroad' (2019) *International Organizations Law Review* 1.

answers is, of course, part of the challenge and requires vision and audacity. Yet, the ILO has never shied away from its responsibilities. The combination of ILO's constitutional architecture and the collective wisdom and resourcefulness of its tripartite constituency are the most solid assets to guide the way forward.

The ILO centenary offers an extraordinary opportunity to portray the ILO's dynamism, a dynamism marked by an unwavering commitment to human-centric values, dialogue and pragmatism. At the same time, the ILO centenary commands to look honestly and critically at the missed opportunities, the failures and all unfinished business.

At its Centenary session in June of this year, the International Labour Conference adopted the Centenary Declaration for the Future of Work in an effort to address the profound changes taking place in the world of work and in the international community and consider how the Organization can respond to those momentous challenges and complexities. The Centenary Declaration was drafted as a concise and action-oriented document that identifies challenges, sets the long-term strategic direction of the Organization and consolidates the ILO as the global authority on labour and employment matters.

The ILO has never believed that future is predetermined. The arduous task of promoting social justice is far from being completed. Over the last one hundred years, relentless efforts have been deployed with considerable results for the promotion of social justice. Yet this – as much as the 'universal and lasting peace' it purports to engender – remains an ideal yet to be attained.

* * *

This publication is based on the proceedings of the 'ILO100 – Law for Social Justice' international conference which was held at the ILO headquarters in Geneva on 15-17 April 2019. The three-day event was organized as part of the centenary celebrations in order to pay tribute to the legal tradition of the ILO and showcase its multiple contributions to the development of international law.

Because of its normative agenda, ILO's existence is identified with law-making, both at the international and the national level. The constituent act

of the Organization one hundred years ago was a multilateral treaty – in fact several multilateral treaties as the ILO Constitution was inserted in all the peace treaties concluded at the end of the Great War. As one of the first non-State subject of international law, the ILO has both witnessed and shaped the development of what have now become major fields of public international law, such as the law of international institutions, the law of treaties, or the privileges and functional immunities of international civil servants.

In the first years of its existence, the ILO's institutional identity was molded by the World Court of the time – the Permanent Court of International Justice – which rendered key advisory opinions determining, among others, the scope of the normative mandate of the Organization. The founding fathers attributed to the adoption and implementation of international labour standards a prominent role in the realization of the ILO constitutional objectives. In fact, the ILO's unique tripartite governance was geared towards the preparation and adoption of global labour standards. Half of the provisions of the ILO Constitution are dedicated to standard-setting and the application of standards.

Many of ILO's interactions with its Members at the national level are also legal in nature, involving a number of institutions and actors, starting with national parliaments to which all Members have the obligation to submit newly adopted standards. In a more recent development, the Organization initiated regular dialogue and collaboration with national courts and judges, in addition to ILO's well-established relationship with other national institutions such as labour inspection services.

Certainly, the potency of ILO's contribution to contemporary international law owes much to the long line of eminent scholars who have served throughout the years in ILO supervisory bodies, the ILO secretariat, the ILO Administrative Tribunal, or represented the government of their countries in ILO governance organs. Roberto Ago, Boutros Boutros-Ghali, Begum Ali Khan, Arnold McNair, Felice Morgenstern, William Rappard, José María Ruda, George Scelle, Grigory Tunkin and Nicolas Valticos are among those who have contributed in different capacities to the distinction and outreach of the Organization. Their intellect, vision and gifted pen have marked ILO's legal culture and scholarship.

The trajectory and achievements of the *primus inter pares* – Wilfred Jenks – are known to most international lawyers. Suffice to quote from

a paper written by Jenks in 1956 on craftsmanship in international law: A good craftsman ‘presupposes sound scholarship and a scholarship of a range and grasp commensurate with the order of magnitude and urgency of the problems involved in the creation of an effectively organized world community’.⁸ His words serve as a powerful reminder of the measure of ambition some of our predecessors have lived up to in developing ILO’s legal theory and practice.

* * *

The ‘ILO100 – Law for Social Justice’ conference has been a gratifying experience in every sense. The quality of the presentations and the ensuing debates confirmed that the ILO story of legal experimentation continues to attract vivid academic interest and stimulate critical thinking far beyond the confines of international labour law. At the closing of the event, it was announced that a special commemorative volume based on the conference proceedings would be published before the end of centenary year. Thanks to the responsiveness and support of all contributors, that promise has been kept.

This publication is divided in two parts. Part One contains the essays of the guest speakers to the conference arranged in the order and following the themes of the nine panel sessions. These are not transcripts of the recorded oral presentations but full-fledged academic papers submitted in the four months following the conference to enable the timely publication of this volume. Three special events which were organized in the context of the conference are also reflected in Part One; the launching of a lecture series in honour of Wilfred Jenks with the inaugural speech by his son Bruce Jenks; the roundtable discussion on the challenges and prospects of international normative organizations; and the document exhibition entitled ‘*Scripta manent*: Delving into the ILO archives’ bringing to light archival material and legal sources from the early days of the Organization.

Part Two includes various contributions from serving or retired ILO officials. These are research papers on a wide range of legal issues, at the authors’ free choice, addressing theoretical but also practical aspects of ILO’s work.

⁸ Wilfred Jenks, ‘Craftsmanship in International Law’ (1956) 50 *American Journal of International Law* 60.

As per the usual disclaimer, the views expressed in those papers are those of the authors and may not be deemed to reflect the official position of the International Labour Organization or of the International Labour Office.

Here below is an overview of the volume. Section I on ILO's founding values and the development of international law begins with *Georges Abi-Saab* who offers reflections on the structural transformation of international law, and explains that the emergence of the ILO in the international landscape in 1919 inaugurated a new era in inter-State relations essentially marking the transition from a law of co-existence to a law of cooperation based on common values. Inspired by Rousseau's philosophy, *Philip Allott* considers that the creation of the ILO seems to have come from a 'better world' that appeared possible in the eyes of visionary people in 1919 and further suggests that the ILO was and is a pioneer in what he calls the 'new human self-consciousness', a consciousness that gives us a new idea for possible worlds in which the values and interests of all human beings are respected in the service of the common good of humanity. *Jean-Michel Bonvin* examines from a sociological perspective the ILO's original concept of social rights and social citizenship, which is anchored on the need to protect the most vulnerable, to ensure that work is not just a commodity and to make labour an object of social negotiations between the various stakeholders. *Sandrine Kott* explains that the ILO has always acted as a 'social agency of globalization' and identifies three distinct periods in ILO's normative history: the inter-war period and the elaboration of a true international 'social science'; the period 1944-1970 and the promotion of the model of social democracy; and the advent of neoliberalism in the 1980s with the ensuing implications for social justice.

Section II discusses the ILO's quest for social justice and theories of international law. *José Alvarez* proposes an analysis of the ILO's nature and function as an international organization through the lens of major legal theories such as legal positivism, functionalism, realism, liberal theory, law and economics, constructivism, constitutionalism, and global administrative law. *Marcelo Kohen* reflects on whether the concept of social justice has found its place into general international law and takes the view that while the principle of social justice has indeed entered different fields of contemporary international law, it has yet to be systematized and consistently applied across all international law domains. *Obiora Okafor*, *Titilayo Adebola* and

Basema Al-Alami study ILO's 'social justice praxis' using the Third-World Approaches to International Law (TWAAIL) framework and suggest that the TWAAIL and the ILO discourses of global social justice are both similar and different, and that they have much to learn from each other. *Guy Fiti Sinclair* looks back on the pivotal role played by former ILO Legal Adviser and Director-General Wilfred Jenks in two specific respects: shaping the ILO's identity and mission in the post-Second World War era, and laying the foundations for a new sub-discipline of international law known today as international organizations law.

Section III on international organizations and the sources of international law begins with *Catherine Brölmann* who looks at the ILO's underexplored and intricate combination of contractual and institutional law-making, or 'mixed methods', from a general law of treaties' perspective. *Alain Pellet* analyzes the role and legal effect of resolutions of international organizations in the light of the jurisprudence of the International Court of Justice. His essay ends with a post-scriptum refuting the ILO's long-standing position on the inadmissibility of reservations to international labour conventions. *Eduardo Valencia-Ospina* sheds light on General Assembly's action at the final stage of the process of progressive development and codification of international law by the International Law Commission and draws an analogy between the manner in which the ILC and the ILO contribute to the strengthening of the rule of law in international relations. *Christina Hoss* and *Santiago Villalpando* undertake an assessment of the ILO's contribution to the law of treaties touching upon issues, such as the standard-setting technique, including the participation of non-State actors, normativity and soft law, standards supervision and abrogation of obsolete conventions.

Section IV is about the past and future of international supervision. *Laurence Boisson de Chazournes* examines the ILO's constitutional judicial mechanisms, noting that despite internal resistance to make any use of the possibilities offered by article 37 of the ILO Constitution, these mechanisms can make a unique contribution to settling interpretation disputes and ensuring that the Organization remains in control of its instruments. *Steve Charnovitz* gives an account of the system of sanctions foreseen in the ILO Constitution focusing on the early years through 1934. Reflecting on the 'excision of sanctions from the ILO's implementation system', he makes the point that a successful application of sanctions is still plausible

to confront scandalous cases of non-compliance. *Laurence Helfer* compares international monitoring mechanisms in the human rights and labour regimes and identifies four steps in the process of pushback against international monitoring mechanisms by States and non-State actors, special reference being made to the challenge of the authority of the ILO Committee of Experts regarding the right to strike. *Erika de Wet* examines the potential of enforcing international labour standards through domestic legal systems and argues that, in view of recent case law, there should be a shift from what she calls the ‘rights narrative’ to a ‘conflicts of law/tort law’ narrative whereby international labour standards, for instance health and safety standards, may be successfully enforced through tort law litigation in the courts of a multinational company’s home State although the harm to the subject of the claim may have occurred in another State.

Section V of the book is devoted to tripartism as a model. *Janice Bellace* proposes a historical excursion into the diplomatic intricacies that gave birth to ILO’s tripartite structure before reviewing tripartism in action, or what she describes as long periods of harmonious cooperation but also of tense conflict culminating in the rupture over Convention No. 87 and the right to strike. She makes the case that only tripartite organizations have the legitimacy to adopt standards designed to regulate business conduct in today’s globalized environment. *Guy Mundlak* offers reflections on the possible opening up of the ILO’s traditional model of representation to civil society and the virtues and limitations associated with such a change. Considering that simply adding a fourth pillar to the current institutional design is neither viable nor suitable, he proposes an innovative ‘tri-plus model’ which would ensure the full and dynamic incorporation of the civil society without overturning the existing tripartite framework. *Tonia Novitz* makes a critical assessment of ILO’s tripartite governance model based on the globally recognized principle of ‘sustainability’ and demands for intra- and inter-generational justice. She argues that there is need for change and further reform, especially to protect participatory and representative voice taking also advantage of the propitious framework of the Agenda 2030 and its sustainable development goals.

Section VI turns the focus on international civil service law and the seminal contribution of the ILO Administrative Tribunal. Former ILOAT President *Giuseppe Barbagallo* draws upon lessons from legal history and

offers insightful thoughts on the independence of administrative tribunals – fundamental but ‘fragile’ value and essential prerequisite for their existence. *Pierre Bodeau-Livinec* compares the jurisdiction *ratione materiae* of the ILO and United Nations administrative tribunals highlighting the challenges and deficiencies in terms of access to justice of a considerable number of international ‘agents’ other than established officials, and the legal and reputational risks arising from this persistent gap in coverage. *Louise Otis* and *Jérémy Boulanger-Bonnelly* deliver a comprehensive study of the tenets and application of the doctrine of legitimate expectations in both domestic and global administrative law. They further analyze the four criteria applied by the ILO Administrative Tribunal for establishing that a promise is binding and consider this framework to be the most comprehensive and representative of the current state of the law. *August Reinisch* reviews the contribution of the ILO Administrative Tribunal to the development of general principles of employment relations within international organizations, both in terms of procedural and substantive law, with a particular focus on the notions of fair trial, independence of adjudicators, due process and equality of arms, affordable access to dispute settlement, and transparency.

Section VII concerns the promotion of universal respect for social and labour rights. *Adelle Blackett* argues that labour law and distributive justice are too often treated as purely domestic matters. She calls for a re-embedding of the social in the economic at a transnational level and a rethinking of the appropriate governance level of our social justice concerns. *Virginia Brás Gomes* reflects on the role for human rights treaty bodies with respect to rights to work and rights at work regretting that all relevant global institutions seem to work in silos and pleading for better synergies between supervisory systems. *Brian Langille* offers philosophical reflections on the alarming situation labour law is facing and as to whether it is actually too late to do anything about it. Drawing upon an exhaustive review of recent literature, he uses in particular Dani Rordik’s ‘trilemma’ in order to explain the problems associated with the current state of hyper-globalization. He ends with a word of optimism placing hope on education as vital to the ability to imagine renewed democratic political space and institutions. *Vitit Muntarbhorn* examines the connectivity between labour rights and human rights through a variety of entry points, such as standard-setting, implementation measures and monitoring mechanisms. He then explores

how those rights are challenged by armed conflict situations, non-democratic regimes and rampant technologization, and draws up recommendations for greater cohesion and complementarity among UN institutions.

Section VIII is on ways to enhance the impact of standards. *Shin-ichi Ago* examines the significance of corporate social responsibility as a means of ensuring the observance of international labour standards, while underlining that the soft approaches should be promoted only as subsidiary means to fill the gap of non-ratification of important ILO conventions. *Philip Alston* and *Jackson Gandour* provide one of the first analyses of the ILO's 2019 Centenary Declaration for the Future of Work, examining its key policy prescriptions and juxtaposing the ILO's approach to that of the World Bank. *Nicola Bonucci* gives a summary account of OECD's experience as global standard-setter and of the Standard-Setting Review launched in 2016 to strengthen the relevance and impact of OECD standards. *Christine Chinkin* examines three international normative agendas – post-conflict reconstruction for peace, women's human rights, and Security Council resolutions on women, peace and security – and brings out the lack of coordination and institutional divide between relevant actors that are responsible for persistent implementation challenges.

Section IX addresses the issues of fragmentation and coherence in the law of international organizations. *Sean Hagan* presents the IMF's new anti-corruption policy and its guiding principles and offers general observations on designing and implementing an effective anti-corruption strategy. *Jan Klabbers* explores a new 'supra-functionalist' exegesis of the role of international organizations, which consists in the fact that organizations offer a way to overcome problems of privity, since the organizational form makes it easier to expand the reach of a regime (as compared to a treaty regime for instance) both in terms of persons and in terms of substance. *Joost Pauwelyn* presents what he calls 'novel, unorthodox ways of levelling the playing field in favour of labour', that are often market-based, hard-law instruments embedded in domestic law or arbitration, or in international organizations or treaties outside of the ILO. *Hélène Ruiz Fabri* and *André Nunes Chaib* review the modalities of cooperation between the ILO and international economic organizations focusing on the three dimensions (technical, normative and epistemic) of their relationship.

In Part Two, *Xavier Beaudonnet* considers how international labour standards are used by domestic courts and shows that, while such use is not systematic and universal, it is becoming a rather significant means of implementation of international labour law in ILO member States. *Alexandre Charbonneau* and *Beatriz Vacotto* look at how the ILO's Maritime Labour Convention, 2006 – also called the Seafarers' Bill of Rights – has become a concrete tool for seafarers and their organizations, maritime administrations, shipowners, inspectors and recruitment agencies, that profoundly transforms the global regulatory framework for maritime labour. *Carlos García Guzmán* draws on key elements of Niklas Luhmann's systems theory and characterizes the ILO as a self-reproducing social system within the international legal system.

Tomi Kobiyama and *Dražen Petrović* make the case for the existence of an 'International Labour Code' based on numerous elements such as ILO constitutional principles, a comprehensive body of diverse instruments, mechanisms to ensure coherence, and a full set of policies and procedures to ensure that standards are reviewed and revised, when needed. *Riikka Koskenmäki* explores the laws governing the internal organization and functioning of intergovernmental organizations (covering primarily constitutional, procedural and administrative matters in addition to employment relations) and how such internal laws have been adapted to respond to the perceived accountability gap. *Claire La Hovary* and *Jordi Agustí Panareda* throw light on the definition (or lack thereof) of a key notion that goes to the heart of the ILO's mandate – the concept of work – and the implications for the functioning of the Organization.

Thomas Lieby analyzes an under-explored method of interpretation of ILO conventions, the principle of systemic integration, and takes the view that a future in-house tribunal could make use of that method as a means to reinforce the visibility of international labour standards and preserve their integrity in the context of an ever-increasing use of such standards outside the Organization. *Kroum Markov* and *María Marta Travieso* reflect on whether the ILO could take the normative lead by making use of its international labour standards to secure decent work in the digital economy and explore the potential of new technologies, such as 'blockchain' technology, for the benefit of the world of work. *Francis Maupain* revisits the capacity of the ILO to shape the future of work in line with its constitutional principles

and objectives, by examining two inter-related aspects: the coherent realization of economic objectives and social progress in the UN system and the optimization of the ILO system of standards together with its universal and tripartite International Labour Conference.

George Politakis takes a cursory look at the principle of legal certainty and what this may imply for the ILO's normative agenda in terms of creation, interpretation and supervision of standards. He argues that without underestimating the merits of flexibility, legal certainty should be placed at the forefront of ILO's priorities and that the questions of softening binding instruments to enhance their ratifiability, the possible recourse to article 37 of the Constitution, or the codification of the procedure for article 26 complaints should all be approached through the lens of legal certainty, stability, clarity and the rule of law. *Anne Trebilcock* closes this collection of essays with an in-depth analysis of the new Violence and Harassment Convention, 2019 (No. 190) and Recommendation, 2019 (No. 206), the first comprehensive international instruments to call for the prevention and elimination of such unacceptable behaviour in relation to all workers across the world of work, two instruments affirming human dignity at work for all.

* * *

In closing these prolegomena, the editors wish to express their deep and sincere gratitude to each one of the eminent scholars who participated in the 'ILO100 – Law for Social Justice' conference and contributed to this commemorative volume. They also wish to acknowledge the valuable help of the colleagues who made this publication possible, in particular Priscille Latchman for the graphic and typesetting services and Raphaël Crettaz who steered the entire production process. Their readiness to share the stress and deliver in time are highly appreciated. Special thanks also go to Remo Becci and Jacques Rodriguez for their support in retrieving valuable archival material.

This publication aspires to stimulate further reflection on the role law can play in supporting ILO's foundational principles and objectives, and more generally, on the present and future of normative international organizations, their legitimacy, adequacy and impact. The challenges of today's world are multi-faceted, and call for perspicacity, ambition and faith in the rule of law.

The last sentence of the ILO Constitution reads: ‘The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution’. These sentiments of justice and humanity are still the driving force of ILO’s action today. Its contribution to international law is just about that – advancing justice. This imperative must continue to define the Organization for the decades to come.

The Editors

Geneva, 16 December 2019



This publication is also available in publicly accessible digital form
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PART ONE



I

THE ILO'S FOUNDING VALUES AND THE DEVELOPMENT OF INTERNATIONAL LAW



I

The ILO and the Structural Transformation of International Law

Georges Abi-Saab

I

The current international legal system, while still bearing the main features it acquired as it emerged from the Peace of Westphalia in 1648, has undergone a long process of transformation, particularly since the late nineteenth century, from a purely State-centric system towards a community-centred one. The establishment of the ILO, with its specific features, in the wake of the First World War, constituted an important milestone in this transformation.¹

The system ensuing from the Peace of Westphalia was the result of the disintegration of a community of values and allegiance, which prevailed in Europe throughout the Middle Ages, at least in theory, if not in practice: an *imperium mundi* based on the fiction of a universal Christian empire, successor to Rome, that Vinogradoff, the famous historian of international law, called 'the world state of medieval Christendom'.² A feudal, hierarchical community which, though progressively showing signs of loosening up, remained from an ideological point of view an integrated community with both its legitimacy as a community and the legitimacy of its law rooted in a double allegiance to the Pope and the Emperor.

¹ For more, see Georges Abi-Saab, 'Cours général de droit international public' (1987) 207 Recueil des cours 9 passim; cf. Georges Abi-Saab, 'The Changing World Order and the International Legal Order : The Structural Evolution of International Law Beyond the State-Centric Model' in Yoshikazu Sakamoto (ed), *Global Transformation : Challenges to the State System* (UNU Press 1994) 439.

² Paul Vinogradoff, 'Historical Types of International Law' (1923) I *Biblioteca Viseriana* 53.

This stable, static and hierarchical European universe went through a series of traumatic shocks straddling the fifteenth and the sixteenth centuries, including the discovery of the New World, Galileo's writings on heliocentrism, the Renaissance, the rediscovery of pre-Christian heritage, the expansion of trade with the Far East, India and China, with the opening of the southern maritime routes, the *conquista*, and the establishment of trading posts. These shocks resulted in a material and intellectual opening up to an infinite world. Retrospectively, this could be deemed as the first wave of globalization.

It was in this context that strong States emerged together with the contestation of the prevailing ideological structure of the double allegiance. It led to the Reformation, which in turn led to the Wars of Religion which were ideological wars, the only object of which was to annihilate the other ideological camp. When neither of the two camps managed to prevail and impose its 'truth' upon the other, they sought a way out of these long drawn-out wars, through a legal structure, in the manner of an armistice agreement that would allow the coexistence of potentially antagonistic units.³

An agreement was thus reached by the parties to the Peace of Westphalia to recognize as governing principle the famous dictum *cuius regio, eius religio* (whose realm, his religion) which in effect meant that each prince would have the right to determine the religion of his own territory. In the ideological terms of the time, a transformation was operated from a hierarchical, ideological and legal system to a completely horizontal system under which each State would be free to follow its own ideology within its territory.

In order to coexist, States which had been at war with each other, had to skirt around their differences through the new twin parameters of allocation of power: the principles of sovereignty and equality. According to the first principle, each prince had the final word, or, he was the final instance within his territorial and functional domain and did not depend on any

³ Georges Abi-Saab, 'The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy' in Rüdiger Wolfrum and Völker Röben (eds), *Legitimacy in International Law* (Springer 2008) 112-113.

higher authority. For the system to be sustainable in the presence of a plurality of princes, they had to recognize the same attributes to each other, regardless of their differences of size, power, wealth, ideology or religion. Thus, to suit the system's needs, the princes had to turn a blind eye on their differences or feign not seeing them (the principle of equality), whence the model of the hermetic State – or to use Arnold Wolfers' expression, 'billiard ball' States – completely opaque, that one cannot see through and which touch only from the outside.⁴

The basic assumption of the system was that it was a system of ceasefire. To use the words of David Mitrany, the task of this system was to keep its subjects 'peacefully apart'.⁵ It was not a system based on common interests or common values. There was only one common procedural or mechanical interest: to have minimum rules of the game that permit each to play against the others in order to gain at their expense. The task of the system was very minimal in that it permitted the continued coexistence of potentially antagonistic units with a *modicum* of intervention from the system itself. As to the scope and nature of the obligations which emerged from that system, these could be reduced to a mega obligation in the form of an injunction not to trespass on the territorial or functional ambit of other sovereigns; an obligation of result, as there is no graduation in abstention.⁶

How did the system work? It was characterized by the prefix 'self': self-limitation, self-interpretation, self-help. It was a purely State-centric system. States were the subjects, creators and the organs of the system. Even, as regards arbitration, the German historian of international law Wilhelm Grewe, in his book *The Epochs of International Law*, wrote that the period starting with the Peace of Westphalia constituted the 'nadir' of international arbitration, precisely because of this new legal structure of the international society.⁷ The princes did not want to give by the left hand what they have just got by the right hand, by submitting their differences to a third party, be it an arbitrator or a judge. The dynamo and driving force of the system

⁴ *ibid* 113.

⁵ David Mitrany, *A working peace system: An argument for the functional development of international organization* (Oxford 1943).

⁶ Abi-Saab (n 3) 113.

⁷ Georges Abi-Saab, 'The Normalization of International Adjudication: Convergence and Divergencies' (2010) 43 *New York University Journal International Law and Politics* 2-3.

was reciprocity, either positive or negative – negative in the form of reprisals or war, in response to self-interpreted violations of one's rights. The law of coexistence is merely the 'modelization' or 'ideal type' of the classical international law resulting from the Peace of Westphalia.⁸

II

The advent of the Industrial Revolution – together with the social upheavals it induced – at the end of the eighteenth century and beginning of the nineteenth brought about new and important transformations. The revolution in science and technology and in ideas (all ensuing directly or indirectly from the Enlightenment) was yet again the driving force for change, heralding a new wave of globalization. The technical and economic overtaking of the State became more and more apparent, in the sense that not only the small European States, but also the Great Powers such as Great Britain, no longer provided an adequate territorial base to encompass the economic activities made possible by the new means of production and exchange.

This explains the emergence of an international economy based on a growing division of labour and a growing awareness of a need for a new type of international regulation permitting and facilitating the development of these activities, which swept through and beyond States, thus creating bonds of material interdependence and giving rise to partial solidarities. This, in turn, explains the occasional emergence, from the second half of the nineteenth century, of pockets of the law of cooperation, especially in the field of communications, in order to respond to problems of global nature caused by the Industrial Revolution. These pockets were small islands within the ocean of the law of coexistence or classical international law but they were significant islands because they were based on a different logic. Their privileged legal instrument, the multilateral treaty, was not only a 'law-making treaty' (*traité-loi*) bearing a new type of legal regulation, but also an 'organic' treaty, providing an institutional structure which underlay this regulation and attended to its implementation. This led to the first

⁸ Georges Abi-Saab, 'Wither the International Community' (1998) 9 *European Journal of International Law* 250-251.

generation of international organizations, such as the River Commissions (for the Danube and the Rhine) and the administrative unions such as the Universal Postal Union.⁹

The basic assumption was that there was a common interest, hence a community around that interest. It was almost the opposite of the assumption of classical international law. In this context, the task of the legal system was more ambitious; to make collaboration possible in order to satisfy this common interest which could not be satisfied at all or adequately on an individual basis and which required combined efforts. The purpose was no longer 'to maintain States peacefully apart' – as Mitrany wrote. The purpose of the legal system was 'to bring States actively together'. As regards the nature of the obligations, the transformation was from a passive obligation of abstention to an obligation to play an active role in order for the whole enterprise to work.

How did the system work? It needed proper institutions. It was, by nature, an institutional type of regulation as the collective activity required a division of labour which depended on the capacity and on the specific situation of each of the participants. Therefore, a regulator was needed.

III

The establishment of the ILO in 1919, in the wake of the First World War, marked a new and significant stage in the structural evolution of international law. Until then, there were few islands of law of cooperation in a vast ocean of law of coexistence. They were based on (and driven by) a perceived material common interest, palpable to each participant. The great novelty of the ILO was that it ushered a new kind or species of law of cooperation, and a new generation of international organizations, its institutional component, based on common values. The ILO was avowedly created to promote social justice, though on the dark side of the moon there may have been some ulterior motives, such as not leaving to the Bolsheviks the monopoly of speaking for the workers of the world.

⁹ *ibid* 255.

The ILO also innovated in developing new techniques in pursuit of its objective, such as the system of reporting and scrutiny of the reports through the Committee of Experts on the Application of Conventions and Recommendations, and in assisting member States in integrating protective norms in their municipal legal systems.

The fact that the ILO managed to continue to function and to develop and sharpen its instruments during the inter-war period, in spite of the assaults of totalitarian regimes from the left and the right, verges on the miracle. Hibernating during the Second World War, while preserving its *acquis*, the ILO resuscitated even before the formal end of the War, to resume with renewed vigour its mission. One of its particularly valuable contributions during the post-war period was the transmission of its experiences and techniques to the new regimes of law of cooperation that pullulated since the end of the war, particularly with the opening of the floodgates in the field of human rights.

The current legal system as a whole is still guided by the Westphalian paradigm of the 'international law of coexistence'. But it is clear that this paradigm does not tally with large and growing expenses of legal regulation. Yet, as shown by Thomas Kuhn,¹⁰ if the specific applications do no longer conform to the central paradigm, then the paradigm must change. We are living in a period of search for a new paradigm for international law, a new paradigm which is yet to be captured.

¹⁰ Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press 1962).

An Ideal World Like Our World, But Completely Different

Philip Allott

Law cannot be better than the high values of the society of which it is the law. The values of international society in its present form reflect the interests of States. The high values of actual human beings may be reflected in the representational role of governments, but only if and when those governments are behaving well.

The international world – as it is – is not the only human world that might have been. We know that there could be many worlds better than our actual world.

The International Labour Organization seems like something that has come to us from a better world, a better world that must have seemed to be a possible world in the eyes of certain visionary people in 1919. The International Labour Organization was to be a bright light shining in a time of darkness, a darkness that would soon extinguish human hope for another generation.

The idea of ‘better worlds’ was at the heart of Voltaire’s dialectical relationship with those he saw as congenial optimists, such as Rousseau and Leibniz and Alexander Pope. They all knew that they were taking part in the permanent confrontation between the ideal and the actual that determines the permanent re-making of the human world.

Our own role in history is still the task of re-making the human world, a task more formidable and more urgent now than ever before.

Human history is not only the history of the use and abuse of power by powerful people. It is also the history of those who have worked to make a better world. It so happens, as a fact of history, that it was European thinkers who, over the course of centuries, dominated the dialectical resolution of the

ideal and the actual that has shaped the present form of the human world, for better and for worse.

The battle of ideas to make the future of our chaotic and dangerous world is no longer a debate among public intellectuals from Europe. It is a debate among thinking people everywhere, reflecting all cultural traditions and all human experience. An exciting prospect!

In the meantime, I can only speak as a very old public intellectual from Europe. We European public intellectuals will continue to contribute what we can to the great debate of the human future. It remains a heavy burden of responsibility on us also.

Above all, it must be a battle of ideas that engages and excites young people everywhere. The world that we older people have made is passing into the hands of younger people. We older people have done our best and our worst in the human past.

Young people should see themselves as the poets and the builders of a new kind of human world, like our own but completely different. 'Every child begins the world again'.¹ We need that.

Jean-Jacques Rousseau, citizen of Geneva as he was proud to call himself, to whom I owe the title of these remarks, felt passionately the world-changing responsibility, and it caused him great suffering. His enlightenment friends were looking at the world with a new excitement, certainly, but with a congenital scepticism, materialism, cynicism, pessimism.

Rousseau's new kind of world would be a world in which the fundamental social dialectic of individualism and collectivism would be resolved in a way that treated each and every human being as something of ultimate value. It sees human society as an almost miraculous thing, based on the binding force of law, but offering ever greater possibilities of personal self-fulfilment.

In the frenzy of social change of recent centuries, we have, in fact, been doing Rousseau's work, mostly unaware even of the name of Rousseau. We fail to recognise that peaceful social revolutions in many countries have

¹ Henry David Thoreau, *Walden, or, Life in the Woods* (Ticknor and Fields 1854).

transformed the lives of people who, for centuries, for millennia, were the victims of their own society, not its primary beneficiaries.

They were beautiful revolutions – to borrow a phrase from Karl Marx, speaking in a passing moment of optimism after the revolutionary events in France in February 1848.

The enemy of progress is fatalism. Fatalism is a pandemic which is now infecting people who think. Faced with a chaotic world and a frightening future, many thinking people have lost the will to think creatively, to think hopefully. Defeatism in the minds of the privileged classes soon infects all classes in society.

Indifference, resignation, passivity become an acceptable form of social and personal consciousness. ‘*Si tout n’est pas bien, tout est passable*’ – ‘If not everything is good, everything is good enough’, as Ituriel says, in Voltaire’s ambiguous story called ‘*Le monde comme il va*’.²

The enemy of progress is fatalism. The enemy of fatalism is education. Education develops the thinking systems of the brain. Education develops the thinking capacity of the mind. Knowledge is power, as Francis Bacon said in 1597, foreseeing the modern world.

The decline in education at all levels, in so many of our societies, is a decline in a unique characteristic of the human species, its amazing capacity to think about its own thinking, and thereby to think better, and thereby to live better.

The idea that knowledge contained in the World Wide Web is equivalent to knowledge contained in the human mind is a devastating error. My mind is my own search engine, and much much more.

The depersonalizing of knowledge is part of a broader phenomenon of the increasing insecurity of the human mind. The tragic ethos of the social media is polluting public debate. Machines are reproducing the activity of the human brain, and may surpass the human brain in some respects. The algorithms of ‘Artificial Intelligence’ offer irresistible truth without values or feelings.

² Voltaire, *Le monde comme il va* (1746).

The triumphalism of science and engineering and mathematics is relegating the humanities to the margin, in the making of the human future. The humanities are the human mind's essential and arduous task of studying itself and its works.

We must remember and reassert vigorously two priceless products of the human mind which must serve as the foundation on which a better human future will be built.

Politics is the pursuit of the possible. The social practice that we call politics is the everyday struggle of values and interests through which a society chooses its better future. Politics takes place in the public mind of a society. But it allows the private minds of the citizens to affect their society's choice of its better future.

Law is the possible made actual. Law is a bridge between the ideal and the real. Reflecting the high values of a society, law is the vehicle that a society uses to carry it into the better future that it chooses and its citizens desire.

Problems of law and politics are at the heart of the imperfection of the existing form of international society. We inhabit an international 'unsociety' whose most grotesque weakness is the absence of any true politics beyond frontiers. You cannot have good law without a good system of politics.

For most of human history, customary law has been the law of human societies. Customary law depends on a powerful sense of social cohesion. It naturally reflects a society's highest values. It serves the common good of a society.

Customary international law, in its present form, cannot reflect the social cohesion of a human world that still does not have any true sense of social cohesion. It cannot reflect the high values of an international society that has not yet discovered what those high values are, a humanity that still lacks any good idea of its common destiny, let alone its common good.

What will it be like – the ideal world that is like our world, but completely different?

It will be a world in which there is a fundamental change of human self-consciousness. It will be a consciousness that gives us a new idea and a new ideal of what it is to be human, what it is to be the creator of possible human worlds, possible worlds in which the values and interests of all human beings are respected in the service of the common good of humanity.

Our job as thinking human-beings is to help to find new ways to overcome gross social injustice and inequality everywhere, to give all human beings everywhere the possibility of ever greater levels of personal self-fulfilment. A better life for all human beings everywhere. That is the most beautiful of all possible revolutions.

The International Labour Organization was and is a pioneer in the new human self-consciousness. Our working life is a primary aspect of what we should still take pleasure in calling 'the good life', 'the good life' that everybody everywhere hopes for, 'the good life' that everybody everywhere deserves.

In celebrating the centenary of the International Labour Organization, we may be inspired to express our joy as we remember that we are the self-evolving and self-perfecting species, a species programmed to make and remake a human world, a human world that wholly depends on a natural world that makes us what we are, that makes us what we can be in the future.

And we have a particular species-characteristic that no one, and nothing, can take away from us. Our capacity to hope for a better human future.

Les valeurs fondatrices de l'OIT et la promotion de la citoyenneté sociale – Jalons historiques et défis contemporains

Jean-Michel Bonvin

I. Introduction

Tout au long de son histoire, l'OIT a défendu une conception spécifique et ambitieuse du droit social et de la citoyenneté sociale. Celle-ci, d'abord esquissée dans la Constitution de 1919, a été formulée de manière de plus en plus explicite à partir de la Déclaration de Philadelphie. Elle repose sur trois piliers principaux: a) la nécessité de protéger les personnes les plus vulnérables contre les risques sociaux et autres accidents de la vie; b) une conception du travail à la fois comme source de rémunération et comme facteur d'épanouissement et de réalisation de soi; c) l'importance de la démocratie sociale et de la liberté syndicale en vue de promouvoir la réalisation de la citoyenneté sociale et des droits fondamentaux au travail. Ces trois piliers constituent le cœur de la Déclaration de Philadelphie qui rappelle dès sa Partie I que «a) le travail n'est pas une marchandise; b) la liberté d'expression et d'association est une condition indispensable d'un progrès soutenu; c) la pauvreté, où qu'elle existe, constitue un danger pour la prospérité de tous». La Déclaration rappelle aussi que ces principes doivent s'appliquer à toutes et tous: «Tous les êtres humains, quels que soient leur race, leur croyance ou leur sexe, ont le droit de poursuivre leur progrès matériel et leur développement spirituel dans la liberté et la dignité, dans la sécurité économique et avec des chances égales»¹.

Le caractère fondamental du dialogue social au sein de l'OIT s'est par ailleurs traduit de manière éminente à travers la structure tripartite

¹ Déclaration de Philadelphie, Partie II.

de l'Organisation qui donne aux associations professionnelles une représentation et un poids équivalents à ceux des gouvernements, ainsi que par l'adoption de la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 et de la Convention (n° 98) sur le droit d'organisation et de négociation collective, 1949 et l'insertion, dans la Déclaration de l'OIT relative aux principes et droits fondamentaux au travail de 1998 (Déclaration de 1998), de la liberté d'association et la reconnaissance effective du droit de négociation collective.

Au travers de ces piliers, l'OIT énonce une conception spécifique de la justice sociale qui est compatible avec le maintien d'une économie de marché capitaliste. Cette volonté d'inscrire son action dans le cadre du système capitaliste a poussé certains de ses détracteurs à voir dans l'OIT un soutien, voire une justification, indispensable au maintien du capitalisme. Selon eux, l'OIT s'inscrirait ainsi dans la ligne de la politique sociale comme «chaude rosée sentimentale» dénoncée par Marx: loin de remettre en cause le capitalisme, elle viserait à en atténuer les effets les plus délétères afin de dissuader toute velléité de renverser ce système et de le pérenniser. Cette contribution adopte une position plus nuancée à cet égard: l'OIT n'a certes pas remis en cause le capitalisme, mais elle a certainement contribué à le rendre plus humain. Elle retrace brièvement la manière dont l'OIT a conçu et progressivement élaboré chacun de ces trois piliers tout au long de son histoire, ainsi que les enjeux et défis auxquels ces trois piliers se confrontent dans le contexte actuel. Chacun des piliers sera envisagé successivement.

II. Protéger les personnes les plus vulnérables

La Constitution initiale de l'OIT mettait déjà l'accent sur l'importance fondamentale de ce pilier, en soulignant la nécessité d'améliorer les conditions de travail, notamment en lien avec la réglementation des horaires, la garantie d'un salaire décent, la protection des travailleurs contre les maladies professionnelles et générales, la protection des enfants, des adolescents et des femmes, etc. La Déclaration de Philadelphie reprend ces éléments via une formulation plus explicitement enracinée dans des considérations d'équité et de justice sociales, il s'agit en effet de réaliser «la possibilité pour tous d'une participation équitable aux fruits du progrès en matière de salaires et de gains, de durée du travail et autres conditions du travail, et un salaire minimum vital pour tous ceux qui ont un emploi et ont besoin d'une telle

protection»². On retrouve le même souci dans la Déclaration de 1998 ou dans la Déclaration de l'OIT sur la justice sociale pour une mondialisation équitable de 2008 (Déclaration sur la justice sociale).

Une première constante consiste ici dans l'affirmation de la nécessité d'une action volontariste en vue de promouvoir la justice sociale et la protection des plus défavorisés. Dans chacun de ces documents fondateurs, l'OIT affirme avec constance que la confiance dans les mécanismes de marché ne suffit pas à garantir l'amélioration du sort des personnes les plus défavorisées. La justice sociale exige une action volontariste et ne saurait être considérée comme une conséquence automatique de la prospérité économique et du libre jeu du marché. La relation entre social et économie a ainsi toujours figuré au cœur de la réflexion de l'OIT, qui a constamment refusé de subordonner le social à l'économie ou de considérer la justice sociale comme une conséquence automatique de la prospérité économique³.

La Constitution de 1919 est emblématique à cet égard: elle renverse les termes du débat en soulignant que la protection sociale ne doit pas être envisagée comme un désavantage compétitif (en ce qu'elle augmente les coûts du travail); elle insiste au contraire que la concurrence ne peut pas être invoquée, au nom de la théorie des avantages comparatifs, pour «justifier la non-adoption par une nation quelconque d'un régime du travail réellement humain», laquelle entraverait par là même les «efforts des autres nations désireuses d'améliorer le sort des travailleurs dans leurs propres pays». En d'autres termes, la compétitivité économique ne peut se déployer sur fond d'injustices sociales. Dans un esprit similaire, la Déclaration de Philadelphie rappelle que la poursuite de la justice sociale, du progrès matériel et du développement spirituel doivent «constituer le but central de toute politique nationale et internationale»⁴, y compris dans les domaines économique et financier. Si elle souligne l'importance de la prospérité économique dans sa Partie IV, c'est en tant que moyen de réaliser la justice sociale et le développement humain et non pas en tant que finalité ultime de l'action publique. Il y a certes eu des moments plus ambigus à cet égard,

² Déclaration de Philadelphie, Partie III d).

³ J.-M. Bonvin, *L'Organisation internationale du travail* (Presses Universitaires de France 1998). Voir aussi N. Valticos, *Droit international du travail* (2^e éd, Dalloz 1983).

⁴ Déclaration de Philadelphie, Partie II b).

comme la Déclaration de 1998 selon laquelle «les normes du travail ne pourront servir à des fins commerciales protectionnistes» et «l'avantage comparatif d'un quelconque pays ne pourra, en aucune façon, être mis en cause du fait de la présente Déclaration et son suivi»⁵, semblant indiquer que la préservation du libre-échange dans un contexte de globalisation économique devait avoir la primauté sur les droits des travailleurs. Mais ce document constitue une exception et la très grande majorité des documents de l'OIT (qu'ils aient été adoptés avant ou après la Déclaration de 1998) met en avant la nécessité de ne pas subordonner la justice sociale aux considérations d'efficacité et de compétitivité économiques et de ne pas la considérer sous l'angle exclusif de l'avantage ou du désavantage comparatif qu'elle pourrait induire. L'octroi de droits sociaux fondamentaux ne saurait être remis en question par des considérations de compétitivité économique.

Cette conception de la relation entre l'économie et le social est tout particulièrement importante dans le contexte contemporain, où les arguments économiques et financiers, notamment ceux relatifs à l'équilibre des finances publiques portés par les banques centrales, tendent souvent à reléguer au second plan les considérations de justice sociale. Nombreux sont ainsi les travaux qui montrent comment les exigences d'équilibre budgétaire dans un contexte marqué par la mondialisation et la compétitivité des territoires, peuvent coïncider avec une remise en question de certaines prestations sociales, via la réduction de leurs montants ou de leur durée, voire leur suppression. De même, le souci de compétitivité économique peut aboutir à une remise en cause des dispositifs visant à protéger les travailleurs et leurs droits dans le sens de davantage de flexibilité des conditions de travail. La tendance à privilégier les questions de finances publiques et de compétitivité économique aux dépens du souci de justice sociale est ainsi fréquente dans un contexte de globalisation marqué par une concurrence accrue entre pays et entre entreprises. Dans ce contexte, l'OIT se caractérise par une position différente inspirée par la volonté d'envisager la prospérité économique et la justice sociale sur un pied d'égalité, voire d'accorder la préséance à la réalisation de la justice sociale (comme la Déclaration de Philadelphie semble le suggérer).

⁵ Déclaration de 1998, par. 5.

Une deuxième constante concerne le lien que l'OIT établit entre justice sociale et paix. La justice sociale est ainsi présentée comme une condition du maintien de la paix. Cet élément a été décisif pour la création même de l'OIT, dans la mesure où la crainte d'une extension de la menace révolutionnaire bolchévique sur le continent européen a incité les délégués réunis à Versailles à accepter certaines concessions. On retrouve ici un motif similaire à celui qui a présidé à l'adoption des premières assurances sociales en Allemagne, où l'intention principale du chancelier Bismarck était de dissuader la classe ouvrière d'adhérer au parti social-démocrate et à ses ambitions de renverser le système capitaliste. La Déclaration de Philadelphie, qui a marqué une étape décisive vers l'adoption du droit à la sécurité sociale comme droit de l'homme, poursuit le même motif mais avec une tonalité différente: dans les dernières années du deuxième conflit mondial, l'injustice sociale était perçue comme l'une des causes majeures des dérives totalitaires nazies et fascistes; par contraste, l'instauration de la justice sociale était envisagée comme une condition nécessaire pour éviter de telles dérives à l'avenir. Dans ce cadre, le motif du respect des droits et de la dignité de chacune et chacun comme fondement de la paix prend le pas sur la crainte de la révolution. Tout au long de l'histoire de l'OIT, on retrouve une combinaison de ces deux motifs: volonté de juguler la menace révolutionnaire en privilégiant une voie réformiste d'une part, souci de promouvoir les droits de l'homme et le respect de la dignité des personnes de l'autre. Dans les deux cas, le motif selon lequel «une paix durable ne peut être établie que sur la base de la justice sociale»⁶ est rappelé avec force.

Un troisième élément constant réside dans l'insistance sur l'universalité des droits sociaux. Ce souci d'universalisme s'est progressivement explicité tout au long de l'histoire de l'OIT: à ses débuts, l'accent était prioritairement placé sur la protection des personnes les plus vulnérables – femmes, enfants, adolescents, personnes âgées, invalides, etc. – mais l'intention de mettre en place des mécanismes de protection destinés à l'ensemble des travailleurs et des citoyens était déjà présente. Celle-ci a été formulée plus explicitement dans la Déclaration de Philadelphie qui garantit la protection à toutes les personnes, quels que soient leur sexe, leur croyance ou leur race.

⁶ Déclaration de Philadelphie, Partie II (qui reprend presque littéralement la première phrase du préambule de la Constitution de 1919).

Elle est reprise dans la Déclaration de 1998 qui rappelle l'importance des conventions visant l'abolition de la discrimination en matière d'emploi et de profession (la Convention (n° 100) sur l'égalité de rémunération, 1951 et la Convention (n° 111) concernant la discrimination (emploi et profession), 1958). De même, le droit à la sécurité sociale n'est pas réservé à certaines catégories de population, mais doit être garanti universellement. De fait, l'OIT a constamment privilégié l'adoption de normes universelles même si cela devait impliquer certaines concessions quant au niveau de ces normes, voire une préférence pour des normes d'apparence minimaliste, à l'instar de la Recommandation (n° 202) sur les socles de protection sociale, 2012. Cette préférence pour les normes universelles s'est aussi exprimée au travers du refus d'adopter des normes régionales du travail, qui auraient alors pu développer des prescriptions plus ambitieuses pour certaines régions que dans d'autres, en vertu du principe selon lequel il n'y a pas de sous-normes pour des sous-hommes⁷.

Dans le contexte actuel, ces trois constantes – *a*) la relation équilibrée entre économie et social exige une action volontariste; *b*) la justice sociale est la condition d'une paix durable; *c*) elle doit bénéficier à l'ensemble des êtres humains – demeurent des valeurs fondatrices, mais elles sont confrontées à plusieurs défis. Tout d'abord, la mondialisation exacerbe la concurrence entre acteurs économiques et tend à renforcer la perception des droits sociaux comme des coûts à limiter en vue de maintenir la compétitivité économique. Cette perception est mise en avant par de nombreuses organisations internationales telles que le Fonds monétaire international, l'Organisation de coopération et de développement économiques (OCDE) ou la Banque mondiale, et l'OIT est appelée à jouer plus efficacement son rôle de porte-parole d'une relation plus équilibrée entre l'économie et le social. L'Agenda du travail décent qui insiste dans le même temps sur la nécessité d'une économie prospère et créatrice d'emplois et sur l'importance des droits fondamentaux, de la protection sociale et du dialogue social traduit cette préoccupation. Le récent rapport de la Commission mondiale sur l'avenir du travail, intitulé «Travailler pour bâtir un avenir meilleur» en est une autre manifestation, il met en avant la nécessité d'une action résolue

⁷ C. Philip, *Normes internationales du travail: universalisme ou régionalisme?* (Emile Bruylant 1978).

des gouvernements et des associations professionnelles en vue de construire un avenir du travail juste et équitable qui place «les hommes et les femmes et le travail qu'ils accomplissent au centre de la politique économique et sociale et des pratiques des entreprises»⁸.

Ensuite, la question du contenu et du niveau des normes en lien avec la question de l'universalité des droits de citoyenneté sociale présente un défi important. L'OIT est ici appelée à tenir compte de la diversité socio-culturelle existant dans les différents pays et régions du monde ainsi que des différences de niveau de développement socio-économique, tout en gardant le cap de l'universalisme. La Convention (n° 102) concernant la sécurité sociale (norme minimum), 1952 ne prenait ainsi pas parti entre les mécanismes d'assurance sociale, d'assistance sociale ou de sécurité sociale: elle indiquait que le but – la couverture des personnes vulnérables – importait plus que les instruments choisis et leur inspiration «beveridgienne» ou «bismarckienne» par exemple. Le risque existe ici d'une OIT qui privilégie des normes minimalistes représentant le plus petit dénominateur commun entre les pratiques nationales, ou des normes floues qui n'impliquent pas d'obligations précises ou contraignantes pour les Etats ratifiant les textes concernés. Se pose aussi la question de la mise en œuvre de ces normes: les conventions de l'OIT ne constituent en effet pas des obligations parfaites contraignant les Etats, mais aussi les autres acteurs du monde du travail, à agir d'une manière bien spécifique, mais plutôt des obligations imparfaites où ces acteurs sont tenus d'expliquer et de rendre des comptes sur les actions qu'ils ont déployées en vue de respecter ces normes. La question du niveau des normes doit prendre en compte l'ensemble de ces paramètres.

Un développement particulièrement important à cet égard consiste dans l'adoption de la Déclaration de 1998 qui institue un rapport différent entre OIT et Etats-Membres, dans la mesure où ceux-ci sont tenus de rendre compte de leurs efforts pour appliquer cette Déclaration même en l'absence de ratification des huit conventions fondamentales⁹. Ainsi, le simple fait

⁸ Commission mondiale sur l'avenir du travail, *Travailler pour bâtir un avenir meilleur* (OIT 2019) 11.

⁹ Les huit conventions fondamentales sont: la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948; la Convention (n° 98) sur le droit d'organisation et de négociation collective, 1949; la Convention (n° 29) sur le travail forcé, 1930 (ainsi que son protocole de 2014); la Convention (n° 105) sur l'abolition du travail forcé, 1957; la Convention

d'être Etat Membre de l'OIT impose des obligations, alors que la ratification des textes concernés était requise jusque-là. La Recommandation n° 202 représente une autre tentative intéressante, d'inspiration différente: elle établit des normes minima ou socles de protection sociale, tenant compte des capacités économiques des divers Etats-membres, et se pose comme une recommandation plutôt que comme une norme contraignante dont le non-respect pourrait entraîner des sanctions. Comme ces exemples l'illustrent, l'OIT est appelée à explorer de nouvelles voies d'action normative reposant sur des combinaisons différentes entre *soft law* et *hard law*.

Enfin, l'OIT doit également chercher à diversifier ses moyens d'action au-delà des instruments normatifs, en vue d'atteindre plus efficacement les objectifs visés. Dans les premières années, l'adoption d'instruments juridiques était la voie privilégiée et elle s'est maintenue au fil des décennies d'existence de l'Organisation. L'OIT a cependant transformé peu à peu ses moyens d'action pour les ajuster aux transformations contextuelles auxquelles elle devait faire face, comme l'entrée massive des pays en développement suite à la décolonisation ou encore la mondialisation de l'économie. Le développement le plus important consiste ici dans les activités de coopération technique et de production de connaissances, qui ont pris un poids de plus en plus important tout au long des années. La protection des personnes vulnérables passe ainsi, au-delà de la promulgation d'instruments normatifs, par la mobilisation des Etats et acteurs concernés et leur implication dans la définition de solutions réalistes et ajustées à leur contexte. L'expertise scientifique du Bureau international du Travail (BIT) et la mise en place de partenariats avec des acteurs locaux sont ainsi largement mobilisées pour mettre en œuvre la Recommandation n° 202 au travers de l'élaboration collaborative de stratégies nationales de protection sociale. Cette combinaison de divers modes d'action – instruments normatifs, coopération technique, production de connaissances, etc. – se présente comme une condition de mise en œuvre de solutions universelles. Le risque existe toutefois que la volonté de l'OIT d'ajuster son action aux circonstances des divers pays et à ce qu'elles autorisent aboutisse à limiter considérablement l'ambition et la portée de cette action. L'OIT est ici

(n° 138) sur l'âge minimum, 1973; la Convention (n° 182) sur les pires formes de travail des enfants, 1999; la Convention (n° 100) sur l'égalité de rémunération, 1951; la Convention (n° 111) concernant la discrimination (emploi et profession), 1958.

placée devant le défi de garder le cap d'un universalisme ambitieux, inspiré par les idéaux de justice sociale et les valeurs fondatrices de l'Organisation, tout en gardant le souci du pragmatisme.

III. Le travail n'est pas (ou plutôt pas seulement) une marchandise

Les textes fondateurs de l'OIT avancent tous que le travail ne peut pas être considéré seulement comme une marchandise, mais les formulations diffèrent suivant les époques. Alors que la Constitution initiale stipule dans sa section «Principes généraux» que «le travail ne doit pas être considéré simplement comme un article de commerce» (article 427 du Traité de Versailles, premier principe), la formulation privilégiée par la Déclaration de Philadelphie est plus radicale: «Le travail n'est pas une marchandise»¹⁰. Alors que la première formulation est compatible avec le maintien du système capitaliste, la deuxième semble impliquer une remise en cause profonde du principe même qui fonde la notion de «marché du travail». Le travail ne serait pas l'objet d'un échange entre un offreur et un demandeur répondant à une transaction de marché. La Déclaration sur la justice sociale reprend la même formulation selon laquelle «le travail n'est pas une marchandise». Ces formulations sont clairement trompeuses, dans la mesure où ces textes fondateurs comportent également des éléments qui montrent sans ambiguïté le soutien de l'OIT à l'économie de marché. Il s'agit donc plutôt de comprendre que le travail n'est pas seulement une marchandise, en d'autres termes il est aussi une marchandise qui peut s'échanger sur un marché (ce qui implique qu'une offre et une demande doivent se rencontrer pour qu'une relation puisse s'établir) mais il ne se résume pas à cela. L'OIT n'est pas une institution opposée à l'économie de marché ou au capitalisme, son objectif n'est pas de renverser ce mode de fonctionnement économique, mais de le rendre plus humain ou plus raisonnable suivant les termes de l'économiste américain John Commons.

Ce parti pris pour la régulation du capitalisme se traduit de deux manières complémentaires. Tout d'abord, il s'agit d'affirmer que le cadre marchand ne suffit pas à réguler le travail et à garantir qu'il contribue au

¹⁰ Déclaration de Philadelphie, Partie I. V. aussi M. Dubuy, «La consécration de la justice sociale dans le système de l'OIT: une contribution à l'émergence des finalités providentialistes du droit international public» (2014) 33 *Civitas Europa* 111.

développement humain: l'OIT soutient ainsi qu'on ne peut pas réduire l'échange de la force de travail à une simple question d'offre et de demande, c'est également une question de droits sociaux. Pour reprendre le langage de Karl Polanyi, la relation de travail doit être encadrée socialement et institutionnellement par le biais du dialogue social et du droit social compris au sens large (qui inclut les conventions collectives conclues entre associations professionnelles). La promotion d'un travail décent et respectueux de la dignité des personnes ne saurait résulter automatiquement de contrats entre individus, elle requiert la mise en place de cadrages collectifs.

Ensuite, l'OIT insiste sur la nécessité de prendre en compte non seulement la question de la création d'emplois en quantité suffisante, mais aussi celle des conditions de travail. Ce souci de la qualité du travail s'est concrétisé par l'adoption de nombreuses conventions et recommandations sur les thèmes de la santé et sécurité au travail, du temps de travail (la première convention de l'OIT, celle des huit heures, est consacrée à cette importante question), de l'inspection du travail, l'élimination de la discrimination en matière d'emploi et de profession, etc. Dans les textes fondateurs et les instruments normatifs de l'OIT, le travail n'est pas réduit à sa dimension instrumentale de gagne-pain; il est aussi considéré comme un facteur d'épanouissement et de réalisation de soi. La Déclaration de Philadelphie évoque «l'emploi des travailleurs à des occupations où ils aient la satisfaction de donner toute la mesure de leur habileté et de leurs connaissances et de contribuer le mieux au bien-être commun»¹¹. Le travail doit être utile socialement et contribuer à l'épanouissement individuel.

L'OIT pose ainsi deux jalons importants: *a*) le travail n'est pas qu'une marchandise, il doit être encadré et régulé par d'autres mécanismes que le marché; *b*) le travail ne se résume pas au salaire, même si cette question a indéniablement une importance centrale comme en témoigne la référence récurrente au *living wage* ou salaire de subsistance dans le rapport de la Commission mondiale sur l'avenir du travail. L'Organisation marque ainsi sa spécificité par rapport à d'autres organisations comme l'OCDE et sa stratégie de l'emploi basée sur la volonté de favoriser la création d'emplois en rendant le travail payant (*Making work pay*) ou comme l'Union européenne

¹¹ Déclaration de Philadelphie, Partie III b).

et sa stratégie basée sur l'investissement social et la flexicurité¹². Elle suggère une conception du travail moins enracinée dans le marché et plus soucieuse de la question de la qualité de l'emploi, conception que l'on retrouve tout au long de son histoire.

Dans le contexte contemporain, cette conception du travail est confrontée à un double défi. Tout d'abord, celui de créer les conditions pour une relation équilibrée entre offre et demande dans l'établissement de la relation de travail. Sur cette question, les récents développements à l'échelon national et international illustrent la tendance généralisée à envisager la question de l'emploi comme relevant en priorité d'une politique de l'offre: que ce soit dans les documents de l'OCDE ou ceux de l'Union européenne, le développement du capital humain est présenté comme la panacée pour la création d'emplois. Les stratégies inspirées par le slogan *Making work pay* insistent ainsi sur la nécessité d'améliorer la qualification de la main-d'œuvre en vue de convaincre les employeurs potentiels de créer des emplois. Par contraste, l'action sur le volet demande se résume à garantir les conditions-cadres de la compétitivité économique et donner aux acteurs de l'économie les leviers de flexibilité nécessaires à la bonne marche de leurs affaires. La création d'emplois est souvent présentée comme prioritaire par rapport à leur qualité, au nom du principe qu'un mauvais emploi vaut mieux que pas d'emploi du tout. De la sorte, la relation entre offre et demande apparaît déséquilibrée, avec comme conséquences la nécessité pour le travailleur de s'adapter aux exigences des employeurs s'il veut trouver un emploi et le risque de se voir imposer un mauvais emploi qui ne répond pas aux exigences du travail décent.

Dans ce contexte marqué par ce que Wolfgang Streeck appelle le fondamentalisme des politiques de l'offre (*supply-side fundamentalism*), l'OIT n'échappe pas complètement à la tendance dominante consistant à mettre une priorité forte sur les politiques de l'offre. La Déclaration sur la justice sociale met ainsi l'accent sur l'importance pour les travailleurs d'«acquérir les capacités et les compétences nécessaires leur permettant de travailler de manière productive», mais reste plus floue sur l'action requise au niveau de la demande où il s'agit, de manière plus vague, de faire en sorte que «l'ensemble des entreprises, publiques ou privées, soient durables, afin de favoriser

¹² A. Hemerijck (ed), *The Uses of social investment* (Oxford UP 2017).

la croissance et de créer davantage de possibilités et de perspectives d'emploi et de revenu»¹³. Le rapport de la Commission mondiale sur l'avenir du travail est également beaucoup plus précis dans ses recommandations visant à «accroître l'investissement dans le potentiel humain» que lorsqu'il s'agit d'«accroître l'investissement dans les institutions du travail»¹⁴. Le déséquilibre entre la manière de concevoir les volets offre et demande semble confirmer que l'amélioration de l'attractivité de l'offre – le développement des capacités et des compétences – est dorénavant la question centrale en matière d'emploi et de travail. De telles formulations montrent bien que l'OIT ne s'oppose pas à l'économie de marché capitaliste, elles semblent aussi suggérer que l'Organisation se montre désormais plus favorable à des politiques dites *market-making*, où le rôle de la puissance publique est de permettre le bon fonctionnement du marché du travail en lui fournissant une main-d'œuvre de qualité, plutôt que *market-correcting* où il s'agit de réguler et d'encadrer ce marché en ligne avec l'Agenda du travail décent. Les documents de l'OIT mentionnent l'importance du volet demande, mais restent peu précis en termes de moyens d'action concrets à déployer. C'est là un premier défi à relever en vue de concrétiser le principe selon lequel le travail n'est pas qu'une marchandise.

Ensuite, et de manière complémentaire, la question de la qualité de l'emploi et de la manière la plus efficace de la promouvoir dans le contexte de l'économie mondialisée et digitalisée, est également centrale. Dans un contexte où le principe selon lequel «un mauvais emploi vaut mieux que pas d'emploi du tout» est largement accepté, le risque existe que le souci de la création d'emplois en quantité suffisante occulte la question de la qualité des emplois créés. Ce risque est tout particulièrement important dans le secteur informel, mais aussi dans les entreprises multinationales qui échappent souvent à l'emprise des régulations nationales ou encore dans l'économie des plateformes digitales qui, tout en ouvrant de nouvelles opportunités de création d'emplois, comporte également le danger de créer des zones grises à l'écart de toute forme de régulation, ainsi que l'illustre notamment le débat sur le statut des travailleurs du numérique souvent présentés comme de «faux indépendants». Le récent rapport de la Commission mondiale

¹³ Déclaration de l'OIT sur la justice sociale, Partie I A.

¹⁴ Commission mondiale (n 8) 11-13.

sur l'avenir du travail le rappelle avec force: «La relation de travail reste la pièce maîtresse de la protection du travail»¹⁵.

Les défis à relever dans chacun de ces champs sont nombreux et il importe que l'OIT se positionne explicitement dans ces débats, car elle est porteuse d'une vision originale du travail décent. Une question centrale à cet égard est celle des moyens à mettre en place pour garantir l'application effective des normes: que ce soit dans le cadre des multinationales ou dans celui de l'économie digitale ou encore dans celui du secteur informel, nombreuses sont les formes de travail qui semblent échapper aux juridictions nationales ou à d'autres mécanismes de régulation comme les conventions collectives. L'objectif consiste ici à investir dans la création d'institutions du travail, suivant la formule du rapport de la Commission mondiale sur l'avenir du travail. Ces institutions devront être en mesure d'encadrer ces formes de travail; il ne s'agit donc pas simplement de favoriser la mise en place de marchés, mais aussi et surtout de pouvoir les réguler et les encadrer dans le sens de la promotion du travail décent pour toutes et tous. Sans doute est-il difficile de soutenir, à propos de ces nouvelles formes de marché du travail, que le travail n'est pas une marchandise, comme l'avancait la Déclaration de Philadelphie; mais l'OIT se doit de rappeler qu'il n'est pas seulement une marchandise et que le libre jeu de l'offre et de la demande ne suffit pas à garantir que chacune et chacun puissent exercer un travail décent. A défaut d'un tel investissement dans les institutions du travail, l'OIT sera perçue comme une organisation au service du marché plutôt que des travailleuses et des travailleurs.

IV. La démocratie sociale comme fondement de la citoyenneté sociale

La question de la démocratie sociale occupe une place centrale dans l'histoire de l'OIT, elle est certainement ce qui fait la spécificité de cette organisation dans la famille des Nations Unies. La structure tripartite de l'OIT, qui voit gouvernements et associations représentatives des employeurs et des travailleurs avoir une représentation et un poids équivalents, illustre ce souci de considérer le travail comme une question requérant la négociation sociale entre acteurs concernés. Le travail n'est en effet pas envisagé

¹⁵ *ibid* 39.

prioritairement comme un facteur de profit, mais comme un bien commun dont la régulation et l'encadrement en vue du développement humain nécessitent la participation de toutes les parties prenantes. Les deux instruments normatifs les plus emblématiques de l'OIT, la Convention n° 87 et la Convention n° 98 sont consacrés à cette question. Ils démontrent sans ambiguïté que pour l'OIT, le travail n'est pas seulement une question d'efficacité ou d'organisation, en vue d'améliorer la productivité des divers facteurs de production, mais aussi et surtout une question politique.

Au travers de l'adoption de ces deux instruments normatifs, l'OIT vise à doter les travailleurs de la capacité et de la liberté de s'organiser et de constituer un acteur collectif en mesure de défendre efficacement leurs droits à un travail décent. Alain Supiot a mis en lumière l'importance de garantir l'effectivité de tels droits: la politisation du travail, nécessaire pour en faire un bien commun au service de toutes les parties prenantes, passe par la capacité d'organisation collective qui seule peut donner aux travailleurs, en position de faiblesse s'ils sont isolés, la faculté de devenir un interlocuteur crédible et reconnu dans les discussions autour des enjeux du travail¹⁶.

Ce n'est pas un hasard si deux des dispositifs qui autorisent l'OIT à déployer son action sans l'accord ou la ratification des Etats concernent précisément cette question de la liberté syndicale: l'institution du comité tripartite de la liberté syndicale permet ainsi de procéder à un examen des pièces écrites disponibles, de demander des informations complémentaires voire de prendre des contacts directs avec les parties concernées lorsque la liberté syndicale est en jeu, tout cela sans que le consentement préalable de l'Etat concerné ne soit requis¹⁷. Dans le même esprit, la Déclaration de 1998 consacre les principes de la liberté syndicale et de la négociation collective (en plus de ceux de l'abolition du travail forcé, du travail des enfants, et de la discrimination en matière d'emploi et de profession) comme des piliers dont la validité ne dépend pas de la ratification des Etats, ceux-ci ayant dès lors l'obligation de remettre à échéance périodique un rapport sur leurs actions en la matière même s'ils n'ont pas ratifié les Conventions n° 87 et 98. Souvent timorée lorsqu'il s'agit d'affronter des Etats récalcitrants, l'OIT s'est dotée de moyens d'action plus importants en matière d'infractions à

¹⁶ A. Supiot, *L'esprit de Philadelphie. La justice sociale face au marché total* (Seuil 2010).

¹⁷ Bonvin (n 3) 282ss.

la liberté syndicale et au droit d'organisation et de négociation collective. Le souci de démocratie sociale, qui est sous-jacent à l'ambition de politiser le travail et ses enjeux, est ainsi une constante que l'on retrouve dans tous les textes fondateurs de l'Organisation.

Ce souci est confronté à plusieurs défis dans le contexte contemporain. Tout d'abord, la politisation du travail est appelée à trouver de nouveaux leviers dans le cadre de la mondialisation économique. L'affaiblissement des Etats et de leur capacité à réguler l'économie requiert la constitution d'acteurs collectifs à une échelle différente afin de répondre par exemple aux défis posés par les multinationales. L'OIT est ici appelée à imaginer des fondements supra- ou infra-nationaux pour le tripartisme, de manière à donner aux diverses parties prenantes davantage de prise sur la manière dont les enjeux inhérents aux marchés du travail contemporains – tels que l'émergence de l'économie des plateformes, l'importance de l'économie informelle ou encore l'internationalisation de l'économie qui se manifeste par la montée en force des entreprises multinationales et des chaînes globales de valeur – sont négociés. De nombreux pans de l'économie tendent en effet à se dépolitiser dans le sens d'un affaiblissement, voire d'une absence de négociation sociale des enjeux du travail, dont la définition et la prise en charge risquent dès lors d'être monopolisées par l'un des acteurs aux dépens des autres.

Il s'agit donc d'inventer les formes de dialogue social et de démocratie sociale aptes à promouvoir une re-politisation du travail dans un contexte de mondialisation et de digitalisation de l'économie. La notion de «droits procéduraux» mise en avant par Simon Deakin et Alain Supiot suggère une piste de réflexion intéressante à cet égard¹⁸ : l'objectif consiste à doter toutes les parties prenantes du monde du travail de droits effectifs à participer aux processus de régulation du marché du travail, par exemple en leur donnant le droit d'être informés ou consultés, ou encore le droit de produire leurs propres informations – en faisant appel à leurs propres experts – sur une thématique donnée plutôt que de devoir accepter l'information construite par leurs interlocuteurs (la situation économique d'une entreprise en difficulté pourrait ainsi faire l'objet d'analyses commanditées par des syndicats, qui apporteraient une information complémentaire par rapport à celle des

¹⁸ S. Deakin, A. Supiot (eds), *Capacitas: Contract law and the institutional preconditions of a market economy* (Hart Publishing 2009).

analystes financiers), mais aussi le droit de co-décision sur les enjeux les plus importants. Les propositions abondent, qui vont de références à la *Mitbestimmung* allemande à des suggestions plus radicales telles que l'entreprise bicamérale défendue par Ferreras (où coexistent une chambre des apporteurs de capital et une chambre des apporteurs de travail, chacune des deux ayant un droit de veto sur les enjeux liés au travail, obligeant ainsi à trouver des points d'entente)¹⁹. L'OIT est particulièrement bien placée pour jouer un rôle moteur dans ces réflexions.

Ensuite, il convient de se demander si la structure tripartite doit être élargie pour intégrer d'autres acteurs. L'économie actuelle apparaît par exemple de plus en plus tournée vers le consommateur, s'éloignant ainsi du modèle fordiste où les producteurs jouaient un rôle prépondérant dans la manière de concevoir et de réguler le travail. Dans un tel contexte, il y a sans doute lieu d'imaginer des formes de dialogue civil qui viennent compléter le dialogue social, ne serait-ce que pour responsabiliser les consommateurs vis-à-vis des enjeux du travail. La notion d'objectivité positionnelle²⁰, forgée par Amartya Sen, peut être utile pour délimiter les nouveaux contours du dialogue et de la négociation sociale: suivant cette perspective, un problème social peut être abordé par des acteurs situés dans diverses positions sociales et chacun de ces acteurs peut apporter des éléments objectivement valides pour une meilleure connaissance de cet enjeu. Ainsi, l'ensemble des *stakeholders* du marché du travail – employeurs et travailleurs, producteurs et consommateurs, Etats et autres collectivités publiques, organisations internationales et organisations non gouvernementales, etc. – sont détenteurs d'une connaissance propre sur le travail et ses enjeux et chacun de ces éléments de connaissance est doté d'une objectivité positionnelle. Dans l'esprit de Sen, personne n'est détenteur de la connaissance absolue de ces enjeux; ce n'est donc que par la réunion des diverses objectivités positionnelles pertinentes dans les processus de négociation et de débat public autour des enjeux du travail que l'on peut regrouper les connaissances à disposition et ainsi aboutir à des solutions mieux informées.

¹⁹ I. Ferreras, *Firms as political entities: Saving democracy through economic bicameralism* (Cambridge UP 2017).

²⁰ A. Sen, 'Positional objectivity' (1993) 22 *Philosophy and Public Affairs* 126.

Cette interprétation nous semble refléter le sens profond de la démocratie sociale telle qu'elle s'incarne dans les instruments normatifs et les textes fondateurs de l'OIT: il ne s'agit pas simplement d'amener les divers intérêts en présence autour de la table de négociation, mais aussi d'y réunir toutes les sources informationnelles pertinentes dans la mesure où elles sont dotées d'objectivité positionnelle. L'OIT s'est construite sur la conviction de cette fonction informationnelle de la démocratie sociale; pour cette raison elle a constamment cherché à associer les Etats, les employeurs et les travailleurs autour de la définition des problèmes sociaux et de la construction de leurs solutions. Dans ce même esprit, il lui incombe d'examiner comment une négociation sociale donnant place à toutes les objectivités positionnelles pertinentes et à tous les intérêts en jeu peut se mettre en place dans le contexte du monde du travail contemporain. L'inclusion de formes de dialogue civil, complémentaires au tripartisme et au dialogue social, est par exemple une piste à explorer²¹.

V. Conclusion

Tout au long de son histoire, l'OIT a développé une conception originale des droits sociaux et de la citoyenneté sociale enracinée dans la triple nécessité de protéger les plus vulnérables, de veiller à ce que le travail ne soit pas qu'une marchandise et de politiser la question du travail dans le sens d'en faire un objet de négociation sociale entre les divers *stakeholders* plutôt qu'une question d'efficience à régler par des ingénieurs ou des spécialistes de ressources humaines. De la sorte, l'OIT s'inscrit dans une conception complexe et multidimensionnelle du travail mettant l'accent sur ses dimensions instrumentale, expressive et politique²²; elle contribue ainsi à fonder la dignité du travail et de celles et ceux qui l'exercent. Une telle conception visant à rendre le capitalisme plus humain est très ambitieuse et requiert que l'OIT prenne des positions claires sur un certain nombre d'enjeux. Cet article s'est efforcé d'identifier certains de ces enjeux et d'explicitier les défis auxquels ils confrontent l'OIT. Sa capacité d'y apporter des réponses convaincantes sera sans doute décisive pour l'avenir de l'Organisation.

²¹ J. De Munck, C. Didry, I. Ferreras, A. Jobert (eds), *Renewing democratic deliberation in Europe: The challenge of social and civil dialogue* (Peter Lang 2012).

²² I. Ferreras, *Gouverner le capitalisme?* (Seuil 2012).

L'OIT et la justice sociale (1919-2019)

*Sandrine Kott**

I. Introduction

Pour livrer quelques éléments de réflexion au débat sur «les valeurs fondatrices de l'OIT» il semble nécessaire de retourner aux textes fondateurs, soit la Constitution de 1919, la Déclaration de Philadelphie de 1944 et la Déclaration de l'OIT sur la justice sociale pour une mondialisation équitable de 2008 (la Déclaration de 2008).

La stabilité des valeurs fondatrices de l'Organisation depuis 1919 peut surprendre; en particulier l'affirmation selon laquelle le travail n'est pas une marchandise. Dans le monde capitaliste que l'OIT ne remet pas en cause, le travail est bien une marchandise. On utilise de manière régulière, à l'OIT, l'expression de «marché du travail». Cette affirmation ne prend sens à l'intérieur de l'OIT que dans la mesure où on l'associe au premier principe de l'OIT, celui de justice sociale, également toujours réaffirmé. C'est l'objectif de «justice sociale» qui corrige, sans l'annuler, la réalité du travail marchandise. Tel est le rôle de la législation et des normes internationales du travail.

L'OIT se présente depuis les origines comme une agence sociale de la mondialisation ayant en effet été créée pour répondre à la «première mondialisation économique» du XIX^{ème} siècle. Elle est le lieu où s'élabore un code international du travail dont les dispositions sont mises en œuvre nationalement. L'Organisation est donc étroitement dépendante des équilibres et rapports de force internationaux et nationaux qui changent avec le temps.

* Présentation orale fondée sur l'article «Quelles normes pour quelle justice sociale? 100 ans d'histoire normative» in S. Dagon, A.-S. Dupont, K. Lempen (eds.): *L'OIT et le droit social en Suisse: 100 ans et après* (Pôle Berenstein 2019) 7.

L'évolution de la nature des normes et les discussions qui les entourent illustrent la manière dont les valeurs fondamentales de l'OIT reçoivent une traduction concrète dans des contextes qui sont toujours contraints. De plus, pour comprendre l'Organisation, il est nécessaire d'étudier ensemble les compétences variables déployées au sein de l'Organisation elle-même et les contextes dans lesquels elle agit.

On peut distinguer trois périodes qui mettent en lumière trois formes de mise en œuvre et d'interprétation de la justice sociale globale: L'entre-deux-guerres et la diffusion d'une science internationale du social; 1944-1970 et le modèle universel de démocratie sociale; et les difficultés de la justice sociale dans un monde néo-libéral depuis 1980.

II. L'entre-deux guerres et la diffusion d'une science internationale du social

La justice sociale n'est définie dans aucun des textes fondamentaux de l'OIT. Le préambule de la Constitution de 1919 et l'article 41 de la Constitution intitulé «principes généraux» énumèrent cependant les différents éléments qui la fondent.

Elle se déploie essentiellement selon trois piliers: protection, répartition, démocratie sociale. Ce faisant les objectifs et le travail de l'OIT s'inscrivent dans la tradition de la réforme sociale du XIX^{ème} siècle qui voit dans le développement de l'industrialisation et du salariat un danger pour les équilibres politiques et sociaux. L'OIT est en effet une organisation ancrée dans le XIX^{ème}, ce qui peut expliquer les difficultés qu'elle a à s'adapter aux évolutions.

Dès la première moitié du XIX^{ème} siècle, la protection des travailleurs est une demande d'un petit nombre d'employeurs éclairés qui ont vu dans la préservation et l'éducation de la main-d'œuvre la condition de la prospérité économique. Dans le contexte de la première mondialisation, ils prennent position en faveur d'une coordination des législations sociales. Ils trouvent le soutien des gouvernements effrayés par le tableau de la dégénérescence des populations ouvrières et qui souhaitent disposer d'une population saine (pour faire la guerre en particulier). Ces avocats de la réforme sociale se constituent à la fin du XIX^{ème} siècle en une sorte de communauté de savoir ou communauté épistémique au sein de grandes associations internationales et en particulier de l'Association internationale pour la Protection légale des

travailleurs (AIPLT) qui est le véritable ancêtre de l'OIT. Outre certains employeurs et fonctionnaires, on trouve également, déjà, des représentants du mouvement ouvrier réformiste au sein de l'AIPLT. Toutefois, il ne faut pas oublier que ce n'est pas du mouvement ouvrier qu'émane l'idée de protection légale des travailleurs. Les réformes sociales sont en effet combattues par le mouvement ouvrier révolutionnaire (voir, par exemple, le manifeste du parti communiste de 1848) qui les voit comme une «béquille» du capitalisme. Toutefois, la réduction de la durée du travail, puis la journée des huit heures est une revendication du mouvement ouvrier depuis la seconde moitié du XIX^{ème} siècle.

Si les employeurs, conscients des risques de distorsion de concurrence sont les premiers à lancer l'idée d'une législation sociale internationale, c'est bien le mouvement ouvrier qui a concrètement poussé durant la Première Guerre mondiale pour la création de l'OIT.

Néanmoins, l'OIT n'aurait sans doute pas vu le jour sans l'inquiétude provoquée par la révolution bolchévique et les vagues révolutionnaires européennes. Jusqu'en 1989, la peur de la révolution et l'existence de régimes communistes sont des aiguillons utiles pour tous les réformateurs sociaux et pour l'OIT. C'est donc pour faire droit aux revendications ouvrières que la première convention internationale du travail est celle des huit heures de travail par jour, soit la Convention (n° 1) sur la durée du travail (industrie), 1919. Les conventions adoptées en 1919 pour réguler le travail des enfants et des femmes s'inscrivent quant à elles parfaitement dans la tradition des réformes sociales libérales du XIX^{ème} siècle, légitimées par le fait que ces deux groupes ne pouvant pas se défendre eux-mêmes doivent être protégés par l'Etat¹.

Outre la législation du travail, les assurances sociales constituent le second domaine privilégié d'intervention de l'OIT durant la première période. Les assurances figurent presque chaque année au programme des discussions de la Conférence internationale du Travail entre 1919 et 1935. L'histoire fine de l'élaboration des conventions d'assurances sociales permet

¹ Ces conventions sont la Convention (n° 3) sur la protection de la maternité, 1919, la Convention (n° 4) sur le travail de nuit (femmes), 1919, la Convention (n° 5) sur l'âge minimum (industrie), 1919 et la Convention (n° 6) sur le travail de nuit des enfants (industrie), 1919.

de comprendre comment se sont établies progressivement les modalités du travail normatif de l'OIT et d'identifier la diversité des acteurs qui y contribuent.

L'élaboration normative est précédée par une longue activité de collecte de l'information au cours de laquelle les différents États-nations sont constitués en véritables réservoirs d'expériences pour les fonctionnaires du Bureau international du Travail (Bureau). Ces derniers travaillent donc en étroite collaboration avec les fonctionnaires nationaux. Les fonctionnaires du Bureau s'entourent d'experts qui contribuent à alimenter mais aussi à valider un savoir et savoir-faire social.

Ainsi dès les origines, l'OIT n'est pas seulement une agence productrice de normes, elle est aussi le lieu où se produit et se diffuse un savoir social. Elle s'inscrit dans un courant de « mise en science du social ». Cette orientation a commencé dans la seconde moitié du XIX^{ème} siècle avec les enquêtes sociales, le début de la sociologie empirique et s'accélère à la fin de ce siècle avec la naissance des sciences sociales. Cette activité d'élaboration d'une science du social fait dès les origines explicitement partie des missions et des valeurs fondamentales de l'Organisation. Elle est aussi la condition même de son existence.

III. 1944-1970 et le modèle universel de démocratie sociale

La Seconde Guerre mondiale a été un moment important pour l'OIT. Après son déménagement à Montréal en 1940, elle a été à la pointe du combat contre le nazisme en diffusant une vision de la justice sociale portée par les Alliés. Le Bureau a alors contribué à défendre et diffuser l'idée que la vraie justice sociale était étroitement liée à la démocratie.

La Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 et la Convention (n° 98) sur le droit d'organisation et de négociation collective, 1949 témoignent de cette inflexion. L'OIT est alors en plein accord avec les paradigmes dominants du monde occidental, ce qui est sanctionné par l'attribution du prix Nobel de la paix en 1969.

Durant les années 1980, dans le contexte de reprise de la guerre froide, ces conventions sont d'ailleurs largement mobilisées et sont interprétées à

travers une rhétorique «droits de l'homme» qui, à partir de la fin des années 1970, devient un référentiel hégémonique dans les arènes internationales.

L'exemple le plus illustratif de l'efficacité des conventions internationales du travail dans ce contexte est le rôle joué par l'OIT dans la campagne en faveur de Solidarnosc entre 1981 et 1984. Le gouvernement polonais avait en effet ratifié les deux conventions n^{os} 87 et 98 mais, par sa tradition communiste, avait une définition bien différente de la négociation collective et de la liberté syndicale.

Ce point renvoie à la question de l'universalisation de ce modèle de démocratie sociale dans le contexte de la multiplication du nombre des membres et de diversification des référentiels politiques et culturels.

En 1944, la Déclaration de Philadelphie a affirmé que les principes doivent être applicables à tout le monde et partout et introduit une double universalisation en rupture avec la période précédente.

Durant l'entre-deux-guerres, l'OIT est une organisation dominée par les pays européens et surtout par les deux puissances coloniales (la France et la Grande Bretagne). L'OIT a accepté, aux termes de l'article 35 de la Constitution, l'inégalité de traitement entre les travailleurs des métropoles et ceux des colonies.

L'accroissement du nombre des Membres confronte l'Organisation à la question de la diffusion de normes qui avaient été établies pour les pays industrialisés du monde occidental. Face à cela, l'Organisation déploie deux stratégies.

La première stratégie consiste à accepter des ajustements à la norme. A partir des années 1950, les «clauses de souplesse» sont de plus en plus sophistiquées. La Convention (n^o 102) de 1952 concernant la sécurité sociale (norme minimum) constitue la meilleure illustration de flexibilité normative déployée par l'Organisation.

La seconde stratégie repose sur l'envoi de missions techniques pour aider les gouvernements des pays moins développés à mettre en place des politiques sociales compatibles avec les normes de l'OIT. Les fonctionnaires du Bureau ont commencé à offrir leur assistance technique aux pays de la périphérie européenne et en particulier à ceux des Balkans puis à ceux d'Amérique latine dès les années 1930. Cette assistance technique leur a

ainsi permis de diffuser leur modèle d'assurances sociales en assurant la compatibilité des législations de ces pays avec les conventions de l'OIT.

Ces missions techniques se développent dans les années 1950 et 1960 dans le cadre du programme des Nations Unies pour le développement et, fondamentalement, elles contribuent alors à étendre les modèles managériaux occidentaux comme les formes d'emploi standard qui lui sont liées.

L'universalisation présente également une dimension sociologique. Dans la Constitution de 1919, les salariés sont les seuls travailleurs couverts par l'activité normative de l'OIT.

L'Organisation «découvre» la question du secteur ou du travail informel en marge du Programme mondial pour l'emploi lancé en 1969. Mais structurellement, parce qu'elle est dépendante des acteurs étatiques qui sont ceux qui mettent en œuvre les conventions internationales du travail, elle a du mal à y répondre. La Convention (n° 189) sur les travailleuses et travailleurs domestiques, 2011 offre toutefois une réponse mais partielle à l'informalité parce que les formes du travail hors contrat se diversifient.

IV. Depuis 1980, les difficultés de la justice sociale dans un monde néo-libéral

L'OIT a toujours été sous le feu des critiques de la gauche «révolutionnaire» mais aussi de certains groupes, à droite, hostiles aux régulations sociales. On assiste depuis la seconde moitié des années 1970 à une période de remise en cause fondamentale de l'idée même de régulation sociale et durant les années 1990, en l'absence d'ennemi utile comme les communistes, l'Organisation est devenue vulnérable.

Lors de la fondation de l'Organisation mondiale du commerce en 1995, une coalition de gouvernements des pays asiatiques, soutenue par les syndicats de ces mêmes pays, s'oppose ainsi à l'introduction de clauses sociales dans les traités de commerce.

Dans le même temps, cet affaiblissement est un paradoxe: l'OIT avait été créée dès les origines comme un instrument de la régulation sociale de la mondialisation économique. Sur le papier son existence se justifie plus que jamais.

Mais comme toutes les organisations internationales, l'existence de l'OIT est étroitement liée à celle d'Etats-nations puissants capables de développer et de mettre en œuvre les législations sociales. Or ces Etats-nations sont affaiblis par de nouveaux et puissants acteurs internationaux: les entreprises multinationales sur lesquelles l'OIT ne peut, pas davantage, que les Etats nationaux exercer un pouvoir.

La notion de responsabilité sociale des entreprises qui renvoie aux pratiques des patrons philanthropes du XIX^{ème} siècle la confronte à une importante difficulté car la responsabilité sociale des entreprises est une pratique volontaire dont le caractère subsidiaire ne garantit aucun droit et aucune justice sociale.

La Déclaration relative aux principes et droits fondamentaux au travail de 1998 et la Déclaration de 2008 tentent d'apporter une réponse à ces difficultés. Les conventions fondamentales sélectionnées sont essentiellement celles qui doivent renforcer le pouvoir des travailleurs. Elles visent donc à créer un rapport de force favorable dans un contexte international défavorable.

De fait, comme on l'a vu le mouvement syndical travailleur fut essentiel dans la naissance de l'OIT de même que dans les campagnes de ratification des conventions internationales du travail. La Convention (n° 100) sur l'égalité de rémunération, 1951 relative «au principe de l'égalité de rémunération entre la main d'œuvre masculine et féminine pour un travail de valeur égale» fut très largement obtenue grâce aux pressions syndicales. Le contexte international de guerre froide syndicale était favorable puisque la question de l'égalité des femmes constituait une revendication importante du mouvement syndical communiste.

Par ailleurs même les conventions qui ne sont pas ratifiées peuvent être utiles lorsqu'elles sont appropriées par des travailleurs. C'est le cas de la Convention n° 102, peu ratifiée mais qui exerce une réelle influence. Les travailleurs indiens du système informel obtiennent ainsi en 2008 le vote de l'*Unorganised Sector Social Security Act*, en partie en référence à la Convention n° 102.

Néanmoins les critiques de la Déclaration de 1998 soulignent qu'elle privilégie les droits négatifs (abolition des discriminations et formes extrêmes d'exploitation) et les principes sur la protection réelle des droits

des travailleurs et sur la redistribution. C'est d'ailleurs son caractère faiblement exigeant qui lui permet d'être intégrée aux traités de commerce international comme à des codes de conduite adoptés volontairement par de grandes sociétés multinationales. La même chose pourrait être dite pour le travail décent. Il permet à l'Organisation de reprendre pied dans la conversation mondiale mais, dans la mesure où aucun indicateur de travail décent n'est établi, il peut difficilement constituer un instrument du droit social.

V. Conclusion

Pour conclure, il est certes facile de condamner l'OIT en soulignant le caractère parcellaire et incomplet du code international du travail que les syndicats avaient appelé de leurs vœux en 1916 et dont la Constitution de 1919, puis la Déclaration de Philadelphie en 1944, avaient fièrement annoncé l'avènement et qui devait mettre fin au travail marchandise en garantissant la justice sociale.

Alors que peut faire l'OIT ou plutôt que peut-on faire à l'OIT pour faire progresser la justice sociale?

La première chose c'est de continuer à produire et à diffuser une expertise et un savoir social à partir desquels peut être élaboré du droit social, tout en ayant recours à d'autres disciplines telles la sociologie ou l'anthropologie et en allant sur le terrain.

Par ailleurs, l'Organisation ne sera pas en mesure d'imposer une régulation sociale de la mondialisation contre les puissances économiques et politiques de la planète si elle ne peut pas s'appuyer sur les groupes sociaux ou les gouvernements dont elle défend les valeurs et les intérêts.

A cet égard la Convention n° 189 constitue un moment important dans l'histoire de l'OIT. Car ce sont des groupes organisés qui ont poussé en faveur d'une telle convention et se sont saisis du texte dans divers pays pour faire valoir leurs droits. Cette convention indique bien l'importance symbolique mais aussi pratique d'un tel texte et le maintien, dans les faits, des objectifs – et non seulement des valeurs – de justice sociale.

II

THE ILO QUEST FOR SOCIAL JUSTICE AND THEORIES OF INTERNATIONAL LAW



Frameworks for Understanding the ILO

José E. Alvarez

I. Introduction

The organizers of this centennial conference suggested that I consider how jurisprudential approaches common among international law scholars apply to the ILO. The request calls to mind the Indian parable about blind men who are asked to define an elephant but are allowed to touch only part of the animal. Predictably, each of them comes up with seriously misleading descriptions based on their impressions of its tail, ears, skin, trunk, and so on. Perhaps, in line with the moral of this story, ILO insiders recognize that they may be too close to the ILO's discrete parts and need the distance provided by external perspectives to better understand their complex employer. Alternatively, maybe they fear that their professional stake in the Organization's success makes them less than dispassionate about the Organization's past and less than ideal prognosticators of its future. Or maybe they think that this 'academic' exercise will suggest how this particular 'elephant' fits into its broader species, namely other international organizations (IOs).

Whatever the reason, we need to acknowledge at the outset some practical hazards. International legal frameworks have their own blind spots. Scholars associated with each may attempt, like blind men, to extrapolate too much from their limited expertise or data. As Jan Klabbers has noted, many schools of thought – especially those having a U.S. academic pedigree – extend the insights of political scientists (who famously know little about law) into the legal domain (where arguably they threaten to undermine precisely what makes lawyers valuable to policy makers).¹ Other

¹ Jan Klabbers, 'The Relative Autonomy of International Law and the Forgotten Politics of Interdisciplinarity' (2004/2005) 1 *Journal of International Law and International Relations* 35.

frameworks, such as law and economics, have been subjected to their own powerful critiques – namely that its core concepts (such as efficiency, free markets, competition, rational actors, costs and benefits, the tragedy of the commons, the prisoner’s dilemma, the presence of transaction costs) are interpretative screens that filter out legal values in favour of the economists’ trade.² Scholarly frames pose risks of distortion. Each may provide a partial view, no more accurate than a car’s rearview mirror where ‘objects may be closer than they appear’. There is, moreover, the risk that surveying competing frames ends up producing a toolkit from which observers can choose, pragmatically, their preferred ‘truth’, even if it happens to validate pre-conceived normative (and political) judgments.³

Despite these concerns, surveys of select international law frameworks – functionalism (and its close cousin, legal positivism), realism, liberal theory, law and economics, constructivism and other ‘deliberative’ approaches, constitutionalism, and critical theories – have been undertaken and applied to the world of international organizations, even if not, as such, to the ILO.⁴ This essay rectifies that gap.

II. Some select frameworks

Realists, whose views encourage dialogues with international relations, focus on the role of the State, State power, and State interests.⁵ Since traditional realists were deeply skeptical of the autonomous significance

² See, for instance, David M. Driesen and Robin Paul Malloy, ‘Critiques of Law and Economics’ (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2572574>.

³ See, for instance, Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 *American Journal of International Law* 351; Martti Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’ (2014) 26 *International Relations* 3. Cf Daniel Bodansky, ‘Legal Realism and Its Discontents’ (2015) 28 *Leiden Journal of International Law* 267 (arguing that legal realists and international legal scholars each contribute to the truth, as do the proverbial blind men and their elephant).

⁴ José E. Alvarez, *International Organizations as Law-Makers* (Oxford UP 2005) 17, 57. For a general survey of these frameworks or ‘methods’, see Steven R. Ratner and Anne Marie Slaughter (eds) *The Methods of International Law* (American Society of International Law 2004).

⁵ See, for instance, Richard H. Steinberg, ‘Wanted Dead or Alive: Realism in International Law’ in Jeffrey L. Dunoff and Mark J. Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge UP 2013) 146 (discussing

of shared international norms, of the ‘international community,’ or of the effect of ‘soft law,’ their views have generated considerable hostility on the part of international law scholars committed to the normative impact of all three. Realists like Hans Morgenthau – for whom an IO is only as powerful as its powerful member States and only has effects on ‘high politics’ when powerful members deign to use it to launder their own interests – are easy to caricature as fundamentally hostile to international law.⁶ At the same time, core realist assumptions have deeply influenced virtually all jurisprudential perspectives on international law addressed below – from functionalism to positivism to multiple ‘isms’ associated with international relations – and are hard for international lawyers to ignore.⁷

Realist critiques have clearly been applied to the ILO for some time. Realism appears to be the basis for the view that the ILO is a venue for relatively harmless paper shuffling exercises that do little except provide modest job satisfaction to ineffectual bureaucrats in Geneva.⁸ For some, the ILO’s failures to enforce even its most fundamental labour standards (such as the prohibitions on forced or child labour) or to secure authoritative guidance (on such vital questions as whether freedom of association entails a right to strike) follows logically from what its most powerful (if hypocritical) government members and employer delegates desire. Nor are

early modern, traditional and structural forms of realism but noting that all three posit that States, the central actors in international law, use their material power to advance their (typically exogenously determined) interests through international organizations and law).

⁶ *ibid* (noting that contrary to this ‘straw man’ contention, realists accept that international law (or IOs) that advance shared norms or the interests of powerful States can benefit all States and can elicit compliance).

⁷ Thus, liberal and constructivist theories (as discussed below) offer ways to understand how State interests are formed to begin with or over time. Other scholars have embraced ‘legal realism,’ defining it broadly to embrace all forms of ‘socio-legal theorizing’ that examine, empirically and pragmatically, the role of actors, norms and power in relation to legal processes. On this view, legal realists include all the international jurisprudential frameworks mentioned here with the exception of those based on natural law-moral theory or based on purely analytic theory (such as strict positivism); see Gregory Shaffer, ‘Legal Realism and International Law’ in Jeffrey L. Dunoff and Mark A. Pollack, *International Legal Theory: Foundations and Frontiers* (Cambridge UP 2019), forthcoming; Bodansky (n 3).

⁸ See, for instance, Alan Hyde, ‘The ILO in the Stag Hunt for Global Labor Rights’ (2009) 3 *Law & Ethics Human Rights* 154, 162 (quoting one realist critic, Jessica Mathews, who has written ‘the ILO has indeed been around forever, but it has done nothing forever, so it is not terribly interesting’).

realist insights relevant only to the ILO's past. To the extent realists focus attention on the role of powerful States within the Organization, they provide potential insights into how, as IOs like the ILO become more responsive to emerging superpowers like China, that shift in power impacts the labour law that it produces.⁹

Functionalism is the most traditional explanation for international legal regimes and IOs in particular.¹⁰ As depicted in classic works in the field,¹¹ functionalism defines IOs as the agents of collective State principals. As do realists, functionalists see IOs as fulfilling the rational interests of their members, which use these institutions to secure their material and security concerns.¹² Functionalism is deeply connected to legal positivism – which posits that three State-centric sources of obligation – treaties, custom, and general principles – are the alpha and omega of international law.¹³ IOs supply the core elements needed to build those sources of law, particularly role differentiation, proceduralization, formalization, and iterative behaviour.¹⁴ Functionalist IOs, such as those of the UN system constructed to fulfill distinct specialized goals – from peace and security to avoiding transnational threats to health – are, more generally, tools for centralization and independence.¹⁵ IOs centralize the talents

⁹ It would be interesting to examine, for example, whether decisions taken by the ILO supervisory bodies that were once severely critical of the rights to freedom of association in pre-Solidarity Poland will continue to be applied to another 'workers' State' namely China. Compare, for instance, David A. Wirth, 'Trade Union Rights in the Workers' State: Poland and the ILO' (1984) 13 *Denver Journal of International Law and Policy* 269 to Human Rights In China, 'Formalistic cooperation masks rejection of key labor rights' (2001) <<https://www.hrichina.org/en/content/4804>>.

¹⁰ See, for instance, Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25 *European Journal of International Law* 645; Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism,' in J. Klabbers and Å. Wallendahl, (eds) *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 3.

¹¹ See, for instance, Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (4th edn Martinus Nijhoff 2003).

¹² See, for instance, Kenneth Abbott and Duncan Snidal, 'Why States Act through Formal International Organization' (1998) 42 *Journal of Conflict Resolution* 3.

¹³ Alvarez (n 53).

¹⁴ Tonny Brems Knudsen, 'Fundamental Institutions and International Organizations: Theorizing Continuity and Change' in Tonny Brems Knudsen and Cornelia Navari (eds), *International Organizations in the Anarchical Society* (Palgrave 2019) 23,44.

¹⁵ Abbott and Snidal (n 12).

and resources of a number of States, thereby reducing transactions costs, facilitating issue linkages, and producing information that can enable more treaties to be concluded and enforced.¹⁶ They supply independent mechanisms for collective legitimation that permit the impartial assessments of facts and the application of the law to resolve inter-State disputes. Functionalists contend that IOs remain under the control of the States that create them. Like realists, they argue that international legal regimes are created and survive to the extent their net benefits to States exceed the costs of their establishment, including the financial and ‘sovereignty’ costs associated with their exercise of their delegated powers.

Although functionalists differ on whether discrete IOs serving States’ distinct functions could eventually generate ‘peace by pieces’,¹⁷ they see UN inter-State organizations as sites of cooperation infinitely preferable to war. Unlike most realists, functionalists tend to take a normative stance: they generally subscribe to international law’s ‘progress narrative’ whereby an increase in the numbers of IOs or international courts is always desirable.¹⁸ Under this view, international administrative unions were preferable alternatives to unrestrained nationalism and their successors, UN system organizations propelled by liberal cosmopolitanism, deploy their generally technocratic and apolitical powers to grease the wheels of inter-State interactions to benefit all. To functionalists, IOs – like international law itself – pose no threat to ‘sovereignty’ since they do not exercise ‘governance.’

Functionalism gives clear answers to the question ‘what is the ILO for?’ The ILO exists, first, to manage the centralized resources made available to it by States. It supports, in Abbott and Snidal’s terms, a diverse set of ‘interstate interactions’ – such as partnering efforts with governments to provide education, training, and technical assistance and the pooling of financial resources and labour expertise.¹⁹ Second, it legitimizes what it does on the basis that it acts, not on behalf of any one State, but on behalf of the

¹⁶ See, for instance, William J. Aceves, ‘Institutional Theory and International Legal Scholarship’ (1997) 12 *American University International Law Review* 227.

¹⁷ Alvarez (n 4) 27-28 (quoting David Mitrany).

¹⁸ See generally, Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Martinus Nijhoff 2008).

¹⁹ Abbott and Snidal (n 12) 10-12.

‘international community’ or the ILO’s tripartite membership. Its elaboration of some 190 treaties, 206 Recommendations, Declarations, Codes of Practice, Guidelines, informal Office opinions (issued at least through 2002), and ‘non-authoritative’ interpretations issued by supervisory bodies demonstrate the Organization’s capacity to deploy centralization and/or independence for normative ends. The functionalist insight that ‘independence’ can be the product of different types of persons and be a matter of degree is reflected in the ILO’s turn to, on the one hand, expert-driven bodies like its Committee of Experts on the Application of Conventions and Recommendations (CEACR) alongside tripartite-legitimized ones like its Conference Committee on the Application of Standards, its Governing Body, or the International Labour Conference.²⁰

Functionalist insights can also help explain the ILO’s evolution over time, including its resort to Declarations to redefine itself as needed to comport with changing State needs. Its 1998 Declaration on Fundamental Principles and Rights at Work (the 1998 Declaration), for example, reflects the members’ realization that the proliferation of labour standards is not an unalloyed good but requires further refinement. That Declaration is an obvious tool of centralization: it elevates the significance of four fundamental ‘principles’ found in eight ‘core’ ILO Conventions. But it also serves an ‘independence’ function: it provides community justification for allocating resources in ways not explicitly anticipated by the ILO’s Constitution (which does not mention the possibility of ‘declarations’ or their use in prioritizing institutional resources).

But functionalists have trouble accounting for the autonomous authority of IOs. The 1998 Declaration, for example, stretches the limits of principal-agent theory to the breaking point. In that case, the International Labour Conference drew creatively from the authority in its Constitution to have States report on unratified conventions (under article 19(5)(e)). That Declaration’s institutional follow-up mechanism, which requires States to report on certain unratified conventions, is a significant departure from positivist consent and expands the power of institutional actors at the

²⁰ *ibid* 18-19 (describing the capacity of IOs to ‘launder’ the interests of States through various tools of ‘independence’).

expense of the ‘State principals’.²¹ Similarly, the ILO’s 1944 Declaration of Philadelphia and its 2008 Declaration on Social Justice for a Fair Globalization (the 2008 Declaration) are not straight-forward applications of the ILO’s limited delegated powers. These institution-defining Declarations approximate de facto constitutional amendments that are initiated by the collective’s ‘agent’ to better respond to the demands of human rights advocates and critics of economic globalization’s inequities respectively. The Organization’s decision in 1951 to establish freedom of association supervisory machinery – another departure from positivist consent – is an additional institutional innovation made possible by the claim that an IO, impliedly licensed to be the agent of the ‘community,’ can do what individual States cannot.

Liberal theorists break into the black box of unitary States to examine the interests of constituencies inside them.²² They argue that distinct stakeholders – such as businesses engaged in a particular sector or environmental activists operating through national and transnational non-governmental organizations (NGOs) – determine the foreign policy of States. Liberals see IOs as doing the bidding of, for example, distinct interest groups within States or discrete government agencies (which respond to different stakeholders). The former can assert pressures on an IO even without a formal vote, as where NGOs manage to secure observer or consultative status or exercise de facto ‘enforcement’ roles (as do human rights NGOs whose shadow reports in Geneva ‘mobilize shame’ against governments that violate their human rights commitments).²³

Liberal theory provides a highly plausible account of the only UN system organization that from the beginning broke the stranglehold States have on formal representation. The ILO’s tripartism, even if designed as the West’s answer to socialism, is a corporatist model of labour relations that, at least in 1919, was seen as reflecting the three core constituencies of Western

²¹ For a description of the consequences of this departure from the requirement of strict positivist consent, Laurence R. Helfer, ‘Monitoring Compliance with Unratified Treaties: The ILO Experience’ (2008) 71 *Law and Contemporary Problems* 193.

²² See generally, Andrew Moravcsik, ‘Liberal Theories of International Law,’ in Dunoff and Pollack (n 5) 83.

²³ For a rich account of the impact of NGOs in enforcing human rights, Beth A. Simmons, *Mobilizing for Human Rights* (Cambridge UP 2009).

labour law. From the start, the ILO was perceived as a breed apart from the rest of international law precisely because its normative output would reflect the priorities of two significant non-State interests: labour and capital.²⁴

Today, liberal theory as applied to the ILO has a more critical edge. Liberals would be among the first to call attention to the ways the ILO's tripartism – however laudable a concession to liberal theory it once was – falls short of representing the full range of stakeholders in today's world of work. An organization perceived as representing the views of powerful labor unions, organized groups of businesses that hire them, and labour ministries within States may not fully capture the interests of, first, most of the world's workers (including in the informal sector in the Least Developed Countries or in non-unionized workplaces in places like the United States); second, many of the world's most powerful employers (from those at the top of global supply chains who exercise tremendous economic power but do not employ the workers at the bottom of those chains or tech-centric companies like Lyft and Uber which claim not to have employees at all); and third, many parts of governments (whose welter of agencies – from those handling health care to immigration – exercise power over labour conditions and its regulation that may equal or exceed that wielded by labour ministries).²⁵

Those who study law and economics explore the economic rationales for and the economic effects of IO produced standards, nationally or internationally.²⁶ A number of these scholars incorporate insights from game theory. An organization designed to solve a coordination problem – such as to establish and apply safety standards for international aviation as does the International Civil Aviation Organization – acts differently than

²⁴ For one account of how tripartism came to define the ILO, see, for instance: Jonathan Symons, 'The legitimation of international organisations: Examining the identity of the communities that grant legitimacy' (2011) 37 *Review of International Studies* 2557.

²⁵ For descriptions of the challenges of tripartism, see, for instance, James J. Brudney, 'The Internationalization of Sources of Labor Law' (2017) 39 *University of Pennsylvania Journal of International Law* 1; Cynthia Estlund, 'Working together transnationally' in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 260.

²⁶ See, for instance, Jeffrey Dunoff and Joel P. Trachtman, 'Economic Analysis of International Law' (1999) 24 *Yale Journal of International Law* 1. For a wider lens, incorporating economic insights as part of those who see States as rational (unitary) actors, see, for instance, Anne van Aaken, 'Rationalist and Behavioralist Approaches to International Law' in Dunoff and Pollack (n 7).

one that seeks to resolve prisoner's dilemmas, such as the World Trade Organization (WTO) (which is designed to prevent individual States from cheating through protectionist measures). More generally, law and economics scholars contend that IOs that fail to respect the laws of the market – that, for example, disregard David Ricardo's theory of comparative advantage – promote inefficiencies and are likely to fail.

Insights premised on law and economics have played a prominent role with respect to the merits of international labour law over many years. Claims by some economists and free traders that global labour protections are a form of inefficient protectionism, for example, influenced the debate over the wisdom of a 'social clause' within the WTO and formed the backdrop for the 2004 Report on 'A Fair Globalization' of the ILO's World Commission on the Social Dimension of Globalization and ultimately the 2008 Declaration. Although economists are often associated with hostile views towards international labour standards on the premise that many of these violate the theory of comparative advantage and undermine the long term economic health of nations, this assessment is not shared by all economists or law and economics scholars. Amartya Sen's embrace of human capabilities encompasses international labour standards as much as enhancing access to property.²⁷ Those who examine the market effects of labour standards or their impact on the wealth of nations do not necessarily conclude that all such standards are economically unwise. Simon Deakin, for example, praises, on the basis of economic rationality, rules that bar employers from dismissing pregnant women.²⁸ He argues that in addition to remedying an injustice, this prohibition provides positive economic incentives for employers and employees alike insofar as the demonstration effects of sanctions on breaching employers imposes a stigma on those employers and the prohibition becomes self-enforcing. In his view, the ban is likely to lead more women to seek employment (even as working mothers), and the result, greater female employment, will encourage more women to be educated and lead in turn to greater productivity and growth.²⁹

²⁷ Amartya Sen, *Development as Freedom* (Anchor 1999).

²⁸ Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford UP 2005) 57.

²⁹ *ibid.* See also Sangheon Lee and Deidre McCann, 'New Directions in Labour Regulation Research,' in Sangheon Lee and Deidre McCann (eds), *Regulating for Decent Work*

Constructivist scholars argue that IOs are not the passive agents of rational States with pre-determined interests.³⁰ Unlike functionalists and structural realists who presume that rational States use IOs to fulfill pre-determined interests, they see IOs as helping to define the interests of States, at least over the long term. They argue that IOs help construct the malleable identities of States; that a State is ultimately what IOs (among others) make of it.³¹ For advocates of deliberative versions of constructivism – who focus on the legal process itself rather than its positivist outputs – IO-based interactions are themselves constructivist tools.

Those who see international legal regimes (including the interplay between international and national courts) as sites for political contestation also regard ideological battles waged in and around these organizations (and among them) as having a normative impact.³² The information that IOs supply, on this view, are not tools that, as functionalists would contend, enable a successful treaty negotiation and prevent governments from cheating on their treaties. IO-generated fact-finding, including that emanating from expert bodies, afford opportunities for juris-generative and continuous point/counterpoint.

Similarly, for students of ‘praxis,’ IOs may be places where historical geopolitical cycles play out or where global social forces generate competing ideas that are presented, contested, and eventually re-emerge in a new synthesis.³³ The ILO is a place of praxis to the extent it is a reliable venue for

(Palgrave 2011) 1 (arguing that the regulation of overtime solves a prisoner’s dilemma by barring excessive hours and is economically beneficial and that the minimum wage, which resolves a coordination problem, encourages higher skilled jobs and combats gender based discrimination).

³⁰ Jutta Brunnée and Stephen J. Toope, ‘Constructivism and International Law’ in Dunoff and Pollack (n 5) 119.

³¹ See, for instance, Alexander Wendt, ‘Anarchy is what States make of it: The social construction of power politics’ (1992) 46 *International Organization* 391; Ian Hurd, ‘Constructivism,’ in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations* (Oxford UP 2008) 298.

³² See generally Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels* (Hart 2016). See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge UP 2006) (analyzing how the competing principles of international law mediate the tensions between apology for State power and appeals to utopic reason).

³³ See generally Friedrich Kratochwill, *The Status of Law in World Society: Mediations on the Role and Rule of Law* (Cambridge UP 2014).

contentious disputes among States over the respective roles of the market versus government or where, as a product of such debates, new meanings are generated with respect to fundamental goals like ‘economic development’.

Constitutionalist scholars draw analogies between principles or doctrines contained in liberal constitutions and either certain characteristics of international law (for instance *jus cogens*, *erga omnes* obligations, universal international law or processes, the ‘legalization’ brought about by the proliferation of international courts) or ‘constitutionalized’ regimes (such as the European Union).³⁴ Constitutionalist, many of whom have a normative aspiration, may see elements of ‘checks and balances’ or ‘judicial review’ emerging even in IOs whose charters are silent on such concepts.³⁵ They may interpret, as noted above, some ILO innovations as *de facto* or informal amendments to that Organization’s ‘living’ Constitution – and accept that this founding document is owed special deferential review that is not applicable to other treaties. Some may see developments in IOs as constitutional in effect, that is, as serving to ‘lock in’ changes in national law.³⁶ Self-described constitutionalists are more apt to see IOs (or some of them) as stepping stones to a more vertical world public order dependent on universal rule of law values, including human rights.³⁷ A number of scholars apply a constitutional frame to the ILO.³⁸

³⁴ For an overview of the varieties of constitutionalism, Jan Klabbers, ‘Constitutionalism as Theory’, in Dunoff and Pollack (n 7). For particular examples, Erika de Wet, ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51; Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford UP 2009); Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge UP 2009).

³⁵ Alvarez (n 4) 65-67. Constitutionalist may also be sharply distinguished from functionalists; see Klabbers (n 10).

³⁶ See, for instance, Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ (2000) 54 *International Organization* 217 (arguing that the evolving European Court of Human Rights has become a mechanism for solidifying democratic governance); Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, ‘Democracy-Enhancing Multilateralism’ (2009) 63 *International Organization* 1.

³⁷ For similar reasons, some scholars define such organizations not as ‘constitutional’ orders but as forms of global or transnational ‘governance’; see Klabbers (n 34).

³⁸ See, for instance, Laurence R. Helfer, ‘Understanding Change in International Organizations: Globalization and Innovation in the ILO’ (2006) 59 *Vanderbilt Law*

A number of these frameworks – constructivism, forms of contestation, praxis, or constitutionalism – are grounded in normative change produced by deliberation.³⁹ To the extent scholars rely on communicative action, their relevance to the work of the ILO is self-evident. Deliberation or social dialogue, promoted by public participation and transparent information, lies at the core of everything that the ILO does. Dialogue, the basis for the Organization's elaborate reporting, supervisory, and complaints mechanisms, is the ILO's favoured tool of 'enforcement.' Continued consultations between labour and capital lie at the heart of ILO conventions, including their flexibility clauses; consultation with indigenous groups is also the core obligation imposed by one of the ILO's most cited (and influential) conventions – the Indigenous and Tribal Peoples Convention, 1989 (No. 169).⁴⁰ Those who are most optimistic about the ILO's capacity to affect labour conditions around the world tend to be those who see the virtue of ILO-induced deliberation.

Diverse critical theories have emerged with respect to international law and organization. Some of these scholars target functionalists' (and others') progress narratives. Critical scholars emphasize institutional failings that cast grave doubt on the idea that the more IOs we have – the more international law, the more international courts – the better off we are. Critical perspectives target different problems within IOs such as their problematic capture by experts with blind spots,⁴¹ their perpetuation of the patriarchy of States,⁴² or their inability to overcome neo-colonial legacies.⁴³ A number of these critical perspectives adapt the insights of realists, turning these into forms of critique.

Review 649; Guy Fiti Sinclair, *To Reform the World*, (Oxford UP 2017) 29. See also Rose-Marie Belle Antoine, 'Constitutionalising labour in the Inter-American system on human rights' in Blackett and Trebilcock (n 25) 284.

³⁹ See, for instance, Laurence Boisson de Chazournes, 'A dialogic approach in perspective' in Blackett and Trebilcock (n 25) 65.

⁴⁰ See, for instance, María Victoria Cabrera Ormuza, *The Requirement of Consultation with Indigenous Peoples in the ILO* (Brill 2017).

⁴¹ See, for instance, David Kennedy, *A World of Struggle How Power, Law, and Expertise Shape Global Political Economy* (Princeton UP 2016).

⁴² See, for instance, Karen Engle, Dianne Otto, and Vasuki Nesiah, 'Feminist Approaches to International Law', in Dunoff and Pollack (n 7); Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Juris 2000).

⁴³ See, for instance, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge UP 2007).

They may fully agree with realists that IOs provide figleaves for power – of expertise, of men, or of old-fashioned military/economic prowess associated with hegemonic States – but find little to celebrate in these realities.⁴⁴

Critical perspectives on the ILO may focus on the power of particular States within the Organization or their impact on the Organization's ideology.⁴⁵ They may treat the institution's failures to fully engage with other legal regimes that deeply affect the plight of workers around the world – such as the actions of international financial institutions, of investor-State arbitrators under international investment agreements, or of the WTO – as reflecting the impact of State power on agenda-setting or forum-shopping.⁴⁶ Critical scholars may cast a less favorable light on even 'progressive' ILO actions like the Organization's new found openness to working with multinationals (MNEs).⁴⁷

These academic frameworks – and others which cannot be surveyed in this brief essay⁴⁸ – can appear in different guises, be defined by those who

⁴⁴ For an overview of critical perspectives on international law, see Fleur Johns, 'Critical International Legal Theory' in Dunoff and Pollack (n 7) (characterizing these approaches as addressing the persistence of bias, the ambivalent operations of power in the global order, and the role of international lawyers in both). For purposes of this essay, I include as 'crits' global critiques of liberalism (or 'neo-colonialism') by those who identify as members of the Third World Approaches to International Law; see, for instance, James Gathii, 'Third World Approaches to International Law' in Dunoff and Pollack (n 7).

⁴⁵ See, for instance, Robert W. Cox, 'Labor and hegemony' (1977) 31 *International Organization* 385 (contending that the ILO legitimizes United States hegemony in defense of corporatist capitalism); see Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn Cambridge UP 2017).

⁴⁶ See, for instance, Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595.

⁴⁷ Criticism of the turn to private enterprises to fulfill public functions, while common to critiques of the 'Washington Consensus,' extends beyond that; see, for instance, Paul B. Stephan, 'Privatizing International Law' (2011) 97 *Virginia Law Review* 1579 (discussing the positive and negative consequences of turning to private non-state actors to produce or enforce international law); José E. Alvarez, 'Is Investor-State Arbitration 'Public'?' (2016) 7 *Journal of International Dispute Settlement* 534 (addressing the 'public law' critique of the international investment regime).

⁴⁸ Surveys of jurisprudential perspectives as applied to international law include frameworks not examined here, such as important sociological inter-disciplinary work; Michael N. Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53 *International Organization* 699.

associate themselves with a particular ‘school’ in different ways, or be used for different ends. They can blur into one another in highly idiosyncratic ways.⁴⁹ A traditional international lawyer who thinks that ‘real law’ requires hard treaties accompanied by enforceable hard economic sanctions can be a kind of legal realist, for instance.⁵⁰ Application of these frameworks do not always point in one direction. Liberal internationalists may see the ILO’s endorsement of ‘democratic values’ as a positive rebuke to communist authoritarianism and therefore deeply supportive of human rights goals. Card-carrying members of Third World Approaches to International Law may see the same ILO actions very differently.⁵¹

At the same time, although these theories originate in academe, they should not be dismissed as ‘academic.’ Ideas matter. It matters to States and to the ILO whether, for example, those law and economics scholars who see all global labour standards as inconsistent with comparative advantage prevail over those who argue, as does Alan Hyde, that there is a large set of labour practices – from engaging in child labour to failures to adhere to basic health and safety protection – that are not a source of comparative advantage but are maintained only because of collective action problems where everyone is stuck with sub-optimal policies.⁵² The next section provides further illustrations of some contemporary scholarly disputes of relevance to the ILO.

⁴⁹ See, for instance, Shaffer (n 7) (defining legal realism to embrace aspects of all the jurisprudential frames discussed here); Klabbers (n 34) (including global governance scholars as a form of constitutionalism).

⁵⁰ *ibid.* See also Alexander Thompson, ‘Coercive Enforcement of International Law’ in Dunoff and Pollack (n 5) 502.

⁵¹ In large part because each group of scholars sees and uses history differently; see, Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’ (2001) 42 *Harvard International Law Journal* 201.

⁵² Hyde (n 8). Under Hyde’s view, the ILO can usefully provide communication, transparency, and trust among trading rivals that permit them jointly to raise labor standards without harming long term economic growth. But the ILO, in his view, harms economic growth when its standards make no effort to distinguish legitimate sources of comparative advantage from those that are not or when it fails to give members information as to which countries are defecting from ILO standards to achieve short term gains.

III. Three contemporary scholarly arguments and the ILO

Three inter-related debates among international law scholars help us to understand the ILO ‘elephant’ in all its complexity. The first concerns a fundamental disagreement between defenders of legal positivism and their critics over whether the traditional sources of international obligation (treaties, customary law, and general principles) continue to be an accurate guide to explaining the law produced by or under IOs. The second (inter-related) dispute involves competing claims about how and why States ‘comply’ with international law or how international law secures ‘enforcement.’ For some, compliance continues to mean compliance with positivist sources; if so, the key measure of the ILO’s effectiveness is the extent States ratify and implement ILO conventions. Others dispute that measure of compliance, arguing that in a world where the duties of States and non-States are increasingly defined not only by treaties they ratify but by diverse forms of ‘soft’ or ‘informal’ law, the focus on ‘positivist rule compliance’ is misconceived. A third jurisprudential disagreement exists over whether to describe institutionalized legal regimes like those governing labour, trade or investment as forms of ‘global governance’.

1. *Debate one: Does the ILO promulgate positivist or ‘transnational’ labour law?*

The typical student of international law is taught that legal science recognizes only the three sources of law contained in article 38 of the Statute of the International Court of Justice (ICJ). She is taught that these State-centric sources arise from the actions and consent of States and apply only to them.⁵³ The legal positivist argues that these ‘public law’ sources can be distinguished from mere moral or political injunctions because they are legally binding and because their violations (defined to be ‘international wrongful acts’) entail State responsibility.⁵⁴ Positivist international law

⁵³ For a description of legal positivism and the challenge IOs pose to it, see José E. Alvarez, *The Impact of International Organizations on International Law* (Brill 2017).

⁵⁴ James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge UP 2002). It is assumed that since public international law sources focus on breaches by States of inter-State rules, they have little to say about breaches of private law committed by private actors – whether in the home or the workplace. In this fashion, ‘public’ international law reifies the public/private divide in, for example, the civil law tradition.

exists within a defined system of primary obligations on States (e.g. prohibition of torture) and rules about how to find, interpret or apply those norms, namely secondary rules (e.g. if a State violates the obligation not to torture, which can be found in both treaty and customary law, it owes any remedies provided under the relevant treaties as well as under the customary rules on State responsibility).⁵⁵ The value of a lawyer lies precisely in identifying the primary and secondary rules of law and outlining the consequences of breach to clients.

For legal positivists, as for most realists and functionalists, the proliferation of IOs has not changed who ultimately wields the power to make law. IOs (which are rarely tasked with any role other than serving as a forum for inter-State treaty-making) and international courts (which are only charged with applying, not making law) are not juris-generative, States are. Treaties, under the traditional rules of treaty interpretation as seen by positivists, are treated as inter-State contracts whose text, object and purpose, and when needed, original travaux, determine their meaning.⁵⁶ Except where all State parties agree to a change in meaning, the static interpretation of treaties is the default position – the better to further the goals of positive law to stabilize and protect the legitimate expectations of States. Except where the treaty text says otherwise, interpreters are not authorized to engage in dynamic re-interpretation – least of all non-State parties not expressly delegated with such power, such as ILO supervisory organs or ILO bureaucrats. Customary international law remains the product of general State practice accompanied by equally general *opinio juris* that it was before the turn to IOs.⁵⁷ General principles remain the relatively narrow

⁵⁵ *ibid.*

⁵⁶ Vienna Convention on the Law of Treaties (VCLT), art. 31. See generally Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford UP 2011) 157-161 (describing the goal of formal interpretation rules as seeking to provide certainty in the behavior of law-applying authorities).

⁵⁷ For a recent affirmation of custom's State centrality, UN General Assembly, International Law Commission, 'Identification of Customary International Law, Text of draft conclusions as adopted by the Drafting Committee on second reading' A/CN.4/L.908 (2018) Conclusions 2 and 4 (affirming that both the practice of States and their *opinio juris* are required, but acknowledging that 'in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law').

list of vague injunctions that all States would agree can be extrapolated from their respective national laws.⁵⁸

Positivism's skeptics argue, on the contrary, that the three sources of legal obligation have been fundamentally changed by, among other things, the rise of IOs.⁵⁹ They argue, first, that the origin and contents of treaties, custom, and general principles are no longer State-centric. They contend that IO-generated treaties avoid the strictures of State consent and exhibit distinct qualities; that IO products and processes, and not merely the practice or opinions of States, influence how custom is found, generated, or interpreted; and that IO-grounded supervisory bodies or tribunals (such as the ILO's Administrative Tribunal) discover and apply a welter of general principles outside the positivist imagination. More radically, they assert, second, that international law is no longer limited to the sources in article 38 but has now expanded to diverse forms of 'informal law' capable of exerting varying qualities of 'binding' authority on States and non-States actors. These institutionally generated norms, issued in the form of, for example, IO 'resolutions,' are less State-centric, are ambiguous in terms of 'binding' legal effect, and may be harder to distinguish from mere 'political' or moral duties.

The normative activity of IOs, on this view, is not limited to serving as venues for negotiating inter-State compacts. The ILO's hortatory resolutions, declarations, principles, guidelines, or 'internal' regulations – as well as the juris-generative product of its supervisory bodies – rely on the absence of objection by States, not their express consent, to be established or to change over time. Further, IO-based interpreters of this normative activity invoke the traditional VCLT rules to non-positivist ends; they often invoke those in furtherance of more dynamic teleological readings (loosely attributed to the 'international community').⁶⁰

⁵⁸ Alvarez (n 53) 15-17. See also Jean d'Aspremont, 'International Legal Positivism' in Dunoff and Pollack (n 7) (surveying competing arguments about whether legal positivism is alive/dead, dominant, empty, or needed and acknowledging that it is commonly associated with State centrality/State consent, reliance on clear hermeneutics with respect to interpretation, source-based argumentation, and the displacement of politics).

⁵⁹ Alvarez (n 53) 345-371.

⁶⁰ Thus, the ILO's supervisory bodies have in some cases gone from the application of labour rights to the application/interpretation of other human rights. See, for instance, ILO Committee on Freedom of Association, Complaint Against the Government of China

Consistent with this critique of positivism, many scholars see the ILO's international labour code as a species of 'global' or 'transnational labour law' at a considerable remove from the core tenets of legal positivism enumerated above.⁶¹ Transnational labour law (i) penetrates the unitary States presumed by the positivist sources of article 38;⁶² (ii) goes beyond the corporatist model of labour relations to address other interests within and outside States, such as MNEs at the heads of global supply chains;⁶³ (iii) relies on unconventional treaties and diverse non-treaty instruments;⁶⁴ (iv) does not always rely on State consent;⁶⁵ (v) 'softens' the law substantively and procedurally;⁶⁶

presented by the International Confederation of Free Trade Unions, Case No. 1500, ILO Official Bulletin (1990) volume LXXIII, Series B paras. 325-333 (criticizing the treatment of labour activists in the immediate wake of Tiananmen).

⁶¹ See, for instance, Anne Trebilcock, 'Why the Shift from International to Transnational Law Is Important for Labor Standards' in H. Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 57; Adelle Blackett and Anne Trebilcock, 'Conceptualizing transnational labour law' in Blackett and Trebilcock (n 25) 3; Harry Arthurs, 'Making Bricks Without Straw: The Creation of a Transnational Labour Regime' in Gráinne de Búrca et al (eds) *Critical Legal Perspectives on Global Governance* (Hart 2014) 129; Brudney (n 25).

⁶² As noted, this was true even at the institution's founding, given its reliance on corporatist tripartism. It is even more true today given the ILO's efforts to engage with diverse government actors within States beyond their ministries of labor; see Brudney (n 25).

⁶³ See, for instance, Jeff Kenner and Katrina Peake, 'The Bangladesh Sustainability Compact: An Effective Exercise of Global Experimentalist EU Governance?' (2017) 19 Cambridge Year book of European Legal Studies 86 (discussing the Bangladesh Sustainability Compact). See also Ruben Zandvliet and Paul van der Hiejden, 'The rapprochement of ILO standards and CSR mechanisms: Towards a positive understanding of the 'privatization' of international labour standards' in Axel Marx et al (eds) *Global Governance of Labour Rights* (Edward Elgar 2015) 170.

⁶⁴ See, for instance, Kenner and Peake (n 63). See also Tomi Kohiyama, 'Role of International Organizations in Driving Rule-Making: The Example of the International Labour Organization' in American Society of International Law, Proceedings of the 112th Annual Meeting (2018) 278.

⁶⁵ See, for instance, Helfer (n 21).

⁶⁶ See, for instance, Hagen Henry, 'The Contribution of the ILO to the Formation of Public International Cooperative Law' in Sandrine Kott and Joëlle Droux (eds) *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave 2013) 98. For another example of the 'softening' of ILO law, consider the many ways the Maritime Labour Convention, 2006 (MLC, 2006) and related instruments on the conditions for seafarers' and the manning of ships 'softens' the mandates on governments by resorting to principles that anticipate considerable flexibility in implementation. That Convention anticipates guidelines, for example, that will explain how States should fulfill, in good faith, the 'mandatory' requirement that vessels carry a medicine chest on board ship (MLC, 2006, Explanatory

(vi) elevates some treaties over others while rendering others obsolete;⁶⁷ (vii) may favor ‘lex specialis’ rules of treaty interpretation;⁶⁸ (viii) relies, periodically, on ‘informal’ constitutional reinvention;⁶⁹ (ix) penetrates the public/private divide;⁷⁰ and (x) avoids ‘authoritative’ interpretations such as those issued by courts like the ICJ.⁷¹

The ILO and its defenders are conflicted about these aspects of transnational labour law. On the one hand, the ILO would appear to have little hope of affecting the conditions of most workers in the world if it sticks to narrowly interpreted conventional treaties that respond only to its tripartite constituency. These ten departures from strict positivism respond

Note, paras. 8-9). Other examples are contained in the evolution of the ILO’s standards for occupational safety and health (OSH) over time. See generally ILO, *The Standards Initiative: Report of the Fourth Meeting of the Standards Review Mechanism Tripartite Working Group*, GB.334/LILS/3 (2018).

⁶⁷ Philip Alston, ‘Labour Rights as Human Rights: The Not So Happy State of the Art’ in Alston (n 28) 1 (discussing the 1998 Declaration). See also Desiree LeClercq, ‘Sea Change: New Rulemaking Procedures at the International Labour Organization’ (2015) 22 *ILSA Journal of International and Comparative Law* 105 (discussing new procedures for abrogating or amending prior ILO conventions).

⁶⁸ The ILO’s departures from strict constructivist interpretations of international labor law consistent with the VCLT’s default interpretation rules are legendary. While some of the ILO’s supervisory bodies’ interpretations, such as the CEACR’s finding that the freedom of association Conventions include a right to strike, have generated dispute and backlash, other such interpretations have been accepted. See, for instance, Claire La Hovary, ‘The ILO’s supervisory bodies’ “soft law jurisprudence” in Blackett and Trebilcock (n 25) 316; ILO, *The Committee on the Application of Standards of the International Labour Conference A dynamic and impact built on decades of dialogue and persuasion* (2011). See also Anne Trebilcock, ‘The International Labour Organization,’ in Michael Bowman and Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848 (describing the ILO’s ‘lex specialis’ approach to treaty interpretation).

⁶⁹ See, for instance, Sinclair (n 38) 29-110 (discussing the ILO’s de facto constitutional evolution from engaging in standard setting to technical assistance in the 1919-45 period).

⁷⁰ See, for instance, Kenner and Peake (n 63) (discussing the ILO’s work with MNEs in global supply chains).

⁷¹ See, for instance, Trebilcock (n 68). Although the International Labour Office opinions are no longer published, for decades the ILO relied on those opinions, even if these acknowledged on their face that they were ‘not authoritative’; see, for instance, E. Osiekie, *Constitutional Law and Practice in the International Labour Organisation* (Martinus Nijhoff 1985); ILO, Article 37, Paragraph 2, of the Constitution and the Interpretation of International Labour Conventions, GB.256/SC/2/2 (discussing the ILO’s then 50 year old practice of avoiding the invocation of its constitutional provisions anticipating resort to a tribunal and/or the ICJ for binding rulings).

to felt needs for less formal law, because informal standards not subject to authoritative interpretations can be dynamic, reflect a ‘life cycle’, be more suited to serving the needs of and affecting non-State actors, may entice States to ratify an ILO convention or implement a stand-alone ILO Recommendation, or better respond to technological change.⁷² But others express doubts about this brave new world of ‘transnational labour law’. Philip Alston contends that when the ILO ignores its core positivist task by emphasizing vague revisable ‘principles’ over hard treaty, it weakens international labour law, human rights, and the international rule of law.⁷³ He argues that instruments like the 1998 Declaration undermine the premise that all treaties need to be respected, not just ‘fundamental’ ones; that treaties direct States to abide by their precise terms; that all ILO conventions, not just eight special ones, are owed serious ratification consideration under the terms of the ILO’s Constitution; and that respect for *pacta sunt servanda* – not to mention human rights – demands strict compliance with their terms and not ‘promotional flexibility’.⁷⁴ His criticisms of the ILO’s penchant for an ‘ethos of voluntarism’ and ‘soft promotionism’ could equally apply to many aspects of the Maritime Labour Convention, 2006.

Alston is not alone. Klabbers argues that the ILO’s turn to soft law helps to explain its marginalization; that a promulgator of soft law can only expect the ‘soft enforcement’ that comes from soft support.⁷⁵ No one respects, he says, the lenient school teacher who fails to enforce rules in the classroom.⁷⁶ Neo-positivists argue, in short, that informal law and processes

⁷² See, for instance, Arthurs (n 61). See also Judy Fudge, ‘Regulating for Decent Work in a Global Economy’ (2018) 43 *New Zealand Journal of Employment Relations* 10,13 (praising the shift ‘from law to regulation’ as a welcome departure from the ‘straitjacket of legal positivism’).

⁷³ Alston (n 67).

⁷⁴ *ibid.*

⁷⁵ See, for instance, Jan Klabbers, ‘Marginalized International Organizations: Three Hypotheses Concerning the ILO’ in Ulla Liukkunen and Yifeng Chen (eds), *China and ILO Fundamental Principles and Rights at Work* (Kluwer 2014) 181, 187-190 (arguing that soft law institutions are not taken as seriously). Compare Jan Klabbers, ‘The Undesirability of Soft Law’ (1998) 67 *Nordic Journal of International Law* 381 to defenders of soft law like Brian Langille, ‘“Hard Law Makes Bad Cases”: The International Labour Organization (Nervously) Confronts New Governance Institutions’ (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 407. See also Fudge (n 72).

⁷⁶ Klabbers (n 75) 190. See also Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413.

leave lawyers and their clients uncertain about what the law demands. They point out that soft law's defenders have yet to provide anything as clear as article 38 to guide lawyers and their clients as to what matters within the potpourri now spewing out in the law's name.

The ILO's struggles with the backlash against its Office's resort to informal opinions (which have not been published since 2002) or, more recently, the controversies over the 'precedential' role of the CEACR's interpretations appear to reflect divisions within the Organization about the merits of 'informal' law or 'soft' enforcement. Comparable disagreements divide those who defend the ILO's 'innovative' turn from those who say that labour law cannot protect legitimate expectations if it imposes only general 'duties' on some vague spectrum of bindingness. Similarly, while some praise the 'constructive ambiguities' embedded in the Maritime Labour Convention, 2006 others see these as less constructive (as where those ambiguities might make a sailor less certain about whether her vessel contains the medical supplies needed to save her life).⁷⁷

2. *Debate two: Is the ILO losing the battle of 'compliance'?*

The ILO's supervisory efforts presume that compliance with international labour law is a matter of top-down rule enforcement by States that ratify ILO conventions. It is routinely assumed that the Organization is effective when ILO member States are persuaded to ratify and implement ILO treaties; that genuine labour law exists only when ILO conventions are successfully enforced, particularly through the classic technique that all law uses, namely judicial enforcement. This appears to be the goal of the ILO's reporting obligations on States, why it authorizes complaints and representations to be made against States that refuse to comply, and why, in an extreme case, such as Myanmar, the Organization contemplates hard sanctions in the face of State defiance.

Insufficient evidence of positivist rule compliance along these lines leads to the common perception that the ILO is facing a 'compliance crisis.' To the extent the ILO experiences a decline in the production of ILO conventions, continued low ratification rates for its existing conventions, poor

⁷⁷ MLC, 2006 (n 66) (discussion of medicine chest mandate).

reporting rates for both ratified and unratified conventions, ‘overloaded’ supervisory bodies that fail to mobilize shame against States who fail to file their reports on time or do not reach complaints or representations made to them, demonstrable failures in engaging in ‘coercive persuasion’ on defaulting States, or ever more fragmented interpretations of international labour law, it is easy to conclude that it is failing to achieve its core function. The ILO’s perceived failures of compliance also explain many proposals for reform as well as some of its recent innovations.⁷⁸ One way to deal with a ‘rule compliance crisis’ is to have fewer rules that States can ignore. Certainly this is the potential effect (if not the goal) of the ILO’s constitutional amendment, which entered into force in 2015, permitting the International Labour Conference to abrogate by two-thirds majority vote conventions that have lost their purpose or no longer make a useful contribution. Another way for the Organization to deflect the compliance critique is to make it harder to assess whether States are in compliance by having softer rules: it is harder to say that the Organization is failing if States only need to give ‘due consideration’ to policy advice in ‘codes of practice’ or if its Conventions or resolutions turn former ‘shalls’ into ‘shoulds’.

For those who are horrified by ‘soft law,’ however, these are not compelling defences. And yet the opposite extreme, inspired by realists in political science – namely reliance on at least the credible threat of ‘coercive enforcement’ – seems an ill-fit for the Organization. Given the relative absence of hard judicial enforcement at the international level, and the ILO’s century-long avoidance of it, a compliance model premised on tangible economic or even military action enforced (as it commonly is at the domestic level) by judicial fiat seems wholly inapplicable to the ILO. While the ILO’s Constitution anticipates the possibility of hard sanction even without resort to judicial resolution and article 33 of its Constitution has been applied to Myanmar for that country’s forced labour policies, those efforts have been exceedingly rare. Worse still, as the example of Myanmar arguably demonstrates, there is little to suggest that they are effective.

⁷⁸ See, for instance, Francis Maupain, ‘The ILO Regular Supervisory System: A Model in Crisis?’ (2013) 10 *International Organization Law Review* 117; Francis Maupain, ‘ILO normative action in its second century: Escaping the double bind?’ in Blackett and Trebilcock (n 25) 301; Lars Thomann, *Steps to Compliance with International Labour Standards – The International Labour Organization (ILO) and the Abolition of Forced Labour* (Springer 2011).

Dissatisfaction with positivist rule/coercive compliance is evident in the ILO's efforts to explain why international labour standards achieve real world traction without either. ILO reports suggest that the numbers of ratifications of ILO Conventions both understate and overstate the extent of State compliance. As Francis Maupain has noted, States may often be in compliance with ILO standards in the absence of ratification – because they are persuaded by hortatory ILO reports or recommendations, because ILO standards are convenient or morally attractive or because private actors like MNEs adopt them or because they are pressured by consumers or other IOs to do so.⁷⁹ On the other hand, some States may be 'in compliance' with ILO Conventions because their national laws were already consistent with what was put in those treaties to begin with. Counting such cases as demonstrating the ILO's successful efforts to persuade States into compliance overstates the ILO's impact.

Managerial, socialization, and legal process approaches to 'compliance' are seen as more promising gateways to compliance in the ILO. These alternatives are much more attractive to those who believe the ILO's 'compliance crisis' is overstated. Managerial approaches presume that all or most failures to comply with international law result from States needing to be persuaded that the law is in their interest, uncertainty about what the law requires or about what needs to be done to give it effect, or the lack of technical or other resources.⁸⁰ Under this model, an IO can secure higher rates of compliance by supplying what States that are willing, but unable to comply need: namely information that clarifies what the law requires and resources needed to implement it. These are precisely what the ILO's monitoring of State reports, its other supervisory mechanisms for handling complaints and representations, and its abundant technical

⁷⁹ Francis Maupain, 'International Labor Organization Recommendations and Similar Instruments' in Dinah Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford UP 2003) 372. See also Bryan H. Druzin, 'Why does Soft Law Have any Power Anyway?' (2017) 7 *Asian Journal of International Law* 361 (describing the network 'snowball effects' of soft law); Jean-Marc Thouvenin, 'Diffusion and leveraging of transnational labour norms by the OECD' in Blackett and Trebilcock (n 25) 385.

⁸⁰ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard UP 1998).

assistance activities are intended to supply. All of these seem designed to help States ‘manage’ their way into compliance.⁸¹

The ILO would also appear to be relying on what Ryan Goodman calls socialization.⁸² Compliance with international law on this model emerges not only when States are persuaded that the rules are in their rational self-interest but when they are faced with the fact that other States in the relevant community (which may be defined regionally or globally) are in compliance. States, like teenagers following the latest fad, tend to go along with certain ‘social scripts.’ One might see the 1998 Declaration in this light. That Declaration – which appears to have instigated a substantial increase in the numbers of State ratifications to its ‘core’ ILO Conventions – appears to have convinced many ILO members that certain principles are part and parcel of their membership and their status as members. Empirical evidence that ILO standards are more common among peer States in a region may also suggest regional socialization as the explanation.⁸³

Evidence that national courts from Kenya to Australia have relied on ILO standards to interpret and apply national law might be framed in terms of another compliance model: Harold Koh’s ‘transnational legal process.’⁸⁴ Under this view, since international law is most successful and entrenched when a government’s own courts internalize it, a crucial tool to secure compliance is to seek out local interests with which an ILO can partner which might be convinced to pursue litigation in local court to enforce the Organization’s edicts.⁸⁵

⁸¹ See ILO Report (n 68). See also Francis Maupain, ‘Introduction: Whither the ILO’s Second Century? Persuasion at its Limits in the Global Economy,’ in Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Bloomsbury 2013) 1 (discussing the functions of social dialogue and other theories of compliance).

⁸² Ryan Goodman and Derek Jinks, *Socializing States* (Oxford UP 2013).

⁸³ See, for instance, Sara Kahn-Nisser, ‘The Ripple Effect: Peer ILO Treaty Ratification, Regional Socialization, and Collective Labor Standards’ (2016) 22 *Global Governance* 513.

⁸⁴ Harold Koh, ‘Why Do Nations Obey International Law?’ (1996-97) 106 *Yale Law Journal* 2599.

⁸⁵ See, for instance, Emma Nyhan, ‘International Law in Transit: The Concept of ‘Indigenous Peoples’ and its Travel between International and National Realms – The Example of the Negev Bedouin,’ in *European Society of International Law, Vienna Conference (2014) Conference Paper No. 8*. But bottom-up accounts of how international labor law is enriched

A more controversial frame for explaining ILO actions is the experimental governance model developed by De Burca, Keohane, and Sabel.⁸⁶ Experimentalists describe their approach as involving (i) initial reflection among stakeholders over common problem; (ii) an articulated framework with open-ended goals; (iii) leaving implementation to lower-level contextually situated actors; (iv) continuous feedback from local contexts; (v) periodic re-evaluation of goals and practices. For experimentalists, it is helpful if all the foregoing efforts take place in the shadow of a legal penalty default (such as imposition of sanctions or other forms of pressure). While De Burca, Keohane, and Sabel argue that these elements are not satisfied by ordinary tripartite ILO processes,⁸⁷ others have pointed to particular ILO initiatives like the Bangladesh Sustainability Compact as a more persuasive illustration of the experimentalist model in action.⁸⁸

All of these approaches presume that the focus needs to be on securing ‘compliance’ by governments. But some believe that exclusive attention on changing the behaviour of States does not fully capture the goals or the impact, positive or negative, of many international legal regimes, including the ILO’s. Knowledgeable ILO observers have argued that the proposition that States change their behaviour (or their laws) because they ratify a treaty or the ILO adopts a recommendation is difficult to prove and perhaps less important than whether ILO standards in any form or through any process have a real world impact on the lives of workers. It is postulated that such impact occurs when relevant ILO standards are used by influential actors – including unions or consumers – to put pressure on those (including businesses and not only governments) that are in a position to do something about them.⁸⁹ The effectiveness of international labour law may

by local actors may involve the actions of consumers and not just courts; see, for instance, P. Martin Dumas, ‘Thickening soft law through consumocratic law: A pragmatic approach’ in Blackett and Trebilcock (n 25) 374.

⁸⁶ Gráinne de Búrca, ‘Human Rights Experimentalism’ (2017) 111 *American Journal of International Law* 277; Grainne de Búrca, Robert O. Keohane, and Charles Sabel, ‘New Mode of Pluralist Global Governance’ (2013) 45 *New York University Journal of International Law and Policy* 723. For an approach that has some affinities to experimentalist governance, see Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar 2013).

⁸⁷ De Burca, Keohane, and Sabel (n 86) 776.

⁸⁸ Kenner and Peake (n 63).

⁸⁹ See, for instance, Janelle M. Diller, ‘Pluralism and privatization in transnational labour regulation: Experience of the International Labour Organization,’ in Blackett and

turn not only on whether governments formally implement into law ILO conventions but on whether ILO standards – whether hard or soft – set benchmarks for decisions reached by relevant actors, including municipalities, police officials or government inspectors in their daily tasks, or MNEs in their internal practices, including those in a position to influence firms operating in global supply chains. ILO standards incorporated into corporate codes of conduct or imposed on private parties by national judges, investor-State arbitrators, or international courts can have real world impact.⁹⁰ Of course, international labour standards are imposed on IOs themselves, to the benefit of their respective employees, to the extent they (and the ‘legitimate expectations’ of employees more generally) are incorporated into rulings issued by the ILO’s Administrative Tribunal or other comparable bodies.

ILO standards may impact the behaviour of relevant actors simply because they generate expectations for and on private actors. ‘Lock-in effects’ comparable to those anticipated for hard law can emerge, in short, in the absence of treaty promulgation followed by formal ratification and domestic implementation. International labour standards – whether hard, soft or shades in between – also may be used by sympathetic governments to justify, for example, a unilateral decision to threaten denial of General Scheme of Preferences’ treatment in response to a country’s violation of ‘fundamental labour rights.’ Such standards may also acquire de facto ‘hard’ law status to the extent they are incorporated and implemented in a bilateral or regional trade agreements, in the legal output of other IOs (like the Organization for Economic Co-operation and Development (OECD)), or by other actors such as the G20.⁹¹

Trebilcock (n 25) 329; Dumas (n 85).

⁹⁰ See, for instance Nyhan (n 85). See also Franz Christian Ebert and Martin Oelz, ‘Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts’ International Institute for Labor Studies, (ILO 2012) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192786.pdf>.

⁹¹ Assessments of whether the incorporation of ‘labor provisions’ in trade agreements have improved labor conditions vary greatly; see generally ILO, *Assessment of Labour Provisions in Trade and Investment Arrangements* (2016). For reform proposals in this respect, see Gregory Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ (2019) University of Illinois Law Review, forthcoming <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3217392>.

These possibilities are not unique to the ILO. Indeed, they are so ubiquitous that Howse and Teitel argue this it is misleading to attempt to measure the effectiveness of international law by looking to see whether States ‘comply’ with it the way positivists anticipate.⁹² These alternative frames for thinking about ‘compliance’ have a prescriptive, and not solely descriptive, edge. They provide responses for those interested in making the ILO work better than go beyond finding ways to secure higher ratification numbers for ILO conventions.

3. *Debate three: Does the ILO exercise ‘global governance’?*

The multi-faceted activities of IOs have generated rival views over whether IOs remain – as functionalists and realists have long contended – merely the agents of States or whether their activities have overtaken the traditional principal/agent model and evolved into a form of governance at the international level. As the prior discussion on ‘compliance’ suggests, some argue that IOs exercise multi-level governance by, among other things, casting shadow effects on State bargains and settlements, setting benchmarks for private decision-making, or shifting the power to interpret relevant law to different actors at the international level (as from diplomats to international judges, including those sitting on international administrative courts).

Since ‘governance’ is an amorphous concept, at least two distinct schools have emerged. The first is the German school of ‘international public law’ based in the Max Planck institute in Heidelberg. Von Bogdandy and his colleagues examine entities that deploy public authority through the issuance of legally binding and non-binding instruments which condition another subject (States or private parties) by creating incentives for compliance.⁹³ They argue that IOs have effects akin to those produced by law not only because they are venues for the negotiation of treaties or for the issuance of other forms of binding law but because they put communitive pressures on

⁹² Robert Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1 *Global Policy* 127.

⁹³ Armin von Bogdandy et al (eds) *The Exercise of Public Authority by International Institutions* (Springer 2010).

relevant actors through specific mechanisms for review.⁹⁴ As this German school defines ‘public authority,’ the key is to locate sites of authority established through State action (including public/private partnerships) that, whether formally delegated with power by States or not, have constraining effects on States and private parties. The public law school does not insist that an IO’s impact be exercised through the issuance of something called ‘law’ – hard, soft, or in-between. Nor does it insist that the constraining effects be exercised by identifiable or traditional legal entities, such as courts.⁹⁵ If one applies this perspective to the ILO, that Organization is a public regulator even when its activities do not purport to be normative but when it simply creates incentives for compliance, as do the ILO’s supervisory bodies or the Organization’s diverse venues for technical assistance.

A second group of scholars, originating at New York University School of Law and spreading elsewhere, describes the emergence of ‘global administrative law’ (GAL) through the actions of inter-State organizations, hybrid public-private bodies, or private transnational organizations (such as ICANN).⁹⁶ GAL scholars combine insights from traditional international law, international institutional law, and domestic administrative law to address the ways public, private and hybrid institutions exercise power where States are both the regulators and the subject of regulation. GAL consists of the issuance of rules, standards, and adjudicative decisions by subsidiary bodies as well as informal decisions in the course of overseeing and implementing a regime that go beyond the traditional positivist sources of law. These norms may sometimes be implemented directly against private parties but most commonly are given effect through the implementing action of States. GAL compares the work of a myriad of institutions – from the

⁹⁴ Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ in von Bogdandy (n 93) 3.

⁹⁵ Thus, the ILO chapter in the leading text on ‘international public law’ focuses on the 1998 Declaration’s effects as a tool of governance. Erika de Wet, ‘Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work’ in von Bogdandy (n 93) 377.

⁹⁶ See, for instance, Benedict Kingsbury, Nico Krisch, and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; Lorenzo Casini, ‘Global Administrative Law’ in Dunoff and Pollack (n 7).

International Standards Organization to those of the UN system – to what is achieved by domestic administrative agencies.

The ILO produces GAL, as these scholars define the term, because it regulates States not only through the promulgation of treaties but through, for example, the interpretations offered by ILO recommendations, guidelines or other codes of practice produced by its expert bodies or by those charged with technical assistance, or the views expressed by its supervisory bodies. GAL sees the ILO as managing a sector of economic and social life through actions that are distinct from traditional treaty-making or episodic forms of inter-State ‘dispute settlement’.⁹⁷ Because it focuses on, among other things, how the internal administration of an organization can have normative impact, GAL can provide insight into how the ILO, like other IOs, establishes the normative supremacy of some of its norms or deploys different internal mechanisms for updating, changing or harmonizing standards over time.⁹⁸ Because it focuses attention on ‘distributed administration’, GAL can also help explain when or how the ILO engages other actors (from the G20 to the OECD). And, because it examines the policy aspects of procedure, GAL makes it easy to recognize the normative significance of the ILO’s recent decision to abrogate ‘obsolete’ Conventions by a 2/3 vote of the Conference, for example.

Like many of the frameworks discussed in this essay, describing IOs (or the ILO) as a form of GAL has a prescriptive side. As GAL scholars put it, they focus on both describing global rulemaking and on ‘taming’ it.⁹⁹ In highlighting the rulemaking characteristics and (relative) autonomy of entities like the ILO,¹⁰⁰ GAL scholars call attention to the fact that such actions

⁹⁷ Kingsbury, Krisch, and Stewart (n 96) 17 (defining GAL).

⁹⁸ A GAL scholar would call attention to, for example, the ILO use of its Standards Review Mechanism (SRM) Tripartite Working Group to change the interpretation of relevant instruments from a protective view of women workers to one that emphasizes equal treatment. See, for instance, Overview Document: Background information applicable to the examination of instruments concerning OSH (ILO 2018) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_636090.pdf>.

⁹⁹ See, for instance, Casini (n 96).

¹⁰⁰ The recognition that IOs like the ILO enjoy a degree of autonomous discretion is not limited to public law theorists. Note Guy Ryder’s comment that ILO Director-Generals are ‘players in their own right’ and that the ‘primary condition of modern sovereignty’ is membership in a universal organization as part of international citizenship and international

generate accountability and rule of law expectations. Accordingly, much of GAL scholarship consists of Recommendations for remedying the ‘accountability’ (or ‘legitimacy’) deficits of global administrators-cum regulators. GAL’s reform agenda goes beyond the prescriptions that functionalists might recommend. It is not just a matter of finding ways for the collective principals to hold their organizational ‘agents’ accountable, as by being able to fire the head of an IO that fails to follow States’ orders. For GAL scholars, accountability means more than making organizations accountable to their members.

For GAL’s adherents, making global regulators accountable means adopting the time tested methods used to make national administrators responsible. It means ensuring, first, that that what they do in the public interest can be examined by the public, that is, transparency. Second, it means making sure that the public that is affected by governance (including constituencies within and among States) can participate. Third, it requires that the administrative regulator provides public reasons for its actions, including for its adjudicative decisions. Fourth, it requires review mechanisms to correct mistakes. Finally, GAL, properly exercised, requires regulators or adjudicators to balance the relevant interests being affected (for example striking the right balance between any restrictions imposed on the rights of persons with the government’s right/duty to regulate in the public interest) through the application of principles that are also applied at the national level, such as proportionality.¹⁰¹

IV. Conclusion

Different frames for understanding international legal regimes and international law – considered in turn or applied cumulatively – provide a fuller picture of the ILO in its full context. They enable insights on the ILO’s traditional treaty-making activities, as well as its more innovative

franchise; Guy Ryder, ‘Lessons from the Irish internationalist who organized social justice’ (Inaugural Edward Phelan Lecture, Dublin February 2013) <https://www.ilo.org/brussels/key-documents/WCMS_207305/lang-en/index.htm>. This echoes the definition of the ‘new sovereignty’ in Chayes and Handler Chayes (n 80).

¹⁰¹ Kingsbury, Krisch, Stewart (n 96) 37. See also Benedict Kingsbury and Lorenzo Casini, ‘Global Administrative Law Dimensions of International Organizations Law’ (2009) 6 *International Organizations Law Review* 319.

actions over the years, such as its adoption of the 1998 Declaration, its involvement in the Bangladesh Accord, or its promulgation of the 2006 Maritime Labour Convention. They tell us why ‘transnational labour law’ and non-traditional modes to give it effect (as through interpretation efforts by the ILO’s supervisory bodies) arise and elicit controversy. They frame on-going disputes about the extent of ‘compliance’ with the ILO’s standards and about whether what the ILO does can be deemed ‘governance.’

At the very least, examining the ILO using lens used to examine other IOs enable us to see this elephant in its habitat, among other inter-State organizations. To the extent jurisprudential frameworks put the ILO in the larger context of other IOs, the comparison yields new understanding.¹⁰² Moreover, to the extent comparative institutional analysis demonstrates that other IOs also have an impact on the rights of workers, that may provide an answer to those who ask whether the ILO will remain relevant for a second century. The ILO is likely to remain necessary to regulate the conditions of work precisely because other IOs, with distinct priorities, already are. It will be needed for some time to come because if the ILO were to cease to play its distinctive role in the on-going production/interpretation of transnational labour law, the vacuum will be filled by others less committed to protecting the dignity of work.

Jurisprudential perspectives are also relevant to a second question posed at the ILO’s centenary: namely, what will the Organization do with its second century? Will the ILO, a hundred years from now, still be engaged in the jurisprudential debates canvassed here? Will it still be torn between legal positivism and its discontents, still be wrestling with doubts over whether it elicits sufficient State ‘compliance,’ and still be caught in an identity crisis over whether it is a mere ‘agent’ of States or something more? Or will the ILO of 2119 have overcome these growth pains and have adopted reforms befitting an entity that, because it engages in governance, needs to be accountable to the governed?

¹⁰² For examples of the insights generated by comparative analyses across IOs, see, for instance, Steve Charnovitz, ‘What the World Trade Organization learned from the International Labour Organization’ in Blackett and Trebilcock (n 25) 411; Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge UP 2015); Barbara Koremenos, ‘Institutionalism and International Law’ in Dunoff and Pollack (n 5) 59; Joost Pauwelyn, et al (eds) *Informal International Lawmaking* (Oxford UP 2012).

Does General International Law Incorporate the Concept of Social Justice?

Marcelo G. Kohen

I. Introduction

It is said that happy people live their life as though the law does not exist, which, to tell the truth, is quite disturbing for us jurists. I could also say that, for a long time, happy jurists decided to live as though justice was not a matter of their concern. Indeed, for some, justice would not be an object of analysis for the jurist, neither at the domestic nor at the international level. For those following a formal positivist approach, the object of analysis or implementation is the law 'as it is', without 'polluting' it with extra-legal 'impurities' such as values or social analysis. For them, it would be enough to say, at most, that everything that is legal is just. For others, introducing the notion of justice would simply be wishful thinking and would deserve to be called just 'utopia'. Yet for others, justice, like ideology, is determined by the economic structure of the society and hence is merely a tool to reproduce exploitation in the capitalist system.

All this rather dark perspective has been rendered even more obscure at the beginning of this century with the still modish concept of 'globalization' and some of the phenomena that accompanied it after the end of the Cold War: the essential concern has turned around efficiency, free market and free play of the economic, political and other factors. With this in mind, we are told that commutative justice is achieved by itself. So, if we follow this idea, there is no need to waste time talking about justice. Indeed, if one believes Friedrich Hayek, 'social justice' is one of the most harmful concepts in vogue in our contemporary societies. It would be opposed to the ideas of

justice *tout court* and freedom. In a market society, 'social justice' does not have any content and makes no sense.¹

In this paper, I will follow another path. This contribution has not been first submitted at Mont Pèlerin, in the canton of Vaud, where Hayek established his society with Milton Friedman, but in Geneva, at the headquarters of the ILO, whose Constitution states in the first sentence of its preamble that 'universal and lasting peace can be established only if it is based upon social justice'. The linkage between peace and social justice must be stressed. The Vienna Declaration and Programme of Action of 1993 also links it with democracy and development in the context of education for human rights.²

My purpose is not to analyze the manner in which the ILO has interpreted and applied the concept of social justice and its impact in international law. I will rather briefly examine whether the notion of social justice has been incorporated into international law in general. To put it otherwise, my question is whether this notion is reflected in the content of contemporary international law. This is, of course, not the place to embark on a general discussion about the concept of justice and its relationship with law. While no doubt examples of unjust legal systems can be offered in abundance, it will suffice to say here that even the most unjust of the legal systems claims to be based on a particular –and often, odious – interpretation of 'justice'. The assumption is that any legal system claims to be closely associated with the idea of justice, as something inherent to it. We will not discuss here either the idea that when the judge or the interpreter ascertains a flagrant contradiction between the law and justice, he or she has to disregard the former.³

Some distinguished scholars have reflected on the relationship between justice and international law. In his General Course at the Hague Academy of International Law, Georges Abi-Saab reminded us that 'le sentiment de justice ou plutôt d'injustice est un moteur puissant de la dynamique sociale

¹ Friedrich August Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (University of Chicago Press 1978).

² Adopted by the World Conference on Human Rights on 25 June 1993.

³ The so-called Radbruch Formula, according to the Gustav Radbruch's analysis in *Gesetzliches Unrecht und übergesetzliches Recht* (Süddeutsche Juristenzeitung 1946) 107.

et [...] le droit international n'est pas totalement étranger à cette finalité ni totalement absent de cette dynamique'.⁴

Georges Scelle was certainly among the first international lawyers to link social justice with international law. In his own words, 'le caractère organique et finaliste du droit se combine avec la notion de justice sociale dont l'éthique lui impose le respect'.⁵

Another precursor of this connection between social justice and international law was Judge Alejandro Alvarez, in his opinions appended to both the first advisory opinion and the first judgment on the merits of the ICJ, respectively delivered in 1948 and 1949. He referred to the new international law that emerged from the Second World War, that he called the 'law of social interdependence', which, according to him, 'is the realization of social justice'.⁶

Half a century later, another Latin American Judge of the ICJ, Antônio Cançado Trindade, referring to the cycle of World Conferences organized by the United Nations during the 1990s in the search for common solutions to the challenges affecting humankind, mentioned that 'a growing call was formed for the pursuance of social justice *among* and *within* nations'.⁷

Oscar Schachter, in his contribution to the *Festschrift* for Wolfgang Friedmann, also analyzed what he called the 'Principles of International Social Justice', focusing on the emerging economic aspects of the question, such as the responsibility to assist countries in need, just prices, world food security, the right to benefit from science and technology and permanent sovereignty over natural resources.⁸

While declaring 20 February of each year as 'The World Day of Social Justice', the United Nations General Assembly also seemed to embrace

⁴ Georges Abi-Saab, *Le droit international dans son environnement* (1987) 207 Recueil des cours 29. See also 33-43 and 105-126.

⁵ Georges Scelle, *Manuel de droit international public* (Domat-Monchrestien 1948) 7.

⁶ Individual opinion of Judge Alvarez, *Corfu Channel, Merits, I.C.J. Reports 1949*, 40.

⁷ Dissenting Opinion of Judge Cançado Trindade, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, 956, para 124, footnote 140.

⁸ Oscar Schachter, 'Principles of International Social Justice' in Gabriel M. Wilner (ed), *Jus et Societas: Essays in Tribute to Wolfgang Friedmann* (Martinus Nijhoff Publishers 1979) 249.

the idea of the applicability of social justice at the international level. The resolution ‘recognizes that social development and social justice are indispensable for the achievement and maintenance of peace and security within and among nations and that, in turn, social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms’.⁹

II. The meaning of ‘social justice’

Going beyond declamatory analysis, the first difficulty in this endeavour is to grasp the exact meaning of social justice. Just a few words, first, to recall how this concept was incorporated in the preamble of the ILO Constitution. The original draft of the first paragraph mentioned that ‘peace can be established only if it is based upon the prosperity and contentment of all classes in all nations’.¹⁰ These words were changed to ‘peace can be established only if it is based upon social justice’, following a proposal of the Belgian delegate Emile Vandervelde. Until 1918, Vandervelde had been the president of the Council of the Second International, later transformed into the Socialist International. He explained his proposal in the following manner:

We are told that peace can be founded only on the basis of the prosperity and contentment of all classes in all countries. It is therefore asserted that in the peaceful society of the future there will be classes, and that their satisfaction or contentment will contribute to maintaining peace. Now, it is a thesis in formal contradiction with the socialist thesis which affirms, on the contrary, that in a society where there are classes, the opposition of interests exists, that the antagonism is inevitable and that consequently the social peace can only be achieved through the elimination of classes and the creation of a community of workers who are collectively owners of working tools. Of course I am not asking you to adopt the socialist thesis, to declare that it is only collectivism or communism that will make social peace

⁹ UN General Assembly Resolution 62/10 (2007).

¹⁰ Edward J. Phelan, ‘The Commission on International Labor Legislation’ in James T. Shotwell (ed), *The Origins of the International Labor Organization*, vol. 1 (Columbia UP 1934) 132.

prevail, but I think it is quite legitimate that we ask you, on the other hand, not to oppose the contrary view; and that is why I have adopted the formula which reserves doctrines in the presence and, I repeat, seems acceptable to all.¹¹

Those familiar with the debate within the socialist movement that led to the division between social-democrats and communists may recall the furious attack of Lenin against Kautsky and Vandervelde in his well-known pamphlet *The Proletarian Revolution and the Renegade Kautsky*.¹² Lenin's essential accusation was the abandonment – in his view – of a revolutionary line in order to embrace a reformist one. The explanation of Vandervelde for his preamble proposal shows that, at least at that time, socialists had not abandoned the idea of the possibility of existence of a society without classes, even though the means to achieve it could be through reform. And the work of the ILO could certainly contribute to it.

In the Anglo-Saxon literature that followed John Rawls' *Theory of Justice*, 'social justice' is used as synonymous with 'distributive justice'. Even though the latter is a primordial element of it, social justice goes beyond the *suum cuique tribuere*. What follows is an attempt at making an approach to the notion.

¹¹ Translation from the original French: 'On nous dit que la Paix ne peut être fondée que sur la base de la prospérité et du contentement de toutes les classes dans tous les pays. On affirme donc que dans la Société pacifique de l'avenir, il y aura des classes et que leur satisfaction ou leur contentement contribuera à maintenir la paix. Or c'est une thèse en contradiction formelle avec la thèse socialiste qui affirme, au contraire, que dans une société où il y a des classes, l'opposition des intérêts existe, que l'antagonisme est inévitable et que par conséquent la paix sociale ne peut être obtenue que par la suppression des classes et la création d'une communauté de travailleurs propriétaires collectivement des instruments de travail. Bien entendu je ne vous demande pas d'adopter la thèse socialiste, de déclarer que c'est seul le collectivisme ou le communisme qui fera régner la paix sociale, mais je pense qu'il est tout à fait légitime que nous vous demandions, d'autre part, de ne pas vous opposer à la thèse contraire; et c'est pourquoi j'ai adopté la formule qui réserve les doctrines en présence et, je le répète, me paraît acceptable pour tous'; see *La Paix de Versailles: Législation internationale du travail – Conférence des préliminaires de paix – Commission de la législation internationale du travail* (Les Editions internationales 1932) 412-413 <<http://www.ilo.org/public/libdoc/historical/1901-2000/58893.pdf>>.

¹² See, in particular, its Appendix II: 'Vandervelde's New Book on the State' <<https://www.marxists.org/archive/lenin/works/1918/prrk/append02.htm>>.

First, 'social justice' emphasizes the idea of community's justice, as differentiated from individual justice. It is the society as a whole that becomes the recipient of justice. It ultimately means a just society, from the point of view of its organization, including its governance, and of the sharing of the commons. Second, and in a narrower conception, social justice refers to the rights of the most deprived actors or those who need special protection by society. Third, and in the same vein, social justice alludes more broadly to justice to be rendered to those who produce social goods, and who may be disadvantaged in the distribution of their fruits. In these last two approximations, social justice concerns the relationship between political power and the economic sphere of society – the distribution of social goods in an equitable manner.

III. Social justice at the international level

Certainly, the aspects of social justice referred to above have influenced societies at the national level and the work of ILO has contributed to this. Hence, the question here is whether the same can be said at the international level. Can social justice be pursued only domestically? My answer is certainly not. My contention is that there are certain areas in which the notion of social justice has found its way into international law, whereas other areas are not at all concerned and yet others still need to incorporate such value.

I will mention some premises for the application of social justice at the international level. A first premise is the existence of an inclusive universal international society. A restricted Eurocentric international community for the few, as it classically existed, was simply incompatible with the ideal of social justice. The universalization of the international society is something that started to be constructed after the major divide that meant the end of the Second World War. The right of peoples to self-determination, one of the most revolutionary changes in contemporary international law, is not only the first necessary rule for the implementation of social justice at the international level, it is the basic condition for its very existence. The impact is twofold: not only States, but also peoples, become holders of rights and obligations at the international level, and for the first time in history, some given human communities – the 'peoples' – are recognized as having the right to create their own sovereign States and see their territorial integrity respected,

as the ICJ has just declared in its last advisory opinion of 25 February 2019.¹³ It is through the universalization of the international community that the principle of sovereign equality expanded to all States and peoples.

A second premise for the application of social justice at the international level is the existence of a duty of cooperation, recognized as a fundamental principle of international law in the Friendly Relations Declaration adopted in 1970.¹⁴ The passage of a pure international law of coexistence to an international law of cooperation highlights this condition.¹⁵

A third premise is international solidarity, which goes beyond cooperation and which should not be confounded with charity. The United Nations Millennium Declaration seems to mix both when affirming – under the heading of solidarity – that ‘global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most’.¹⁶

IV. Has the concept of social justice entered international law?

The question is whether those premises were taken into account in the formulation of rules in specific areas of international law. Human rights, international economic law and environmental law are good candidates. Since other contributions to this collective work address these particular areas of international law, I will limit myself to just a few comments. One would think that the emergence of the so-called second and third generations of human rights constitute examples of the inclusion of social justice in this particular field. Yet, economic, social and cultural rights, as well as the right to peace, or those related to the environment remain vastly programmatic.

International social justice demands fair trade and the fulfillment of the right to development, a fundamental pillar of the ‘new international

¹³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, para 160. See also, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, 436, para 79.

¹⁴ UN General Assembly Resolution 2625 (XXV) (1970).

¹⁵ *Abi-Saab* (n 4) 319-323.

¹⁶ UN General Assembly Resolution 55/2 (2000).

economic order' that has never really emerged, despite the efforts of the Third World in the 1970s, particularly at the UN General Assembly and/or through UNCTAD. The 'Permanent Sovereignty over Natural Resources' Resolution of 1962,¹⁷ the Declaration for the Establishment of a New International Economic Order, the Charter of Economic Rights and Duties of States¹⁸ and the Programme of Action of 1974 are all a testament to those efforts that were largely superseded by what essentially followed after the end of the Cold War and the reign of what Georges Abi-Saab called 'marketheism'.¹⁹

True, in considering whether social justice has penetrated international law, a key element is the application of the principle of special and differential treatment for developing States, or States facing a disadvantageous situation in particular fields, such as land-locked States. The number of treaties and other international instruments reflecting this principle is important, and the fields that are incorporating it are in constant expansion, such as trade, environment, health, law of the sea, intellectual property rights and many others.²⁰ This is an undeniable evidence of the acceptance by States of the existence of a social need for this treatment.

Certainly, whether and how the provisions of special and differentiated treatment are operationalized is a different matter. Key issues are that the provisions in question should not discriminate between developing States themselves and that the granting and withdrawal of such preferences should not be left to the unilateral decision of the conceding States. As Georges Abi-Saab wrote, 'preferences, have to be uniform in their content and general in their personal scope of application, in the sense of being granted by all developed countries and enjoyed by all developing ones'.²¹

¹⁷ UN General Assembly Resolution 1803 (XVII) (1962).

¹⁸ UN General Assembly Resolution 3281 (XXIX) (1974).

¹⁹ Georges Abi-Saab, 'The Changing World Order and the International Legal Order: The Structural Evolution of International Law Beyond the State-Centric Model' in Yoshikazu Sakamoto (ed), *Global Transformation: Challenges to the State System* (United Nations University 1994) 457.

²⁰ Juan Nicolás Guerrero Peniche, *The principle of special and differential treatment for developing states in international law. A study of the differences in rights and obligations derived from differences in development*, PhD thesis (Graduate Institute of International and Development Studies, Geneva 2012).

²¹ Georges Abi-Saab, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order: Analytical Study*, UN doc. A/39/504/Add.1 (1984) para 142.

Irrespective of persistent deficiencies, it can be concluded that the differentiation of rights and duties of States based on the reality of economic inequalities is a concrete manifestation of the application of social justice at the international level.

V. Social justice at the international level requires common action

Promoting international social justice is not confined to the normative dimension. It also requires common action. ILO action has contributed to the acceptance that there are existing situations at the domestic level that are matters of international concern, and consequently that any State has the right to raise them at the international level. Indeed, ILO action has preceded the international law of human rights in this respect. *Erga omnes* obligations and *actio popularis*, today widely recognized, can find their origin in ILO practices. It is not by coincidence that Judge Jessup, in his separate opinions in the *South West Africa* cases brought by Ethiopia and Liberia against South Africa, referred to the first sentence of the preamble of the ILO Constitution to support his views.²²

One might be tempted to mention the ‘Responsibility to Protect’ as another example.²³ Yet, this widely used concept has not added anything to the normativity of international law relating to the use of force and to the international protection of human rights.

Another element to be taken into account is the manner in which adjudicative bodies rely on it or its associated tools. The ICJ has largely used the idea of equity, and stressed that ‘as a legal concept is a direct emanation of the idea of justice’, as mentioned in the *Tunisia/Libya* case.²⁴ Certainly, in the same case, while analyzing the equitable principles applicable to the delimitation of the continental shelf, the Court advanced ‘the principle that

²² Separate opinion of Judge Jessup, *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, 426.

²³ *A more secure world: Our shared responsibility. Report of the High-Level Panel on Threats, Challenges and Change*, UN doc. A/59/565 (2004); *Implementing the Responsibility to Protect. Report of the Secretary-General*, UN doc. A/63/677 (2009).

²⁴ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, 60, para 71.

there can be no question of distributive justice'.²⁵ This is a striking example of an area in which social justice does not play a role – the delimitation of land and maritime boundaries. Indeed, the territorial distribution of the world is the product of history and that of maritime areas is essentially tributary of geography. The advisory opinion of the Seabed Disputes Chamber of the ITLOS on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* is a good example.²⁶

To be effectively applied, social justice also requires a change both in concrete compliance and a structural change in the organic constitution of the international community. Effective inequality is still preponderant in key areas of global governance, such as in the Security Council and the Bretton Woods institutions.

VI. Conclusion

From the above it can be concluded that although the concept of social justice has entered contemporary international law in different fields, it is far from being concretely crystallized. Yet in other fields, such as investment arbitration, the concept remains widely ignored. The mainstream in this area focuses on the interest of foreign investors, completely neglecting the very purpose for which the World Bank, the institution that created ICSID, allegedly emerged – reconstruction and development.

John Maynard Keynes wrote that 'the political problem of mankind is to combine three things: economic efficiency, social justice and individual liberty'.²⁷ To favour the first, neglecting the two others, leads indeed not to a new international order, but to further disorder. The struggle for international social justice is open-ended. When it seems that progress has been made, we discover new social needs that have to be faced. Let have social justice as the guiding star that is always followed with the knowledge that it will never be attained.

²⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, 40, para 46.

²⁶ ITLOS, Case No. 17, 1 February 2011.

²⁷ John Maynard Keynes, *Essays in Persuasion*, part IV (Macmillan 1931) <<https://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html>>.

Viewing the International Labour Organization's Social Justice Praxis Through a Third World Approaches to International Law Lens: Some Preliminary Insights

Obiora Chinedu Okafor, Titilayo Adebola and Basema Al-Alami

I. Introduction

The overarching objective of this paper is to shine a Third World Approaches to International Law (TWAIL) torchlight on the ILO's social justice discourse and praxis to find out what can be seen, or seen in a new light, or seen in a different way, when the TWAIL approach is adopted, and to comment on the significance of our findings, if any. To this end, the paper pursues two specific and intertwined goals, namely: (i) to analytically tease out the similarities and differences between TWAIL's avowedly (global) social justice discourse and praxis and its ILO counterpart; and (ii) to, in the light of the findings of the preceding exercise, reflect on what (if anything) the ILO's and TWAIL's social justice discourses and praxis can learn from each other.

In the light of these goals, the paper will necessarily begin with a brief explanation of what TWAIL stands for as an intellectual social justice movement and as a 'networked' school of thought in international legal studies. This exercise will be followed by an examination of what we see as the 'commanding heights' of the ILO's social justice discourse and praxis (workers' rights, other economic and social rights, and the rights of indigenous peoples). Thereafter, a number of preliminary insights from an engagement between the TWAIL and ILO social justice discourses and praxis will be offered. The paper ends with some brief concluding comments.

II. Explaining TWAIL

While TWAIL is an intellectual movement, and is not partisan, it also does not float high above politics in the way too many schools of thought present themselves – not always with credibility.¹ What binds TWAIL scholars (TWAILers) is a rock-solid commitment to the difficult task of producing international law scholarship that (i) uncovers how international law disadvantages the Third World and/or (ii) envisions ways to change or transform international law to accommodate much more equitably than is currently the case, the interests of Third World peoples.² TWAIL work is global social justice work, and is vitally important to international law scholarship and practice, because hitherto, international law – both its texts and the living law as it is actually applied and experienced – has generally (albeit not totally) functioned in a way that systematically disempowers, dispossesses and disadvantages the Third World.³ It is therefore important to adopt or at least listen keenly to TWAIL in order to be in a better position to push or coax both the texts and the living versions of international law in the right directions, and progressively right the wrongs of the past and present.

So, where exactly is this ‘Third World’ located, this geo-political expression that TWAIL argues has, in general, tended to be subordinated by the living international law praxis? In a ground-breaking paper, Karin Mickelson imagined the Third World as a ‘chorus of voices’.⁴ In a chorus, you have all types of pitches and voices. But in the best choirs, their songs come out harmoniously. China is not Botswana, Botswana is not Nigeria. Nonetheless, on most issues, these different countries have very many shared concerns, which is because they have a history of being subordinated or being treated with in similar ways. This is why despite China’s great and rapid economic growth and its new position as a major global power itself,

¹ Makau Mutua, ‘What is TWAIL?’ (2000) 94 *Proceedings of the Annual Meeting of the American Society of International Law* 31.

² *ibid.* See also Obiora Chinedu Okafor, ‘Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective’ (2005) 43 *Osgoode Hall Law Journal* 171.

³ Mutua (n 1); Okafor (n 2).

⁴ Karin Mickelson, ‘Rhetoric and Rage, Third World Voices in International Legal Discourse’ (1998) 16 *Wisconsin International Law Journal* 353.

it still aligns on almost every issue with the G77 at the UN; an alliance that now self-describes as the ‘G77+China’.⁵

Thus, the Third World is an appellation that is affixed to the peoples and the States in which those peoples live that have, broadly speaking, experienced a particular kind of historical subordination with specific properties at the hands of global power formations (be they the Royal Niger Company, the Dutch East India company, the European colonial powers, and the contemporary global hegemon); the places where this has been most intense or pronounced.

The Third World is not, however, a ‘fixed geographic space’.⁶ Nevertheless, there is a remarkable consistency of those who self-identify as ‘Third World’. There are, of course, material circumstances that have led to their broadly shared sense of self and understandings of the world and international law’s orientation and valency as both text and practice. Thus, as Upendra Baxi has noted, there are also certain ‘geographies of injustice’⁷ that shape the location of the Third World. In the last 100 years or so, these geographies of injustice have tended to point in certain well-known directions: the former European colonies in Asia, Africa and Latin America. But there is also the notion that at least the understandable conception of the ‘Third World’ needs to be eased open to accommodate the South within the North – the so-called ‘Fourth World’.⁸ What is more, as discussed in Chimni’s work, one should not forget the North within the South. This is not a completely new concept because the concept of ‘compradors’ (from Marxism) has been around with us for a long time. There is for sure a South within the North and an emerging North within the South. However, in line with B.S. Chimni’s position, it is argued that while there may be a

⁵ For example, see the position of this group at the recent UN Conference on South-South Cooperation (BAPA+40) (March 2019) <<https://www.unsouthsouth.org/bapa40/statements/>>.

⁶ Balakrishnan Rajagopal, ‘Locating the Third World in Cultural Geography’ (1999) 15 *Third World Legal Studies* 1.

⁷ Upendra Baxi, ‘Geographies of Injustice: Human Rights at the Altar of Convenience’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 197.

⁸ Amar Bhatia, ‘The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World’ (2012) *Oregon Review of International Law* 131.

North within the South, it is not the same North. There are differences in the features of the North in the North and the North in the South. Space limitations does not allow the adumbration of this point here.

TWAIL analysis is not, however, de-mobilized by the fact that the Third World with which it is mostly concerned may not have perfectly exact boundaries. It remains a cogent theoretical framework and methodology that is as cogent as other broad frameworks and methodologies. For instance, it has been argued that TWAIL offers both theories of, and methodologies for, analyzing international law and institutions; TWAIL may also be thought of as a broad approach.⁹ That paper began by examining the conventional features of theories and methodologies. Without necessarily accepting those features as immanent or canonical benchmarks for ‘measurement’ or assessment, it tried to discover the extent to which TWAIL matches the features of these traditionally established theories and methodologies. It found that TWAIL does indeed match the features of these more conventional theories and methodologies.

However, it should be kept in mind that TWAIL does enjoy a rich and productive kind of internal variegation. Some TWAILers are more oppositional than reconstructive. Some focus more on pointing out the problems with international law’s engagement with the Global South. For example, scholars like Joel Ngugi have asserted that TWAIL should be entirely oppositional (arguing that you cannot put old wine in new wineskins and expect it to taste any better).¹⁰ He had assumed a harder post-structuralist stance at the time. Conversely, B.S. Chimni takes the opposing view. He has always insisted that TWAIL should not merely ferret out the disadvantaging and dispossessing aspects of international law.¹¹ Instead, TWAILers should imagine a new international law – a more just international order.¹² Nevertheless, like feminists for example, TWAILers are all united solidly

⁹ Obiora Chinedu Okafor, ‘Critical Third World Approaches to International Law: Theory, Methodology, or Both?’ (2010) 10 *International Community Law Review* 371.

¹⁰ Joel Ngugi, ‘Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?’ (2002) 8 *UC Davis Journal of International Law and Policy* 73.

¹¹ Bhupinder Chimni, ‘Third World Approaches to International Law: A Manifesto’ in Antony Anghie et al (eds), *The Third World and International Legal Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers 2003) 52.

¹² *ibid.*

by an ethical commitment to focus their analytical lens on the subjects and objects that contribute to the subordination and disadvantaging of the Third World, and to imagine or re-imagine an international law/order that will not dispossess or disadvantage the Third World. That is what binds TWAILers, to analytically centre the Rest rather than the West. And so, despite the rich variegation within it, TWAIL offers a vastly coherent approach to the study of international law and international relations. It should be kept in mind (and this bears repetition) that the kind of differentiation that characterizes TWAIL is also exhibited by all other recognized schools of thought. At the level of detail, all schools of thought and approaches also have variegations and internal differences. On-the-whole, however, considering that TWAIL is a big tent, it is better to think of it as a set of approaches that cohere at a level, as an approach. This would save us time lost to endless debates about narrow positivist notions of what theories are and are not, and what methodologies are or are not.

In terms of the methods that TWAIL scholars deploy,¹³ the very first thing that TWAIL approaches require us to do is to take history seriously. This is crucial to TWAIL work, albeit not unique to it. TWAIL scholars map the techniques, devices and technologies used by global power in the past and present. One cannot adequately map and think through how global power circulates and operates today in international law and relations without understanding how it functioned in the past in that context. If you have studied the past, you are better equipped to recognize it in today's manoeuvres and operations of the law. In looking at history, TWAIL scholars look not only at continuity, but also discontinuity. Continuity and discontinuity exist simultaneously, but in what relative measure?

Second, in taking history seriously, TWAIL scholars take global history seriously; that is to say not just the history of the West, but also the history of the Rest.¹⁴ TWAIL scholars seek to write the Third World's shared historical experiences into the processes and outcomes of international legal thought and action. For example, with intellectual property, questions to ponder include: historically, what was the relationship of intellectual property to the Third World? Was intellectual property used to extract

¹³ For these methods, see Okafor (n 2).

¹⁴ *ibid.*

resources? If one were to look at issues from the perspectives of Third World peoples, what may they think about intellectual property laws and the international regimes that underpin them?

Third, TWAIL takes the normative equality of Third World peoples seriously.¹⁵ TWAIL insists that all thoughts and actions concerning international law and international relations should proceed on the assumption that Third World peoples deserve no less rights and dignity than citizens of the West. For example, a TWAIL examination of the arguments that international law should allow the ‘consensual’ transfer of toxic waste from the Global North to the Global South reveals how the law demeans and endangers the lives of the Third World peoples.¹⁶

Fourth, TWAILers are informed by a deep attentiveness to the historically persistent misuse and abuse of notions of universality and claims of common humanity which have licensed the subjugation, suppression and dispossession of the Third World throughout history. The early chapters of Antony Anghie’s book explain how that was precisely the technique the Spanish used in conquering Latin America.¹⁷ TWAILers are – quite rightly – very suspicious of glib or facial notions or assertions of universality.¹⁸ For example, Muthucumaraswamy Sornarajah correctly notes that ‘a lesson to be learnt [from Third World history] is that one must beware of self-proclaimed universalists whose [...] reasons for taking universalist stances must be constantly scrutinized’.¹⁹ Again, this is not peculiar to TWAIL.

Fifth, TWAILers study the resistance of Third World peoples to global hegemonies and their effects. For example, Blakrishnan Rajagopal’s work on development in international law comes readily to mind.²⁰ And some of Titilayo Adebola’s work on the ways of resisting the expropriation of the intellectual property of Third World peoples using formal legal techniques

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP 2005).

¹⁸ *ibid.*

¹⁹ Muthucumaraswamy Sornarajah, ‘The Asian Perspective to International Law in the Age of Globalization’ (2001) 5 *Singapore Journal of International and Comparative Law* 284.

²⁰ Balakrishnan Rajagopal, *International Law from Below* (Cambridge UP 2003).

falls within this genre.²¹ How do you resist the deployment of the principles of law? Some TWAILers study resistance and techniques of resisting hegemonic laws.

The above is not an exhaustive list, but it covers examples of techniques used by TWAILers. Although many of these techniques are not in themselves unfamiliar to other critical international law scholars, it is their use in combination one with the other and their being squarely focused on the treatment of Third World peoples in and by international law and relations that provides them with their distinctiveness as TWAIL methods/techniques.

III. The ILO's social justice discourse and praxis

Since its creation, the ILO has adopted 190 conventions, 6 protocols and 206 recommendations that address a wide range of issues, ranging from minimum wages and working conditions to discrimination and social security. Setting international labour standards goes to the heart of the work of the Organization. Depending on the context, histories, and so on, such standards can have a salutary effect on the enjoyment of the social and economic rights of workers, as well as on the realization of the rights of indigenous peoples.

The promotion and enhancement of social justice sits at the core of the ILO's mandate, as the Organization is committed to improving labour conditions around the world, almost always in situations and contexts involve social-economic injustices and hardships for some (though not all).²² In fact, the ILO is often celebrated in the academic realm as one of the few international organizations that has a mandate that is squarely focused on social justice.²³ While the Offices of the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees, among others, may

²¹ Titilayo Adebola, 'Access and Benefit Sharing, Farmers' Rights and Plant Breeders' Rights: Reflections on the African Model Law' (2019) 9 *Queen Mary Journal of Intellectual Property* 105.

²² Monique Zarka-Martres and Monique Guichard-Kelly, 'Decent Work, Standards and Indicators' in David Kucera (ed), *Qualitative Indicators of Labour Standards: Comparative Methods and Applications* (Springer 2007) 83.

²³ Guy Ryder, 'The International Labour Organization: The next 100 years' (2015) 57 *Journal of Industrial Relations* 748.

dispute this conclusion, the main point being made here is that the attainment of social justice is so central to the ILO's work that it tends to stand out in that regard. This section of the paper explores the ILO's social justice mandate and its relevance for, and consequences on, workers' rights, social and economic rights more generally, as well as on indigenous peoples' rights.

1. *What is social justice?*

Given that social justice is at the heart of the ILO's mandate, one must understand what is meant by social justice before analyzing it in the context of the ILO's work. Thomas Pogge has adopted an institutional approach to justice, arguing that the principles of justice apply to the basic structure of society and its rules. This basic structure consists of the most prominent institutions of society, particularly those that fundamentally shape society and hence have profound and pervasive effects on people's lives.²⁴ These institutions include:

society's basic mode of economic organization; the procedures for making social choices through the conduct of [...] individuals and groups [...]; the more important practices regulating civil (noneconomic and nonpolitical) interactions, such as the family or the education system; and the procedures for interpreting and enforcing the rules of the scheme.²⁵

Furthermore, according to Pogge, what is key to the notion of global justice are the negative duties that impose constraints on conduct that worsens the situation of others.²⁶ Pogge's analysis of global justice relies to a large extent on human rights, which he regards as the core values of society's moral and political discourses.²⁷ Hence, according to Pogge, institutional order is unjust if it foreseeably generates a human rights deficit.²⁸ Other renowned scholars have also delved into the notion of social justice, especially as it pertains to workers. According to ILO's Director-General

²⁴ Thomas Pogge, *Realizing Rawls* (1st edn Cornell UP 1989) 22.

²⁵ *ibid* 22–23.

²⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edn Polity Press 2008) 15.

²⁷ Thomas Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36 *Metaphilosophy* 182, 195. Pogge (n 24) 25.

²⁸ *ibid*.

Guy Ryder, for example, ‘social justice is not synonymous with inequality, but it coincides very strongly with inequality’.²⁹ Clearly, the inequalities that societies have been undergoing for decades produced, and continue to produce, social injustice.³⁰

2. *The ILO and social justice*

One key significance of the notion of social justice in the context of international law, and more particularly international labour law, is set out in the preamble of the ILO Constitution. The preamble states that ‘universal and lasting peace can be established only if it is based upon social justice’. The preamble also highlights a number of concrete measures urgently required in order for social justice to be achieved around the world, such as the establishment of a maximum number of work hours in a day or week, the provision of adequate wages, and the prevention of unemployment. It therefore seems that such measures are fundamental to the Organization’s social justice mandate, and that social justice is in turn key to its overall remit.

As we have seen already, the preamble also draws a direct link between the notion of social justice and that of world peace and security.³¹ The ILO’s website states that the ‘aspiration’ for social justice involves working men and women freely claiming ‘on the basis of equality of opportunity their fair share of the wealth which they have helped to generate’.³² As Marius Staden puts it, it seems that ‘the real reason for the establishment of the organisation was [...] the need to achieve social justice so as to avoid war and revolution’.³³ This makes it even clearer that the pursuit of (specific types of) social justice goals are a key part of the ILO’s *raison d’être*. According to Staden, the founding principles of ILO have been reformulated on three different occasions: the Declaration of Philadelphia 1944,

²⁹ Ryder (n 23) 751.

³⁰ *ibid.*

³¹ In the Constitution, member States agreed that they were ‘moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world’.

³² ILO, ‘The need for social justice’ <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang-cn/index.htm>>.

³³ Marius Staden, ‘Towards a South African Understanding of Social Justice: The International Labour Organisation Perspective’ (2012) *Journal of South African Law* 91, 95.

the Declaration on Fundamental Principles and Rights at Work 1998, and the Declaration on Social Justice for a Fair Globalisation 2008, all three of which are elaborated upon, to an extent, below.³⁴

3. *The ILO and the socio-economic rights of workers*

As is evident from the discussion above, it seems that ILO's social justice mandate is mainly focused on improving workers' rights and their work conditions. What is more, the Organization is currently celebrating its 100 years of fighting for social justice, on and off its website. The ILO has noted that, alongside promoting a fair globalization, it has championed the concept of 'Decent Work' as a global development goal.³⁵ The Organization points out that its Decent Work concept was adopted by the international community through Goal 8 of the 17 Sustainable Development Goals, which aims to 'promote inclusive and sustainable economic growth, employment and decent work for all'.³⁶ Furthermore, the ILO notes that, through its Decent Work efforts, it has carried out a quest that addresses forced labour, slavery, and freedom at work since the early 1990s, and that the Organization has adopted multiple standards on such issues.³⁷ For instance, the ILO's Governing Body created the Special Action Programme to Combat Forced Labour (SAP-FL) following the publication of 'Stopping Forced Labour' in 2001.³⁸ Eliminating forced labour has now become one of the most widely accepted norms in the international realm. The ILO's website also notes that the Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) enjoy the highest rates of ratification among all ILO conventions. Despite this treaty ratification success, however, forced labour, human trafficking and slavery practices continue to exist around the world.³⁹

³⁴ *ibid* 96.

³⁵ ILO, '100 years of fighting for Social Justice' (2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_657787/lang-en/index.htm>.

³⁶ *ibid*; Sustainable Development Goals Fund, 'Goal 8: Decent Work and Economic Growth' <<http://www.sdgfund.org/goal-8-decent-work-and-economic-growth>>.

³⁷ ILO, 'A Global Alliance Against Forced Labour and Trafficking in Persons' (2012) <https://www.ilo.org/wcmsp5/groups/public/---cd_norm/---declaration/documents/publication/wcms_203446.pdf>.

³⁸ *ibid*.

³⁹ *ibid*.

It could appear from the preceding discussion that the focus of the ILO is solely on the improvement of working conditions. However, about a decade into the ILO's life as an organization, and following the incidence of mass poverty that characterized the Great Depression in the United States, the expansion of the mandate of the Organization appeared necessary. As such, the ILO's first Director affirmed that 'the social factor must take precedence over the economic factor'.⁴⁰ For him, social justice was a policy through which individuals are able to attain their 'political, economic and moral rights'.⁴¹ Hence, it became clear as time went on that in order for the Organization to be successful at achieving social justice, it had to expand its mandate to cover more social and economic rights. Economic and social affairs were no longer considered an end or a goal in and of themselves, but rather a means of achieving the social justice end.

The preamble of the ILO Constitution sheds light on the principles that should guide the policies of member States. Although many of these objectives may be categorized as traditional labour standards – e.g. policies relating to the minimum wage, hours of work, and work conditions, among others – the Declaration of Philadelphia nonetheless contains, as Lee describes, 'broad objectives which amount to the concept of a Welfare State'.⁴² For example, the Declaration contains objectives such as efforts towards the enjoyment of adequate housing, equality of education, full employment, child welfare, and higher standards of living. While the ILO's 1919 Constitution states that 'labour should not be merely regarded as a commodity', the 1944 Declaration conveys the same notion more affirmatively and decidedly by explicitly asserting that 'labour is not a commodity'. Hence, this Declaration reaffirms that the fundamental aim of ILO is the achievement of a broadened notion of social justice.

Furthermore, one of the key objectives of the Declaration on Fundamental Principles and Rights at Work is to cooperate with ILO member States in their efforts to promote, among other issues, the

⁴⁰ Nicolas Valticos and Geraldo Potobsky, *International Labour Law* (2nd edn Kluwer 1995) 26.

⁴¹ *ibid.*

⁴² Eddy Lee, 'The Declaration of Philadelphia: Retrospect and Prospect' (1994) 133 *International Labour Review* 467, 471.

elimination of discrimination and forced labour, freedom of association, and the right to collective bargaining.

Ten years later, ILO adopted the Declaration on Social Justice for a Fair Globalisation. According to its preface, this Declaration emerges at a crucial time 'reflecting the wide consensus on the need for a strong social dimension to globalization in achieving improved and fair outcomes for all'. The Declaration promotes and reaffirms many other related objectives, such as fuller employment, and enhanced social security and labour protection measures. The Declaration also states that member States have 'a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic objectives, which encompass the Decent Work Agenda'. Hence, it is yet again evident that this Declaration also has at its core goal the achievement of social justice, largely through the promotion of social and economic rights around the world.

4. *The ILO and the rights of indigenous peoples*

The ILO was the very first international organization to turn its attention to the rights of indigenous peoples.⁴³ The Organization has been engaging with indigenous peoples' issues almost since the year of its creation. For instance, in 1921 the ILO carried out a number of studies on indigenous workers,⁴⁴ and five years later, the Organization created the Committee of Experts on Native Labour, which gradually led to the adoption of a series of conventions related to native labour issues.⁴⁵ Although all ILO's conventions and declarations apply to indigenous and tribal peoples, the Organization adopted two international instruments open to ratification, which specifically and exclusively address indigenous and 'tribal' peoples: the Indigenous and Tribal Populations Convention, 1957 (No. 107) and its successor the Indigenous and Tribal Peoples Convention, 1989 (No. 169). These are the

⁴³ Athanasios Yupsanis, 'The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples' (2016) 49 *Canadian Yearbook of International Law* 117, 118.

⁴⁴ Hurst Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649, 652.

⁴⁵ Patrick Thornberry, *Indigenous Peoples and Human Rights* (1st edn Manchester UP 2002) 320.

only international treaties that deal exclusively with the rights of indigenous peoples' issues as they pertain to labour.⁴⁶

Convention No. 107, which came into force in June 1959, was the first, and in fact remained for thirty years the only international legally binding instrument focusing on the individual rights of indigenous peoples.⁴⁷ Convention No. 107 was particularly celebrated for having focused on the rights of indigenous peoples to their lands – despite overlooking the issue of access to natural resources in these lands. For instance, article 11 recognizes the right of individual or collective ownership of the lands that indigenous peoples have traditionally occupied. Furthermore, article 12(1) mandates that indigenous peoples shall not be removed without their free consent from their habitual lands. The convention generally covers land rights,⁴⁸ working conditions,⁴⁹ social security and health,⁵⁰ education and means of communication,⁵¹ and administration.⁵²

While at face value such provisions seem to be in line with the fundamental objective of achieving social justice, articulated in both the ILO Constitution and by Thomas Pogge, such provisions are undermined by a number of vague clauses that confer on member States the discretion to remove indigenous peoples from their traditional and habitual lands without their consent when this is 'in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations'.⁵³ The object of the convention is to protect and integrate indigenous peoples in the national societies within which they live, which, as Athanasios Yupsanis eloquently puts it, is a clear 'paternalistic approach that was a product of the ethnocentric view of those populations as being 'less advanced'.⁵⁴ The dual aim to protect and integrate indigenous peoples into national societies is a role

⁴⁶ ILO 'Indigenous and tribal peoples' <<https://www.ilo.org/global/topics/indigenous-tribal/lang-en/index.htm>>.

⁴⁷ Yupsanis (n 43) 120.

⁴⁸ Convention No. 107, articles 1-10.

⁴⁹ *ibid* article 15.

⁵⁰ *ibid* articles 19-20.

⁵¹ *ibid* articles 21-26.

⁵² *ibid* article 27.

⁵³ *ibid* article 12(1).

⁵⁴ *ibid* article 1(1)(a); Yupsanis (n 43) 121.

allocated primarily to member States, by virtue of article 2(1). One of the most fundamental elements of Convention No. 107 is the type of temporary State (affirmative) action required under the convention to realize the indigenous peoples' rights it guaranteed. In other words, the convention encourages States to take special measures wherever social, economic and cultural conditions hinder indigenous peoples' lives. This positive duty is in fact subject to the provision that it need only continue as long as it would be deemed necessary to have a special protection mechanism, and should cease otherwise in order to avoid 'creating or prolonging a state of segregation'.⁵⁵

The paternalistic approach that this convention tended to be based on meant that indigenous peoples were left entirely out of the Organization and enforcement of such programs. Although the imposition of an obligation on the State to adopt such special measures was undoubtedly a positive development, especially at the time the convention was adopted, the temporary nature of the provisions is nonetheless largely problematic, as it tends to conflict with the aims and aspirations of indigenous peoples, most of whom reject the notion of assimilation and instead demand permanent protection.⁵⁶

It was in recognition of many of the problems with this convention that in September 1986, ILO's Governing Body organized a fourteen-day meeting of fifteen experts to investigate the possibility of amending the convention, given (a) indigenous peoples' disapproval of Convention No. 107 and (b) the shift in the attitude of both international bodies such as the UN, and many national governments.⁵⁷ All fifteen experts unanimously condemned the assimilation approach of the convention,⁵⁸ recommending that the convention be amended immediately in a way that would ensure that indigenous peoples had the greatest possible control over their economic and social development.⁵⁹ The revision of the Convention No. 107 resulted in the adoption of Convention No. 169 on 27 June 1989. Both

⁵⁵ *ibid* article 3(2)(a).

⁵⁶ Garth Nettheim, 'Peoples and Populations – Indigenous Peoples and the Rights of Peoples' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 107, 125-26.

⁵⁷ Yupsanis (n 43) 129.

⁵⁸ *ibid*.

⁵⁹ Russel Barsh, 'Revision of ILO Convention No. 107' (1987) 81 *American Journal of International Law* 756, 761.

conventions deal with the same subject-matter in almost the same fashion, with one stark difference: the new convention abandons the assimilationist orientation of its predecessor. Thus, Convention No. 169 recognizes, *inter alia*, indigenous peoples' right to their distinct and unique cultural identity.⁶⁰ The preamble of this newer treaty recognizes the aspirations of indigenous peoples 'to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the States in which they live'.

Another major shift authored by the drafters and parties to the new convention is the replacement of the term 'populations', adopted in Convention No. 107 by that of 'peoples' in the new convention, given that indigenous peoples are, like other peoples, entitled to the right of self-determination.⁶¹ Although the inclusion of the term 'peoples' in this convention is positive, there exists a caveat in article 1(3) of the convention, stressing that 'the use of the term peoples in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'. In other words, the convention could be read by some as implicitly excluding the right of indigenous peoples to exercise self-determination. Hence, despite its successes, some argue that the new convention is still somewhat assimilationist in its spirit and in fact far more detrimental to the rights of indigenous peoples than its predecessor, given that 'colonists have become a little more sophisticated', abandoning the language of assimilation but yet retaining the underlying core policies unchanged.⁶² For instance, the newer convention still contains a requirement that indigenous customs and practices be compatible with the national legal system and internationally recognized human rights.⁶³

⁶⁰ Elizabeth Pearce, 'Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law' (1991) 22 *Columbia Human Rights Law Review* 361, 382.

⁶¹ Scott Forrest, 'Indigenous Self-Determination in Finland: A Case Study in Normative Change' (2006) 42 *Polar Record* 229.

⁶² Sharon Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169' (1990) 2 *Without Prejudice* 53, 56, 66.

⁶³ Convention No. 169, article 9(1).

IV. Preliminary insights from a TWAIL engagement with the ILO's social justice work

Having laid a foundation for the analysis that we follow, by explaining TWAIL (albeit only briefly), and thereafter outlining what we see as the 'commanding heights' and 'highlights' of the ILO's social justice discourse and praxis, this section focuses on dealing squarely with both its overarching objective (i.e. to shine a TWAIL torchlight on the ILO's social justice work), and on its more specific – if closely integrated – goals (i.e. to tease out the similarities and differences between TWAIL's social justice discourse and praxis and its ILO counterpart; and to reflect on what, if anything, these two bodies of work can learn from each other's approach).

It should be noted at the outset that the point of this comparative exercise is not to identify which social justice discourse and praxis is better, as between the ILO's and TWAIL's. Rather it is simply to report our analytical findings.

1. *Similarities*

The first similarity between TWAIL and the ILO social justice discourse/praxis is, of course, that they are both focused (to an extent) on international law: its creation, character, implementation, impact, relevance, and dual capacity to both facilitate and hinder the struggle for social justice.⁶⁴ This much is evident from the discussions in sections II and III, and is hardly a controversial point. This is not, of course, to claim that the ILO and TWAIL are only focused on the international plane. For, both TWAIL and the ILO social justice work have certainly been transnational in at least one sense; in the sense of also working at and on the juncture between the 'international' and the 'domestic'. Both are as concerned with international law qua international law as they are with how it operates within States and societies.⁶⁵ For instance, as we have already seen, the ILO's core mandate and operational activities also focus on the real-life conditions of workers on the domestic plane and on the conformity or otherwise of these conditions

⁶⁴ Chimni (n 11).

⁶⁵ For an example of this kind of TWAIL scholarship, see Luis Eslava and Sundrya Pahuja, 'Beyond the (Post)colonial: TWAIL and the Everyday Life of International Law' (2012) *Law and Politics in Africa, Asia and Latin America* 195.

with international law.⁶⁶ The ILO also focuses on what these conditions, and the views/actions of the actors within States that are responsible for their creation or amelioration, can tell us about the need for international regulatory reform in the worker's rights/welfare area.⁶⁷ This is one consideration that is at the centre of its tripartite approach.⁶⁸ On TWAIL's part, it is as concerned with the character of particular international treaties and practices, as it is with the 'everyday life of international law' at the 'mundane level' within Third World and other States (how it is applied by administrative officials in tax departments, or by immigration officers at airports).⁶⁹

The second similarity is that while the protection of workers' rights is, of course, at the very core of the ILO's social justice discourse and praxis, TWAIL is as concerned with the rights and labour conditions of working people, and some TWAIL scholars have also explicitly trained their lens and focused their efforts in the same direction, for instance, Upendra Baxi,⁷⁰ Obiora Okafor,⁷¹ Titilayo Adebola⁷² and Adrian Smith.⁷³

The third similarity is that the concerns of TWAIL and the ILO for social justice are expressed, in part, through their deliberate, socially aware, and historically-predicated engagement with economic and social rights (as opposed to only or mainly civil and political rights), and with their centrality to any credible global human rights scheme and any viable effort to uplift living standards and ensure world peace. As section III shows, this understanding is palpable from even a cursory familiarity with the ILO's constitutive document and work. That TWAIL work is undergirded by this kind of conceptual framework is as decipherable from the discussion in section II.

⁶⁶ Anil Swarup, 'A Tripartite Approach to the Prevention of Bonded Labour in India' (2009) <https://www.ilo.org/global/about-the-ilo/multimedia/video/video-interviews/WCMS_119268/lang-en/index.htm>.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Eslava and Pahuja (n 65).

⁷⁰ Upendra Baxi, *The Future of Human Rights* (Oxford UP 2006).

⁷¹ Obiora Chinedu Okafor, 'Assessing Baxi's Thesis on the Emergence of a Trade-Related Market-Friendly Human Rights Paradigm: Recent Evidence from Nigerian Labour-Led Struggles' (2007) 1 *Law, Social Justice and Global Development*.

⁷² Adebola (n 21).

⁷³ Adrian Smith, 'The Bunkhouse Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers' Housing in Ontario' (2015) 52 *Osgoode Hall Law Journal* 863.

The last similarity that we have discerned is that while the ILO has dealt, in some way, with the rights of the indigenous peoples of both the Global North and the Global South for nearly 100 years now (however unsatisfactorily), TWAIL's scholarly agenda has more recently grown beyond its concern mainly for the indigenous peoples of the Global South, to accommodate (if rather inadequately as well) the concerns of the indigenous peoples of the Global North – people who have been referred to as the 'South within the North'.⁷⁴ More recent work by Amar Bhatia illustrates this point.⁷⁵

2. *Differences*

The discussion in the last paragraph contains within it the seed of the first difference that we have noticed between TWAIL and ILO social justice discourse and praxis. This is that the ILO's engagement with the rights of indigenous peoples has been historically more global in reach and much more longstanding than TWAIL's, even though this gap has closed more lately. This suggests that there could be a thing or two for TWAIL to learn from the ILO's institutional memory and work in this area.

A related but differently oriented point is that the concern of TWAIL's discourse and praxis with the rights of indigenous peoples has tended to be more deeply structural than the ILO's. It has tended to be more closely oriented toward the ways in which indigenous peoples can exercise their rights to self-determination and claim their autonomy in a robust way from largely domineering and repressive States around the world.⁷⁶ As we have seen, the ILO's discourse and praxis in this area was initially more assimilationist, and later on became much less so, although it is still accused of standing significantly short of a framework that could offer discursive, normative, or even practical facilitation to the expression of the demands of many indigenous peoples for deeper structural reform leading to enhanced autonomy.

Another area in which TWAIL's social justice discourse and praxis is more structural and thus poses a greater challenge to the conventional global legal and political order than that of the ILO, is in relation to the

⁷⁴ Bhatia (n 8).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

distribution of global socio-economic resources and their benefits. While it is capable of contributing to the restructuring of global wealth distribution along a number of axis, the ILO's highly commendable efforts to enthrone a regime of decent work across the globe and ensure that many economic and social rights are enjoyed in a more widespread manner both within and across State borders is nevertheless circumscribed and limited by the fact that it more-or-less does not really extend beyond this point. By contrast, while TWAIL's social justice discourse and praxis largely aligns with the ILO in this area, it goes well beyond to target squarely and consistently the structural barriers that create the massive inequalities in the enjoyment of economic and social rights across the world in the first place.

It is thus no surprise then that while TWAIL's social justice discourse and praxis is in addition also heavily focused on right to development discourse and praxis, and on the need for that right to be framed and experienced more and more in binding legal terms, the ILO does not appear to have been as focused as TWAIL has on this approach. Right to development discourse and praxis is a structural approach to the effort to achieve social justice across the world.

It also appears that TWAIL's social justice discourse and praxis tends to be more suspicious of assertions of our common humanity and impositions of allegedly or even legitimately universal standards, as either existing or desirable, usually backed by claims of our common humanity. While our common humanity is an alluring goal to achieve, it has never really been as widely accepted and internalized in real life around the world as it would otherwise appear. From the time of Vittoria to this day, assertions of our common humanity have not always turned out all that well for subaltern, less powerful, peoples. And so, while universal standards can, of course, be desirable, and can often be a force for good, TWAIL teaches us to embrace them with caution. Universality is not to be embraced at the drop of a hat, without a deep and careful considering its intended and unintended consequences. To be clear, TWAIL does not tend to argue that common humanity claims and universal standards possess a fixed subordinating or oppressive valency, or are always a bad thing. Rather, to emphasize by repetition, the point is to be more suspicious of these claims and standards, and to embrace them on a case by case basis. No rejection of multilateralism is entailed here, and no embrace of unilateralism is suggested either.

The last difference between the ILO and TWAIL social justice discourses and praxis that is commented on in this paper is that while the ILO's work in this regard has been strong from the beginning about the need to view the State, especially the Third World State, as far from a 'supra-class' entity (that possessed little internal variegation and in that regard and that was not riven by socio-economic class divisions), with notable exceptions, earlier TWAIL work tended to exhibit a degree of studied ignorance in this regard. The ILO is, of course, almost intrinsically designed to deal with the State on the basis of its differentiation into different 'class' interests.

Turning to what can the ILO and TWAIL social justice discourses/praxis learn from each other, the first teachable point is that TWAIL needs to continue to focus – as it has now been over the last two decades – on not treating the Third World State as supra-class. It needs to continue to examine the class and other divisions within the Third World itself which support or facilitate international law's contribution to the subordination and immiseration of all too many people in the States that self-identity as such.⁷⁷ The ILO's social justice discourse and praxis has been excellent at this.

By contrast, the ILO may benefit (within the significant political constraints it certainly faces and has to survive within) from a greater attention to the structural; a turn to an approach that is intrinsic to TWAIL. It will benefit by paying greater attention to the structural barriers that, in the first place, produce the social injustices that it has to deal with. Without a greater success at upsetting the structures that produce these injustices, they will simply continue to expand in scale and intensity, and in their negative impact of the lives of the workers of the world, and especially those who are from the Global South. This expansion in scale and intensity has been the world experience for some time now.

Lastly, the ILO may also benefit from a greater attention to the ways in which even well meaning universally applied standards could, in reality, work against the interests of Third World peoples who are the vast majority of humanity after all. As we all know, same treatment does not always lead to equity.

⁷⁷ See, for instance, Bhupinder Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

V. Conclusion

In conclusion, the overarching point is that TWAIL and the ILO are engaged in a discourse and praxis of global social justice that is both similar and different, and that both will do well to learn from each other's approach. However, it is realized that as TWAIL is a scholarly movement and the ILO a political institution, the latter may face certain kinds of constraints as to the approach it can take in this regard that the former does not. Still, as we have seen, as international institutions go, the ILO is the closest to TWAIL in terms of its goals and approaches.

However, this paper has two key limitations. The first is that it does not unpack the negotiating histories of the ILO Constitution, conventions and recommendations. In other words, it does not consider the issue of whose voices mattered and whose interests prevailed in the construction and development of the ILO's legal architecture. The second is that the paper does not delve into any kind of detailed analysis of the ILO decisions and 'jurisprudence'.

A Bridge and a Pivot: The ILO and International Organizations Law in Times of Crisis

Guy Fiti Sinclair

I. Introduction

The challenges facing humankind today, on the centenary of the founding of the ILO, are very different from those that confronted the world and the ILO three-quarters of a century ago. Then, the world was just beginning to emerge from a period of three decades which had seen unprecedented devastation through two world wars and the great depression. The ILO itself was in self-imposed exile in Montreal and was engaged in a process of reflecting on the previous decades and re-evaluating the role it would occupy in the international order to be built after the Second World War. Today, we are faced with a complex, perplexing combination of interconnected crises: accelerating climate change and environmental degradation; extreme inequalities of wealth and opportunity; internal state conflicts that are driving massive displacements of populations; and a disturbing recrudescence of nationalism, xenophobia, and anti-liberal politics. These and other challenges come at a time when trust in the competence, motives, and integrity of international organizations is also under strain for a variety of reasons. Now, as then, the ILO must reflect on what steps it can take and how it may adapt to meet the pressing needs of the day.

In doing so, it may be valuable to look back on the role played by one international lawyer working at the International Labour Office in that earlier moment of crisis, and the steps he took in response. Clarence Wilfred Jenks requires no introduction to anyone reading this volume. After joining the Office in 1931, Jenks remained in the service of the ILO for more than 40 years, eventually being appointed as Director-General in 1970, only three years before his early death. His contributions to the ILO itself are legion,

and legendary; to international lawyers, he is probably best known as the author of *The Common Law of Mankind*, though his contributions to the discipline are in fact much wider.¹ However, his particular role in establishing continuity between two eras in the organization's development, while laying a foundation for important changes, is perhaps less well appreciated. Of course, I don't wish to claim here that Jenks was the only one to do this, nor even that his actions were the most significant factor in this respect. My purpose, rather, is simply to suggest that we might gain insight into the adaptability and resilience of international organizations by taking into consideration the particular roles played by international law and lawyers in them.

This short paper does not attempt a global evaluation of Jenks' contributions to the ILO or international law. That project will have to be taken up elsewhere, and at much greater length, to do justice to the complex and dynamic institutional, legal, political, and cultural milieu in which he lived and worked.² Instead, this paper adopts a more modest aim, focusing on that relatively narrow span of time towards the end of the Second World War, in which momentous efforts were made to re-establish the ILO, and international law and international organizations more generally, on a new foundation. With this in mind, the paper advances two interlinked claims. First, Jenks' expertise as an international lawyer was crucial in providing an institutional bridge between the pre-war and the post-war ILO. Second, he used that same expertise – and his experience in the ILO during that critical time – to help establish and set the direction for a new (sub)discipline in international law, later known as international institutional law or international organizations law. Together, these contributions make Jenks a crucial figure whose achievements are deserving of remembrance on this centenary occasion.

¹ C. Wilfred Jenks, *The Common Law of Mankind* (Stevens & Sons 1958). See generally Guy Fiti Sinclair, 'The Common Law of Mankind: C. Wilfred Jenks' Constitutional Vision' (2016) Jean Monnet Working Paper 3/16 <<http://www.jeanmonnetprogram.org/paper/the-common-law-of-mankind-c-wilfred-jenks-constitutional-vision/>>.

² Biographical and bibliographical sketches can be found in Humphrey Waldock and R Y Jennings, 'Clarence Wilfred Jenks' (1972-1973) 46 *British Yearbook of International Law* xi; Felice Morgenstern, 'Wilfred Jenks in the ILO' (1972-1973) 46 *British Yearbook of International Law* xvi; 'Wilfred Jenks, 1909-1973' (1973) 108 *International Labour Review* 455; Jaci L. Eisenberg, 'Jenks, Clarence Wilfred' in Bob Reinalda, Kent J. Kille and Jaci Eisenberg (eds), *IO BIO, Biographical Dictionary of Secretaries-General of International Organizations* <www.ru.nl/fm/iobio>.

II. An institutional bridge

The ILO that emerged from the Second World War was very different from that which was established at the end of the First. Originally envisaged primarily as a standard-setting body, centred on draft conventions and recommendations to be produced by an annual conference, the ILO quickly expanded its activities and legal powers well beyond the limits anticipated by its founders. By the end of its second decade, the Organization routinely offered technical assistance to its members to aid them in drafting social legislation and setting up new administrative services, and had established itself as a leading incubator of ideas and practices relating to scientific management and rationalisation, national and international planning, and social and economic development.³

In the post-war international order, centred on the United Nations, technical assistance and development practices became even more central to the ILO's mission. A large number of specialized agencies, both newly established and re-established at the end of the Second World War, joined UN and the ILO in this enterprise. In addition, the leadership and centre of gravity of the ILO shifted even more decisively to the United States with the appointment in 1948 of David Morse as Director-General, a position in which he served until 1970.⁴ A large number of factors contributed to these transformations after the Second World War – both in the ILO and more broadly – not least the seismic geopolitical and economic changes associated with the Cold War and decolonisation. However, several actions taken by Jenks as Legal Adviser, which helped the ILO to adapt to the new international landscape, should not be overlooked.

One of these, Jenks' contributions to drafting the Declaration of Philadelphia along with the then-Director Edward Phelan, is well known. Adopted at the twenty-sixth session of the Conference in April-May 1944, the Declaration affirmed the Organization's fundamental principles and presented a vision of development linked to universal human rights. The right of 'all human beings, irrespective of race, creed, or sex [...] to pursue

³ See generally Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford UP 2017) chs 1-2.

⁴ Another American, John G. Winant, had previously served briefly as Director of the International Labour Office from 1939 to 1941.

both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity', it proclaimed, would now constitute 'the central aim of national and international policy' and the ILO had an obligation to promote international programs that would, among other things, achieve full employment, raise living standards, extend social security measures and comprehensive medical care, assure equal educational opportunities, and provide adequate nutrition, housing, and facilities for recreation and culture. The ILO's initial narrow focus on setting labour standards thus gave way to a complete worldview in which the achievement of human rights, development, industrialization, and trade were all inextricably bound together – a worldview that was adopted by the UN and other international organizations and guided many of their activities in the postwar decades.⁵

Perhaps just as important as the Philadelphia Declaration, although much less well-known, were the actions of Jenks to guide the ILO's transition into the new international system. One example of such actions can be found in the advice he gave to inform the Organization's internal discussions about the possibility of revising its Constitution. In a lengthy memorandum submitted to a committee of the Governing Body on 'constitutional questions', Jenks carefully outlined the various pathways available for the 'Future Development of the Constitution and Constitutional Practice' of the ILO – including the pros and cons of 'constitutional amendment' versus 'constitutional evolution'; ways to adjust the existing techniques of producing conventions and recommendations; the devolution of authority to regional and functional bodies within the ILO; and opportunities to give better representation to underrepresented groups in the Organization.⁶ In all these dimensions, Jenks' deep knowledge of the ILO's practices and expertise in international law are evident.

Two aspects of Jenks' memorandum on constitutional questions are worth emphasizing here. The first relates to the legal imaginaries that Jenks

⁵ Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market* (Verso 2012).

⁶ C Wilfred Jenks, 'The Future Development of the Constitution and Constitutional Practice of the International Labour Organisation: Memorandum by the Legal Adviser of the International Labour Office' (1945) 27 Official Bulletin 114 (hereinafter 'memorandum on constitutional questions').

invokes when arguing for the possibility of continued constitutional evolution by the ILO. The metaphor of constitutional growth was present in ILO discourse almost from the outset, with the first Director of the Office, Albert Thomas, comparing the transformation of the French Constitution with the possibilities of the ILO becoming a ‘really living’ organization.⁷ Jenks’ signal contribution was to link this existing metaphor in ILO discourse – supported by a series of advisory opinions by the Permanent Court of International Justice supporting a ‘dynamic’ approach to interpreting the ILO’s mandate – to the constitutional tradition of the country that was soon to dominate both the ILO and the international order more generally. He thus argued that support for a dynamic approach to interpretation could be found in the classic judgment of US Chief Justice John Marshall in *McCulloch v Maryland*, which referred to ‘a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs’.⁸ The more recent decision by Justice Oliver Wendell Holmes in *Missouri v Holland* had similarly described the US Constitution as having ‘called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters’.⁹ These cases had already been widely cited in support of the administrative reforms and governmental expansions undertaken during the Progressive Era and as part of the New Deal. In drawing on these cases to argue that the ILO’s Constitution maintained considerable scope for evolution in practice without need for formal amendment, Jenks deftly re-presented the ILO’s legal practices as consistent with, and coherent to, US constitutional culture.

The second aspect worth underscoring is Jenks’ interest in the relationships between the ILO and other international organizations ‘which now exist or may be established for the promotion of economic and social well-being’.¹⁰ This was a matter which, in Jenks’ view, could be facilitated without any need for constitutional amendment. In particular, Jenks identified ‘three modalities’ through which such relationships could be managed:

⁷ Albert Thomas, *International Social Policy* (ILO 1948) 7–8; Albert Thomas, ‘The International Labour Organisation: Its Origins, Development, and Future’ (1921) 1 *International Labour Review* 7–8. For an exploration of this theme in ILO discourse, see generally Sinclair (n 3) chs 1–2.

⁸ Cited in Jenks (n 6) 116.

⁹ *ibid* 117.

¹⁰ *ibid* 120.

the exchange of information and reports on matters of mutual interest; the exchange of representatives; and the creation of joint committees.¹¹ Again, this interest should be viewed in light of the ILO's long-held practice of asserting its autonomy vis-à-vis other international organizations, in particular the League of Nations. In this discussion, therefore, we can see Jenks establishing means by which the ILO could maintain regular interactions with other international organizations, most notably the UN, while at the same time maintaining its independence from them.

Finally, it is also notable in this connection that Jenks' engagement with the ILO's relationships with other international organizations went well beyond the advice in his memorandum on constitutional questions. Among other things, it extended to his drafting the first relationship agreement between the UN and a specialized agency,¹² and his participation for many years in the work of the Administrative Committee on Co-ordination – a standing committee established by the UN Secretary-General to supervise the implementation of relationship agreements between the UN and its specialized agencies.¹³ Similarly, Jenks continued for the next two decades to promulgate a vision of world order centered on the values that had been proclaimed the Philadelphia Declaration.¹⁴ In these and a myriad other quotidian and unheralded ways, Jenks can be seen as bridging a dramatic change in the ILO's activities and position in the international system, enabling both continuity and transformation at the same time.

¹¹ *ibid* 121.

¹² See 'Relations with Other International Organisations' (1948) 31 Official Bulletin 264.

¹³ Morgenstern (n 2) xxvi. The Committee was renamed, as the United Nations System Chief Executives Board for Coordination, in 2001.

¹⁴ See, for instance, C. Wilfred Jenks, *The International Protection of Trade Union Freedom* (Stevens & Sons 1957); C. Wilfred Jenks, *Human Rights and International Labour Standards* (Stevens & Sons 1960); C. Wilfred Jenks, *Law, Freedom and Welfare* (Stevens & Sons 1963); C. Wilfred Jenks, *Social Justice in the Law of Nations: The ILO Impact after Fifty Years* (Oxford UP 1970).

III. A legal pivot

Before the Second World War, there was no recognized discipline or field of international organizations law. International lawyers had, of course, along with their colleagues in political science, written extensively about particular international institutions. Even in the 19th century, jurists such as Pierre Kazansky and Gustave Moynier had noted the significance of the emergence of public administrative unions for the development of international law; political scientists of the early 20th century, such as Paul Reinsch, had begun to systematize the study of international bodies from a functionalist point of view;¹⁵ a vast body of scholarship had accumulated in the decades following the First World War on particular organizations, notably the League of Nations and to a lesser extent the ILO; and the Permanent Court of International Justice had issued a number of advisory opinions on important issues relating to the powers of particular organizations, not least the ILO.

However, the vast majority of this scholarship and jurisprudence cannot be described as belonging to the discipline of international organizations law – though it certainly contributed to the emergence of that discipline at a later time – simply because it lacked a clear legal definition of what constituted an international organization, together with a comparative focus on entities fitting that definition.¹⁶ The first English-language textbook dedicated solely to the subject was only published in 1963, by which time its author felt confident in reporting that the law of international organizations had become the most rapidly expanding branch of international law.¹⁷

Jenks was a pivotal figure in the establishment of international organizations law during and in the years immediately following the Second World War. His early writings naturally focused on legal issues relating directly to the ILO. However, even by the late 1930s his practice and scholarship

¹⁵ Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9.

¹⁶ For a fuller development of this argument, see Guy Fiti Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law' (2018) 31 *Leiden Journal of International Law* 841.

¹⁷ D. W. Bowett, *The Law of International Institutions* (Stevens & Sons 1963) xi.

had begun to take on a comparative quality;¹⁸ again, this may be explained by the fact that, as an official of the ILO, Jenks was constantly aware of the need to draw distinctions between the particular purposes and processes of his own institution and those of the League of Nations. But the emergence of a systematic, comparative legal discipline may only have been possible in the context of an intensive process of stock-taking and reflection on international institutional arrangements that took place as a result of the outbreak of another world war. To a large extent, that process was led by national governments, in particular the United States, but international legal scholars and practitioners made important contributions as well.¹⁹

In Jenks' case, that contribution took the form of a series of publications on aspects of the functioning of international institutions,²⁰ which culminated in a long, synthetic and programmatic article under the title of 'Some Constitutional Problems of International Organizations'.²¹ Belying the modesty of that title, Jenks conducted a detailed, comparative study covering a vast number of international organizations, including long-standing ones like the ILO, the League of Nations, and the public administrative unions established in the 19th century, as well as the very recently created UN, the Food and Agriculture Organization, the UN Relief and Rehabilitation Administration, the International Monetary Fund, and the International

¹⁸ See, for instance, C. Wilfred Jenks, 'The Relation between Membership of the League of Nations and Membership of the International Labour Organization' (1935) 16 *British Yearbook of International Law* 79.

¹⁹ See, for instance, Manley O. Hudson, 'A Design for a Charter of the General International Organization' (1944) 38 *American Journal of International Law* 711; Philip C. Jessup, 'Status of International Organizations: Privileges and Immunities of their Officials' (1944) 38 *American Journal of International Law* 658; Mitchell B. Carroll, 'Postwar International Organization and the Work of the Section of International and Comparative Law of the American Bar Association' (1945) 39 *American Journal of International Law* 20; Herbert W. Briggs, 'Membership in the Proposed General International Organization' (1945) 39 *American Journal of International Law* 101.

²⁰ See, for instance, C. Wilfred Jenks, 'Some Legal Aspects of the Financing of International Institutions' (1942) 28 *Transactions of the Grotius Society* 87; C. Wilfred Jenks, 'Some Problems of an International Civil Service' (1943) 3 *Public Administration Review* 93; C. Wilfred Jenks, *The headquarters of international institutions: A study of their location and status* (Royal Institute of International Affairs 1945); C. Wilfred Jenks, 'The Legal Personality of International Organizations' (1945) 22 *British Yearbook of International Law* 267.

²¹ C. Wilfred Jenks, 'Some Constitutional Problems of International Organizations' (1945) 22 *British Yearbook of International Law* 11.

Bank for Reconstruction and Development, among others. Drawing on examples from the constituent instruments and practice of these organizations, Jenks systematically addressed all significant aspects of their functioning: statements of purposes and competence; membership (including admission, withdrawal, and suspension); the composition of representative organs; methods of voting; permanent officers and staffs (including the exclusively international character of their responsibilities); powers; the coordination of the activities of specialized organizations; immunities and facilities; finance; arrangements for interpretation; amendment; supersession of earlier organizations; provision for winding-up; and custody of original texts of constitutions. Indeed, this remarkable article established a methodological and substantive template that was adopted, with some variations, by all major texts in the field subsequently published.

Again, several aspects of this article are worth mentioning here. First and most obviously, as in the memorandum on constitutional questions, Jenks freely transposes the vocabulary of constitutionalism into his discussion of legal issues concerning international organizations. As he described it, the subject matter of the article is 'the comparative law of the constitutions of international organizations',²² that comparative study is possible in part due to 'a period of intensive constitution-making under the leadership of the United Nations',²³ and the effectiveness of the constitutions of these organizations will depend on 'the development of a body of constitutional practice which breathes reality into such provisions and makes good any lacunae in the texts of such instruments'.²⁴ Here, too, Jenks quotes from the judgments by Holmes and Marshall, and cites his own memorandum on constitutional questions in the ILO, to argue for the need for flexibility and adaptability in the framing of founding instruments for international organizations.²⁵ Despite the largely technical nature of the article, we can see Jenks rehearsing here some of the more ambitious theoretical claims and themes that would appear in his later works, especially in connection with the idea of the 'common law of mankind'. The closing passage of the article is characteristic of this emerging mode in Jenks' writing:

²² *ibid* 11.

²³ *ibid*.

²⁴ *ibid* 52.

²⁵ *ibid* 16.

An effective system of international organization cannot be achieved by a few dramatic decisions. International institutions will necessarily evolve slowly; the loyalty is necessary to make them solid realities will involve still more slowly. Institutional development is primarily the responsibility of statesmanship; it must be guided and controlled by a true appreciation of political forces; but it must be inspired by a teleological constitutionalism, dynamic in outlook, based on a scholarly grasp of the institutional needs of a rapidly evolving society, and sustained by a keen awareness of the institutional techniques available to meet those needs. Therein lies the responsibility and the opportunity of the international lawyer in the present stage of the development of international institutions. The greatest of legal traditions is still to be created; its texture will be largely determined by the quality of the craftsmanship which international lawyers place at the disposal of statesmen during the next generation [...] In these circumstances the greatest scope for decisive steps forward in the development of an international legal order lies in the fields of international legislation, of international constitution making, and of the evolution of the constitutional practice of international organizations. Happily there is now available a body of experience in these fields which, incomplete as it may be and ill-digested as we may have allowed it to remain, is adequate for charting the path of future progress along boldly constructive lines.

Second, despite (and in part through) this constitutional language, the article largely supports a functionalist approach to international organizations law.²⁶ Jenks thus affirms that international organizations ‘will continue to be primarily instruments for the organisation of co-operation between States’;²⁷ emphasises the need for defining the purposes of international organizations ‘in broad language so as to allow the widest possible scope for future development under unforeseen conditions’;²⁸ invariably describes international organizations as forces for good in the world; and observes that the privileges and immunities of the UN and other newly established

²⁶ See generally Jan Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’ (2014) 25 *European Journal of International Law* 645.

²⁷ Jenks (n 21) 19.

²⁸ *ibid* 16.

organizations have been adopted on the basis of ‘the functional principle’.²⁹ It should be noted, however, that he stops short of endorsing that principle; refers to powers being ‘conferred’ on international organizations, rather than delegated to them;³⁰ and discusses at considerable length the need for mechanisms of coordination among international organizations, with the aim of contributing ‘towards the ultimate development of an integrated system of world organization’.³¹ In this latter respect, Jenks was ahead of his time in contemplating important questions of fragmentation and interaction in global governance;³² and his later works returned to these questions repeatedly in a variety of ways.³³

Lastly, the article also served an institutional purpose. Alongside Jenks’ undoubtedly sincere desire to see the creation of a strong network of specialized agencies centred on the UN, we can observe in this article a sustained effort to position the ILO as *primus inter pares* in that network. In describing the ‘considerable body of experience on which to base [...] a comparative study’ of the constitutions of international organizations, Jenks mentions the (soon to be dissolved) League of Nations first and the ILO second.³⁴ In identifying constitutional provisions relevant to a particular issue, those of the ILO usually appear at or very close to the top of the list. At various points, Jenks offers an action taken by the ILO as an example that it would be desirable for other organizations to emulate, such as in the ‘parliamentary conception’ of the relationship between permanent officers and staffs and representative organs, which Jenks argues developed in the ILO ‘through the force of personality of Albert Thomas and the strength of the tradition created by him’.³⁵ In other places, he emphasizes the ILO’s unique tripartite character as a reason for treating it differently.³⁶ It is nat-

²⁹ *ibid* 59.

³⁰ *ibid* 47.

³¹ *ibid* 52.

³² See, for instance, International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.686 13 (2006).

³³ See, for instance, Jenks (n 1); and C. Wilfred Jenks, *The Proper Law of International Organisations* (Stevens & Sons 1962).

³⁴ Jenks (n 21) 11.

³⁵ *ibid* 43-44 and also 15, 42, 47.

³⁶ *ibid* 27, 32.

ural, of course, that Jenks would draw first and most often on the materials closest to hand and front of mind. However, it is not excessively cynical to recognize also that Jenks was concerned, just as naturally, to secure the position of the ILO, whose values and mission he so closely identified with, in the emerging post-war international system.

IV. Conclusion

It is no easy task to assess the impact of Jenks' writings and activities in this crucial period. Certainly many of their effects are likely to have been diffuse and indirect, through institutional and discursive pathways that are difficult to trace, and dependent on the decisions and conduct of innumerable other actors. It is always tempting to adopt a 'realist' posture and dismiss international law and lawyers as epiphenomena, without any real significance in the world of politics and great powers which international organizations must navigate. Recent works on the ILO's transition to the post-war period, for example, make no mention at all of Jenks' role, or indeed of law. This paper has argued that these factors, however elusive, should not be so easily dismissed. On the one hand, Jenks' deep knowledge of ILO practices and broad legal expertise enabled him to draw connections that subtly but firmly aligned the ILO with the prevailing political forces of the day. On the other hand, he was able to look beyond the specificities of his particular institutional setting to make a significant contribution to the legal framework for the construction of a new international order.

Indeed, we should see these two endeavours as inseparably linked in Jenks' program of action at the end of the Second World War. By ensuring the continuity and relevance of the ILO after the war, Jenks saw himself as helping to secure the stability of international order: as the preamble to the ILO's constitution has affirmed for the past 100 years, 'universal and lasting peace can be established only if it is based upon social justice'. Equally, as this paper has argued, the invention of international organizations law could only redound to the benefit of a well-established specialised agencies such as the ILO. In these respects, Jenks himself offers a model of creativity and craftsmanship that international lawyers and ILO officials would do well to emulate as they seek solutions for our own time of crisis.

III

**BETWEEN DOCTRINE AND PRACTICE:
INTERNATIONAL ORGANIZATIONS
AND SOURCES OF INTERNATIONAL LAW**



ILO Convention Practice: Mixed Methods in Norm-Setting for Social Justice

Catherine Brölmann

I. Introduction

The ILO centenary is an occasion to take a closer look at the Organization's practice of adopting Conventions for the purpose of international norm-setting. This vignette aims to do so. Naturally, the International Labour Organization stands out for the substance of its work. Still, to zoom in on a formal – and rather technical – facet of the Organization's standard-setting is not *l'art pour l'art*. The ILO Convention mechanism as envisaged in article 19 of its Constitution,¹ is exceptional and can count as a bold design, still today.

The ILO was ahead of its time with a strong executive secretariat and a constitutional mandate to prepare and adopt Conventions in its plenary organ by a two-thirds majority. Together with a number of Recommendations, those Conventions would constitute the steadily expanding International Labour Code aimed at social justice. The Convention mechanism undoubtedly has been helpful in furthering the cause for which the ILO was created, with moreover 'the unique [...] tripartite structure permit[ting] adoption of binding conventions by its non-State members, even against the vote of State representatives'.² This fact remains regardless of the challenges faced by the Organization in a globalized economy – reflected for example in concerns

¹ Adopted in 1919 (15 UNTS 40).

² Barbara K. Woodward, 'International Lawmaking and Civil Society' in C. M. Brölmann and Y. Radi, *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 286, 297.

about the number of ratifications of ILO Conventions.³ A formal perspective on the technique of ILO Convention-making can also leave aside the periodisation of ILO's history that is generally adopted when it comes to the substance of labour law standard-setting.⁴ Through the formal lens we see an intricate mix of contractual and institutional features of norm-setting – to which the title of this contribution refers with the terms 'mixed methods'. That intricacy (and the ensuing possibility of confusion) is illustrated by a contemporary case before the Dutch Courts, which is described in section 2. This chapter then continues to address briefly the contractual and the institutional paradigms (section 3); the place of the ILO Convention system in international treaty practice (section 4); and ends with some observations on the potential of the system (section 5).

II. The 2005 Council of State decision in the Dutch Seamen's Welfare Foundation case

On 5 November 2002, the Dutch Minister of Transport, Public Works, and Water Management adopted a temporary subsidy regulation on seamen's welfare. Based on this, he informed the Rotterdam Seamen's Welfare Foundation, by decision of 17 December 2002, that it would receive no further subsidy as of 1 January 2005. An objection lodged against this decision was rejected by the Minister by decision of 11 August 2003, whereupon the Rotterdam Sailor's Home Foundation and the Dutch Seamen's Welfare Foundation (hereinafter 'Foundation') applied to the District Court of Rotterdam for a review of the decision. The District Court rejected (in relevant part) the application.⁵ The Foundation appealed to the Administrative Jurisdiction Division of the Council of State. The highest instance of Dutch administrative procedure in turn rejected the Foundation's application and confirmed the decision of the District Court.⁶

³ As described, for instance, by Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart 2013).

⁴ <<https://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm>>. See also Maupain (n 3).

⁵ *Dutch Seamen's Welfare Foundation v Minister of Transport, Public Works, and Water Management*, Appeal decision of the District Court of Rotterdam, Nos WET 03/2803 and 04/2071, 12 November 2004.

⁶ Council of State, Decision No. 200410468/1, ECLI:NL:RVS:2005:AU0095, 27 July 2005. See also C. M. Brölmann, 'Casenote on LjN: AU0095, Administrative Jurisdiction

The Seamen's Welfare Foundation had relied on ILO's Seafarers' Welfare Convention, 1987 (No. 163). It could do so, incidentally, because in the constitutional system of the Netherlands, natural and legal persons can directly invoke before domestic judicial institutions (a certain type of) treaty obligations resting on the State. The Foundation argued, ingeniously, that even if the Netherlands had not ratified Convention No. 163, as an ILO member State it could be presumed to have signed the Convention.

This assumption was based on the fact that in the law of treaties framework, ratification by definition must confirm something, that is, an earlier signature. Thus, under article 14 of the Vienna Convention on the Law of Treaties (VCLT),⁷ ratification follows 'signature subject to ratification'. Given that in ILO speak, ILO Conventions require 'ratification', (always within the same VCLT regime) the only legal moment envisaged before that in the ILO mechanism, namely adoption of the Convention by the International Labour Conference,⁸ must be presumed somehow to comprise or immediately to entail also signature on the part the individual States. As the argument went, after adoption of Convention No. 163 by the International Labour Conference, the Netherlands as an ILO member State (even if it had voted against the adoption of the Convention) by necessary implication had become 'signatory' to the Convention. From there, it would follow that the Netherlands had a legal obligation pursuant to article 18 of the VCLT 'to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval'. The Foundation then argued that the Dutch government, by terminating the subsidy for the Foundation, had violated the very object and purpose of Convention No. 163, with ensuing responsibility for breach of an incumbent international obligation.

The Council of State – confirming the decision of the Rotterdam District Court – rejected the claim that the ILO Convention had created obligations for ILO member States prior to ratification. The ILO Constitution did not

Division of the Council of State' in *Oxford Reports on International Law in Domestic Courts* (Oxford UP 2008) <<http://www.oup.com/online/ildc/>>.

⁷ 1155 UNTS 331.

⁸ ILO Constitution, article 19(2).

envisage separate signature of ILO conventions by member States, but only their eventual ‘ratification’, the Council said. In fact, for the Netherlands, after the adoption of the Convention at the International Labour Conference and before a possible ‘ratification’, no treaty obligations such as under article 18 of the VCLT existed; in legal terms, there was only the duty to report periodically as indicated in article 19(5) (e) of the ILO Constitution.

III. Mixing the contractual and the institutional

What the 2005 Council of State’s decision brought out – without articulating it – is that the soundness of the argument really depends on the framework that is applied. In the law of treaties framework, by definition no ‘ratification’ can exist without an object, viz. an earlier signature, that is ‘ratified’ or ‘confirmed’. But in a separate institutional framework, this is different: such an ‘internal’ order may provide for any sequence of legal moments, with any terminology, and any normative effect. In that sense, to designate the fixing of the text as ‘adoption’ is ILO discursive practice and a free terminological choice, rather than a legal act prescribed by article 9 of the VCLT (also termed ‘adoption of the text’). That said, employment of the technical law of treaties term makes it easy to connect the institutional framework to the law of treaties framework and to trace the process of formation and pedigree of the treaty in question to its origin. This is facilitated by the fact that the law of treaties does not put any formal requirements to the collective legal act of ‘adoption’ of the text. On a different note, the drafters of the ILO Constitution may have seen political value in the fact that the chosen term evokes the traditional, sovereign act of treaty-making.

In that respect, the performative power of ‘ratification’ is even stronger. This is the word used in article 19(5) of the ILO Constitution for the individual legal act of the contracting States concluding the treaty-making process. By referring to States’ individual consent to be bound, the Organization connects its sphere of control over the treaty-making process to the sphere of general international/ legal relations. Technically speaking, a term referring to some form of ‘simplified signature’ as the required legal act would have made more sense in the context of the law of treaties – considering that only one individual legal act is envisaged on the part of States. The use of the term ‘ratification’ on the other hand carries a strong suggestion that all *Rechtsmomente* are taken care of by the Organization, while

the individual States only need to confirm. This might be taken as a case of ‘constructive ambiguity’ in the text of the ILO Constitution, or even more than that: Rosenne has pointed out, referring to the ILO’s memorandum filed in the context of the *Reservations to the Genocide Convention case*, that the Organization itself seems to have held the view that ‘a convention [...] so adopted [...] is the equivalent of an instrument already signed by plenipotentiaries but not yet ratified’.⁹

In the *Seamen’s Welfare case*, the core question was which framework was applicable: the general law of treaties or the ILO institutional framework? Another way to put it, as suggested in the title, is: which ‘method’ of the legal instrumentarium did ILO constituent States use to lay out their Convention mechanism? In a deeper sense, this may be seen as a question as to whether the contractual or the institutional paradigm – the term in this case is not an overstatement – applies. The issue could gain relevance at a practical level because in the context of international organizations the relevant legal actors are both sovereign States and member States. So they are capable in principle to function in both frameworks.

Thus, we may say that the adoption of an ILO convention qualifies as a collective legal act of member States in an institutional organ. In addition, the ILO provides for a rather assertive engagement of the Organization with the national legal order of member States (section 4 below) to follow up on the adoption. This, in any event, entails that the general law of treaties (including the good faith rule enshrined in article 18 VCLT) is not applicable to that institutional stage of the treaty-making process, which incidentally seems quite protracted. This stage was at issue in the case before the Dutch Council of State.

Frequently the ILO convention-making mechanism is conceptualized as a particular sub-category of the law of treaties.¹⁰ However, it seems more sound analytically to recognize that ILO convention practice partly takes

⁹ Shabtai Rosenne, ‘United Nations Treaty Practice’ (1954) 86 *Recueil des cours* 281, 326), referring to the written statement submitted by the Organization in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case* (pleadings 216).

¹⁰ See, for instance, Anne Trebilcock, ‘The International Labour Organization’ in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848, 852-862.

place altogether outside the law of treaties, within an institutional law context, and that it only later moves into a general treaty-making framework, with ‘member States’ turning into ‘treaty parties’. In that sense, the process of ILO Convention-making truly operates at the cutting face of the law of treaties and institutional law. This is what makes the ‘system’, as it has also been called, special. International law leaves room for this, through both the general reservation clause of article 5 VCLT,¹¹ and the absence of a common law of international organizations. As Bernstorff has observed, ‘remarkably, Felice Morgenstern’s classic conclusion regarding the state of legality in international organizations by and large still holds true today: as a system of law all this does not amount to very much’.¹² Article 19(5) of the ILO Constitution provides for an exceptional arrangement in a time of dualist doctrine and strong emphasis on State sovereignty.

IV. ILO convention-making as a special practice

Treaty texts adopted in an international organization are to be distinguished from the practice of treaties drawn up under the auspices of an organization or through use of its facilities – a prominent example being the 1998 Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹³ When treaty texts are adopted in an international organization, article 5 of the two Vienna Conventions gives precedence to the institutional law of the organization over general international law. To be sure, there are more examples of such adoption practice

¹¹ Article 5 of the VCLT reads: ‘The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization’. In the ILO, article 5 is nicknamed the ‘ILO clause’; Trebilcock (n 10) 855.

¹² J. von Bernstorff, ‘Procedures of Decision-Making and the Role of Law in International Organizations’ (2008) 9 *German Law Journal* 1940, referring to Felice Morgenstern, ‘Legality in International Organizations’ (1976-77) 48 *British Yearbook of International Law* 241. The standard reference work in the field by Henry J. Schermers and Niels M. Blokker, *International Institutional Law* (6th edn, Brill 2018) likewise describes decision-making processes within various international organizations without reference to a general procedural law.

¹³ On the distinction between conventions concluded ‘under the auspices’ of the organization and those concluded ‘within’ the organization, see Paul Reuter, *Institutions internationales* (5th edn, Presses universitaires de France 1967) 10-11.

than only in the ILO. Still, those cases generally concern solely the stage of ‘adoption’ of the treaty in the sense of agreeing on the text – think of the extensive UN treaty practice in the field of human rights¹⁴ – without additional institutional rules for the exhortation of prospective contracting States, and with both signature and ratification remaining as subsequent legal acts on the part of individual States in order for them to become bound.

In the case of the ILO, it is the dominant role of the ILO institutional framework after adoption of the text that makes a difference, as it extends the authority of the Organization during the treaty-making process. The rules of classic treaty-making seem subsumed in the rules of the Organization and quite a bit of institutional pressure is envisaged; these are the ‘persuasive tools’ mentioned by Maupain.¹⁵ Alvarez aptly points to the ‘maximum use of the iterative benefits conferred by international organization’.¹⁶ The ILO’s implicit claim of authority over the entire process of treaty-making short of the States’ final consent to be bound (section 3 above) in that sense would be fair. A renowned element in the mechanism is the stipulation in article 19(5)(b) of the ILO Constitution that the adopted Convention, without additional signature by the States, within 18 months be submitted by the government to the competent national legislative body. Article 19(5)(d) goes on to state that ‘if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General’, which means that acceptance of the Convention by an internal organ of a State essentially entails an obligation for the State to ratify. Rousseau in the 1950s,¹⁷ and later also Reuter¹⁸ pointed with great reserve to such ‘notification’ by the Minister for Foreign Affairs to the Organization taking the place of deposit or even ratification itself. Otherwise, the direct address to the national legislature was considered far-reaching and was, for example, the reason for the French government not to join the ILO régime until 1926.

¹⁴ Visible in the collection of *Multilateral Treaties Deposited with the Secretary-General* <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en>.

¹⁵ Maupain (n 3).

¹⁶ José Alvarez, *International Organizations as Law-Makers* (Oxford UP 2005) 345. The actual mechanism of ILO treaty-making with ‘strings attached’ is described at 331-337.

¹⁷ Charles Rousseau, *Droit international public* (Recueil Sirey 1953) 39.

¹⁸ Paul Reuter, *Introduction to the Law of Treaties* (Pinter Publishers 1989) 11.

There are other examples of ‘persuasive tools’ of the ILO that can only exist in a somewhat centralized, institutional setting, such as the Declaration on Fundamental Principles and Rights at Work¹⁹ in which the International Labour Conference reaffirmed – without opposition – the obligation of all ILO Members to adhere to the principles underlying the ILO’s eight ‘fundamental Conventions’. Thus, an institutional obligation was upheld for member States, even if they had not ratified the fundamental Conventions, to respect, promote and realize the principles concerning these fundamental rights (article 2). Their recognition moreover confirms the status of the Conventions embodying them as core labour standards. Otherwise, the treaty practice of the ILO has several idiosyncracies²⁰ in comparison to the general treaty practice. The mechanism as set out in article 19(5), however, stands out.

Wilfred Jenks, whose functionalist outlook has been mentioned by other authors,²¹ had called the treaty-making process within the ILO a ‘valuable rationalisation’ of the traditionally ‘cumbersome’ procedure for conclusion and entry into force of treaties, but acknowledged it had had ‘relatively little effect on the practice of the League of Nations’.²² A marked exception was the 1928 General Act for the Pacific Settlement of International Disputes²³ which was ‘adopted’ in a conclusive manner similar to the ILO procedure.²⁴ Adoption of the Act by the Assembly was preceded by authentication by means of the sole signature of the Secretary-General and the President of the Assembly. No further signature subject to ratification on the part of States was needed, only the final expression of consent to be bound.

In the early days of the United Nations, Jenks famously expressed the hope that the power of the ECOSOC enshrined in article 62(3) of the UN Charter to ‘prepare draft conventions [...] within its competence’ would be

¹⁹ Adopted by the International Labour Conference at its 86th Session in June 1998 (Annex revised on 15 June 2010).

²⁰ Trebilcock (n 10).

²¹ Guy Fiti Sinclair, ‘The Original Sin (and Salvation) of Functionalism’ (2016) 26 *European Journal of International Law* 965, 968. Cf C Wilfred Jenks, *The common law of mankind* (Praeger 1958) 105.

²² C Wilfred Jenks, ‘Some Constitutional Problems of International Organizations’ (1945) 22 *British Yearbook for International Law* 11, 48.

²³ 93 LNTS 343.

²⁴ Reuter (n 18) 43.

‘used with imagination and vigour’ for the benefit of ‘a far-reaching rationalisation of the technique of the multipartite instrument’.²⁵ But that did not happen. Extension of the ILO system to the United Nations, so that ‘adoption’ in the plenary organ would be followed immediately by ratification by the States, had been proposed but expressly rejected at the San Francisco Conference.²⁶

Otherwise, methods similar to the ILO procedure were used sparingly – examples being the 1946 Convention on the Privileges and Immunities of the United Nations²⁷ and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.²⁸ These treaties – where the ‘intention’ to further pursue the treaty process implied by signature subject to ratification or a similar *Rechtsmoment* was perhaps taken for granted – were ‘adopted’ and ‘approved’, respectively, by the UN General Assembly and subsequently envisaged a single legal act on the part of States – ‘accession’ or ‘succession’ – as the immediate expression of consent to be bound. When States nonetheless would insist to communicate their accession ‘subject to ratification’, this was interpreted by the Secretary-General as a ‘declaration of intention’.²⁹

At the time of creation of the ILO also the new Health Organization had been fitted with a procedure for the adoption of treaties by a two-thirds majority in the plenary organ, with the difference that conventions then would be transmitted to governments through the Council of the League, where again the unanimity rule prevailed.³⁰ In the UN era, some specialized agencies by way of exception took on elements of the ILO system, such as the World Health Organization (WHO)³¹ and the United Nations Educational, Scientific and Cultural Organization (UNESCO).³²

²⁵ Jenks (n 22) 48.

²⁶ Documents of the United Nations Conference on International Organization (1945) vol IX, 79-81.

²⁷ 1 UNTS 15; 90 UNTS 327.

²⁸ 33 UNTS 261 et seq.

²⁹ See the 1959 Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements (ST/LEG/7) para 48.

³⁰ Resolution of 10 December 1920 (LoN Sp.Sup. Jan. 1921) 18. Part of the procedure was later enshrined in articles 19 and 20 of the WHO Constitution.

³¹ WHO Constitution, articles 19 and 20, 14 UNTS 186.

³² UNESCO Constitution, article IV(B), 4 UNTS 275.

V. The potential of mixed methods

This chapter designates the ILO mechanism for convention-making as a case of ‘mixed methods’, referring to the combination of institutional and contractual lawmaking, intricate to the point that it could escape the eye. It is an exceptional design – laid out three decades before the Advisory Opinion in the 1949 *Reparation for Injuries case*,³³ in which the independence of international organizations came to the fore as an intellectually and doctrinally hard fought conceptualization. The ILO was the first (and in this form still the only) organization with such an arrangement, created at a time in which shortcuts for ‘sovereign moments’ in norm-setting processes were far from self-evident. It shows how the pursuit of social justice in the world of labour could create support for a legal arrangement that would have been politically unfeasible in other areas.

The legal phenomenon of mixed methods (and ‘paradigms’) in ILO convention practice has been somewhat underexplored and undertheorized. However, as the previous sections have sought to demonstrate the distinction between an institutional and a contractual framework is relevant – if only for stakeholders to establish obligations, responsibilities, legal remedies.

It is worth recalling that the mix of treaty context and institutional context as a juridical phenomenon is distinct from developments under the header of ‘informal lawmaking’ or ‘soft law’. The ILO convention mechanism is special also in that it conjoins two components of ‘hard law’. Combining this with the tripartite set-up that is famously part of its institutional architecture, the ILO manages to include non-State actors in the international standard-setting process while staying within the parameters of formal international norm-creation – a formalness that was paramount 100 years ago, but that also carries weight today.

Many commentators have called for institutional reforms that would enable the ILO to meet the challenges of the 21st century. Indeed, also when it comes to ILO Conventions and the objective of maximum effect (‘coverage’) among member States, there is no need to wait for doctrinal innovations in the law of treaties. Considering the ILO convention mechanism it seems

³³ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, 174.*

clear that flexibility and room for reform will be found in the strong institutional component of the treaty-making process. Moreover, it has been said that the decline of organized labour in the contemporary globalized, neoliberal environment has weakened the Organization's social-corporatist structure and posed a strain on the tripartite mechanism; this reportedly has made the ILO look for engagement also with non-labour NGOs and business groups. Here too the exceptional institutional space for participation of non-State actors in the standard-setting mechanism seems to have room for development, precisely if stakeholders wish to stick to the formal-legal framework.

Le rôle des résolutions des organisations internationales à la lumière de la jurisprudence de la Cour internationale de Justice

*Alain Pellet**

Décrire le rôle des résolutions des organisations internationales à la lumière de la jurisprudence de la Cour internationale de Justice est une tâche à la fois facile et difficile. Facile car la question du rôle des résolutions des organisations internationales a été très largement défrichée en doctrine et il ne reste plus grand-chose à dire de nouveau sur ce sujet qui est un peu une tarte à la crème. Ce qui est difficile c'est de concilier les vues très diverses qui ont été exprimées alors que la jurisprudence de la Cour internationale de Justice ne jette guère de lumière sur ce sujet controversé: les résolutions des organisations internationales y jouent un rôle à géométrie variable et la Haute Juridiction semble souvent y recourir par facilité et au cas par cas, en s'abritant derrière leur autorité plus supposée que démontrée pour s'épargner les embarras d'une démonstration plus complexe à l'appui des solutions qu'elle retient.

Ceci étant, il y a résolutions et résolutions. Pour faire court, il convient de distinguer celles qui constituent des décisions obligatoires pour leurs destinataires de celles qui se veulent, ou ne peuvent être, que de simples recommandations¹ – étant entendu que la distinction, difficilement discutable dans l'abstrait, n'est pas toujours facile à faire dans la pratique. La première difficulté consiste à déterminer à laquelle de ces deux catégories

* L'auteur remercie M. Jean-Baptiste Merlin, consultant en droit international, pour l'aide qu'il lui a apportée dans la préparation de cette contribution.

¹ CIJ, avis consultatif, 7 juin 1955, *Sud-Ouest africain – Procédure de vote*, opinion individuelle de H. Lauterpacht, *Rec. 1955*, 115-116.

appartient la résolution dont il est question. Pour simple rappel, il suffit de penser aux problèmes que pose la classification des résolutions du Conseil de sécurité: alors que le célèbre article 25 de la Charte des Nations Unies, mais aussi l'article 27, peuvent donner l'impression que celui-ci ne peut prendre que des «décisions», il est clair qu'il peut également, sans doute plus souvent, «inviter» ou «recommander» – ce que prévoient expressément, par exemple, les articles 33, paragraphe 2, 36, 37, paragraphe 2, ou 38 mais aussi les articles 39 et 40 qui, pourtant, figurent dans le chapitre VII de la Charte, source première du pouvoir de décision dont dispose le Conseil². Comme celui-ci se garde la plupart du temps de déterminer la valeur juridique qu'il entend attribuer à ses résolutions, il faut, comme l'a dit la Cour,

«soigneusement analyser le libellé d'une résolution du Conseil de sécurité avant de pouvoir conclure à son effet obligatoire. Étant donné le caractère des pouvoirs découlant de l'article 25, il convient de déterminer dans chaque cas si ces pouvoirs ont été en fait exercés, compte tenu des termes de la résolution à interpréter, des débats qui ont précédé son adoption, des dispositions de la Charte invoquées et en général de tous les éléments qui pourraient aider à préciser les conséquences juridiques de la résolution du Conseil de sécurité»³.

Obscure clarté. Les choses ne sont pas beaucoup plus claires en ce qui concerne les résolutions de l'Assemblée générale. En premier lieu, il peut arriver que certaines recommandations contiennent des normes obligatoires: c'est le cas lorsque, jouant alors le rôle d'instruments «mous» de codification, elles énoncent des règles coutumières abouties ou lorsque leur contenu a été expressément accepté par leurs destinataires. Mais, dans ces hypothèses, l'obligation résulte non pas de l'adoption de la recommandation elle-même mais des sources «dures» que sont la coutume ou l'acte unilatéral d'acceptation. Un exemple typique de «résolution de codification» (et, en

² Par exemple, l'article 39 est on ne peut plus explicite: «Le Conseil de sécurité constate l'existence d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression et *fait des recommandations ou décide* quelles mesures seront prises conformément aux Articles 41 et 42 pour maintenir ou rétablir la paix et la sécurité internationales».

³ CIJ, avis consultatif, 21 juin 1971, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, Rec. 1971, 53, par. 114. V. aussi CIJ, avis consultatif, 22 juillet 2010, *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo*, avis consultatif, Rec. 2010, 442, par. 94.

même temps, de développement progressif) est fourni par la très fameuse «Déclaration sur les principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations unies» de 1970⁴. Et, pour ce qui est des résolutions acceptées, on peut penser aux résolutions initiales de l'Assemblée générale sur le droit de l'espace, que les deux seules puissances spatiales de l'époque, les États-Unis et l'URSS, avaient déclaré accepter par avance⁵. Autre hypothèse assez spéciale: l'annexe XI du Traité de paix de 1947 avec l'Italie aux termes duquel les Parties s'engageaient par avance à accepter les recommandations de l'Assemblée générale sur le sort des colonies italiennes. Dans le même esprit, la CPJI avait reconnu que

«rien n'exclut que les Parties acceptent des obligations et confèrent au Conseil [de la Société des Nations] des pouvoirs plus étendus que ceux qui résulteraient de la lettre de l'article 15 et en particulier que, par un engagement contracté d'avance, elles remplacent le pouvoir qu'a le Conseil de faire une simple recommandation par le pouvoir de prendre une décision qui, en vertu de leur consentement préalable, tranche obligatoirement le litige»⁶.

C'est d'ailleurs ce qui s'est produit à l'égard, cette fois, d'une recommandation du Conseil de sécurité des Nations Unies adressée aux Gouvernements du Royaume-Uni et de l'Albanie de soumettre leur différend relatif au *Détroit de Corfou* à la CIJ⁷.

⁴ Assemblée générale des Nations Unies, Résolution 2625(XXV), *Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies*, 24 octobre 1970.

⁵ Documents officiels de l'Assemblée générale, dix-huitième session, Première Commission, 1342^{ème} séance, 2 décembre 1963, 167, par. 17: «Le représentant des États-Unis a déclaré que son pays considérait que les principes juridiques contenus dans le projet de déclaration reflètent le droit international tel que le conçoivent les Membres de l'Organisation et que, pour leur part, les États-Unis étaient décidés à les respecter. À son tour, l'Union soviétique tient à donner l'assurance qu'elle respectera, elle aussi, les principes énoncés dans le projet de déclaration, si celui-ci est adopté à l'unanimité». La déclaration en question fut finalement adoptée sans vote le 13 décembre 1963 (Résolution 1962 (XVIII), *Déclaration des principes juridiques régissant les activités des États en matière d'exploration et d'utilisation de l'espace extra-atmosphérique*).

⁶ CPJI, avis consultatif, 21 novembre 1925, *Interprétation de l'article 3, paragraphe 2, du traité de Lausanne, Série B, No. 12, 27*.

⁷ Résolution 22 du 9 avril 1947 sur les Incidents survenus dans le Détroit de Corfou.

Dans tous ces cas, c'est la norme qui est obligatoire, pas sa source apparente, la résolution qui la porte. Si on laisse de côté ces exceptions qui n'en sont pas, aux termes des articles 10 à 15 de la Charte, l'Assemblée générale semble ne pouvoir que discuter, étudier, et recommander; mais l'article 18, relatif au vote des États membres, ne parle lui que de «décisions», terme qui, à l'évidence, ne vise pas seulement l'approbation des accords de tutelle ou l'adoption du budget (ou d'autres décisions de nature interne) visées aux articles 16 et 17 mais, sans aucun doute, l'ensemble des résolutions adoptées par l'Assemblée générale dont, dans un célèbre passage de son avis sur la *Namibie*, la CIJ a rappelé qu'

«il serait [...] inexact de supposer que, parce qu'elle possède en principe le pouvoir de faire des recommandations, [elle] est empêchée d'adopter, dans des cas déterminés relevant de sa compétence, des résolutions ayant le caractère de décision ou procédant d'une intention d'exécution»⁸.

Clarté quelque peu obscure à nouveau. Dans quels «cas spécifiques»? Comment détecte-t-on l'«intention d'exécution» qui se cache derrière la résolution? Pour cela, dit l'oracle, il faut

«en examiner le contenu ainsi que les conditions d'adoption; il faut en outre vérifier s'il existe une *opinio juris* quant à son caractère normatif. Par ailleurs des résolutions successives peuvent illustrer l'évolution progressive de l'*opinio juris* nécessaire à l'établissement d'une règle nouvelle»⁹.

J'ai l'air d'ironiser mais, au fond, je pense que la Cour ne pouvait guère être plus précise. Certes, ces orientations générales sont loin d'offrir des solutions toutes faites, mais elles orientent suffisamment la réponse à donner lorsque l'on est confronté à une question concrète, réponse qui, en effet, ne peut être que casuistique. Le droit est affaire d'esprit de finesse plus que d'esprit de géométrie et il ne faut pas ôter le pain de la bouche des juristes.

⁸ *Conséquences juridiques* (n 3) 50, par. 105; v. aussi *Traité de Lausanne* (n 6).

⁹ CIJ, avis consultatif, 8 juillet 1996, *Licéité de la menace ou de l'emploi d'armes nucléaires*, *Rec. 1996*, 254-255, par. 70 et pars. 71-73. V. aussi *Sud-Ouest africain* (n 1) 115-116; arrêt, 27 juin 1986, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, *Rec. 1986*, 100, par. 188; *Kosovo* (n 3) 414, par. 24; avis consultatif, 25 février 2019, *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*, par. 152.

Ceci étant, nous sommes arrivés au point où l'interprète, en se fondant sur les directives ouvertes de la Cour, est arrivé à la conclusion que la résolution qui lui pose problème est une décision. Apparemment, c'est le cas le plus simple: les décisions sont obligatoires pour leurs destinataires. Certes! Mais ceci n'épuise pas la question.

Bien sûr, les «membres de l'Organisation des Nations Unies [...] sont dans l'obligation d'accepter et d'appliquer les décisions du Conseil de sécurité conformément à l'article 25 de la Charte»¹⁰ et, malgré l'absence d'une disposition équivalente pour les résolutions de l'Assemblée générale, il en va de même en ce qui concerne celles-ci. La CIJ l'a admis dans son avis de 1971 sur la *Namibie*; mais elle a ajouté, ce qui a été plus discuté, que

«la cessation du mandat et la déclaration de l'illégalité de la présence sud-africaine en Namibie sont opposables à tous les États [...] Dès lors qu'il a été mis fin au mandat par décision de l'organisation internationale chargée du pouvoir de surveillance à son égard et que le maintien de la présence sud-africaine en Namibie a été déclaré illégal, il appartient aux États non membres d'agir conformément à ces décisions»¹¹.

Autre exemple (parmi bien d'autres): il semble logique que ce que le Conseil de sécurité ou l'Assemblée générale ont fait, ils puissent le défaire. Pas si simple si l'on pense – toujours par exemple – à l'effet des décisions de ces organes créant des juridictions internationales.

Interrogée – ou s'interrogeant – sur la question «de savoir si l'Assemblée générale est fondée en droit à refuser d'exécuter un jugement accordant indemnité, rendu par le tribunal administratif régulièrement constitué et agissant dans les limites de sa compétence statutaire»¹², la Cour, pour des raisons connues de tous (pouvoirs implicites, indépendance des fonctionnaires internationaux, etc), a estimé que «l'Assemblée générale peut exercer le pouvoir d'instituer un tribunal pour faire justice entre l'Organisation et les fonctionnaires»¹³. Le Tribunal pénal international pour l'ex-Yougoslavie

¹⁰ CIJ, Ordonnance en indication de mesures conservatoires, *Incident aérien de Lockerbie*, 14 avril 1992, *Rec.* 1992, 15, par. 39 et 126, par. 42.

¹¹ *Conséquences juridiques* (n 3) par. 126.

¹² CIJ, avis consultatif du 13 juillet 1954, *Effet de jugements du tribunal administratif des N. U. accordant indemnité*, *Rec.* 1954, 51.

¹³ *ibid* 58.

s'est abondamment référé à l'avis de 1954 pour tenir le même raisonnement en ce qui concerne la capacité du Conseil de sécurité de créer les tribunaux pénaux internationaux *ad hoc*¹⁴.

Les choses sont évidemment bien plus complexes lorsque l'on est en présence non pas d'une décision mais d'une recommandation. Les positivistes classiques ont une réponse d'une simplicité confondante: le droit c'est ce qui est obligatoire ou interdit; par définition, les recommandations ne lient pas; il n'y a donc aucune raison de se poser la question. Je ne suis pas un positiviste classique et ne partage pas cette vision simplette. La CIJ non plus, heureusement.

Faute de force obligatoire, les recommandations peuvent avoir (et ont en règle générale) une «valeur normative»¹⁵ qui va au-delà de leur impact politique mais varie en fonction des circonstances de leur adoption et de leur contenu. En tout cas, on ne leur rend pas justice en se bornant à déclarer qu'elles ne peuvent créer d'obligations. C'est cependant non pas dans un arrêt ou un avis consultatif de la Cour elle-même mais dans une formidable opinion individuelle que l'on trouve l'expression la plus claire de la valeur juridique, contraignante d'une certaine manière, mais non-obligatoire, des recommandations des organisations internationales.

Comme l'a expliqué de manière limpide le grand juge qu'était Hersch Lauterpacht dans l'opinion qu'il a jointe à l'avis consultatif de la CIJ du 7 juin 1955 dans l'une des nombreuses affaires relatives au Sud-Ouest africain, «il serait tout à fait incompatible avec les principes d'une saine interprétation comme avec l'intérêt international supérieur, qui n'est jamais sans pertinence juridique, de minimiser la valeur des résolutions de l'Assemblée générale»¹⁶ des Nations Unies:

«En général, il est clair que l'Assemblée n'ayant pas le pouvoir de décision [...] ses résolutions n'ont pas en elles-mêmes de force obligatoire. [Un] État n'est donc pas tenu de se conformer à une résolution

¹⁴ TPIY, Chambre d'appel, *Le Procureur c/ Duško Tadić, alias 'Dule'*, arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence, 2 octobre 1995, pars. 15-38.

¹⁵ *Licéité* (n 9) 254.

¹⁶ *Sud-Ouest africain* (n 1) 122.

particulière lui recommandant de prendre ou de s'abstenir de prendre une mesure législative ou administrative donnée»¹⁷.

Ce qui est contestable, en revanche,

«c'est l'opinion qu'une recommandation est sans aucun effet juridique quelconque. Une résolution recommandant à un État administrant une mesure déterminée crée une certaine obligation juridique qui, si rudimentaire, souple et imparfaite qu'elle soit, est cependant, une obligation juridique et constitue une mesure de surveillance. L'État en question, s'il n'est pas tenu d'accepter la recommandation, est tenu de l'examiner de bonne foi. S'il décide de ne pas en tenir compte, il doit donner les raisons de sa décision»¹⁸.

Et si l'État récalcitrant

«persiste à ne pas tenir compte de l'avis de l'Organisation solennellement exprimé et réitéré, et plus particulièrement dans le cas où l'expression de cet avis se rapproche de l'unanimité, [il] peut finir par dépasser la limite imperceptible entre l'impropriété et l'illégalité, entre la discrétion et l'arbitraire, entre l'exercice de la faculté juridique de ne pas tenir compte de la recommandation et l'abus de cette faculté» et s'exposer ainsi «aux conséquences qui en découlent légitimement sous forme d'une sanction juridique»¹⁹.

C'est une longue citation; mais j'aime admirer et Sir Hersch est certainement l'un des internationalistes du siècle passé pour lequel je nourris la plus grande admiration. Pourquoi dire moins bien ce que nos grands aînés ont su parfaitement exprimer?

Non seulement «les résolutions de l'Assemblée générale, même si elles n'ont pas force obligatoire, peuvent parfois avoir une valeur normative», mais encore «elles peuvent, dans certaines circonstances, fournir des éléments de preuve importants pour établir l'existence d'une règle ou l'émergence d'une *opinio juris*»²⁰.

¹⁷ *ibid* 119.

¹⁸ *ibid* 120.

¹⁹ *ibid*.

²⁰ *Licéité* (n 9) 254-255, par. 70.

Ceci est l'expression prudente d'une réalité à la fois plus radicale et plus fluctuante. Je veux dire par là que la CIJ utilise abondamment les résolutions des organisations internationales, y compris et d'abord celles qui n'ont pas de valeur obligatoire, pour établir l'existence de règles coutumières sans que leur rôle dans le processus de leur élaboration soit clairement défini.

Indépendamment de leurs effets particuliers et de leur impact politique parfois non négligeable, les recommandations peuvent jouer un rôle considérable de «jalons normatifs» dans le processus de cristallisation d'une norme coutumière. Songez par exemple au rôle crucial de la Déclaration universelle des droits de l'homme de 1948²¹ dans le «durcissement» du droit international des droits de l'homme ou à celui de la très fameuse résolution 1514 (XV) de l'Assemblée générale des Nations Unies²² qui a été une «étape importante»²³ (on pourrait dire «déterminante») dans la consécration du droit des peuples coloniaux à la décolonisation, et que la CIJ a considéré, non sans raison, comme ayant «été la base du processus de décolonisation»²⁴. Et, tout récemment dans son avis consultatif sur les *Chagos*, la Cour a affirmé que:

«bien qu'elle soit formellement une recommandation, la résolution 1514 (XV) a un caractère déclaratoire s'agissant du droit à l'autodétermination en tant que norme coutumière, du fait de son contenu et des conditions de son adoption. Cette résolution a été adoptée par 89 voix, avec 9 abstentions. Aucun des Etats participant au vote n'a exprimé d'opposition à l'existence du droit des peuples à l'autodétermination. Certains des Etats qui se sont abstenus ont justifié leur abstention par le temps nécessaire pour la mise en œuvre de ce droit»²⁵.

Ces positions successives de la Cour mondiale sur le rôle joué par la résolution 1514 dans le processus de décolonisation montrent que la frontière peut parfois être mince entre une résolution déclaratoire d'une règle coutumière existante et une résolution consacrant l'existence d'une règle

²¹ Résolution 217 A (III), 10 décembre 1948.

²² Résolution 1514 (XV), 14 décembre 1960, *Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux*.

²³ *Conséquences juridiques* (n 3) 31, par. 52. V. aussi CIJ, avis consultatif, 16 octobre 1975, *Sahara occidental*, Rec. 1975, 32, par. 56.

²⁴ *Sahara occidental* (n 23) par. 57.

²⁵ *Chagos* (n 9) par. 152 et pars. 153, 173.

coutumière. Ceci confirme que, dans tous les cas, une résolution ne saurait se suffire à elle-même et que sa valeur juridique doit nécessairement être appréciée eu égard à la conduite des États dans le domaine considéré²⁶. La CIJ se réfère fréquemment à des instruments non-obligatoires, qu'il s'agisse de recommandations d'organisations internationales ou d'actes concertés non conventionnels, pour établir l'existence ou le contenu d'une règle coutumière²⁷. Ainsi, dans l'arrêt sur le fond rendu dans l'affaire opposant le Nicaragua aux États-Unis, elle a multiplié les références à ce type de textes et insisté sur l'importance qu'ils pouvaient revêtir dans l'identification des normes coutumières:

«La Cour a par ailleurs souligné l'importance que revêt [...] un texte comme l'acte final d'Helsinki ou, à un tout autre niveau, la résolution 2625 (XXV) de l'Assemblée générale [...]. Des textes de cette nature, dont la Cour a dit que certaines de leurs dispositions, telles que les principes de non-emploi de la force et de non-intervention, avaient un caractère coutumier, envisagent les relations entre les États à systèmes politiques, économiques et sociaux différents sur la base de la coexistence entre les diverses idéologies qui les animent»²⁸.

Dans cet arrêt (de 1986), la Cour se réfère à plusieurs reprises à des résolutions non obligatoires de l'Assemblée générale. Au paragraphe 193, elle s'appuie sur la Déclaration relative aux principes du droit international touchant les relations entre États de l'Assemblée générale des Nations Unies pour démontrer la nature coutumière du droit de légitime défense. Au paragraphe 195, elle étudie les modalités d'exercice de ce droit en se référant à la définition de l'agression annexée à la Résolution 3314(XXIX). Enfin, aux paragraphes 203 et 204, pour démontrer la nature coutumière du principe de non-intervention, elle s'appuie, de manière très vague, sur «de très nombreuses déclarations adoptées par diverses organisations et par

²⁶ Commission du droit international, Projets de conclusions sur la détermination du droit international coutumier, 2018, conclusion 12 et commentaire y relatif, *in* Rapport de la Commission du droit international sur les travaux de sa soixante-dixième session (2018), doc A/73/10, 156-158 [147-149 de la version anglaise], en particulier le par. 3 du commentaire: «les résolutions ne sauraient dispenser de vérifier s'il existe en fait une pratique générale qui est acceptée comme étant le droit (assortie de l'*opinio juris*)».

²⁷ (n 9).

²⁸ *Nicaragua* (n 9) 133, par. 264.

des conférences internationales auxquelles participaient les États-Unis et le Nicaragua», dont elle cite quelques exemples et ceci tient lieu de preuve de la coutume.

Curieusement, en dépit d'un certain nombre d'affaires portées devant elles ayant un lien avec l'OIT²⁹, ni la Cour actuelle ni sa devancière n'ont jamais été saisies d'affaires mettant en jeu des recommandations ou des déclarations adoptées par la Conférence internationale du Travail – alors même que l'OIT est sans doute la plus «juridicisée» des organisations internationales universelles. Mais bien que la jurisprudence de la Cour sur laquelle j'ai centré cet exposé, concerne presque exclusivement les résolutions de l'Assemblée générale et du Conseil de sécurité, le raisonnement qu'elle a suivi à leur égard (ou ses fortes affirmations) valent tout autant pour les instruments similaires émanant d'autres organisations internationales. La conclusion 12 du projet de la CDI sur la détermination du droit international coutumier le confirme: elle est formulée en des termes généraux applicables aux résolutions des organisations internationales quelles qu'elles soient.

²⁹ La CPJI et la CIJ ont rendu des avis consultatifs dans huit affaires en lien avec l'OIT, de près ou de loin. Dans quatre avis consultatifs rendus par la CPJI en 1922 et 1926, les questions appelaient une interprétation des dispositions pertinentes du Traité de Versailles, à savoir: avis consultatif, 31 juillet 1922, *Désignation du délégué ouvrier néerlandais à la troisième session de la Conférence internationale du Travail*, série B, n° 1, 8; avis consultatif, 12 août 1922, *Compétence de l'OIT pour la réglementation internationale des conditions du travail des personnes employées dans l'agriculture*, série B, n° 2, 8; avis consultatif, 12 août 1922, *Compétence de l'OIT pour l'examen de proposition tendant à l'organisation et à développer les moyens de production agricole*, série B, n° 3, 48; avis consultatif, 23 juillet 1926, *Compétence de l'OIT pour régler accessoirement le travail personnel du patron*, série B, n° 13, 6).

Dans l'avis consultatif rendu en l'affaire *Ville libre de Dantzig et Organisation internationale du Travail* (26 août 1930, série B, n° 18, 4), l'enjeu était de déterminer la capacité de Dantzig à devenir membre de l'OIT, alors que l'avis consultatif en l'affaire de *l'interprétation de la convention de 1919 concernant le travail de nuit des femmes* (15 novembre 1932, série A/B, n° 50) concernait là encore l'interprétation de dispositions conventionnelles.

Quant à elle, la CIJ a rendu deux avis consultatifs concernant la révision de décisions du Tribunal administratif de l'OIT et qui ne mettent pas davantage en jeu l'interprétation de recommandations d'organes de l'OIT aux fins de déterminer le droit international coutumier, à savoir: avis consultatif, 23 octobre 1956, *Jugements du Tribunal administratif de l'O.I.T. sur requêtes contre l'U.N.E.S.C.O.*, Rec. 1956, 77; avis consultatif, 1^{er} février 2012, *Jugement no 2867 du Tribunal administratif de l'Organisation internationale du Travail sur requête contre le Fonds international de développement agricole*, Rec. 2012, 10).

Post-scriptum

Durant les discussions qui ont suivi les diverses interventions dans le panel auquel j'ai participé, une discussion animée m'a opposé à l'ensemble des anciens Conseillers juridiques de l'OIT (et à l'actuel) au sujet de l'exclusion des réserves aux conventions internationales du travail. Avec l'accord des organisateurs, il m'a semblé intéressant de résumer ce débat.

Dès 1927³⁰, l'OIT a développé une thèse à ce sujet et l'a fermement et constamment maintenue depuis lors. Elle a été présentée avec une clarté et une vigueur particulières par Wilfred Jenks lors de la Conférence de Vienne sur les traités en 1968:

«Les réserves aux conventions internationales du travail sont incompatibles avec le but et l'objet de ces conventions. Les dispositions de procédure qui concernent les réserves sont totalement inapplicables au cas de l'OIT, en raison de sa qualité d'institution tripartite où, selon sa Constitution même, les représentants des employeurs et des travailleurs ont un statut égal à celui des représentants des gouvernements. Une grande souplesse est évidemment nécessaire lorsque l'on applique certaines conventions internationales du travail dans des circonstances extrêmement variées, mais les dispositions que, dans son application collective, la Conférence internationale du Travail juge sages et nécessaires à cette fin sont consacrées dans le texte des conventions et, si elles se révèlent mal adaptées à leur objet, sont susceptibles d'être révisées à tout moment par la Conférence selon ses procédures ordinaires. Toute autre solution détruirait le Code international du travail en tant que code de normes communes»³¹.

³⁰ Voir le Mémoire présenté par le Directeur du BIT au Conseil de la Société des Nations sur la recevabilité des réserves aux conventions générales (1927) Journal Officiel de la Société des Nations, annexe 967a, 882; voir aussi le mémorandum présenté à la CIJ en 1951 à l'occasion de la demande d'avis consultatif relatif aux *Réserves à la Convention sur le génocide C.I.J., Mémoires, plaidoiries et documents, 1951, 217, 227 et 228.*

³¹ Déclaration de Wilfred Jenks, Conseiller juridique du BIT, partiellement reproduite au par. 3) du commentaire de la directive 1.1.6 (Réserves formulées en vertu de clauses autorisant expressément l'exclusion ou la modification de certaines dispositions d'un traité) du *Guide de la pratique sur les réserves aux traités in* Rapport de la Commission du droit international, 63^{ème} session (2011) doc A/66/10/Add.1, 64. Voir aussi *ibid.* la réponse de l'OIT au questionnaire de la CDI sur les réserves aux traités, 63-64.

Je m'inscris en faux contre cette position, pour des raisons que j'ai développées dans le rapport que j'ai rédigé en tant que rapporteur spécial de la Commission du droit international des Nations Unies sur les réserves aux traités³² et que la Commission a endossées dans le *Guide de la pratique* adopté sur ce sujet en 2011³³. D'une part, aussi particulières que soient les modalités d'adoption des conventions internationales du travail, ces dernières n'en sont pas moins des traités entre États, sans que la participation de représentants non gouvernementaux à leur adoption ne modifie leur nature juridique. D'autre part, il me paraît assez évident que la possibilité que la Conférence internationale du Travail révisé une convention n'empêche nullement que celle-ci puisse prévoir la possibilité de réserves à certaines dispositions – mécanisme plus souple et maniable que la lourde procédure de révision si des adaptations se révèlent nécessaires. Et, pour ce qui est du cœur de l'argumentation traditionnelle, on ne voit pas pourquoi les trois parties prenantes ne pourraient pas se mettre d'accord sur des clauses de réserves exactement comme elles le peuvent sur tous les autres aspects du texte. En outre, et peut-être surtout, il me paraît loin d'être évident que les organisations syndicales et patronales préfèrent forcément une convention non ratifiée ou inappliquée à une convention acceptée et appliquée moyennant certaines réserves (à la formulation desquelles elles pourraient également être associées au plan national).

Malgré l'unanimité de mes éminents contradicteurs, je persiste à penser que leur attachement dogmatique à la thèse traditionnelle n'a pas lieu d'être et relève davantage de la force de l'habitude que d'une nécessité juridique ou logique.

³² Cinquième rapport sur les réserves aux traités, doc A/CN.4/508 et Add.1 à 4, *Annuaire de la Commission du droit international* (2000) 184-185, par. 157-159.

³³ *Guide de la pratique* (n 31) 65-66, par. 4 du commentaire de la directive 1.1.6.

General Assembly Action at the Final Stage of the Process of Progressive Development and Codification of International Law by the International Law Commission

Eduardo Valencia-Ospina

One year ago the International Law Commission (ILC) reached seventy years of age. The commemoration within the span of twelve months of both the ILC and ILO anniversaries is a celebration of international law, within and beyond the confines of the United Nations.

As it is well known, the ILC was established by the UN General Assembly¹ as a means to fulfill the mandate given to it under article 13(1)(a) of the UN Charter, to initiate studies and make recommendations to encourage the progressive development of international law and its codification. The ultimate responsibility for implementing the Charter mandate remains, of course, that of the parent organ, the Assembly, which is expected to discharge it by acting positively upon the recommendations of its permanent subsidiary organ, the ILC. Nevertheless, irrespective of the action or inaction of the Assembly, the work of the Commission, by itself, has played and continues to play a major role in the realization of the Charter's objective.

It is also well known that for its part the ILO, since its creation in 1919 as part of the Treaty of Versailles, has established and developed a comprehensive system of international labour standards² which are the essential legal components in an international framework which is aimed at achieving the constitutional objectives of the Organization. The standards, drawn up by representatives of governments, employers and workers, cover

¹ General Assembly resolution 174 (II) (1947) with annexed Statute.

² *Rules of the Game – An Introduction to the standards-related work of the International Labour Organization* (ILO 2019).

all matters related to work and social policy. As the ILO has itself acknowledged, 'the legal nature of the Standards means that they can be used in legal systems and administrations at the national level and as a part of the corpus of international law which can bring about greater integration of the international community'.³

Obviously, in highlighting their common vocation regarding international law in general, it is far from being my intention to equate two institutions that exist within the framework of the United Nations system, the ILO and the ILC, with their own distinctive profile in terms of origin, mandate, organization, and many other specific aspects of their functioning. Still, this presentation would likely gain from a comparative short summary description of the manner in which the ILO and the ILC carry out their respective tasks aimed at strengthening international law, with the active participation of representatives of governments of the member States of each Organization, and in the case of the ILO, also of its two other traditional constituents, employers and workers.

As explained by the ILO, once an issue is put on the agenda of a future session of the International Labour Conference, the International Labour Office prepares a report on the relevant law and practice of member States, which is circulated to the tripartite ILO constituents for comments before being discussed at the Conference. A second report is then prepared by the Office with a draft instrument for comments and subsequent discussion at the following Conference, which can amend it before it is proposed for adoption. A majority of two third of the votes is required for an international labour instrument to be adopted.⁴

As prescribed in article 19(1) of the ILO Constitution, when the Conference has decided on the adoption of proposals with regard to an item on the Agenda, it will rest with the Conference to determine whether these proposals should take the form (i) of an international convention, or (ii) of a recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at the time for a convention. Reservations are not permitted to ILO conventions.

³ *ibid* 17.

⁴ *ibid* 20.

The ILC's Statute distinguishes between two concepts, 'progressive development' and 'codification' of international law, which it defines as follows: the former as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'; and the latter as 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.⁵

While the Statute defines 'progressive development' solely in terms of the preparation of draft conventions, it envisages two further possible outcomes for its work of 'codification': (i) the publication of its final report; and (ii) a resolution of the General Assembly taking note of or adopting the report.⁶ However, as the Commission itself recognized from its early beginnings, the statutory distinction between the two concepts has proven impracticable, since work on a given topic usually involves some aspects of both processes, with the balance between the two depending on the nature of the particular topic at hand. As I had the opportunity to observe at the Congress held within the framework of the UN Decade of International Law in 1995,⁷ although formally separated in the Statute, the two processes have in fact merged into one broader concept of 'codification', which is no longer seen just as the mere transposition of 'unwritten' law into 'written law' but as a process encompassing both elements of codification and progressive development *stricto sensu*. The ILC has, thus, developed a consolidated procedure for its method of work and applied it in a flexible manner.

Central to that working method is the close relationship that exists between the ILC, a body of independent experts, and its parent organ, consisting of representatives of governments. Ever since its first session in 1949, the Commission has submitted annually to the General Assembly a report as the means to keep it informed of the work accomplished at each session. The debate held every year at the Sixth Committee and the

⁵ ILC Statute, article 15.

⁶ *ibid* article 23.

⁷ UN Office of Legal Affairs, *International Law as a Language for International Relations: Proceedings of the United Nations Congress on Public International Law* (Kluwer Law International 1995) 522-525.

ensuing resolution of the Assembly represent the concrete manifestation of that relationship.

Throughout the whole course of the ILC's work, governments are offered ample opportunity to comment on the Commission's partial or definitive products, mainly orally in the Sixth Committee. But governments may also provide in writing comments and observations on specific questions addressed to them, including evidence of State practice. Once the Commission concludes the first reading of a draft on a given topic, it again invites written comments and observations on the text, to be taken into account during the second reading. It then submits its definitive draft to the Assembly, with the corresponding recommendation as to the final form to be given to it.

While the ILC's Statute only contemplates the preparation of drafts in the form of articles,⁸ the Commission has, with increased frequency, undertaken and concluded work on drafts couched in terms of Principles, Conclusions, Guidelines or Model Clauses, or as the final report of a Study or Working Group. But the fact that those various forms are available does not mean that, in the Commission's view, conventions have become obsolete. Far from it, as the ILC's own attitude demonstrates.

In the past two decades, among the many definitive texts on diverse topics that the Commission has submitted to the Assembly, nine were drafted as articles aimed to eventually serve as the basis of international codification conventions. Since the beginning of this Millennium, and until 2014, the corresponding recommendation of the Commission, pursuant to article 23 of its Statute, has been a novel mixed formula to the effect that, as a first step, the Assembly takes note of the respective set of draft articles in a resolution and reproduces it in an annex thereto, and that at an ulterior date the Assembly considers the possibility to elaborate a convention on the basis of the draft articles in question.⁹ The Assembly has consistently endorsed such formula.¹⁰

⁸ ILC Statute, article 20.

⁹ ILC, *Yearbook of the International Law Commission* (2001, 2008, 2011, 2014) vol. II (part Two), docs A/56/10, paras 72-73; A/63/10, para 49; A/66/10, paras 85, 97; A/69/10, para 42.

¹⁰ General Assembly resolutions 56/83 (2001) and 71/133 (2016); 63/124 (2008) and 71/150 (2016); 66/99 (2011) and 72/121 (2017); 66/100 (2011); 72/122 (2017); 69/119

Significantly, however, the Commission reverted in 2016 to its original practice, when it squarely recommended to the Assembly the elaboration of an international convention on the basis of its definitive set of draft articles on the ‘Protection of Persons in the Event of Disasters’,¹¹ a topic on which I had the honor to be the ILC’s Special Rapporteur. Such an example might be followed at this year’s session, when the ILC makes a recommendation regarding the final form that its definitive draft on ‘Crimes against Humanity’ should take.

By departing from its old practice, the Commission had attempted to fall in line with the, to say the least, reluctant attitude that openly and increasingly has been shown by the Assembly towards the elaboration of international conventions based on the definitive drafts of the Commission. After all, the decision, which is eminently political, as to the final form to be given to one of its definitive drafts is not the Commission’s but entirely the Assembly’s own, on the advice of its Sixth Committee, which gives it by consensus. The Assembly’s attitude is faithfully reflected in the fact that starting in 2004 – that is to say, during the past fifteen years – no convention has been adopted by the General Assembly or under its auspices, on the basis of a definitive draft produced by the ILC. As pointed out before, the Assembly has reacted systematically to the ILC’s recommendations by periodically adopting resolutions, in general at three-year intervals, limiting itself to implement the mixed recommendatory formula utilized by the Commission, annexing or not the corresponding ILC text but repeatedly delaying, in one recent specific instance almost *ad vitam aeternam*,¹² its consideration and decision on the conventional form recommended by the Commission.

There should be no need to recall here that international conventions are the first of the three main sources of international law listed in article 38, paragraph 1, of the Statute of the International Court of Justice, which is an integral part of the UN Charter. But if recourse to that source is now becoming almost blocked given the current mood of the Assembly, the other two sources still remain operational, in particular the second, international

(2014) and 72/117 (2017).

¹¹ General Assembly resolutions 71/141 (2016) and 73/209 (2018).

¹² General Assembly resolution 72/121 (2017).

custom as evidence of a general practice accepted as law. This is of special relevance in assessing the legal impact of the Commission's work.

The Commission has, as recently as last year, had the occasion to pronounce itself on this issue, in the context of its work on 'Identification of Customary International Law'. It did so in the General Commentary to Part Five, entitled 'Significance of Certain Materials for the Identification of Customary International Law', of its final draft of Conclusions on the topic, adopted at its 70th session in 2018. I can do no better than to quote the pertinent paragraph in the ILC's report, which reads as follows:

The output of the International Law Commission itself merits special consideration in the present context. As has been recognized by the International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value, as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification; the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.¹³

The Commission further explained that 'once the General Assembly has taken action in relation to a final draft of the Commission, such as by annexing it to a resolution and commending it to States, the output of the Commission may also fall to be considered under draft conclusion 12' of the definitive text adopted.¹⁴ Conclusion 12 concerns the role that resolutions adopted by international organizations or at intergovernmental conferences may play in the determination of rules of customary international law.

¹³ ILC, *Yearbook of the International Law Commission* (2018) doc A/73/10, Chapter V, para 66, Part V (2).

¹⁴ *ibid* footnote 741.

Be it as it may, it must be recognized that the ILC, like the ILO, have fully accomplished the noble mission entrusted to them by the community of nations. Their conventional contribution has been fundamental for the purpose of strengthening the rule of law in international relations, enabling these to evolve since the Second World War from a framework of confrontation to one of cooperation. Suffice it to mention in this respect, as far as the ILC is concerned, its final drafts leading to the adoption of the Vienna Conventions on Diplomatic and Consular Relations and on the Law of Treaties. Today, however, this painstaking yet constructive process towards the achievement of multilateralism through the adoption of international conventions is being seriously threatened by the unilateral actions of some major actors in the world stage, invoking a distorted notion of 'national interest' in the exercise of their sovereignty.

Both the ILO and the ILC have played a crucial role in laying the foundations for the proper functioning of the international community in the post-war era. Given the worrisome isolationist tendencies that have recently surfaced, there is need, today more than ever, for the two institutions to continue their work of consolidating international law, which remains the sturdiest bulwark for ensuring the survival of an international society that all nations have helped build and from which all have benefited.

La contribution de l'OIT au droit des traités

*Cristina Hoss et Santiago Villalpando**

I. Introduction

Pour le juriste contemporain, la lecture de l'avis consultatif de la Cour permanente de Justice internationale sur l'*Interprétation de la convention de 1919 concernant le travail de nuit des femmes*¹ provoque une étrange sensation de déjà-vu. Dans sa réponse à la question de savoir si la convention devait s'appliquer aux femmes qui occupent des postes de surveillance ou de direction et n'effectuent pas normalement un travail manuel, la Cour se lance dans un exercice d'interprétation du traité qui reprend, presque mot pour mot, la plupart des éléments qui seront codifiés par la Convention de Vienne presque quarante ans plus tard!

La Cour y affirme tout d'abord que l'article 3 interdisant le travail de nuit, «considéré isolément, ne soulève par lui-même aucune difficulté; il est rédigé en termes généraux, exempts d'ambiguïté ou d'obscurité». La Cour, cependant, prend le soin de placer la disposition dans son contexte, notant que ses termes «ne sont en rien contredits, ni par le titre, ni par le préambule, ni par les autres dispositions de la convention». Tout de même, poursuit la Cour, il convient de se demander si la nature de la convention, en tant que convention de droit du travail, ou le fait que la réalité du travail des femmes avait évolué depuis son adoption (celles-ci occupant désormais des postes de surveillance ou de direction) ne justifiaient pas une interprétation différente (évolutive, dirait-on aujourd'hui), ce qu'elle exclut: ces motifs, dit-elle, ne

* Les idées et les opinions exprimées dans cette contribution sont celles des auteurs et ne reflètent pas nécessairement celles de la Cour internationale de Justice, de l'Organisation des Nations Unies ou de l'UNESCO.

¹ *Interprétation de la convention de 1919 concernant le travail de nuit des femmes*, C.P.J.I., avis consultatif, 15 novembre 1932, série A/B no. 50.

suffisent pas «pour soutenir que le sens naturel du texte de la convention peut être écarté». En guise de précaution, la Cour se penche malgré tout sur les travaux préparatoires, qui ne font que confirmer sa conclusion. Non, s'insurge le Juge Anzilotti dans son opinion dissidente: «je ne vois pas comment il est possible de dire qu'un article d'une convention est clair avant d'avoir déterminé l'objet et le but de la convention» (expression tellement nouvelle à l'époque que les traducteurs de la Cour peinent à la rendre en anglais, se référant à «the subject and aim of the convention»). Pour lui, une interprétation correcte de la disposition, à la lumière de l'objet et du but de la convention, porte à conclure que celle-ci s'applique exclusivement aux ouvrières.

L'étonnante modernité de ce débat presque centenaire nous rappelle à quel point les discussions contemporaines sur le droit international ont des racines profondes. Éblouis par nos «phénomènes de mode»² et peut-être par un certain complexe de supériorité du juriste moderne, nous avons tendance à oublier que les termes employés de nos jours pour faire l'exégèse de notre matière se réfèrent souvent, derrière le charme de leur nouveauté, à des concepts bien établis et qui ont occupé la réflexion des géants sur les épaules desquels nous œuvrons.

D'où l'intérêt de revenir, à l'occasion de la célébration de son centenaire, à la contribution de l'Organisation internationale du Travail (OIT) au droit des traités. À certains égards, celle-ci est bien connue, dans sa dimension historique: la jurisprudence de la Cour permanente, dont la colonne vertébrale est constituée par les six demandes d'avis consultatif qui lui ont été adressées concernant l'interprétation de la Constitution de l'OIT et de la convention n° 4, fut l'un des facteurs déterminants qui ont mené Hersch Lauterpacht (écrivant sous le couvert de l'anonymat un mémorandum du Secrétaire général portant *Examen d'ensemble du droit international en vue des travaux de codification de la Commission du droit international*) à conclure que le droit des traités était «mûr pour codification»³. Quant au

² Expression empruntée à Serge Sur, «Les phénomènes de mode en droit international», in *Le droit international et le temps*, Société française pour le droit international (Pédone 2001) 49, dont nous ne partageons pas, au demeurant, l'analyse selon laquelle «l'idéalisme juridique mène à la dépression» (65).

³ Document A/CN.4/1/Rev.1, 1949, p. 59. Un anonymat tout relatif si l'on considère que l'Examen est inclus dans le recueil des écrits de Hersch Lauterpacht publiés en 1970; voir Hersch Lauterpacht, *International Law Collected Papers* (Cambridge UP 1970).

corpus juridique auquel a donné lieu l'activité de l'Organisation en matière de droit du travail, il fait l'objet d'autres interventions plus spécialisées dans le cadre de cet ouvrage. Nous n'y reviendrons pas.

Cette contribution se penchera plutôt sur les techniques qui ont marqué l'œuvre conventionnelle de l'OIT, depuis désormais un siècle, dans la formation, l'interprétation et l'application des traités. Nous les analyserons à la lumière de quatre «phénomènes de mode» du débat contemporain sur le droit international, à savoir: (1) la participation des acteurs non-étatiques (*non-State actors*) à l'élaboration des normes conventionnelles; (2) les critères régissant le choix de l'adoption de normes de droit dur (*hard law*) ou de droit mou (*soft law*); (3) le soi-disant «droit administratif global» et les questions connexes de gouvernance globale (*global governance*); et (4) la question de l'unité de l'ordre juridique international face aux risques allégués de fragmentation. L'objectif est celui de montrer le rôle d'avant-garde de l'OIT dans ses efforts pour faire face à ces phénomènes, que l'on retrouve, sous des avatars différents, dans l'ensemble de son travail de création normative.

II. Le rôle d'avant-garde de l'activité normative de l'OIT

En 1919, l'OIT fut le premier mécanisme collectif stable de création normative par le biais de traités multilatéraux: sa Constitution établit une procédure qui permet à ses institutions de fonctionner d'une manière similaire à un organe législatif travaillant pour la mise en place d'un *corpus* systématique et cohérent de normes conventionnelles⁴.

La marque de fabrique de l'OIT est sans aucun doute l'institutionnalisation de la table de négociation. Le rôle premier et traditionnel des organisations internationales jusqu'alors (et, à maints égards, depuis) n'était pas nécessairement celui d'être des créatrices de normes. Dans le cadre du droit du travail, cependant, l'idée s'est rapidement imposée non seulement que le mandat normatif devait avoir une place centrale dans les buts de la nouvelle organisation, mais également que la magnitude de la tâche à accomplir requérait une adaptation et une simplification des mécanismes d'adoption

⁴ Voir notamment Georges Scelle, *L'Organisation internationale du Travail et le BIT* (Sirey 1930).

des traités multilatéraux aux fins d'atteindre pleinement les buts de contribuer à la paix internationale par la justice sociale. Ce mécanisme particulier, dont nous examinerons certaines caractéristiques ci-après et qui incorpore notamment la procédure d'adoption des conventions par une majorité des deux tiers (au lieu de l'unanimité régnante jusqu'alors), correspond à la vocation législative et non transactionnelle des instruments adoptés par l'OIT.

Cette approche est le reflet d'une certaine perception du rôle de l'Organisation par ses fondateurs. Celle-ci avait pour identité et vocation d'aborder la création normative d'une manière qui ne fût pas dogmatique: elle ne pouvait se limiter à trouver des solutions communes, mais devait adopter une approche pragmatique, et si nécessaire «peu conventionnelle», pour atteindre ses buts. Depuis lors, maintes autres organisations (l'Organisation des Nations Unies elle-même et les institutions spécialisées de l'après-guerre, mais également d'autres organisations ayant une composante normative dans leur mandat) ont été confrontées à des besoins similaires, choisissant parfois des solutions qui se placent dans la lignée de celles de l'OIT ou cherchant dans d'autres cas des approches différentes qui pourraient aujourd'hui inspirer leur aînée. En tout état de cause, l'influence de l'OIT, institution précurseuse de la création normative en droit international, s'est faite sentir.

III. Les acteurs non étatiques dans l'activité normative de l'OIT

Dès sa création, l'OIT a été confrontée à la question de savoir quelle place il conviendrait de donner aux acteurs non-étatiques dans le processus de création normative internationale. Vu l'objectif de justice sociale poursuivi par l'Organisation et les événements historiques qui avaient précédé sa création, il ne faisait aucun doute que la «société civile», à savoir les employeurs et les employés, devaient avoir un rôle à jouer, et ce d'autant plus que les groupes intéressés étaient déjà organisés, souvent dans des réseaux transnationaux. Il restait à en déterminer la forme, et l'Organisation choisit une solution toute singulière: la fameuse structure tripartite reflétée au sein des deux organes principaux (la Conférence et le Conseil d'administration). Cette structure, qui permet une participation directe de la société civile dans la négociation et adoption des normes internationales, y compris de traités multilatéraux qui engageront ensuite les États sur le plan international, n'a pas trouvé beaucoup d'imitateurs par la suite: elle reste une spécificité de

l'OIT. Malgré les multiples appels de la société civile en dehors de l'OIT cherchant à être associée à l'élaboration des normes internationales et leur mise en œuvre, leur rôle reste, dans la plupart des cas, aux marges des négociations, en tant qu'observateurs ou lobbyistes n'ayant pas accès aux coulisses de l'œuvre normative.

S'il n'a donc pas fait école, le tripartisme des organes de l'OIT n'en reste pas moins une expérience qui mériterait peut-être d'être prise en compte à la lumière des appels contemporains de la société civile qui réclame une participation plus directe dans la négociation des traités multilatéraux, dans des matières comme le droit de l'environnement ou les droits de l'homme. La structure tripartite n'a pas fait obstacle à la création normative de l'OIT et a certainement permis à l'Organisation de bénéficier pleinement des apports et du soutien de ceux qui sont les plus directement intéressés par les conventions concernées: en ce sens, elle constitue un succès. Cependant, cette forme d'intégration de la société civile dans les travaux de l'Organisation s'est faite au prix d'une certaine rigidité.

Une faiblesse du système est qu'il cloisonne la participation de la société civile à des partenaires sociaux préétablis, à savoir les organisations des travailleurs et celles des employeurs, et qu'il leur assigne un rôle institutionnel rigide au sein de la procédure d'adoption de l'instrument normatif. Or, si ce format était probablement adapté à la réalité du monde du travail et au cérémonial de l'adoption d'une convention d'il y a un siècle, il ne répond plus réellement à la multiplication des acteurs sociaux dans la société civile moderne et aux exigences de dynamisme qui s'imposent dans la production normative d'aujourd'hui. Ainsi, l'OIT pourrait peut-être s'intéresser à de nouvelles formes de participation des acteurs non-étatiques dans les négociations conventionnelles de notre époque. Par exemple, la Conférence des Nations Unies pour la négociation d'un instrument contraignant pour l'interdiction des armes nucléaires a permis la participation et la contribution de représentants de la société civile, qui pouvaient soumettre à la Conférence des documents écrits pour circulation, sans droit de vote. De manière similaire (et même plus avancée), la négociation de l'Accord régional sur l'accès à l'information, la participation publique et la justice environnementale en Amérique latine et les Caraïbes (connu comme Accord d'Escazú) a autorisé les représentants d'organisations de la société civile non seulement à prendre la parole au cours des débats, mais aussi à faire des propositions (considérées

dans les négociations lorsque soutenues par un État membre) et à participer aux travaux du bureau du comité de négociation.

Une certaine rigidité se retrouve également dans le régime spécifique des réserves à l'OIT, qui est un gage direct de la structure tripartite. Très tôt, en 1920, le Bureau international du Travail a estimé que les réserves aux conventions de l'Organisation ne sauraient être admises⁵. Cette position s'explique, d'une part, par la participation des trois parties intéressées au mécanisme d'adoption: l'équilibre des intérêts qui résulte de ce processus et trouve son expression dans le texte de la convention n'aurait pas pu être proprement sauvegardé si les gouvernements, agissant de manière unilatérale au moment de la ratification, avaient pu assortir celle-ci de réserves. Elle se justifie, d'autre part, par les particularités du mandat normatif de l'Organisation: l'objectif de mettre en place une véritable législation internationale qui réponde au but de progrès social établi par la Constitution de l'OIT requiert une cohérence et une unité du *corpus* normatif qui seraient frustrées par les réserves; c'est plutôt aux organes directeurs de l'Organisation de répondre au travers de leur activité normative à de nouvelles exigences, si elles venaient à surgir⁶.

Cette approche a été réitérée à plusieurs reprises, et demeure incontestée au sein de l'OIT. Dans son exposé écrit dans le cadre de la procédure consultative devant la Cour internationale de Justice concernant les *Réserves à la convention pour la prévention et la répression du crime de génocide*, l'Organisation déclarait, par exemple:

«The constitutional practice of the International Labour Organisation indicates the context in which the question of the admissibility of reservations to international labour conventions has arisen. It has been the consistent view of the International Labour Organization, since its establishment, that reservations are not admissible. This view is based upon and supported by the consistent practice of the International Labour Organisation and by the practice of the League of Nations during the period from 1920 -1946 when the League was responsible for the registration of ratifications of international labour conventions [...] In each case in which a ratification subject to a reservation has been presented

⁵ Exposé écrit de l'OIT, *Réserves à la convention pour la prévention et la répression du crime de génocide*, C.I.J. Mémoires 1951, 228, par. 19.

⁶ *ibid* par. 17.

for registration, the inadmissibility of reservations to international labour conventions has been drawn to the attention of the government concerned; in each case the government concerned has concurred in the view put forward by the International Labour Office; in certain cases, the proposed reservations have subsequently been withdrawn and the conventions have remained unratified; in no case has a ratification been registered subject to a substantive reservation»⁷.

Le Conseiller juridique de l'Organisation, C. Wilfred Jenks, est intervenu dans le même sens lors de la conférence de Vienne sur le droit des traités, en 1968. Selon lui,

«les réserves aux conventions internationales du travail sont incompatibles avec le but et l'objet de ces conventions. Les dispositions de procédure qui concernent les réserves sont totalement inapplicables au cas de l'OIT, en raison de sa qualité d'institution tripartite où, selon sa Constitution même, les représentants des employeurs et des travailleurs ont un statut égal à celui des représentants des gouvernements. Une grande souplesse est évidemment nécessaire lorsque l'on applique certaines conventions internationales du travail dans des circonstances extrêmement variées, mais les dispositions que, dans son application collective, la Conférence internationale du Travail juge sages et nécessaires à cette fin sont consacrées dans le texte des conventions et, si elles se révèlent mal adaptées à leur objet, sont susceptibles d'être révisées à tout moment par la Conférence selon ses procédures ordinaires. Tout autre solution détruirait le Code international du travail en tant que code de normes communes»⁸.

⁷ *ibid* 227-228, par. 18. L'exposé contient un récit exhaustif de la pratique des Etats Membres en matière de réserves avant de conclure: «It is for the Court to consider how far the principles which have been followed in respect of international labour conventions have any bearing upon or application to the problems which may arise in respect of conventions adopted or approved by the General Assembly or by organs of other international organizations which may exercise pre-legislative functions similar in general character to those entrusted to the International Labour Office» (par. 26).

⁸ *Conférence des Nations Unies sur le droit des traités, Documents officiels, première session, Vienne, 26 mars-24 mai 1968, Comptes rendus analytiques des séances plénières et des séances de la Commission plénière, Commission plénière, 7^{ème} séance, 41, par. 11, cité par le Rapporteur spécial M. Alain Pellet dans son Dixième Rapport sur les réserves aux traités: «En ce qui concerne les traités conclus dans le cadre des organisations internationales, le meilleur*

L'OIT a tout de même adopté d'autres mécanismes introduisant une certaine flexibilité aux États membres au moment de souscrire à une convention par la ratification: dans le texte de certaines conventions, la Conférence autorise, voire oblige, les États à faire des déclarations connexes délimitant la portée des obligations conventionnelles qu'ils acceptent, selon un mécanisme d'*opting-out*. Le Bureau international du Travail a pris la position que ces déclarations «font [...] partie des clauses de la Convention qu'a approuvées la Conférence lorsqu'elle a adopté le texte de celle-ci, et ne sont comparables à des réserves, ni d'un point de vue juridique ni d'un point de vue pratique»⁹. Dès lors, elles ne seraient pas soumises au régime général des réserves, codifié notamment par la Convention de Vienne.

Ce point de vue n'est pas sans susciter des critiques. Selon la Commission du droit international, par exemple, le raisonnement tenu par le Bureau international du Travail «réflète une tradition respectable mais n'emporte guère la conviction», et ce pour trois raisons. Tout d'abord, dit la Commission, le fait que les conventions du travail soient adoptées selon une procédure particulière (notamment avec la participation de représentants non gouvernementaux) ne modifierait pas leur nature juridique en tant que traités entre États. Ensuite, la Commission considère que la possibilité pour la Conférence de réviser une convention n'est pas pertinente pour déterminer la nature juridique des déclarations unilatérales faites par les États en application d'une clause d'exclusion (*opting-out*). Enfin, la Commission a dit que la position traditionnelle soutenue par l'Organisation répond à une «conception restrictive» de la notion de réserve qui n'est pas celle qui est retenue par les Conventions de Vienne et le Guide de la pratique de la Commission¹⁰.

exemple d'exclusion (supposée) des réserves est celui de l'Organisation internationale du Travail dont la pratique constante est de ne pas accepter le dépôt d'instruments de ratification des conventions internationales du travail lorsque ces instruments sont assortis de réserves» (A/CN.4/558 et Add. 1-2, 157) et dans le Rapport de la CDI sur les Travaux de sa cinquante-deuxième session, Annuaire de la Commission du droit international (2000) vol II (2^{ème} Partie) 114-115.

⁹ Exposé (n 5) 233-234, par. 23. «They are therefore part of the terms of the convention as approved by the Conference when adopting the convention and both from a legal and from a practical point of view are in no way comparable to reservations». Traduction française dans Annuaire (n 8) 115.

¹⁰ *Guide de la pratique sur les réserves aux traités*, commentaire à la directive 1.1.5, para 4, dans Rapport de la Commission du droit international, 63^{ème} session (2011), doc NU A/66/10/Add.1, 65-66.

Quelle que soit l'orthodoxie terminologique de l'OIT, l'argument qui souligne le besoin de sauvegarder l'unité normative en matière du droit du travail mérite une certaine attention. Le fait est que l'Organisation s'est donnée les moyens de garantir l'intégrité de sa fonction normative et la pleine participation de ceux qui sont directement intéressés par les normes: ses mécanismes bien rôdés de production conventionnelle sont ce que le droit international a de plus proche à une véritable procédure législative. Cette préoccupation pour l'intégrité normative siérait bien dans d'autres domaines du droit international où les engagements des États sont devenus tellement lacunaires, de par le jeu des réserves, qu'ils en deviennent parfois méconnaissables.

IV. La soft law et la normativité variable au sein de l'OIT

La rigidité de l'Organisation dans la préservation de sa production conventionnelle doit également être comprise à la lumière de l'ensemble de son mandat normatif. Celui-ci, en effet, ne se limite pas à la forme conventionnelle: l'article 19 de la Constitution établit que, lorsqu'elle est appelée à se prononcer pour l'adoption de propositions, la Conférence doit déterminer si celles-ci devront prendre la forme d'une convention internationale, ou bien d'une recommandation «lorsque l'objet traité ou un de ses aspects ne se prête pas à l'adoption immédiate d'une convention». En d'autres termes, l'Organisation a une approche tout à fait pragmatique de son mandat de législation sociale où la normativité formelle des conventions trouve son complément, lorsque cela est nécessaire, dans la normativité plus informelle des recommandations¹¹.

Voilà qui place l'OIT une fois de plus à l'avant-garde d'un phénomène de normativité variable qui nous est aujourd'hui bien connu et que nous

¹¹ On note néanmoins aussi des voix critiques à l'égard, notamment, de la pratique normative actuelle d'adoption en parallèle de recommandations et de conventions qui portent sur le même sujet. De même, l'effet escompté des recommandations, qui consisterait à déclencher un processus normatif par la suite, n'est pas toujours réalisé. Ainsi a-t-on suggéré que l'OIT devra peut-être «opérer quelques changements dans ses choix en matière de politique normative et réaliser que le cumul de normes contraignantes et non-contraignantes sur tous les sujets qu'elle choisit faire l'objet de normes, n'est pas une absolue nécessité»; voir Georges Politakis et Kroum Markov, «Les recommandations internationales du travail: instruments mal exploités ou maillon faible du système normatif?» in Jean-Claude Javillier et Bernard Gernigon (dir.), *Les normes internationales du travail: un patrimoine pour l'avenir – Mélanges en l'honneur de Nicolas Valticos* (BIT 2004) 522.

classons dans notre terminologie moderne – non sans ambiguïté – sous les termes de *hard law* et *soft law*. Les recommandations de l'OIT appartiennent en effet à la même famille de ces instruments modernes sans valeur contraignante qui prolifèrent dans notre matière sous différentes appellations: déclarations, orientations, directives, bonnes pratiques, principes, etc. Ceux-ci permettent aux États de faire preuve de bonne volonté dans la poursuite de certains buts, mais également, en toute bonne foi, d'orienter leur politique sans pour autant s'engager juridiquement et craindre des conséquences en cas de non-respect des dispositions.

Ceci, d'ailleurs, n'a pas forcément pour effet de diminuer la force normative de l'œuvre de l'OIT. Comme l'indiquait Michel Virally, dans son article de 1956 sur la valeur juridique des recommandations, «la sanction [des recommandations] restera encore longtemps celle de l'opinion publique mondiale. On aurait tort d'en sourire. Les gouvernements [...] savent déjà combien ils doivent en tenir compte et, s'ils se résignent souvent à l'affronter, ils n'en éprouvent pas moins tout le poids»¹².

Dans l'univers hétéroclite de la *soft law*, les recommandations de l'OIT ont tout de même une particularité: elles sont assorties de procédures d'adoption et de suivi spécifiques et impliquent même certaines obligations pour les États membres. Les recommandations sont, par exemple, adoptées avec une majorité des deux tiers, elles sont authentifiées suivant la même procédure, requérant la signature conjointe du Président de la Conférence internationale du Travail et du Directeur général, et elles doivent même être déposées en deux exemplaires au Bureau international du Travail et auprès du Secrétaire général des Nations Unies. D'un point de vue formel et procédural, en d'autres termes, elles partagent toutes les caractéristiques d'un instrument conventionnel. Les recommandations doivent également être communiquées aux États, qui s'engagent à les soumettre, dans des délais précis, à l'autorité ou aux autorités dans la compétence desquelles rentre la matière, en vue de les transformer en loi ou de prendre des mesures d'un autre ordre. Qui plus est, les Membres sont tenus d'informer le Directeur général des mesures prises pour soumettre la recommandation à leurs autorités, en lui communiquant tous renseignements pertinents, et, par la suite,

¹² Michel Virally, «La valeur juridique des recommandations des organisations internationales» (1956) 2 *Annuaire français de droit international* 96.

de continuer de faire rapport périodiquement à celui-ci sur l'état de leur législation et sur leur pratique concernant la question qui fait l'objet de la recommandation¹³.

Si la Constitution s'empresse de préciser que «les Membres ne seront soumis à aucune autre obligation», il n'en reste pas moins qu'un tel mécanisme renforce la force normative des recommandations de l'OIT. D'une part, les procédures détaillées imposées par la Constitution requièrent, pour l'Organisation, un ordonnancement soigné de sa production normative, même en dehors du cadre normatif: la Conférence se doit de déterminer clairement la nature de l'instrument qu'elle adopte, puisque celle-ci a une signification précise du point de vue juridique et la liste des recommandations adoptées doit être maintenue méticuleusement dans la mesure où elle permettra le suivi périodique. En soi, il s'agit déjà d'une matière dans laquelle l'OIT pourrait donner des leçons à d'autres organisations, y compris l'ONU elle-même, où l'univers normatif est souvent labyrinthique. D'autre part, les obligations de communication et de faire rapport qui incombent aux États, bien que limitées, ont certainement pour effet de favoriser la mise en œuvre des recommandations sur le plan interne. Si ce mécanisme renforcé de suivi a fait quelques rares émules au sein de la famille des Nations Unies (par exemple, à l'UNESCO), on pourrait se demander s'il ne serait pas utile pour d'autres de le considérer comme un moyen d'assurer une certaine organisation dans leur œuvre normative.

V. Une global governance à l'OIT?

L'OIT a également introduit, dans son système normatif, un certain nombre de mécanismes de contrôle. Ceux-ci incluent, notamment, une procédure régulière fondée sur l'examen de rapports sur l'application des normes par une Commission d'experts (depuis 1927) et par une Commission tripartite, ainsi que des procédures particulières de réclamation et de plainte sur l'application de conventions ratifiées¹⁴. En ce sens, l'Organisation a été pionnière dans une matière qui est aujourd'hui centrale dans le droit des traités, à savoir celle du suivi de la mise en œuvre des engagements conventionnels, et

¹³ Constitution de l'OIT, article 19.

¹⁴ Nicolas Valticos, «Un système de contrôle international: La mise en œuvre des conventions internationales du travail» (1968) 123 Recueil des cours 311-400.

qui lui donne, en sus de son mandat quasi-législatif, un rôle qui s'apparente aux fonctions exécutive et quasi-judiciaire. En cela, l'Organisation fournit un exemple précoce de phénomènes qu'une partie de la doctrine contemporaine tente de décrire sous l'égide du concept de droit administratif global ou de *global governance*.

En l'absence d'un pouvoir exécutif ou judiciaire global, le système de l'OIT a, ici encore, adopté une approche pragmatique fondée sur une certaine institutionnalisation du suivi de la mise en œuvre des engagements conventionnels, voire de la légalité des comportements étatiques sous l'égide des conventions. Certes, le droit international a grandement évolué depuis lors dans d'autres matières, avec les mécanismes de suivi et de réclamation, de comités d'experts, la mise en place d'organes judiciaires internationaux spécialisés, le suivi de la mise en œuvre des conventions par des conférences d'États parties, soutenues par des organes spécialisés, et même des mécanismes de «*compliance*». Cela dit, la plupart des éléments qui composent ces mécanismes modernes se retrouvent dans le système de l'OIT, qui a su combiner les mécanismes de suivi (par l'examen des rapports) avec des procédures particulières de réclamation et de plainte sur l'application des engagements conventionnels, ou l'intervention des organes intergouvernementaux (et même tripartites) avec celui de commissions d'experts indépendants. Par ce biais, l'Organisation a proposé non seulement une institutionnalisation de la création des normes en matière du droit du travail, mais également celles de fonctions de mise en œuvre et quasi-judiciaire.

Le système de contrôle de l'OIT est conçu pour permettre le plus grand ralliement d'acteurs dans la mise en œuvre des obligations conventionnelles. Tout d'abord, les États sont tenus de soumettre les projets de conventions (tout comme ceux de recommandations, tel qu'indiqué ci-dessus) aux autorités nationales compétentes en vue de leur adoption. Par la suite, la ratification d'une convention engendre l'obligation pour l'État de soumettre des rapports périodiques sur la mise en œuvre. Les différents acteurs offrent leurs commentaires sur ces rapports, fournissant ainsi à l'Organisation des informations complémentaires pour son examen de la situation concernant chaque État.

Ce système, déjà relativement contraignant pour l'État, est complété par le rôle de la Commission d'experts indépendants pour l'application des conventions et recommandations. Celle-ci se réunit annuellement et rend

un rapport dans lequel elle peut faire des observations sur les difficultés dans l'application de conventions particulières. Ce rapport est alors présenté à la session de la Conférence internationale du Travail, où il est examiné par la Commission tripartite de l'application des normes. Enfin, celle-ci adopte ses conclusions sur les mesures à prendre. Par ailleurs, la Commission d'experts peut également s'adresser directement aux gouvernements pour demander des explications sur des questions plus techniques de mise en œuvre.

A cela s'ajoutent les procédures spéciales de réclamations¹⁵ et de plaintes¹⁶. Le dépôt d'une plainte peut déclencher la conduite d'une enquête par une commission de trois membres indépendants qui a pour tâche d'établir d'éventuels manquements et, s'il y a lieu, de faire des recommandations¹⁷. Dans ce contexte, il est utile de mentionner en particulier la procédure spéciale instituée en 1951 en matière de liberté syndicale. Sous ce mécanisme, le Comité de la liberté syndicale est appelé à examiner des plaintes reçues concernant des violations alléguées de droits syndicaux. Depuis sa création, ce Comité a examiné plus de 3300 cas¹⁸ et ses recommandations jouissent d'une grande autorité (selon les statistiques pour l'année 2018, le pourcentage des recommandations qui sont suivies s'élève à 46 pour cent).

Cela dit, cette multiplicité de tâches assumées par l'Organisation en relation avec la production normative n'est pas sans poser de problèmes, notamment en termes d'efficacité. Le nombre de rapports reçus, combiné avec le caractère hautement technique des questions à traiter et la limitation des ressources pour ce faire, pose un important défi pour la durabilité des systèmes de contrôle.

Aussi, si le nombre de rapports reçus par la Commission d'experts était de 180 en 1927, ils étaient près de 3000 en 2004¹⁹. En d'autres termes, si l'augmentation du nombre des conventions adoptées par l'OIT et des

¹⁵ Constitution de l'OIT, articles 24 et 25.

¹⁶ *ibid*, articles 26 à 34. Cette procédure pouvant culminer dans une saisine de la Cour internationale de Justice.

¹⁷ Le rapport le plus récent en date étant le rapport du 17 septembre 2019 de la Commission d'enquête constituée en 2018 sur une plainte déposée contre la République bolivarienne du Venezuela <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_722037.pdf>.

¹⁸ Comité de la liberté syndicale, rapport annuel, GB.335/INS/13 (Add.) 18.

¹⁹ Eric Gravel, «Les mécanismes de contrôle de l'OIT: bilan de leur efficacité et perspectives d'avenir» *in* Javillier (n 11) 9.

ratifications reçues est certainement un développement dont on ne peut que se réjouir, il est certain qu'il comporte le risque collatéral de mener à un entassement de cas auprès du système de contrôle et de supervision. L'OIT fait d'ailleurs face, de nos jours, à un arriéré considérable dans le traitement des dossiers sous les mécanismes susmentionnés, qui ne cesse de s'accumuler²⁰.

Or, le système de contrôle reste un élément indispensable pour la mise en œuvre des normes internationales en matière de droit du travail, un élément qui rend «vivant» et «palpable» l'engagement des États. Dès lors, face à un système qui est indubitablement en surchauffe, une réforme envisageant sa rationalisation ne ferait qu'accroître l'autorité de l'OIT en la matière.

VI. L'unité de l'activité normative de l'OIT face aux risques de fragmentation

De par l'ampleur de son activité normative, l'OIT a été confrontée assez tôt aux risques de fragmentation du *corpus* conventionnel en matière de droit du travail et a pris des mesures d'avant-garde pour y faire face. Le débat sur la fragmentation est un autre des «phénomènes de mode» en droit international. Comme l'expliquait Pierre-Marie Dupuy dans l'introduction de son cours général à l'Académie de droit international de La Haye: «L'ordre juridique international connaît [...] un phénomène constant d'expansion. On veut désigner par là à la fois l'extension de son champ d'application et la complexification des techniques de sa mise en œuvre. Il en résulte un problème nouveau. C'est celui du maintien de son unité, perçue à la fois du point de vue formel et matériel»²¹.

Compte tenu de la multiplication des conventions et recommandations, ainsi que des mutations du monde du travail, il est apparu nécessaire pour l'OIT de conduire périodiquement des procédures de révision des normes internationales adoptées sous son égide. Vu qu'il n'était pas initialement

²⁰ Francis Maupain, «Une Rolls Royce en mal de révision: L'efficacité du système de supervision de l'OIT à l'approche de son centenaire» (2010) 114 *Revue Générale de Droit International Public* 465.

²¹ Pierre-Marie Dupuy, «L'unité de l'ordre juridique international» (2002) 297 *Recueil des cours* 39.

possible de les abroger formellement, le Conseil d'administration de l'OIT a considéré qu'il était possible de les «endormir» dès lors qu'elles étaient identifiées comme étant désuètes.

Aujourd'hui, à la suite d'un amendement constitutionnel entré en vigueur en 2015, il est possible d'abroger les conventions²². Tout effet juridique étant dès lors terminé, les États ne sont plus dans l'obligation de soumettre de rapports périodiques et leur conduite n'est plus susceptible d'être soumise à l'examen de la Commission d'experts. Cette initiative innovante contribue considérablement à assurer l'intégrité et la cohérence de l'œuvre normative de l'OIT. L'Organisation continue à œuvrer dans la conviction que la désuétude de certaines conventions pourrait non seulement causer un désordre normatif, mais également porter atteinte à l'autorité du système normatif dans son ensemble. En d'autres termes, la cohérence et l'efficacité du système normatif international en matière de droit du travail sont considérés comme allant de pair.

Dans la nouvelle procédure entrée en vigueur avec cet amendement constitutionnel, un groupe de travail tripartite du mécanisme d'examen des normes (*standards review mechanism*) a été créé, chargé de faire en sorte que le *corpus* normatif soit solide et adapté au monde du travail. Les principes qui doivent guider le travail de ce groupe de travail, établis par le Conseil d'administration, reflètent bien le souci de cohérence, d'unité normative et de sécurité juridique quant au contenu des normes²³.

Ce travail d'envergure semble être sur une bonne voie, puisqu'en 2017 la Conférence internationale du Travail a décidé l'abrogation de quatre conventions internationales du travail et le retrait de deux conventions

²² Nouveau paragraphe 9 de l'article 19 de la Constitution de l'OIT, adopté en 1997 et entré en vigueur en 2015 suite à la ratification par deux tiers des États membres dont cinq des dix Membres représentés au Conseil d'administration en qualité de Membres ayant l'importance industrielle la plus considérable.

²³ GB.325/LILS/3 par. 13: «Les principes et considérations ci-après guident le Groupe de travail tripartite du MEN dans l'accomplissement de sa mission: (a) un cadre d'action cohérent, intégré aux mécanismes normatifs de l'OIT; (b) un corpus de normes clairement défini, solide et à jour, aux fins de la protection des travailleurs et compte tenu des besoins des entreprises durables; (c) l'importance de la clarté, de la transparence et de la cohérence; (d) l'adoption des décisions par consensus; (e) la souplesse adéquate du mécanisme, l'évaluation régulière et la possibilité d'apporter des modifications si nécessaire; (f) des négociations de bonne foi et en toute confiance, et l'adhésion aux objectifs du MEN».

supplémentaires²⁴. Plus récemment, en 2018, la Conférence a décidé l'abrogation de six autres conventions et le retrait de trois recommandations²⁵. En outre, en vue de la cinquième réunion du groupe de travail du mécanisme d'examen des normes, le groupe avait demandé au Conseiller juridique de préparer une nouvelle étude sur la procédure de révision des normes pour faciliter ses discussions²⁶. Le but est de permettre une adaptation plus rapide des normes internationales, qui aille de pair avec l'évolution du monde du travail, au travers d'une procédure simplifiée de révision, qui serait plus efficace que la procédure bien plus longue, laborieuse et incertaine de nouveaux instruments normatifs.

VII. Conclusion

Dans *Le guépard* de Giuseppe Tomasi di Lampedusa, Tancredi, le neveu du protagoniste, membre d'une famille de la noblesse sicilienne faisant face aux turbulences du *Risorgimento* italien, s'exclame: «Il faut que tout change pour que rien ne change».

Pour le juriste contemporain, le droit des traités est une matière, marquée par la codification onusienne de 1969, qui ne cesse de changer pour faire face aux défis du monde actuel. La participation de la société civile à

²⁴ Conférence internationale du Travail, 106ème session (2017), rapport ILC.106/VII/2, Abrogation de la convention (no 4) sur le travail de nuit (femmes), 1919; Abrogation de la convention (no 15) sur l'âge minimum (routiers et chauffeurs), 1921; Retrait de la convention (no 28) sur la protection des dockers contre les accidents, 1929; Abrogation de la convention (no 41) (révisée) du travail de nuit (femmes), 1934; Retrait de la convention (no 60) (révisée) sur l'âge minimum (travaux non industriels), 1937; Abrogation de la convention (no 67) sur la durée du travail et les repos (transports par route), 1939 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_543492.pdf>.

²⁵ Conférence internationale du Travail, 107ème session (2018), rapport ILC.107/VII/2, Convention (no 21) sur l'inspection des émigrants, 1926; la convention (no 50) sur le recrutement des travailleurs indigènes, 1936; la convention (no 64) sur les contrats de travail (travailleurs indigènes), 1939; la convention (no 65) sur les sanctions pénales (travailleurs indigènes), 1939; la convention (no 86) sur les contrats de travail (travailleurs indigènes), 1947; la convention (no 104) sur l'abolition des sanctions pénales (travailleurs indigènes), 1955; la recommandation (no 7) sur la durée du travail (pêche), 1920; la recommandation (no 61) sur les travailleurs migrants, 1939, et la recommandation (no 62) sur les travailleurs migrants (collaboration entre Etats), 1939.

²⁶ Document de référence 2: *Révision des normes internationales du travail*, Cinquième réunion du Groupe de travail tripartite du MEN (2019) <www.ilo.org/global/standards/international-labour-standards-policy/WCM_715804/lang-fr/index.htm>.

la négociation de traités multilatéraux, l'agencement entre les instruments de différents degrés de normativité formelle, le suivi effectif de la mise en œuvre des engagements conventionnels ou les risques de conflits de normes face à l'expansion du droit international sont autant de défis qui sont souvent invoqués dans les fors internationaux et auxquels on cherche à donner des solutions innovantes.

Pourtant, ces défis sont, à maints égards, les mêmes auxquels l'OIT a été confrontée dès son origine, en raison de l'ambition de son mandat normatif déjà centenaire. L'originalité de la Constitution de l'Organisation a été de proposer l'établissement d'un mécanisme qui permette une réglementation, à la fois exhaustive et dynamique, du droit international du travail, tout en maintenant l'unité et la cohérence du *corpus* juridique. Sa structure tripartite a permis l'intégration des préoccupations des destinataires dans la négociation des conventions, son agencement des conventions et recommandations a permis de donner des instruments flexibles aux organes directeurs dans l'exécution du mandat normatif, des mécanismes précurseurs ont été mis en place pour assurer le suivi de la mise en œuvre, et d'autres ont permis d'assurer l'adaptation des normes aux exigences changeantes de la société. Au lieu de réinventer la roue, il conviendrait certainement de mettre à profit cette expérience unique de l'OIT, qui autant dans ses défauts que dans ses réussites, peut servir de repère à nos débats actuels sur l'état du droit des traités et son évolution future.

IV

OF IMPLEMENTATION AND COMPLIANCE: PAST AND FUTURE OF INTERNATIONAL SUPERVISION



The ILO and International Judicial Mechanisms: A Story of Control and Trust

*Laurence Boisson de Chazournes**

I. Introduction

The notion of control is linked to the respect for and the implementation of international law. It includes a broad array of mechanisms and tools, which include, inter alia, reporting and alert mechanisms, complaints mechanisms, fact-finding, peer-pressure as well as ad hoc and permanent judicial mechanisms.¹ Various terms are used to express the idea of control – such as supervision, compliance, implementation or enforcement – but they all aim at the same objective: ensuring effective respect of the law by member States. It is quite remarkable that the ILO Constitution placed a special focus on effectiveness since its establishment.² In this sense, the ILO is unique in many respects. Since the very inception of the Organization, one of its key features has been the emphasis placed on normative activities as well as on ensuring respect for the rules adopted as a result of such activities.

The control mechanisms foreseen and used in the context of the ILO, although diverse in their characteristics, are envisaged in a comprehensive framework. The Organization has been and continues to be very innovative in this area. One particular issue I would like to focus on relates to the international judicial mechanisms and their possible contribution to the respect

* The author would like to thank Mr. Apollin Koagne Zouapet for his assistance in the preparation of this contribution.

¹ Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'Suivi et Contrôle' in Evelyne Lagrange and Jean-Marc Sorel (eds), *Traité de droit des organisations internationales* (LGDJ 2013) 800.

² See article 19, paragraph 5d), requiring that a State ratifying a convention undertakes to 'take such action as may be necessary to make effective the provisions of such Convention' and article 24 of the ILO Constitution which speaks of 'effective observance'.

for the law of the ILO. To this end, the array of ILO control mechanisms will first be presented (II). I will then give special attention to how judicial mechanisms can also have a role to play. I will focus on how the judicial mechanisms have been incorporated into the ILO mechanisms of control (III) and show that they are subject to increasing resistance within the ILO (IV). Finally, it is important to have a look at judicial and quasi-judicial procedures for the application and interpretation of international labour standards being set up outside the ILO, and discuss the role the ILO can play (V).

II. The diverse characteristics of ILO control mechanisms

The ILO control mechanisms are many and diverse. They were innovative at the time of their establishment. They are still ‘advanced’³ in comparison to the control mechanisms of other international organizations. An additional feature is that they exist in a unitary framework, that is to say that they are linked to one another.⁴ In this context, tripartism is of central importance. It plays a role in the choice of topics of standards (which is decided by the tripartite Governing Body of the ILO), their elaboration and their adoption (by the annual tripartite International Labour Conference), but also with regard to the control mechanisms. Indeed, many aspects of the ILO’s control mechanisms are tripartite in nature, and involve tripartite decision-making. The current difficulty in the operationalization of tripartism is having an impact on the ILO in general, but more specifically on the ILO’s control system.⁵

1. *The reporting procedure*

The ILO control mechanisms include, first and foremost, a reporting procedure as reflected in article 22 of the ILO Constitution. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) – created in 1926 and currently composed of 20 experts – and

³ Francis Maupain, ‘A Second Century for What? The ILO at a Regulatory Crossroad’ (2019) *International Organizations Law Review* 1, 14.

⁴ Anne Trebilcock, ‘The International Labour Organization’ in Michael J. Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848, 864.

⁵ Claire La Hovary, ‘The ILO, its standards and their supervision: difficult times?’ (Völkerrechtsblog 2015).

the Conference Committee on the Application of Standards (CAS) – created in 1927 with a tripartite composition – are tasked with making observations on specific reports. The CEACR can also make general observations in relation to the application of a convention. State parties to an ILO convention have an obligation to report on a regular basis on the measures they have taken towards its implementation. They have to do so every three years for the ‘priority’ conventions⁶ and every six years for the others. They may also be obliged to send reports at shorter intervals. The social partners may send comments as provided for in article 23 of the ILO Constitution. After an exchange with the concerned States, the CAS draws up conclusions which may recommend States to take specific measures or to ask for technical assistance.

The reporting procedure plays a crucial role in monitoring and alerting. That said, it is in a way a victim of its own success. It has been overwhelmed by the increasing number of conventions which have been adopted. It thus faces challenges in terms of deadlines which need to be extended. More importantly, there is also an issue of relevance caused by the decreasing appetite of States for ratifying conventions.⁷ This situation should be seen as one of shared responsibility between the member States and the Organization, raising the issue of the proper role to be played by the reporting procedure and addressing the challenges it faces.

2. *Representations by social partners*

Social partners, be they employers’ or workers’ organizations, have the right to make a representation to the Governing Body under article 24 of the ILO Constitution against any State which has allegedly failed to abide by a convention to which it is party.⁸ In making a representation, it is necessary to identify the relevant convention(s) and specific provisions at stake.

⁶ This denomination was adopted by the Government Body in 1999 to designate four conventions, which were to be ratified quickly by the States Parties: the Employment Policy Convention, 1964 (No. 122), the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129) and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); see GB.276/LILS/WP/PRS/1.

⁷ Maupain (n 3).

⁸ To date, about 168 article 24 representations have been received <https://www.ilo.org/dyn/normlex/en/f?p=1000:50010:::NO:50010:P50010_ARTICLE_NO:24>.

Tripartite committees may be established by the Governing Body to examine the merits of such representations. Due process needs to be respected, in particular the adversarial process (*principe du contradictoire*). The tripartite committees send their reports to the Governing Body. Various follow-up activities may be considered, such as referral to the aforementioned CEACR. Representations may also be pursued as complaints under article 26 of the ILO Constitution.

3. *Complaints procedure*

Under article 26 of the ILO Constitution, complaints⁹ may be filed against a State not complying with a ratified convention by another member State to the same convention, a delegate to the ILO Conference or the Governing Body in its own capacity.¹⁰ The Governing Body may set up a Commission of Inquiry composed of three independent persons.

Thirteen Commissions of Inquiry have been established so far. Practice reveals that there is a certain threshold to be met for a commission to be established: there must be persistent and serious violations. There is a possibility for on-site fact-finding, but there is no obligation on a targeted country to accept an on-site fact-finding commission.¹¹

A question arises as to when it should be decided to send a fact-finding commission. The case of Venezuela reveals the difficulties linked to the establishment of a Commission of Inquiry. Thirty-three employer delegates at the International Labour Conference presented in June 2015 a complaint, but it was only in March 2018 that the Governing Body decided that a Commission of Inquiry should be established with respect to the Minimum

⁹ To date, 30 article 26 complaints have been made <<http://www.ilo.int/global/standards/applying-and-promoting-international-labour-standards/complaints/lang-en/index.htm>>.

¹⁰ Before the 1946 amendments to the procedure, only a member State could make a complaint.

¹¹ Some countries have refused to cooperate. As a reminder, article 27 of the ILO Constitution sets out a broad cooperation obligation for all Member States: ‘The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint’.

Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). This decision was finally made on the recommendation of the Officers of the Governing Body. They were deeply concerned with the lack of any progress with respect to the previous decisions of the Governing Body, in particular as to the establishment of a social dialogue table and action plan, which it had urged the Government to institutionalize before the end of 2017.¹² It was also not possible to carry out the high-level mission recommended at the preceding session,¹³ due to the objections raised by the Government to the mission's agenda.¹⁴ The abovementioned commission was established in March 2018 and made a visit to the country in July 2019.¹⁵

When a State does not abide by the recommendations of the Commission, the Governing Body can take action under article 33 of the Constitution. It may 'recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. It did so once in 2000 against Myanmar because of its forced labour practice as described and qualified by a Commission of Inquiry. The possibility to resort to the International Court of Justice was envisaged. However, another course of action was decided upon. A resolution of the International Labour Conference, adopted on 15 June 2000,

¹² Complaint concerning non-observance by the Bolivarian Republic of Venezuela of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), made under article 26 of the ILO Constitution by several delegates to the 104th Session (2015) of the International Labour Conference, GB.329/INS/15.

¹³ *ibid.*

¹⁴ Decision on the complaint concerning non-observance by the Bolivarian Republic of Venezuela of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), GB.332/INS/10(Rev.) para 13.

¹⁵ 'ILO Commission of Inquiry will visit the Bolivarian Republic of Venezuela from 8 to 12 July, 2019' (ILO Press Release 8 July 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_712318/lang-en/index.htm>.

recommend[ed] to the Organization's constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced to compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body.¹⁶

4. *Complaints before the Committee on Freedom of Association*

The Committee on Freedom of Association was created in 1951 for the purpose of examining complaints about violations of freedom of association in application of Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).¹⁷ The complaints may be lodged by employers' and workers' organizations against an ILO member State, whether or not it has ratified the two conventions.¹⁸ The Committee is composed of an independent chairperson and eighteen members representing the three constituencies. All members act in their personal capacity. The Committee evaluates specific allegations regarding freedom of association principles. After receiving a response from the State concerned, the Committee formulates recommendations on how the situation could be remedied. The Governing Body adopts the report and a State must report on how it has taken into account the Committee's recommendation. All recommendations have so far been adopted by the Committee by consensus.

The ILO and the United Nations have created a supplementary mechanism that can receive complaints. The Fact-finding and Conciliation Commission on Freedom of Association was established in 1950 under an agreement between the two organizations. Its mandate was initially to

¹⁶ ILC 88th Session (2000), Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, point 1(b).

¹⁷ To date, approximately 3,100 complaints have been filed <<http://www.ilo.int/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm>>.

¹⁸ Freedom of association is mentioned in the ILO Constitution.

consider whether a complaint merited asking the member State to accept a fact-finding commission. It is a part of the special procedures at the ILO for the examination of complaints alleging violations of the freedom of association. The Economic and Social Council can receive complaints, which it may forward to this body.¹⁹

5. *Judicial mechanisms*

Since the time of the adoption of the ILO Constitution in 1919, resort to international judicial mechanisms has figured among the means the ILO has for ensuring respect for the rule of law. The contribution of international judicial mechanisms is plainly part of the ILO control framework. It is one element of this comprehensive framework. Noteworthy is the fact that even before the creation of the Permanent Court of International Justice (PCIJ) in 1920, ILO member States had considered that the World Court should play a key role in ensuring respect for the normative instruments adopted by the ILO as well as for interpreting its Constitution.

In 1946, a proposal to establish a tribunal was included in article 37 of the ILO Constitution, in addition to a possible resort to the International Court of Justice (ICJ). Its role and contribution as well as that of the other judicial mechanisms will be examined in detail in the light of the objective of ensuring effective compliance with the law by member States.

¹⁹ To date, it has received six complaints; see *Prelude to change: Industrial relations reform in South Africa* (1992); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the United States/Puerto Rico* (1981); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Lesotho* (1975); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Case of Chile* (1975); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Trade Union Situation in Greece* (1966); *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Persons Employed in the Public Sector in Japan* (1966) <https://www.ilo.org/global/standards/information-resources-and-publications/WCMS_160778/lang-en/index.htm>.

III. Judicial mechanisms as core components of the ILO control framework

The role of judicial mechanisms deserves further scrutiny in order to stress their unique role within the ILO in comparison to other international organizations. Their intervention was conceived in the context of the other control mechanisms of the ILO. An assessment will thereafter be made of their use.

1. *The various paths to the International Court of Justice*

Having recourse to the PCIJ, and later to the ICJ, was envisioned in various ways. The ILO Constitution foresees referral to the ICJ following an examination of a complaint by an ILO Commission of Inquiry. It also refers to the intervention of the ICJ with respect to the interpretation of ILO conventions and of the Constitution itself. In practice, resort to the Court has also been foreseen in the context of article 33 of the ILO Constitution.

1.1 The ICJ and the complaints procedure

It is recalled that, pursuant to article 26 of the ILO Constitution, a member State may be the object of a complaint which alleges non-observance of a convention it has ratified. Under article 29, paragraph 2, of the ILO Constitution, the State concerned by the complaint can inform the ILO Director-General, within three months of the rendering of the report of an ILO Commission of Inquiry, as to whether it accepts the recommendations of the Commission, and, if not, whether it proposes to refer the complaint to the World Court. Articles 31 and 32 of the Constitution provide that the ICJ may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry and that its decision will be final.²⁰

The insertion of this provision in 1919 was forward-looking. The resort to the Court was considered as offering an additional due process layer. The aim was to introduce some kind of appeal procedure open to a defaulting State, that is to say, 'one more intervening stage before the economic sanctions could become operative'.²¹

²⁰ ILO Constitution, article 31.

²¹ Anne-Marie La Rosa, 'Links between ILO and the ICJ: A less than Perfect Match', in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002) 119, 126.

The procedure foreseen in article 29 was envisaged as a contentious one. The Organization went to great lengths to ensure a corresponding place for itself in the PCIJ Statute. However, the Statute of the PCIJ did not include any provision allowing the ILO to have access to the Court when it exercises its contentious function. It has been said that: ‘even if recourse to the Court was provided in the ILO Constitution, cases where a State would not accept the recommendations of a Commission of Inquiry [...] were just not appealable because, in both cases, it could not be considered as an interstate dispute’.²²

1.2 The ICJ and interpretation issues

Another resort to the Court is foreseen in article 37, paragraph 1, of the ILO Constitution, which reads as follows:

Any question or dispute relating to the interpretation of this Constitution or any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

This provision acknowledges a preeminent role to the World Court in terms of interpretation of the ILO Constitution and international labour conventions, highlighting its privileged, although not exclusive, position in this endeavor. Due to the tripartite nature of the Organization, it was considered that the interpretation of ILO conventions could not be left to the member States. Because of this institutional specificity, it was considered that the power of interpreting the ILO’s instruments, including its Constitution, should be entrusted to a third party such as the PCIJ. The World Court ‘was believed independent enough to credibly carry out this custodian role and render decisions which would be binding on all (constituencies)’.²³

Article 37, paragraph 1, provides for the referral of ‘any question or dispute’ (*questions ou difficultés* in French) relating to the interpretation of the Constitution or of any international labour convention adopted by member States pursuant to the provisions of the Constitution to the International

²² *ibid.*

²³ *ibid* 122.

Court of Justice ‘for decision’ (*appréciation* in French). The wording of this provision calls for some explanation as it deviates from the established principles and rules governing the advisory function of the International Court of Justice and of its predecessor. In other words, should it be considered that article 37, paragraph 1, refers to the contentious function of the ICJ (as with article 29) or does this provision refer to the advisory function of the Court?

There are historical reasons that may explain, at least in part, the language used in article 37, paragraph 1. Article 14 of the Covenant of the League of Nations, which called for the establishment of the PCIJ, also provided that the Court ‘may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly’. As interpreted in practice, and eventually also reflected in article 82 of the Rules of the Court of 1936,²⁴ two types of advisory opinions were considered: one was an opinion related to a ‘dispute’ (*différend* in French) which should be largely assimilated to a contentious case while the other was an opinion related to a non-contentious ‘question’ (*point* in French).²⁵ It has thus been suggested that the drafters of article 37 intended, while borrowing language from article 14 of the Covenant, to recognize the compulsory jurisdiction of the Court for contentious cases between ILO member States as well as to allow for requests for advisory opinions to be brought directly before the Court without the prior approval for the League’s Council.²⁶ According to the ILO, article 37, paragraph 1, has always been understood as conferring a binding and decisive effect to advisory opinions obtained on that basis.²⁷

²⁴ Article 82 of the Rules of the Court of 1936 reads as follows: ‘In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute of the Court, apply the provisions of the articles hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognises them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of article 14 of the Covenant of the League of Nations, to a “dispute” or to a “question”’.

²⁵ ILO, *The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards*, GB.322/INS/5 para 9. On this issue, Démètre Négulesco, ‘L’évolution de la procédure des avis consultatifs de la Cour permanente de Justice internationale’ (1936) 57 *Recueil des cours* 5. See also Manley Hudson, ‘Les avis consultatifs de la Cour permanente de Justice internationale’ (1925) 10 *Recueil des cours* 345.

²⁶ Georges Fischer, *Les rapports entre l’Organisation internationale du Travail et la Cour permanente de Justice internationale* (Pedone 1947) 30-46.

²⁷ ILO (n 25) para 7.

A similar and rather enigmatic provision to article 37, paragraph 1, was introduced in constitutive agreements of other international organizations. One can refer to article XIV of the UNESCO constitutive act or to article 75 of the WHO constitution. Notwithstanding the similarity with other international organizations' constitutive agreements, a peculiarity is that the ILO constitutive agreement is pioneering insofar as the provision was included in 1919. Tripartism surely played a role and resort to the World Court was perceived as a guarantor of the constitutional order of the Organization.

In practice, six requests for an advisory opinion were made at the time of the PCIJ.²⁸ Four of them were initiated following a request made by the ILO Governing Body,²⁹ and two of them following a State's initiative.³⁰ Even though article 37, paragraph 1, which corresponds to article 423 of the Versailles Treaty, had entered into force at that time, it is interesting to note that no request was ever submitted directly to the PCIJ on this ground. All six requests were submitted to the Court through the League Council pursuant to article 14 of the Covenant.³¹ The Council of the League of Nations merely served as a conduit as the questions put by the Council to the Court were those posed by the ILO and the State who asked for the advisory opinion.

²⁸ *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ, Series B, No. 1 (1922); *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, PCIJ, Series B, No. 2 (1922); *Competence of the International Labour Organization to examine proposals for the Organization and Development of Methods of Agricultural Production*, PCIJ, Series B, No. 3 (1922); *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Series B, No. 13 (1926); *Free City of Danzig and the International Labour Organization*, PCIJ, Series B, No. 18 (1930); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, PCIJ, Series A/B, No. 50 (1932).

²⁹ In the case of the first advisory opinion, the International Labour Conference called upon the Governing Body to request the Council of the League of Nations to request an advisory opinion to the Court.

³⁰ France was at the origin of the two advisory opinions on the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* and on the *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production*.

³¹ In the case of the *Free City of Danzig and the International Labour Organization*, although reference was made to article 423 of the Treaty of Versailles (now article 37 of the ILO Constitution), it was on the basis of article 14 of the Covenant that the request for an advisory opinion was made; see *Danzig* (n 28) 4, 8–9.

With the creation of the United Nations, request for advisory opinion was envisaged in new terms. In 1946, the conclusion of the UN-ILO Agreement offered another path for requesting advisory opinions. Given the fact that, in accordance with article 96 (2) of the UN Charter, the General Assembly had duly authorized the ILO to request advisory opinions, the ICJ would base its jurisdiction primarily on article IX (2) of the 1946 UN-ILO Agreement between the UN and the ILO, which explicitly authorizes the ILO to request an advisory opinion.³² According to article IX, paragraph 2, of the said Agreement,

the General Assembly authorizes the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationship of the Organisation and the United Nations or other specialized agencies.

Article IX, paragraph 3, of the Agreement provides that a request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorization by the Conference. The ILO has so far not sought any advisory opinion from the International Court of Justice.

1.3 The ICJ advisory function and the participation of non-State actors

The tripartism feature of the ILO was taken into account through article 73 of the (Revised) Rules of the Permanent Court of International Justice pursuant to which employers' and workers' organizations were allowed to participate in advisory proceedings initiated by the ILO.³³ As noted by the Court's President in 1926, practice had created a precedent

³² See also the Resolution 50 (I) (1946) by which the General Assembly approved the UN-ILO Agreement.

³³ As an example, in the advisory opinion concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the Court invited the International Association for the Legal Protection of Workers, the International Federation of Christian Trade Unions, and the International Federation of Trade Unions. The third annual report of the PCIJ, published in 1927, contains a list of the international organizations permitted to submit information to the Court under article 73 which consists almost entirely of international trade unions, as noted by Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 623.

of admitting ‘great industrial organizations, whether of workers or of employers’, which would be difficult to exclude ‘owing to their very great importance’, although admittedly these great organizations were ‘at any rate indirectly recognized as constituting elements’ of the ILO.³⁴

The question whether the social partners can be accorded some place in the advisory proceedings that would correspond to their role in the adoption process has always been central to the debate about the possible referral of a dispute regarding the interpretation of a convention to the ICJ. In 1993, an Office paper on this matter noted that

there is probably good reason to consider that it is even more important, in order to ensure that the specificity of the Organisation and of international labour conventions is taken adequately into account at the Court, to ensure appropriate access for the social partners to enable them to assert their interests and intentions, than to be concerned with the methods and principles of interpretations that may be applied at the Court.³⁵

Although no advisory opinion has been requested by the ILO to the ICJ on whatever basis, the participation of non-State actors should not be a concern. As a matter of fact, this form of participation has become a feature in ICJ advisory proceedings.³⁶ Recent advisory proceedings support the view that the ICJ is ‘prepared to open up its advisory proceedings to actors, other than States and international intergovernmental organizations, every time the participation of such actors is substantively and procedurally essential

³⁴ PCIJ, Acts and documents concerning the organization of the Court, Series D, Addendum to No. 2, 1926, 224-225, cited by Yaël Ronen, ‘Participation of non-State actors in the ICJ proceedings’ (2012) 11 *Law and Practice of International Courts and Tribunals* 77, 88.

³⁵ ILO, Article 37, paragraph 2, of the Constitution and the interpretation of international labour conventions, GB.256/SC/2/2 para 48. The paper indicated, however, that ‘it is unclear whether, in the current context of the Statute of the International Court of Justice the term “international organization” could continue to be given such a wide interpretation as to enable international employers’ and workers’ organizations to be consulted and heard directly’ (para 42).

³⁶ Laurence Boisson de Chazournes, ‘La procédure consultative de la Cour internationale de Justice et la promotion de la règle de droit: remarques sur les conditions d’accès et de participation’, in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl Sommerman (eds), *Common values in international law: Essays in honour of Christian Tomuschat*, (N.P. Engel 2006) 479.

considering the concrete context of the case, in light of considerations of fairness and justice, but also bearing in mind the need to obtain the fullest information possible'.³⁷ The *Wall* and *Kosovo* cases appear to confirm that the Court is open to the participation of entities that are directly interested in a dispute and likely to be affected by the outcome of the proceedings; they are also likely to provide information that may not be available to the Court otherwise.³⁸ As an Office paper has underlined

irrespective of whether the Court would grant permission to any international employers' and workers' organizations to participate autonomously in the proceedings, the Office could include in the dossier to be submitted together with the request any briefs, position papers or other documents that the Employers' and Workers' groups might wish to bring to the knowledge of the Court. In any event, failing direct invitation by the Court, nothing prevents employers' and workers' organizations from submitting their views as uninvited briefs. Moreover, it cannot be excluded that, in preparing their written statements, some member States may consult national employers' and workers' organizations and properly reflect their views as part of the information communicated to the Court.³⁹

2. *The establishment of a tribunal*

In 1946, a second paragraph was added in article 37 of the ILO Constitution. It states that the ILO can establish a tribunal 'for the expeditious determination of any dispute or question relating to the interpretation of a convention'.⁴⁰ This was introduced into the Constitution in 1946 on the proposal by the Committee on Constitutional Questions set up by the Governing Body on 13 May 1944. The Committee considered that it would in any case be desirable to grant to the Governing Body the discretionary power to institute a tribunal for the rapid settlement of all questions

³⁷ ILO (n 25) para 43.

³⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 141-142, paras 4-5; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010 407, para 3.

³⁹ ILO (n 25) para 47.

⁴⁰ ILC 27th Session (1945) Report IV(1) 107-108, 158; ILC 29th Session (1946) Report II(1) 60-61.

or disputes concerning the interpretation of a convention. It was stressed that, whereas the interpretation of the Constitution was solely a matter for the ICJ, this was not the case regarding questions of the interpretation of conventions. The points to be settled were ‘often so detailed that it was not worthwhile placing them before the principal judicial authority’. Other considerations of a practical nature were also made.⁴¹ In the words of a representative of the French Government on the subject,

as it would be impractical to refer every question or dispute concerning the interpretation of a Convention to the Court, his Government had long been in favour of establishing an in-house interpretative body under article 37(2) of the Constitution. It should be a flexible, low-cost mechanism that would convene at the express request of the Governing Body.⁴²

At the time of the amendment to article 37, the idea of a hierarchy between international judicial mechanisms was present, giving the last word to the ICJ when seized. Article 37, paragraph 1, which refers to the advisory function of the International Court of Justice, is part of the Constitution as originally drafted in 1919, whereas article 37, paragraph 2, which provides for the establishment of an internal judicial body, was introduced at the time of the constitutional amendment of 1946. It was considered that article 37 is based on the postulate that the most critical questions relating to the interpretation of ILO conventions and any question relating to the interpretation of the Constitution itself should be brought before the International Court of Justice, while requests for the interpretation of ILO conventions that might be less complex or more amenable to expeditious determination could be submitted to an internal tribunal.⁴³ In this respect, it is noteworthy that according to article 37, paragraph 2, ‘any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph’.

The setting up of a tribunal as foreseen in article 37, paragraph 2, constitutes additional evidence of the importance attached to the role played by judicial mechanisms. The objective was to create a judicial mechanism, which

⁴¹ ILO (n 35) para 5.

⁴² GB.322/PV, para 90.

⁴³ ILO (n 25) para 5.

would be 'closer' to the ILO than the World Court. The interpretation function of the tribunal was at stake, with it being binding on all member States. Article 37, paragraph 2, even stresses that 'any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference'.

An element of trust is evident in the proposal for the establishment of a tribunal. This mechanism is often referred to in ILO reports and documents as an 'in house' mechanism.⁴⁴

It was felt that the tribunal would be better able than the ICJ to gain the confidence of the various ILO constituencies. Indeed, the flexible nature of arbitration offers some leeway in this respect. The selection of the arbitrators, the choice of the applicable law and of the rules of procedure could meet the requests of the three ILO constituencies and make room for their interventions. Notably, the rules of procedure could foresee the access of the social partners to the tribunal. On this subject, the tribunal provided for in article 37, paragraph 2, could offer a clear advantage in that the Governing Body would be entirely free to decide on the conditions of its functioning. To this effect, the Office drew upon earlier discussions and consultations on the subject and undertook a comprehensive review of the structure of major international courts and tribunals in operation.⁴⁵ A draft Statute of the tribunal was prepared and submitted to the Governing Body.⁴⁶ However, many States and stakeholders remain opposed to the establishment of such

⁴⁴ ILO, *The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association*, GB.326/LILS/3/1 para 44.

⁴⁵ See, in particular, ILO (n 35); GB.256/PV(Rev.); ILO, *Non-paper on interpretation of international labour Conventions* (February 2010); ILO, *Informal exploratory paper on interpretation of international labour Conventions* (October 2010). The statutes and rules of procedure of the following courts and tribunals were consulted: International Court of Justice; International Tribunal for the Law of the Sea; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; Inter-American Court of Human Rights; European Court of Human Rights; African Court on Human and People's Rights; ILO Administrative Tribunal. Other relevant documents included the World Intellectual Property Organization Arbitration and Expedited Arbitration Rules, the Agreement establishing the World Trade Organization (WTO), the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, and the UNCITRAL Arbitration Rules.

⁴⁶ ILO (n 25) Appendix II.

a tribunal, the immediate need for which they do not yet see and they point to additional sources of expenditure for the Organization.⁴⁷ On this latter point, one can note that the ILO is already hosting the ILO Administrative Tribunal, and the registry of this tribunal could be used for the tribunal to be established under article 37, paragraph 2.

The Governing Body is responsible for the referral of any dispute or question related to the interpretation of a convention.⁴⁸ One question that must be asked is how and by whom the matter may be placed on the Governing Body's agenda. Article 37, paragraph 2, presupposes that there is a contestation, or at least a serious question, that has arisen concerning the interpretation to be given to a convention and the required intervention of the Governing Body guarantees that this will in fact be the case.

The above-mentioned draft Statute prepared by the Office does not indicate how the Governing Body might assess the appropriateness of referring a particular matter to the tribunal. In assessing whether to make an interpretation request, the Governing Body may consider all practical, legal and political circumstances it deems pertinent, such as whether the matter has already been the subject of comments by an ILO organ or by another body; the nature of the interpretative question or dispute and its implications, including in relation to the ILO supervisory system; whether any requests for clarification have been made and by whom; and the usefulness of obtaining an authoritative interpretation. The proposed Statute does not regulate either how the consideration of a question or dispute could be brought before the Governing Body. As an Office paper pointed out, several courses of action can, nevertheless, be envisaged as to how a question or a dispute might be brought before the Governing Body for possible submission to the tribunal. For example, the ILO control mechanisms, in particular the CEACR or the CAS, may in their respective reports express the view that the Governing Body should refer a specific matter to the tribunal. Consideration of an interpretation issue could also be included in a session of the Governing Body by the screening group, whose mandate to draw up the agenda of the Governing Body would allow the matter to be introduced whenever it is deemed suitable.⁴⁹

⁴⁷ ILO (n 42) paras 47-210.

⁴⁸ *ibid* para 136.

⁴⁹ ILO (n 25) paras 81-82. See also ILO (n 35) paras 59-60.

IV. A growing resistance to international judicial mechanisms

Since 1946, the ILO has neither requested an advisory opinion, whatever the legal basis, nor established an ad hoc tribunal. Although the ILO is rather unique in its professed faith in the role that international judicial mechanisms can play, it has so far resisted in engaging itself on this path. This is probably due to the control framework that has developed in parallel to fill the gaps and which to a certain extent makes it possible to settle day-to-day difficulties without having to go through the complex procedure of requesting an advisory opinion to the ICJ. This framework brings into play three complementary bodies: the Office, the Committee of Experts, and the Conference itself, mainly through the CAS.

That said, at least on two occasions, discussions and consultations took place on having resort to international judicial mechanisms but no decision was taken. First, the non-cooperation of Myanmar after the Commission of Inquiry had submitted its report in 2000 (which dealt with forced labour) brought some to consider the possibility of a request to the ICJ for an advisory opinion. As previously stated, this was considered and discussed in the context of article 33 of the ILO Constitution. As an action to secure compliance, a question could have been asked to the ICJ. To this end, discussions were held in the Governing Body on the need for such a request for an advisory opinion and the formulation of questions, if any, to be addressed to the ICJ.⁵⁰ However, another course of action was retained with the adoption of a resolution requiring States and international organizations, to take a series of measures against Myanmar.

⁵⁰ The following questions were proposed: '(1) Do the requirements of the Forced Labour Convention, 1930 (No. 29), imply that complaints of forced or compulsory labour can be made: (i) without any sort of intimidation of persons who complain or seek to make such complaints, and (ii) in conditions such that complainants may have sufficient confidence that their complaints will be objectively examined by the national authorities with a view to the prosecution of, and the imposition of adequate and strictly enforced penalties on, those who exact forced or compulsory labour? (2) If the answer to either part of the first question is in the affirmative, and taking into account the national legal regime governing the prosecutorial and judicial system for handling complaints of forced or compulsory labour, is the public assertion by the Government of a right to prosecute persons for making false allegations of forced or compulsory labour compatible with the requirements of the Forced Labour Convention, 1930 (No. 29)?' See ILO, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930* (no. 29), GB.298/5/2 Appendix. See also GB.298/PV para 141.

More recently, in 2012, the Employers delegates on the CAS which discusses the recommendations of the CEACR during the International Labour Conference, 'refused to include any comments involving the right to strike under Convention No. 87, since they objected to interpretations by the CEACR concerning freedom of association on this point'.⁵¹ This created an institutional crisis. Discussions were conducted on the possibility to ask the ICJ for an advisory opinion,⁵² or on the possibility to establish an ad hoc tribunal which would render a judgment on the issue. No decision was taken although the problem is not yet fully resolved. One of the points of deadlock is the meaning and scope of a request for an advisory opinion to the ICJ. Many participants fear the impact of such an approach on both the spirit of negotiation that must prevail within the ILO and the precedent that it could create.⁵³

The discussion which took place in the context of these two situations attests to a certain reluctance towards the World Court being involved in the work of the ILO. The Court has become more and more detached from the control framework of the ILO and there seems to be a similar reluctance towards an ad hoc tribunal as envisaged under article 37, paragraph 2.

Various questions arise in relation to the role of judicial mechanisms, especially the ICJ. They turn around the opposition between legal security and uncertainty. A judicial pronouncement presents the advantage of breaking the cycle of uncertainty but there is nonetheless the risk that it may not be accepted by the ILO tripartite constituents or that it may be accepted by one group but not by the others. One might wonder if it is better to find an 'internal' compromise at the price of uncertainty. Is constructive ambiguity better? Referring to the above-mentioned institutional issue in

⁵¹ Trebilcock (n 4) 875.

⁵² ILO (n 25) 14. The suggested questions were as follows: '(1) Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)? (2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to: (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?'

⁵³ (n 42) 2 paras 47-210.

relation to the right to strike, it appears difficult to argue that ambiguity over this issue is proving constructive in practice.

In other situations, one might argue that the advantage of an interpretation given by the Conference, through the CAS, provides for an open discussion, in which interested parties have an opportunity to present their case. 'The persons taking part are precisely those with whom the standards originated and thus in the best position to appreciate the implications of any change of context for their contents'.⁵⁴ One would have to make an assessment of the cases where such an approach might be favoured, at the difference of cases where constructive ambiguity does not help resolve a crisis and may indeed contribute to its worsening.

Uncertainty may also present advantages in terms of negotiation. Uncertainty might offer more flexibility and thus more value in finding a solution that satisfies the tripartite constituents. The choice of interpretation by the organs of the Organization, at the price of lengthy negotiation processes, may be explained by the fact that this system of interpretation meets the need for a certain margin of legal uncertainty as well as the desire to limit the discretion left to judges. A statement of the Employers' representative, expressed during the debates on the issue of the right to strike, illustrates this sentiment:

The ILO could organize a tripartite meeting of experts in January 2015, to identify the problems relating to the modalities of exercising the right to strike at the national level and evaluate possible areas of future ILO action on the issue, including standard setting [...] The scenario he was proposing was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the ICJ, which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute [...] An ICJ opinion to the contrary would damage the credibility of the ILO's supervisory system, by calling into question the status of the Committee's observations and reports.⁵⁵

⁵⁴ ILO (n 35) para 22.

⁵⁵ (n 42) paras 58-59.

The issue of the binding character of an advisory opinion under article 37, paragraph 1, of the ILO Constitution might also have an influence on the attitude of ILO constituents and bodies vis-à-vis the Court. There might be the fear that the ILO would have its hands tied. However, whatever the meaning of the term ‘decision’ in article 37, another option is open to the ILO, namely that of the UN-ILO agreement which clarifies the non-binding nature of advisory opinions.

Another question is concerned with the judicial authority of the ICJ. The World Court enjoys an authority *per se*. That said, one may wonder if the judicial organ enjoys too much authority or benefits from an authority that does not fit with today’s international institutional world. The notion of ‘authority’ refers to a voluntary submission.⁵⁶ There is no hierarchical relationship between an authority holder and its subjects. As defined, the notion of ‘authority’ therefore excludes coercion and persuasion. In this context, the authority of the Court rests on multiple foundations. Its universal character, composition and working methods have played a major role in the establishment of this authority. Further, it is the only court with general jurisdiction. That said, from the outset, the latter feature has been identified as ‘a matter of concern to the ILO, and in particular, when the Statute of the Permanent Court of International Justice was being prepared. The ILO approached the Committee of Jurists to whom this task was assigned in order to ensure that, in matters concerning labour, the Court would be composed in such a way as to offer not only guarantees of impartiality, but also of technical competence.’⁵⁷ The Office proposals were not followed with the exception of the reference to a chamber of the Court dedicated to issues of labour law.⁵⁸

When assessing the role of the World Court in the ILO control framework, one should recall the importance of the 1922 advisory opinion of the PCIJ concerning the nomination of the Dutch worker delegate at the third session of the International Labour Conference.⁵⁹ Still today, it remains the only authoritative guidance on matters relating to representativeness

⁵⁶ Max Weber, *The Theory of Social and Economic Organization* (The Free Press 1964) 324.

⁵⁷ ILO (n 35) para 39.

⁵⁸ Statute of the International Court of Justice, article 26, paragraph 1.

⁵⁹ *Designation of the Workers’ Delegate* (n 28).

of workers' organizations and on which the Conference Credentials Committee systematically builds its case law.

It should also be noted that the rationale underlying article 37 of the ILO Constitution was to recognize the referral to the ICJ as the ultimate recourse in matters of interpretation disputes and to accept the Court's 'decision' as final settlement of any such dispute. It is clear that according to the letter and the spirit of the ILO Constitution, advisory opinions given by the International Court of Justice enjoy a special status and authority for all ILO Members. In the case of the six advisory opinions delivered at its request, all of them – even though not on the basis of article 37 – were published in the ILO Official Bulletin and referred to in the Director-General's Report to the Conference. They were also given effect in the subsequent practice of the Organization. For instance, following the Court's advisory opinion relating to the interpretation of the ILO's Night Work (Women) Convention, 1919 (No. 4), the Governing Body decided in 1933 to propose a revision to the convention that was eventually adopted by the Conference in 1934.⁶⁰

Lastly, it is also necessary to take into account the changing mandate of non-judicial mechanisms within the ILO. As regards the CEACR, for instance, according to the provisions adopted by the Governing Body and the Conference in 1926, its functions are technical and in no sense judicial. However, by comparison with this original mandate, the Committee has taken on a more independent role regarding interpretation, as it also has in other fields, without raising objections in principle. This enlarged role is in fact a response to the inherent needs of its work and to the conditions in which it is called upon to examine a constantly increasing number of reports concerning conventions that are also growing in number. That said, as the Committee itself stated in 1991, it is not a tribunal, and its views are not judgments.⁶¹ An implicit role therefore continues to be recognized for international judicial mechanisms, although this role may not be as significant as it was envisaged in 1919 and 1946.

⁶⁰ ILO (n 35) para 30.

⁶¹ Report of the CEACR (ILO 1990) para 11.

V. A new challenge for the ILO: The role of other judicial and quasi-judicial mechanisms

Interestingly, specialized international judicial and quasi-judicial mechanisms have been established since the late 1990s, being granted implicit jurisdiction to interpret and apply ILO instruments, directly or indirectly. The most significant are those contained in regional free trade agreements. These agreements include specific chapters devoted to labour legislation which refer in one manner or another to ILO norms and standards.⁶²

For example, Free Trade Agreements (FTAs) concluded by the EU contain ‘Trade Sustainable Development (TSD) chapters’ and ‘labour standards’. They are considered as a key element of the EU’s commitment to a ‘value-based trade agenda’. They have been a standard component of the EU’s Free Trade Agreements since the EU – South Korea FTA in 2009. There are variations between the provisions in these various agreements but the essential elements of TSD chapters are found in all recent FTAs.⁶³

The agreements require parties to make commitments in relation to the ILO Declaration on Fundamental Principles and Rights at Work 1998 which includes the principles concerning the fundamental rights which are the subject of the ILO’s fundamental labour conventions.⁶⁴ These conventions deal with freedom of association and collective bargaining, forced and compulsory labour, child labour, and workplace-related discrimination. Substantial standards also refer to commitments expressed in political declarations such as the 2006 Ministerial Declaration on the UN Economic

⁶² Francis Maupain stresses the risk of selectiveness by these agreements in their understanding of labour laws. Maupain (n 3) 28.

⁶³ James Harrison, Mirela Barbu, Liam Campling and Franz Christian Ebert, ‘Labour standards provisions in EU free trade agreements: Reflections on the European Commission’s reform agenda’ (2018) *World Trade Review* 4-8.

⁶⁴ In the Declaration, ILO member States agreed that they should all respect, promote, and realize the principles concerning the fundamental rights which are the subject of fundamental conventions (whether they have been ratified or not). The core labour standards consist of five standards, laid out in eight conventions: Freedom of association and the effective recognition of the right to collective bargaining (Conventions No. 87 and No. 98); the elimination of all forms of forced and compulsory labour (Conventions No. 29 (together with its Protocol of 2014) and No. 105); the effective abolition of child labour (Conventions No. 138 and No. 182); the elimination of discrimination in respect of employment and occupation (Conventions No. 100 and No. 111) <<https://www.ilo.org/declaration/lang-en/index.htm>>.

and Social Council Attainment of Full and Productive Employment and Decent Work for All. A set of procedural commitments accompanies the substantive standards. They include: commitments on dialogue and co-operation (via institutional structures), monitoring and review of the sustainability impacts of the agreement, a commitment to uphold levels of domestic protection in relation to labour standards, a commitment not to use standards for the purposes of disguised protectionism, and a commitment not to weaken or waive laws to encourage trade or investment. TSD chapters have their own dispute resolution mechanisms which are composed of a two-stage procedure: Government consultations and a Panel of experts that can be established if necessary.⁶⁵

Another illustrative example of this possible interpretation of ILO standards outside the ILO framework is the Dominican Republic – Central America Free Trade Agreement (CAFTA – DR)⁶⁶. Chapter 16 of the CAFTA – DR is dedicated to labour and, in particular, the enforcement by each State party of labour protections to which workers are entitled under national laws. The labour protections largely reflect those of the ILO Declaration on Fundamental Principles and Rights at Work 1998. According to article 16.8, they include the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The parties must, under article 16.1, strive to ensure that their laws provide for consistent labour standards and improve these standards where necessary.

Chapter 16 also includes a control mechanism, but with a rather narrow scope. According to article 16.7, it is limited to situations arising from article 16.2.1(a). Under the latter, ‘a Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement’. If there are questions as to whether a

⁶⁵ Harrison et al. (n 63) 6.

⁶⁶ First free-trade agreement between the United States and a group of smaller developing countries: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Dominican Republic.

Party is conforming to its obligations under article 16.2.1(a), another State party may request consultations pursuant to article 16.6.1. If the consulting Parties have failed to resolve the matter, the complaining Party may resort to the provisions of Chapter 20 on dispute settlement. This may lead to the establishment of an arbitral panel on the basis of a specific roster if further consultations or the Free Trade Commission are unable to resolve the issue.

It was on this basis that the very first labour dispute under a free trade agreement took place. Following unsuccessful consultations and a meeting of the Free Trade Commission, the United States requested in 2011 the establishment of an arbitral panel regarding Guatemala's alleged failure to effectively enforce its labour laws on the right of association, the right to organize and bargain collectively, and acceptable conditions of work. In 2017, the panel issued its report and rejected all US claims. It found the two elements of article 16.2.1(a), that is 'sustained or recurring course of action or inaction' and 'in a manner affecting trade between the parties', to be of a cumulative nature. On this basis, it rejected the US claims because of the absence of either element. Thus, although the United States had proved that Guatemala had failed to effectively enforce its labour laws in some situations, these instances did not constitute a course of inaction in a manner affecting trade. In other words, these proven breaches did not 'confer some competitive advantage on an employer or employers engaged in trade between the Parties'. The Panel also dismissed another claim on the ground that the law enforcement failure did not constitute a sustained or recurring course of action or inaction, although it had an impact on trade.⁶⁷

As was noted, some of the constituents of the ILO seem to have concerns about the Organization losing control over interpretation of international labour standards to the International Court of Justice. One might observe that, although more specialized in their prerogatives, free trade judicial and quasi-judicial mechanisms are already engaged in this endeavour. It would be important for the ILO to establish a relationship with these mechanisms. Many trade agreements, for example, make reference to the ILO Declaration of Fundamental Principles and Rights at Work 1998, but

⁶⁷ Panel Report, In the Matter of Guatemala – Issues relating to the obligations under article 16.2.1(a) of the CAFTA – DR, 14 June 2017; see also <<https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>>.

the inconsistency in the wording of such references, and potential differences in interpretation and application, may lead to legal uncertainty and problems in practice.⁶⁸ The ILO could play a role in offering interpretative guidance on the application of labour instruments.⁶⁹

Another way would be for the ILO to participate in international dispute settlement proceedings, as the World Health Organization did in *Philip Morris Brand SàRL (Switzerland) et al. v. Oriental Republic of Uruguay* by submitting a request for *amicus curiae*.⁷⁰ Article 20.10.1(d) of CAFTA – DR provides for the submission of *amicus curiae* by non-governmental entities. A flexible interpretation should allow for the participation of the Organization.

A similar concern arises in the context of criminal proceedings, as exemplified with decisions taken in relation to the Myanmar situation. In the conclusions adopted by the 95th International Labour Conference in 2006, it was suggested that the Office should provide information about criminal remedies that may exist under international law for action against perpetrators of forced labour in the context of the Myanmar case. Following an Office paper on the issue,⁷¹ a proposal was made to take the matter before the International Criminal Court (ICC), and that the Director-General should take steps to prepare this submission, in case no success would be achieved. The UN Security Council could subsequently be involved, as the following illustrates: ‘It should be made clear to the Government of Myanmar that the international community considered the situation in Myanmar to be extremely serious. The Governing Body should make the ILO’s detailed information on forced labour in Myanmar available to Security Council members through the UN Secretary-General, to allow

⁶⁸ Jordi Agusti-Panareda, Franz Christian Ebert and Desirée LeClercq, ‘ILO Labor Standards and Trade Agreements: A Case for Consistency’ (2015) 36 *Comparative Labour Law and Policy Journal* 347, 366.

⁶⁹ *ibid* 368.

⁷⁰ Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Request to file a written submission (*Amicus Curiae* Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 28 January 2015.

⁷¹ ILO, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.297/8/2 paras 18-26.

the Council to examine and consider action to be taken to address the situation, with the possibility of referring the matter to the ICC Prosecutor. The ILO should already submit all information on the issue to the ICC, to allow the Prosecutor to begin work forthwith.⁷² Following that proposal, general conclusions were agreed to the effect that the Director-General could ensure that the developments concerning forced labour in Myanmar are appropriately brought to the attention of the UN Security Council and the Prosecutor of the ICC.⁷³ In this context, the ICC should monitor and interpret ILO rules on forced labour and their violation as a crime against humanity. As can be seen, had this route been followed, the number of judicial bodies capable of interpreting and monitoring the application of ILO rules and standards would have increased.

VI. Concluding remarks

As has been explored, the ILO's control mechanisms have diverse characteristics that include reporting procedures, the involvement of social partners, complaints procedures as well as interaction with judicial mechanisms. One of the dimensions of the latter was that there was originally a special relationship between the ILO and the World Court that had been developed by the founding fathers of the ILO Constitution. This interaction had been envisioned in a detailed way. The judicial organ was supposed to play a key role in ensuring respect for the ILO constitutional and normative order. The belief within the ILO that international judicial mechanisms could play an even more central role was strengthened with an amendment to the ILO Constitution providing for the establishment of an ad hoc or 'in house' tribunal. Over time the relationship has somewhat faded away and the appetite for interaction with judicial mechanisms appears currently to be lacking.

In this context, we must ask the question: would the setting up of a tribunal as foreseen in article 37, paragraph 2, of the ILO Constitution reinvigorate the relationship of the ILO with judicial institutions? As in all relationships, it is necessary for the actors concerned to know each other better before establishing firm trust. The setting up of an 'in house' tribunal

⁷² GB.297/PV para 122.

⁷³ *ibid* para 140.

would constitute a step in this direction, and could help dissipate resistance towards international judicial mechanisms. Other ILO control mechanisms may then refer to the tribunal when an interpretation dispute cannot be settled. Internalizing the judicial function in this way may allay fears of surrendering control to an external body.

That said, a diverse array of judicial and quasi-judicial mechanisms have been established in the context of bilateral and regional free-trade agreements and in other fora. In any event, the ILO should interact with these external bodies to ensure that ILO conventions and other standards are soundly interpreted, especially to avoid fragmentation and conflicting interpretations. This will require the ILO to intervene in new judicial mechanisms. As such, the ILO may need to develop internal judicial mechanisms as well as be proactive in its interaction with external judicial mechanisms, if it is to stay in control of the way in which labour law develops.

The Lost History of the ILO's Trade Sanctions

*Steve Charnovitz**

I. Introduction

In 1994, the Report of the ILO Director-General declared that one of the 'premises' on which the ILO is based is that it 'should rely on cooperation rather than coercion in its efforts to promote social progress'.¹ In line with that premise, the Report observed that

the framers of the Constitution deliberately discarded all forms of coercion. Showing a great sense of realism, they concluded that recourse to constraints or sanctions would only discourage States from ratifying Conventions, or worse yet, from joining the Organization.²

When I read this statement in 1994 that the ILO's framers had discarded coercion and sanctions, I knew it to be untrue because, several years earlier, I had written about how the framers, in 1919, had placed trade sanctions into the ILO's Constitution.³

Over the years, my writings have occasionally discussed the ILO's original enforcement system. In 2001, I suggested that there are lessons to be

* This essay is dedicated to four individuals in the ILO community who, over the decades, sought to enhance my understanding of the ILO's past, present, and future – especially Francis Maupain, and also to Abraham Katz, Virginia Leary, and Nicolas Valticos. My thanks to José Alvarez for his thoughtful comments and to the participants at the seminar at the University of Vienna Faculty of Law where a draft of this essay was presented.

¹ International Labour Conference, 81st Session (1994), Report of the Director General, *Defending values, promoting change – Social justice in a global economy: An ILO agenda*, 58.

² *ibid* 55.

³ Steve Charnovitz, 'The Influence of international labour standards on the world trading regime. A historical overview' (1987) 126 *International Labour Review* 565, 576.

learned from the lack of use of the ILO's sanctions.⁴ A few years ago, I showed how the ILO's original dispute procedures had important impact outside the ILO in serving as a model for dispute resolution in the world trading system.⁵ But until recently, I had not looked closely at why the endowed sanctions were not used.

The ILO's experiment with trade sanctions receives little attention in literature about the ILO. How did the trade sanctions for the ILO get erased from its institutional memory? For many ILO scholars, the original availability of trade sanctions was a bygone factoid to be overlooked in simplifying the portrayal of the ILO as an organization relying on voluntarism and persuasion rather than coercion or teeth. Even as advocacy for using trade sanctions to promote worker rights intensified in the late 20th and early 21st centuries, those advocates were incurious as to what happened with the ILO's own trade sanctions.

Yet there has to be a good reason why an international organization would leave unused in its toolbox the sanctioning mechanism specifically designed to enforce its ratified standards. Reflecting on this puzzle last year in the run-up to the ILO's centenary, I looked again at the 1994 Report which states that 'sanctions' have 'been repeatedly discarded since the ILO's earliest days for pragmatic reasons'.⁶ I wondered what those episodes of discarding were. So, I decided to search for and write up that lost history.

Given the space constraints of this volume, my essay will focus on the early years of the ILO through 1934.⁷ Using two chronological narratives, this essay will examine the rise and fall of ILO sanctions. The final section discusses the continuing relevance of the ILO's adventure with its trade sanctions.

⁴ Steve Charnovitz, 'Rethinking WTO Sanctions' (2001) 95 *American Journal of International Law* 792, 831.

⁵ Steve Charnovitz, 'What the World Trade Organization learned from the International Labour Organization' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook of Transnational Labour Law* (Edward Elgar 2015) 411.

⁶ Report of the Director-General (n 1) 52.

⁷ For future scholars, let me note that I was not able to delve into the archives of the ILO or the League and not able to access most non-English-language sources.

II. The rise of ILO sanctions

Looking back from 1934, ILO founder Sir Malcolm Delevingne observes that one of the ‘leading ideas embodied’ in the ILO Constitution of 1919 is ‘supervision over, and enforcement of, the observance’ of ILO conventions.⁸ Delevingne explains that the idea of enforcement by the ILO can be traced back to earlier intergovernmental labour negotiations including the British government’s unsuccessful proposals for enforcement through arbitration offered at the Berne diplomatic conference of 1906.⁹

In 1918, as the Great War draws to a close, both the French and British governments seek to create an international organization focusing on labour.¹⁰ Unlike the institutional caution in 1906, this time there is agreement on the need for an international arrangement with enforceability. The French government’s proposal is that the Conference of the new organization ‘will supervise the enforcement of Conventions which have been accepted’ and will settle disputes either itself or through a Court of Arbitration.¹¹ The British government’s proposal is an intricate framework of what becomes the ILO. Known as the ‘Early British Draft’, this framework provides a ‘complaint’ process against ‘inadequate enforcement’ of ILO conventions because ‘otherwise countries might obtain unfair advantage in industrial competition through lax administration of the international standards’.¹² Penalties are to be available against ‘non-observance’, but the British Draft maintains that it is ‘undesirable to provide an excessive penalty’ for a ‘comparatively trifling offence’.¹³ On the other hand, for a failure to carry out ‘a convention designed to prevent oppressive conditions’, the

⁸ Sir Malcolm Delevingne, ‘The Pre-War History of International Labor Legislation’ in James T. Shotwell (ed), *The Origins of the International Labor Organization* (Columbia UP 1934) vol I, 19, 41-52. In 1919, Sir Malcolm was an Assistant Under Secretary in the British Home Office with extensive experience in improving British workplace regulation.

⁹ The Berne conference adopted the first two multilateral labour conventions – on phosphorus matches and night work for women in industry.

¹⁰ By 1918, the concept of the functional international organization had deep roots in international law going back to the scholarship of University of Vienna Professor Georg Jellinek in 1889.

¹¹ Letter from the French Minister of Labour (December 1918) Document 21 in Shotwell (n 8) vol II, 97, 105.

¹² Early British Draft, Document 25 in Shotwell (n 8) vol II, 124.

¹³ *ibid* 125.

British Draft suggests that the appropriate penalty would be for signatory States 'to discriminate against the articles produced under the conditions of unfair competition proved to exist unless those conditions are remedied'.¹⁴

At the end of January 1919, the Preliminary Peace Conference appoints a Commission on International Labour Legislation (the Labour Commission) to prepare detailed recommendations on labour. Nine countries are represented on the Commission whose delegates are drawn mainly from governments. But for some of the countries, delegates (or substitutes) are also drawn from industry, labour and academia.¹⁵ In an early decision, the Labour Commission agrees to use the 'Draft Convention' formulated by the British government as a vehicle for discussion.¹⁶

The Draft Convention provides that when a 'complaint' arises from a contracting party that another party is not 'securing the effective observance' of an ILO Convention, 'the Governing Body shall apply for the appointment of a Commission of Enquiry' to consider the complaint and report thereon on 'steps which should be taken to meet the complaint and the time within which they should be taken'.¹⁷ In addition, the Commission of Enquiry¹⁸ is directed to indicate in its report the measures, if any, 'against the commerce' of a defaulting State which it considers to be appropriate, and which other States would be justified in adopting.¹⁹ Should the defaulting State not accept the recommendations of the Commission, the defaulting State would have a right to refer the matter to the Permanent Court of International Justice (PCIJ). The role of the Court is to 'affirm, vary or reverse any of the findings or recommendations of the Commission of

¹⁴ *ibid.*

¹⁵ Several of the Commission's main players had collaborated with each other for years in international labour circles; see Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50 *International Review of Social History* 435, 451–52.

¹⁶ Minutes of Proceeding No. 2, Second meeting of the Commission on International Labour Legislation, Official Bulletin (OB) (1919-20) I 8.

¹⁷ Draft Convention, *ibid* 13-14, articles 24 and 27.

¹⁸ By 1919, the Commission of Enquiry is already part of international law machinery. Yet the ILO Commission is assigned broader duties than earlier commissions had. Cesare P.R. Romano, 'The ILO system of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements' (1996) *Vienna International Institute for Applied System*, 11, 14.

¹⁹ Draft Convention (n 17) article 27.

Enquiry', and the Court may indicate the 'measures, if any, against the commerce' of the defaulting State which the Court considers to be appropriate, and which other States would be justified in adopting.²⁰ Should the defaulting State fail to comply, any other State would be authorized to take 'against the commerce' of the defaulting State the 'measures indicated' by the Commission or the Court.²¹

In the ensuing debate within the Labour Commission, the most active delegates make several important observations. Ernest Mahaim, a law professor at the University of Liège (Belgium) and the principal organizer nearly 20 years earlier of the International Association of Labour Legislation, warns that the 'economic sanctions' in the British Draft have a 'danger of encouraging protectionist measures' (17).²² Léon Jouhaux, the Secretary-General of the French General Confederation of Labour, praises the sanctions as being 'of supreme importance' (66). Emile Vandervelde, the Belgian Minister of Justice and former President of the Second International, emphasizes that it 'was not a question of measures to compel a State to accept international labour legislation, but only of sanctions against Governments which, having ratified a Convention, failed to honour their word' (66). Vandervelde also points out that Belgian employers are 'somewhat alarmed by the fact that no scales of penalties had been provided' (66). George Barnes, a Scottish parliamentarian and member of the British War Cabinet, notes the procedural value of providing a 'Court of Appeal open to defaulting States [...] before the economic sanctions [...] could become operative' (66).

Several delegates advance amendments. Vandervelde proposes that in addition to complaints from contracting parties, complaints should also be allowed from delegates to the ILO Conference (62, 64). Another Vandervelde amendment recognizes the need for 'sanctions'²³ and 'penalties', but proposes a wording change from 'measures against the commerce'

²⁰ *ibid* article 31. The Court's decision is to be 'final' meaning no further judicial review; *ibid* article 30.

²¹ *ibid* article 32.

²² I will include the page references in parentheses to the Commission's Minutes republished in OB (n 16).

²³ The term 'sanctions' does not appear in the English version of Part XIII of the Treaty of Versailles, but the French version uses the term 'les sanctions'; Treaty of Versailles, 28 June 1919, 112 British and Foreign State Papers 1, articles 414, 418-419.

to 'measures of an economic character' (66, 68). Both amendments succeed. In a subsequent session, a British amendment is accepted to grant the Governing Body discretion as to whether to utilize a Commission of Enquiry (109, 124).

As the debate proceeds, Arthur Fontaine, the Director of the French Ministry of Labour, offers slightly broader language for the potential penalties. Mahaim responds that the Belgian delegation opposes 'protectionism of a penal character' and therefore urges that 'recourse should be had to penalties of an economic character (financial tariffs, transit facilities, etc.), but barring any penalty of a military character' (125). Delevingne explains that the term 'penalties of an economic character' has a 'very wide application, and included all measures affecting the economic life of a country' (125). After hearing those points, Fontaine drops his amendment, but avows that the agreed-upon text 'would of course not exclude the possibility of inserting in a Convention clauses establishing a system of fines in the case of violation' (125).

Henry Robinson, a lawyer-banker and United States delegate to the Allied Supreme Economic Council, proposes several amendments affecting obligations and sanctions. One amendment seeks to devolve the United States treaty obligation internally to the individual state governments (73-74). Against that amendment, Fontaine objects that 'it was difficult to see what form of economic sanction could be applied against any of them which failed to carry out a Convention' (74). Another Robinson amendment seeks to water down the United States commitment to merely a 'best endeavour' to obtain compliance at the subnational level (88). Delevingne objects that this could free a federal State 'from all liability, while the other States remained subject to the application of the clauses concerning enquiry and penalties' (91).

As part of the United States 'counter-draft', Robinson then proposes 'to delete the whole system of penalties' as being 'superfluous' and 'dangerous', and instead leave the 'application of penalties to the League of Nations' (150). Speaking in favor of this amendment, James Shotwell, a history professor at Columbia University, warns that with the availability of 'penalties', there is 'a risk of going too far and creating too many organizations, for what was done for labour might equally be done as regards other questions' (153). Speaking against the United States amendment, Fontaine

declares that ‘he was convinced that as regards international legislation it would rarely be necessary to have recourse to penalties; all the same it was necessary that they should be provided as the very basis of international legislation’ (154). The American Federation of Labor President Samuel Gompers, who is the president of the Labour Commission, intervenes to suggest that several clauses, including ‘the clauses dealing with penalties’ are ‘imprudent’ given the ‘heated discussion’ in the United States about the League of Nations (154). Fontaine’s position ultimately prevails after the United States delegation drops its proposal to transfer out the enforcement as one part of the crucial compromise reached to reduce certain obligations of governments with federalism (179).

Years later, two negotiators memorialized their recollections regarding the decision against eliminating the ILO’s enforcement machinery. In 1934, Edward Phelan explained that ‘it had been thought desirable to have the machinery in the hands of experts in labor matters’.²⁴ In 1937, Shotwell observed that ‘it was quite impossible’ to secure the United States amendment from a Commission ‘the leading members of which had had years of experience in dealing with evasions of the law’.²⁵

Returning to 1919, the Labour Commission then takes up an amendment from the French delegation to remove the ‘discretion’ of States in applying ‘penalties’ in order to give the tribunal’s application of economic measures ‘a more obligatory character’ (125, 184). This amendment draws some support, but tougher opposition. For example, Robinson argues that the existing text already provides ‘sufficient sanction’ (184). The French amendment is withdrawn.

At the conclusion of the debate, the Labour Commission prepares its Report presenting the agreed-upon treaty language and a commentary on that text.²⁶ In editing their report, the Commission agrees to change

²⁴ Edward J. Phelan, ‘The Commission on International Labor Legislation’ in Shotwell (n 8) vol I, 127, 165. Phelan had been a key author of the Early British Draft and was secretary of the labour section of the British delegation to the 1919 Peace negotiations. Phelan became the first civil servant in the ILO and by 1934 had risen to be the Assistant-Director.

²⁵ James T. Shotwell, *At the Paris Peace Conference* (Macmillan 1937) 218.

²⁶ The Commission’s report gets rapidly published in 1919; Report of the Commission on International Labour Legislation of the Peace Conference, American Association of International Legislation 6 International Conciliation 851-78; see also OB (n 16) 260.

the title of the descriptive section called 'Penalties (articles 22 to 34)' to 'Enforcement (articles 22 to 34)' because the word 'penalties' is viewed as 'too strong' (223, 265). With reference to the 'economic measures' in article 33, the Report states:

It will be seen that the above procedure has been carefully devised in order to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a convention. It can hardly be doubted that it will seldom, if ever, be necessary to bring these powers into operation, but the Commission consider that the fact of their existence is nevertheless a matter of almost vital importance to the success of the scheme. The representatives of the working classes in some countries have pressed their delegates to urge more drastic provisions in regard to penalties. The Commission, while taking the view that it will in the long run be preferable as well as more effective to rely on the pressure of international public opinion rather than on economic measures, nevertheless considers it necessary to retain the possibility of the latter in the background. If all forms of sanction were removed, the effectiveness of the scheme, and, what is almost equally important, the belief in its effectiveness, would be in great measure destroyed (266).

In April 1919, Minister Barnes presents the Labour Commission's Report to the Preliminary Peace Conference. He explains that because there were 'limitations imposed on States against accepting the decrees of any super-authority', the Commission 'had perforce to give up ideas of uniformity or coercion, and to rely mainly upon the goodwill of States to accept advice and guidance which might be given to them' (288). Barnes then introduces the ILO as having the role 'to diffuse light in dark places' with the 'effective idea' of the ILO being 'creation and mobilisation of healthy public opinion' (288-89).²⁷ He goes over the ILO's main features, including its 'enforcement clauses', and remarks that 'although the machinery of organisation is brought into play, reliance is based on inquiry and publicity'

²⁷ Barnes also enigmatically states: 'I freely admit that at one time I had a good deal more faith in penalties but, Sir, closer inspection led me to the conclusion that penalties must be kept well in the background and can be applied only through the League of Nations and under the authority of the League of Nations' (288).

(291). Barnes closes by noting the expectation that the 'Peace-makers' are going 'to make industrial as well as military peace' (292). After some discussion and minor wording changes, the Preliminary Peace Conference adopts the Commission's recommendations for the labour clauses to be inserted into two Peace treaties as 'Part XIII Labour'.

At least two of the national parliamentary debates on the Peace Treaty discuss ILO enforcement and sanctions. When the United States Senate debates the ratification of the Peace Treaty in fall 1919, several senators express dismay about the dangers of potential economic sanctions and boycotts against the United States economy arising from ILO membership.²⁸ By contrast in France, the ILO's enforcement procedures get criticized for being too weak. In reporting the Treaty to the French Parliament, Louis Barthou, a former Prime Minister of France, bemoans that 'labour had hoped for and had deserved something more'.²⁹ Barthou goes on to predict that 'sooner or later it will be necessary to establish an international code of labour with executive machinery, compulsory powers and sanctions'.³⁰

The ILO's enforcement provisions quickly garner the attention of the legal community. In 1919, former United States Attorney General George Wickersham explains that 'machinery is provided whereby a state which fails to carry out its obligations, or to enforce a convention which has been ratified, may be subjected to economic measures to compel it to do so'.³¹ In her lecture to the Grotius Society, Sophy Sanger discusses the authority of the ILO's Commission of Enquiry to suggest 'what economic penalties might properly be imposed upon the defaulting government'.³²

In 1920, an excellent and swiftly-prepared collection of essays about the ILO is published under the title *Labour as an International Problem*.

²⁸ Daniel Patrick Moynihan, 'The United States and the International Labor Organization (1889-1934)' (unpublished thesis Fletcher School of Law and Diplomacy 1960) 267-76.

²⁹ Remarks of Justin Godart, a French parliamentarian and government delegate, upon his election as President of the ILO Conference: International Labour Conference, 18th Session (1934) 11-12.

³⁰ *ibid* 12.

³¹ George W. Wickersham, 'Labor' No. 25, (1919) 2(3) World Peace Foundation Pamphlets 161-162.

³² Sophy Sanger, 'The International Labour Organisation of the League of Nations' (1919) 5 Transactions of the Grotius Society 145, 151. Sanger was a British advocate for labour law reform and the longtime editor of the quarterly journal *World's Labour Laws*.

Several of the essays discuss the ILO's enforcement system. The editor of the volume, John Solano, describes the ILO as 'a wonderful development for democracy' and notes how the worker and employer would be enabled to 'charge the government of another nation with breach of faith toward its workers, and if necessary to cause it to be arraigned before the Tribunal of the League of Nations for judgment which may involve corrective measures of an economic nature taken against it conjointly by all the member states of the League'.³³ In his essay, Professor Shotwell optimistically observes that the 'provision for overseeing the enforcement of labour legislation was of fundamental importance' and that this 'interference in the home life of the participants in case they do not behave' is 'going a long way towards the breakdown of that conception of sovereignty as absolute which was the ruinous doctrine upon which the old régime, before the war, was based'.³⁴ Arthur Fontaine writes that while the rules of the ILO 'make due provision for economic measures, moral considerations have been given full weight, and those responsible for drafting the rules when discussing them, attached as much importance to moral factors as to definite measures of enforcement'.³⁵ George Barnes details the treaty procedures wherein the 'defaulting State' is given an opportunity of 'remedying voluntarily any grievance alleged' before the 'punitive economic measures' and 'penalties for default' may be taken.³⁶

Albert Thomas, a French parliamentarian and Minister of Armament during the War, is elected to be the Director of the ILO. In his first report of the Director, Thomas details how the International Labour Office (hereinafter 'Office') had begun to ready two components of the enforcement process for ILO conventions: first, the establishment of the panel of persons of industrial experience who could be appointed to a Commission of Enquiry; and second, the PCIJ's rules for its labour jurisdiction. Although article 14 of the Covenant of the League of Nations provides

³³ E. John Solano, 'Introduction' in E. John Solano (ed), *Labour as an International Problem* (MacMillan, 1920) xiii, li. Solano had served in the British Ministry of Labour.

³⁴ James T. Shotwell, 'Historical Significance of the International Labour Conference' in Solano (n 33) 41, 55-56.

³⁵ Arthur Fontaine, 'A Review of International Labour Legislation' in Solano (n 33) 161, 185.

³⁶ George N. Barnes, 'The Scope and Purpose of International Labour Legislation' in Solano (n 33) 3, 19-20.

for the establishment of the PCIJ, the only part of the Treaty of Versailles that assigns specific duties to the Court are the provisions in Part XIII. In December 1920, the Council of the League of Nations finalizes the Statute for the PCIJ which provides several innovative mechanisms to address the anticipated labour cases. These mechanisms include: a 'special chamber' for labour matters, assistance to the judges by four 'technical assessors' chosen 'with a view to insuring a just representation of the competing interests', and the 'liberty' of the Office to furnish the Court with all relevant information.³⁷

While the drafters of the Statute realized that some of the labour cases 'may present features which are not of an exclusively legal character',³⁸ the Statute evinces no hesitation in the directive that labour cases 'shall be heard and determined by the Court'.³⁹ Because only States could be parties before the PCIJ (see Statute article 34), there was a possibility that an appeal to the Court by a defendant government (see Treaty article 415) would entail a proceeding in which there was only one party before the Court, especially if the complaint came from the ILO Governing Body (see Treaty article 411). In the absence of any contentious labour case given appellate review, the Court was never called upon to formulate a standard of review for that awkward scenario.

In addition to the attention he devotes to the mechanics of the ILO's enforcement machinery, Thomas affirms the sanctions in several other ways. Writing in the first issue of the *International Labour Review* in January 1921, the Director states that the ILO 'may organise inquiries and undertake inspection and, where necessary, may have recourse to its sanctions'.⁴⁰ That month, at the Governing Body, Thomas clarifies that 'economic action could only be taken with regard to a State which failed to apply the Convention which it had ratified and not to a State which

³⁷ Statute of the Permanent Court of International Justice, 16 December 1920, 6 League of Nations Treaty Series 390, article 26. Note the interlinking treaty features whereby Part XIII assigns duties to the PCIJ and the PCIJ Statute assigns duties to the ILO Governing Body to nominate assessors.

³⁸ League of Nations, Report Submitted to the Third Committee, reprinted in Alexander P. Fachiri, *The Permanent Court of International Justice* (Oxford 1925) 312, 316.

³⁹ Statute (n 37) article 26.

⁴⁰ Albert Thomas, 'The International Labour Organization. Its Origins, Development and Future' (1921) 1 *International Labour Review* 5.

had refused to ratify a Convention'.⁴¹ He further explains that 'as regards the application of general principles [article 427], unless States voluntarily agreed to apply them, the International Labour Organisation could not, at present, have recourse to coercive measures'.⁴² In response to concerns as to the scope of the competence of the Governing Body, Thomas sagaciously urges the Governing Body 'not to bind itself by the adoption of a definite principle, since it would often be called upon to take decisions which would involve the making trial of fresh measures without disregard of the text of the Treaty'.⁴³

In the 1921 report of the Director to the International Labour Conference, Thomas alludes to potential conflicts between 'the sanctions at the disposal of the International Labour Organisation for enforcing agreements' and the potential sanctions at the disposal of the League's International Blockade Commission.⁴⁴ Thomas had already communicated with the Blockade Commission about a potential overlap with the ILO's 'economic sanctions'.⁴⁵ The Commission had responded that its terms of reference do not include 'questions concerning the workers'.⁴⁶ Thomas also points out in his Report that the 'organisation of sanctions [...] comprises all the mechanism of a legislative or juridical nature placed at the disposal of the International Labor Organisation'.⁴⁷ He states that this 'machinery is already in being and that it merely remains for the individual States to set it in motion'.⁴⁸

No motion ensues. In his 1922 report, Thomas writes: 'there is no doubt that we are still far from the complete scheme anticipated in the Treaty of Peace, wherein the system of Conventions which have come into force is completed by a series of measures of supervision, accompanied if necessary by sanctions'.⁴⁹ Even though still far from use, the sanctions seem

⁴¹ Governing Body, sixth session (1921), minutes 25.

⁴² *ibid.*

⁴³ *ibid.* 18.

⁴⁴ International Labour Conference, third session (1921), Report of the Director, para 115.

⁴⁵ *ibid.* para 118.

⁴⁶ *ibid.*

⁴⁷ *ibid.* para 120.

⁴⁸ *ibid.*

⁴⁹ International Labour Conference, fourth session (1922), Report of the Director, para 89.

real enough to trigger concerns. For example, the 1922 ILO Special Report on the situation regarding the ratification of the hours Convention looks at the ratification debate in the Netherlands. During that parliamentary discussion, the Dutch government expresses worries that ratification ‘affords no guarantee that other countries will take the same measures’ and yet if the Netherlands ratifies and then fails to observe its obligations, then the Dutch economy ‘would become subject to severe sanctions.’⁵⁰

The novelty of ILO enforcement elicits new scholarship by ILO insiders. For example, in 1921, Ernest Mahaim, now Belgian Minister of Industry, Labour and Food and a member of the Governing Body, writes an article stating after ILO conventions are ratified by legislatures, ‘a system of penalties guarantees their observation.’⁵¹ In 1922, Sophy Sanger, by then the first chief of the ILO’s Legislative Section, presents a detailed study to the International Law Association on the topic of the PCIJ and labour cases.⁵² Sanger anticipates that workers or employers who have ‘become fully alive to the economic advantages of an international standard of regulation’ will ‘take the initiative in urging their Government to start proceedings before the Court to induce a competing country faithfully to impose the same standard.’⁵³

In 1924, the Office prepares a report on several procedural matters in which ‘sanctions’ are discussed in two contexts.⁵⁴ First, in explaining why the Governing Body should not seek to interpret ILO conventions, the Office warns that if a State has in ‘good faith conformed’ with the Governing Body’s opinion, the State might nevertheless ‘find itself liable to sanctions’ if the PCIJ renders a contrary decision, and then the ‘authority of the Governing Body would be compromised.’⁵⁵ Second, in considering the implications of allowing reservations to conventions, the Office points out how important it is to know when ratifications ‘take full effect’ because at

⁵⁰ *ibid.*, Appendix XIV 945, 1009, para 59.

⁵¹ Ernest Mahaim, ‘International Labour Law’ (1921) 1 *International Labour Review* 283, 285.

⁵² Sophy Sanger, ‘The Permanent Court of International Justice and Labour Cases’ (1922), *International Law Association, Report of the 13th conference*, vol 1 46-72.

⁵³ *ibid.* 49.

⁵⁴ *International Labour Conference, sixth Session (1924), Report on the institution of a procedure for amendment of conventions.*

⁵⁵ *ibid.* 44-45.

that point, ratifying countries are subject to prescribed supervision in the case of non-observance and 'would be liable to the sanctions prescribed'.⁵⁶

By the mid-1920s, the ILO's progressive features generate a new wave of scholarship. In 1924, George Alexander Johnston comprehensively examines the ILO in its social and economic context. Johnston explains that a State ratifying an ILO convention takes on an obligation of 'effective observance' and that the 'due fulfilment by each Government of this responsibility is intended to be secured by a system of sanctions'.⁵⁷

Also in 1924, José de Vilallonga, the ILO's first Legal Adviser, expounds the law of the ILO in relation to international law.⁵⁸ While noting that Part XIII 'provides for the adoption of measures of an economic character against a Member failing to fulfill its obligations', he explains that the Organization itself lacks 'means of international compulsion' to impose those economic measures.⁵⁹ Moreover, neither the Commission of Enquiry nor the PCIJ have 'the power to order the adoption of the economic measures indicated'.⁶⁰ Instead, 'each Member is entirely free to decide' whether it will undertake the indicated 'economic reprisals'.⁶¹ The value added is that Part XIII 'has certainly modified the common law of reprisal, but only to the advantage of the Members' by recognizing that each ILO Member 'has the right to take economic reprisals'.⁶² In addition, Vilallonga postulates that the ILO's 'attributes' bring it 'under what has been called administrative international law' which he praises as 'the most modern part' of 'the law of nations' because it 'aims at organising the international community'.⁶³

⁵⁶ *ibid* 76.

⁵⁷ George A. Johnston, *International Social Progress. The Work of the International Labour Organisation of the League of Nations* (George Allen & Unwin Ltd. 1924) 42. In 1924, Johnston is a lecturer at the Universities of Glasgow and St. Andrews. Earlier, he embarks upon long service as an ILO official. Johnston writes two important books about the ILO as bookends on his career. His second book George A. Johnston, *The International Labour Organisation. Its Work for Social and Economic Progress* (Europa 1970) is quoted below (n 178).

⁵⁸ José de Vilallonga, 'The Legal Character of the International Labour Organisation' (1924) 9 *International Labour Review* 196-207.

⁵⁹ *ibid* 202-03.

⁶⁰ *ibid*.

⁶¹ *ibid* 203.

⁶² *ibid*.

⁶³ *ibid*.

In that same year, the ILO's procedure for representations (article 409) gets its first use. A Japanese seamen's union lodges a representation that the Japanese government is not adhering to the Placing of Seamen Convention, 1920 (No. 9). When it considers this representation, the Governing Body decides not to advance this case to 'the first stage in the procedure for enquiry laid down in the Treaty'.⁶⁴ Decades later, Ernst Haas analyzes this and other representations in the ILO's first two decades and concludes that the Governing Body's committees were 'quite ready to accept all sorts of excuses which, on a rigorous reading of ILO obligations, might not have been considered germane'.⁶⁵

In 1925, Edward Harriman undertakes a detailed examination of the legal aspects of the League, the PCIJ and the ILO.⁶⁶ Harriman analogizes that a complaint in the ILO 'is in the nature of a criminal as distinguished from a civil action'.⁶⁷ He explains that after a 'judgment rendered against the defaulting Member [...] the Court has the power and the duty to fix the sanction for its own decree'.⁶⁸

The report of the Director for 1925 hints some impatience at the slowness in 'putting into operation the system of mutual supervision'.⁶⁹ While 'the machine had been assembled', writes Thomas, 'there was no guarantee that the required current would be forthcoming and that the machine would be set in motion'.⁷⁰ The only upside to this lack of motion is that it gives Thomas a ready answer to criticism that the ILO is not doing enough on implementation. Thomas asks why, if countries ratifying conventions are alarmed about 'competition of neighboring States which have ratified

⁶⁴ ILO, *The International Labour Organisation: The First Decade* (George Allen & Unwin 1931) 71.

⁶⁵ Ernst B. Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford UP 1964) 359. Haas was a political scientist and international relations scholar.

⁶⁶ Edward A. Harriman, *The Constitution at the Cross Roads: A Study of the Legal Aspects of the League of Nations, the Permanent Court of International Justice, and the Permanent Organization of Labor* (George H. Doran 1925). When he wrote this book, Harriman was a lecturer at the George Washington University Law School.

⁶⁷ *ibid.* 71.

⁶⁸ *ibid.* 71, 185.

⁶⁹ International Labour Conference, sixth session (1925), Report of the Director, para 74.

⁷⁰ *ibid.*

Conventions but do not apply them, why do not the former set in motion the procedure for filing complaints'.⁷¹ Calling for 'a bold and persistent application of the whole of the machinery created by the Treaty', Thomas urges that 'each Member must exercise its recognized rights, and thus promote the common interest of all'.⁷²

In 1926, the Director reiterates the value of the ILO's complaint system. Thomas reports that 'no actions have been taken under articles 411 and following which govern the procedure for dealing with complaints'; then he reminds everyone that 'the machinery is there' should a Commission of Enquiry 'have to be appointed'.⁷³ Thomas avers that a government ratifying an ILO convention acquires 'moral pressure' to insist on 'ratifications elsewhere'.⁷⁴ Showing his sophisticated understanding of the interplay between social and economic factors, Thomas contrasts the 'efficacy of a simultaneous raising of labour standards' with the 'ineffectiveness of protection by means of tariffs'.⁷⁵ Thomas also documents the recent labour Ministerial Conference held in London among five European countries to come to a common agreement on the interpretation of the Washington Hours of Work (Industry) Convention, 1919 (No. 1) in order to promote its ratification. The 'London Agreement' of March 1926 provides that the five governments 'will not lodge complaints against each other for wrongful or incomplete application of the Convention'.⁷⁶

In June 1926, the PCIJ holds a public sitting in an important matter for the ILO, the advisory opinion on the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*. In a proceeding that is impossible to imagine in today's State-centric International Court of Justice, the PCIJ allows three international non-governmental organizations to make oral statements to the Court. Although the ILO's system of enforcement is not itself at issue in the proceeding, two of those organizations discuss enforcement as context for interpreting the ILO's competence.

⁷¹ *ibid* para 199.

⁷² *ibid*.

⁷³ International Labour Conference, seventh session (1926), Report of the Director, para 60.

⁷⁴ *ibid* para 218.

⁷⁵ *ibid*.

⁷⁶ *ibid* para 117.

Seeking to delineate a narrower role of the ILO, the representative of the International Organization of Industrial Employers explains that 'if at any time a Government fails to carry out its duties', the actions to be taken following a Commission of Enquiry 'lie with the Governments', and the Treaty 'has carefully excluded intervention by the International Labour Organisation as such'.⁷⁷ Seeking to demonstrate expanded competence, the representative of the International Confederation of Christian Trade Unions points out that the ILO's authors 'have not confined themselves to giving the International Labour Organization strong and effective rules, they have also provided a procedure including economic sanctions'.⁷⁸ Commenting a few years later on the role 'played by private organisations in international life' in the PCIJ's advisory proceedings on labour, Thomas discerns on the legal horizon 'the sign of a possible evolution of international law in a more realistic direction'.⁷⁹

In his 1927 Report, the Director devotes attention to evolving processes for supervision of ratified ILO conventions. Referring to the newly-established Committee of Experts, Thomas insists that its work 'is still only the beginning of real supervision' with 'no immediate sanction behind them'.⁸⁰ He asserts that 'the only methods which can be effective are the procedures of representation and complaint'.⁸¹ Yet he also understands that 'there are various difficulties which may prevent industrial organisations from setting in motion the procedure of representation'.⁸² As for the prospect of complaints, Thomas laments that 'the time has perhaps not yet come when the different States will have brought home to them afresh the importance of working conditions in international competition'.⁸³ Thomas submits that 'the Office has never had the ingenuous idea that by the magic of the written word, the whole machinery provided for in the Treaty of Peace can

⁷⁷ Speeches delivered and documents read in Court (1926) 11 OB 238, 244, 253-54.

⁷⁸ *ibid.* 268, 275. For the official version, see *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, PCIJ Series C, Acts and documents relating to judgments and advisory opinions given by the Court, No. 12, documents relating to advisory opinion No. 13.

⁷⁹ International Labour Conference, 14th Session (1930) Report of the Director para 45.

⁸⁰ International Labour Conference, 10th Session (1927) Report of the Director para 114.

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid.*

be set going at one stroke' so that 'the States which are mutually bound by Conventions will severely supervise one another and set to work the different procedures provided for, including even decisions of the Court of Justice and economic sanctions'.⁸⁴ Looking ahead, Thomas envisions that complaints and representations 'will only be set going, when the time comes for their use, by the development of international life'.⁸⁵

Thomas continues to champion the complaint process during his remaining years as Director, but he increasingly warms up to the improved article 408 process as an alternative to complaints. In 1927, he calls the new process 'a kind of first warning publicly given to the States' which are not strictly applying a ratified convention.⁸⁶ In his report of 1928, Thomas questions the claims that ratifying governments take 'liberties' with conventions in practice, and asks why the authors of such claims have 'not set in motion the procedure of complaint'.⁸⁷ In 1929, Thomas lauds the 'considerable progress' in utilizing article 408 reports, and suggests that 'it is perhaps for this very reason' that there are not any 'cases of the opening of the procedure of representation or complaint'.⁸⁸ In 1931, Thomas accords more credit to the new process. While admitting that 'it is true that the machinery of supervision and sanctions has as yet scarcely been utilised', Thomas points out that 'it is misleading to keep alleging that ratified Conventions are not being enforced' because 'exceptions' to enforcement 'are being dealt with and are disappearing' through the article 408 processes.⁸⁹

In 1929, as part of the ongoing discussion of the revision of ILO conventions, H.C. Ørsted, a Danish employer delegate and director of the Nordic employers federation, writes a memo to the ILO's Standing Orders Committee analyzing the legal character of the ratification of an ILO convention. According to Ørsted, this legal character is an obligation 'with respect to the Organisation', not the 'legal character of reciprocity'.⁹⁰

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid* para 118. Article 408 requires every ILO member to make an annual report on the measures it has taken to give effect to the provisions of conventions to which it is a party.

⁸⁷ International Labour Conference, 11th Session (1928) Report of the Director para 104.

⁸⁸ International Labour Conference, 12th Session (1929) Report of the Director para 101.

⁸⁹ International Labour Conference, 15th Session (1931) Report of the Director 6.

⁹⁰ International Labour Conference, 12th Session (1929) appendix III, 762, 764–65.

Ørsted reaches this conclusion, in part, because of the exclusive power of the Governing Body 'to adopt the procedure of enquiry which may lead to the adoption of economic sanctions against a State Member which fails to fulfil the obligations resulting from the ratification of a Convention'.⁹¹

Later that year, Mahaim authors an article for the *Revue de Droit International et de Législation Comparée* in which he responds to Ørsted's thesis.⁹² In Mahaim's view, that the obligations of ILO conventions are towards the Organization does not preclude that such obligations can simultaneously be towards other States parties. Mahaim reasons that the Berne labour conventions of 1906 were mutual obligations 'although without sanctions'.⁹³ The Peace Treaty, says Mahaim, is intended 'to improve on the methods inaugurated at Berne' through the creation of the Permanent Organization with its new processes 'and, finally, the sanctions'.⁹⁴ But these improvements are supplemental to the underlying mutual obligations, not a replacement for them. Mahaim sees the sanctions as an important part of the improvements achieved in 1919 with the Organization having 'the whole system of sanctions placed in its hands'.⁹⁵ Indeed, the 'procedure of sanctions' appears to be so central to Mahaim's ontology that he views the sanctions as evidencing an 'abdication of sovereignty on the part of the Members'.⁹⁶

In 1929, a book by Charles Howard-Ellis details the ILO's complaint procedure and explains that it is 'very carefully devised in a series of graduated steps' starting with the Governing Body and ending with 'the actual operation of economic coercion to secure compliance'.⁹⁷ Ellis, a sometime British intelligence officer, observes that 'public opinion has proved exceedingly efficient in inducing governments to live up to conventions once ratified, and no suggestion has been made of resorting to more stringent

⁹¹ *ibid.*

⁹² I have relied on the English translation of the shortened version of Mahaim's article as edited for publication by the ILO.

⁹³ Ernest Mahaim, 'Some Legal Questions relating to International Labour Conventions' (1929) 6 *International Labour Review* 765.

⁹⁴ *ibid.* 779.

⁹⁵ *ibid.* 779, 783.

⁹⁶ *ibid.* 783.

⁹⁷ Charles Howard-Ellis, *The Origin Structure & Working of the League of Nations* (Houghton Mifflin 1929) 229–30.

measures'.⁹⁸ In his view, 'it is doubtful whether a case will ever occur of this procedure being applied to the end'.⁹⁹

In 1929-30, P.P. Pillai, the first and longtime director of the ILO's branch office in New Delhi, delivers a series of lectures about the ILO.¹⁰⁰ One lecture discusses the ILO's enforcement process and notes that any ILO member 'can enforce against the recalcitrant state the punitive economic measures set out either in the report of the Commission of Enquiry or in the Court's final order'.¹⁰¹ Pillai observes that 'it has sometimes been argued that international supervision over ratified Conventions cannot but be perfunctory and that the economic sanctions referred to would hardly, if ever, be resorted to'.¹⁰² Pillai disagrees, suggesting instead that the sanctions would be resorted to.

In a 1931 monograph chronicling the ILO's first decade, the Office points out that the ILO has 'a complete system of procedure for complaints, enquiries and sanctions which occupies no fewer than ten Articles of Part XIII'.¹⁰³ The monograph goes on to explain that:

the system is clearly inspired by a desire to delay the application of sanctions as long as possible, so as to allow the State implicated to justify itself at every stage of the procedure or to fulfil its obligations under the Convention. The sanctions provided, moreover, are of a purely economic nature, and the power of imposing them rests with the Permanent Court of International Justice.¹⁰⁴

In addition, the Office points out that if the Governing Body were to publish a representation, 'all the States Members would be given the opportunity, if they thought fit, to make a formal complaint, and so to open the procedure for enquiry and sanctions'.¹⁰⁵

⁹⁸ *ibid* 230.

⁹⁹ *ibid* 229.

¹⁰⁰ P.P. Pillai, *India and the International Labour Organisation* (Patna University 1931). Pillai was an Indian economist.

¹⁰¹ *ibid* 98.

¹⁰² *ibid*.

¹⁰³ ILO (n 64) 71.

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* 72.

In 1931, the Governing Body takes up several interconnected issues involving the supervisory process. To better inform these discussions, the Governing Body had requested a study of the status of article 411 complaints. The ensuing legal study by the Office restates the authority of Conference delegates to lodge a complaint, and clarifies that the Governing Body enjoys 'wide' freedom and 'discretion' in addressing complaints and in deciding whether to authorize a Commission of Enquiry.¹⁰⁶ With regard to the rules for representations in the Standing Orders, the Governing Body had tasked a Committee to consider needed revisions. During debate within that Committee on a draft prepared by the Office, a participant had remarked that since the 'term sanction was not specifically referred to in the Treaty, it was not desirable to make use of it in the Standings Orders'.¹⁰⁷ In late 1931, the Governing Body adopts new Standing Orders for handling representations that provide for a confidential consideration within the Governing Body until there is a decision as to what to do about the representation, including the possibility of proceeding to a complaint.¹⁰⁸ The term 'sanction' is omitted.

In 1932, a question arises as to whether the ratification of an ILO convention by a non-Member of the ILO would make that country 'liable to the sanctions laid down in the Treaty of Peace'.¹⁰⁹ At the time, the United States is still a non-member. A legal analysis by the Office concludes that a non-member State ratifying an ILO convention 'would in effect involve acceptance *ad hoc* of certain of the provisions of Part XIII concerning supervision and sanctions with respect to the application of Conventions'.¹¹⁰

Albert Thomas dies suddenly in May 1932 and is succeeded by Deputy Director Harold Butler. Butler had begun his service to the ILO on the Labour Commission drafting Part XIII. Thomas himself was not a drafter, and that status may have better enabled him to transform the nascent ILO into a 'living'¹¹¹ institution energetic and adept enough to earn its way through the tumultuous decades ahead.

¹⁰⁶ Governing Body, 56th session (1932), minutes, appendix XIII, 155, 156.

¹⁰⁷ *ibid* 85, 94-95.

¹⁰⁸ *ibid* 164-66. The Legal Study notes the 'serious nature of the possible consequence of the procedure of complaint' *ibid* 156.

¹⁰⁹ Governing Body, 57th Session (1932), minutes, 229-30.

¹¹⁰ Governing Body, 60th Session (1932), minutes, appendix XIV, 668.

¹¹¹ 'Albert Thomas' (1932) XVII (3) OB 95-96.

All of the documentation I have been able to collect suggests that Thomas believes in the importance of the complaint process and does all he can to put that system into operation. Although Thomas is surely aware of the critical views (discussed below) about the ILO's machinery for sanctions, nothing in any of his writings or actions suggests that he objects to the possibility of sanctions if a complaint is verified and proves unsuccessful in remedying the treaty default. On the contrary, for Thomas, the sanctions 'placed at the disposal of the International Labour Organisation' are an integral part of his vision for a successful ILO. As he explained in 1922 (quoted above), the system of conventions is 'completed' by supervision and 'if necessary by sanctions'.¹¹²

In October 1932, the Governing Body considers the question of what should be done about situations where article 408 reports fail to produce adequate results. Tom Moore, the Canadian worker delegate, proposes that 'there should be some intermediate step' between observations 'and the application of sanctions under the Treaty'.¹¹³ Léon Jouhaux interjects that 'it was certain that the Office would soon reach the stage at which it would have to take certain responsibilities regarding the application of the sanctions provided by the Treaty'.¹¹⁴ This discussion of sanctions is brought to a close by Butler, the new Director, who declares that 'if it were found that, in spite of all the observations made, certain States persisted in not applying the Conventions they had ratified, it would be necessary to contemplate the application of sanctions'.¹¹⁵ So, as Butler begins his six years of service as Director, he does not initially express any differences in his views on sanctions from the long-time support for the possibility of sanctions expressed by Thomas from 1920 through 1931.

The March 1933 issue of the *Annals of the American Academy of Political and Social Science* is devoted to the ILO whose cutting-edge enforcement system is discussed and praised in several of the 24 essays. Jean Morellet, the ILO's second legal adviser, points out 'the important distinction in methods of application between International Labor conventions and ordinary

¹¹² International Labour Conference (n 49).

¹¹³ Governing Body (n 110) 583.

¹¹⁴ *ibid* 584.

¹¹⁵ *ibid.* Butler goes on to say that he believes that 'the number of such cases would be very small'.

international Conventions, for the application of the former is subject to a procedure of supervision and sanctions which is regulated in great detail by the [Peace] Treaties'.¹¹⁶ Joseph Chamberlain, a law professor at Columbia University, calls attention to the ILO's 'provision for economic sanctions against a recalcitrant state'.¹¹⁷ Charles Pipkin, a professor of political science at Louisiana State University, takes note of the provisions 'providing sanctions for the observation of labor treaties'.¹¹⁸ Shotwell describes Part XIII as 'having a long series of provisions for the international punishment of any state not living up to its agreement under the treaty'.¹¹⁹

One of the essayists, Francis Graham Wilson, writes specifically on the topic of enforcement of international labour standards.¹²⁰ At that time, Wilson is a 32-year old professor of political science at the University of Washington who had received a fellowship to spend a year in Geneva (1931-32) to write a book about the ILO. Over a lengthy academic career, Wilson becomes an eminent political scientist known for his writings on conservatism and public opinion. I will discuss Wilson's thesis on ILO enforcement in the context of his 'controversial' book about the ILO published in late 1934.¹²¹

III. The fall of ILO sanctions

The rejection of the ILO's sanctions commences as the ink dries on the Peace Treaties. In July 1919, after noting the availability of 'measures of an economic character prepared to compel compliance', George Wickersham

¹¹⁶ Jean Morellet, 'Legal Competence of the International Labor Organization' (1933) 166 *Annals of the American Academy of Political and Social Science* 46, 51.

¹¹⁷ Joseph P. Chamberlain, 'Legislation in a Changing Economic World' (1933) 166 *Annals of the American Academy of Political and Social Science* 30, 44.

¹¹⁸ Charles W. Pipkin, 'Relations with the League of Nations' (1933) 166 *Annals of the American Academy of Political and Social Science* 124.

¹¹⁹ James T. Shotwell, 'The International Labor Organization as an Alternative to Violent Revolution' (1933) 166 *Annals of the American Academy of Political and Social Science* 18, 22.

¹²⁰ Francis G. Wilson, 'The Enforcement of International Labor Standards' (1933) 166 *Annals of the American Academy of Political and Social Science* 95-101. Wilson had written on international labour regulation as early as 1929.

¹²¹ See 'Book Notes' (1935) 31 *International Labour Review* 907, 921 (reviewing Wilson's book and calling it 'one of the most controversial accounts' of the ILO 'that have appeared for some years', yet praising Wilson's 'standard of accuracy').

suggests that the ILO should act more like the League of Nations in placing reliance ‘upon the effect of discussion, interchange of opinion and suggestion, than upon coercion, to accomplish the beneficent ends in view’.¹²² George Barnes, in his 1920 essay quoted above, proclaims that ‘it is important to eliminate from the scheme, as far as possible, coercive measures to enforce the observance of the conventions’.¹²³ Instead, Barnes suggests that ‘national honour, public opinion, [and] the moral obligations of good faith and diplomacy should be relied upon, and should almost invariably suffice to secure the observance of conventions, provided that they are practicable and based upon justice and good reason’.¹²⁴

In 1924, Beddington Behrens points out that while the Treaty of Versailles ‘lays down various forms of coercion’ should the terms of an ILO convention not be applied, those provisions are ‘of no present practical importance’.¹²⁵ He goes on to explain: ‘one can hardly conceive, in the present state of the world, of a general economic boycott of a country, especially if it was one of the large Powers, for failure to observe some clause in a labour convention it had ratified’.¹²⁶ Instead, Behrens postulates that the ILO’s ‘strength must reside in its power to appeal to international public opinion’ rather than in ‘the threat of armies or of economic boycott’.¹²⁷

By 1926, there is growing discomfort with the sanctions in the ILO Constitution. In his address upon being elected President of the ILO’s 1926 Conference, Monseigneur Nolens points to the ILO’s ‘system of international supervision and sanctions’ and calls attention to how ‘the enforcement of Conventions’ applies only to ratifying countries.¹²⁸ Nolens voices

¹²² George W. Wickersham, ‘International Labor Standards and their Possible Enforcement in the United States’ (July 1919) 8 Proceedings of the Academy of Political Science in the City of New York 50, 65-66.

¹²³ Barnes (n 36) 6.

¹²⁴ *ibid.*

¹²⁵ E. Beddington Behrens, *The International Labour Office* (Leonard Parsons 1924) 36. At the time, Beddington-Behrens was an international civil servant at the League and the ILO.

¹²⁶ *ibid.* 37.

¹²⁷ *ibid.* 37-38.

¹²⁸ International Labour Conference, 8th Session (1926) 9. In addition to his religious roles, Nolens is a longtime government delegate of The Netherlands who had founded the Netherlands Association for Labour Legislation.

concern that this potential enforcement ‘may in itself be to Members who have not ratified a further ground for not ratifying in a hurry’.¹²⁹ In his treatise on the ILO, Paul Périgord observes that in complaints being considered by a Commission of Enquiry or the PCIJ, ‘abundant provision is made for the defaulting state to remedy any grievance alleged against it before any question of penalty can arise’.¹³⁰ Périgord adds that the drafters of the ILO procedures ‘did not believe in coercive measures’ to ‘secure the observance of the conventions’, but instead relied upon ‘national honor, public sentiment, international moral sense, and friendly representations’ which ‘should prove sufficient’.¹³¹ Périgord may be the originator of the myth that the ILO’s founders did not believe in coercive measures.¹³²

The ILO Conference of June 1926 features a spirited discussion of the sanctions in the ILO system. The context is the decision to establish what is now called the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The Office had prepared a note explaining that the ‘functions of the Committee of Experts would be entirely technical and in no sense judicial’.¹³³ The note clarifies that the proposed system of examination ‘is not in any way concerned with the machinery of enquiry and of sanctions’ and its operation ‘is not based upon complaints’.¹³⁴ During the debate on setting up the Committee of Experts, Mahaim (now a longtime Belgian government delegate) points out that ‘formal complaints’ are a ‘serious step’ that can lead to an ‘official inquiry’ which can make possible the ‘system of sanctions’ including ‘a financial and economic blockade of a defaulting State’.¹³⁵ Mahaim suggests that such sanctions should be reserved only for cases that are ‘scandalous’.¹³⁶ For the rest of the cases, Mahaim explains that the Peace Treaty provides an ‘intermediate

¹²⁹ *ibid* 10.

¹³⁰ Paul Périgord, *The International Labor Organization: A Study of Labor and Capital in Cooperation* (D. Appleton 1926) 131. Périgord was a French-American professor at the University of California at Los Angeles.

¹³¹ *ibid* 132.

¹³² I characterize this claim as a myth because the Commission’s minutes show only a modicum of opposition to the coercive measures actually approved.

¹³³ International Labour Conference, 8th Session (1926) 399-400.

¹³⁴ *ibid* 400.

¹³⁵ *ibid* 250.

¹³⁶ *ibid*. I read Mahaim as making a distinction between scandalous noncompliance and technical noncompliance.

system' based on the annual reports of governments.¹³⁷ Both the Office and Mahaim are conceptualizing a distinction between two alternative methods of managing treaty implementation. As Mahaim sees it, the Peace Treaty 'organises a system of control separate from the system of sanctions'.¹³⁸

Right after Mahaim's reference to a 'blockade', Belgium's worker delegate Corneille Mertens jumps in. Noting 'the possible result of an economic blockade' on the ILO-defaulting country, Mertens protests: 'I do not like such measures, and I hope they will not be taken, but that any defect with respect to application will be met by other means'.¹³⁹ Still, Mertens is dubious of 'the argument that any such system [of sanctions] will lead to difficulties in ratification' because 'for the most part this argument is brought forward by countries which do not wish to ratify'.¹⁴⁰

This discussion of sanctions provokes an intervention from Sir Joseph Cook. Cook is an Australian government delegate who had once been Prime Minister and was one of the plenipotentiaries in Paris who received the report of the Labour Commission. Cook retorts that the ILO was never intended to

be a court to wield a big stick and go about with a blackthorn to flagellate nations which were recalcitrant. It was intended to be an Organisation where reason and persuasion and public opinion should be enthroned. It was proposed to gather the facts and let in the light of public opinion upon them. That, I venture to say, will in the long run, perhaps prove the best sanction of all – the most effective and the most likely to give the best results.¹⁴¹

In June 1934, the ILO is given its first opportunity to 'open the procedure' for a Commission of Enquiry. This opportunity arises during the ILO's 1934 Conference when the Indian worker delegate, Jamnadas M. Mehta, the President of the National Trades Union Federation and the All-India Railwaymen's Federation, decries India's failure to apply the Hours

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ *ibid* 251.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid* 252.

of Work (Industry) Convention to half of the railway workers.¹⁴² Even as a first-time delegate, Mehta (who is a barrister) understands his rights and invokes his complaint ‘as a Delegate from India’.¹⁴³ He asks ‘the Governing Body to have a Commission of Enquiry appointed’.¹⁴⁴

To his disadvantage, Mehta neglects to line up some allies for his initiative. And his timing is poor. Mehta lodges his complaint at the end of the discussion of article 408 reports, and just before the eagerly awaited announcement that the United States Government is now ready to be invited to join the ILO.

Notwithstanding the bad timing, Mehta’s initiative should have been celebrated by the Conference as a long-awaited institutional achievement for the ILO. Yet no celebration occurs. Mehta’s announcement draws a quick rejection from A.G. Clow, an Indian government delegate. Clow rebukes Mehta for bringing up a ‘domestic dispute’ and showing ‘ignorance’ because, as Clow puts it, ‘those of you who are familiar with the Treaty, will of course, know that it is only [...] Member States, and not “members” of the Conference who “have the right” to make effective applications under’ article 411.¹⁴⁵ On the substance, Clow points out that the Committee of Experts ‘has never expressed the view’ put forward by Mehta regarding defects in India’s implementation of the Convention.¹⁴⁶

As soon as he can get recognized, P.J.S. Serrarens, the worker delegate from The Netherlands and longtime Secretary-General of the International Federation of Christian Trade Unions, stands up to Clow. Serrarens appreciates the historical significance of Mehta’s bold move. Serrarens states that he is ‘glad that the Indian Workers’ delegate has invoked the procedure laid down in article 411 *et seq.* of the Treaty of Peace’.¹⁴⁷ In riposte, Serrarens points out that Clow ‘himself was in error’ regarding Mehta’s rights.¹⁴⁸ Soon afterward, a British government delegate seeks to end the discussion

¹⁴² International Labour Conference, 18th Session (1934) 451–52.

¹⁴³ *ibid.* 452.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.* 453.

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.* 456.

¹⁴⁸ *ibid.*

and notes that the Governing Body will consider Mehta's complaint 'in due course'.¹⁴⁹

Due course occurs behind closed doors. In September 1934, the Governing Body takes up Mehta's complaint in a private sitting.¹⁵⁰ Then in early 1935, in another private sitting, the Governing Body adopts a resolution expressing 'hopes' that the 'benefits of the Convention will be extended at an early date to such workers on Indian railways as do not yet enjoy them'.¹⁵¹ Because the Governing Body debates Mehta's public complaint in a private sitting, there is no transparency as to what considerations led to the negative determination. Although article 411 gives the Governing Body the discretion to decide whether a Commission of Enquiry is needed, the circumstances of this complaint warrant an affirmative decision of the Governing Body made in a public session.¹⁵² The criticism that I express here parallels that of Professor Haas who pungently states that 'instead of appointing the Commission of Inquiry foreseen in the Constitution, the Governing Body in effect used the representation procedure in order to exonerate the British authorities'.¹⁵³

Wilson's 1934 treatise presents a detailed description of the ILO's enforcement mechanism and offers numerous valuable insights.¹⁵⁴ Wilson coins a great name, the 'Commission of Verification', for the inventive and precedential article 420 procedures to lift sanctions (223).¹⁵⁵ He appreciates

¹⁴⁹ *ibid.*

¹⁵⁰ Governing Body, 68th session (1934) 19 OB. 101, 112.

¹⁵¹ Governing Body, 69th session (1935) 20 OB 15; Governing Body, 69th Session (1935), Minutes, 30, 62, 127.

¹⁵² To be sure, the allegation Mehta presents fell far short of scandalous non-compliance (non-coverage of certain Indian railway workers would seem to be permitted by article 10 of the Washington Hours Convention). Recalling the discussion in the Early British Draft, the right first case for a Commission of Inquiry would have been against non-compliance that leaves in place 'oppressive conditions' for workers. On the other hand, an easy case like India's railway workers might have provided a good test drive. And it was important for the Governing Body to demonstrate that the accused Government cannot veto an inquiry. Certainly, there was no justification for the Governing Body to rule against Mehta without giving reasons.

¹⁵³ Haas (n 65) 358.

¹⁵⁴ Francis Graham Wilson, *Labor in the League System: A Study of the International Labor Organization in Relation to International Administration* (Stanford UP 1934).

¹⁵⁵ For ease of reference, my essay includes page references to Wilson's book.

the significance of the ILO's alternative to unilateral reprisal by placing 'in the hands of an international body the supervision and evaluation of enforcement' (231). He grasps how 'unique' ILO enforcement is and shows that the League of Nations has no parallel means of enforcement of its conventions because sanctions in the League apply only to 'political issues' rather than to 'questions of social co-operation' (221, 230-231).

Yet despite all of the legal progress in the ILO's enforcement system, Wilson denounces the sanctions:

If one consults the minutes of the Peace Conference Commission which drafted Part XIII, one will find there a high regard for 'sanctions'. It seems utterly absurd now that sensible members of that Commission could have believed that an economic blockade might be instituted by the Powers simply because, let us say, one country allowed more hours of work than are permitted by the Washington hours convention (217). The plain fact is that the Labor Organization is functioning in a world of nationalistic realism which admits of no teeth to Part XIII. States have more sanctions against the Labor Organization than the Labor Organization has against the states (218). Although the Peace Conference made heroic attempts to provide sanctions for international labor law, none in fact was assured. Sanctions machinery is to be found in Part XIII, but the international situation does not permit it to be endowed with life (241).

After several pages of like criticism, Wilson announces the burial of the ILO's sanctions. He writes that beyond articles 408 and 409, the rest of the 'measures of control' are 'likely to become a dead letter, while remaining a testimonial to the mentality of the Peace Conference' (221). Wilson explains that up 'to 1932 at least', the position of the Office has been 'that there are genuine sanctions for the enforcement of the international law of labor' (220). Yet, as he completes his book in October 1934, Wilson predicts: 'the chances are now that there will be no further references to sanctions in the documents of the Organization' (219). In addition, he observes that 'the Office seems to recognize that if the Governing Body should proceed beyond the mere consideration of a complaint, it would be faced with the future abstention of a member from its work, and perhaps the denunciation of a Convention or perhaps all of the conventions which the particular state in question has ratified' (220).

In summary, Wilson declares that ‘the governments are unwilling to register complaints; the Governing Body is unwilling to set the machinery of enforcement in motion on its own initiative; and trade unions, it seems, have not been interested in filing representations against their governments’ (230).¹⁵⁶ Why are governments not filing complaints? To Wilson, ‘the obvious reluctance of the governments to resort to [the] enforcement procedure is understandable’ (230) because ‘it is not likely that such steps would result in the better enforcement of the convention and it would likely provide grounds for future retaliation by the same means’ (230).

Wilson’s prediction proves correct as to the cessation of the ILO’s references to ‘sanctions’. Once Albert Thomas is gone, no ILO Director-General mentions sanctions or even the complaint process in his annual report until 1950. After 1932, sanctions are only rarely mentioned in ILO bodies until a new debate commences around 1945 on the ILO’s constitutional reforms. One such mention occurs in 1936 when Léon Jouhaux, the French workers representative, advises the Governing Body that ‘sanctions’ have never been applied because ‘it was felt that to apply them would have the effect of preventing Governments from ratifying Conventions’.¹⁵⁷

Scholarly references to sanctions likewise diminish. In 1937, Jean Zarras authors a comprehensive juridical study of the machinery for supervising the application of ILO conventions. Zarras explains how mutual supervision through annual reports has supplanted the formal procedures of representation and complaints. He engages in an extensive analysis of complaints and sanctions and points out numerous problems in applying sanctions, such as the absence of certainty that all States will apply the sanctions. Furthermore, Zarras suggests that rigorously applying the sanction procedure would weaken the ‘moral force’ of the ILO.¹⁵⁸ In 1938 when Serrarens explains that the ILO Constitution provides for commissions of inquiry and ‘the possibility of economic sanctions’; then, in understatement,

¹⁵⁶ In a late-added footnote to his book before it goes to press in October 1934, Wilson reports that India’s worker delegate has invoked the complaint procedure ‘for the first time’. Wilson (n 154) 30.

¹⁵⁷ Governing Body, 75th Session (1936), minutes 55. Jouhaux suggests that the sanction procedure could be modified ‘to provide a more elastic procedure’; *ibid.*

¹⁵⁸ See Jean Zarras, *Le contrôle de l’application des conventions internationales du travail* (Sirey 1937) 331. Zarras is a labor ministry official in Greece.

Serrarnes observes that this ‘severe machinery of supervision did not become the usual method of international administration’ in the ILO.¹⁵⁹ What happens instead, in my own view, was that the decentralized complaint process, which was originally intended to be a regular method of administration, got left behind in favor of a more centralized and upgraded review process. At some point in time, the new process gets renamed the ‘regular’ supervisory system, while the complaint process is recharacterized as one of the ‘special procedures’.¹⁶⁰

Looking now at Wilson’s trenchant analysis, one can see that he presciently announces the moment in which the ILO discards its trade sanctions. Wilson is right in detecting the sharp mood swing against sanctions. Wilson is right in forecasting that when the Governing Body receives its first complaint (the India railway case that concludes in February 1935), its response will be capped at ‘mere consideration’. How does Wilson so shrewdly anticipate the ILO’s philosophical rejection of its own trade sanctions? My hunch is that Wilson applies his skills as a political theorist to the insights he gains mingling with ILO insiders.¹⁶¹ There may also be a Wilson Effect.

IV. The contemporary significance of the demise of ILO sanctions

Why are the trade sanctions not deployed between 1919 and 1934? The simplest answer is that no complaints are lodged until Mehta’s failed move. Without complaints, there cannot be any sanctions. As Albert Thomas signals in 1927, complaints would get going only at the right time in the ‘development of international life’. As it turns out, international life does not welcome an ILO complaint for decades to come.

While the absence of complaints explains why there are no sanctions, could it also be that the availability of ILO sanctions explains why there are no complaints? Perhaps. Yet even Wilson does not blame the sanctions. Instead, Wilson suggests that governments are unwilling to register complaints because of the ‘international situation’ and worries about

¹⁵⁹ P.J.S. Serrarnes, ‘International Good Will and I.L.O. Treaties’ (1938) 28 American Labor Legislative Review 119, 120.

¹⁶⁰ <<https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm>>.

¹⁶¹ Wilson (n 154) viii-ix (noting his unattributed conversations with ILO staff).

counter-complaints. Moreover, if the availability of sanctions is the key factor blocking complaints, then the so-called elimination of sanctions in 1946 should have opened the floodgates to complaints. Although the details of the ILO's 1946 constitutional amendment are outside the temporal scope of my essay, Haas in 1964 expresses the conventional wisdom that because of the amendment, 'the possibility of sanctions no longer exists'.¹⁶² Yet in the long period between 1946 and 1960, the ILO's now sanction-free complaint process remains inactive.

The workers might have been less worried about counter-complaints than governments and yet workers, too, withhold complaints. Recalling the concerns of worker delegate Mertens in 1926 about an ILO-related 'economic blockade', one can speculate that workers were not attracted to a process that could lead to trade sanctions on the fruits of their labour. Consistent with my speculation, a longtime ILO official has observed that workers have traditionally 'taken the view that the application of sanctions to countries which violated standards was not part of ILO culture'.¹⁶³

My own guess is that workers did not file complaints because they doubted that a complaint could succeed. In the ILO's first two decades, the process for worker representations looks futile.¹⁶⁴ Moreover, the disappointing treatment given by the Governing Body to Mehta's complaint probably reinforces doubts as to the ILO's commitment to its complaint process. Indeed, when Wilson reports that Mehta has filed the first complaint in the ILO, Wilson discerns that the 'handling of this problem will be of great interest to observers of the enforcement machinery'.¹⁶⁵

As noted above, the ILO's sanctions are given only superficial attention in literature about the ILO. This pattern of omission does not apply to Professor Haas who is among the leading scholars of the ILO during the 1960s. But although Haas takes account of the ILO's sanctions, some of his conclusions are questionable. Insofar as studies of the ILO offer an

¹⁶² Haas (n 65) 356.

¹⁶³ William R. Simpson, 'Standard-setting and supervision: A system in difficulty' in Jean-Claude Javillier and Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir. Melanges en l'honneur de Nicolas Valticos* (ILO 2004) 47, 61.

¹⁶⁴ See Haas (n 65) 357 (analyzing the disposition of 12 worker representations between 1920 and 1938).

¹⁶⁵ Wilson (n 154) 30.

explanation as to why the sanctions go unused, one explanation we see is that the ILO's enforcement process lacked its own volition and was being controlled by the League.¹⁶⁶ This explanation is sometimes footnoted to Haas who argued that 'the consent of the Council of the League of Nations was required to initiate serious sanctions; the League controlled the ILO pursestrings'.¹⁶⁷

In my view, the argument that the League prevented the ILO from using its sanctions is erroneous. Writing during the era of the League, Wilson debunks what he calls the 'conservative view' that sanctions 'are measures which are to be taken by the League of Nations through the Secretary-General and not by the Organization at all'.¹⁶⁸ Instead, Wilson insists, correctly, that if the Governing Body applies for a Commission of Enquiry, 'there is no discretion left the Secretary General as to whether or not this commission shall be established'.¹⁶⁹ Furthermore, any suggestion that the political capacity of the League set a ceiling for the political capacity of the ILO overlooks the fundamental point that, unlike the League, the ILO enjoys the benefits of tripartism. From his vantage point in studying both the League and the ILO, Smith Simpson, in 1941, observes that tripartism gives the ILO 'an element of strength, of vigor, of independent criticism which the League never had'.¹⁷⁰

Some of the sources quoted in my essay (e.g., Solano 1920 and ILO 1931) can be read to suggest that the role of the Court as the final

¹⁶⁶ Some confusion that arises in comparing the League to the ILO is that the ILO was an affiliated agency of the League.

¹⁶⁷ Haas (n 65) 143. See also Laurence R. Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59 *Vanderbilt Law Review* 649, 680 (explaining that 'the power of the purse and the authority to impose economic sanctions remained with the ILO's parent organization, the League of Nations').

¹⁶⁸ Wilson (n 154) 219. Furthermore, Wilson's analysis refutes the idea that the trade sanctions are part of the machinery of the League, rather than the ILO, because, as he explains, the League did not have any judicialized compliance sanctions. In addition, as noted above, the 1919 Labour Commission had decided against an amendment to outsource enforcement to the League.

¹⁶⁹ Wilson (n 154) 68.

¹⁷⁰ Smith Simpson 'The International Labour Organisation: Retrospect and Forecast' (1941) 20 *International Conciliation* 317, 326. In 1941, Simpson was teaching at the Wharton School. He later became a career U.S. Foreign Service officer known for his observant and candid reporting.

adjudicator of trade sanctions meant that the sanctions belonged to the Court, rather than to the ILO. And if so, then the ILO never possessed any sanctions to use or not to use. The problem with this assertion is that the Court had the same independence from the League as it did from the ILO. Alternatively, as Professor Harriman explains, one should view the Court as being a part of both the ILO and the League.¹⁷¹ Either way, the existence of independent judicial review does not transfer agency regulatory authority to the courts.

Another explanation Haas gives for the non-use of sanctions is that 'neither the Office nor the Governing Body ever took the enforcement procedure very seriously'.¹⁷² Haas cites no evidence backing up his claim. By contrast, my essay stacks up considerable evidence that refutes his claim. My essay reports numerous statements about sanctions made within the ILO and in the writings by ILO officials.¹⁷³ Besides, if no one took sanctions very seriously, why was so much intellectual energy devoted to pushing back against sanctions beginning in 1919 and culminating in the sharp critique Wilson paints in 1934? And why the London Agreement of 1926 to forego government-sponsored complaints?

The history presented here shows that it would not be accurate to suggest that neither the framers of the ILO nor the ILO's early leadership ever seriously contemplated that the sanctions would be used. On the other hand, the history shows a conviction of many of the ILO's framers and early leaders that sanctions would be reserved and should be reserved only for a severe breakdown in compliance. Recall statements to that effect by Fontaine (1919), the Labour Commission (1919), Barnes (1919), Mahaim (1926), Ellis (1929), and Butler (1932).¹⁷⁴

Based on experience with the use of sanctions in the World Trade Organization (WTO) over the past 25 years, let me offer a new hypothesis

¹⁷¹ Edward A. Harriman, 'The United States and the World Court' (1926) 13 *Virginia Law Review* 1, 2 (stating that 'the Permanent Court of International Justice was to be the Supreme Court of the Permanent Organization of Labor as well as of the League of Nations').

¹⁷² Haas (n 65) 350.

¹⁷³ Many of these statements are made in a clearly positive context including, for example, the statements by Ernest Mahaim who serves continuously on the Governing Body from 1919 to 1938.

¹⁷⁴ See OB (n 16); International Labour Conference (n 133); Ellis (n 97); Butler (n 115).

as to why the ILO community was so reluctant to open the door to complaints and sanctions. The problem is that the original ILO Constitution did not provide 'scales of penalties' (Vandervelde) to be applied in order to avoid 'excessive penalty' (Early British Draft). The existence of this unguided missile of ILO penalties explains why participants were expressing worries about 'severe sanctions' (Dutch Government), 'a general economic boycott' (Behrens), a 'financial and economic blockade' (Mahaim), and an 'economic blockade' (Mertens and Wilson). Such aggressive remedies seem out of the question today, but that is only because we have become conditioned to deploying sanctions only against threats to peace. Back in 1919 apparently, the use of an economic blockade to uphold worker rights was not so obviously a nonstarter.

In my view, had the sanctions process advanced to the point where a Commission of Enquiry or the PCIJ needed to indicate 'appropriate' economic measures (articles 414 and 418), then legal standards for appropriateness would have developed through caselaw. The PCIJ would have had before it any recommendations on economic measures by the Commission of Enquiry and could have sought views of the parties and the assessors as to the level and type of sanction to 'indicate'. Then some proportionality principle could have been applied to quantify the sanctions indicated.

Nevertheless, reasonable observers in the 1920s were justified in worrying about the unpredictability of the ILO's economic measures. In the absence of any prescribed limitation on sanctions, the ILO's complaint machinery was Pandora's box. What would be the point of rolling the dice with ILO sanctions if Wilson were right that 'States have more sanctions against the Labor Organization than the Labor Organization has against the states'?

As the sanctions for labour convention enforcement atrophy from disuse, the ILO recovers by growing new supervisory tissue. Wilson may be the first commentator to describe the ILO as an Organization with 'no teeth'. Yet, when Wilson pens those words, the ILO still has teeth. Wilson's key intellectual contribution is that the ILO's teeth can be pulled because

persuasion is a much more powerful instrument of the Organization than force, as is exemplified in the possible sanctions provided in the Treaty of Peace. Thus, the Organization becomes an agent for the formation of public opinion, for the cultivation of the international sense

of right, and an instrumentality for the shaping of those attitudes in the various states which make possible the passage of social legislation.¹⁷⁵

It is Wilson who ushers in the ILO's first constitutional moment in which the law of control is transformed from hard to soft measures without formal constitutional revision. A capacity for such institutional change is a hallmark of the ILO. Looking back at the first half-century of ILO practice, C. Wilfred Jenks observes in 1969 that 'the spirit of the system' is that 'constitutional arrangements' are 'treated as the starting point of a process of continuing growth'.¹⁷⁶ As instituted by the framers in 1919, the ILO's sanctions exist side-by-side with the 'pressure of international public opinion' (Labour Commission) and the 'moral factors' (Fontaine). Then, in the reconceptualization of ILO supervision, as initiated by Barnes in 1920, the coercive measures are fingered for elimination.

Wiping out the trade sanctions is accomplished through a new philosophy of implementation. This informal constitutional amendment reflects a belief that compliance with ILO conventions is more fruitfully promoted without sanctions through the power of 'suggestion' (Wickersham) and 'friendly representations' (Périgord). In 1926, Sir Joseph Cook formulates what becomes the modern theory of ILO implementation by rejecting the ILO's 'big stick' in favour of 'reason and persuasion' that would be 'more likely to give the best results' than sanctions.

Several years afterward, Wilson sharpens ILO theory by recognizing how various mechanisms enable the ILO to be 'an agent' and 'an instrumentality for the shaping' of attitudes in the various States and enable the ILO 'to lead and not merely to follow opinion'.¹⁷⁷ Comparing the two options, Wilson pronounces that 'persuasion is a much more powerful instrument of the Organization than force'. In other words, the ILO could now disavow its sanctions because the ILO believed it had paved a better path.

¹⁷⁵ Wilson (n 154) 295.

¹⁷⁶ C. Wilfred Jenks, *Social Justice in the Law of Nations* (Oxford UP 1970) 67-68.

¹⁷⁷ Wilson (n 154) 295, 296. Wilson references Lowe's 1921 book about international labour and was probably influenced by it. Lowe had written that 'public opinion is the fundamental sanction of international agreements' and 'that sanction can be made effective only by an efficient organization through which the public will can express itself; Boutelle Ellsworth Lowe, *The International Protection of Labor* (MacMillan 1921) 103.

The original ILO Constitution featured a two-prong implementation system: to secure State consent to an ILO convention, the Constitution relied only upon persuasion. But to combat non-compliance with a ratified ILO convention, the Constitution provided sanctions. Those are the sanctions discontinued in the ILO's constitutional moment with a recalibration of means to ends.

In the ILO's normative revamp, compliance with ratified conventions is to be promoted only with persuasion mediated through supervisory processes. The ILO disengages its sanctions because the sanctions are thought to militate against the goal of national implementation due to the contradiction of seeking to compel a country to do what is putatively in its self-interest. Even the term 'pressure' becomes too harsh for the ILO's ears. In 1970, the staff veteran George Johnston confides that the 'word pressure is never used in the ILO. Nevertheless, influence can be, and is, exercised'.¹⁷⁸ Utilizing influence without pressure constitutes a coherent approach.

The excision of the sanctions from the ILO's implementation system does not render the remaining managerial system the best of all possible worlds. The ILO gave up a technique that was unique and then placed too much confidence in 'moral factors' (Fontaine), 'moral obligations of good faith' (Barnes), 'international public opinion' (Behrens), 'national honor' (Périgord), 'the light of public opinion' (Cook), 'public opinion' (Ellis), and 'persuasion' (Wilson) as a sufficient means to achieve compliance. Had the first ILO complaints launched much earlier in international life, the tale of the ILO's sanctions might have been different.

A successful scenario is imaginable for how ILO sanctions might have been used to confront scandalous non-compliance in a democratic country. As David Hunter Miller hypothesized in 1921 in a discussion of the 'sanctions' in the 'Labor Clauses of the Treaty of Versailles', 'no State could afford to reject a public decision of the International Court that it was not fulfilling an agreement made for the benefit primarily of its own people'.¹⁷⁹ To my knowledge, no one has ever conducted interactive simulation games of the

¹⁷⁸ Johnston (n 57) 101.

¹⁷⁹ David Hunter Miller, *International Relations of Labor* (Alfred A. Knopf 1921) 48, 50-51. Miller was the legal adviser to the U.S. peace negotiators and later became a senior legal officer in the United States Department of State.

ILO's trade sanctions to test the prospect of successful sanction scenarios against scofflaw countries. Looking back from today, I believe that Wilson underestimates the power of international law processes to remedy government misbehaviour, especially with the filip of trade measures 'against the articles produced under the conditions of unfair competition proved to exist' (British Draft).

Nevertheless, in the big picture, Wilson got it right: the sanctions were too heavy-handed for the ILO. One can easily imagine the frustration of an ILO official trying to explain to developing countries why signing on to a convention is voluntary, yet improperly administering the convention is sanctionable. The ILO needed a softer touch. By dismantling the sanctions, the ILO's two-engine system could be remodeled into a simpler design relying only on the engine of persuasion and tripartism.

When sanctions have worked in international organizations as catalysts for treaty compliance – most notably in the trading system – the context is an organization where one set of rules applies to all member governments. The key structural difference between ILO law and WTO law is not that the topic of the ILO is labour while the topic of the WTO is trade. Rather, the key structural difference between WTO rules and ILO conventions is that (most of) the WTO's substantive rules are membership obligations, while the ILO's substantive rules are *à la carte* options.

In 1995, Abram and Antonia Handler Chayes co-authored an influential book titled *The New Sovereignty* about compliance with international regulatory agreements. The book contends that 'sanctioning authority by treaty' is 'rarely used when granted, and likely to be ineffective when used'.¹⁸⁰ Instead, in the 'theory of compliance' they put forward, compliance is promoted by a process of 'persuasion' that is 'essentially managerial rather than enforcement'.¹⁸¹ The book's analysis distinguishes an enforcement model from a managerial model, and then documents the adoption and use of

¹⁸⁰ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Harvard 1995) 33.

¹⁸¹ *ibid* 1, 230. See Harold Hongju Koh, 'Why Do Nations Obey International Law' (book review) (1997) 106 *Yale Law Journal* 2599, 2601 (in the 'Chayeses' view, nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong').

intergovernmental managerial processes to promote compliance without formal enforcement.¹⁸²

Chayes and Chayes report that the ‘roots of this development can be traced at least as far back as the early days of the International Labor Organization’.¹⁸³ Yet the headwaters of the rejection of hard enforcement – the sidelining of ILO sanctions in the early 1930s – is completely absent from the Chayes and Chayes book even though that episode would have provided strong evidence for their thesis. When the ‘Chayeses’ trace the root to the ILO, the ILO practice they dig back to is the limited use of the ILO’s machinery for complaints and the establishment of the CEACR.¹⁸⁴ *The New Sovereignty* does not mention the ILO’s sanctions.

The Chayeses miss the big story about how the ILO pushes back against its trade sanctions because that neglected history does not appear in the international law and international relations literature they draw upon. Because the two story lines presented in my essay are so little known, the ILO has not received any credit for its volitional move to disconnect its trade sanctions. The mangled account given in the Director-General’s 1994 report quoted above¹⁸⁵ leaves the false impression that no change occurs because the ILO has always lacked sanctions.

Let me draw it all together by quoting the most famous sentence in 19th century legal scholarship. In 1881, Oliver Wendell Holmes Jr. wrote that ‘the life of the law has not been logic: it has been experience’.¹⁸⁶ The story of the ILO’s sanctions provides a good illustration of this maxim. The original ILO Constitution’s provision on sanctions is based on the straightforward logic that ILO conventions need enforcement to prevent self-interested defection.¹⁸⁷ Although an aversion to the ILO’s trade sanctions materializes by 1920, the expendability of sanctions becomes apparent only after the ILO

¹⁸² Chayes and Chayes (n 180) 230.

¹⁸³ *ibid.*

¹⁸⁴ *ibid* 203, 231, 375 n. 27.

¹⁸⁵ International Labour Conference (n 1).

¹⁸⁶ Oliver Wendell Holmes, Jr, *The Common Law* (Little Brown 1881) 1.

¹⁸⁷ See Arthur Fontaine’s statement to the 1919 Labour Commission that penalties ‘should be provided as the very basis of international legislation’ and the Labor Commission’s Report declaring the penalties to be ‘a matter of almost vital importance in the success of the scheme’; OB (n 16) 125, 266. See also Francis Maupain, ‘Is the ILO Effective in Upholding

gains experience year after year without a need for the sanctions originally thought to be logically necessary. By 1934, ILO's trade sanctions could be ejected from the life of the law because the ILO was moving forward with a less confrontational strategy for implementation.

I would like to believe that the reformation of ILO practice to abandon the trade sanctions would have gained the approval of Albert Thomas who was never fearful to make 'trial of fresh measures'. Ever the apostle of internationalism, Thomas is eager to teach the lesson that 'international life, after all, is something new and still in an embryonic stage; it can only really be created and developed by practice'.¹⁸⁸

As it embarks upon its second century, the ILO should reunite with its lost history.

Workers' Rights?: Reflections on the Myanmar Experience' in Philip Alston (ed), *Labor Rights as Human Rights* (Oxford 2005) 85, 118 (noting how the ILO's 'sanctions' fit the 'logic of reciprocity' in the 'original vision of the founders').

¹⁸⁸ International Labour Conference, 10th Session (1927), Report of the Director, First part, 113.

Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions

Laurence R. Helfer

I. Introduction

The ILO supervisory system, which reviews compliance with international labour standards, is widely hailed as a cornerstone of the Organization's institutional architecture. The monitoring activities of the supervisory bodies that comprise this system have expanded considerably over the Organization's 100-year history. A noteworthy example concerns the right to strike. Since the 1950s, ILO expert committees have consistently interpreted the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) as implicitly protecting the right to strike – a conclusion that received the support or acquiescence of all three branches of the ILO's tripartite membership. In 2012, however, the employer representatives challenged this longstanding consensus.¹ In addition to objecting to the expert bodies' interpretation of Convention No. 87, the employers also 'brought the supervisory machinery to a halt by refusing to cooperate' in ILO monitoring proceedings.² An uneasy truce was brokered in 2015, but ongoing tensions remain, both regarding the proper

¹ See, for instance, Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338; Francis Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10 *International Organizations Law Review* 117; Lee Sweptson, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29 *International Journal of Comparative Labor Law and Industrial Relations* 199.

² Diane F. Frey, 'Social Justice, Neoliberalism, and Labour Standards at the International Labour Organization' in Gillian MacNaughton and Diane F. Frey (eds), *Economic and Social Rights in a Neoliberal World* 285, 295 (Cambridge UP 2018).

interpretation of international labour law and the appropriate competences of ILO monitoring mechanisms.³

This chapter offers a wider perspective on these events. It analyzes how States and non-State actors have pushed back against the treaty monitoring bodies created by UN human rights conventions and considers what insights these challenges offer for the ongoing controversy over the right to strike and the future of the ILO supervisory system.

There are several reasons why comparing international monitoring mechanisms in the human rights and labour regimes is a fruitful exercise. First, the supervision of international labour conventions by ILO expert committees and the review of human rights conventions by UN treaty bodies share several common features. The central objective of both mechanisms is to assess whether domestic laws and practices are compatible with or violate international law. Monitoring in both systems is initiated by the bodies themselves or by communications from non-State actors. Both systems also delegate to independent experts the authority to interpret and apply legal norms and to develop a body jurisprudence that may lead to the expansion of international obligations.⁴

A second benefit of comparing labour and human rights monitoring mechanisms is to identify the actions that trigger pushback and the responses of actors and institutions in the two systems. Pushback has been a regular occurrence in the post-World War II human rights regime, and it has become more frequent and more pointed over the last decade.⁵ Until the recent controversy over the right to strike, however, opposition to the monitoring of international labour standards has received less attention,

³ Claudia Hofmann and Norbert Schuster, 'It ain't over till it's over: The right to strike and the mandate of the ILO Committee of Experts revisited' (2016) Global Labour University Working Paper No. 40, 25 <www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.40.pdf>.

⁴ Janice R. Bellace, 'Pushback on the Right to Strike: Resisting the Thickening of Soft Law' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 181, 185.

⁵ See, for instance, Alison Brysk and Michael Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (Edward Elgar 2018); Alison Brysk and Michael Stohl (eds), *Contesting Human Rights* (Edward Elgar 2019).

notwithstanding the fact that ILO review bodies have informally expanded their powers over time.⁶

Thirdly, both ILO review bodies and UN human rights treaty bodies adopt interpretations and recommendations that are formally non-binding but that nevertheless seek to influence the behavior of States and non-State actors. The extent to which these soft law pronouncements are in fact respected turns on a number of factors. Some of these factors relate to the monitoring bodies themselves, such as their expertise, reputation, legal reasoning, and working methods. But the influence of the bodies' interpretations and recommendations also depends on other actors, including national and international courts and expert bodies.

The remainder of this chapter proceeds as follows. Part II identifies four steps in the process of pushback against international monitoring mechanisms, illustrating each step with examples from UN human rights treaty bodies. The process begins when these mechanisms expansively interpret international law or their own review powers. The second and third steps concern how States and entities outside of the treaty system, respectively, respond to those expansions. The final step concerns whether the interactions among these actors result in continued contestation or a new equilibrium regarding the scope of applicable legal norms and the authority of the international experts who interpret them. Part III compares the similarities and differences between pushback against human rights treaty bodies and the challenges to ILO expert committees regarding the right to strike. Part IV briefly concludes by highlighting ongoing initiatives in both the UN and the ILO to 'strengthen' international supervisory systems.

⁶ Laurence R. Helfer, 'Monitoring Compliance with Unratified Treaties: The ILO Experience' (2008) 71 *Law and Contemporary Problems* 193, 201-04; Claire La Hovary, 'A Challenging Ménage à Trois? Tripartism in the International Labour Organization' (2015) 12 *International Organizations Law Review* 204, 219.

II. Pushback against international monitoring of UN human rights conventions

Why do States create international bodies to monitor compliance with treaties, including human rights and labour conventions? In brief, monitoring enhances the credibility of the commitments that States make to each other and to the individuals and groups whose rights the conventions protect. Independent experts review reports and complaints, clarify treaty texts, and label with precision the behaviors that contravene international law. They also enhance accountability and increase the likelihood that States will comply with international law.⁷

1. *Step 1: Expansive interpretations of legal norms and monitoring powers*

International laws and institutions are not chiseled in stone at the moment of their creation. Treaty texts must be applied to new and contemporary circumstances, including situations that their drafters did not anticipate and could not have foreseen. While some interpretive and institutional evolution is both necessary and desirable,⁸ it can also be politically fraught. The first step in the process of pushback often originates with decisions that broaden the substantive reach of international law or augment the authority of international monitoring institutions in ways that States view as narrowing their discretion or constraining their sovereignty.⁹

UN treaty bodies have engaged in both types of expansions. Applying the principle that human rights conventions are ‘living instruments’ that are ‘interpreted and applied taking into account the circumstances of contemporary society’,¹⁰ the treaty bodies have sometimes broadened the conventions’

⁷ See, for instance, Laurence R. Helfer, ‘Why States Create International Tribunals: A Theory of Constrained Independence’ in Max Albert and others (eds), *Conferences on New Political Economy* (Mohr Siebeck 2006) 253; Andrew T. Guzman, ‘International Tribunals: A Rational Choice Analysis’ (2008) 157 *University of Pennsylvania Law Review* 17.

⁸ See, for instance, Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (2014); Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties, Part I’ (2008) 21 *Hague Yearbook of International Law* 101.

⁹ Karen J. Alter and Laurence R. Helfer, ‘Nature or Nurture? Judicial Law-Making in the European Court of Justice and the Andean Tribunal of Justice’ (2010) 64 *International Organizations* 563, 566.

¹⁰ CAT Committee, *VXN and HN v Sweden*, Communications Nos 130/1999 and 131/1999, UN Doc CAT/C/24/D/130 and 131/1999, para 7.3 (2000); see also

substantive reach far beyond their often sparse or ambiguous texts. They have also asserted review powers not delegated to them by States parties.

Consider as an example the general comments of the Committee on Economic, Social and Cultural Rights. These comments articulate principles – such as the non-derogable minimum core, State obligations to respect, protect and fulfil, and the extension of duties to private actors – that have transformed norms that many assumed were aspirational and non-justiciable and have helped civil society groups around the world to secure economic and social rights.¹¹

Other treaty bodies have followed similar trajectories. For example, article 12 of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) has been interpreted by the CEDAW Committee to ensure equal access to health care services, including family planning, and as implicitly protecting the right to abortion.¹² The Human Rights Committee has condemned laws criminalizing conscientious objection and restricting the promotion of homosexuality that it had previously found compatible with the International Covenant on Civil and Political Rights (ICCPR).¹³ The Committee on the Rights of the Child has ‘incorporated the entire corpus’ of international humanitarian law into the children’s rights convention.¹⁴ And the Committee

Judge v Canada, Human Rights Committee, Comm No. 829/1998, UN Doc CCPR/C/78/D/829/1998, para 10.3 (2002); Hagan v Australia, CERD Committee, Comm No. 26/2002, UN Doc CERD/C/62/D/26/2002, para 7.3 (2003).

¹¹ Philip Alston, ‘The General Comments of the UN Committee on Economic, Social and Cultural Rights’ (2010) 104 *American Society of International Law Proceedings* 4, 6; Michael J. Dennis and David P. Stewart, ‘Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (2004) 98 *American Journal of International Law* 462, 493-95.

¹² Andrea Stevens, ‘Pushing a Right to Abortion Through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment’ (2018) 6 *Penn State Journal of Law and International Affairs* 70, 92.

¹³ Birgit Schlütter, ‘Aspects of Human Rights Interpretation by the UN Treaty Bodies’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge UP 2012) 261; Paula Gerber and Joel Gory, ‘The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?’ (2014) 14 *Human Rights Law Review* 403, 432.

¹⁴ David Weissbrodt et al., ‘The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law’ (2011) 24 *Harvard Human Rights Journal* 115, 118.

on the Elimination of Racial Discrimination has expanded the definition of racial discrimination to encompass certain religious and citizenship classifications.¹⁵

Turning to augmentations of institutional competences, treaty bodies have capaciously construed their mandates to review State party reports, make concluding observations, formulate general comments, and issue decisions in response to individual complaints. Most of these expansions have been incremental; several, however, have been more audacious.¹⁶

Beginning in the early 1990s, for example, the Human Rights Committee began to behave ‘more and more like a judicial arbiter of human rights disputes, even when granted only limited powers by states parties’.¹⁷ Although the ‘views’ it adopts in response to complaints from individuals are non-binding, the Committee expects States to comply with these decisions. And it has taken concrete steps to monitor compliance, appointing a special rapporteur to review State responses and collecting and publicizing compliance information. The Committee has also, as discussed more fully below, proclaimed its role as the primary expositor of the ICCPR’s meaning, including by issuing authoritative interpretations and determining the permissibility of reservations and the consequences of their invalidity.¹⁸ In these ways, the Human Rights Committee, and other treaty bodies, have pushed ‘the limits of [their] authority and sometimes arguably gone beyond it’.¹⁹

¹⁵ E. Tendayi Achiume, ‘Governing Xenophobia’ (2018) 51 *Vanderbilt Journal of Transnational Law* 333, 355-57.

¹⁶ See, for instance, Joanne Pedone and Andrew R. Kloster, ‘New Proposals for Human Rights Treaty Body Reform’ (2012-2013) 22 *Journal of Transnational Law and Policy* 29; Gerald L. Neuman, ‘Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members’ (2016) *Research Working Paper Series*, HRP 16-002.

¹⁷ Laurence R. Helfer and Anne-Marie Slaughter, ‘Toward a Theory of Supranational Adjudication’ (1997) 107 *Yale Law Journal* 273, 344.

¹⁸ Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 6 (1994); Human Rights Committee, General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc CCPR/C/GC33 (2008).

¹⁹ Helfer and Slaughter (n 17) 344.

2. *Step 2: How States respond to expansive interpretations*

The second step in the process of pushback concerns how States parties respond to treaty bodies that dynamically interpret legal norms or augment their own review powers. Reactions run the gamut from express approval or tacit acceptance, to inaction (perhaps the most common response), to opposition that varies in degree, scope, and intensity.²⁰ Examples of opposition include disagreements over the scope of a particular right or freedom, concerns about doctrinal or methodological approaches, and more fundamental objections that a monitoring body has overstepped its mandate. Identifying the type of disagreement is sometimes difficult; ‘what seems at first sight to be a difference of opinion [...] about the content of a norm is sometimes, upon closer inspection, a far deeper battle about whether States or [treaty bodies have] the power to make and shape the law’.²¹

One way to assess the nature of a challenge is to tally the number of objections, how they are expressed, and the focus of official responses. Criticisms made by a single State during the reporting process or in response to an individual complaint – such as critiques by Cameroon and Pakistan of the CEDAW Committee’s views on abortion, or South Korea’s debate with the Human Rights Committee over the evolving right to conscientious objection²² – are unlikely to reflect systemic opposition. In contrast, claims to augmented monitoring powers may trigger sustained and forceful opposition.

An informative illustration concerns reservations. In 1994, the Human Rights Committee issued a general comment on the topic in which it asserted the authority to determine the validity of reservations and the consequences of invalidity:

²⁰ See, for instance, Philp Alston, ‘The Historical Origins of the Concept of General Comments in Human Rights Law’ in Laurence Boisson de Chazournes and Vera Gowland Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff Publishers 2001) 763, 764-65; Sandesh Sivakumaran, ‘Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law’ (2017) 55 *Columbia Journal of Transnational Law* 343, 373.

²¹ Sivakumaran (n 20) 350.

²² Schlütter (n 13) 266; Pedone and Kloster (n 16) 47.

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because [such a determination] is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions [...] Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.²³

As to the legal effects of an impermissible reservation, the Committee asserted that the ‘normal consequence [...] is not that the Covenant will not be in effect at all for a reserving party’, but instead that the ‘reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation’.²⁴

Reactions to the general comment were strongly negative. The first volley of opposition was leveled by the United States, which submitted a statement rejecting the Committee’s approach to reservations as ‘contrary to the Covenant scheme and international law’.²⁵ The United Kingdom filed a similar if more politely worded objection,²⁶ while France issued a forceful rejoinder that the Committee ‘has no powers other than those conferred on it by the States parties; it is therefore for the latter, and for them alone [...] to decide whether a reservation is incompatible with the [treaty’s] object and purpose’.²⁷ A few years later, Trinidad and Tobago denounced the First Optional Protocol to the ICCPR after the Committee concluded that its reservation – which sought to preclude review of petitions from defendants convicted of capital crimes – was contrary to the Protocol’s object and purpose and severable from the State’s decision to accede to the treaty.²⁸

²³ General Comment No. 24 (n 18) paras 16, 18.

²⁴ *ibid.*

²⁵ Human Rights Committee, Report on the Work of Its Fiftieth Session, UN Doc A/50/40 (1996) 126-27.

²⁶ *ibid.* 130.

²⁷ Human Rights Committee, Report on the Work of Its Fifty-First Session, UN Doc A/51/40 (1997) annex VI para 14.

²⁸ *Kennedy v Trinidad and Tobago*, Communication No. 845/1999, U.N. GAOR, Human Rights Committee, 55th Session, Supp No. 40 vol 2, UN Doc A/55/40 (1999) 266.

The Human Rights Committee has not revised its general comment on reservations in response to these events, but its subsequent approach has been less confrontational. It has urged States to consider modifying or withdrawing reservations that it has identified as problematic, but it has refrained from directly questioning their validity or asserting that States are bound to provisions of the ICCPR to which their reservations attach.²⁹

The Committee's next attempt to assert interpretive supremacy – a 2008 general comment on the obligations of States parties to the First Optional Protocol – followed a different procedure. The treaty body issued a draft text, invited responses from States parties and non-State actors, and then published a revised and final general comment.³⁰ The draft text endorsed a bold and capacious view of the Committee's interpretive authority, the legally binding status of views adopted in response to individual complaints, and States' obligations to 'give full effect to the views [...] by whatever means lie within their power'.³¹

No fewer than twenty-one countries objected to one or more of the Committee's claims. For example, Sweden expressed concern that the draft 'attempts to extend the Human Rights Committee's competence beyond what is actually feasible in international law and goes beyond what the states intended when this body was created'.³² The harshest criticism, however, was leveled by the United States, which chastised the treaty body for an 'extraordinary and unprecedented expansion of [its] authorities' and urged it to withdraw the draft altogether.³³

The Committee backtracked considerably in the face of this strong criticism. The final version of General Comment No. 33 describes the Committee's views as

See also Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832.

²⁹ Edward T. Swaine, 'Reserving' (2006) 31 *Yale International Law Journal* 307.

³⁰ Human Rights Committee, General Comment No. 33 – General call for written comments, <www.ohchr.org/EN/HRBodies/CCPR/Pages/GC33-ObligationsofStatesParties.aspx>.

³¹ Human Rights Committee, Draft General Comment No. 33 (second revised version), CCPR/C/GC/33/CRP.3, para 32 (25 August 2008).

³² Comments by the Government of Sweden on Draft General Comment No. 33 (3 October 2008).

³³ Comments of the United States of America on Draft General Comment No. 33 4, 7.

exhibiting ‘some of the principal characteristics of a judicial decision’ – as opposed to ‘most of the characteristics of a judicial decision’. While views continue to be described as ‘an authoritative determination’, General Comment No. 33 in the end omitted the critical phrase ‘authentic interpreter’ when describing the role of the Committee. The ‘obligation to respect the views of the Committee’ was deleted; instead, the final version referred to a ‘duty to cooperate with the Committee’ arising from an application of the principle of good faith to the observance of all treaty obligations. On the whole, therefore, the [Committee] retreated from its proactive stance on the imperative character of its views.³⁴

Taken together, these examples suggest that treaty bodies are attuned to political signals generated by expansive assertions of authority. ‘If there is sufficient outcry from states parties’, these bodies will ‘consider toning down [their] approach in order to preserve the perceived legitimacy’ of their normative output and their monitoring powers more generally.³⁵

3. *Step 3: How actors other than States respond to expansive interpretations*

Who ultimately prevails in the contestations between treaty bodies and States depends not only on the interactions between States and supervisory bodies, but also on the responses of other actors in the international legal system.³⁶

The reception of the Human Rights Committee’s claims to interpretive supremacy illustrates these points. The controversy surrounding the Committee’s 1994 general comment on reservations informed a comprehensive study by the International Law Commission (ILC). In a 2005 special rapporteur’s report,³⁷ and in a Guide to Practice adopted in 2011, the ILC

³⁴ Machiko Kanetake, ‘UN Human Rights Treaty Monitoring Bodies Before Domestic Courts’ (2018) 67 *International and Comparative Law Quarterly* 201, 206.

³⁵ Helen Keller and Leena Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge UP 2012) 116, 172-73. The United States maintained its opposition to the final version of General Comment No. 33.

³⁶ Sivakumaran (n 20) 386-91.

³⁷ Special Rapporteur, International Law Commission, Tenth Report on Reservations to Treaties, U.N. Doc A/CN.4/558 (2005) 178 para 154.

described the treaty bodies as having asserted ‘a particularly broad concept of their powers in this field’, an approach that ‘aroused the opposition of States’.³⁸

The ILC adopted a more restrained approach. It concluded that although international monitoring bodies are competent to assess the validity of reservations, such assessments ‘have no greater authority than that accorded by the status of the body in question’.³⁹ States ‘shall give consideration’ to the treaty bodies’ assessments, but they are not legally required to follow them.⁴⁰ With regard to the effects of an impermissible reservation, the ILC adopted a presumption of continued membership, which the State can rebut by ‘expressing at any time its intention not to be bound by the treaty without the benefit of the reservation’.⁴¹

The human rights treaty bodies have mostly acceded to the ILC’s approach. A 2007 report of an inter-committee working group on reservations largely tracks the special rapporteur’s analysis, later adopted in the Guide to Practice.⁴² In 2010, the CEDAW Committee, which oversees a convention that has attracted numerous reservations, issued a general recommendation that pointedly refrained from invalidating reservations that are contrary to CEDAW’s object and purpose. Instead, the Committee invited States to consider withdrawing the reservations voluntarily.⁴³ In sum, as one commentator has pointedly stated, the Human Rights Committee’s 1994 reservations gambit has ‘found no support among the member states [and] the force of [...] doctrinal opinion [...] has turned entirely against it’.⁴⁴

³⁸ International Law Commission, Report on the Work of its Sixty-third Session, Text of the Guide to Practice on Reservations to Treaties, Addendum, UN GAOR, 66th Sess., Supp. No. 10, UN Doc A/66/10/Add.1 (2011) 394.

³⁹ *ibid* 397.

⁴⁰ *ibid* 401.

⁴¹ *ibid* 26.

⁴² International Human Rights Instruments, Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2007/5 (2007) 4 para 14.

⁴³ CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc CEDAW/C/GC/28 (2010); see also Tanya Monforte, *Broad Strokes and Bright Lines: A Reconsideration of Shari’a Based Reservations*, (2017) 35 Columbia Journal of Gender and Law 1, 24-25, 28-29.

⁴⁴ Akbar Rasulov, ‘The Life and Times of the Modern Law of Reservations: The Doctrinal Genealogy of General Comment No. 24’ (2009) 14 Austrian Review of European and International Law 103, 111.

The treaty bodies' claim to be the preeminent interpreter of human rights conventions has been somewhat less controversial. The ILC Guide to Practice on Reservations asserts that States parties 'are obliged only to take account of [treaty body] assessments in good faith'.⁴⁵ The General Assembly, however, has been less receptive. The Assembly normally 'takes note' of general comments, a tacit 'sign of respect' for the treaty bodies.⁴⁶ In 2009, however, the Assembly for the first time 'voted in favor of not taking note'⁴⁷ of the 2008 general comment, discussed above, in which the Human Rights Committee asserted that its views 'represent an authoritative determination' of the ICCPR.⁴⁸

The ICJ has a more favourable view of the treaty bodies' normative output. In the *Ahmadou Sadio Diallo* case, the ICJ provided its own analysis of the ICCPR, but then explained that its interpretation was 'fully corroborated by the jurisprudence of the Human Rights Committee'.⁴⁹ Although emphasizing that it 'is in no way obliged [...] to model its own interpretation of the Covenant on that of the Committee', the ICJ opined that 'it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'.⁵⁰

National judiciaries have also relied on treaty body interpretations. Empirical studies reveal that individual views and general comments (and, less often, country-specific concluding observations) are 'a relevant interpretative source for many national courts',⁵¹ which refer to them when

⁴⁵ Guide to Practice on Reservations (n 38) 402. What qualifies as good faith consideration remains an open question; see Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge UP 2012).

⁴⁶ Keller and Grover (n 35) 149.

⁴⁷ *ibid* 181.

⁴⁸ General Comment No. 33 (n 18) para 13.

⁴⁹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, *Merits, Judgment*, *I.C.J. Reports* 2010, 639, para 66.

⁵⁰ *ibid*. Two years later, however, the ICJ followed a 'pick and choose' approach to treaty body jurisprudence, citing with approval an early decision of the UN Committee Against Torture while distinguishing more recent decisions; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, *Judgment*, *I.C.J. Reports* 2012, 422, para 101.

⁵¹ International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (2004) para 175.

‘interpreting the UN human rights conventions, national law that incorporates these conventions, or national law provisions guaranteeing fundamental rights’.⁵² Treaty body decisions have also enabled individuals to obtain damage awards and to reopen domestic civil judgments or criminal convictions.⁵³ At the same time, national courts ‘occasionally avoid, discount and contest the interpretations put forward by the treaty bodies’.⁵⁴

These examples reveal that disagreements between States and human rights treaty bodies over expansive interpretations cannot be fully controlled by either set of actors. To the contrary, the decision to recognize the competence of these bodies initiates a process that can shift the understanding of legal rules and augment institutional competences.⁵⁵ These effects are often indirect, emerge over time, and potentially implicate a wide range of actors, including individual litigants, international organizations, national and international courts, and civil society groups. The number and diversity of these institutions and actors, and the trajectory of their interactions, affect whether claims of expansive authority remain contested or settle into new equilibria.

4. *Step 4: Continued contestation or new equilibrium?*

The final step in the process of pushback against supervisory systems concerns when claims to expansive interpretations or augmented review powers reflect a new status quo that is expressly or implicitly accepted by States, or conversely, when such claims have been decisively defeated.

It is important to evaluate State responses over time, across monitoring mechanisms, and in the aggregate. The Human Rights Committee, the oldest of the ten treaty bodies, was born into a Cold War environment in which international monitoring was contested and deeply polarizing. A comparison of the sparse texts of the ICCPR and First Optional Protocol describing the Committee’s competences with its actual practices reveals just how substantially the body has expanded its monitoring activities in

⁵² Alebeek and Nollkaemper (n 45) 399.

⁵³ *ibid* 362-71; Kanetake (n 34) 215.

⁵⁴ Kanetake (n 34) 203; Alebeek and Nollkaemper (n 45) 72-79, 398-99.

⁵⁵ Karen J. Alter, Emilie M. Hafner-Burton and Laurence R. Helfer, ‘Theorizing the Judicialization of International Relations’ (2019) 63 *International Studies Quarterly* 449.

ways that States now accept as settled. From country-specific concluding observations, to more detailed and expansive general comments, to special rapporteurs who follow up on whether and how States give effect to its views, the Human Rights Committee is a far different international monitoring body in practice than it is on paper.⁵⁶

These developments resulted from an incremental accretion of practices over several decades and across different monitoring functions. As a growing number of States joined the ICCPR and the Optional Protocol after the end of the Cold War, they did so aware that the Human Rights Committee was exercising enhanced monitoring functions. By repeatedly participating in the review of periodic reports, offering feedback on draft general comments, and responding to individual complaints, both new and longstanding States parties demonstrated at least tacit acceptance of these activities.

Further evidence of State endorsement of augmented international monitoring powers is found in more-recently adopted human rights conventions. The evolution of treaty body views in response to individual complaints is illustrative. The ICCPR's First Optional Protocol, adopted in 1966, provides only that the Human Rights Committee 'shall forward its views to the State Party concerned and to the individual' and shall include 'a summary of its activities under the [...] Protocol' in its annual report to the UN General Assembly.⁵⁷ In striking contrast, more recent Optional Protocols adopted between 1999 and 2009, codify practices developed by the Committee a decade earlier. These include an obligation for States to 'give due consideration' to a treaty body's 'recommendations' as well as its 'views', and to submit, 'within six months, a written response [...] on any action taken', as well as a clause authorizing the committees to request 'further information about any implementation measures' adopted, including in subsequent reports submitted by the State.⁵⁸

These developments widen the lens through which to evaluate push-back against the Human Rights Committee's efforts to authoritatively

⁵⁶ Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge UP 2012) 73.

⁵⁷ ICCPR Optional Protocol, articles 5(4) and 6.

⁵⁸ ICESCR Optional Protocol, article 9; CEDAW Optional Protocol, article 7; CRPD Optional Protocol, articles 5-7.

interpret the ICCPR, to determine the invalidity of reservations and their consequences, and to conceptualize its views as analogous to legally binding judicial rulings. These are the most audacious claims of any of the ten treaty bodies, and it is not surprising that some States have challenged them, nor that the Committee has pulled back somewhat in response to those challenges. Both proponents and critics recognize, however, that the treaty bodies are today more robust and influential international monitoring institutions than the drafters of the first generation of UN human rights conventions could have envisioned.⁵⁹

The foregoing discussion suggests that the supervision of UN human rights conventions has achieved a *de facto* equilibrium in which the treaty bodies' core monitoring functions are accepted, at least in principle and often in practice, by most States parties most of the time. As part of this equilibrium, treaty bodies will sometimes expansively interpret protected rights and freedoms, generating a range of responses from States and non-State actors. The committees are also likely to chafe against the limits of their monitoring powers and to seek incremental expansions of those powers to reinforce the contemporary relevance of the conventions they supervise and to improve compliance by States parties.

III. Insights for the ILO supervisory system

This section considers the insights that pushback in the human rights system offers for evaluating ongoing contestations in the ILO over the right to strike. Much like the pushback against UN treaty bodies, the controversy over the right to strike can be seen as a series of interconnected steps that began with an international monitoring body's capacious interpretations of legal norms and of its own review powers. These interpretations generated responses from a range of actors, both within and outside the Organization, over the proper scope of ILO monitoring. At the same time, pushback in the human rights and labour regimes differ in a number of ways. These differences may influence whether the tripartite membership achieves a sustainable equilibrium regarding the future of the ILO supervisory system.

⁵⁹ See, for instance, Pedone and Kloster (n 16) 38-45; Ulfstein (n 56) 106-07.

1. *Similarities*

In both the ILO and the UN human rights system, disputes that initially appeared to focus on the interpretation of a particular legal norm in fact went far deeper. In the ILO, the employers objected to the implicit recognition of a right to strike in Convention No. 87. But they did so by challenging the interpretive competence of the Committee of Experts, casting doubt – intentionally in the view of some observers – on the Committee’s authority to interpret all international labour conventions and on the supervisory system in general.⁶⁰

A second similarity is that pushback in both venues was motivated in part by external actors – especially national and regional courts – which relied on the expert bodies’ decisions as highly persuasive interpretations of international law. With regard to the right to strike, the European Court of Human Rights,⁶¹ the South African Constitutional Court,⁶² and the Canadian Supreme Court⁶³ favourably cited the views of ILO expert bodies, and the Court of Justice of the European Union ruled that the right to strike is a general principle of European Community law, relying on Convention No. 87.⁶⁴ The result was a significant ‘hardening’ of ILO soft law jurisprudence.⁶⁵

Third, expert bodies in both regimes responded to pushback by defending their authority. In 2013, the ILO Committee of Experts forcefully reiterated its competence to interpret and apply international labour law. In addition to tracing the history of its mandate and the employers’ longstanding acceptance of ‘its views on the legal scope and meaning of the provisions of these Conventions’, the Committee analogized its interpretative functions to those exercised by ‘independent supervisory bodies

⁶⁰ Paul van der Hiejen, ‘The ILO Stumbling Towards its Centenary Anniversary’ (2018) 15 *International Organizations Law Review* 203, 205.

⁶¹ *Demir and Baykara v Turkey*, Judgment, 12 November 2008.

⁶² *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) and Another* (CCT 14/02), Judgment, 13 December 2002.

⁶³ *Saskatchewan Federation of Labour v Saskatchewan*, 2015, 1 SCR 245.

⁶⁴ *International Transport Workers’ Federation and the Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, Case C- 438/05, Judgment, 11 December 2007.

⁶⁵ Bellace (n 4).

created within other UN organizations addressing human rights and labour rights'.⁶⁶

Fourth, and similar to the trajectory of pushback against UN human rights treaty bodies, the initially sharp contestations in the ILO over the right to strike were followed by a *de facto* ceasefire among the tripartite membership. In 2015, the social partners issued a Joint Statement that affirms 'the right to take industrial action by workers and employers in support of their legitimate industrial interests', without, however, mentioning Convention No. 87.⁶⁷ The Joint Statement also approvingly cites a report in which the Committee of Experts describes its functions as 'undertaking an impartial and technical analysis of how [ILO] Conventions are applied in law and practice by member States', and 'determining the legal scope, content and meaning' of the conventions. Unlike the Committee's initial defense of its mandate in 2013, however, the 2015 report notably refrains from using the controversial word 'interpretation'.

The Joint Statement allowed the supervisory system to resume operating. However, the review of cases involving the right to strike has changed. To preserve the *modus vivendi* between employers and workers, the decisions of the Committee of Experts relating to Convention No. 87 have been short and straightforward, omitting the detailed findings and recommendations of earlier decisions and avoiding 'controversial views' concerning the right to strike.⁶⁸ Worker representatives have also expressed concern that the Committee 'has started to apply a certain degree of self-censorship due to the controversy'.⁶⁹ As of 2019, these contestations remain largely unresolved.⁷⁰ An ongoing review of the supervisory system, discussed below, may well affect the stability of this *de facto* arrangement.

⁶⁶ Report of the Committee of Experts on the Application of Conventions and Recommendations (ILO 2013), paras 26, 35(b) <[www.ilo.org/public/libdoc/ilo/P/09661/09661\(2013-102-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf)>.

⁶⁷ ILO, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike and the modalities and practices of strike action at national level, GB.323/INS/5, Appendix I.

⁶⁸ Hofmann and Schuster (n 3) 24.

⁶⁹ *ibid.*

⁷⁰ Report of the Committee on the Application of Standards (ILO 2019) <www.ilo.org/ilc/ILCSessions/108/committees/standards/WCMS_711293/lang-en/index.htm>.

2. Differences

At the same time, there are several noteworthy differences in the processes of pushback in the international human rights and labour regimes. First, and most obviously, the pushback in the ILO was spearheaded by the Employers' group – the ILO constituent most directly affected by the recognition of a right to strike. Governments expressed support for the right in principle, but did not mount a strong defense of the supervisory system.⁷¹

The ILO is unique among international organizations in including non-State actors as full voting members. This status gave employers an unparalleled ability to oppose interpretations of international labour law that they disavored and to challenge the authority of ILO expert bodies. But the distinction between private actor and government pushback should not be overstated. Actions within international institutions that are formally carried out by States are often taken in response to pressure from industry associations or interest groups.⁷² In addition, non-State actors can and do mount their own challenges to the activities of international bodies, including in the human rights system, as recently revealed by corporate opposition to a UN Human Rights Council initiative to draft a new treaty on business and human rights.⁷³

A second distinction concerns the time that elapses between the initial articulation of an interpretation and subsequent challenges. In the UN, States expressed opposition while an expansive legal norm was being articulated – for example in response to draft general comments – or very shortly thereafter. In the ILO, in contrast, supervisory bodies first decided that Convention No. 87 implicitly protects the right to strike in the 1950s, and they repeatedly reaffirmed that right in hundreds of cases in the 1970s and 1980s. It was not until 1989 that the Employers' group first opposed

⁷¹ Tripartite Meeting (n 67) Appendix II.

⁷² See, for instance, Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (The Brookings Institution 2003).

⁷³ See, for instance, International Chamber of Commerce, Response of the international business community to the 'elements' for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (20 October 2017) <<https://iccwbo.org/publication/un-treaty-business-human-rights-business-response-elements-draft-legally-binding-instrument/>>.

this interpretation, and only in 2012 that they took meaningful action to buttress that opposition.⁷⁴

By 2012, therefore, the power of expert bodies to review complaints alleging violations of the right to strike had been deeply embedded in ILO practice for more than half a century. Seen from this perspective, the employers' actions – in particular the challenge to the Committee of Experts' interpretive authority and willingness to block the supervisory system's business as usual – were not good faith disagreements over the scope of a norm. They were, instead, illegitimate challenges to central tenets of the international labour regime. This presumed incontestability also helps to explain why leading commentators labeled the employers' actions as a 'crisis' for the ILO supervisory system.⁷⁵

A third difference concerns the ability of an external actor to resolve the controversy over the right to strike. Article 37 of the ILO Constitution authorizes the Organization to refer to the ICJ or to an in-house tribunal 'any question or dispute relating to the interpretation' of an international labour convention. In 2014, the Governing Body considered submitting two questions to the ICJ, one asking whether a right to strike can be implied from Convention No. 87 and the other concerning the Committee of Experts' review powers.⁷⁶ Although formally non-binding, referrals to the ICJ have 'always been understood [within the ILO] as conferring a binding and decisive effect to advisory opinions obtained on that basis'.⁷⁷ The Governing Body ultimately decided not to pursue the referral for the time being, instead choosing to endorse the 2015 Joint Statement discussed above, and to establish new initiatives to review international labour standards and the supervisory system.⁷⁸

The UN human rights system lacks a mechanism for external review of treaty bodies' normative output (although, as previously discussed, the ICJ has occasionally interpreted human rights conventions). Interpretive

⁷⁴ La Hovary (n 6) 227.

⁷⁵ (n 1).

⁷⁶ ILO, *The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards*, GB.322/INS/5, para 49.

⁷⁷ *ibid* para 7.

⁷⁸ ILO (n 76) <www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351475.pdf>.

disputes are instead hashed out by interactions among States, treaty body members, courts, and non-State actors. The absence of an external review mechanism precludes a definitive resolution of such disagreements and increases the likelihood that disputes will persist for a considerable period of time.

The ILO could have avoided a similar result by seeking an authoritative decision from the ICJ. Why might the tripartite members have declined to do so? One answer is that the Organization had never previously sought an advisory opinion from the ICJ (although it had sought interpretive guidance from the Permanent Court of International Justice). There was thus considerable uncertainty as to how the ICJ would respond to a referral. Yet a decision blessing the longstanding interpretation of ILO review bodies – perhaps the most likely outcome⁷⁹ – would have been especially consequential for employers and governments. Such a result would have cemented the right to strike as an incontestable feature of international labour law and bolstered the authority and legitimacy of the independent Committee of Experts to review violations of all ILO instruments.

A fourth and final difference in how pushback unfolded relates to shifts in external contexts. The tacit bargain in support of international labour standards among large majorities of the ILO's tripartite membership began to unravel with the end of the Cold War. The apparent triumph of neoliberal democratic capitalism was accompanied by a decline in union membership and a shift away from long-term, contract-based employment toward informal labour markets with fewer benefits and less job security. It is thus hardly a coincidence that employers first objected to the right to strike in 1989, the year the Berlin Wall fell. Taken together, these developments outside the ILO shifted the balance of power within the Organization, giving employers greater leverage, beginning in 2012, to oppose foundational labour standards and long-settled practices of expert monitoring bodies.

The UN human rights system, in contrast, did not experience foundational shifts in its external environment during the same period. If anything, State support for that system increased, as reflected in the adoption of new treaties, the growing number of ratifications, and escalating efforts

⁷⁹ Hofmann and Schuster (n 3) 15-16, 19-24.

to hold violators accountable before national courts and international tribunals.⁸⁰ Some commentators have gone further, arguing that the human rights system's successes were directly aided by neoliberalism.⁸¹ Whatever the merits of that position, the broad trajectory has been one of progress and expansion, albeit with some noteworthy exceptions.⁸² Whether this trend will continue is uncertain, however, given the distinctive challenges that the rise of populism poses for international human rights institutions.⁸³

IV. Conclusion

This chapter compares examples of pushback against UN human rights treaty bodies to instances of pushback against the expert monitoring bodies of the ILO supervisory system. The chapter identifies four steps in the process of pushback that are broadly similar in both international regimes – decisions that expansively interpret international legal norms or augment the powers of international monitoring bodies; State approval or opposition to those decisions; the reaction by non-State actors, including international and national courts; and whether interactions among all of these actors lead to continued contestation or to a new equilibrium regarding the meaning of legal norms and the authority of international review bodies. The chapter also highlights several salient differences in how pushback efforts unfolded in the UN and in the ILO.

The current status quo for both UN human rights treaty bodies and the ILO supervisory system can be characterized as acquiescence by most stakeholders to international monitoring processes that have expanded significantly over time – although not as broadly as some review bodies would have preferred. This *de facto* settlement may soon be tested, however. In both the UN and ILO, initiatives are underway to evaluate and

⁸⁰ See, for instance, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton & Company 2011); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge UP 2009).

⁸¹ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard UP 2018).

⁸² See, for instance, M. Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible* (Intersentia 2010); Helfer (n 28).

⁸³ Laurence R. Helfer, 'Populism and International Human Rights Institutions: A Survival Guide' in Gerald L. Neuman (ed), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge UP 2019) forthcoming.

reform – and perhaps even radically restructure – existing international monitoring mechanisms.

In 2009, the UN General Assembly and the High Commissioner for Human Rights launched a process to ‘strengthen and streamline’ the treaty body system.⁸⁴ The next major phase of this process will occur in 2020, when the General Assembly will review the measures previously adopted and decide what further actions, if any, should be taken.⁸⁵ Since 2015, the ILO has been pursuing a similar work plan that examines ‘the interrelationship, functioning and possible improvement’ of the ILO supervisory system.⁸⁶

These initiatives are generating debates among States, civil society groups, and commentators over whether to adopt incremental revisions or more comprehensive reforms.⁸⁷ In the best case scenario, these efforts will lead to more effective and efficient monitoring mechanisms. However, in an era when challenges to international institutions are on the rise, there is a non-trivial risk that ‘strengthening’ processes could in fact lead to the opposite result – weakened and less impactful systems of international supervision and monitoring.

⁸⁴ UN High Commissioner for Human Rights, Strengthening the United Nations Human Rights Treaty Body System, UN Doc. A/66/860 (2012) <www.ohchr.org/EN/HRBodies/HRTD/Pages/FirstBiennialReportbySG.aspx#treaty>.

⁸⁵ UN GA Resolution 68/268 (2014), Strengthening and enhancing the effective functioning of the human rights treaty body system, para 41 <www.ohchr.org/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf>.

⁸⁶ ILO (n 76).

⁸⁷ See, for instance, ILO, The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, GB.326/LILS/31 <https://www.ilo.org/gb/GBSessions/previous-sessions/GB326/lils/WCMS_456451/lang-en/index.htm>; Academic Platform on Treaty Body Review 2020, Optimizing the UN Treaty Bodies System <www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf>.

Decentralized Enforcement of International Labour Standards: The Role of Domestic Courts

Erika de Wet

I. Expanding the legal toolbox

This contribution is limited to a few brief remarks pertaining to the potential enforcement of ILO standards through the domestic legal systems of member States. Its purpose is to draw attention to the fact that national (domestic) law can play an important complementary role in enforcing international labour standards. In fact, in a decentralized international legal order one might even argue that domestic law should be the starting point for enforcement of international law, for having the most direct impact on the lives of those affected. Moreover, within domestic legal systems there may be different avenues for enforcing international labour standards, not all of which will rely on the narrative and legal framework of ‘international labour standards’, or what can be described as a ‘rights narrative’. Instead they may, depending on the circumstances of the case, rely on the narrative of tort law in the context of conflicts of law.

This in turn requires those committed to the enforcement of international labour standards to broaden their horizon and not be fixated on a particular type of legal strategy for enforcing compliance with labour standards. Depending on the context of the case, reliance on the legal tools provided by conflicts of laws (otherwise known as private international law), may prove to be more effective in as far as generating compensation for victims of violations of labour standards is concerned, as well as inducing improved (oversight of) legislation. This is not to suggest that traditional ILO mechanism for oversight should be abandoned. In fact, some of these oversight mechanisms already engage with the domestic law of member

States. One well known example is the ILO Committee of Experts, which from time to time considers the decisions of domestic courts in its monitoring function. In so doing, there is an important ‘bottom-up’ dialogue through which local manifestations of international labour standards influence the perspective of the ILO.

Nonetheless, in order to optimize the impact of ILO standards in the day to day lives of individuals around the globe, it should consider diversifying the legal strategies for enforcing its core labour standards. This approach departs from the premise that the values underpinning international labour standards can coincide with those underpinning other branches of law. As a consequence, various mechanisms and narratives for enforcement within also the domestic legal order can be considered, when it comes to the enforcement of international labour standards.

II. The traditional national/international law narrative

When considering the role of domestic law in enforcing international labour standards, there is of course the possibility of domestic courts enforcing national legislation implementing international labour standards vis-à-vis natural or legal persons operating in the territory of State whose law is being applied. Similarly, some States may allow for individuals to invoke international labour standards directly before its courts vis-à-vis the State itself or even third parties operating in the State in question. These mechanisms for enforcement are closely related to the classic debates pertaining to monism and dualism and the fact that the differences between them are often gradual. Suffice it to say that laws of incorporation as well as the direct invocation of international labour standards before domestic courts have a role to play in the meaningful enforcement of these standards at the domestic level.

Similarly, the interpretation by domestic courts of existing national legislation in accordance with international labour standards (including the views of international bodies such as the ILO Committee of Experts) can be of significance in this regard. In fact, in many countries the national legislature at times does not incorporate international obligations into the domestic legal order in a timely fashion. In such circumstances, an ‘international law friendly’ interpretation and application of existing national

legislation by courts (and the executive) can play an important role in ensuring that the State gives due effect to its international obligations.

These above mechanisms for decentralized enforcement often occur in line with a classic ‘rights narrative’. They are inevitably accompanied by the possibility of divergent conclusions by different courts regarding the scope of the rights and obligations in question. However, such divergencies may at times be both justifiable and necessary to give due effect to the very different contexts and conditions prevailing in different jurisdictions. Moreover, even in instances where the interpretation and application of international standards by domestic courts seem to contradict international standards, such regression could be corrected over time. Controversial decisions are likely to ignite judicial debate (both nationally and through ILO oversight mechanisms), that can in due course result in progressive development of the law. Whether through a legislative amendment that could include more comprehensive incorporation of international labour standards, or by being overturned by subsequent court decisions.

III. The conflicts of law/ tort law narrative

Another, potentially very dynamic avenue for utilizing domestic law for the purpose of enforcing the values underpinning international labour standards, has gained momentum since the adoption of the United Nations Guiding Principles on Business and Human Rights.¹ This avenue moves beyond the ‘rights narrative’, relying instead on the principles of tort law as applied in the conflicts of law context. This approach makes it possible for domestic courts in one jurisdiction to gain a role in monitoring the behaviour of legal persons (including multinationals and their subsidiaries) in other jurisdictions. It thus gives them a significant role in holding multinationals legally accountable under domestic law, at a time when they still lack legal personality under international law. This in turn makes it very difficult to hold multinationals legally accountable on the international plain, as a result of which domestic legal accountability becomes all the more important.

¹ United Nations Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31 (2011).

However, this route implies an entirely different narrative than the classic ‘rights narrative’ within ILO monitoring bodies. This is illustrated by the cases currently unfolding in different member States of the European Union (EU). These cases are all based on so-called European private law principles, i.e. conflicts of law principles that have been harmonized within the EU. These principles relate to a highly specialized area of law that requires labour lawyers who intend to utilize it for the purpose of enforcement of international labour standards, to move beyond the comfort zone of the ‘rights narrative’. They will *inter alia* have to redefine international health and safety standards (to name but one example) in line with the applicable tort law principles in the country in question, making a convincing case that the violations of these principles amounted to a tort for which damages have to be awarded.

In so doing, plaintiffs first have to make the case that the courts in a multinational company’s home State has jurisdiction, despite the fact that the harm to the subject of the claim occurred in another State. In the EU courts have indeed been willing to assume jurisdiction over cases where harm to the subject of the claim has occurred outside the home State. Article 4(1) of the revised Brussels Regulation allows for (legal) persons domiciled in a member State to be sued in the courts of that member State.² Furthermore, the so-called Rome II Regulation determines that the applicable law to compensation claims arising out of a tort or delict, is that of the country in which the damage occurred.³

The opportunities and obstacles posed by this narrative can be illustrated by two recent cases, although several more are in the making. The first concerns *Jabir and others v. KiK Textilien und Non-Food GmbH* (the *KiK* case),⁴ which was declared inadmissible by a German court in Dortmund in January 2019. The case concerned damages claims for personal injury and death. It was brought by four Pakistani nationals against the German retailer KiK, in relation to a fire in the Karachi factory of KiK’s supplier Ali

² Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

⁴ *Jabir and others v. KiK Textilien und Non-Food GmbH*, LG Dortmund, Case No. 7 O 95/15 <<https://openjur.de/u/2155292.html>>.

Enterprises. The applicable law in this instance was that of Pakistan, which was the country in which the damages occurred.⁵ However, as Pakistani tort law is based on English common law, the merits of the case would essentially have to be decided on the English common law of negligence. This means that a German court would have to decide the potential liability of a German company (KiK) for health and safety violations by a supplying company (Ali Enterprises) in Pakistan on the basis of English law.⁶ A further complicating factor is the fact that the English courts themselves have thus far not yet attributed liability to a purchasing company under such circumstances.⁷

As it turned out, the Dortmund court found the claim to be time-barred under Pakistani law and dismissed the case.⁸ In consequence, the question whether and under what circumstances multinational companies could be held liable under Pakistani (and English) tort law for negligible conduct in their supply chain that impact health and safety standards, remained unanswered. During negotiations that also included ILO involvement, KiK for its part agreed to *ex gratia* payments of pension benefits to the relatives of deceased workers.⁹

The second case, which was brought in the United Kingdom, is that of *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc* (the *Vedanta* case).¹⁰ While Vedanta (the holding company of Konkola Copper Mines) was domiciled in the United Kingdom, Konkola Copper

⁵ *ibid.*

⁶ Julianne Hughes-Jennett et al, 'Supply chain liability under the law of negligence: What does Jabir and Others v KiK Textilien und Non-Food GmbH mean for European companies with supply chains in the sub-continent and other common law countries?' (2018) Hogan Lovells Focus on Regulation <<https://www.hlregulation.com/2018/12/10/supply-chain-liability-under-the-law-of-negligence-what-does-jabir-and-others-v-kik-textilien-und-non-food-gmbh-mean-for-european-companies-with-supply-chains-in-the-sub-continent-and-other-common-la/>>.

⁷ *ibid.*

⁸ *KiK* decision (n 4) para 21.

⁹ Jonas Poell et al, 'Jabir and others v. KiK Textilien und Non-Food GmbH – Dortmund court dismisses lawsuit' (2019) Hogan Lovells Focus on Regulation <<https://www.hlregulation.com/2019/01/11/jabir-and-others-v-kik-textilien-und-non-food-gmbh-dortmund-court-dismisses-lawsuit/>>.

¹⁰ *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20.

Mines as well as the claimants were domiciled in Zambia. The case involved a series of specific allegations relating to water contamination due to Konkola Copper Mines' mining activities.¹¹

The jurisdiction against both Vedanta and Konkola Copper Mines was ultimately confirmed by United Kingdom Supreme Court, although more cautiously than by the Court of Appeal. The latter for its part confirmed that the claims against both companies were based on the same facts, relied on similar principles and if Konkola Copper Mines were already within its jurisdiction, would plainly be a proper defendant in the proceedings.¹² It further determined the applicable law to be that of Zambia which is both common and statutory law. It also referred to the possibility that if Zambia followed the English common law, this would raise questions about the duty of care of the parent company.¹³ The Court of Appeal noted that the parent company could have a duty of care towards the employees of the subsidiary or other parties directly affected by its operations. This would notably be the case where there is a relationship of proximity between the parent company and the operations of the subsidiary. For example, where the parent company has taken direct responsibility for devising a material health and safety policy of its subsidiary (the adequacy of which is the subject of the claim), or where the parent company controls the operations which give rise to the claim.¹⁴

The United Kingdom Supreme Court subsequently also confirmed the jurisdiction of the United Kingdom courts.¹⁵ However, it did concede that the appropriate jurisdiction would in principle be Zambia, as that is where the claimants and evidence were based, as well as where the alleged damage occurred.¹⁶ However, this had to be balanced against the fact that before the Zambian courts the claimants would face serious obstacles in terms of

¹¹ *ibid.*

¹² *Dominic Liswaniso Lungowe and others (Respondents) v Vedanta Resources Plc (Appellants) & Konkola Copper Mines Plc* [2017] EWCA Civ 1528, para 99.

¹³ *ibid* paras 67 ff.

¹⁴ *ibid* paras 83 ff. See also Gabrielle Holly, 'Access to Remedy Under the UNGPs: Vedanta and the Expansion of Parent Company Liability' (2017) EJIL:Talk! <<https://www.ejiltalk.org/if-the-pleading-represents-the-actuality-vedanta-access-to-remedy-and-the-prospect-of-a-duty-of-care-owed-by-a-parent-company-to-those-affected-by-acts-of-subsidiaries/>>.

¹⁵ *Vedanta* (n 10).

¹⁶ *ibid* para 87.

access to justice. First, there was the limited capacity of the Zambian courts to deal with a case of this size and complexity.¹⁷ Second, the claimants would not have access to the type of legal aid available in the United Kingdom, while facing a wealthy opponent in what is likely to be a drawn-out case.¹⁸ As a result, the case was declared admissible.¹⁹

Added to the logistical obstacles relating to the accessibility to evidence and witnesses, is the fact that the court deciding these type of cases are unlikely to be familiar with the foreign law that it has to apply. Moreover, different courts in different (EU) member States may apply the English common law of negligence (which is likely to form the legal basis for many tort claims arising in its previous colonies) very differently. There is thus no guarantee that the court decisions resulting from this avenue will give rise to a set of coherent principles for determining the liability of a parent company for the conduct of one of its subsidiaries, in matters relevant to health and safety standards. But even so, it is an avenue that may in any specific case result in very tangible relief for victims of torts that also involve the violation of international labour standards. It may also over time result in legislative amendments that concretize the duty of care of holding companies domiciled in the *forum* State vis-à-vis their transnational supply-chain.

It may therefore be worthwhile for the ILO to explore avenues for strengthening its engagement with experts in tort law litigation. The ILO's involvement in the KiK settlement is an indication that it is not entirely unfamiliar with this type of litigation. But perhaps it is worth considering how the ILO can extend its influence during these type of proceedings, in order to ensure that the domestic law of negligence in the *forum* State is interpreted in accordance with international labour standards. In addition, the ILO could include seminars about the relevance of the tort law/conflicts of law narrative for the (indirect) enforcement of international labour standards in its training seminars. Similarly, the technical assistance programs offered by the ILO should include support for this type of litigation.

¹⁷ *ibid* para 89.

¹⁸ *ibid*.

¹⁹ *ibid* para 102.

However, this broader approach that relies on a broader toolbox of legal oversight mechanisms, will require a significant mind-shift within the ILO, one hundred years after its foundation. It requires a willingness to move beyond the echo-chamber of international labour standards (the 'rights narrative') and to engage with other branches of law in a creative manner. In particular, it will require more recognition of the fact that if one wants to receive tangible and sustainable results for the victims of systematic violations of health and safety standards, a 'rights narrative' that relies on traditional ILO oversight mechanisms might not always be the most effective. Instead, a narrative based on the law of delict may be at times be the better alternative for obtaining relief, or should at least be considered as one of various, complementing alternatives.

V

**ADVANCING AS ONE:
ILO'S TRIPARTISM AS A MODEL**



The ILO and Tripartism: The Challenge of Balancing the Three-Legged Stool

Janice R. Bellace

I. Introduction

The centenary of the International Labour Organization has produced many reviews of the ILO's achievements, and its challenges as it begins its second century. But missing has been an analysis of why the ILO managed to remain in existence during the turbulent period when the League of Nations collapsed, nor how it managed to transition successfully to the status of a UN agency during a time when some wished to see the UN assume some of its functions. In considering this, it can be posited that the ILO's tripartite structure has been integral to its longevity and its continuing relevance. Yet, this tripartite structure has never been emulated. It is unique among international organizations.

Tripartism has been accepted as part of the DNA of the ILO, and as something that permeates all its activities. But in view of the fact that this feature is unique, it is curious that the reasons for tripartism have not been widely recognized or probed. It is as if commentators have assumed certain justifications prompted the inclusion of tripartism in the proposal for an international labour organization. For instance, some assume that both employers' groups and trade unions wanted a check on governments, since those who would be most directly affected did not want governments, through the ILO, to impose labour standards on them. Another possible justification presumes that those who established the ILO wanted the new intergovernmental organization to have democratic legitimacy and thus to possess credibility when it issued labour standards. Some have assumed that the drafters of Part XIII of the Paris Peace Treaty were responding to the

times, when workers were demanding to be heard about the need for better working conditions. As such, representativity or voice is seen as a possible justification. However, an examination of the historical record reveals that none of these reasons identifies the motivation for building tripartism into the structure of the ILO. Rather, a commitment to follow the logic of what needed to be done to take effective action to set labour standards led to the design of a tripartite international labour organization.

II. Tripartism from day one

Tripartism was part of the proposed structure of the ILO from the first day the Commission on International Labour Legislation met at the Paris Peace Conference. On that first day, the British submitted a proposal for an international labour organization. Importantly, it was the only complete proposal submitted,¹ and since the substantive content of other proposals covered some of the same issues, the British proposal was the only proposal discussed and debated.²

Since the British had a complete proposal that incorporated tripartism before the Labour Commission first met and submitted it on the first day the Labour Commission met, it is clear that the British were solely responsible for tripartism being part of the ILO's DNA. From this, it must be asked why the British proposed a tripartite structure for the ILO. The reasons why do not appear to have been discussed during the sessions of the

¹ Wilfred Jenks later commented: 'There were, however, some almost accidental circumstances which contributed to the success achieved in Paris, notably the combination of the general desire to do something about the labour question with the absence of any rival plan elaborated in anything like the same detail'; C. Wilfred Jenks, 'The Origins of the International Labour Organization,' (1934) 30 *International Labour Review* 575, 577. For instance, the French government had established a committee in 1917 to consider social policy issues, and this committee did confer with its British counterparts. But under the press of work, it had not formulated a complete proposal by the time the Commission on International Labour Legislation started working; Reiner Tosstorff, 'The International Trade-Union Movement and the Founding of the International Labour Organization,' (2005) 50 *International Review of Social History* 399, 416 <https://orca.cf.ac.uk/3948/1/International_Trade-Union_Movement.pdf>.

² Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50 *International Review of Social History* 435.

Labour Commission,³ in part apparently because none of the delegates from the nine countries on the Commission⁴ ever queried, let alone opposed, the concept of a tripartite structure for this new intergovernmental body. To some extent this may be explained by the fact that the various governments sent as delegates to the Labour Commission proceedings those persons who were most interested in and knowledgeable about labour matters. Most were civil servants, with many connected to their country's labour ministry. In addition, it was generally recognized that the United States, Great Britain and France were the most important countries by virtue of their importance in winning the war and the size of their economies. As this was the British proposal, which the United States and France generally supported, objections were few. Throughout February and early March 1919, the only objections raised with regard to tripartism related to the weighting of votes. In the end, a compromise was reached, with the governments accorded two votes, and employers and workers one vote in the International Labour Conference, and the Governing Body, but the 1-1-1 weighting retained for all other parts of the ILO.⁵

III. Pragmatic view of how to achieve desired results

To consider the British motivation for including tripartism in their proposal for an international labour organization, it is necessary to examine how and why the British came to draft the specific proposal presented.

³ There were no official published minutes of the Labour Commission sessions although stenographic minutes were taken. The different delegations took their own notes/wrote their own minutes. Similarly there was no official translation of proposals. As such, different memoirs often present different views. This, however, appears merely to represent different perspectives on what happened, based on what information a given individual possessed. The accounts of various participants rarely conflict on any significant substantive point.

⁴ The five great powers (Great Britain, France, Italy, Japan and the United States) each had two representatives. The other four Commission members were Belgium, Cuba, Czechoslovakia and Poland with Belgium being allotted two representatives. For a listing of the members and their substitutes, see Van Daele, (n 2) 449 n. 42.

⁵ Van Daele states that Samuel Gompers of the United States was strongly opposed to 2-1-1 on the grounds it gave the government too much power; *ibid* 454.

Edward Phelan⁶ provides the most complete account⁷ of how the British team⁸ drafted the proposal, and other contemporary accounts are in accord.⁹ Phelan notes that as soon as Bulgaria withdrew from the war in late September 1918, those in the British labour ministry realized that the end of the war was near and that when the war ended, there would be a peace conference. They anticipated that ‘the labour problem’¹⁰ would be a topic at the peace conference and began to prepare the British position.

Although Phelan was the most junior of the handful of persons who prepared the draft proposal, he was the one with ground level experience of how wages were actually set. At the outset of his career, he had been sent to Glasgow to collect data on prices for a cost of living index and on wage rates.

⁶ Edward Phelan in 1919 was a junior civil servant in the British Ministry of Labour. He was on the staff of the British delegation to the Paris Peace Conference and was appointed secretary to the British delegates to the Labour Commission. He subsequently became the first international civil servant when he was hired to organize the ILO office in Geneva in 1920. In 1941 he became the fourth Director of the ILO; see *Edward Phelan and the ILO: The Life and Views of an International Social Actor* (ILO 2009) 137.

⁷ Edward J. Phelan, *The birth of the ILO: The personal memories of Edward Phelan*. (unpublished manuscript, ILO Library, Geneva). Phelan wrote more than one article or chapter on this topic but all were published before he retired from the ILO. The unpublished memoirs were written between 1948 and the early 1960s. The manuscript was incomplete at the time of his death in 1967. The account of the deliberations at the Paris Peace Conference does not differ substantively with his earlier writings, but Phelan gives a more detailed and more reflective account in his unfinished memoirs, <http://www.ilo.org/public/libdoc/ilo/1967/67B09_199_engl.pdf>.

⁸ The ‘little committee’ Phelan speaks of consisted of Hope Simpson, Charles MacMullan, Hector Hetherington and Phelan himself.

⁹ The leading work, published fifteen years after the event is James T. Shotwell (ed), *The Origins of the International Labor Organization* (Columbia UP 1934). Most chapters in this volume were written by men who personally took part in the deliberations of the Labour Commission at the Paris Peace Conference. Noting that most cited histories of the 1919 Labour Commission were written in English, Van Daele examined various archives for other historical accounts in her research. She focuses on the influence of two Belgians, Ernest Mahaim, professor of international law, and Emile Vandervelde, a leader in the international socialist labour movement; see Van Daele (n 2) 436-438.

¹⁰ This is a term that crops up repeatedly in the writings of the time, without any definition, indicating that at the time everyone seemingly understood what it meant. The phrase reflects that in the first two decades of the twentieth century strikes, boycotts and picketing were common throughout Europe as workers in many countries protested the harsh conditions of their employment, such as low wages, very long hours and unsafe conditions. British Prime Minister Lloyd George had promised British trade union leaders that once the war was ended, he would respond to their proposals for the improvement of labour conditions.

He witnessed how wages and terms of work were negotiated and how negotiated wage rates were applied at shop floor level to specific work. In late 1918, it seems that the British team initially thought that the Peace Conference would produce responses to labour's demands.¹¹ But after considering what exactly an international body could do to set standards, Phelan had doubts:

The general view [...] was that the peace treaty should incorporate a series of labour guarantees and standards [...] but as I tried to picture how this could be accomplished in practice, I became more and more conscious of the many difficulties that would be encountered. I knew from my experience of collective agreements that, even when only one industry was concerned [...] long discussion was required before appropriate words could be found to define the exact obligations involved. The process would be infinitely more complicated when the scope of the obligations extended to all industries and all countries. Innumerable technical questions would arise, and it was certain that the Peace Conference delegations would not include members qualified to deal with them.¹²

Phelan gloomily concluded that 'the most that the Peace Conference could be expected to do would be to give its blessing to some kind of general declaration which, realizing that it was treading on unfamiliar and dangerous ground, it would frame in cautious terms creating no real obligations'.¹³

To Phelan, establishing general and therefore ineffectual standards was most unsatisfactory, and he began to consider what 'kind of body' would be 'competent' to 'take any effective action on the substance of trade union proposals'.¹⁴ It was at this point that he conceived of the kind of body that could do this, saying later that the 'principal features of such a body were evident':

¹¹ Van Daele notes that later some on the Labour Commission, most notably Italy and France, had a similar view, seeing the ILO as some sort of 'super parliament' that could vote for conventions that would be legally binding on member States. There was, however, overwhelming opposition to this view; see Van Daele (n 2) 456. Phelan also notes that there was some exploration of whether the ILC could adopt conventions that would be binding on ILO member States but the United States was adamantly opposed; see Phelan (n 7) 237-241.

¹² Phelan (n 7) 214. Phelan notes the various demands put forward at the Berne conference of October 1917, such as a ten-hour working day which by 1918 had already evolved in some countries to a demand for an eight-hour day. He viewed this as the sort of pressing issue which the Peace Conference was ill-suited to handle.

¹³ *ibid.*

¹⁴ *ibid* 215.

In the first place, it would have to bring together technically qualified representatives of the interests involved, namely workers, employers and government departments concerned with industrial matters. In the second place, it would have to have the power to frame its decisions in the form of international conventions which would give rise to binding international obligations. And in the third place, it would have to be a permanent institution functioning continuously so that it could take account of changing conditions.¹⁵

Thus tripartism was not an add-on to the concept of an international labour organization. Rather, it was an essential component of a body that would be capable of taking effective action on proposals relating to labour, and effective action meant that the resulting standards had to be expressed in legally binding international conventions. Moreover, that body would have to be a permanent institution and it was this realization that led him to formulate the proposal for a permanent international labour organization.¹⁶

Phelan was able to persuade the small drafting team of the merit of his proposal for a tripartite international labour organization, and the proposal was pushed upwards by Harold Butler¹⁷ in the labour ministry to Cabinet. For reasons Phelan had not contemplated when conceptualizing

¹⁵ *ibid.*

¹⁶ This may seem an obvious outcome now but it was not as one example illustrates. In July 1944, the Allied Powers at the Bretton Woods Conference established the post-World War II economic order based on the premise that liberal trade and free markets contribute to global prosperity and peace. Besides creating multilateral organizations such as the International Monetary Fund and the World Bank, this Conference led to the General Agreement on Tariffs and Trade (the GATT) in 1947. Successful in reducing tariffs and other trade barriers, the GATT was simply what its name stated – an agreement. The GATT was a multilateral agreement, which embodied a series of rules, re-negotiated periodically in a trade ‘round’ without significant institutional support. By 1990, it was recognized that to increase global trade, an organization with greater capacity was needed, one designed to be a permanent institution with its own secretariat. The Marrakesh Agreement in 1994 led to the GATT being succeeded in 1995 by the World Trade Organization.

¹⁷ Harold Butler joined the Home Office in 1908 and in 1917 moved to the Ministry of Labour to serve as Assistant Secretary to the Minister. In late 1918, he worked with Phelan and Malcolm Delevingne to draft the programme for the labour section of the Paris Peace Conference. In the early years of the ILO, he was the Deputy Director of the Office. In 1932, upon the death of Albert Thomas, Butler became the second Director of the ILO.

a tripartite international labour organization,¹⁸ tripartism was critical in securing Cabinet's approval of the proposal. As he later came to know:

The suggestion that the Government should urge the Peace Conference to depute the responsibility for dealing with labour matters to a separate international body in which the workers would be represented consequently appealed to his [Lloyd George's] political sense as affording an argument with which he could make great play if the charge of bad faith became a dangerous issue. He gave the proposal [...] his warm support and the Cabinet's approval followed.¹⁹

The political considerations that led to Cabinet's approval of the proposal also resulted in an unexpected decision that would lead to the most favourable condition for the proposal's reception at the Peace Conference. The Cabinet decided to establish a special section of the British delegation to the Paris Peace Conference to deal with labour matters, and this would be under the direction of George Barnes,²⁰ the Labour member of the War Cabinet. As a result, a leading trade unionist, who strongly believed in collective bargaining, was the person who would be presenting the British proposal for a tripartite international labour organization in Paris.

IV. Proposal at the Peace Conference

The British Ministry of Labour staff at the Paris Peace Conference were confronted by the challenge of how to move their proposal forward at a Peace Conference that would be dominated by political issues, such as national boundaries, which would occupy the minds of most governments.

¹⁸ When Lloyd George campaigned to replace Asquith as prime minister in 1916, he portrayed himself as a liberal who could lead a more unified government and sought Labour's support in forming a government. Labour demanded to be represented at the Peace Conference at the end of the war and Lloyd George agreed. But by fall 1918, Lloyd George's Liberal Party was moving to an election at war's end, one which no longer would have a minister from the Labour Party, and thus Lloyd George would find it difficult to have Labour representatives at the Peace Conference. He thus faced the prospect of being denounced for renegeing on a promise.

¹⁹ Phelan (n 7) 219.

²⁰ George Nicoll Barnes was a leading British trade unionist and Labour Party politician. He was one of three Labour MPs who became ministers in Lloyd George's coalition government during the war.

In January 1919, the members of the British delegation began arriving in Paris, with Edward Phelan, now secretary of the labour section of the delegation, the first to arrive. There he met with members of the American delegation, including Professor James Shotwell.²¹ Phelan ascertained that the Americans had no labour proposal and proceeded to explain the British proposal. Once the Americans indicated their general agreement with the idea of a tripartite international labour organization, there was a discussion of what could be done to avoid the labour discussion being side-tracked or enmeshed in non-labour debates. It was agreed that it would be preferable for labour matters to be discussed by a committee of the Peace Conference so that the issues could be discussed by those most knowledgeable about the subject and who would focus on the British proposal. With the Americans and the British taking this position, the British quickly secured French agreement as it was evident that the three major powers at the Peace Conference would set the agenda and determine the procedures to be followed.

Before the Peace Conference began on 18 January 1919, the British proposal was refined, with the essential features as envisioned by Phelan remaining. As Phelan explained:

With one exception, all the major features of the ILO's Constitution as eventually adopted were included at this stage, and in particular three points that marked a break with all previous diplomatic tradition and practice, namely that the Conference could adopt international Conventions by a majority, that employers' and workers' delegates should be entitled to vote, and that the Conventions adopted should be laid before national parliaments and ratified if they were approved.²²

At its next session, on 25 January, the Peace Conference by resolution established a Commission on International Labour Legislation to work on a proposal regarding labour matters. The advantage of the Labour Commission being able to deliberate outside the main conference session soon became

²¹ James Shotwell was an American historian and Columbia University academic who was part of a study group set up by President Woodrow Wilson to prepare for the peace negotiations. He became a member of the American delegation on the Labour Commission at the Peace Conference. He was the editor and lead author of the 1934 volume, *The Origins of the International Labor Organization*.

²² Phelan (n 7) 224.

apparent. It was able to work quickly without outside interference, with contentious issues debated by delegates from only nine countries.²³

Another unexpected but fortunate occurrence was the selection of the chairman of the Commission. The United States was the only country on the Commission that had as its representatives persons who were not in government or civil servants. Rather the United States sent a leading representative of labour and of employers with the labour leader Samuel Gompers, president of the American Federation of Labor. The French nominated Gompers to be the chairman of the Commission. The election of Samuel Gompers as chairman meant that the views of trade unions were very strongly put forward and could not be ignored.

The provision for a tripartite structure was accepted by all members of the Labour Commission. What caused difficulty, however, was the allocation of votes. The British proposal had provided for three voting delegates from each country, with the Government delegate having two votes and the Employers' and Workers' delegates each having one vote. Various counter-proposals were put forward,²⁴ with the basic difference being whether to have a 2-1-1 weighting or a 1-1-1 system. On 28 February, when the Labour Commission adjourned for a ten-day break to allow delegates to consult with their governments, the 2-1-1 system had been approved but only very narrowly and with certain leading countries in favour of the 1-1-1 weighting.²⁵ Aware that under no circumstances would the British government support the proposal for an international labour organization in which the government delegates would have less than 50 percent of the votes, the British delegation to the Commission lobbied for their proposal during the break.²⁶ On 19 March, when the Commission delegates voted, the 2-1-1 weighting prevailed, by a vote of 8 to 6.

²³ Shotwell (n 9) xx (Introduction to volume I).

²⁴ Van Daele discusses these, including the 1-1-1 stance of the United States and France, and how the Anglo-Belgian 2-1-1 proposal won; Van Daele (n 2) 453-456. It should be noted that the 2-1-1 weighting applies only to the International Labour Conference and the Governing Body. The 1-1-1 weighting applies to all committees (except the Finance Committee of the ILC and the independent Committee of Experts).

²⁵ Phelan (n 7) 237.

²⁶ Phelan discusses the various lobby pitches made, and the fears up to the last minute that the British proposal would go down to defeat; *ibid* 241-246.

If the British 2-1-1 stance had not prevailed, it is difficult to predict what might have occurred. It is conceivable that the entire British proposal might have been withdrawn because the British government had taken the position that national governments had to have at least 50 percent of the votes, if not an outright veto, on the adoption of conventions. Phelan himself indicates he had other reasons for fearing the defeat of the 2-1-1 weighting. He viewed the British proposal as a 'closely knit logical whole'²⁷ such that key provisions could not be removed without having the entire structure collapse. Thus, it is not an exaggeration to view tripartism in the inter-governmental international labour organization as integral to the integrity of the whole.

V. Tripartism as a unique governance process

While Phelan may have viewed tripartite participation pragmatically, as necessary to produce meaningful standards, which would be the basis for effective action, he did not dwell on how such a structure would play out in practice. The ILO is unique in that it is the only intergovernmental institution in which governments do not have exclusive voting power in adopting conventions, setting standards and defining policies to be pursued. This has an enormous impact on the position of governments. Unlike in other international intergovernmental organizations, governments at the ILO do not simply listen to the views of affected parties. They share power with them. And since the 2-1-1 system does not give governments overwhelming advantage, governments must find allies if the governments' stance is to prevail. Thus, moving a proposal forward at the ILO invariably involves considerable negotiation rather than the staking out of fixed positions. It is obvious that the Employers' and Workers' groups must negotiate if their position is to succeed since each only possesses 25 percent of the votes. But they do have one advantage in this tripartite organization. Although there are differences within each of the three groups at the ILO, in general the Employers' group and the Workers' group are more unified than the governments, which have very diverse interests. This dynamic, continuous and complex negotiation, makes for a unique governance process. This process

²⁷ *ibid* 235.

is often criticized for being time-consuming, thus making for a slow decision-making process with compromises such that the original proposal is watered down. It is rarely praised for being a deliberate process which results in sustainable decisions, which is crucial for an organization that does not have enforcement power.²⁸

Kari Tapiola has observed that ‘negotiating processes are a roughly equal combination of strategic views, tactical movements, and pure hazard’ and further commented that there ‘is no simple formula to determine when pressure works better than encouragement’.²⁹ Timing is also a consideration, and at the ILO there have been times when an issue has had to be put on a back burner, to wait for a more propitious time to move it forward. For example, throughout much of the 1920s, there were continuing attempts to reach consensus on what freedom of association meant, including what constituted permissible industrial action. Discussion simply came to a halt, but in the aftermath of World War II, consensus was reached on a text for the Freedom of Association and the Protection of the Right to Organise Convention, 1948 (No. 87) in a matter of a few months.³⁰

Incongruous alliances were common in the Cold War period because of the East–West ideological divide. Those supporting a tripartite structure for the ILO had assumed that the government, employer and worker groups would have autonomy and would exhibit representativity, which would result in a robust discussion within the ILC. They did not contemplate the admission of member States where the three groups would not be autonomous and where the views expressed by employer and worker

²⁸ Since 1995, many have been impressed by the ability of international organizations in the financial/trade area to command compliance. More recently, however, powerful States, such as the United States, have refused to cooperate and/or comply, with the result that organizations (such as the WTO) and agreements (such as those on climate control) are at the point of becoming paralyzed. It is evident that for agreements to be sustainable, enforcement may not be the key issue; rather, the issue is whether there is true commitment to a specific standard.

²⁹ Kari Tapiola, *The Teeth of the ILO: The Impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*. (ILO 2018) vi and vii. In a similar vein, Tapiola complains that so many criticize the ILO as being toothless, because they fail to consider the impact of an ILO convention or policy over the long term.

³⁰ Janice R. Bellace, ‘The ILO and the right to strike’ (2014) 153 *International Labour Review* 29. For a discussion of external political currents that influenced the speed at which the ILC handled this issue, *ibid* 36–43.

representatives might not reflect the interests of employers or workers.³¹ Within the ILC, this produced an odd dynamic. The government, employer and worker representatives from communist countries might take a certain stance, and then the government, employer and worker representatives of non-communist countries would take an opposed view, one that might not have been their view if a unified front in the face of a common foe was not of paramount concern. An example relates to the Employers' position on Convention No. 87, and in particular, whether a right to strike is implied in that convention. For forty years, the Employers' group had supported the views expressed by the independent Committee of Experts, which were in line with decisions of the tripartite Committee on Freedom of Association. But after the fall of the Berlin Wall, the Employers' stance changed. The vice-Chair of the Employers' group, Alfred Wisskirchen, indicated that the Employers had long held such views but had refrained from expressing them during the Cold War in order for the market economy countries to maintain a united front on the salient issue of freedom of association.³²

In light of the reasons expressed by Phelan for tripartism being essential for an international labour organization to be effective, one might consider what impact this lack of 'true' tripartism had on the operation of the ILO during the Cold War. It is well known that the ratification rate of conventions adopted in the 1970s and 1980s, compared to prior decades, was quite low. There has been no research on the reasons for this.³³ One might simply be that the Office was not focused on ratifications. It may be, however, that during the Cold War, government, employer and worker representatives at

³¹ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 3-4.

³² Alfred Wisskirchen, the German Employers' representative, attended the ILC from 1969 until 2004. He has written that 'for obvious reasons, no issue was made of this and many other differences during the long years of the Cold War. This changed very fast after the great turning point in world politics'; Alfred Wisskirchen, 'The standard-setting and monitoring activity of the ILO: Legal questions and practical experience' (2005) 144 *International Labour Review* 253, 288.

³³ Some have commented on this phenomenon. Standing discusses this period and criticizes several aspects of the ILO's direction; Guy Standing, 'The ILO: An Agency for Globalization?' (2008) 39 *Development and Change* 355. See also Efrén Córdova, 'Some reflections on the overproduction of international labour standards' (1993) 14 *Comparative Labor Law Journal* 138.

the ILC voted in favour of conventions even though they had misgivings about the conventions' substantive provisions or the applicability to their situation. As a result, at the point when the member State had to consider ratification of a convention, there was insufficient support. As research has confirmed, the 'ratification of ILO conventions is ultimately a process driven by domestic actors interacting within a domestic institutional setting'.³⁴

There is a related issue; namely, whether true tripartism can exist at the ILO in Geneva without there being some semblance of tripartism at the national level.³⁵ In recent decades, there has been some concern that the worker representatives at the ILC may lack a degree of legitimacy because of the rapidly declining size of the labour force that is unionized in many countries. In the last few years, there has been a similar concern regarding the employer representatives since most are from large companies in the 'old' economy rather than the new companies in the online, social media and digital economy. While they used the words 'employer' and 'worker', it appears that those at the Paris Peace Conference thought of capital and labour and simply used the terminology of the times to label them. What is important in the 21st century is not what the words are, but whether the views expressed by the representatives broadly reflect the interests of all employers (or companies or platforms or brands) and workers (whether employees or dependent contractors or independent contractors). Although these concerns may be valid, it must be recalled that in 1919 when the structure of the ILO was debated, the degree of unionization was quite low in many of the countries on the Labour Commission, and the employer voices heard were those of large employers. It may be that this was deemed sufficient, if not ideal, to inject pragmatic realism into discussions of labour standards at the new international labour organization.

³⁴ Leonardo Baccini and Mathias Koenig-Archibugi, 'Why do States commit to international labor standards?: Interdependent ratification of core ILO conventions, 1948-2009' (2014) 66 *World Politics* 446, 449.

³⁵ Simpson examines developments related to tripartite arrangements at national and regional level in light of changes caused by the oil crises of the 1970s and increasing globalization in the 1980s. He implicitly views these as connected to the ILO's effectiveness as he states that tripartism is 'basic' to the 'operations' of the ILO; William R. Simpson, 'The ILO and Tripartism: Some Reflections' (1994/09) *Monthly Labor Review* 40.

VI. Harmonious cooperation

There have been periods in the ILO's history when the tripartite groups have managed to cooperate in a harmonious fashion. Certain factors appear to explain this.

In the aftermath of major wars, there seems to be greater awareness of social issues that may have led to hostilities or there may have been striking injustices that occurred during the war. After both the First and Second World Wars, the ILC adopted several important conventions within just a few years. After WWI, six conventions were adopted in 1919, all responding to the issues urgently requiring attention that were listed in the Treaty of Versailles. After WWII, major conventions on freedom of association, collective bargaining, and equal remuneration were approved in a three-year period.

On topics of specialized interest, cooperation often occurs, such as with the maritime/seafarers' conventions. Here those member States most affected by the convention are likely to be actively involved in the discussions, and the tripartite system works in an optimum fashion to inject pragmatic realism into discussions of specific provisions. It was this pragmatism that made the path-breaking Maritime Labour Convention, 2006 possible because those affected saw the advantages of comprehensive convention rather than many conventions each dealing only with an aspect of the industry. Another example of seeing the advantage of a comprehensive convention is the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

On topics where large employer and union interests are not directly implicated, the two non-governmental groups can more dispassionately consider the setting of labour standards. An example is the Domestic Workers Convention, 2011 (No. 189).³⁶ Another example is the Worst Forms of Child Labour Convention, 1999 (No. 182). Most large companies do not employ children (at least not knowingly) and unions historically have been opposed to the employment of children. In addition, this convention is

³⁶ Although those covered by the convention are most definitely workers, in most countries they are not unionized (as they are difficult to unionize) and the employer is typically an individual or family.

limited to worst forms of child labour, some of which are outside the traditional notions of lawful employment.³⁷ As such, there was no disagreement between two of the three tripartite groups.

An unusual example of tripartite cooperation has occurred when there have been external threats to the ILO's core mandate and mission. In 1945, when the Allies were designing a new organization to replace the League of Nations, there was concern that the new United Nations would be empowered to handle the ILO's functions in a more integrated way.³⁸ Maupain comments that the Office mobilized the 'energies of the tripartite constituents to break the legal ties between the ILO and the League, and to vindicate the ILO as the competent body' to accomplish the purposes for which it was created, and adds 'obviously, the organization's tripartite structure was also instrumental in this reprieve'.³⁹ Another external threat occurred the following year when the new UN Economic and Social Council was asked by the World Federation of Trade Unions to consider the exercise of trade union freedoms, which prompted a complaint from the American central trade union federation on the same subject in which it argued that the ILO was the competent body to examine the question. At its March 1947 session, the ECOSOC decided to refer the matter to the ILO but asked for a report back by July. Within three months the Governing Body and a special committee of the ILC had discussed, drafted and voted upon the text that would become the Freedom of Association and the Right to Organise Convention, 1948 (No. 87). This was an effort that had eluded the Organization throughout the 1920s, but in 1947, spurred on by a clear external threat, the tripartite partners responded with unprecedented speed.⁴⁰ The remarkable unity of Employers' and Workers' representatives on this issue indicates that they were keenly aware that had no voice at the UN and therefore were very motivated to keep labour issues within the competence of the ILO.

Another example of tripartite cooperation in response to external pressures came in 1998 when the ILC adopted the Declaration of Fundamental

³⁷ Examples would be the use of children in the sex trade, or the use of child soldiers.

³⁸ Maupain (n 31) 3.

³⁹ *ibid.*

⁴⁰ Bellace (n 30) 40-42 and footnotes therein on the issue of speed.

Principles and Rights at Work. There was no dissent from the Employers' group to this Declaration. There had been discussion on such a document from the early 1990s, but the speed with which it was agreed upon was undoubtedly encouraged when the WTO, at its first Ministerial meeting in December 1996 declined to consider the issue of linking trading rights with a country's observance of human rights and labour standards. The WTO instead took the position that the ILO is 'the competent body to set and deal with these standards, and affirm[ed] our support for its work in promoting them'.⁴¹ The speed at which this Declaration was drafted and adopted, however, had a downside. It meant that painstaking debate about the meaning of the fundamental principles and how exactly these related to the core conventions listed in the Declaration, let alone how these would apply in ILO member States that had no legislation guaranteeing certain rights, such as freedom of association, did not take place. Edward Phelan had envisioned this as the contribution of the employer and worker representatives rather than governments giving their 'blessing to some kind of general declaration [...] which they would frame in cautious terms creating no real obligations'.⁴² In 1998, the tripartite partners gave their blessing to a general declaration which they framed in broad, lofty terms, which gave the appearance of creating obligations but were later to become the source of intense conflict.

VII. Tripartism and tense conflict

It was expected that a tripartite body would have some degree of conflict and that over time negotiation would produce some acceptable text of a labour standard. Over the past 100 years, this has proven to be correct. There have, however, been extended periods of disagreement. The longest period occurred during the Cold War with capitalist and communist ideologies producing deep rooted disagreements. Even among the capitalist countries, differences between adherents of free markets and regulated markets have produced clashes. Although all three of the tripartite groups could disagree, these typically brought governments into disagreement.

⁴¹ This statement is part of para 4 of the Ministerial Declaration adopted on 13 December 1996, the final day of the meetings. Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN (96)/Dec, 18 December 1996 <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>.

⁴² Phelan (n 7) 214.

With regard to the Employers' and Workers' groups, the sharpest conflicts have occurred when unions and large employers have perceived that the balance of economic leverage was threatened. Most recently this has been highlighted by the rupture over Convention No. 87 and the right to strike.

At the June 2012 ILC, the Conference Committee on the Application of Standards (CAS) meeting began as usual with a discussion on the General Survey. The General Survey of the Committee of Experts (CEACR) examined all eight conventions concerning the four principles set forth in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁴³ With regard to freedom of association, the 2012 General Survey merely updated the material in the earlier General Survey noting refinements and developments. The last General Survey on freedom of association dated to 1994.⁴⁴ At that time, the CEACR observed:

Although the right to strike is not explicitly stated in the ILO Constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98, it seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87.⁴⁵

During the CAS discussion of the 1994 General Survey, no one challenged this. Rather, the Employers' group took the position that while there was a right to strike in Convention No. 87, it was subject to national law.⁴⁶

At the outset of the 2012 CAS meeting, the Employer vice-Chair expressed dissatisfaction with parts of the General Survey. The Employers' group took the position that a right to strike could not be read into Convention No. 87. The Employers' disagreement with the CEACR's views on the right to strike had been voiced to some extent since the early 1990s, and in particular in 1994 when the General Survey had considered the

⁴³ Report of the CEACR, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012) 46–65 <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2012-101-1B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1B).pdf)>.

⁴⁴ Report of the CEACR, *Freedom of Association and Collective Bargaining* (ILO 1994) 136-179 <[http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1994-81-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1994-81-4B).pdf)>.

⁴⁵ *ibid* para 142.

⁴⁶ *Report of the Committee on the Application of Standards* (ILO 1994) paras 115-148 <www.ilo.org/public/libdoc/ilo/P/09616/09616%281994-81%29.pdf>.

topic of freedom of association.⁴⁷ As the text of the 2012 General Survey with regard to freedom of association and the right to strike tracked the language of the 1994 General Survey, criticism from the Employers' group during the CAS was to be expected. But in 2012, the Employers' group in an unprecedented fashion⁴⁸ refused to examine any case of serious non-compliance by a ratifying member State that involved Convention No. 87. The Workers' group refused to accept this condition. Thus, by withholding its support to examining cases involving this one convention, the Employers' group blocked the consensus that is necessary for the CAS to accomplish its task of reviewing cases of serious non-compliance and deadlock occurred.⁴⁹ As a result, for the first time since 1927, the CAS examined no individual cases during the 2012 Conference.⁵⁰

This was the most visible and sharpest rupture between the Employers' and Workers' groups at the ILC in many decades, and though several attempts to patch things over have been made, the pre-2012 status quo has not been fully restored.⁵¹ As Maupain has noted, this crisis is unlikely to be simply an episodic eruption of tripartite tensions.⁵² Whether it portends a long lasting transformation of how tripartism operates at the ILO remains to be seen.⁵³

⁴⁷ For a discussion of the debate on this point during the 1994 CAS, see Janice R. Bellace, 'Back to the Future: Freedom of Association, the Right to Strike and National Law' (2016) 27 *King's Law Journal* 24, 34-35.

⁴⁸ The Workers' group expressed this sentiment; see *Report of the Conference Committee on the Application of Standards* (ILO 2012) paras 144-146 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_190828.pdf>.

⁴⁹ The CAS usually examines about twenty-five cases during its session. Prior to 2012, many related to Convention No. 87. The list of cases to be reviewed is typically drawn up by the Employer and Worker vice-Chairs based on Observations in the CEACR's report for the year; Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 199.

⁵⁰ Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338.

⁵¹ For a discussion of the post 2012 attempts, see Janice R. Bellace, 'The ILO Supervisory System post-2012: Back on Track?' (2019) *Archiv des Völkerrechts* 153.

⁵² Francis Maupain, 'The ILO Regular Supervisory System: A model in crisis?' (2013) 10 *International Organizations Law Review* 117.

⁵³ La Hovary takes the view that the Employers' group is seeking to change the balance of power within the ILO; Claire La Hovary, 'A Challenging *Ménage à Trois*?' (2015) 12 *International Organizations Law Review* 204.

VIII. Tripartism and globalization

Why the Employers' group took such a vehement stance at this particular time when they had been expressing dissatisfaction with the views of the CEACR for twenty years on the right to strike is a pertinent question. Some commentators have focused on the objection raised by the Employers' group; namely, that the CEACR had impermissibly interpreted a convention when only the International Court of Justice can hand down a binding interpretation. But surely the underlying dispute is on the substantive meaning of Convention No. 87, because there are other conventions which are so broadly worded that the CEACR must interpret what the convention means,⁵⁴ and because when the issue of going to the International Court of Justice for a binding interpretation came up in 2015, the Employers representatives unanimously opposed such a referral.

The Employers' group stance at the June 2012 ILC may have been precipitated by a 2011 event.⁵⁵ In June 2011, the UN Human Rights Council adopted Guiding Principles on Business and Human Rights. Using the 'Protect, Respect and Remedy' framework, Part II of the Guiding Principles focuses on the 'corporate responsibility to respect human rights' and lists five foundational principles, the first of which declares 'Business enterprises should respect human rights'. Part II, paragraph 12, states:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

The commentary states what instruments comprise an 'authoritative list of the core internationally recognized human rights'. It further states that these 'coupled with the principles concerning fundamental rights in the

⁵⁴ One example is the Equal Remuneration Convention, 1951 (No. 100), which calls for equal remuneration between men and women for work of 'equal value'. No. definition is given, and there is no generally accepted view among labour economists or compensation specialists about what this means or how it is determined.

⁵⁵ For a discussion of the timeline, see Janice R. Bellace, 'Hoisted on their own petard? Business and Human Rights' (2014) 56 *Journal of Industrial Relations* 442.

eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work' set the benchmarks for assessing human rights impacts. Thus the UN for the first time expressly linked the concept of business responsibility to respect human rights with the rights enumerated in the eight core conventions of the ILO. At the 2012 CAS meeting, the Employers' vice-Chair had expressly decried the tendency of ILO outsiders to look at CEACR's pronouncements as a way of determining what the fundamental principles mean.

The UN body's stance cast the spotlight on the glaring lack of specificity in the 1998 Declaration, proclaimed in general terms, and in particular the lack of specificity in the linked core convention on freedom of association. Those responding to the Employers' attack on the CEACR were somewhat handicapped because in 1947 the draft text of Convention No. 87 had been approved hurriedly without the usual negotiation between the tripartite groups that might have led to more detailed language in the convention.

But the question remains why this particular issue, the right to strike, was the one on which the Employers' group decided to take a very hard stance. Some have viewed it as an attack on unions. Others have viewed it as result of globalization changing the economic reality on which the ILO was founded. This, however, ignores the fact that those who designed the ILO sought to create a level playing field because they were well aware that countries compete with each other and those countries with lower labour standards have a cost advantage. Thus, they designed an organization where governments would agree to a set of standards, and companies would compete subject to those rules. If anything has changed since 1990, it is governments, not companies. The founders' assumptions about the behaviour of governments, based on countries more or less at the same stage of development, are being tested in an era of global supply chains when developed countries are competing with lesser developed countries in the manufacturing sphere.

Since the era of free trade agreements began in the early 1990s, and with the advent of the WTO in 1995, an increasing number of governments have seen an advantage in marketing their labour force as low wage and peaceful (that is, not going on strike).⁵⁶ Yet, as members of the ILO,

⁵⁶ Maupain (n 31) 244-246 wherein the author emphasizes the need for the ILO to ensure 'universal and effective diffusion of the Rules of the Game'.

these governments are obligated to apply the fundamental principles, and many have ratified the core conventions. Nonetheless, they often fall far short of applying Convention No. 87. Thus, companies who align their operations with these fundamental principles find themselves at a competitive disadvantage with those companies who do not and who find no difficulty in operating in countries where the government does not enforce these rights. This is the economic reality that may well underlie the 2012 rupture, with governments the primary cause of the instability of the tripartite arrangement.

IX. Conclusion

In 1941, Franklin D. Roosevelt recalled the founding of the ILO:

I well remember that in those days the ILO was still a dream. To many it was a wild dream. Who had ever heard of Governments getting together to raise the standards of labor on an international plane? Wilder still was the idea that the people themselves who were directly affected – the workers and the employers of the various countries – should have a hand with Government in determining these labor standards.⁵⁷

This ‘wild’ notion of a tripartite international organization where the people affected have a say in setting the standards that will affect them is as relevant today as it was in 1919. The Workers’ group has always held this conviction.⁵⁸ But just as the first Director of the ILO, Albert Thomas, realized it was essential to communicate a vision and to mobilize the tripartite constituents to support international labour standards,⁵⁹ it is crucial today

⁵⁷ Quoted in Gerry Rodgers, Eddy Lee, Lee Swepston and Jasmien Van Daele, *The International Labour Organization and the quest for social justice, 1919-2009* (ILO 2009).

⁵⁸ In giving an overview of the history of the Workers’ group at the ILO, Tapiola notes that the Workers’ group has been the driving force in the ILO since it is the main organization where the workers’ aims can be achieved but that from the beginning ‘principled realism’ led them to accept the need of gaining agreement from the other tripartite constituents; see Kari Tapiola, *The Driving Force: Birth and Evolution of Tripartism – Role of the ILO Workers’ Group* (ILO 2019).

⁵⁹ The inspirational leadership, vision of social justice and commitment of tripartism of Albert Thomas is widely acknowledged. Phelan’s biography of Thomas, written shortly after his sudden death in 1932, best conveys how an individual breathed life into and energized the nascent organization; see Edward J. Phelan, *Yes and Albert Thomas* (Cresset Press 1936).

for the Director-General to persuade the tripartite constituents, particularly governments and employers, to do so. Echoing the 1947 tension between the ILO and the new UN, today's situation calls for the Director-General to point out that adoption of standards relating to business conduct should not be the province of international organizations which are not tripartite. And recalling Phelan's thinking in 1918, the pragmatic reason for insisting on tripartite determination of international labour standards should be highlighted – a tripartite organization is best placed to grapple with the issues those on the front lines best understand.

Tri-Plus: Reflections on Opening the ILO's Tripartite Structure

Guy Mundlak

I. Introduction

Episodically, every few years, questions arise regarding the justification and feasibility of opening the ranks of the ILO to civil society, which is not part of the traditional government-employers-workers tripartite governance structure. Multiple rationales could justify such a claim, but they are also contested. More difficult is the translation of the idea into practice. There are no full-fledged institutional models for introducing a fourth leg to the ILO's three-legged platform. The following article emerges from the debate over opening the ILO's ranks, tying it to the hurdles that face implementation. For those who object to opening the ranks altogether, the question of institutional design is misguided to begin with. But for those who are willing to follow the logic of extended representation, the problematics of institutional design are not merely a technicality. The difficulty in conceiving the structure of a fourth leg is indicative of the intrinsic differences between civil society and the three pillars of the tripartite system. As the title suggests, the article concludes in favour of a Tri-plus model of representation, which is not merely a midway compromise between advocates and opponents of incorporating civil society. Instead, it should be viewed as an ongoing learning process that accommodates the differences in logic and methods of operations that characterize the traditional social partners on the one hand and organizations in civil society on the other hand.

The article proceeds as follows: part II outlines the virtues of tripartite governance generally and in the ILO in particular, but also points to its limitations. Part III introduces the contribution of civil society, as well as its limitations in a stable and ongoing system of governance. Part IV dismisses the simplicity of a fourth pillar, leading to part V that demonstrates various

paths for incorporating civil society into the governance of the ILO. The concluding section suggests a Tri-plus model in which the experimental and dynamic – yet explicit, intentional and fully institutionalized – incorporation of civil society can bring together the advantages of tripartite governance and the contribution of civil society. Such integration should serve as a model not only for the ILO itself, but also for what the ILO advocates in its Conventions, Recommendations and the development of global expertise for promoting social justice.

The following does not seek to critique the achievements of the ILO's tripartite structure and its stability over a hundred years. Rather, it draws on the Organization's internal misgivings and innovations, cautious as they are, in order to reach out of the tripartite structure with the aim of further inclusion. Not one of the ideas presented here is foreign to the activities already being pursued by various sections of the Organization. This article's aim is to integrate these ideas and examine how they can be systematized in an organic form of transition. Such a move does indeed affect the 'identity' of the Organization, a term that will appear below, but embraces both previous achievements and future challenges.

II. The functions of tripartism and its limitations

Tripartism refers to governance by deliberation and the distribution of power in decision-making among three representative bodies – representing the government, the employers and workers. It is an exclusive arrangement that historically has been used for governance of the labour market as well as social matters within the domain of the welfare State. While there are numerous examples of institutions that foster deliberation between adverse interests, there is no other stable, fully developed and universal structure of joint governance outside the context of labour.

Tripartism is an essential aspect of the ILO's governance structure, as well as that of numerous institutions taking part in governance at the national and, to a lesser extent, transnational levels. It is, therefore, both an essential source of legitimacy for the ILO as an international governance body, and an important component of the ILO's prescription for its member States regarding good governance. Yet tripartism is not a good in itself. It is a method that serves the virtues of social dialogue, which in themselves

are instrumental to the fundamental values associated with the ILO's mission – social justice, economic efficiency, peaceful resolution of conflict, and egalitarian democracy.

There are multiple justifications for advancing social dialogue.¹ It can be justified as a vital contribution to the democratic process, enabling the representation of interests otherwise muddled by other political interests. Moreover, it can accommodate a richer idea of deliberative democracy in which interests are not merely represented, but also change in the process of deliberation. It enables the pursuit of mutual learning, where the quest is to identify shared goals though in acknowledgment of differences.² It can also be justified in substantive terms, demonstrating that the outcomes of policies and acceptance of norms that emerge from negotiations and ongoing deliberations are better suited to advancing such goals as equality, dignity and sustainable development.

The justifications for social dialogue can be divided into those referring to *legitimacy* and those related to *efficacy*. The two measures are tightly linked, and efficacy is sometimes woven into concerns of legitimacy.³ When assessing both measures, it is also useful to distinguish between input and output factors.⁴ Input refers to what the parties bring to the dialogue, while output refers to what the relevant agents do with the outcomes of dialogue.

Social dialogue legitimizes regulatory norms, as compared to those of the State and the outcomes of market processes in the shadow of law. Input legitimacy refers to the importance of representing plural interests, thereby ensuring an inclusive democratic process. Output legitimacy ensures that

¹ Anne Trebilcock (ed), *Towards Social Dialogue: Tripartite Cooperation in National Economic and Social Policy-making* (ILO 1992).

² Different strands of democratic thought can justify these claims, from pluralist to deliberative and associational democracy; James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 2000); Joshua Cohen and Joel Rogers, 'Secondary associations and democratic governance' in E.O. Wright (ed), *Associations and Democracy* (Verso 1995) 7. The latter offers in my view the strongest, even if not an exclusive justification for social dialogue.

³ Tonia Novitz and Phil Sypris, 'Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism' (2006) 35 *Industrial Law Journal* 367. According to the authors' typology, my concern with efficacy overlaps their category of 'performance legitimacy'.

⁴ Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford UP 1999).

from pluralist interests and conflict emerge solutions that the collective parties and individuals are willing to accept because they were represented; they were heard, they had the opportunity to affect the outcomes, and they were able to learn about the competing interests. Outcomes are expected to be well suited to the actual needs and interests of the parties; they are more dynamic and adaptable. Ideally, in an iterative process of negotiation and deliberation there is a building of trust and solidification of community, rather than merely an aggregation of preferences.

Arguments concerning the efficacy of social dialogue touch on its practical benefits. They also distinguish between input and output efficacy. The former refers to the expertise the parties bring to the dialogue, which is based on their familiarity with their constituents' interests and preferences. The efficacy of the dialogue's output is based on the parties' responsibility and commitment to ensuring the compliance of their constituents in implementing the dialogue's outcomes.

The gains of social dialogue are further dependent on the structure of the dialogue, including such aspects as the identity of the agents taking part, the process itself, measures taken to address differences in the parties' power resources, the process's transparency, and the possibilities of adjusting the process to changing circumstances. These 'moving parts' distinguish different forms of social dialogue, and can be designated as throughput forms of legitimacy and efficacy.⁵

The advantages of tripartism are intertwined with those of social dialogue, justifying the narrowing of general claims to a particular prescript as to how it should be conducted. Tripartism ensures that only labour's and employers' sides are admitted to the dialogue, side by side with government representatives, by the application of fixed rules on representativeness. This implies two assumptions: first, that labour market and welfare governance is not open to other stakeholders, such as consumers, local communities, environmentalists or representatives of other interests such as gender, racial minorities, or migrants; second, that the voices of labour and employers are sounded by their representatives, and are not open to 'free competition' between competing voices. For example, rules on the representativeness

⁵ Vivien A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput' (2013) 61 *Political Studies* 2.

of trade unions in tripartite negotiations determine which trade unions can send representatives, and deny representation to other trade unions or other institutions of workers' voice. These delegates are then assumed to be accountable not only to their constituencies but also to their partners in the dialogue, and the stable representation of the two sides accommodates negotiation and deliberation. These assumptions underscore the premises of societal corporatist governance.⁶

The importance of tripartism lies in its stabilizing effect on the dialogue. Each side and its representatives know who they are facing. They can negotiate on the basis of mutual compromises in previous rounds; they can build a shared lexicon to facilitate ongoing deliberation with their partners and establish mutual trust; they can serve as a fixed address for their constituents. Practically, the importance of tripartism lies in its stability and certainty. Morally, it is an important aspect of constituting the primacy of class relations, where labour as a whole deliberates with capital as a whole. The primacy of broad class structures overrides other forms of social conflict, such as gender, but also makes it possible to absorb internal divisions within each camp, such as those between small-medium employers and mammoth multinational companies, or between workers in the formal and informal economies.

Despite the alleged advantages of tripartism, there is a recurring critique of its limitations. No one challenges the importance of social dialogue in soft forms of information sharing and reliance on professionalism. One form of critique, which I will set aside, questions the instrumental and ethical justifications of power sharing through social dialogue. The other form of critique addresses the fixed institutional design and stability of tripartism. For those who are concerned that social dialogue *per se* undermines the authority of the State or the benefits of the market, the choice between the tripartite method and other forms of deliberation is of lesser importance. However, questions regarding the institutional design of tripartism overlap

⁶ Tripartism and corporatism are strongly related but not identical. Tripartism can serve the centralized nature of corporatism but can also develop in more pluralist environments. See generally Philippe Schmitter, 'Still the Century of Corporatism?' (1974) 36 *The Review of Politics* 85; David Marsh and Wyn Grant, 'Tripartism: reality or myth?' (1977) 12 *Government and Opposition* 194; Harry Katz, Wonduck Lee and Joohee Lee (eds), *The New Structure of Labor Relations: Tripartism and Decentralization* (Cornell UP 2004).

with claims that social dialogue is not only a method of inclusive democratic participation, but also a method that excludes competing voices.

Declining membership, on both labour's and employers' sides, raises questions regarding representativeness.⁷ There are different explanations for the small share of workers and employers in their respective associations. These may refer to the weakness of associations and what they can offer, lack of access to associations, a concern on workers' side that membership can lead to their employer's retaliation (a 'representation gap'), or lack of interest due to a general disinterest or active opposition. Alternatively, it can be argued that representativeness should not rely on membership rates but on a general demonstration of support by the constituency.⁸ Indeed, some countries do not assess representative status on the basis of membership and suffice with lesser indications of support and legitimacy.⁹ Even greater leniency may be acceptable on the claim that absent alternative forms of associations to voice the ongoing interests of their constituencies, then traditional trade unions and employers' associations are the best proxy available, albeit an imperfect one. However, as the requirements of representativeness are relaxed, the conceptual and practical advantages that are associated with tripartism decline in strength or even disappear when there is no actual labour or business constituency that actively supports their representatives, affects their positions, and demands accountability. The power of representatives to enforce concessions and gather support for their position is similarly in doubt. The allegiance that individual workers and employers are expected to develop to those institutions participating in tripartite negotiations is at risk of being substituted for by the rule of an elite bureaucracy.

A different critique refers to the primacy of the class axis along which labour and capital are aligned as two sides. A growing concern that emerges from objectives very similar to those underlying the tradition of social dialogue suggests that gender, race and other cleavages shape current debates

⁷ Francis Maupain, 'A Second Century for What? The ILO at a Regulatory Crossroad' (2019) 1 *International Organizations Law Review* 1.

⁸ Alan L. Bogg, 'The Death of Statutory Union Recognition in the United Kingdom' (2012) 54 *Journal of Industrial Relations* 409; Gary N. Chaison and Barbara Bigelow, *Unions and Legitimacy* (Cornell UP 2012).

⁹ *The concept of representativeness at national, international and European level* (Eurofound 2016).

just as much as class. For the same reason that the State needs tripartism alongside the normal course of politics, social dialogue needs to incorporate voices and interests that are not in the usual mode of communications that characterizes deliberations between capital and labour.

These limitations affect both input legitimacy as well as the efficacy of input, which can benefit from expertise, reframing of familiar issues, and agents that are irritants, nudging routine and accepted conventions, identifying when their scope and content does not address concerns that fall into the blind spots of tripartism. These problems are then translated into output legitimacy, with the concern that groups of workers, such as those working in the informal economy or those who are unemployed, may be excluded. Excluding representatives of different groups and alternative framings may therefore also pose a risk to the efficacy of implementation and bringing agreements to the ground. Similar concerns can be raised with regard to employers who forgo managerial prerogatives in favour of a common good or for the benefit of increasing labour's share. Employers seek to ascertain that obligations are shared and equally applied to offset competitive advantage. If some employers have better access to input, or if some employers do not take part in implementation of the output and sidestep the pact, legitimacy declines.

III. Filling in the gaps in social dialogue with representatives of civil society, and its limitations

'Civil society' encompasses an intermediate space between the market and the State, where organizations present forms of collective action and voice that are neither wholly public nor private.¹⁰ Civil society is composed of numerous groups that are an option, it is claimed, for filling in the blind spots of tripartism. These can include agents of different sorts – some of them specialize in community building on the ground, while others serve as an international think tank that coordinates between various groups with similar objectives, such as gender equality. They can be radical, challenging existing norms, or work within the existing framework of norms, aiding individuals and communities. They coalesce on common objectives, and can compete at the same time over ideas, resources, and public attention.

¹⁰ Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press 1994).

With respect to civil society organizations, reference is often made to those advocating workers' interests, but the category also includes business and industrial bodies that are not employers' associations.

Organizations in civil society are almost uniformly not based on individuals' membership, as opposed to trade unions and employers' associations, which remain primarily membership-based organizations. Rather, their conceptual accountability is to an 'idea', their mission, and their practical accountability may be to various sources of funding. With the decline in membership rates (density) of the traditional social partners, civil society organizations bring alternative conceptions of voice. Their substantive platforms and means of operation are tested in the marketplace of ideas. A social movement can succeed by forging alliances between otherwise distinct and even isolated communities. A human rights NGO can advocate for the fulfilment of social and economic rights, linking the experience of workers with that of pervasive social structures of hierarchy and domination. For example, sexual harassment is something that happens *inter alia* at work, but cannot be detached from general concerns regarding harassment, violence and patriarchy. Workers' centres can advocate for action where the obstacles to collective bargaining are too high to accommodate effective association. For example, migrant workers in a community can be organized to take action against subcontracting arrangements and home-work provisions that make them invisible in the world of work. For workers in digital platforms and other workers in the precariat, a range of alt-labour arrangements have evolved seeking to provide better protection and advocacy for those workers who are not deemed to be employees and are therefore denied formal association in traditional trade unions. Operating outside the formal rules of collective bargaining is a constraint, but also a source of innovation in providing voice to the ever-growing margins of the labour market.

Civil society organizations, formal and informal alike, can potentially fill in at least some of the blind spots of tripartism by increasing the representativeness of groups otherwise excluded, as well as bringing in action, voice and expertise in areas where the social partners are lacking or which they do not want to develop.¹¹ These advantages also come into play at the

¹¹ Lucio Baccaro, 'Civil Society Meets the State: Towards Associational Democracy?' (2006) 4 *Socio-Economic Review* 185.

output end – both legitimizing the norms and practices that evolve from social dialogue and harnessing civil society's outreach to diverse populations for the purpose of implementation.

However, mirroring the blind spots of tripartism, the structure of civil society entails its own blind spots. Without membership and clear structures of accountability, organizations in civil society present a different version of the representativeness problem. Social movements can be measured by the number of people they mobilize, workers' centres by the number of workers who enjoy their services, industrial chambers by the number of training courses they offer or lobbying actions they conduct, and gender-based organizations by the number of women and men who hold the opinion that their political agenda is important. None of these options captures the organizations' actual impact, and in practice they are not measured, ranked or selected according to such measurable indicia. Many organizations in civil society would object to a fixed list of attributes to define those deserving of the exclusive prerogatives associated with representativeness. These problems can be captured in terms of legitimacy and democracy, as there is no clear framework for establishing who talks on behalf of whom.

Moreover, the dynamic nature of civil society, which encourages ad hoc partnerships and constant reshaping of activities and organizational forms, prevents the selection of representatives for ongoing social dialogue. Absent a stable structure of representation, negotiation and deliberation with civil society may encounter a lack of ongoing commitment, responsibility to outcomes, and will to compromise for shared gains. Moreover, positions of power in such a system are at risk of being captured by organizations with vast economic resources, with a possible tilt towards big business and away from the weakest segments of the workforce, augmenting inequality. The virtue of civil society organizations, their dynamic cooperation and contestation, strains the efficacy of their ability to secure ongoing cooperation and trust between a stable set of agents.

Finally, without a clear divide between State, labour and capital, it is difficult to sort organizations in civil society according to any clear matrix. Civil society encompasses the representation of multiple voices without pre-defined categories, intersectionality of claims (e.g. migrant women), as well as internal divisions in the framing of the represented categories and classifications themselves. The uniformity of the representative criteria for

two predefined groups – labour and employers – was argued to have both inclusive and exclusionary effects. The purposeful absence of criteria for social categories can have a disintegrative effect on a governance method altogether. These problems render the design of the ‘throughput’ particularly challenging and imperil the legitimacy and efficacy of integrating civil society organizations into the tripartite regime.

Consequently, the uncoordinated and what some deem to be ‘untamed’ nature, which is a virtue for framing and reframing problematics, as well as reaching out to those otherwise unheard, is also a vice at both the input and output levels. Increasing inclusion by multiple vectors of interests that are constantly being challenged can benefit the system of tripartism but also undermine its achievements at the same time.

IV. Adding a fourth pillar?

A simple claim would suggest that the ILO should address the challenge of narrow representativeness and the need to look at issues through prisms that are not limited to the traditional dialogue between workers, employers and governments. No system is perfect, but precisely because the advantages of civil society compensate for the disadvantages of tripartism, and vice versa, it is possible to suggest the establishment of a fourth pillar in the ILO’s system of governance, and in its policy recommendations to the member States.

The political economy of such a change would entail considerable organizational resistance, as it is clear that adding a pillar also affects the power resources of the other players. Moreover, a renewed power sharing arrangement is unlikely to be equal for the incumbent sides in the governance system. As demonstrated here, civil society, as distinguished from private players in the marketplace, has a stronger focus on representing those who are socially disadvantaged. Its inclusion may therefore come exclusively at the expense of the labour pillar. But organizations representing economic sectors and industrial interests – whether small and medium sized enterprises, or conversely multinationals or digital platforms, or libertarian think tanks – may ask to receive their share of the employers’ side. Activation specialists may ask to abstain from taking sides, claiming that they have a better understanding how to forge common

interests for the sake of economic growth, and resist the division between labour and employers altogether. It is not clear how these claims should be sorted and whether sorting them neatly on the two sides of the labour/employers class cleavage does not undermine some of the advantages of civil society organizations.

Practically, it is not effective to simply add a representative from civil society in the delegation of each ILO member State. Under the current structure of the ILO, with tripartite delegates to the International Labour Conference (two government delegates, one delegate representing employers and one delegate representing workers), an additional delegate would have to represent a field of action that is diverse and dynamic. If most countries were to add a representative of gender organizations, the advantages of factoring in civil society would be limited. This would amount to switching from a tripartite to a quadripartite structure that gives voice to women (and men), but still withholds representation from other groups such as people with disabilities, workers in the informal economy, migrants, and more. While the staffing of key positions in the ILO can afford more leeway for diversification, the challenge of a clear distribution key remains.

It could be argued that such problems are mere technicalities. Some can be resolved in the attempt to change national tripartite institutions where the number of delegates is not fixed. But technicalities are indicative of the deeper problem. The advantages of civil society lie in dynamically presenting different ideas of representation and voice, and constantly challenging and reframing the terms of the debate. Exactly these qualities make it more resistant to stable, fixed and well-defined criteria for representation. Under the current structure of the ILO, as well as of many tripartite institutions at the national levels, simply to assume that civil society can be treated as a pillar like all others is neither viable nor suitable. Instead of pulling up yet another identical bench for civil society, is it possible to think creatively of a Tri-plus model in which civil society is integrated but its distinct character is respected and maintained?

V. Considering a Tri-plus model

In considering a governance method that can benefit from the advantages of civil society organizations while avoiding the pitfalls of establishing a fourth pillar, there are several trajectories on which I wish to elaborate: (i) a division of labour that maintains the tripartite structure of the ILO but strengthens its cooperation with agencies that are better suited to accommodating civil society; (ii) encouraging or requiring the State and social partners to be more open to the representation of interests and strategies that are voiced by organizations of civil society; (iii) pursuing a 'plus' model within the governance and daily operations of the ILO, but resisting the caricature of a four-pillar model. In all three trajectories the emphasis will be on the structure of the ILO, but with slight adaptation these options apply to tripartite institutions at the local, national and regional levels or to any other institution with a territorial, occupational or sectoral scope as well. The three options are nonexclusive and are all based on existing processes, some of which have been formalized, while others simply derive from a common sense of good governance.

1. *External diversification – an institutional division of labour*

The first trajectory suggests that the ILO should continue to function, as it always has, on the basis of a tripartite governance system. At the same time, it should strengthen its cooperation with other international institutions, formal and informal, that can compensate for the shortcomings of tripartism. For example, the UN Committee on Elimination of Discrimination against Women (CEDAW) – with its clear mission of advancing gender and women's interests – should be viewed as a partner on all gender matters in the ILO. At the same time, CEDAW should benefit from the expertise of labour (ILO), health (WHO), education (UNESCO), migration (IOM) and the like. This alliance is formalized in article 22 of CEDAW. The ILO should branch out and have similar representatives in the operations of other agencies, while inviting their agents to take part in the operations of the ILO. The ILO's mission should be viewed as one component in a broader inter-agency web.¹²

¹² For instance, as requested by the ILO Governing Body in March 2013 and reaffirmed in March 2016, ILO's Action Plan 2018–21 is completely aligned with the indicator elements

The ‘division of labour’ trajectory assumes that each agency should maintain its particular emphases, even if these may miss other aspects that could be aired by changing the participants, the agenda, or the governance system. This could be viewed as a wholesale resistance to integrating civil society into the ILO. It is similar to the WTO’s Singapore Ministerial Statement, which succeeded in renewing its commitment to social standards, while claiming it is not for the WTO to engage with them and relegating them to the ILO.¹³ However, the division of labour trajectory can also be an authentic and true way to reflect on the limitations of the ILO, just like the limitations of any international agency or single governance system, and to try to correct them through dialogue between external partners and the internal governance system.

There are two strong arguments that support such a trajectory. From the internal perspective of tripartism, it can be argued that having a set of stable players with clear criteria and a unified axis that constitutes the nature of deliberations remains a strong advantage. The ILO’s mission – i.e. to advance a fair and just labour market and a social welfare system in many countries with different economic starting points, as well as at the transnational level – is daunting enough. Moreover, precisely because of the rise of identity politics and multiple framings of justice, it is so important that the single organization that is organized around class relations be preserved. This does not undermine the importance of any other framing of public issues, but if the class axis should become muddled in the ILO it will not be resurrected by any other institution.

A complementary argument voices the concerns of players in civil society. Civil society encompasses organizations with very different ideas of voice and representation. Many organizations in civil society would like

of the UN System Wide Action Plan (UNSWAP) on Gender Equality and the Empowerment of Women, which was endorsed by the UN Chief Executives Board for Coordination (CEB). Version 2.0 of the UN-SWAP was developed through an 18-month participatory process in which the ILO was actively involved and to which it contributed lessons learned and good practices; see *Action Plan for Gender Equality 2018-2021* (ILO 2018) section 4.

¹³ Article 4 of the WTO Singapore Ministerial Declaration of 13 December 1996 read: ‘We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them’.

to be heard, but are likely to be fiercely opposed to a centralized and rigid method of recognition and certification that assigns privileges and duties. Imposing ideas of representativeness that are built on those developed for labour and employers is not in line with the true spirit of civil society.

Upon consideration of both these perspectives, it appears that a diversification of the tripartite system also carries costs – both to the traditional tripartite system and to the organizations that can potentially fill in the blind spots of tripartism. The first trajectory is, therefore, characterized by clarifying the utility function of what the ILO does, and how it operates, while compensating for conceded limitations by reaching out to others.

2. *Internal diversification – assigning the responsibility to open representation for other voices to each of the tripartite agents*

A different idea that has been suggested in the literature is to encourage the social partners and the State to be more inclusive and open to civil society. Instead of gaining the advantages of civil society through a fourth pillar, it is possible to promote inclusiveness and innovation through the three existing pillars, using soft measures of encouragement, or by drawing on a harder version that involves the ILO's credentials committee and similar methods at the national level.¹⁴ An example of such is the requirement that delegates to the International Labour Conference must consider gender in choosing advisers when there are questions affecting women to be considered.¹⁵ Another expression of this approach can be seen in the ILO's Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), paragraph 6 of which provides that 'the competent authority should make use of tripartite mechanisms with the full participation of the most representative employers' and workers' organizations, which should include in their ranks, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy'.

¹⁴ Faina Milman-Sivan, 'The Virtuous Cycle: A New Paradigm for Democratizing Global Governance Through Deliberation' (2008) 30 *Comparative Labor Law and Policy Journal* 801.

¹⁵ ILO Constitution, article 3(2).

Like the first trajectory, the second maintains the tripartite system, but seeks to change the way the various parties operate, particularly their attitude towards other forms of voice. For the State, this option is challenging, particularly when civil society organizations seek to contest the State and its operations. For the social partners, such forms of cooperation are sometimes deemed threatening, as they downplay their monopoly on voice, which can also affect their representative status. This problem is particularly acute on labour's side. Perhaps surprisingly, it has been argued that on labour's side trade unions and alternative forms of workers' voice are operating on 'parallel tracks' that engage in different ways for similar social objectives, but remain distant from each other.¹⁶ There is nothing essentialist about the alienation between the social partners and competing institutions of voice. There are trade unions that have learned to master such coalitions and methods of joint action. Cooperation between trade unions and social movements, workers' centres and human rights organizations is no longer rare but at the same time remains hard to generalize.¹⁷ Identifying such forms of cooperation by means of 'best practices' is a feasible and desirable way to revitalize collective bargaining and engagement over policy. Such soft methods of encouragement merge with the following trajectory.

A more formal method of accreditation that is based on the degree of openness to civil society, which by nature applies to the business and labour sides, is more difficult to implement. Without formal requirements, it is difficult to measure alliances with civil society, their intent and effects. Requiring a formal demonstration of alliance is still foreign to many associations. There is no single model of alliance. Many forms of cooperation that can be deemed successful have been the outcome of innovative thinking and tailoring to particular situations, barriers posed by national legal regimes, and geographical circumstances. There is a further risk of co-opting civil society that will need to be broken up into predefined templates, which may be prescribed by the tripartite organizations themselves.

¹⁶ Virginia A. Leary, 'The Paradox of Workers' Rights as Human Rights' in Lance Compa and Stephen Diamond (eds), *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press 2003) 22.

¹⁷ For the diversity of alliances, see Guest editorial, 'Trade Unions and NGO relations in development and social justice' (2004) 14 *Development in Practice* 13.

3. *A Tri-plus model – integrating civil society organizations in the tripartite system according to the logic of civil society itself*

Short of a stable fourth pillar, it is possible to constitute a Tri-plus model in which it is necessary to imagine from scratch what the contribution of civil society to the ILO will be and vice versa (as well as in corresponding tripartite institutions at the national level). Integrating civil society does not necessarily imply formal voting rights in the ILO's annual Conference or in various committees, necessitating a redistribution of voting power. Although voting rights carry much expressive power, much of the regulatory and professional power is based on deliberations before voting and in the process of implementation. It is hard to imagine that measuring what the ILO or national tripartite bodies are doing, and what their contribution is to the political process, can be limited to the counting of votes.

Civil society organizations can be integrated at different levels. At one end of the continuum, there are minimal forms of involvement such as granting access to observe proceedings.¹⁸ At the other end of the continuum, are full-fledged political rights on parity with the incumbent agents in the tripartite system. In-between, the tripartite system can be obligated to provide and diffuse information, to collect information, to create forums for dialogue, to launch complaints and to take part in their investigation. Civil society organizations can be designated as partners in implementation, monitoring and the drafting of reports assessing efficacy of policies and standards.

Like the first two trajectories, most of these options are not foreign to the operations of the ILO, and various examples of involvement can be viewed at the national level as well. Such examples can serve as the basis for the organic and natural evolution of a Tri-plus model. The ILO has a designated department for forging such partnerships – PARDEV (Partnering

¹⁸ For instance, article 2(j) of the Standing Orders of the International Labour Conference recognizes the right of admission to sittings of the Conference for 'representatives of non-governmental international organizations with which it has been decided to establish consultative relationships and with which standing arrangements for such representation have been made and representatives of other non-governmental international organizations which have been invited by the Governing Body to be represented at the Conference' <<https://www.ilo.org/ilc/Rulesfortheconference/lang-en/index.htm>>. See also the list of organizations enjoying consultative status <<https://www.ilo.org/pardev/partnerships/civil-society/ngos/ilo-special-list-of-ngos/lang-en/index.htm>>.

and Field Support). The department is entrusted with forging partnerships for funding and for implementation, with other UN agencies and civil society. In its website, PARDEV notes that

As a tripartite organization, the ILO does not simply collaborate with non-governmental organizations but actually integrates sectors of civil society into its structure. The ILO maintains a close relationship with the non-governmental sector, which involves the following: (1) integration of non-governmental social partners in the identity of the Organization itself; (2) according consultative status to non-governmental international organizations that meet certain criteria; (3) collaboration at the operational level with a variety of international, regional, national and local organizations.¹⁹

This broad description can serve as a launching pad for a Tri-plus model. It indicates that the Organization has been aware of the alleged advantages of cooperation with civil society and is acting to fulfil them. However, acknowledgment of collaboration with civil society is limited to the goals of tripartite dialogue:

The representative function in the world of work belongs – and can only belong – to governments, with their democratic mandate, and to representative and independent organizations of employers and workers. The same principle has always applied to all decision-making structures in the ILO, and will continue to do so. There can be no dilution of that tripartite mandate; it cannot be shared with other organizations, however visible or expert they may be, and however aligned with the objectives of the ILO. That implies no adverse appreciation of their value and standing, but rather a recognition of their distinctive character. [...] It should be possible to involve non-tripartite constituents appropriately in the Organization's work, on the basis of clearly demonstrated advantage and well-defined roles. They can and do provide added value in terms of expertise and knowledge, and it serves no purpose to deny it or to forgo their contribution. That said, the capacity-building responsibilities of the ILO are towards its tripartite constituents, and to them alone.²⁰

¹⁹ <<https://www.ilo.org/pardev/partnerships/civil-society/ngos/lang--en/index.htm>>.

²⁰ See *Towards the ILO centenary: Realities, renewal and tripartite commitment* (ILO 2013) paras 97-99. This view is also echoed in scholarly writings; see, for instance, Tayo Fashoyin,

However, integrating civil society into the intricate operations of the ILO, whether in the authoring of norms or in delivering expertise, requires the incumbent social partners to take a less instrumental view of civil society. Even if the integration of civil society is not accomplished by means of establishing a fourth pillar, its role is not merely to serve others. Devising a unique role for civil society organizations should reflect their special structure, or intentional lack of structure, but it does not render such organizations inferior in their potential contribution. A Tri-plus model requires asking not only how civil society can assist the social partners, but what the responsibilities, rights and the mutual obligations of the parties are in prescribing and fulfilling the ILO's missions and means. Even when the debate over a fourth pillar is reframed to contemplate a different structure, it is still an attempt to devise a system of governance in which civil society takes part. Civil society is by definition separate from the formal State or international institutions, but its participation in governance is an end in itself and not an instrumental aid to others.

The PARDEV statement focuses on three forms of engagement. There may be a gap, however, between the objectives and their implementation. The following are anecdotal indications, not a comprehensive survey, although they do lead to a recommendation to survey in a more comprehensive fashion and institutionalize these forms of cooperation in governance as part of a Tri-plus model.

3.1 Collaboration

An interesting example of collaboration is the building of a Global Coalition for Social Protection Floors.²¹ The ILO established this coalition, assigning civil society 'the opportunity and the responsibility to advance a cause that emerged from a pressing global need'. The importance of civil society's contribution is listed in detail and can clearly serve as a template for the future. But there are also indications that the coalition's approach to the integration of civil society in the ILO is rather hesitant. For example, the coalition refers its members to the UN Economic and Social

'Tripartism and other actors in social dialogue' (2005) 21 *International Journal of Comparative Labor Law and Industrial Relations* 37.

²¹ <www.social-protection.org>.

Council and downplays the ILO as an address for action.²² Moreover, when briefing its members, the coordinators state that ‘in 2019 the International Labour Conference will consider the General Survey that will focus on ILO Recommendation No. 202, with questions also related to other ILO social security instruments. In 2016 the ILO sent an elaborate questionnaire to its tri-partite constituents. *Civil society has not been consulted in this procedure*, but the questionnaire can be a useful model for reporting to other international organizations’ (emphasis added).²³ It appears, then, that collaboration does not fully incorporate civil society in the halls of the ILO and maintains the divide between the social partners and other agents, even on matters where these agents’ expertise is acknowledged and appreciated.

3.2 Consultation

Similar half-hearted attempts have been made with regard to consultation. The ILO developed a list of NGOs that have been awarded a special consultative status.²⁴ The framing of the privileges associated with the status includes the right to request attendance at the International Labour Conference and permission to address the Conference and participate in committees. There are no assigned duties. This is important because this relationship is not based on mutual expectations; it is an indication of excess, rather than access.

As regards NGOs’ participation, the proceedings of the committee preparing the violence and harassment instruments for the International Labour Conference of 2019 reveal that a few representatives spoke at the beginning and were treated with respect.²⁵ Their contribution was informative, even if within the already accepted framework, but they did not demonstrate a strong stance or trigger debates with regard to the numerous

²² Reporting on SPF Implementation to UN Organizations <<http://www.social-protectionfloorscoalition.org/wp-content/uploads/2018/10/20181003-GCSPF-Reporting-on-SPF-implementation.pdf>>.

²³ *ibid.*

²⁴ ILO Constitution, article 12(3); Standing Orders of the Conference, articles 2(j), 14(8-10).

²⁵ Among the civil society organizations that participated and whose statements appear in the proceedings are Inter-Parliamentary Union, International Young Christian Workers, Women in Informal Employment, International Domestic Workers Federation, International Catholic Migration Commission, StreetNet International, and Public Service International.

proposed amendments. The flip side of the NGOs' limited contribution to the ILO is the marginalization of the ILO in the organizations' mission. Upon random sampling of the websites and reports of organizations in the list of those with special consultative status, their own references to the ILO ranged from non-existent, to a general statement that they have consultative status,²⁶ to correspondence with the ILO, but not as part of the special consultative status.²⁷ Only one NGO in the sample, which evolved from the ILO and became autonomous, highlighted its ongoing work with the ILO and presented it as central to its operations.²⁸

In my view, the most instructive example of consultation and involvement of civil society emerged in the process of preparing, accepting and implementing the Domestic Workers Convention, 2011 (No. 189). In unprecedented fashion, domestic workers from various countries attended formal processes and ensured their visibility in the Geneva halls of the ILO. A detailed account of the process by Adelle Blackett testifies both to the achievement and to its limitations:

The global movement of domestic workers [...] left an indelible imprint on the ILO's work. Not only on the substance of the new convention and recommendation but also on the standard setting process itself. Tripartite social dialogue played a central role and took on a new meaning. The ILO's process became much more contextualized and concrete. There was nothing abstract about the earnest domestic workers sitting in the room, forcing delegates to see them [...] However, these efforts did not translate into domestic workers miraculously gaining speaking rights throughout the negotiations. Some felt instead that they were officially silenced.²⁹

Finally, consultation with civil society has been prescribed by the ILO to its member States in particular contexts; examples include the

²⁶ For instance, Defence for Children International <defenceforchildren.org>.

²⁷ For instance, Amnesty International <https://www.amnesty.org>.

²⁸ GLADNET, Global Applied Disability Research and Information Network on Employment and Training <http://www.gladnet.org/>.

²⁹ Adelle Blackett, *Everyday Transgressions: Domestic Workers Transnational Challenge to International Labor Law* (Cornell UP 2019) 28-9.

representative organizations of and for disabled persons,³⁰ organizations representing persons living with HIV,³¹ ‘other concerned groups’ with regard to child labour,³² ‘relevant civil society and community-based organizations’ with regard to attaining peace and resilience following conflict and disaster,³³ and the drafting of national employment policies.³⁴ In the Indigenous and Tribal Peoples Convention, 1989 (No. 169), the conventional tripartite basis is augmented by a reference to civil society, referring in general to representatives of indigenous people, on the assumption that the scope of matters exceeds the work relationship and cannot be adequately secured by the tripartite partners.³⁵ But civil society is notably absent from some Conventions where its potential contribution is obvious, such as the Discrimination (Employment and Occupation) Convention 1958 (No. 111) or the Employment Relationship Recommendation, 2006 (No. 198), which affects the dividing line between formal and informal economies, or between employees fully ‘deserving’ of protection and those who are left exposed to market forces. The 2019 ILO Centenary Declaration for the Future of Work similarly emphasizes tripartism and social dialogue, rather than refer to a more inclusive method of dialogue.

3.3 Identity

PARDEV also lists a third form of engagement, which seems to be residual on the one hand, but also the most encompassing – civil society is part of the ILO’s identity. This claim, however, is difficult to substantiate. Organizational identity is defined by an organization’s claim regarding its central character, its distinctiveness from others, and its temporal continuity.³⁶ It is based on claims that are generated by the leadership from

³⁰ Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) article 5.

³¹ HIV and AIDS Recommendation, 2010 (No. 200) para 6.

³² Worst Forms of Child Labour Convention, 1999 (No. 182) article 6.

³³ Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) para 9.

³⁴ Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169) para 19.

³⁵ Indigenous and Tribal Peoples Convention, 1989 (No. 169) article 6.

³⁶ Stuart Albert and David A. Whetten ‘Organizational identity’ in Mary Jo Hatch and Majken Schultz (eds) *Organizational identity: A reader* (Oxford UP 2004) 89.

inside and on the perceptions of those outside the organization. On all three counts, it is difficult to understand the ILO as anything but the epitome of tripartism, with its inclusionary and deliberative virtues, but also its limitations. The ILO's organizational identity further resonates with its reliance on tripartism as the method of implementing the Organization's norms in member States.³⁷

Absent from the PARDEV list are other opportunities for the integration of civil society, such as participation in the Committee on the Application of Standards, writing shadow reports, being awarded standing before the committee, the right to file complaints on freedom of association, and recognition of the importance of association beyond traditional trade unions and employers' associations. Functional equivalents can be found in other international institutions.³⁸

There are sufficient claims to substantiate the refusal to integrate civil society into the governance system, and they were presented at the outset. There are further arguments against the feasibility of constituting a fourth pillar. But to accommodate the arguments in favour, there are examples of methods for integrating civil society into tripartite governance systems. These can complement and be added on to the first two trajectories described earlier and to PARDEV's threefold claim of integration. There are efforts to institutionalize the integration of civil society in sister international organizations.³⁹ For example, the UN Economic and Social Council (ECOSOC) lists criteria for special consultative status and has developed ongoing expertise in assessing such open-ended criteria as relevant to ECOSOC's activities, democratic governance, accountability,

³⁷ See, for instance, the International Labour Conference Resolution of 2018 concerning the second recurrent discussion on social dialogue and tripartism, which does not repeat previous commitments to the cooperation of civil society in tripartite social dialogue <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting-document/wcms_633143.pdf>.

³⁸ See, for instance, the power accorded to NGOs to file complaints with the European Committee of Social Rights in the Council of Europe <<https://tinyurl.com/yxzl45av>>.

³⁹ Nora McKeon, *The United Nations and Civil Society: Legitimizing Global Governance – Whose Voice?* (Zed Books 2013); Peter Willetts, 'NGOs as Insider Participants: Evolution of the Role of NGOs at the United Nations' in Aynsley Kellow and Hanna Murphy-Gregor (eds), *Handbook of Research on NGOs* (Elgar 2018) 56.

representativeness and authority.⁴⁰ The High Level Political Forum lists the tasks of civil society concretely.⁴¹ There are further comparative studies of national arrangements that expand representation beyond the tripartite model. These feature models that incorporate particular voices outside the tripartite nexus, such as farmers, small business, co-ops, community groups and environmental organizations.⁴² The most prominent and studied are Ireland's institutions of social economic reform in the 1990s, which included vast participation of civil society with the tripartite agents,⁴³ and NEDLAC in South Africa, which in parts of its mission is based on a full-fledged four-legged structure.⁴⁴ These examples combine a process of 'scaling up' grassroots activism in civil society with a 'scaling down' of governance structures to reach the grassroots.⁴⁵

None of these examples can serve as a precise model to replicate. Moreover, careful studies cast doubt on whether the objectives of opening tripartite representation are achieved by the integration of civil society.⁴⁶ Nevertheless, examples from both international organizations and national models of tripartite institutions also demonstrate how it is possible to address various segments of the challenge posed by the unique structure of civil society organizations.

⁴⁰ The NGO Branch in the United Nations Department of Economic and Social Affairs <www.csonet.org>; Resolutions and Decisions of the Economic and Social Council E/1996/96.

⁴¹ High Level Political Forum on Sustainable Development <<https://sustainabledevelopment.un.org/mgos>>; UN GA Resolution A/RES/67/290 (2013).

⁴² Trebilcock (n 1).

⁴³ Paul Teague and Jimmy Donaghey, 'Why has Irish social partnership survived?' (2009) 47 *British Journal of Industrial Relations* 55.

⁴⁴ Lucio Baccaro and Konstantinos Papadakis, *The Promise and Perils of Participatory Policy Making* (ILO 2008).

⁴⁵ Peter Uvin, 'Scaling Up the Grassroots and Scaling Down the Summit: The Relations Between Third World NGOs and the UN' in Leon Gordenker and Thomas G. Weiss (eds), *NGOs, the UN, and Global Governance* (Lynne Rienner 1996) 159.

⁴⁶ Lucio Baccaro and Konstantinos Papadakis, 'The downside of participatory-deliberative public administration' (2009) 7 *Socio-Economic Review* 245.

VI. Towards a Tri-plus model

In considering organizational innovation that maintains the advantages of the stability associated with tripartism and the dynamics of multiple voices that are made possible by civil society, there are several guidelines that evolve from the dialectics presented thus far:

- (i) The integration of civil society seeks to improve representational legitimacy and efficacy at both the input and output stages.
- (ii) Participation of civil society is neither a consolation prize nor an instrumental device to aid the tripartite agents. Organizations in civil society should be deemed valuable subjects of the Organization.
- (iii) An institutional change should be directed at a set of powers, rights and obligations that are associated with governance.
- (iv) There are no fixed methods that can be assessed, and therefore innovation, experimentation, and a learning method should be deployed.
- (v) Representation in the ILO is based on tripartite State delegations, but civil society also operates in small localities and transnational settings. State boundaries are not necessarily applicable.
- (vi) Organizational change requires capacity and will. Existing examples indicate that capacity can be addressed by means of organizational learning, but organizational change must overcome well established traditions, the fear of diffusing and shifting power resources within the Organization, competition over voice and recognition, ideological divides, and the absence of a clear alternative. These are all matters that can clearly affect the will to induce and take part wholeheartedly in change.

On the basis of these guidelines, a proposed Tri-plus model should be designed according to the principle that was established by the theorists and activists of disability studies – *nothing about us without us*. To undo an instrumental approach towards civil society organizations, a Bureau for Civil Society, broadly defined, can match the existing bureaus for employers' and workers' affairs, respectively. Drawing on existing frameworks instead of shaking the traditional pillars of governance, PARDEV's experience and gained expertise – as well as its threefold structure (coordination, consultation and identity) – can serve as the basis for further development. What a Tri-plus model requires is not a general statement of interest, but that in

each category of action (e.g. the process of considering new instruments, from conception to implementation, or new expertise-based projects such as compliance and enforcement, or progressive realization of general standards) there should be a proactive pursuit of strategies to integrate civil society. Such strategies should include the identification of who the relevant partners are, the form of participation and its fit with what different organizations do best (collaboration and coordination, consultation, monitoring, a right to file complaints, and others), methods to monitor the contribution and importance of civil society organizations to the same extent as the veteran tri-parties' contribution. Proactive organizing capacities should be used to encourage the development of organizations in civil society where there is a void.

The Tri-plus model resembles a soft governance mechanism. It does not prescribe strict substantive norms. There can be default templates, and ideally also an outline of best practices, but much room should be reserved for experimentation and innovation. Inclusion statements should be added to documents and plans of action. There should be periodic opportunities for reflections on inclusion. Rather than list in advance the participants and strategies, learning processes should focus on asking the right questions – who was integrated, what the process was, what the topics for joint action were, to what extent the method was effective, according to which criteria, and what can be learned from one instance of inclusion to the next.⁴⁷ If the right questions are asked, it is also fine to admit that not enough was done, or that the outcomes were not helpful on some measures. The Civil Society Bureau should be involved and lead this learning process.

Despite the open-ended and soft nature of experimentation with the proposed Tri-plus model, there is a 'hard' requirement that mandates documentation and reflection on each attempt to integrate civil society. These practices should also be conveyed from the ILO's internal governance system to its policy recommendations and their implementation by the member States. A Convention should not be voted on and a new project should not

⁴⁷ These questions are based on the approach advocated by Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia UP 2008). See also Judy Fudge and Guy Mundlak, 'Justice in a Globalizing World: Resolving Conflicts Involving Workers' Rights beyond the Nation State' in Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge UP 2016) 121.

be budgeted unless there is a discussion of the process and inclusion. This requirement for ongoing reflection invites agitation and nudging both from within and from outside; from those who feel their efficacy was compromised, and from those who resent ongoing exclusion.

Like other soft forms of governance, it may sometimes translate into paperwork and window-dressing. At other times it may be redundant because the traditional players realize the advantage of joint gains and seek to forge partnership without any change in formal governance. But for those who believe that agile and reflective processes matter, there should be instances in which a Tri-plus model can make a difference – in perception, in understanding, and in making it necessary to pause and consider the objectives of social dialogue and how to fulfil them. Over time, defaults can be rewritten and adjusted, ‘soft’ forms turned into ‘hard’ rules, and trade-offs can be empirically demonstrated and preferences made explicit. But the way forward, on the basis of the broad principles listed above, can serve as a basis for a careful step towards a more inclusive and open-ended method of dialogue that fulfils the fundamental objectives and telos of the ILO.

Tripartism as Sustainable Governance

Tonia Novitz

I. Introduction

Tripartism can be understood as an innovative and unique feature of the ILO.¹ From the outset, the drafting, adoption and supervision of labour standards was the joint responsibility of representatives of employers, workers and governments. There was no precedent for this form of governance at the international level in 1919, but the founding ILO Director, Albert Thomas described this as ‘a time for daring and adventure’.² He was adamant that tripartism was needed to make the ILO effective: offering ‘the smoke and dust of practical politics, which may get things smudged, but gets them done’.³ When asked by a journalist in 1921 whether he thought that the International Labour Office could survive, he accordingly answered emphatically in the affirmative.⁴

ILO tripartite governance has entailed the inclusion of worker and employer representatives within the ILO Governing Body and the International Labour Conference (ILC), as well as in supervisory bodies such as the Conference Committee on the Application of Standards (CAS) set up in 1926⁵ and the Governing Body Committee on Freedom of Association (CFA) established in 1951.⁶ There has been formal parity of treatment of the two non-governmental species of representatives, although at times greater

¹ Claire La Hovary, ‘A Challenging Ménage à Trois? Tripartism in the International Labour Organization’ (2015) 12 *International Organizations Law Review* 204, 205-6.

² Albert Thomas, ‘The International Labour Organisation – Its Origins, Development and Future’ (1921) 1 *International Labour Review* 5, 11.

³ *ibid* 9.

⁴ *ibid* 16.

⁵ *The Committee on the Application of Standards of the International Labour Conference – A Dynamic and Impact Built on Decades of Dialogue and Persuasion* (ILO 2011) 11.

⁶ *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (ILO 2018).

powers have been preserved for governments, which have for example two delegates at the ILC, while there is only one employer and one worker delegate for each State.⁷ In this way, State action may still be led by governments, but governments cannot act without consulting the expertise and sampling the flavour of support (or opposition) from key social actors. In this way, tripartism has offered the ILO credibility and a coherence of mission.

However, that unity of purpose was called into question following the end of the Cold War, when the threat of credible alternative socialist political systems appeared to vanish. That change in the geo-political balance enabled the Employers' group to resist past concessions made to worker organizations.⁸ Since then, domestic deregulation of established systems of sectoral industrial relations seems to have prompted a decline in membership of trade unions and employers' associations, which has in turn the potential to undermine the representative quality of the ILO's tripartite system.⁹ Further, the collaborative nature of the tripartite endeavour was seriously challenged by the Employers' group 'walk-out' from the CAS in 2012, all the more so because the motivation for doing so was to obstruct longstanding ILO protection of the right to strike, which had previously been recognized as a vital facet of effective trade union representation of workers' interests.¹⁰

This chapter investigates whether tripartism is a sustainable form of governance for the ILO following its centenary. Is it crucial to the survival

⁷ ILO Constitution, article 3(1).

⁸ Achim Seifert, 'The Protection of the Right to Strike in the ILO – Some Introductory Remarks' (2018) 39 *Comparative Labor Law Policy Journal* 487, 488-91; Claire La Hovary and Tonia Novitz, 'A Cold War Story: The Right to Strike' (2013) 20 *International Union Rights* 19-20.

⁹ Tayo Fashoyin, 'Tripartism and Other Actors in Social Dialogue' (2005) 21 *International Journal of Comparative Labour Law and Industrial Relations* 37, 46-49; Shauna Olney, *Unions in a Changing World: Problems and Prospects in Selected Industrialized Countries* (ILO 1996). More recently, on the decline in membership of employer associations, see Franz Traxler, 'Economic Internationalization and the Organizational Dilemma of Employer Associations: A Comparison of 20 OECD Countries' in Wolfgang Streeck, Jurgen Grote, Volker Schneider, Jelle Visser (eds), *Governing Interests: Business Associations Facing Internationalism* (Routledge 2006) 107; Stephen J. Silvia and Wolfgang Schroeder, 'Why are German Employers' Associations Declining? Arguments and Evidence' (2007) 20 *Comparative Political Studies* 1433; Leon Gooberman, Marco Hauptmeier and Edmund Heery, 'The Decline of Employers' Associations in the UK, 1976-2014' (2019) 61 *Journal of Industrial Relations* 11.

¹⁰ Claire La Hovary, 'Employers' Group 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338; Janice Bellace, 'The ILO and the Right to Strike' (2014) *International Labour Review* 29.

of the ILO, as Albert Thomas originally anticipated? My suggestion is that this question may best be answered by reference to the globally recognized principle of ‘sustainability’, the environmental, economic and social pillars on which this concept has been built, and contemporary recognition of the need for both intra- and inter-generational justice. Sustainability was also, of course, the subject of the 2015 United Nations General Assembly Resolution on Agenda 2030 and the Sustainable Development Goals (SDGs) elaborated in that instrument.¹¹ In this context, reference can be made to not only SDG 8 (which reflects ILO concern with ‘decent work’), but also other goals such as SDG 16 which envisages inclusive and effective participatory representation in a variety of contexts.

It is argued here that tripartism can be sustainable, and the ILO can survive, but only if more is done to protect participatory and representative voice, both within the ILO itself and at the level of member States where the building blocks for tripartism are to be found. Given the transformation of contemporary labour markets and shifts in our understandings of the nature of ‘work’, this entails the expansion of who are to be considered ‘workers’ within the ILO and at the national level. It also requires reconsideration of the legitimate scope of collective bargaining and collective action, so that all workers can act in response to their shared interests regarding multiple and various aspects of environmental concerns, for example addressing such urgent issues as climate change and the distributional aspects of mitigation and adjustment in relation to ‘just transitions’. Some assistance for this proposition can be found in the ILO Centenary Declaration for the Future of Work of 26 June 2019, which draws on some of the findings of the Global Commission of the Future of Work published in the same year.¹² Also helpful are the reflections of the International Labour Office in the Report on SDG 8 presented to the UN High Level Political Forum in 2019.¹³ Nevertheless, more needs to be done.

¹¹ UN General Assembly Resolution A/Res/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 September 2015 <<https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>>.

¹² ILO Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019) <https://www.ilo.org/global/publications/books/WCMS_662410/lang-en/index.htm>.

¹³ *Time to Act for SDG 8: Integrating Decent Work, Sustained Growth and Environmental Integrity* (ILO 2019) <https://www.ilo.org/global/publications/books/WCMS_712685/lang-en/index.htm>.

II. Sustainability and the social pillar: The relevance of labour standards

Sustainability is a notoriously contested concept, but it is possible to identify various aspects of its meaning. The first of these is obviously its synonym, ‘durability’. In this sense, the ILO has sustained itself for a hundred years: a legendary, almost fairy-tale like achievement. In this, the ILO and those who have led and worked for the Organization are to be congratulated. It is no mean feat. And perhaps it has much to do with the deep and lasting appeal of peace and social justice, the normative bases on which the ILO was founded which were elaborated on in Part XIII of the Treaty of Versailles in 1919. ILO longevity may further be attributed to the methods established for the achievement of these objectives, namely tripartism and its dynamic quality, which ensure that the Organization is not merely backward but also forward looking.

1. *Sustainability as intra- and inter-generational justice*

The challenge for the ILO, in ‘sustainability’ terms, is to provide justice by serving the needs of both present and future generations.¹⁴ In so doing, we can think about social justice in an ILO frame as both intra-generational (justice across a current generation of workers, employers and governments) but also inter-generational justice (meeting the needs of future generations). Historically, the focus of discussion of sustainability on the international stage has been more concerned with the latter, seeking to preserve the environment, an objective which is to be integrated with economic ‘development’. This dual emphasis on the environmental and economic pillars of sustainability can be traced from the Stockholm Conference on Environment and Development and the resulting 1972 Declaration of Principles for the Preservation and Enhancement of the Human Environment to the Rio Declaration of 1992, the Johannesburg Declaration of 2002 and the Rio+20 in 2012.¹⁵ That said, in these instruments, concerns with poverty, human dignity, work and participatory

¹⁴ World Commission on Environment and Development, *Our Common Future* (Oxford UP 1987) 51.

¹⁵ Margherita Pieraccini and Tonia Novitz, ‘Sustainability and Law: An Historical and Theoretical Overview’ in Margherita Pieraccini and Tonia Novitz (eds), *Legal Perspectives on Sustainability* (University of Bristol Press 2020, forthcoming).

engagement are also evident.¹⁶ Certain SDGs (and associated targets and indicators) give even greater attention to the ‘social’ pillar. These three facets of sustainable development will often intersect and, indeed, are described in Agenda 2030 as ‘indivisible’.¹⁷ What this means in practice is less clear. It remains a matter of controversy as to whether, under the head of ‘sustainability,’ social and labour matters are worthy of attention independently, and not only as complementary (and supplementary) to environmental and economic concerns.¹⁸

My proposal is that ‘the social’ be viewed as being of equal importance to the other pillars, with which it will intersect, but may sometimes take priority as a reason for action. This argument can be illustrated by provision made for the eradication of ‘the worst forms of child labour’ in SDG target 8.7 and the determination to put an end to ‘the abuse, exploitation, trafficking and all forms of violence against and torture of children’ stated in SDG target 16.2. These are measures which we can understand as promoting inter-generational justice, since we regard children suffering such abuse (and their children) as our future generations. Prevention of violation of such a fundamental labour standard surely does not have to be linked to environmental and economic objectives to make action imperative in sustainability terms. However, environmental and economic concerns enter as complementary to designing effective protections, which will be dependent on dynamic inclusive participatory governance.

¹⁶ See, for example, Principles 1 and 8 of the Stockholm Declaration 1972; Principles 5 and 10 of the Rio Declaration 1992, alongside the Agenda 21 ‘work program’, the Johannesburg Declaration 2002, paras 26 and 28.

¹⁷ UN (n 11) preamble.

¹⁸ For the view that these are inevitably interlinked, see Paolo Tomassetti, ‘Labor Law and Environmental Sustainability’ (2018) 40 *Comparative Labor Law and Policy Journal* 61, 66. For arguments that social concerns may be worthy of independent attention for sustainability reasons, see Beate Littig and Erich Griebler, ‘Social Sustainability: A catchword between political pragmatism and social theory’ (2005) 8 *International Journal of Sustainable Development*, 65; Tonia Novitz and David Mangan (eds), *The Role of Labour Standards in Development: From Theory to Sustainable Practice?* (Oxford UP 2011); Konstantinos Polomarkakis, ‘The European Pillar of Social Rights and the quest for EU social sustainability’ (2019) *Social and Legal Studies*, forthcoming, <<https://journals.sagepub.com/doi/pdf/10.1177/0964663919829199>>.

2. *Treatment of effective and inclusive collective representation in the Sustainable Development Goals*

The SDGs can be understood in terms of the alliterative interaction of the need for protection and promotion of ‘People’, ‘Planet’, ‘Prosperity’, ‘Peace’ and ‘Partnership’.¹⁹ Arguably, planetary environmental concerns predominate, for example, in SDG 2 (agriculture), SDG 6 (water), SDG 7 (energy), SDG 11 (cities), SDG 13 (climate change), SDG 14 (oceans and seas), as well as SDG 15 (ecosystems and biodiversity on land). But the assertion that ‘no one is left behind’ also speaks of a preoccupation with people’s well-being often linked to the social pillar, as evidenced in such provisions as SDG 1 (poverty), SDG 3 (health and well-being), SDG 4 (education and lifelong learning), SDG 5 (gender equality and empowerment) and SDG 8 (which sets out the objective of ‘decent work’ alongside ‘economic growth’). The desire for sustainable economic prosperity can be found not only in SDG 8, but also SDG 9 (infrastructure, industrialisation and innovation) and SDG 11 (consumption and production patterns). Collaborative decision-making, participatory processes and power dynamics which affect the achievement of these objectives (connected to peace and partnership) are appreciated as well. Inequality within and among countries receives recognition in SDG 10, while imbalances of power between those who hire labour and those dependent on their labour for a living are also acknowledged in SDG 8. In response, there is to be a ‘global partnership for sustainable development’ under SDG 17 and it seems that this is to be operationalized with reference to SDG 16, which seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.²⁰ The targets set out in relation to SDG 16 help explicate the relevance of sustainability for tripartism and, indeed, the significance of tripartism for realisation of SDG 16 and the other goals.

SDG 8 and its accompanying targets make no specific reference to ‘freedom of association and the effective right to collective bargaining’, as recognized by the ILO Declaration on the Fundamental Principles and

¹⁹ UN (n 11).

²⁰ This suggestion is also made by Francis Maupain, ‘A Second Century for What? The ILO at a Regulatory Crossroad’ (2019) *International Organizations Law Review* 37-38, <<https://brill.com/view/journals/iolr/aop/article-10.1163-15723747-2019009.xml>>.

Rights at Work 1998. The sole mention of these two connected core labour standards is buried in indicator 8.8.2 as a tool for protection of worker rights and promotion of safe and secure working environments for all workers (notably the most vulnerable). This detracts from the emphasis placed on these entitlements together with ‘social dialogue’ in article I of the ILO Declaration on Social Justice for a Fair Globalization 2008 as the means for realization of a ‘decent work agenda’. This might seem a highly problematic omission, but it is one which can be viewed as repaired by the targets constitutive of SDG 16. The 2018 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association asserts that ‘freedom of association’ must be read into the broader protection of ‘fundamental freedoms’ in SDG target 16.10.²¹ This would be consistent with the acknowledgement in SDG indicator 16.10.1 of the problematic ‘killing, kidnapping, enforced disappearance, arbitrary detention and torture of [inter alia] trade unionists’. Further, SDG target 16.6 seeks to ‘develop effective, accountable and transparent institutions at all levels’, while target 16.7 aspires to ‘responsive, inclusive, participatory and representative decision-making’. The desirability of participatory inclusivity can be traced, as was noted above, back to the 1992 Rio Declaration of Principles²² that stressed the importance of ‘participation of all concerned citizens at the relevant level’, prior to adoption of the Aarhus Convention 1998.²³ Freedom of association and indeed, the kinds of participatory justice envisaged by SDG 16 and its associated targets and indicators seem crucial for the realization of all social pillar objectives, but also, as the Special Rapporteur also acknowledged, ‘equally critical for the achievement of all the Sustainable Development Goals’.²⁴

²¹ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, A/73/279 (2018) para 6.

²² *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26.

²³ Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998 and entered into force on 30 October 2001, 38 International Legal Materials 517 (Aarhus Convention 1998).

²⁴ Report (n 21) para 58 stresses that ‘the exercise of the rights to freedom of peaceful assembly and of association is equally critical for the achievement of all of the Sustainable Development Goals, as it permits workers and employers to form and join unions and enter into dialogue and negotiations not only at the workplace but also when it comes to development policies that foster equitable social and economic progress and inclusivity’. This is also the view taken by the trade union movement globally; see ITUC, *A Trade Union Take on the SDGs* (2019) <https://www.ituc-csi.org/IMG/pdf/tudcn_sdgs_global_report_2018_en.pdf>.

Additionally, targets 16.6 and 16.7 can be understood to reflect objectives already realized through the practice of tripartism in an ILO context, while prompting further scrutiny of the ways in which ILO tripartite governance could be enhanced in light of contemporary challenges.

That scrutiny has been prompted by the Agenda 2030 mechanisms external to the ILO, which demand a response from the Organization. Ban Ki-moon envisaged that the SDGs could be used to generate accountability in the UN system through the creative orchestrative role of the High Level Political Forum (HLPF).²⁵ In 2019, SDG 8 was one of a number of SDGs selected for scrutiny before the HLPF and was, accordingly, the subject of an extensive and thoughtful ILO report.²⁶ The SDGs further offer an opportunity for the ILO internally, irrespective of overarching UN review, to reflect on tripartism. This may entail self-reflection on ILO tripartite methods of governance as currently designed. There is also scope for review of ILO standards relating to collective voice that are set with reference to member States, which determine the constituency and bargaining power of the social partners.

III. Sustainable tripartism – Its significance and design

As the ILO Guidelines on Just Transition 2015 tell us, tripartism can offer social dialogue ‘to forge consensus on pathways towards environmental sustainability with decent work’.²⁷ Further, labour standards concerning freedom of association, the right to form and join trade unions, to engage in collective bargaining and engage in the right to strike are all the building blocks for effective trade unions at the national level. These provide a foundation for tripartite governance at the ILO. This section examines the relevance of collective labour standards for intra- and inter-generational justice in sustainability terms. Tripartism is also scrutinized from a sustainability perspective, with reference to SDG 16.

²⁵ Kenneth Abbott and Steven Bernstein, ‘The High-level Political Forum on Sustainable Development: Orchestration by default and design’ (2015) 6 *Global Policy* 222.

²⁶ ILO (n 13).

²⁷ ILO, *Guidelines for a just transition towards environmentally sustainable economies and societies for all* (2015) para 17 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf>.

1. *The relevance of collective labour standards for intra- and inter-generational justice*

As regards intra-generational justice (equity within a current generation in any given society), workers' collective organization in trade unions offers crucial potential for wealth re-distribution. For example, sectoral collective bargaining can be significant as Florence Jaumotte and Caroline Osorio Buitron in the International Monetary Fund (IMF) have shown. Their studies demonstrated that recent increases in wage inequalities can be linked to a decline in unionization and sectoral collective agreements.²⁸ This research finding is relevant to not only SDG 8, but also SDG 10. Collective voice at work can also prevent health and safety harms to workers by stopping use of pollutants and contaminants,²⁹ which can have benefits for the wider community to which these environmental effects would otherwise spread. In this way collective representation of workers can fuel compliance with with SDG 3 relating to health and well-being, as well as the longer-term environmental concerns reflected in SDGs 2 and 6, as well as 13, 14 and 15.

Collective worker voice can address social concerns which have longer term and inter-generational effects. An example is the campaign of the International Transport Workers' Federation (ITF) against 'flags of convenience' (FOC), which seeks to ensure a 'genuine link' between 'the flag between the flag a ship flies and the nationality or residence of its owners, managers and seafarers', while protecting basic terms and conditions of employment for seafarers regardless of their nationality through ITF collective agreements and ITF inspectors.³⁰ That campaign was found by the Court of Justice of the European Union (EU) in the *Viking* case not to be directly concerned with the welfare of workers in a particular vessel, preserving their jobs and terms and conditions of employment, but as having a more long term and altruistic objective of transforming an entire sector of employment that was not a legitimate exception to employer free

²⁸ Florence Jaumotte and Carolina Osorio Buitron, *Inequality and Labor Market Institutions* (IMF 2015) <<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1514.pdf>>. See also Florence Jaumotte and Carolina Osorio Buitron, *Union power and inequality* (VOX-CEPR 2015).

²⁹ Scott L. Greer, 'Labour Politics as Public Health: How the Politics of Industrial Relations and Workplace Regulation Affect Health' (2018) 28 *European Journal of Public Health* 34.

³⁰ See the outline of the FOC campaign provided by the ITF <https://www.itfseafarers.org/FOC_campaign.cfm>.

movement rights.³¹ However, from an inter-generational justice perspective, collective action which secures broader policy outcomes for present and future generations of maritime workers can be seen as legitimate and important. Moreover, a genuine link between the flag and the country in which a vessel is based is also helpful for enforcement of environmental standards and concomitant obligations. Concern with the precedent set by *Viking* was expressed by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR),³² and is perhaps not surprising, given that the Preamble to Part XIII of the Treaty of Versailles stated that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’. By the same token, the failure to enable collective worker voice against one employer likewise affects collective voice everywhere now and in the future.

Overall, sustainable development cannot be understood as a static end-point merely ascertained through expert advice (although this is an excellent starting point). Rather, sustainability is a dynamic and necessarily flexible process, looking towards improved social, economic and environmental conditions in the short and longer term.³³ This requires collective action and participatory processes, as was acknowledged in SDG 16.

2. Compliance of ILO tripartism with the SDGs

The targets set by SDG 16 are indicative of an emergent normative consensus around legitimate organizational activity and inclusive decision-making within an organization (like the ILO). SDG 16 targets arguably draw on the example set by the ILO, while offering the Organization further aspirations and bases for self-scrutiny.

³¹ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

³² On the British Airline Pilots Association (BALPA) dispute, see *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference 99th Session 2010, Report III (Part 1A) 208-9; *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference 102nd Session 2013, Report III (Part 1A) 196.

³³ Tonia Novitz, ‘The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 243.

Over the past century, ILO tripartism acquired legitimacy in a variety of ways.³⁴ For example, tripartite governance assists, as Albert Thomas noted back in 1921, performance legitimacy. Labour standards set by the ILO draw on the knowledge and experience of not only governments but also workers' and employers' organizations which can ensure that their implementation is workable.³⁵ Regime legitimacy can be linked to representative capacity and accountability of participants. In this respect, Faina Milman-Sivan has observed the significance of the Credentials Committee of the International Labour Conference, which polices representativity,³⁶ while observing that such legitimacy also depends on the constitutions of the associations which make up employer and worker delegates as well as the laws operational in member States. Polity legitimacy entails satisfying the basic standards of a political community and becoming a crucial point of reference for (in the ILO's case) international dialogue, which chimes with the need for a global partnership for development in SDG 17 in which all States and relevant social actors are included. The difficulty is that aspects of the legitimacy of current ILO tripartite practices have come into question. The reasons for concern can be understood in terms of the aspirations outlined in SDG targets 16.6 and 16.7.

2.1 SDG 16.6 – Effective, accountable and transparent institutions

SDG target 16.6 seeks to 'develop effective, accountable and transparent institutions at all levels'. On 'transparency', it could be argued that the ILO remains a role model. While compromise is required in tripartite deliberation (and in the context of debates between countries at different levels of income and wealth in the global North and South), the current ILO practice of online access to debates is an important one. This should if anything be enhanced and not allowed to decline. We want to avoid the

³⁴ Tonia Novitz and Phil Syrpis, 'Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism' (2006) 35 *Industrial Law Journal* 367; drawing on Neil Walker, 'Europe's constitutional momentum and the search for polity legitimacy' (2005) 3 *International Journal of Constitutional Law* 211 and his concern with polity legitimacy for the EU.

³⁵ Thomas (n 2) 9.

³⁶ Faina Milman-Sivan, 'Representativity, Civil Society, and the EU Social Dialogue: Lessons from the International Labor Organization' (2009) 16 *Indiana Journal of Global Legal Studies* 311.

green room – or back room – deals which take place for example within a World Trade Organization setting.³⁷ What is less settled is the extent to which the ILO has a claim to being as ‘effective’ as it once was.

Conventionally, efficacy of tripartite governance relied on an apparent balance of power between the key social actors, assisted by the formal rules for parity of representation in, for example, the ILC or the Governing Body. However, those rules were never sufficient to achieve that balance. Also important were the labour standards promulgated by the ILO, such as freedom of association, collective bargaining and the right to strike, which offered at the national level a check on the powers of employers that tempered their approach in an international forum.³⁸ This is why the Employers’ group walk out from the CAS in 2012 on the subject of the right to strike was so significant. The walk-out simultaneously challenged both the assumption that there could be constructive dialogue between worker and employer representatives within the institutions established by the ILO, and an established entitlement offering countervailing power at a national level for worker organizations.³⁹ It seems timely for the ILO to address both facets of its operations. This may involve exercising caution in too readily pacifying employer dissent, for example in the context of the Standards Review Mechanism,⁴⁰ while also shoring up future protection of trade union action, including the right to strike, through ILO standards.⁴¹ Arguably, the labour standards set by the ILO regarding collective worker representation and activity need to

³⁷ Kent Jones, ‘Green Room Politics and the WTO’s Crisis of Representation’ (2009) 9 *Progress in Development Studies* 349; Jane Kelsey, ‘World Trade and Small Nations in the South Pacific Region’ (2004) 14 *Kansas Journal of Law Public Policy* 247.

³⁸ Regarding the fundamental imbalance of bargaining power between employers and those whose labour they hire, see the classic statement in Lord Wedderburn, ‘Labour Law and the Individual in post-Industrial Societies’ in Lord Kenneth William (Bill) Wedderburn and Hugo Sinzheimer (eds), *Labour Law in the post-Industrial Era* (Dartmouth 1994) 44; Bob Hepple, ‘The Future of Labour Law’ (1995) 24 *Industrial Law Journal* 303, 307.

³⁹ Bellace (n 10) and La Hovary (n 10).

⁴⁰ Claire La Hovary, ‘The ILO’s Employers’ Group and the Right to Strike’ (2016) 22 *Transfer: European Review of Labour and Research* 401, 404; Paul van der Heijden, ‘The ILO Stumbling towards Its Centenary Anniversary’ (2018) 15 *International Organizations Law Review* 203, 219; Francis Maupain, ‘A Second Century for What?: The ILO at a Regulatory Crossroad’ (2019) *International Organizations Law Review* 26, <<https://brill.com/view/journals/iolr/aop/article-10.1163-15723747-2019009.xml>>.

⁴¹ Jeffrey Vogt, Janice Bellace, Lance Compa, Keith Ewing, John Hendy QC, Klaus Lörcher, Tonia Novitz, *The Right to Strike in International Law* (Hart Publishing 2019), forthcoming.

be strengthened rather than weakened in the light of workers' legitimate concern with environmental issues and climate change. There is a case for greater alliances to be forged between trade unions in traditional occupations and other civil society organisations. These connections may be difficult to cement but there have been past successes for example, in the context of domestic work⁴² – a precedent which could be applied to coalitions between worker organizations and environmental non-governmental organizations (NGOs). Accordingly, ILO standards could entail greater tolerance of secondary action, not only where the primary action is lawful, but where it is taken against a lead firm within a global supply chain which is not taking measures to prevent violations of social and environmental standards or is tolerating human rights violations.⁴³ There could also be recognition of the importance of workers' entitlement to engage in what have been called political strikes which do not merely reflect workers' short term economic and social interests, such as the climate change strikes that at the time of writing are being organized globally in solidarity for 20 September 2019.⁴⁴ This would entail further elaboration of jurisprudence by the CEACR and CFA on the right to strike, rather than its curtailment.⁴⁵ While ILO Director-General Guy Ryder in his 2015 Report setting out the terms of his 'Future of Work' initiative explained why he considered that the 2012 dispute over the source and content of the right to strike had been resolved,⁴⁶ more may need to be done to ensure the continuing relevance of ILO standards on the legitimacy of worker collective action in an era of attention to sustainability concerns.

⁴² In the ILO context, see Adelle Blackett, *Everyday Transgressions: Domestic workers' transnational challenges to international labor law* (ILR/Cornell UP 2019); and regarding the UK Trades Union Congress (TUC) working in conjunction with the NGO titled 'Kalayaan', see Virginia Mantouvalou, 'Am I free now? Overseas domestic workers in slavery' (2015) 42 *Journal of Law and Society* 329.

⁴³ For analysis of a participatory approach to regulation of and accountability within global poverty and exploitation chains, see Charlotte Villiers, 'Collective Responsibility and the Limits of Disclosure in Regulating Global Supply Chains' (2018) 23 *Deakin Law Review* 143.

⁴⁴ Jeffrey Vogt and Ruwan Subasinghe, 'Unions must join the Global Climate Strike to avert a climate catastrophe' (2019) <https://www.equaltimes.org/unions-must-join-the-global?var_mode=calcul#.XXzGim5Fx_x>.

⁴⁵ Committee on Freedom of Association, *Compilation of Decisions* (ILO 2018); Committee of Experts on Application of Conventions and Recommendations, *General Survey on Freedom of Association* (ILO 1994).

⁴⁶ International Labour Conference, 104th Session 2015, Report of the Director-General, *ILO Future of Work Centenary Initiative* para 78.

2.2 SDG 16.7 – Responsive, inclusive, participatory and representative decision-making

In addition, to maintain polity legitimacy, it is vital to draw in diverse engaged voices. The aim is to ensure that ideally every person working and all those who are employers are represented within the ILO, in order to meet the minimum standards of a political community capable of legitimate policy making on labour standards. SDG target 16.7 aspires to ‘responsive, inclusive, participatory and representative decision-making’, which may be difficult to achieve in ILO tripartite governance as it is currently configured, given recent changes in the labour market.

An ever-increasing precarious workforce is being denied access to protection by labour standards, on the basis that they are not truly ‘workers’ or workers entitled to make claims. This is the case for agency workers, migrant workers, zero hours workers, and various forms of gig working. ‘Informal’ labour markets have long been present in so-called developing countries in the Global South. It is now an ever more entrenched feature of the Global North, where there are legislative restrictions on atypical workers forming, joining or being represented by trade unions.⁴⁷ There is now a sizeable ‘representation gap’⁴⁸ between those who wish to be represented by a trade union and those who can be, even though trade unions have made concerted efforts to recruit workers hired under so-called ‘atypical’ work contracts, which are now becoming increasingly common.

There are potentially two alternative solutions to the problem that these current phenomena pose for the representative participation in ILO governance. One is to radically redesign tripartism, which could be done by making provision for NGO representation of these so-called atypical workers who do not neatly fit within the ‘standard employment relationship’. This is likely to pose a host of problems in relation to SDG 16.6, reducing the efficacy of a

⁴⁷ Mark Freedland and Nicola Kountouris, ‘Some Reflections on the Personal Scope of Collective Labour Law’ (2017) 46 *Industrial Law Journal* 52; Valerio De Stefano, ‘Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach’ (2017) 46 *Industrial Law Journal* 185; Alan Bogg, ‘Taken for a Ride: Workers in the Gig Economy’ (2019) 135 *Law Quarterly Review* 219.

⁴⁸ Brian Towers, *The Representation Gap: Change and Reform in the British and American Workplace* (Oxford UP 1997); Edmund Heery, ‘The Representation Gap and the Future of Worker Representation’ (2009) 40 *Industrial Relations Journal* 324.

formally balanced existing three-pronged structure and creating difficulties for accountability, given that NGOs are not responsible to their membership in the same ways as trade unions. A better answer may be to use ILO standard-setting to broaden the membership of workers' organizations to reach beyond traditional remits. This could be a way to address the partitioning of the labour market, which has been policed and promoted more by domestic labour laws than trade unions themselves. The ILO's CFA and CEACR have already said that freedom of association is a human right to be exercised by those without 'employment status'.⁴⁹ The ILO could engage in further active standard-setting to ensure that the findings of those supervisory bodies are given force in an ILO Convention. Moreover, the Credentials Committee can encourage a greater breadth in national representatives at grassroots level, which links to the idea of a greater inclusive participation.

IV. Plans for the next century?

Up until 2019, the ILO's approach to sustainability issues centred on attempts to bridge environmental and labour concerns, evident from ILO promotion of 'green jobs' in the context of climate change and environmental action⁵⁰ and making 'just transitions' for workers in this context.⁵¹ The Just Transition Guidelines of 2015 demonstrate how environmental concerns raise distributional concerns that require engagement with representative stakeholders, including worker voice, identifying the importance of 'Social dialogue and Tripartism policies'.⁵²

The ILO has in 2019 drawn further connections between its mechanisms for tripartite governance and sustainability objectives. The report of ILO's Global Commission on the Future of Work, *Work for*

⁴⁹ See Case 2888 (Poland) Report No. 363, March 2012 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194> and CEACR Observation on Poland 2015 regarding preparation of a draft Act which had not, as at that date, been adopted <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3256747,102809,Poland,2015>.

⁵⁰ See for a current summary relating to employment-related issues concerned with sustainability <<https://www.ilo.org/global/topics/green-jobs/lang-en/index.htm>>.

⁵¹ ILO (n 27).

⁵² *ibid* para 17.

a Brighter Future offered a human-centred approach, focussing on access to voice as a facet of ‘social justice’,⁵³ referring repeatedly to the idea of ‘sustainable work’.⁵⁴ Concerns that I have raised in this chapter regarding SDG 16.7 and participatory inclusion were addressed by the Global Commission through advocacy of a ‘Universal Labour Guarantee’, which envisaged that: ‘all workers, regardless of their contractual arrangement or employment status, must equally enjoy adequate labour protection to ensure humane working conditions for everyone’.⁵⁵ This would cover ‘fundamental workers’ rights: freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination; and ‘a set of basic working conditions: (i) adequate living wage, (ii) limits on hours of work and (iii) safe and healthy workplaces.’ The Commission expected that the latter floor of protection could be further raised by collective bargaining, exercised as a fundamental right. There would be strengthening of ‘the social contract’ and ‘social dialogue’. The Commission’s proposal was to be understood as ‘renewing the democratic underpinnings of our labour markets, and strengthening social dialogue, giving everybody a voice in shaping the changes underway and the quality of their working lives’.⁵⁶ How this was to be achieved was however left open, apart from creative use by trade unions of technology,⁵⁷ and no concrete proposals for further ILO standard setting were suggested.

The ILO Centenary Declaration for the Future of Work 2019 paid attention to the significance of collective bargaining, social dialogue and tripartism for sustainability, but did not altogether fulfil the promise of the Commission’s ‘Universal Labour Guarantee’. Article I(C) of the Centenary Declaration acknowledged the significance of sustainable development and its fulfilment through (in paragraph E) ‘full, equal and democratic participation’ in ILO ‘tripartite governance’. Article III(B) of the Declaration, however, seemed concerned to maintain aspects of the status quo, which currently operates to exclude many people in work from protection of their labour standards including the right to organise. It explicitly reaffirmed ‘the

⁵³ ILO (n 12) 10-14, 21-23, 38, 54-56.

⁵⁴ *ibid* 10-13, 44-48.

⁵⁵ *ibid* 38-39.

⁵⁶ *ibid* 28.

⁵⁷ *ibid* 42.

continued relevance of the employment relationship', recognizing the rights of 'all workers' to (i) 'their fundamental rights' and (ii) 'an adequate minimum wage, statutory or negotiated'; (iii) 'maximum limits on working time'; and (iv) 'safety and health at work'. It does seem clear that 'fundamental rights' will include freedom of association and collective bargaining, given reference to their importance elsewhere in article III, where they are referred to as important 'enabling rights' alongside 'social dialogue' and 'tripartite co-operation'. Nevertheless, clear guidance as to the extension of participatory inclusion which could have been prompted by SDG 16.7 is arguably absent.

The drafting of the Office report 'Time to Act for SDG 8' did not require consensus at the ILC and therefore was able to be bolder in its analysis of what sustainability entails and how it might be delivered.⁵⁸ The Office appreciated the overlap (or 'dynamic linkages') between SDG 8 with SDGs 1, 3, 4, 5 and 16.⁵⁹ Notably, the Office report stressed that collective bargaining and social dialogue are vital to achievement not only of SDG 8 but Agenda 2030 as a whole, envisaging an expansion in trade union membership and representation.⁶⁰ In that context, the scale of emergent non-standard work (casual, fixed term, part-time, on-call, agency and other triangular connections, as well as disguised self-employment) was acknowledged,⁶¹ alongside the particular vulnerabilities this could cause for female and migrant workers with reference to SDG 8.8.⁶² This made imperative 'building the capacity of trade unions to represent workers in non-standard employment arrangements'.⁶³ However, the mechanics of doing so were not spelt out in this report, nor was the report arguably the most appropriate vehicle by which to do so since this requires wider deliberation in the tripartite constituency of the ILO. As in the Global Commission's Report and the ILO Centenary Declaration for the Future of Work, the links between sustainability, collective bargaining, social dialogue and tripartism were recognized but not addressed in detail.

⁵⁸ ILO (n 13).

⁵⁹ *ibid* x-xi, 2-3, figures at 29 and 32.

⁶⁰ *ibid* 33-34, 70-75.

⁶¹ *ibid* 69.

⁶² *ibid* 11, 25, 70-71.

⁶³ *ibid* 70.

V. Conclusion

It can be concluded that sustainability discourse, while offering contested terrain, gives us reason to congratulate the ILO on its durability. The Organization can be applauded for its forward-looking gaze, including the current emphasis placed on social dialogue and tripartism in the context of deliberations concerning the 'Future of Work'. Moreover, it seems right and timely that the ILO engages with the broader UN system (and regional, national and local activities) through sustainability norms and supervisory mechanisms such as the HLPF, thereby offering fresh perspectives on social justice.

However, as argued in this chapter, there remains a need for change and further reform. The ILO has to find space for a wider range of voices at work and collective worker activities under an ILO tripartite framework. To achieve this, the ILO will need to promulgate standards for application at the domestic level to promote broader and more inclusive participation in trade unions for all those engaged in what are now many and various types of work. There is also a strong case to enable the engagement of workers' organizations with a wider range of concerns. The ILO could make clear that the legitimate claims of collective bargaining and industrial action can extend to the kinds of environmental objectives itemised alongside the economic and social aims set out in the SDGs. These kinds of collective labour standards adopted by the ILO are constitutive of tripartism and, accordingly, it is important to acknowledge that connection and explore its dynamics more fully.

In 2019, it is time for the ILO to reflect again on the mechanics of tripartite collective voice, especially by whom and for what purposes. Demands for inter- and intra-generational justice, together with the prompts in the SDG 16 targets, can assist the Organization in addressing issues of effectiveness, accountability, inclusion, participation and representativity in tripartite governance. Debates over the proper governance of the ILO and the conditions for its success, which began with Albert Thomas as the first ILO Director, did not end with the ILO centenary. The survival of the ILO dictates that they must be continued.

ILO100 – Law for Social Justice

Geneva, 15–17 April 2019

PHOTO GALLERY

Apart from the academic event held in the ILO Governing Body room consisting of nine panel sessions and bringing together 40 guest speakers, the three-day conference also proposed a visit to the ILO's first building (today WTO headquarters), the launch of the 'Wilfred Jenks Lecture Series' with the inaugural lecture delivered by Mr Bruce Jenks, a roundtable discussion on the future of international organizations, and a document exhibition at the ILO Colonnade from the rich collections of the ILO archives.

All the photos of the different events may be viewed by scanning the QR codes below.







- ▶ An academic event on the occasion of the ILO centenary – four thematic areas, nine panel sessions, 40 guest speakers





- ▶ *Scripta manent: Delving into the ILO archives, document and photo exhibition at the ILO Colonnade*





► Wilfred Jenks Lecture Series – Inaugural lecture by Bruce Jenks at the official dinner hosted by the ILO Director-General





▶ Guided tour at the Centre William Rappard, first ILO headquarters building





- ▶ Roundtable on present and future of international normative organizations with the participation of Professors J. Alvarez, A. Pellet, L. Boisson de Chazournes and Messrs M. de Serpa Soares, B. Jenks and F. Maupain

VI

**ANOTHER CROWN JEWEL:
THE ILO ADMINISTRATIVE TRIBUNAL
AND THE LAW
OF THE INTERNATIONAL CIVIL SERVICE**



Some Considerations on the Independence of Tribunals of the International Civil Service

Giuseppe Barbagallo

In considering the topic of the independence of the administrative tribunals of the international civil service, as a Judge of the Administrative Tribunal of the ILO, I would like to acknowledge that all organs of the ILO not only respected, but also protected, the independence of our Tribunal. Independence is an essential requisite for the existence of a tribunal.

Judiciaries are fragile institutions. By their nature, they cannot and should not have any political power. They only have the duty to determine legal disputes, presented for adjudication, according to the law. Their necessary continued legitimacy, as independent adjudicators, requires the honest support and respect of those who do exercise political power, and of all the actors of the juridical forum in which these tribunals operate, including the parties, lawyers, judges, scholars, and the media.

Independence is an essential quality for all kinds of courts of justice such as supra-national courts, national courts, international courts dealing with inter-State cases, administrative tribunals of the international civil service, or more generically, courts which constitute the way 'the international society gives institutional form and content to the principle of jurisdictional settlement of disputes'.¹ These different kinds of courts have the common function of implementing the rule of law. This function necessarily requires the independence of the judicial bodies from all powers, most importantly, from public powers.

¹ Emmanuelle Jouannet, 'Actualité des questions d'indépendance et d'impartialité des juridictions internationales: la consolidation d'un tiers pouvoir international?' in Hélène Ruiz Fabri and Jean-Marc Sorel (eds), *Indépendance et impartialité des juges internationaux* (Pedone 2010) 271.

Independence of the judiciary is a necessary condition for impartiality. Calling into question a court's independence generates an appearance of partiality, which alone is enough to create an objective partiality. This demonstrates the fragility of this fundamental value and the consequent need for its rigorous protection.

I am reluctant to refer to any system of justice as a 'power', and to the international judiciary as a 'third power'.² I prefer to refer to the system of justice as a service and a duty. It is not just a question of terminology, as the words 'service' and 'duty' underline the judiciary's subordination to the rule of law, which requires the judge's impartiality. Before trying to draw some lessons from history by touching upon the tensions between power and justice over the centuries, I wish to clarify my view on the expressions 'system of justice' and 'service rather than power'.

While administrative tribunals of the international civil service do not form a formally structured system, they do constitute a common forum³ where reference is made to a common jurisprudence⁴ and any deviations are explained. There is a constantly evolving constructive dialogue among the various courts to which all the actors of this common forum participate in their own ways. An example of this is how the same lawyers participate, by defending officials of the various organizations before the different administrative tribunals of the international public service. Another example can be seen in the many articles written by scholars on international administrative tribunals.⁵ Accordingly, the level of independence of each court operating in the common forum also tends towards uniformity. That is to say, an influence on the independence of one court will reflect on the independence of the forum as a whole.

² *ibid* 273-283.

³ For example, the Permanent Court of Arbitration stated that the unique arbiter competent on the complainants filed against it by its officials must apply the case law of the ILO Administrative Tribunal; see Anne-Marie Thévenot-Werner, 'Activité et jurisprudence des tribunaux administratifs des Nations Unies et de l'OIT' (2017) 63 *Annuaire français de droit international* 371 and footnote 29.

⁴ Consider, for instance, the following ruling: 'The principle [...] is now a recognized principle which can be regarded as part of the law common to international organizations'; see Asian Development Bank Administrative Tribunal, Decision No. 18 (1996) para 22.

⁵ See, for instance, Suzanne Basdevant Bastid, *La Condition juridique des fonctionnaires internationaux* (Recueil Sirey 1930); 'Les Tribunaux administratifs internationaux et leur jurisprudence' (1957) 95 *Recueil des cours* 343.

Regarding ‘service rather than power’, it is my belief that a judge’s complete subordination to the law, their neutrality, and the function of guaranteeing the rule of law, are not consistent with the common concept of power. Although ‘the exercise of interpretation creates the rule of the case’, I reject the idea that a judge’s exercise of interpretation can be defined as a true exercise of power. I believe that a judge’s neutrality limits them to an unbiased assessment of the facts and the law, which contributes to produce a just decision, free from any outside influence beyond the law itself.

Over the centuries, many legislative acts forbade judges from interpreting laws, as such interpretation was considered to take power away from the supreme authority. A constitution of Emperor Justinian of 529 AD empowered the Emperor not only to establish statutory laws but also to interpret them. Papal bull ‘Benedictus Deus’ of 1563, from Pope Pius IV, also forbade judges from interpreting all conciliar provisions. The civil ordinance of Louis XIV of 1667 forbade judges from interpreting statutory laws, and required them to refer to the legislator for interpretation. Article 12 of the statute law regarding the judiciary’s organization, adopted by the French National Assembly in August 1790, prohibited judges from interpreting laws when making rulings.⁶ This provision was known under the name ‘*référé législatif*’.⁷

The implementation of the ‘*référé législatif*’ was suspended in 1804 upon of the entry into force of the Napoleonic Code article 4 of which provided that ‘the judge who shall refuse to determine under pretext of the silence, obscurity or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice’. As for article 73 of the Albertine Statute (i.e. the constitution of the Kingdom of Sardinia) of 4 March 1848, it provided that ‘the interpretation of laws, mandatory for all persons, belongs exclusively to the legislative power. Only legislators have the power to interpret the law’. The compulsory ‘*référé*’ was abolished by the French law of 1 April 1837.

⁶ In the original French text, ‘[les tribunaux] ne pourront faire de règlements mais ils s’adresseront au corps législatif toutes les fois qu’ils croiront nécessaire, soit d’interpréter une loi, soit d’en faire une nouvelle’.

⁷ In parallel with the establishment of the Tribunal of Cassation, which occurred in the same year (1790), another kind of *référé* (which was compulsory) was established in order to be applied in cases of conflict between the Tribunal of Cassation and the lower court whose impugned decision had been annulled.

To turn back time for a moment, we must look at the period of the grand tribunals in England and continental Europe. This period, stretching from the 16th to 18th centuries, applied a common European law. The activities of the courts of England and the continental European countries ran parallel and followed common judicial patterns and legal rules as well as general principles.⁸ Professor Gino Gorla and Dr. Luigi Moccia enumerate many similarities between the continental courts and the English courts during that period.⁹ For example, the establishment of the supreme courts was related to the centralisation process which aimed at creating a modern State; judges were normally recruited from the ranks of the legal profession; and judges had a judicial control over the sovereign's acts (*quaestio potestatis* concerning the validity of the acts and *quaestio voluntatis* concerning their interpretation) which had to be consistent with generally recognised principles (i.e. the common rights of the English courts). In that period, judges, lawyers, and law scholars (*doctores*) assumed great importance and excessive power.

Later provisions of the 19th and 20th centuries, such as the 'référé législatif' and the codification (composed of abstract rules rather than a series of practical examples), as well as the prohibition against the citation of legal scholars in the judgments, were implemented as reactions against the excessive power of 'doctores' in the previous period. These provisions derived from the conception of separation of powers and from the consequent idea, common during the Enlightenment, that 'judges are no more than the

⁸ See, in particular, Gino Gorla, 'Civilian Judicial Decisions – An Historical Account of Italian Style' (1970) 44 *Tulane Law Review* 740.

⁹ Gino Gorla and Luigi Moccia, 'A revisiting of the comparison between "Continental Law" and "English Law", 16th-19th Century' (1981) 2 *The Journal of Legal History* 144. As the authors note, the expression 'European common law' is not used in the sense of *jus commune* that refers to Justinian's *Corpus Juris* and its adaptation by interpretation from the twelfth to the eighteenth century, but rather to indicate that great cultural phenomenon which occurred in Europe, especially during the sixteenth to eighteenth centuries, consisting basically of the formation of common juridical patterns as well as of common legal rules and principles that spread throughout Continental Europe and England thanks to a transnational spirit of mutual understanding and even fraternity – to use Walter Senior's words – amongst jurists, both law scholars and practical lawyers (*forenses*) of each European country. See also W. Senior, *Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England* (1922) 111.

mouth that pronounces the words of the law',¹⁰ and 'judges become legislators if they are allowed to interpret the laws'.¹¹

The Enlightenment was also, in part, a reaction against the accumulation of power by judges of the grand tribunals. This reaction had already produced, in Piedmont and Savoy, the Royal Statute of 1729, which forbade the grounding of judicial decisions on the authority of the 'doctores' and prohibited judges and lawyers from citing their opinions in the judgments. Similarly, in Naples, a royal order of 1774 also forbade the courts from basing their decisions on the opinions and authority of the 'doctores'. The prohibition regarding the citation of law scholars is still in force today in Italian law.

The 20th century produced the tragedy of the two World Wars, which led to the adoption of a large number of treaties and the creation of many international organizations whose objectives were peace and social justice, as a reaction to those periods of conflict. The First World War also led to the creation of the Administrative Tribunal of the League of Nations,¹² formally established on 26 September 1927. Following the Second World War, the Assembly of the League of Nations changed the Tribunal's Statute on 18 April 1946, and the Tribunal became the Administrative Tribunal of the International Labour Organization.

I conclude this quick historical review by referring to two opposite visions. The Minister of Justice of the German government of 1944, Otto Georg Thierak, asserted that the time of the neutral or 'third judge' was over; the judge must operate as a member of the living German community and must interpret the sources of law according to the National-Socialist vision of the world as it was expressed in the Party's program. Contrary to that totalitarian vision, article 10 of the 1948 Universal Declaration of Human Rights, provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

¹⁰ Montesquieu, *The Spirit of the Laws*.

¹¹ Pietro Verri, 'Sulla interpretazione delle leggi' (1776) II-28 Il Caffè.

¹² Pierre Siraud, *Le Tribunal Administratif de la Société des Nations* (Librairie Mariale 1942).

Freedom requires an independent judiciary. The independence of the judiciary, now universally recognized, is essential, but fragile. On its own, the mere appearance of a lack of independence, affects the appearance of impartiality and that is enough to undermine the fundamental trust in the judiciary. Without faith in the judiciary, there can be no sense of legal certainty, or belief in justice. The ramifications of this for society should be obvious.

A tribunal's independence can be endangered by many different behaviours or situations. Some examples include but are not limited to: uncertainty in the appointments and renewals of judges; oversight by administrations which are parties to disputes; and fundamental changes in structure or process without advice or consultation of the Tribunal. In the forum of international civil service, the lack of independence of a tribunal entails a negative consequence for all actors operating in that forum, in particular international organizations, staff unions and officials.

To follow the lessons of history, as highlighted in my references to the grand tribunals and the doctores, judges must be conscious of their duty to recognize that their responsibility does not constitute a true power and that they are, most importantly, rendering a service. They must limit themselves to fulfil their duty to determine legal disputes in accordance with the law. In harmony with this idea, the administrative tribunals and their independence need to be supported by the other actors of the forum because the independence of those tribunals is a pillar of the soft system of international civil service. This principle is stated in the Italian Constitution: 'Judges are subject only to the law'. Organizations must consider the independence of administrative tribunals through the prism of their essential function for the benefit of all and not from the angle of the power of the organizations themselves. Actions such as withdrawing recognition of a tribunal's jurisdiction without proper motivation and transparency, or based on a disagreement with the tribunal's case law, give an appearance of non-acceptance of the rulings of that tribunal. That undermines the independence of the tribunal from which they withdraw, of the tribunal to which they transfer, and of the entire forum, which endangers the rule of law itself.

All of us have to consider the big picture, and in doing so, consider how each of our actions can affect the whole.

Le problème de la compétence *ratione personae* des juridictions administratives de l'OIT et des Nations Unies: comparaison et déraison?

Pierre Bodeau-Livinec

I. Introduction

Beaucoup a été écrit sur «le droit des agents internationaux à un recours effectif» – pour reprendre le titre d'une excellente et imposante thèse publiée en 2016 par Anne-Marie Thévenot-Werner¹. Faisant écho à une jurisprudence assez riche et plutôt homogène, la doctrine a déjà cherché à dégager les contours précis de la compétence *ratione personae* des juridictions administratives internationales. Il suffira de citer la contribution de Sigrid Arlen sur la notion de fonctionnaire international, publiée dans l'ouvrage dirigé par Dražen Petrović pour célébrer les 90 ans du Tribunal administratif de l'Organisation internationale du Travail (TAOIT)².

La présente contribution a un objectif plus modeste et quelque peu décalé au regard des études amples et détaillées qui la précèdent sur ce thème. L'objectif est plus modeste car il ne s'agira que d'aborder ici la question de la compétence *ratione personae* telle qu'elle se pose dans le système d'administration de la justice onusien et devant le TAOIT. D'autres juridictions existent, qui abordent cette thématique selon leurs propres logiques d'attribution. Au moins pourra-t-on considérer qu'avec le système onusien

¹ Anne-Marie Thévenot-Werner, *Le droit des agents internationaux à un recours effectif. Vers un droit commun de la procédure administrative internationale* (Brill/Nijhoff 2016).

² Sigrid Arlen, «La notion de fonctionnaire international» in Dražen Petrović (dir.), *Une contribution de 90 ans du Tribunal administratif de l'Organisation internationale du Travail à la création d'un droit de la fonction publique internationale* (BIT 2017) 167.

et le TAOIT, les juridictions majeures de l'ordre administratif international seront examinées. L'angle d'analyse pourra également apparaître quelque peu décalé car la présente contribution ne vise pas à traiter de la situation des fonctionnaires, membres du personnel et autres «*staff members*» vis-à-vis des juridictions considérées. Il est bien connu qu'aux termes de l'article II, paragraphe 6, du Statut du TAOIT, ont accès au Tribunal «le fonctionnaire [*official*], même si son emploi a cessé, ainsi que toute personne ayant succédé *mortis causa* aux droits du fonctionnaire». De même, selon l'article 3, paragraphe 1, du Statut du Tribunal du contentieux administratif des Nations Unies (TCNU), le Tribunal est ouvert «à tout fonctionnaire [*staff member*] de l'Organisation des Nations Unies»³, ancien fonctionnaire ou ayant-droit de celui-ci. Il existe ainsi une véritable «homogénéité derrière la variété des termes»⁴. Dans l'avis consultatif relatif au jugement n° 2867 du TAOIT sur requête contre le FIDA, la Cour internationale de Justice a elle-même souligné que «le terme 'fonctionnaire' employé dans le statut du personnel de l'OIT, ainsi que dans le statut du Tribunal, et l'expression 'membre du personnel', utilisée dans les dispositions statutaires ou réglementaires applicables au personnel de nombreuses autres organisations internationales, peuvent être considérés comme synonymes dans le présent contexte»⁵.

Le problème ici abordé concerne moins les fonctionnaires, ou membres du personnel, que les «agents» de l'organisation, au sens très large que la Cour a donné à ce terme dans l'affaire dite du «Comte Bernadotte», «entendant par-là quiconque, fonctionnaire rémunéré ou non, employé à titre permanent ou non, a été chargé par un organe de l'Organisation d'exercer, ou d'aider à exercer, l'une des fonctions de celle-ci, bref, toute personne par qui l'Organisation agit»⁶. Dans cette acception très large, les

³ Assemblée générale des Nations Unies, A/RES/63/253, 24 décembre 2008.

⁴ Thévenot-Werner (n 1) 339, ainsi que le tableau très détaillé relatif à la définition des fonctionnaires, membres du personnel, agents, etc., fourni à l'appui de la démonstration de l'auteure (339-343).

⁵ *Jugement no 2867 du Tribunal administratif de l'Organisation internationale du Travail sur requête contre le Fonds international de développement agricole, avis consultatif, C.I.J. Recueil 2012*, 389, par. 71.

⁶ *Réparation des dommages subis au service des Nations Unies, avis consultatif, C.I.J. Recueil 1949*, 177. Cette définition est reprise dans les Articles sur la responsabilité des organisations internationales adoptés par la Commission du droit international en 2011 (le terme «agent» devant s'entendre «d'un fonctionnaire ou d'une autre personne ou entité, autre

fonctionnaires internationaux ne forment qu'«un sous-ensemble»⁷ d'une catégorie beaucoup plus ample et disparate, comprenant l'ensemble des personnes qui aident l'organisation à exercer ses fonctions, qu'il s'agisse, par exemple, de consultants, vacataires, volontaires, d'experts ou encore de stagiaires. Or, l'accès de ces personnes à la justice administrative internationale reste à ce jour très restreint, sinon impossible, et pour le moins aléatoire.

Cette difficulté n'est pas entièrement nouvelle mais se présente avec une acuité particulière aujourd'hui. Quantitativement d'abord, le nombre d'agents concernés est probablement considérable⁸. Qualitativement ensuite – et surtout, les personnels dont il est ici question comptent parfois parmi les plus fragiles ou précaires et, partant, ceux qui sont le plus susceptibles d'être victimes de violations du droit du travail ou de droits fondamentaux par l'administration internationale. D'un point de vue juridique et éthique, la revendication du droit de ces personnes à un recours effectif n'est d'ailleurs plus une lubie ou une utopie: la question est régulièrement évoquée dans l'enceinte des grandes organisations internationales concernées et trouve même un écho au-delà de ce cadre⁹. Sur la base d'un état des lieux permettant de mieux cerner l'ampleur prise par ce problème, les risques réels qu'il comporte pourront être mesurés, avant de dessiner quelques perspectives, plus ou moins préoccupantes, s'ouvrant sur ce point à la justice administrative internationale.

II. État des lieux

Sur des bases initiales relativement proches, la question de la compétence *ratione personae* des juridictions administratives internationales se présente pourtant sous un jour différent, selon que l'on s'attache au droit et à la pratique du système onusien (1) ou à ceux du Tribunal administratif de l'OIT (2).

qu'un organe, qui a été chargée par l'organisation d'exercer, ou d'aider à exercer, l'une des fonctions de celle-ci, et par l'intermédiaire de laquelle, en conséquence, l'organisation agit»; A/RES/66/100, 9 décembre 2011, article 2.d)).

⁷ Arlen (n 2) 170.

⁸ Voir *infra*, II, 1.2.

⁹ Voir *infra* III, 2.

1. *La compétence ratione personae du système onusien*

Alors même qu'elle avait été motivée par une volonté claire d'ouverture, la réforme de l'administration de la justice au sein des Nations Unies mise en œuvre à partir de 2009 a conservé une approche restrictive de la compétence *ratione personae* des deux juridictions nouvellement créées, sans que la jurisprudence de celles-ci parvienne à élargir significativement les possibilités de recours.

1.1 Les objectifs (non-atteints) de la réforme de 2009

L'un des objectifs que poursuivait la réforme de l'administration de la justice formellement lancée par l'Assemblée générale en 2007¹⁰ consistait à offrir une voie de recours effective à l'ensemble des personnes employées à un titre ou un autre par les Nations Unies¹¹, en cherchant à consacrer ainsi dans le champ de la justice administrative internationale la réalité contemporaine d'une organisation qui s'appuie non plus seulement sur le corps déjà ample de ses fonctionnaires mais également sur les effectifs nombreux et disparates des «non-fonctionnaires», qu'il s'agisse de vacataires, prestataires de services, consultants, stagiaires et autres bénévoles¹². Dans la résolution 62/228, qui fonde la réforme de l'administration de la justice aux Nations Unies, l'Assemblée générale n'a pourtant décidé de ne donner accès au nouveau système qu'aux «personnes auxquelles est ouvert le système actuel d'administration de la justice»¹³.

Il serait injuste de voir dans cette démarche prudente le signe d'un renoncement à élargir les voies d'accès à la justice administrative, voire une fin de non-recevoir opposée à la revendication d'une approche plus ouverte des Nations Unies sur cette question sensible. L'Assemblée avait en effet

¹⁰ Assemblée générale des Nations Unies, A/RES/61/261, 4 avril 2007.

¹¹ Dans un rapport consacré à la réforme en 2007, le Secrétaire général avait ainsi envisagé d'ouvrir les mécanismes de justice interne à «toutes les personnes qui accomplissent un travail en étant personnellement au service de l'Organisation, sous quelque type de contrat que ce soit» (*Administration de la justice* – Rapport du Secrétaire général, A/62/294, 23 août 2007, 59). Sur ces premières initiatives, voir Pierre Bodeau-Livinec, «La réforme de l'administration de la justice aux Nations Unies» (2008) 54 *Annuaire français de droit international* 316.

¹² Pierre Bodeau-Livinec, «Activité et jurisprudence des tribunaux administratifs des Nations Unies» (2011) 57 *Annuaire français de droit international* 311.

¹³ Assemblée générale des Nations Unies, A/RES/62/228, 22 décembre 2007, par. 7.

prévu d'examiner lors d'une session ultérieure la portée individuelle du nouveau système et, plus particulièrement, l'identification des «voies de recours les plus appropriées»¹⁴ à la situation des non-fonctionnaires (ou, dans les termes de la résolution, «toutes les autres catégories de personnel de l'Organisation»)¹⁵, sur la base d'un état des lieux et des propositions que lui présenterait le Secrétaire général. L'Assemblée générale ne semble pas avoir renoncé à cette ambition depuis lors. En 2012, elle a ainsi réaffirmé la nécessité «de veiller à ce que toutes les catégories de personnel aient accès aux mécanismes de règlement des différends»¹⁶. Et la résolution la plus récente consacrée à l'administration de la justice aux Nations Unies se conclut encore par la demande faite au Secrétaire général «d'établir, dans les limites des ressources existantes, [...] une analyse exhaustive consacrée aux voies de recours ouvertes aux non-fonctionnaires, y compris leur efficacité»¹⁷. La question paraît donc connue et importante, en même temps qu'elle reste à ce jour irrésolue.

1.2 Les limites de la compétence *ratione personae* du système actuel

La diversité des types de relation pouvant exister entre l'Organisation et ses «agents» – au sens large de personnes aidant celle-ci à exercer ses fonctions – est réelle mais demeure difficile à appréhender. De manière significative, le Secrétaire général recourt d'ailleurs à une périphrase négative – celle des «non-fonctionnaires» – pour désigner l'ensemble des personnes concernées, sans pouvoir donc les catégoriser. Très récemment, il convenait ainsi «qu'il existe plusieurs types de non-fonctionnaires – consultants et vacataires, personnel fourni à titre gracieux, personnes n'ayant pas la qualité de

¹⁴ Assemblée générale (n 3) par. 8. Voir Bodeau-Livinec (n 11) 321.

¹⁵ *ibid.*

¹⁶ Assemblée générale des Nations Unies, A/RES/67/241, 24 décembre 2012, par. 50; la mention n'apparaît cependant plus dans la résolution adoptée par l'Assemblée en 2013. Au cours du débat tenu par la Sixième Commission lors de la 67^{ème} session, «*the view was expressed that all persons working for the United Nations, irrespective of status, should have access to an independent body that can address complaints in an effective and efficient manner. In this regard, however, it was observed that any solution to the issue of non-staff personnel must comply with existing obligations of the United Nations, including the Convention on the Privileges and Immunities of the United Nations, 1946 and agreements that the Organization has concluded with host States*» (United Nations Juridical Yearbook 2012, 288).

¹⁷ Assemblée générale des Nations Unies, A/RES/73/276, 22 décembre 2018, par. 46.

fonctionnaire du Secrétariat, stagiaires, Volontaires des Nations Unies – et que les conditions d’emploi qui s’attachent à chacun sont différentes. Les voies de recours ouvertes aux différentes catégories de non-fonctionnaires doivent être compatibles avec la nature de leur relation avec l’Organisation et refléter les droits et obligations correspondant à la catégorie de personnel en question»¹⁸.

Pour mesurer adéquatement la réalité du problème et dessiner des perspectives réalistes de résolution, encore faudrait-il disposer d’une approche quantitative crédible du nombre de personnes éventuellement concernées. Or, les statistiques existantes sont datées et relativement imprécises. Avec les précautions qu’impose ce constat, elles n’en restent pas moins éloquents: au moment de la réforme, environ 60 722 fonctionnaires travaillaient au sein du Secrétariat et des fonds et programmes; les «non-fonctionnaires chargés d’appuyer les activités des Nations Unies partout dans le monde [étaient] au nombre de 45 461»¹⁹. Le dernier rapport relatif à la composition du Secrétariat fait état d’une diminution du nombre de fonctionnaires des Nations Unies, dont les effectifs s’établissaient à 37 505 au 31 décembre 2018²⁰; cet état des lieux, par ailleurs très détaillé, ne fournit en revanche aucune indication sur l’évolution des différentes catégories de «non-fonctionnaires»; la conjonction de l’activisme de l’Organisation sur le terrain et de la tendance à l’externalisation de ses missions ne permet toutefois pas d’affirmer que le nombre des personnes concernées ait pu significativement diminuer.

Au-delà de ces incertitudes statistiques, l’impression que dégage l’examen de la compétence *ratione personae* du système onusien est celle d’une couverture réduite et disparate: tout se passe comme si les Nations Unies n’avaient prévu, pour recevoir les plaintes de leurs agents, qu’un lit de justice d’une place – là où il aurait fallu un matelas double ! – et, pour tenter de pallier cette impéritie, tentaient de fabriquer, sans grand succès,

¹⁸ *Administration de la justice à l’Organisation des Nations Unies. Rapport du Secrétaire général* (2018) A/73/217 par. 96.

¹⁹ *Administration de la justice à l’Organisation des Nations Unies. Rapport du Secrétaire général* (2010) A/65/373 par. 180. Le Secrétaire général reprend les statistiques avancées dans un rapport de 2007, A/62/294 par. 15-16 (avec des tableaux détaillés des effectifs).

²⁰ *Composition du Secrétariat – Données démographiques relatives au personnel. Rapport du Secrétaire général* (2019) A/74/82.

un futon en forme de patchwork. Plus sérieusement, le Groupe d'experts, chargé en 2015 d'une évaluation indépendante intérimaire du système onusien d'administration de la justice, a relevé à «son grand étonnement» que

«les portes de la justice interne n'étaient ouvertes guère qu'à la moitié des membres du personnel de l'Organisation, le personnel contractuel (vacataires), les consultants, etc., en étant exclus. C'est là une carence à laquelle il faut remédier. Nombre de litiges sur le lieu de travail qui opposent des fonctionnaires à des non-fonctionnaires doivent être justiciables du même unique mécanisme. [...] L'ONU doit ménager un recours utile à quiconque lui est lié par quelque relation d'emploi ou contractuelle»²¹.

Tel est loin d'être le cas aujourd'hui et ce, en dépit des efforts accomplis par les juridictions elles-mêmes.

1.3 Les timides ouvertures de la jurisprudence

Dans l'affaire *Basenko*, dès 2011, le Tribunal d'appel a cherché à assouplir quelque peu la rigueur du cadre fixé par l'article 3 du Statut du TCNU, en prenant appui sur le «principe fondamental du droit à un recours effectif reconnu par l'Article 8 de la Déclaration universelle des droits de l'homme»²². Ainsi, pour le Tribunal

«l'accès au nouveau système d'administration de la justice p[eu]t être étendu à des personnes qui ne sont pas formellement des fonctionnaires mais qui peuvent légitimement se prévaloir de droits assimilables à ceux d'un fonctionnaire»²³.

Toutefois, comme le Tribunal le concède lui-même dans un arrêt contemporain du précédent, «cette ouverture doit être comprise de manière restrictive»²⁴ : elle doit bénéficier à des personnes qui ont conclu un contrat avec l'Organisation, même si elles n'ont pas reçu de lettre de nomination, dès lors que l'intention des parties en ce sens est claire. En revanche, la compétence *ratione personae* du Tribunal ne saurait s'étendre ni aux stagiaires,

²¹ *Rapport du Groupe d'évaluation indépendante intérimaire du système d'administration de la justice à l'Organisation des Nations Unies* (2016) A/71/62/Rev.1, 2.

²² TANU, *Basenko*, 2011-UNAT-139, par. 11.

²³ *ibid.*

²⁴ TANU, *Gabaldon*, 2011-UNAT-120, par. 30.

lesquels sortent entièrement du régime statutaire, ni aux bénévoles ou autre «personnel fourni à titre gracieux de type II», selon les restrictions expressément prises par l'Assemblée générale en 2008²⁵ et suivies par le TANU²⁶.

En d'autres termes, l'extension limitée de la compétence *ratione personae* ne peut se produire que sur la base d'une assimilation à la situation du fonctionnaire/membre du personnel. Dès lors, non seulement les stagiaires et bénévoles mais aussi les consultants, experts indépendants, contrats de service, collaborateurs occasionnels se trouvent exclus du système et ce, alors même que d'autres juridictions (comme les tribunaux administratifs de l'OCDE ou de la Banque mondiale) ont adopté une jurisprudence plus libérale en la matière²⁷. Pour reprendre l'image proposée par Suzanne Bastid dans son cours de 1957 à l'Académie de droit international, des «îlots» d'agents des Nations Unies seraient ainsi dépourvus de voies de recours juridictionnel²⁸. Avec l'évolution du système, ces «îlots» ressemblent de plus en plus à de vastes archipels oubliés.

2. *La compétence ratione personae du TAOIT*

Telle qu'elle est prévue sur la base de l'article II, paragraphe 6, de son Statut, la compétence *ratione personae* du TAOIT paraît limitée au «fonctionnaire» et à ses ayants-droit, dans des termes assez similaires à ceux qui régissent la compétence du TCNU et du TANU. Toutefois, sous la double impulsion de sa propre jurisprudence et de certaines caractéristiques externes, le Tribunal a développé une approche plus libérale de sa compétence *ratione personae*.

²⁵ Assemblée générale (n 3) par. 7.

²⁶ Dans l'affaire *Basenko*, le Tribunal conclut ainsi nettement: «non seulement l'appelante est une stagiaire, mais encore aucune violation d'un droit fondamental n'est en jeu. Un différend résultant du simple retrait d'une proposition de stage ne ressortit pas à la compétence du TCNU» (par. 12).

²⁷ Thévenot-Werner (n 1) 378-379.

²⁸ Suzanne Bastid, «Les tribunaux administratifs internationaux et leur jurisprudence» (1957) 92 Recueil des cours 458, par. 53 (cité in Thévenot-Werner (n 1) 381, n. 218).

1.1 L'effet de la jurisprudence du TAOIT

La jurisprudence du TAOIT témoigne d'une attention ancienne à la question de l'étendue de la compétence *ratione personae* du Tribunal, marquée par une «extension progressive de la notion de “fonctionnaire”»²⁹. La tendance est nette mais progressive et partielle. Dès l'affaire *Desgranges* en 1953, le Tribunal considère que

«du point de vue de l'équité, il n'y a pas lieu de distinguer les fonctionnaires proprement dits du Bureau international du Travail, des personnes [qui] réunissent les caractéristiques essentielles du fonctionnaire, lesquelles sont: consécration permanente de son activité au service qui l'emploie; autorité du Directeur général; réglementation unilatérale et non contractuelle de l'emploi; accessibilité aux caisses d'assurance-maladie, de pension, etc.»³⁰.

Ultérieurement, le Tribunal a admis qu'il était compétent pour connaître de la requête formée par l'ancien Directeur général d'une organisation internationale nommé par la Conférence des États parties de celle-ci³¹ ou encore par des personnes liées à une organisation – l'OMPI en l'occurrence – par une «longue succession de contrats de courte durée», au point de faire «naître entre l'intéressée et [celle-là] des liens juridiques équivalant à ceux dont peuvent se prévaloir les fonctionnaires permanents d'une organisation»³².

Comme le montre ce dernier exemple, le Tribunal ne s'arrête plus à une appréciation formelle du lien entre le requérant et l'organisation mais s'attache à déterminer la matérialité du lien fonctionnel – la «réalité des rapports juridiques»³³ – susceptible de les unir. Domine dès lors une forme de «pragmatisme judiciaire»³⁴, caractéristique de la jurisprudence du TAOIT

²⁹ Jacques Lemoine, «Le développement de la jurisprudence du Tribunal administratif de l'Organisation internationale du Travail» (1960) 6 *Annuaire français de droit international* 545.

³⁰ Jugement n° 11, *Desgranges* (1953) 2.

³¹ Jugement n° 2232 (2003) 5-6.

³² Jugement n° 3090 (2012) consid 7. Voir. David Ruzié, «Jurisprudence du Tribunal administratif de l'Organisation internationale du Travail» (2011) LVII *Annuaire français de droit international* 275-276.

³³ Jugement (n 32).

³⁴ Arlen (n 2) 178.

sur ce point, qui a été synthétisée dans les affaires *Diotallevi et Tedjini*: le Tribunal y affirme qu'il a «compétence pour se prononcer sur toute relation d'emploi entre une organisation et ses agents, quelle qu'en soit la forme, contractuelle ou statutaire»³⁵. Cette approche libérale, *in casu*, se trouve encore confortée par la spécificité du cadre institutionnel servant de sous-bassement à la compétence du TAOIT.

1.2 L'incidence de la multiplicité des cadres institutionnels

Aux termes de l'article II, paragraphe 5, du Statut du TAOIT, «le Tribunal connaît en outre des requêtes invoquant l'inobservation [...] des stipulations du contrat d'engagement des fonctionnaires ou des dispositions du statut du personnel des autres organisations internationales» reconnaissant sa compétence. Sur ce fondement, le Tribunal a été appelé à connaître de requêtes émanant de personnes ne relevant pas de la conception usuelle du fonctionnaire international. Il a, par exemple, admis sa compétence pour connaître du recours d'un attaché non rémunéré du CERN (en réalité rémunéré par une ONG extérieure à l'organisation), sur le fondement du Statut du personnel du CERN³⁶, ou encore d'une consultante bénéficiant d'un engagement temporaire à court terme à l'Organisation mondiale de la Santé³⁷. Dans le même temps, cette dernière affaire montre que la compétence du TAOIT reste étroitement tributaire des stipulations du Statut du personnel: dans ce cas en effet, le TAOIT était compétent car l'engagement temporaire excédait les 60 jours, limite temporelle expressément fixée par le Statut de l'OMS pour conférer la qualité de membre du personnel³⁸.

³⁵ Jugement n° 1272 (1993) consid 9.

³⁶ Jugement n° 1166, *Alberty* (1992) consid 3; voir David Ruzié, «Jurisprudence du Tribunal administratif de l'Organisation internationale du Travail» (1992) XXXVIII Annuaire français de droit international 549.

³⁷ Jugement n°1383, *Rio Rumbaitis* (1995) consid 5-10; voir David Ruzié, «Jurisprudence du Tribunal administratif de l'Organisation internationale du Travail» (1994) 40 Annuaire français de droit international 526.

³⁸ Voir aussi le jugement n° 2503 (2005) consid 4: «il résulte du dossier que le requérant n'a jamais été fonctionnaire d'Eurocontrol et que les seuls contrats qu'il produit sont des contrats de missions temporaires soumis au droit français et conclus avec une société de travail temporaire. [...] Il en résulte que, comme le soutient à bon droit la défenderesse, le Tribunal de céans n'a pas compétence pour connaître de la contestation».

De surcroît, la diversité même des statuts des organisations internationales considérées rend délicat l'effort de systématisation de la jurisprudence: s'il sait faire preuve d'une ouverture certaine, le juge reste inexorablement contraint par les limitations inhérentes au principe de la juridiction d'attribution. Persiste dès lors le risque de laisser en-dehors du système juridictionnel des catégories importantes de personnel d'une organisation: comme le souligne Dražen Petrović, «*the present reality is that many persons in an employment relationship within the organizations do not have the formal status of 'officials'. Some others (consultants, external candidates for vacancies, interns, etc.) have no – or have only very hypothetical – means to seek the legal protection of their rights. The time may be right to reconsider this issue*»³⁹.

Le problème n'est donc pas nouveau mais prend une résonance particulière au sein du Tribunal administratif de l'OIT, plus exposé que les juridictions onusiennes à la diversité des liens de subordination pouvant s'établir entre une organisation et une personne aidant celle-ci à exercer les fonctions que ses membres lui ont conférées. Dans l'affaire *Darricades*, le Tribunal avait considéré que la requérante «collaborateur purement occasionnel» de l'UNESCO, ne pouvait «être regardée comme un membre du personnel» de l'organisation; mais c'était pour reconnaître immédiatement que «sa déclaration d'incompétence a pour effet regrettable de priver dame Darricades de tout recours juridictionnel pour obtenir réparation des conséquences dommageables des violations alléguées de son contrat»⁴⁰. Depuis lors, le TAOIT a consacré le droit à la garantie d'un recours contentieux comme principe général du droit de la fonction publique⁴¹. C'est au regard de ce principe général que doivent être appréciés les risques et perspectives de la situation actuelle.

III. Risques et perspectives

S'il est largement admis, par les acteurs et les commentateurs des mécanismes de justice administrative internationale, que la situation actuelle est insatisfaisante, aucune solution simple ne se dessine pour rendre plus accessibles aux «agents» de l'organisation, dans leur diversité, des modalités de règlement effectif des litiges qu'ils peuvent avoir avec elle. Ce constat soulève

³⁹ Dražen Petrović, «Longest-Existing International Administrative Tribunal: History, Main Characteristics and Current Challenges» in Petrović (n 2) 29.

⁴⁰ Jugement n° 67, *Darricades* (1962) consid 2-3.

⁴¹ Jugement n° 122, *Chadsey* (1968).

indubitablement des questions éthiques importantes. Il serait toutefois erroné de chercher à cantonner le problème en-dehors de la sphère juridique. Les restrictions portées à l'accès au juge font peser des risques normatifs et institutionnels sur les mécanismes d'administration de la justice eux-mêmes (1). Il importe dès lors d'identifier quelques perspectives pragmatiques, susceptibles de remédier à la difficulté ou, au moins, d'atténuer celle-ci (2).

1. Risques

Dans l'affaire *Chadsey*, dès 1968, le TAOIT a érigé le droit à la garantie d'un recours contentieux ouvert à tout agent d'une organisation internationale au nombre des « principes généraux du droit de la fonction publique [, lesquels] correspondent de nos jours à des nécessités si affirmées et sont admis d'une manière si générale qu'ils doivent être regardés comme étant applicables à tous les agents ayant avec une organisation un lien autre que purement occasionnel »⁴². Le principe est fermement établi; sa mise en œuvre reste incertaine, laissant planer le risque, de plus en plus tangible, que l'agent – au sens large retenu ici – aille chercher en-dehors l'organisation la voie de recours dont celle-ci persiste à le priver.

1.1 Risque interne: une ouverture erratique de la compétence *ratione personae*

Dans la lignée de la jurisprudence *Chadsey*, le droit à un recours effectif des différentes catégories de personnel a été largement confirmé, dans son principe même, par les juridictions administratives internationales les plus significatives. Le Tribunal administratif des Nations Unies, en s'appuyant explicitement sur la jurisprudence de son homologue de l'OIT, a lui-même entériné dès 1971 le droit de tous les membres du personnel d'organisations internationales d'avoir recours à un organe décisionnel impartial⁴³. Le TAOIT, qui fut donc précurseur dans ce domaine, a fait un pas supplémentaire essentiel dans cette direction, lorsqu'il a assumé la transition d'un

⁴² *ibid.*

⁴³ « The right to resort to an impartial decision-making body was affirmed for the benefit of all staff members of international organizations by the Administrative Tribunal of the International Labour Organization » (jugement n° 150 (1971) point VIII (suivant une pratique déplorable, les jugements du TANU ne sont pas accessibles en langue française – pourtant langue originale du jugement – sur le site des Nations Unies, qui gagnerait sur ce point à s'inspirer du site internet remarquable du TAOIT); voir aussi le jugement n° 230 (1977).

principe général du droit de la fonction publique internationale à un droit fondamental inscrit dans le patrimoine juridique du fonctionnaire international. La jurisprudence *Aschenbrenner* marque à cet égard un tournant: «le droit de recourir à des juridictions administratives internationales fait partie des garanties essentielles dont les fonctionnaires internationaux ne peuvent être privés»⁴⁴.

Sur ces bases normatives solides, le TAOIT s'attache à offrir à l'agent une voie de recours autant que faire se peut! S'il ne peut que décliner sa compétence pour connaître du recours d'un «contractant indépendant» de l'Organisation panaméricaine de Santé, dès lors que le contrat prévoyait une procédure de conciliation et d'arbitrage⁴⁵, il n'hésite pas à ouvrir les portes du prétoire dès que l'opportunité s'en présente raisonnablement. Ainsi, dans une affaire relativement récente concernant deux anciens juges de la Cour pénale internationale, le TAOIT, tout en acceptant le fait que les requérants n'avaient pas qualité pour agir en vertu du Règlement du personnel de la Cour, relève que

«l'argument de la CPI revient à considérer que les juges ne disposent d'aucun moyen de recours en cas de violation alléguée de leurs conditions d'emploi. Cet argument doit être rejeté. Les requérants sont des fonctionnaires (*officials*) et leurs droits ne sont pas limités par le Règlement du personnel. Leur droit de saisir le Tribunal est établi par le Statut du tribunal lui-même»⁴⁶.

Ce volontarisme remarquable ne saurait toutefois dissimuler les marques d'un certain empirisme: même si les termes du Règlement du personnel peuvent être dépassés, il échet au juge de parvenir à assimiler le requérant à la catégorie du fonctionnaire, ce qui laisse le cas de l'agent *lato sensu* très aléatoire. Toutefois, et paradoxalement, cette jurisprudence apparaît *in fine* «protectrice des organisations»⁴⁷, en ce qu'elle permet au moins à celles-ci d'éloigner la menace de la protection équivalente.

⁴⁴ Jugement n° 1660, *Aschenbrenner* (1997) consid 15. Voir, déjà, mais de manière moins explicite, le jugement n° 1330, *Bangasser et autres* (1994) consid 8.

⁴⁵ Jugement n° 1938, *Alvarez Vigil* (2000) consid 4 («les deux parties ont librement accepté le recours à l'arbitrage pour régler les difficultés nées de l'application des contrats de service et ainsi nécessairement entendu exclure la compétence du Tribunal»).

⁴⁶ Jugement n° 3359 (2014) consid 17.

⁴⁷ Arlen (n 2) 181.

1.2 Risque systémique: l'externalisation du droit de recours

Pour reprendre le titre d'un article remarquable consacré à la question⁴⁸, l'«ombre» de la jurisprudence *Waite et Kennedy* plane avec une insistance toujours plus prononcée sur les organisations internationales qui restent réticentes à offrir à l'ensemble de leurs agents, entendus *lato sensu*, une voie de recours effective. Dans cette affaire, la Cour européenne des droits de l'homme a considéré que, «pour déterminer si l'immunité de l'ASE devant les juridictions allemandes [était] admissible au regard de la Convention, il import[ait], selon la Cour, d'examiner si les requérants disposaient d'autres voies raisonnables pour protéger efficacement leurs droits garantis par la Convention»⁴⁹. Ce principe, dit de «protection équivalente», est désormais bien établi, au-delà même du cadre régional qui a vu son éclosion. Comme l'a relevé le Conseil de justice interne des Nations Unies à propos de la fin de non-recevoir opposée aux «non-fonctionnaires» par le système onusien, «les juridictions nationales pourraient un jour insister sur la nécessité de prévoir un recours 'approprié' pour les différends liés à l'emploi, autrement dit un recours qui soit exploitable en pratique et facilement accessible dans les conditions où les non-fonctionnaires concernés sont employés»⁵⁰.

Le risque que présente la mise en œuvre du principe de protection équivalente pour l'immunité des organisations internationales n'a, d'ailleurs, plus rien de théorique. Dans un rapport de juillet 2018, le Secrétaire général des Nations Unies révélait ainsi qu'entre 2009 et 2016, 133 affaires impliquant des non-fonctionnaires du système onusien avaient été portées devant

⁴⁸ August Reinisch et Ulf Andreas Weber, «In the Shadow of Waite and Kennedy - The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement» (2004) 1 *International Organizations Law Review* 59, en particulier 76-82. Voir aussi Carla Fertsman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford UP 2017) 128-155; Cornelia Janik, «Die EMRK und internationale Organisationen: Ausdehnung und Restriktion der "equivalent protection" – Formel in der neuen Rechtsprechung des EGMR» (2010) 70 *ZaöRV* 127; August Reinisch (dir.), *Challenging Acts of International Organizations Before National Courts* (Oxford UP 2010).

⁴⁹ CEDH, *Waite et Kennedy c. Allemagne*, requête n°26083/94, arrêt du 18 février 1999, par. 68. Voir également l'arrêt *Beer et Regan c. Allemagne*, rendu le même jour, requête n° 28934/95, par. 58.

⁵⁰ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Conseil de justice interne* (2016) A/71/158 par. 141.

les juridictions nationales⁵¹. Ce chiffre reste modeste mais significatif en soi; il ne dit rien, toutefois, de l'issue de ces procédures et, notamment, ne précise pas si l'Organisation a invoqué son immunité devant les juridictions considérées. Si la vision fonctionnelle de l'immunité des organisations internationales retenue par la Cour suprême des États-Unis le 27 février 2019 en l'affaire *Jam c. IFC*⁵² fait florès, la porte sera plus grandement ouverte aux «non-fonctionnaires» pour tenter d'obtenir gain de cause devant des juridictions nationales, avec les risques considérables que cela impliquerait pour le bon fonctionnement et la gouvernance effective des organisations concernées.

2. Perspectives

Face à de tels risques, les organisations internationales doivent, à court terme, explorer des possibilités renouvelées et adaptées de recours susceptibles d'être ouverts aux multiples agents ou «non-fonctionnaires» qui relèvent de leur cadre fonctionnel. À plus long terme, c'est la conception même de la responsabilité de ces institutions internationales qui se trouve mise en cause.

1.1 Voies de recours envisageables

Certainement consciente du risque que l'absence d'accès des «non-fonctionnaires» au prétoire international peut faire courir à l'ONU et à sa réputation, l'Assemblée générale a dès 2009, entamé une réflexion sur les voies de recours alternatives, en soumettant à l'analyse du Secrétaire général quatre options: Une procédure d'arbitrage accélérée pour des plaintes d'un montant limité; la création d'une voie de recours unique suivant une procédure simplifiée; une procédure simplifiée devant le Tribunal du contentieux administratif des Nations Unies; et l'extension des mécanismes actuels aux non-fonctionnaires⁵³.

⁵¹ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Secrétaire général* (2018) A/73/217 par. 99.a).

⁵² Voir, à cet égard, Julian Arato, «Equivalence and Translation: Further Thoughts on IO Immunities in *Jam v. IFC*» (2019) *EJIL Talk* <<https://www.ejiltalk.org/equivalence-and-translation-further-thoughts-on-io-immunities-in-jam-v-ifc/>>.

⁵³ Assemblée générale des Nations Unies, A/RES/64/233, 22 décembre 2009, par. 9.

Le Secrétaire général a examiné avec un enthousiasme mesuré ces quatre options en privilégiant la première, mais uniquement pour les contrats conclus entre l'Organisation des Nations Unies et des consultants ou vacataires⁵⁴. Toutefois, l'Assemblée générale n'a pas donné suite à ce projet⁵⁵, qui exigerait des «ressources additionnelles importantes»⁵⁶ et n'offrirait qu'une réponse partielle à un problème beaucoup plus ample⁵⁷.

L'examen de la question par les Nations Unies semble même connaître une forme de recul, le Secrétaire général ayant conclu d'un examen de la pratique d'autres institutions internationales apparentées que «les voies de recours ouvertes aux non-fonctionnaires correspondent en conséquence à celles qui sont offertes dans d'autres organisations internationales»⁵⁸. L'analyse des tableaux détaillés⁵⁹ fournis à l'appui de cette affirmation fait toutefois apparaître une réalité plus contrastée, certaines organisations internationales considérées offrant une voie de recours juridictionnelle aux non-fonctionnaires.

1.2 Un choix relevant de la philosophie même de la justice administrative internationale

Comme l'a avoué sans ambages le Secrétaire général, «l'inclusion des non-fonctionnaires dans les catégories relevant de la compétence du Tribunal du contentieux reviendrait à doubler pratiquement le nombre total d'utilisateurs du système formel de justice»⁶⁰. Ce constat a le mérite de jeter

⁵⁴ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Secrétaire général* (2011) A/66/275, annexe II, par. 8.

⁵⁵ Assemblée générale (n 16) par. 51. L'Assemblée n'a fixé aucune échéance pour reprendre l'examen de la question, laquelle n'a pas été abordée l'année suivante et reste depuis dans les limbes. Il est à craindre qu'il en soit ainsi encore longtemps, du fait de la complexité de la question et de ses incidences budgétaires.

⁵⁶ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Secrétaire général* (2012) A/67/265, annexe IV, par. 46.

⁵⁷ *ibid* annexe VI, par. 1. Ne seraient pas concernés par la procédure d'arbitrage accéléré les Volontaires des Nations Unies, les experts en mission, les personnalités au service des Nations Unies non fonctionnaires du Secrétariat, les stagiaires et les bénévoles notamment.

⁵⁸ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Secrétaire général* (2018) A/73/217, 23 par. 101.

⁵⁹ *Administration de la justice à l'Organisation des Nations Unies – Rapport du Secrétaire général* (2017) A/72/204, annexe II.

⁶⁰ Rapport (n 19) par. 180.

une lumière crue sur la difficulté à laquelle les organisations internationales doivent à présent faire face. La question de l'étendue de la compétence *ratione personae* de la justice administrative internationale révèle en effet l'existence d'un dilemme profond.

Persiste d'une part une exigence de justice, que la Belgique, au nom de l'Union européenne, a fortement exprimée:

«La garantie d'une voie de recours effective à toutes les personnes qui effectuent un travail pour l'ONU revêt une importance capitale pour la crédibilité de l'Organisation. Des voies de recours effectives doivent exister pour toutes les catégories de personnel de l'ONU»⁶¹.

Demeurent toutefois, et d'autre part, les contraintes d'une gestion maîtrisée des ressources humaines, qui incite à privilégier une vision exagérément pusillanime du prétoire des juridictions administratives internationales.

IV. En guise de conclusion

Force est de constater que c'est bien cette seconde vision qui domine aujourd'hui, aux risques et périls des organisations qui la défendent: risque juridique d'abord, par le biais de la protection équivalente, mais aussi risque réputationnel, à terme plus dangereux encore pour l'ONU. Les défaillances de la *responsibility* ne sauraient en effet masquer durablement la rigueur parfois intraitable de l'*accountability*⁶². Si l'organisation peut encore parvenir à échapper aux conséquences juridiques des violations des obligations qui lui incombent vis-à-vis de ses agents, elle a, en revanche, beaucoup à y perdre – aux yeux des personnes concernées, de ses membres ou d'une opinion publique déjà défiante – en tant qu'acteur majeur d'une bonne gouvernance mondiale.

⁶¹ Sixième Commission de l'Assemblée générale, compte-rendu analytique de la 4^e séance (65^e session), 2 décembre 2010, A/C.6/65/SR.4, par. 64.

⁶² Sur ces notions, voir Pierre Bodeau-Livinec et Laurence Dubin, «La responsabilité des institutions internationales dans tous ses états» in Laurence Dubin et Marie-Clotilde Runavot (dirs.), *Le phénomène institutionnel international dans tous ses états* (Pedone 2014) 231.

The Protection of Legitimate Expectations in Global Administrative Law

Louise Otis and Jérémy Boulanger-Bonnely

I. Introduction

International organizations are generally immune from domestic law, including in employment matters. However, to benefit from that immunity, they have to implement and maintain an internal justice system that appropriately protects their civil servants.¹ As part of the substantive law that applies in such matters, it is now generally accepted that all international organizations are bound by a number of customary rules and general principles that transcend their statutes and internal rules.² Indeed, an author notes the ‘emergence of general principles applying to all international organizations’.³

One of these general principles is the protection of legitimate expectations, sometimes framed as the duty of international organizations to abide by the promises they make to their civil servants. While this principle has a longstanding history in both domestic law and global administrative law, it has received increasing attention recently in the realm of international organizations. However, recent cases show that the notion of legitimate expectations still lacks a coherent and harmonized definition, at least in some respects. This chapter tries to bridge that gap by reviewing the tenets

¹ See, for instance, August Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’ (2008) 7 *Chinese Journal of International Law* 285, 286-89.

² See, for instance, ILOAT Judgment No. 28 (1957); OIFAT Decision No. 7 (2018) para 18; ATCE Decision No. 2018/587-588. See also the first decision of the World Bank Administrative Tribunal, Decision No. 1 (1981) 25, in which it acknowledged that a ‘source of the rights and duties of the staff of the Bank consists of certain general principles of law, the applicability of which has in fact been acknowledged by the Bank’.

³ Mathias Forteau, ‘Organisations internationales et Sources du droit’ in Evelyne Lagrange and Jean-Marc Sorel (eds), *Droit des organisations internationales* (LGDJ 2013) 257.

and application of the doctrine of legitimate expectations in both domestic and global administrative law, in order to identify organizing principles that could serve to harmonize the doctrine across organizations and to provide a balanced and predictable framework for all parties involved.

In this chapter, we first review the origins and principles governing the protection of legitimate expectations in selected domestic jurisdictions, to provide some comparative context. Then, we turn to the case law of international administrative tribunals on legitimate expectations.⁴ We explore early cases to identify the conceptual foundations that justified the emergence of that doctrine, including fairness and good faith, and we analyze its application by various tribunals, noting the inconsistency of their approaches in some respects. Lastly, we suggest that the framework developed by the International Labour Organization Administrative Tribunal should inspire other international administrative tribunals to adapt their approaches in order to tend towards a harmonized doctrine across the international public service as a whole.

II. Legitimate expectations in domestic law

This section looks at the doctrine of legitimate expectations in the domestic context, identifying its origins, theoretical underpinnings and application in selected jurisdictions, primarily in the United Kingdom and in the European Union. It also explores the specific application of that doctrine in employment matters, in those jurisdictions and others. While this exercise is far from exhaustive, it provides some comparative context that may help in understanding the application of legitimate expectations by international administrative tribunals.

⁴ This article does not pretend to perform an exhaustive review of the jurisprudence of all international administrative tribunals, but focuses instead on the trends established by some of them, namely the International Labour Organization Administrative Tribunal (ILOAT), the United Nations Appeals Tribunal (UNAT), the World Bank Administrative Tribunal (WBAT), the Organisation internationale de la Francophonie Appeals Tribunal (OIFAT), the African Development Bank Administrative Tribunal (AfDBAT), the Administrative Tribunal of the Council of Europe (ATCE), the Administrative Tribunal of the North American Treaty Organization (ATNATO), the Administrative Tribunal of the Organization for Economic Co-operation and Development (ATOECD) and the Commonwealth Secretariat Arbitral Tribunal (CSAT).

1. *Origins and application*

1.1 United Kingdom and the Commonwealth

The emergence in common law of the doctrine of legitimate expectations is generally traced back to *Schmidt v Secretary of State for Home Affairs*.⁵ A Court of Appeal judgment written by Lord Denning in the late 1960s, *Schmidt* considered the Home Secretary's decision to reject – critically without hearing – two American scientology students' applications to extend their study permits. In this administrative law context, Lord Denning provides the first explicit reference to the doctrine. With reasons steeped in the earlier *Ridge v Baldwin*⁶ case, he notes:

The speeches in *Ridge v. Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some *legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say (emphasis added).⁷

In a few words and without greater explanation, Lord Denning introduces the then controversial notion that a mere expectation could marshal procedural guarantees traditionally reserved for instances of enforceable legal rights and interests. As Hodgson writes, 'the breakthrough provided by Lord Denning's judgment was the express acknowledgment that the possession of a legitimate expectation could give rise to a right to be accorded natural justice'.⁸ Beyond public law protections for 'existing' rights and interests, natural justice was extending safeguards to 'prospective' rights and interests.⁹

Shortly after *Schmidt*, Lord Denning was again involved in a decision considering the doctrine of legitimate expectations in *Breen v Amalgamated Engineering Union*.¹⁰ This time, his reasons focused on the context

⁵ [1968] EWCA Civ 1, [1969] 1 All ER 904 (*Schmidt*).

⁶ [1964] AC 40, [1963] 2 All ER 66.

⁷ *Schmidt* (n 5) 909.

⁸ DC Hodgson, 'The Current Status of the Legitimate Expectation in Administrative Law' (1983) 14 *Melbourne University Law Review* 686, 689.

⁹ Richard Flanagan, 'Legitimate Expectation and Applications – An Outdated and Unneeded Distinction' (2011) 17 *Canterbury Law Review* 283, 284.

¹⁰ [1971] 2 QB 175, [1971] 1 All ER 1148 (*Breen*).

of employment in what has been described as the ‘seminal’ case in this area.¹¹ Here, the members of a trade union voted Mr. Breen to be their shop steward. As per their union rules, this election was subject to the district union committee’s approval. While Mr. Breen’s candidacy had been approved by the committee in the past, this time it was not. The committee provided reasons to Mr. Breen, but refused to grant him a hearing. On appeal, Lord Denning distinguished persons without a claim seeking a privilege – who, he suggested, ‘may be turned away without a word’ – from those with rights, interests, or a legitimate expectation – who should be entitled to some form of hearing or reasons.¹² Despite Lord Denning dissenting in *Breen*, his reasons have since inspired cases throughout the Commonwealth.

These two early cases focused on the procedural aspect of legitimate expectations. However, the doctrine was expanded to include the protection of substantive benefits as well. In *Baker, R (on the Application of) v Devon County Council*,¹³ twenty years after *Breen*, Lord Simon Brown reviewed the case law on legitimate expectations and identified four categories of uses of that phrase, including those referring to procedural guarantees, but also those ‘used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him’.¹⁴ Lord Simon Brown further noted that substantive entitlements are generally protected ‘when there is a clear and unambiguous representation upon which it was reasonable for [the claimant] to rely [...] unless only [the] promise or undertaking as to how [the official’s] power would be exercised is inconsistent with the statutory duties imposed upon it’.¹⁵

Similarly, in *R v North and East Devon Health Authority, ex p Coughlan*,¹⁶ a Court of Appeal decision recently described by the United Kingdom Supreme Court as ‘the leading case on substantive legitimate

¹¹ *Hodgson* (n 8) 711.

¹² *Breen* (n 10) 1154. See also Hilary Delany, ‘The Doctrine of Legitimate Expectation in Irish Law’ (1990) 12 *Dublin University Law Journal* 1, 4.

¹³ [1992] EWCA Civ 16, [1995] 1 All ER 73 (*Baker*).

¹⁴ *ibid* 86.

¹⁵ *ibid* 88, citing *R v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337; and *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482, [1987] 2 All ER 518, 531.

¹⁶ [2001] QB 213, [2000] 3 All ER 850 (*Coughlan*).

expectations',¹⁷ Lord Woolf MR described three categories of cases of legitimate expectations, on a spectrum ranging from mere consideration, to procedural guarantees, to substantive guarantees:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. [...] (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. [...] (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.¹⁸

In line with that recognition of substantive legitimate expectations, the United Kingdom Supreme Court recently reiterated that 'where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so'.¹⁹ While that principle is applied most prominently in administrative public cases pertaining to areas like licensing and immigration,²⁰ it also stretches into both public and private employment law.²¹

1.2 Continental Europe

The doctrine of legitimate expectations also emerged in certain continental civilian jurisdictions, particularly Germany and the European Community.

¹⁷ Finucane, *Re Application for Judicial Review (Northern Ireland)* [2019] UKSC 7 [56].

¹⁸ Coughlan (n 16) 57, cited more recently in Finucane (n 17) 56.

¹⁹ Finucane (n 17) 62.

²⁰ Hodgson (n 8) 691.

²¹ Barry Hough and Ann Spowart-Taylor, 'Realising Partnership in Employment Relations: Some Legal Obstacles' (2002) 13 *King's College Law Journal* 149, 170.

In Germany, the protection of legitimate expectations derives from the principle of *vertrauensschutz* (literally the ‘protection of trust/confidence’), which aims to encourage confidence in public decision-makers by providing protections for those who rely on their representations.²² In 1956, for instance, over a decade before Lord Denning evoked the principle of legitimate expectations in *Schmidt*, the Berlin higher administrative court (*Oberverwaltungsgericht*) applied the notion of *vertrauensschutz* to conclude that a decision-maker was bound to honour a representation concerning a welfare grant.²³ The expectations connected with this representation were safeguarded despite the fact that the representation itself was illegal.²⁴ Since then, Germany has codified a partial version of the principle of legitimate expectations in its Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), article 48(2) of which states that some types of unlawful administrative acts may not be withdrawn if the affected person has relied on them, unless the public interest justifies such a withdrawal.²⁵

In European Union law, protections closely resembling legitimate expectation safeguards were discussed as early as 1966 in *Châtillon v High Authority*.²⁶ As Quinot notes, the ‘type of representations creating expectations that has come to be protected by the doctrine of legitimate expectation [...] has been protected as such in EU law at least since the *Châtillon* case of 1966’.²⁷ In the employment context, the European Court of Justice (ECJ) referenced a ‘rule of protection of [...] legitimate confidence’ in the 1973 case *Re Civil Service Salaries: E.C. Commission v E.C. Council*.²⁸ The Council decided to adjust the remuneration and pension of European

²² Paul Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (2011) 2 *Public Law* 330, 340–41. See also Ioannis Skandalis, ‘Balancing Employer and Employee Interests: Legitimate Expectations and Proportionality under the Acquired Rights Directive’ (DPhil thesis, University of Oxford 2012) 234.

²³ Geo Quinot, ‘Substantive Legitimate Expectations in South African and European Administrative Law’ (2004) 5 *German Law Journal* 65, 68; Christopher F. Forsyth, ‘The Provenance and Protection of Legitimate Expectations’ (1988) 47 *Cambridge Law Journal* 238, 243.

²⁴ Quinot (n 23) 68.

²⁵ *Verwaltungsverfahrensgesetz* of 25 May 1976, last amended on 18 December 2018 <<https://www.gesetze-im-internet.de/vwvfg/VwVfG.pdf>>.

²⁶ Case 54/65 [1966] ECR 185.

²⁷ Quinot (n 23) 68.

²⁸ Case 81/72 [1973] ECR 575, 584.

Community officials and servants, diverging from an existing published guideline on staff salaries. The ECJ ultimately found that ‘the Council [had] failed to found the contested regulation on grounds sufficient to justify it in departing from its prior undertakings’.²⁹ Thus, the ECJ chose to safeguard the legitimate expectations of those affected.

More recently, the ECJ reiterated the criteria applying to the protection of legitimate expectations, noting that such protection ‘presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union’.³⁰ However, these assurances ‘cannot be relied upon against an unambiguous provision of EU law’.³¹

1.3 Theoretical underpinnings in the United Kingdom and European Union law

Though several of the above-mentioned continental cases pre-date Schmidt, the doctrine of legitimate expectations still likely originated independently in England and Europe. Forsyth draws on personal correspondence with Lord Denning who stated he was ‘sure [the principle of legitimate expectation] came out of [his] own head and not from any continental or other source’.³² Rather than sharing a common legal ancestor, the doctrine of legitimate expectations in England and Europe more likely evolved separately, converging to resemble one another over time. In light of these distinct origins, several scholars and judges consider that the Commonwealth and European iterations of the doctrine rest on distinct theoretical underpinnings.

In the Commonwealth, the theory behind legitimate expectations is based on principles of natural justice and fairness. Flanagan notes that ‘in its simplest sense, the concept of legitimate expectation derives from the administrative law principle that governments and public authorities must act fairly and reasonably’.³³ Echoing this sentiment, Lord Bingham notes in

²⁹ *ibid* 585.

³⁰ *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, case C-349/17 [97].

³¹ *ibid* 104.

³² Forsyth (n 23) 241.

³³ Flanagan (n 9) 284, referring to *New Zealand Association for Migration and Investments Inc v A-G*, [2006] NZAR 45, 52.

R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd that the ‘doctrine of legitimate expectation is rooted in fairness’.³⁴

By contrast, in the continental European tradition, the doctrine of legitimate expectations has been associated more closely with the promotion of legal certainty, trust in public administration, and legality. Describing the importance of legal certainty and trust to the European conception of legitimate expectations, Forsyth writes:

The judicial motivation for seeking to protect such expectations is plain: if the executive undertakes, expressly or by past practice, to behave in a particular way the subject expects that undertaking to be complied with. That is surely fundamental to good government and it would be monstrous if the executive could freely renege on its undertakings. Public trust in the government should not be left unprotected.³⁵

Though ‘regularity, predictability, and certainty in government’s dealing with the public’, have been acknowledged as the underpinnings of the doctrine of legitimate expectations in contexts outside of Europe,³⁶ these justifications are not as prominent as in European law.

2. *Legitimate expectations in employment law*

These general principles have been applied in employment matters in several jurisdictions. As with the broader administrative concept of legitimate expectations, disparities exist between jurisdictions on the doctrine’s central features, and on whether the doctrine applies exclusively to procedural rights or whether it also extends to substantive rights. While this section concentrates on jurisdictions such as England, Australia, Canada, the United States, South Africa, and New Zealand, it should be noted that the doctrine of legitimate expectations for employment matters garnered

³⁴ [1990] 1 WLR 1545, 1569-70. See also Hilary Biehler, ‘Legitimate Expectation – An Odyssey’ (2013) 50 Irish Jurist 40, 41.

³⁵ Forsyth (n 23) 239.

³⁶ See, for instance, SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn Sweet & Maxwell 1995) 417, cited in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 [30].

judicial recognition in jurisdictions as diverse as Nigeria,³⁷ Botswana,³⁸ and Bangladesh.³⁹

The general acceptance of legitimate expectations in employment matters has varied between jurisdictions and within jurisdictions over time. The early promotion and appointment cases of *Paterson v Dunedin City Council*⁴⁰ out of New Zealand and *Hamblin v Duffy*⁴¹ from Australia, for instance, were rendered the same year but show a reluctance to apply principles of natural justice in the former, and an inclination to apply natural justice based on legitimate expectations in the latter.⁴² In New Zealand, however, this position has changed over time. Departing from a line of cases opposing legitimate expectations in redundancy and dismissal matters in the 1990s⁴³ and 2000s,⁴⁴ New Zealand has since enacted legislation establishing a duty of good faith in all employment matters, a statute providing natural justice protections that extend even further than those traditionally afforded to legitimate expectations in common law jurisdictions.⁴⁵

2.1 Main features of legitimate expectations in employment matters

In the English employment context, the doctrine of legitimate expectations rests on whether the relevant authorities have made objective

³⁷ *Ibezukwu v University of Jos* [1990] 4 NWLR (Pt. 146) 598, 609. See also David Tarh-Akong Eyongndi, 'The Nigerian Employee and the Quest for Confirmation: Examining the Quagmire of Probationary Status' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 61, 65.

³⁸ *Mokokonyane v Commander of the Botswana Defence Force*, [2000] 2 BLR 102 (CA). See also Christopher F Forsyth, 'The Protection of Legitimate Expectations: Some Pitfalls for Botswana to Avoid' (2006) 3 University of Botswana Law Journal 5, 11.

³⁹ *Bangladesh Biman Corporation v Rabia Bashri and others* [2003] 55 DLR (AD) 132.

⁴⁰ *Paterson v Dunedin City Council* [1981] 2 NZLR 619.

⁴¹ *Hamblin v Duffy (No. 2)*, [1981] 37 ALR 297.

⁴² Hodgson (n 8) 712-13.

⁴³ *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243 (CA); *Aoraki Corporation Ltd v McGavin*, [1998] 3 NZLR 276 (CA). See also Gordon Anderson, 'Good Faith in the Individual Employment Relationship in New Zealand' (2011) 32 Comparative Labor Law and Policy Journal 685, 704-06.

⁴⁴ *New Zealand Fasteners Ltd v Thwaites* [2000] 2 NZLR 565 (CA); see also Anderson (n 43) 707.

⁴⁵ Anderson (n 43).

commitments.⁴⁶ These commitments can be established through express or implied promises, or past or regular conduct.⁴⁷ In making such determinations, courts have considered the language used by these authorities, as well as the manner in which representations were made.⁴⁸ Further, where an employee has relied on an employer's objective commitment and suffered detriment as a result of that reliance, courts will be more inclined to find a legitimate expectation and protect it.⁴⁹

An important distinction between jurisdictions is whether subjective awareness or reliance are needed for legitimate expectations to be protected. At a general level, for instance, in the Australian immigration case of *Ministry for Immigration and Ethnic Affairs v Teoh*, McHugh J indicates that a 'person cannot lose an expectation that he or she does not hold',⁵⁰ suggesting subjective knowledge of the expectation is required. Professor Paul Daly, however, argues that neither knowledge nor reliance should be needed to justify legitimate expectation protections, because judicial enforcement can play a role in good administration even without these elements.⁵¹ Similarly, in the context of European law, Skandalis suggests that while detrimental reliance can certainly increase the likelihood that a legitimate expectation will be protected, it is not a prerequisite.⁵² Case law

⁴⁶ *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, 408-09. See also Muayad Kamal Hattab, 'The Doctrine of Legitimate Expectation and Proportionality: A Public Law Principle Adopted into the Private Law of Employment' (2018) 39 *Liverpool Law Review* 239, 246.

⁴⁷ *ibid.*

⁴⁸ See *National Farmers' Union and another v Secretary of State for the Environment, Food and Rural Affairs and another*, [2003] All ER (D) 55; *Attrill v Dresdner Kleinwort Ltd*, [2013] EWCA Civ 394.

⁴⁹ Daphne Barak-Erez, 'The Doctrine of Legitimate Expectations and the Distinction between Reliance and the Expectation Interests' (2005) 11 *European Public Law* 583, 595. See also Skandalis (n 22) 235.

⁵⁰ *Minister of State for Immigration and Ethnic Affairs v Teoh*, [1995] 3 LRC 1, 37 (HCA).

⁵¹ Paul Daly, 'A Pluralistic Account of Deference and Legitimate Expectations: Pluralism in Action' (October 23, 2015), *Administrative Law Matters*, online: <<https://www.administrativelawmatters.com/blog/2015/10/23/a-pluralist-account-of-deference-and-legitimate-expectations-pluralism-in-action/>> [<https://perma.cc/HD7R-33LZ>].

⁵² Skandalis (n 22) 235, 241.

from certain American states similarly indicates that legitimate expectations require neither knowledge nor reliance.⁵³

2.2 Procedural and substantive protections

Another aspect where domestic law on legitimate expectations diverges between jurisdictions is whether the protection extends to procedural matters only or to substantive ones as well. While substantive legitimate expectations protect those interests in a substantive right (for instance the right of an employee to a loan at a particular interest rate outlined in an employee handbook⁵⁴), procedural legitimate expectations can ensure fair procedures for the continuance or acquisition of a benefit where there is an interest in that benefit (such as giving reasons for promotion decisions), or the adherence to past or promised procedures.⁵⁵

As previously described, English courts have shown a willingness to protect substantive legitimate expectations in general. This is also true in the employment context, as illustrated for instance by *French v Barclays Bank*.⁵⁶ Mr. French, an employee of Barclays, was due to relocate cities. An applicable staff handbook offered an interest-free bridging loan, but, following a collapse in the housing market, the employer sought to readjust the loan arrangement. While the case fell outside of traditional contract rules, the court decided to protect Mr. French's substantive legitimate expectations, holding that the bank had made a clear commitment through its prior conduct towards other employees and the applicability of the handbook provision at the time of the loan.⁵⁷ Rather than focus on the Bank's reasons, or Mr. French's right to a hearing regarding the decision, the judgment focused on the substantive loan itself.

In South Africa, courts have also shown a willingness to protect substantive legitimate expectations in the employment context, despite some

⁵³ *Langdon v Saga Corp.*, 569 P.2d 524, 527 (Oklahoma CA 1977). See also Paul Berks, 'Social Change and Judicial Response: The Handbook Exception to Employment-At-Will' (2000) 4 Employee Rights and Employment Policy Journal 231, 269.

⁵⁴ *French v Barclays Bank plc* [1998] IRLR 646 (CA).

⁵⁵ Elisabeth Laing, 'Legitimate Expectation' (2013) 18 Judicial Review 153, 159.

⁵⁶ *French* (n 54).

⁵⁷ *Hattab* (n 46) 251.

initial hesitation.⁵⁸ Hoexter notes that in a ‘growing number of cases [...] expectations seem actually to have been enforced in a substantive manner, particularly in the area of employment, even if this has not officially or consciously been achieved by means of the legitimate expectation doctrine’.⁵⁹ Vettori proposes that such substantive protections in South Africa may extend to contract renewal in instances where an employee has a legitimate expectation of renewal but, for instance fears non-renewal based on HIV status.⁶⁰ Further, substantive legitimate expectations are embedded statutorily in South Africa’s Labour Relations Act. In defining unfair dismissal and unfair labour practices, article 186(1)(b) of this Act describes a situation in which ‘an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it’.⁶¹ The remedies for unfair dismissal include a court power to order that the employer reintegrate the employee.⁶² Further research could explore the prevalence of such statutory protections across the African continent; Zimbabwe, for instance, has similar substantive protections in its own Labour Act.⁶³

In contrast with these positive postures, other jurisdictions have refused to protect substantive legitimate expectations. At a general level, Canadian⁶⁴ and Australian⁶⁵ courts have rejected that notion, confining the doctrine to procedural guarantees. In the employment context, Indian

⁵⁸ See, for instance, Daniel Malan Pretorius, ‘Letting the Unruly Horse Gallop in the Field of Private Law: The Doctrine of Legitimate Expectation in Purely Contractual Relations’ (2001) 118 South African Law Journal 503.

⁵⁹ Cora Hoexter, ‘The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 165, 178.

⁶⁰ Stella Vettori, ‘Employer Duties towards Employees Infected with HIV/AIDS’ (2007) 19 South African Mercantile Law Journal 151, 155.

⁶¹ Labour Relations Act (No. 66 of 1995), s 186(1)(b) <<http://www.labour.gov.za/DOL/legislation/acts/labour-relations/read-online/document.2008-05-29.2826668274>>.

⁶² *ibid* s 193 (1)(a).

⁶³ For instance, section 12(B)(3)(a) of the Act reads: ‘An employee is deemed to have been unfairly dismissed if, on termination of an employment contract of fixed duration, the employee had a legitimate expectation of being re-engaged’: Labour Act, Government Gazette, 1996 (Chapter 28:01).

⁶⁴ Halsbury’s Laws of Canada (online), *Promissory Estoppel*, ‘Nature of Estoppel: Relationship with Doctrine of Legitimate Expectations’ HES-207.

⁶⁵ *Attorney General for New South Wales v Quin*, [1990] 170 CLR 1, [1990] HCA 21.

courts have categorically excluded the protection of substantive legitimate expectations: In *Secretary, State of Karnataka v Umadevi*,⁶⁶ the question arose of whether daily, casual, or temporary workers whose terms had been repeatedly extended, had a substantive legitimate expectation of ‘regularisation’.⁶⁷ Chandrachud notes how the five-judge bench ‘rejected the claim’ and ‘vetoed substantive legitimate expectations claims in all comparable employment contexts’ a position subsequently confirmed in *UP Gram Panchayat v Daya Rama Saroj*.⁶⁸ Unwilling to expose the courts to ‘a new class of “litigious employment” jurisprudence’, the Indian Supreme Court’s decision provided a clear message to the High Courts to not allow substantive legitimate expectation cases in the employment context.⁶⁹

This overview of the law governing legitimate expectations in various jurisdictions provides some comparative context and valuable insights for understanding the protection of legitimate expectations in global administrative law.

III. Legitimate expectations in global administrative law

We turn now to the application of the doctrine of legitimate expectations by international administrative tribunals. We first explore the various ways in which these tribunals have conceptually justified the existence of that doctrine, before analyzing the criteria they use to apply it. Lastly, we briefly discuss the measure of reparation they usually afford when a legitimate expectation has been affected.

I. Conceptual foundations

In the realm of global administrative law, the protection of legitimate expectation takes its source not in the statutes and regulations of international organizations, but rather in the less tangible pool of general principles. The question that arises, then, is whether that principle is self-standing or whether it is justified and explained by broader, already-existing principles.

⁶⁶ *Secretary, State of Karnataka v Umadevi*, AIR 2006 SC 1806.

⁶⁷ Chintan Chandrachud, ‘The (Fictitious) Doctrine of Substantive Legitimate Expectations in India’ in Groves and Weeks (n 59) 245, 250-51.

⁶⁸ *ibid* 251; *UP Gram Panchayat v Daya Rama Saroj* [2007] 2 SCC 138.

⁶⁹ Chandrachud (n 67) 250-51.

In early cases, some administrative tribunals took the former view, invoking legitimate expectations without tying them to broader principles. As early as 1955, in a series of cases involving UNESCO employees, the ILOAT confirmed that legitimate expectations and promises had to be protected and enforced.⁷⁰ Within these employees, a certain Mr. Duberg was employed under a fixed-term contract. Shortly before the end of his term, he refused to answer a questionnaire from his home country about his national loyalty. The Director-General of his organization then informed him that his contract would not be renewed. Mr. Duberg challenged that decision on multiple grounds, including that the Director-General had issued a general measure in which he ‘decided that all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments.’⁷¹ Mr. Duberg argued that the measure was binding and had to be upheld. The ILOAT granted Mr. Duberg’s claim, and concluded based on the general measure that ‘an official who combines all the necessary qualities has a legitimate expectancy of being offered a new appointment in the position which he occupied.’⁷² However, the ILOAT made that statement without justifying it or describing the criteria that had to be fulfilled in order for a promise to be binding.

That early approach changed over the years, as administrative tribunals started to identify the source and scope of the notion. In subsequent cases such as *Agarwala and Gieser*, the ILOAT explained that the protection of legitimate expectations was in fact based on the broader principle of good faith, which permeates the relationship between an organization and its public servants.⁷³

The case of *Gieser* is particularly important, and has been cited numerous times since it was issued in 1986. Mr. Gieser had been working for eleven years as a fitter when the European Molecular Biology Laboratory offered him a job, for ‘three years to begin with’. He accepted the job and his contract was renewed twice. Praising his work, his supervisors told him

⁷⁰ ILOAT Judgments Nos 17 (1955); 18 (1955); 19 (1955); 21 (1955).

⁷¹ ILOAT 17 (n 70).

⁷² *ibid.*

⁷³ ILOAT Judgment No. 782 (1986). See also ILOAT Judgment No. 121 (1968).

that his contract could soon be converted into an indefinite appointment. Yet, at the end of his third contract, the EMBL Head of Personnel refused to appoint him under an indefinite contract, and also refused to renew his appointment. Mr. Gieser alleged that the non-renewal breached a binding promise made to him at the time of his appointment, that he would soon get an indefinite appointment. He also said that he had left his previous job precisely because of that promise. The ILOAT held that ‘according to the rules of good faith anyone to whom a promise is made may expect it to be kept, and that means that an international official has the right to fulfilment of a promise by the organisation that employs him.’⁷⁴

More recently, the ILOAT reiterated that the protection of promises flows from the duty to act in good faith. In a case concerning the enforceability of a promise to pay damages to an employee, the tribunal said that ‘it is settled by the Tribunal’s case law that, according to the rules of good faith, anyone who was a staff member of an organisation and to whom a promise was made, may expect that promise to be kept by the organisation.’⁷⁵

Other tribunals such as the Arbitral Tribunal of the Commonwealth Secretariat and the Administrative Tribunal of the Council of Europe have also identified good faith as the conceptual foundation of the protection of legitimate expectations.⁷⁶ However, the World Bank Administrative Tribunal seems to adopt a slightly different approach, grounding that protection in the principle of fairness rather than good faith, in a manner that reminds of English case law.⁷⁷ In *Lavelle*, in fact, the WBAT directly cited English jurisprudence to conclude that the principles of fairness and abuse of power could lead, in some cases, to the protection of legitimate expectations:

Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a

⁷⁴ ILOAT Judgment No. 782 (1986) consid 1.

⁷⁵ ILOAT Judgment No. 3204 (2013) consid 9. See also ILOAT Judgment No. 3148 (2012) consid 7; ILOAT Judgment No. 3005 (2011) consid 12.

⁷⁶ CSAT Judgment No. 11 (2006) para 27; ATCE Decisions Nos 133-145 (1986) para 79.

⁷⁷ (n 33), (n 34) and accompanying text.

proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.⁷⁸

That said, the distinction between these two conceptual foundations may in fact be of little practical import. Indeed, the ILOAT has sometimes referred to fairness alongside good faith, noting that it ‘has often affirmed the principle of good faith by which international organisations are bound and their duty to treat their staff members with consideration and fairness’.⁷⁹ In turn, the WBAT has referred to the Bank’s ‘obligation to act in good faith’ on some occasions, albeit not in the context of the protection of legitimate expectations.⁸⁰ Both principles are thus part of the ecosystem of these organizations – and arguably all international organizations – and may therefore serve to justify the protection of legitimate expectations.

In any event, and no matter its conceptual foundation, the doctrine of legitimate expectations is limited to specific circumstances and its scope is delimited by various criteria, to which we now turn.

2. *Criteria and application*

While the wording of the specific criteria applied to determine whether a promise ought to be protected and enforced vary across international organizations, they appear to be substantially similar. The most comprehensive framework in that regard has been established by the ILOAT, which explained

that the promise should be substantive; [...] that it should come from someone who is competent or deemed competent to make it; that breach should cause injury to him who relies on it, and that the position in law should not have altered between the date of the promise and the date on which fulfilment is due. It does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour.⁸¹

⁷⁸ WBAT Decision No. 301 (2003) 24, citing Coughlan (n 16) 57.

⁷⁹ ILOAT Judgment No. 1479 (1996) consid 12.

⁸⁰ See, for instance, WBAT Decision No. 321 (2004) para 69; WBAT Decision No. 499 (2014) para 73.

⁸¹ ILOAT 782 (n 73) consid 1.

These criteria have been reiterated and applied on several occasions by the ILOAT and other administrative tribunals. Recently, the ILOAT also clarified that ‘the third element has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of non-fulfilment of the promise.’⁸²

The WBAT also applies similar criteria, although not in the exact same terms. In *Bigman*, the tribunal referred to the first three criteria, and arguably did not have to refer to the fourth because it was not at issue:

The first question [...] is whether there was in fact a promise made [...] and if so the nature of the promise [...] The question that follows is whether such terms and conditions were decisive [...] [The third] question [is the promisor’s] authority to make a promise of the kind discussed above.⁸³

The Administrative Tribunal of the North Atlantic Treaty Organization similarly described the applicable criteria as follows:

First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the NATO body. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.⁸⁴

These criteria are broadly similar to the above-mentioned criteria developed by English courts and the ECJ, although the English courts add a final step to the test, where they assess the general fairness of the protection of a legitimate expectation, having regard to broader policy considerations.⁸⁵ By contrast, other tribunals such as the Administrative Tribunal of the Council of Europe appear not to have adopted a specific framework to apply the doctrine of legitimate expectations.

⁸² ILOAT Judgment No. 3619 (2016) consid 14. See also ILOAT 3204 (n 75) consid 9.

⁸³ WBAT Decision No. 209 (1999) paras 6-9.

⁸⁴ ATNATO Judgment No. 2013/3 para 30. See also ATNATO Judgments Nos 2015/28 para 70; 2015/1 para 70.

⁸⁵ See, for instance, *Finucane* (n 17).

The following sections examine how these criteria have been applied by the ILOAT and other tribunals, and pay particular attention to the distinctions between the protection of promises and other doctrines such as the enforceability of a practice and the protection of acquired rights.

2.1 First criterion: a clear and effective promise

The first criterion is ‘that there must be a promise to act or not to act or to allow’.⁸⁶ This criterion essentially serves to determine whether the promise exists, and whether its contents are clear and effective.

(i) The existence of the promise: a matter of evidence

The existence of a promise does not depend on its form. As the ILOAT said in Gieser, ‘it does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour’.⁸⁷ However, the form of a promise will often affect the evidence available to substantiate it which, in turn, will affect the likelihood of the complainant successfully establishing its existence.

A written promise will necessarily be easier to prove than a verbal one. In *P v EPO*, a lawyer challenged the decision not to convert her fixed-term contract into a permanent one and not to select her for a vacant permanent position. She claimed that various promises in that regard, both verbal and written, had been made to her in the course of her employment. While the ILOAT found that the written promise did exist, it held that the oral one was not sufficiently reliable to be binding, because it ‘was disputed and in any event was founded on hearsay’.⁸⁸ The written promise was comparatively much more compelling than the verbal one.

Similarly, in *Annabi*, the complainant requested the conversion of his fixed term contract into a continuing one, arguing that the ILO had broken a promise made to him at the time of his recruitment. The ILOAT found that the promise did exist because of a telex that the chief of Personnel Development Branch of the ILO had sent to the Director of the Personnel

⁸⁶ ILOAT 782 (n 73) consid 1.

⁸⁷ *ibid.*

⁸⁸ ILOAT 3619 (n 83) consid 12. See also ILOAT Judgment No. 1667 (1997) consid 5.

Division of the FAO just before the complainant's recruitment, which said 'that the ILO would offer him a contract for two years' but also that he could 'expect to receive one without limit of time in five or six years and that the post was one of the most secure in the Organization'.⁸⁹ It is apparent from the ILOAT's reasons that the promise would not have been enforced had it not been put in writing.

This does not mean that an oral promise cannot be enforced, but in such circumstances it will generally be easier to prove with corroborating evidence.⁹⁰ That evidence may come, for instance, from other testimonies. In Gieser, the complainant relied exclusively on a verbal promise made at the time of his hiring. Three of the witnesses denied that the promise was made, but one confirmed that it had been made. The ILOAT found 'that the making of the oral promise [was] established' because 'there [was] no reason to question the impartiality' of that last witness, who '[was] still on the staff and plainly [had] no reason to oppose' the Organization.⁹¹ In essence, it came down to an appreciation of credibility.

Corroborating evidence may also come from the absence of denial by the promisor. In Schmidtkunz, the complainant alleged that the Director-General had promised him a three-step increase within his grade. The Assistant Director-General denied that the promise was ever made, but the Tribunal concluded otherwise. It noted that 'while the Director-General may communicate within the Organization through others acting on his behalf, the best evidence available must be offered in proceedings before the Tribunal. In this instance, this would have been direct denial by the Director-General himself'.⁹² Again, the credibility of the testimony adduced was central to the conclusion of the case.

Even when corroborating evidence is available, the tribunal may favor the contradicting testimonies of other people within the organization. In Riseley, for instance, the complainant relied on her allegations and on testimony by another staff member to prove the existence of a promise. The ILOAT dismissed her claim, stating that 'there [was] no reason to accept

⁸⁹ ILOAT Judgment No. 1481 (1996) consid 3.

⁹⁰ ILOAT Judgment No. 3362 (2014) consid 8.

⁹¹ ILOAT 782 (n 73) consid 3.

⁹² ILOAT Judgment No. 1781 (1998) consid 13.

one version rather than the other and the burden of proof [was] on the complainant.⁹³ In CC, the WBAT also favoured the declaration of the person who had allegedly made the promise over that of the complainant.⁹⁴

In cases where no corroborating evidence is available, it will generally be much harder to prove the existence of an oral promise. In Colagrossi, for instance, the complainant argued that she had accepted employment with the FAO on the strength of an assurance by her interviewer that her appointment would soon be converted into a continuing one. The ILOAT rejected her claim, concluding that there was ‘no independent evidence [...] to suggest that she was given any such assurance’.⁹⁵ In other words, the complainant’s own testimony was insufficient to establish the existence of a promise.

Similarly, in Douglas, the complainant alleged that his organization had promised to train him in machine translation. However, the ILOAT dismissed his claim and held that the employee had merely ‘presumed on recruitment that, having found him wanting in some respects, the [organization] would be training him up’.⁹⁶ Such a presumption was insufficient to establish a clear and effective promise.

Lastly, where an alleged promise is contradicted by clear evidence, it will most often be rejected by the tribunal. In Gianoli, the complainant relied on a promise of extension that was evidenced, in his opinion, by letters from the organization confirming the previous extensions of his contract. However, the ILOAT found that ‘none of the letters to him extending his appointment may be construed as a promise or commitment; in fact he was told quite plainly that the purpose of extension was to enable him to finish his work and allow a “smooth transition” for his successor’.⁹⁷ That statement contained in the letters presented to the ILOAT contradicted the alleged promise, which could therefore not be enforced.

⁹³ ILOAT Judgment No. 892 (1988) consid 4.

⁹⁴ WBAT Decision No. 482 (2013) paras 37-39; WBAT Decision No. 316 (2004) paras 36-40.

⁹⁵ ILOAT Judgment No. 1044 (1990) consid 2. See also ILOAT Judgment No. 703 (1985) consid 7; ILOAT Judgment No. 445 (1981) consid 2.

⁹⁶ ILOAT Judgment No. 1040 (1990) consid 5.

⁹⁷ ILOAT Judgment No. 956 (1989) consid 5.

In the same way, in Breuckmann (No. 3), the complainant asserted pension rights based on an alleged promise of the Director of Personnel and Administration at the time of his appointment. The ILOAT rejected his claim, noting that no evidence had been adduced to that effect, and that a letter written by the complainant confirmed instead that he had ‘merely discussed the question of acquisition of pension rights in the hope that the competent bodies would take a decision in his favour’, which was far from being a clear promise.⁹⁸

These cases show that absent compelling evidence that a promise was effectively made by the organization, administrative tribunals will simply dismiss a claim based on that promise, without even delving into its contents and the authority of the person who made it. The existence of a promise is thus essentially a threshold issue for any legitimate expectation claim.

(ii) Contents of the promise: clear and effective

The second part of the first criteria is whether the contents of the promise are sufficiently clear and effective to be binding. The effectiveness of a promise often depends on whether it is qualified or not or, in the words of the United Nations Appeals Tribunal, whether it constitutes a ‘firm commitment’ by the organization.

In Remont, for instance, the complainant was employed at the P.5 level but alleged that he had accepted a P.4 appointment on the force of a promise made to him that the position would later be upgraded to the P.5 level. The ILOAT concluded that there was no such promise, because ‘the organisation had told the complainant quite plainly from the outset that the upgrading of his post in Tunisia to P.5 would entail first completing a certain procedure [...] but it could not promise and had in fact never promised any positive outcome’.⁹⁹ In other words, the ‘promise’ made to the complainant was qualified by a condition precedent – the completion of a certain procedure – and was therefore not a ‘firm commitment’.

Similarly, in Waliullah, the complainant relied upon minutes to allege that a promise had been made that his appointment would be extended.

⁹⁸ ILOAT Judgment No. 360 (1978) consid 4.

⁹⁹ ILOAT Judgment No. 228 (1974) consid 3.

The ILOAT dismissed his claim, concluding that those minutes ‘merely show[ed] the Organisation’s wish to find some means of retaining the complainant’s services after the expiry of his appointment’ and ‘contain[ed] no promise either of a further extension or of a new appointment, still less any commitment’.¹⁰⁰ In other words, the commitment was not clear enough to form a binding promise, since it was only a wish of the organization.

In *B v CDE*, the complainant relied on a letter as evidence of an agreement to extend his appointment by seconding him to another organization. However, as the ILOAT noted while dismissing his claim, he himself admitted ‘that the letter [in question did] not mention any agreement or undertaking [...] but contain[ed] only indications, and that there [was] no other document in the file to show that these indications were of such a precise and unconditional nature that they might be deemed to constitute proof of assurances to him that his contract would be renewed’.¹⁰¹ Once again, the alleged promise was tied to a condition – that there be further discussions about the complainant’s secondment – with the result that it could not be enforced by the Tribunal.

The WBAT applies similar principles and refuses to enforce qualified promises. In *Mathew*, it found that the organization ‘did promise to convert the Applicant’s appointment into a permanent one but that the fulfillment of that promise was conditional upon the Applicant’s satisfactory performance’.¹⁰² In light of the evidence, which showed that the applicant’s performance was indeed unsatisfactory and that the condition was therefore unfulfilled, the tribunal refused to enforce the promise.

Similarly, in *Zeynep Zerrin Koçlar*, the complainant relied on a statement that her contributions to the organization would ‘be an important factor in the decision on whether to extend her fixed term contract’. But as the WBAT noted, it was ‘unable to discern from this statement, or from the record adduced by the parties, a promise made by the Bank, either expressly or by unmistakable implication, which would warrant an inference by the Applicant that she had a right to the renewal of her contract’.¹⁰³ Indeed,

¹⁰⁰ ILOAT Judgment No. 190 (1972).

¹⁰¹ ILOAT 3148 (n 75) consid 8.

¹⁰² WBAT Decision No. 103 (1991) paras 26-28.

¹⁰³ WBAT Decision No. 441 (2010) para 31.

a commitment to consider a factor was far from being an unconditional promise of extension.

These cases are examples of qualifications that were expressly made at the time of making the promise. But a qualification may also result from external circumstances that make it impossible for the promise to be effective as is. In *Gross*, for instance, the promise alleged by the complainant was a promise by the FAO that her secondment would be extended to five years and that she would be granted a three-year appointment. The ILOAT declined to enforce the alleged promise, noting that ‘to be enforceable they would have had to be agreed to by both organisations, and the complainant herself does not contend that the United Nations endorsed them’.¹⁰⁴

In *Nasrawin*, the complainant alleged a promise of renewal based on a memorandum by the Director-General in which the latter indicated that he had decided to renew his appointment. The ILOAT dismissed the claim, noting that while the memorandum quite clearly indicated that there had been a decision from a competent authority to renew the complainant’s appointment, this ‘was not a real decision to appoint someone but an internal formality prior to such a decision’, because the administrative services were asked to secure the funds for the post and to establish the documents necessary to proceed with the appointment.¹⁰⁵ The absence of formal notification to the complainant was also a relevant fact.

The Organisation internationale de la Francophonie Appeals Tribunal follows similar principles. In two recent decisions, the complainants alleged that the provisional budget of the organization contained a promise that they would benefit from an increase in the mandatory retirement age. The tribunal dismissed that claim, noting that the budget was not effective in itself, and that a promise could not result from it unless it was followed by indications of the same nature by the competent authorities. In that case, there were no such indications, since the administrator had cautioned that the budget could be modified.¹⁰⁶

¹⁰⁴ ILOAT 703 (n 95) consid 7.

¹⁰⁵ ILOAT Judgment No. 2112 (2002) consid 7.

¹⁰⁶ OIFAT Judgment No. 7 (2018) para 27. See also OIFAT Judgment No. 5 (2017) paras 33-36.

In short, it will be insufficient for a complainant to show an intent, an indication or even a decision of the organization to establish a promise, if that decision is not shown to be clear and effective.

(iii) A promise based on circumstances: implicit expectations of renewal

Despite these stringent criteria, the mere behavior of an organization or of its official may still give rise to an enforceable promise. A question that is raised quite frequently in that regard is whether a legitimate expectation of renewal can arise simply because of an initial appointment, or because of a long period of service. In general, even if some tribunals have acknowledged that these circumstances may give rise to expectations, they have refrained from protecting them in substance and have instead concluded that they lead to heightened obligations of due process in deciding not to extend or renew an appointment.

In such circumstances, regard must be had for the specific criteria that apply to non-renewals, in addition to those governing legitimate expectations. As the ILOAT explained:

A decision not to extend a fixed-term appointment or not to convert it into an appointment of indeterminate duration falls within the [organization's] discretionary authority. Hence the Tribunal may quash it only if it was taken without authority, violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with misuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.¹⁰⁷

This principle was expressly adopted by other tribunals, including the Administrative Tribunal of the Organization for Economic Co-operation and Development.¹⁰⁸ Similar principles are also applied by the United Nations Appeals Tribunal, which held that:

It is well established that a party to a fixed-term appointment has no expectation of renewal of that contract. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, it

¹⁰⁷ See, for instance, ILOAT Judgments Nos 251 (1975); 1349 (1994); 1450 (1995); 1696 (1998).

¹⁰⁸ ATOECD Judgments Nos 73 (2014) paras 29-30 and 76 (2014) para 16.

must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case.¹⁰⁹

Similar principles are also applied by the WBAT, which considers ‘that a restriction on the Bank arises when circumstances warrant the inference by a staff member that the Bank has indeed made the promise to extend or renew his or her appointment either expressly or by unmistakable implication’.¹¹⁰

In line with these principles, an expectation of renewal will usually result not from the mere existence of an appointment, but rather from additional compelling circumstances. As C.F. Amerasinghe explains in his treatise on *The Law of International Civil Service*:

Expectancy is a state of mind which has been created by positive action taken by the holder of a contract coupled with specific behavior on the part of the administrative authority. The concept of legitimate expectancy has been created in spite of the fact that in general the written law of organizations explicitly excludes any expectancy of continued employment for holder of fixed-term contract. Hence as a result of the creation of the concept of expectancy, *the written laws prevail only in the absence of any countervailing circumstances, surrounding facts or behavior on the part of the authority, which could have created in the mind of the holder of the contract an expectancy of continue employment*. Where the required expectancy can be shown to exist, the holder of the contract has certain rights in respect of the renewal or conversion of his contract resulting from such expectancy (emphasis added).¹¹¹

In essence, the staff member has the burden ‘to show a legitimate expectancy of renewal or that the non-renewal of his fixed-term appointment

¹⁰⁹ UNAT Judgment No. 2015-UNAT-522 para 24. See also UNAT Judgments Nos 2014-UNAT-411 para 26; 2017-UNAT-715 para 46; 2016-UNAT-660 para 25.

¹¹⁰ WBAT Decision No. 506 (2015) para 59, referring to WBAT Decision No. 299 (2003) para 10. See also WBAT Decisions Nos 175 (1997) para 13; 339 (2005) paras 30-33. See also ATCE Decision No. 2013/542 and 2014/544 para 49, where the ATCE concluded that ‘the fact that the appellant was dedicated to his job and discharged functions pertaining to a higher grade does not constitute decisive evidence that the principles of legitimate trust and expectations were infringed through the termination of his employment’.

¹¹¹ Chittharanjan Felix Amerasinghe, *The Law of the International Civil Service* II (2nd edn Clarendon Press 1994) 93; cited by the AfDBAT in various cases including Judgments Nos 44 (2005) para 42 and 85 (2013) para 43.

was arbitrary or motivated by bias, prejudice or improper motive against the staff member'.¹¹² In other words, 'the non-expectancy of renewal [can] be challenged if evidence [is] produced leading to the conclusion that an express and concrete decision, promise or commitment of renewal was communicated to a staff member, consequently raising such an expectation'.¹¹³

However, since many organizations specifically provide in their contracts of employment that fixed-term appointments do not carry any expectation of renewal, some administrative tribunals such as the tribunal of the African Development Bank have concluded that 'such situations will [...] be exceptional, given that such expectation would be contrary to the express wording of the employment contract. The evidence supporting the creation of such an expectation must therefore be compelling'.¹¹⁴ In the words of the WBAT, those are 'unusual circumstances'.¹¹⁵

In that context, it is clear that the simple fact of having a contract cannot ensure its renewal.¹¹⁶ However, the ILOAT has concluded that the expectation of renewal that results from the initial appointment imposes upon the organization the duty to examine whether the renewal is possible and, if not, to motivate and explain its decision. As the ILOAT once explained:

Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for – and in practice invariably receives – a

¹¹² UNAT Judgment No. 2015-UNAT-503.

¹¹³ UNAT Judgment No. 2016-UNAT-678 para 32.

¹¹⁴ AfDBAT Judgment No. 104 (2018) para 55.

¹¹⁵ WBAT Decision No. 482 (2013) para 36.

¹¹⁶ See, for instance, ATNATO 2015/1 (n 84) para 71, noting that 'the offer of a three-year contract [...] did not create a legitimate expectation [that] this contract would be renewed'.

decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that *a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly* (emphasis added).¹¹⁷

That due process obligation is heightened when an employee has been working for an organization for several years. While that employee cannot expect his or her employment to continue indefinitely, long service gives rise to more stringent procedural obligations on the part of the organization.¹¹⁸

In Devaux, for instance, the Administrative Tribunal of the Council of Europe considered a case where the plaintiff had been working for seventeen years on temporary and fixed-term contracts. When her latest contract expired, the rules required her to take one year off in order to be eligible again for employment. However, her projects were still ongoing and funded, and therefore the organization exceptionally provided her with a three-month extension, on the understanding that there was no further possibility of renewal. When the organization indeed refused to further extend her contract, the plaintiff complained and asked for her reinstatement. Acknowledging that she 'had no vested right to be offered a new temporary or other contract that would have allowed her to continue working for the Organisation', because 'the fact that appointments have been renewed in the past does not amount to a promise of renewal', the Tribunal nevertheless upheld her complaint, holding that she 'deserved to be treated with greater respect' due to her many years of service, and that the organization's conduct was contrary to good faith, since its conduct in waiving the waiting period for a first time should have led to the plaintiff's continued employment.¹¹⁹ Despite clear rules on the renewal of fixed-term contracts and the absence of a clear promise of renewal, the procedural expectations arising from long years of service took precedence.

¹¹⁷ ILOAT Judgment No. 675 (1985).

¹¹⁸ See, for instance, AfDBAT 44 (n 111) paras 58-64.

¹¹⁹ ATCE (n 2) paras 108-109.

In case No. 73, the Administrative Tribunal of the Organization for Economic Co-operation and Development considered whether the decision not to convert the applicant's appointment from a fixed-term appointment to an open-ended one had to be upheld. The Tribunal noted that a process had been put in place by the organization in order to provide for such a conversion to all officials of the organization, and that in the applicant's case, the process had not been correctly followed. It is therefore because of that lack of process that the Tribunal overturned the decision not to provide the applicant with permanent employment. The Tribunal concluded that as part of that process, 'given his experience acquired prior to 1997 and also his long career within the Organisation in relevant functions, the Applicant had the legitimate expectation that his fixed-term contract would be converted to an open-ended contract'.¹²⁰

Similarly, in *Garcin*, the ILOAT came to the conclusion that 'a lengthy period of satisfactory service' alone 'entitled [the complainant] legitimately to expect the possibility of making a career within the organisation'.¹²¹ However, the ILOAT did not directly protect that expectation, but rather held that in such circumstances the decision of the Director-General not to renew *Garcin's* contract had to 'be taken only while fully respecting the provisions of the Staff Regulations and Rules in order to surround the free decision of the Director-General with the guarantees imposed in the interests both of the organisation and of the official concerned'.¹²² In other words, the Organisation was expected to act within the strict confines of its powers and procedures in order to disregard the expectation that long years of service had created.

In *Hermann*, the ILOAT identified a similar expectation created by a long period of satisfactory service – 15 years in that case – and held that that expectation meant that the employee in question, whose position had been abolished, 'should be treated in a manner more appropriate to his situation', by providing him 'any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates'.¹²³

¹²⁰ ATOECD Judgment No. 73 (2014) para 44.

¹²¹ ILOAT Judgment No. 32 (1958).

¹²² *ibid.*

¹²³ ILOAT Judgment No. 133 (1969). It is worth noting, however, that the Tribunal also found support in article 109.5(b) of the Staff Rules of the organization, which provided

Again, while not binding on the organization, that implicit expectation meant that the organization was restricted in its exercise of discretion.

In such a case, the wording of the applicable rules may also play a role. Indeed, in *Hrdina*, the ILOAT refused to come to the same conclusion, holding that the ILO Staff Regulations provided in their article 4.6(d) that fixed-term appoints carried no expectation of renewal, and did not contain any provision 'requiring the Organisation to take account of the duration of the appointment'.¹²⁴ It therefore refused to quash the non-renewal of an employee who had been at the service of the ILO for approximately six years. In that case however, contrary to some of the above-mentioned cases, it seems that the non-renewal process was duly followed.

Similarly, in *De Sanctis*, the ILOAT refused to quash the non-renewal of an appointment that was justified by the abolition of the employee's post.¹²⁵ While the ILOAT recognized that 'considering the length of his service the complainant might have expected to be kept on', it held that the Director-General had not exceeded his discretionary authority in deciding not to renew the employee's appointment.¹²⁶ The Tribunal also concluded that the simple fact that the complainant had 'served the FAO for longer than the successful candidate' to a post to which he had applied during his service for the organization, did not justify quashing that appointment, since other criteria had to be considered to make such a decision.

In short, when long service creates an expectation of renewal, the duty of the organization is primarily to follow the applicable rules strictly, in which case the decision not to renew the contract will usually not be quashed.¹²⁷ As the ILOAT said in *Del Valle Franco Fernandez*, 'career prospects are not something that exist independently. If the refusal of renewal is lawful, so is the ending of the career'.¹²⁸

that reassignment in the event of the abolition of a post should be based among other things on 'efficiency, competence and integrity and length of service'. See also ILOAT Judgment No. 1323 (1994).

¹²⁴ ILOAT Judgment No. 229 (1974).

¹²⁵ ILOAT Judgment No. 251 (1975).

¹²⁶ *ibid.*

¹²⁷ ILOAT Judgment No. 1526 (1996).

¹²⁸ ILOAT Judgment No. 1610 (1997) consid 24.

(iv) Distinguishing a promise from immediate execution and from practices

In assessing the nature and contents of a promise, it is crucial to understand the differences between promises and other undertakings that are similar in some respects, but are nonetheless governed by different sets of rules.

First, promises necessarily concern future actions or omissions, which are different from actions that are capable of immediate execution. These latter actions follow a different set of rules, under which they become enforceable as soon as they are clear and effective, and made by someone in authority. In other words, the criteria of reliance and of an unchanged set of rules have no role to play regarding decisions capable of immediate execution.

For instance, in a decision where the payment of damages to an employee was at issue, the ILOAT concluded that the ‘principles [applying to promises] are inapt to apply without qualification to a commitment capable of immediate implementation’. Noting that ‘the unequivocal commitment to pay the complainant was capable of immediate implementation’ and that the commitment was made by someone in authority, the ILOAT concluded that the organization had breached its duty to act in good faith.¹²⁹

Second, promises must also be distinguished from practices. While both are enforceable in some circumstances and result from decisions made by persons acting within their sphere of authority, they present a fundamental difference. A promise is an undertaking towards one or several employees, while a practice is not a promise made to someone in particular, but rather a way of conducting the organization’s affairs that becomes accepted and binding. As the ILOAT recently explained:

Consistent precedent has it that while an international organization is obliged to apply its written rules, *it must also act in accordance with a consistent practice while that practice is in existence*. A staff member may rely on a practice that is created by an announcement, by an administrative circular or otherwise, which is evidence that in the exercise of the discretionary power the head of the organisation will follow a specified administrative procedure. Accordingly, a decision by the executive head

¹²⁹ ILOAT 3204 (n 75) consid 10.

of an international organization who has created an established practice in furtherance of the exercise of discretion conferred by a written rule may be vitiated if the decision breaches the existing practice. [...] Consistent precedent also has it that the party who seeks to rely on an unwritten rule or practice bears the burden of proving its substance (emphasis added).¹³⁰

As the AfDB Administrative Tribunal explains, ‘the important principle to emphasize is that the practice must be constant and consistent in order to give rise to a general rule or practice. It must be well established and accepted by the organization. The evidence establishing it must be clear and compelling to leave no doubt that the practice exists and is observed.’¹³¹

One of the important consequences of the distinction between a promise and a practice is that while a promise remains binding as long as the governing framework remains unchanged, international organizations are ‘at liberty to abandon [practices] provided that [they do] so lawfully’.¹³² In other words, ‘there can be no doubt that the same body that [has] the authority to adopt such a practice [has] equally the authority to decide to withdraw it’.¹³³

Another important consequence is that the individual nature of a promise – and the fact that it is generally not widely shared within the organization – may lead to accusations of discrimination amongst employees. In *Raths et al.*, for instance, the complainants alleged that the promotion of a fellow employee caused them injury because that employee, contrary to them, did not fulfill the criteria for the specified grade. The promotion had in fact been granted in fulfilment of a promise, but that fact had not been communicated within the organization, such that in ‘the unusual circumstances in which [the employee] was promoted the complainants were also right to challenge the decision’.¹³⁴ On the other hand, an accepted practice is by its very nature widely shared amongst the organization and will usually not lead to claims of discrimination between employees, unless the practice itself is discriminatory.

¹³⁰ ILOAT Judgment No. 3680 (2016) consid 12. See also ILOAT Judgment No. 421 (1980) consid 8.

¹³¹ AfDBAT Judgment No. 85 (2013) para 51.

¹³² ILOAT Judgment No. 2632 (2007) consid 13.

¹³³ ILOAT Judgment No. 2089 (2002) consid 9.

¹³⁴ ILOAT Judgment No. 1804 (1999) consid 12.

2.2 Second criterion: authority

The second criterion is ‘that the promise must come from someone who is competent or deemed competent to make it’. This criterion is fulfilled when the person making the promise has the actual authority to do so, but also in some circumstances when the person is deemed to have that authority. The necessary authority to make a promise as to the continuity of employment usually derives from the authority either to bind the organization in general, or to hire the person concerned.

In *B v Eurocontrol*, the promise alleged by the complainant had been made by the former Director of Institute of Air Navigation Services in Luxembourg. The ILOAT dismissed the claim, noting that ‘even if there had been promises made, the complainant had failed to prove that they had been taken by the competent authority, since it [was] the Director General who ha[d] sole responsibility for employment policy of Eurocontrol’.¹³⁵

Another example of a claim dismissed because of a lack of authority is *Wasmer*, in which the complainant was a long-standing employee of the ILO who had taken on additional duties when a person above his grade had left the organization. It was demonstrated that at that point, the employee’s supervisor had made him a promise that his post would soon be upgraded to reflect his new duties. However, the post was never upgraded. The ILOAT concluded that that promise did not mean that the ILO was at fault, because ‘all that the supervisor could do was suggest that those who were empowered to do so grant a higher grade, and indeed it seems that he did so. But the decision did not lie with him’.¹³⁶ Therefore, it is on the basis of a lack of authority that the ILOAT refused to enforce the promise.

Apart from actual authority, some decisions indicate that the criterion of authority may be satisfied when the person making the promise is deemed to have the required authority. In *Gieser*, the ILOAT noted that the promise in question was enforceable because, among other things, ‘it was made by someone in authority or at least by someone [the complainant] might deem to have authority’.¹³⁷

¹³⁵ ILOAT Judgment No. 2158 (2002) consid 5.

¹³⁶ ILOAT Judgment No. 629 (1984).

¹³⁷ ILOAT 782 (n 73) consid 7.

Similarly, in *D v EPO*, the complainant alleged that her director had promised her a permanent appointment. Dismissing that claim, the ILOAT concluded that the director ‘was neither someone with the authority nor someone deemed to have the authority to make such a promise’.¹³⁸ These two cases suggest that authority is not only understood as actual authority, but that this criterion can also be fulfilled when the person making the promise is deemed to have the required authority.

An example of such deemed authority is found in *B v ITU*, in which the letter on which the complainant relied to establish a promise had been produced by the Chief of the Administration and Finance Department and purported to speak on behalf of the Secretary-General. The ILOAT dismissed the organization’s argument that only the Secretary-General himself had the power to make such a promise, noting that ‘it is commonplace in international organisations for others in senior positions to speak on behalf of the organisation’s executive head’ and that the letter thus had to ‘be taken to have recorded a decision of the [organization] itself [...] in the absence of fraud or some other fundamental illegality’.¹³⁹ As a result, even accepting that the promisor did not have the necessary authority, the promise could reasonably be interpreted by the complainant as being made by someone in authority.

However, it is not simply because the promisee subjectively believes the promisor to be competent that this criterion will automatically be satisfied. In a case where the complainant challenged the decision not to extend his contract beyond the statutory retirement age, the ILOAT concluded that a promise was made, but that it was unenforceable for want of authority.¹⁴⁰ Although the ILOAT noted that it was sufficient for the person making the promise to be ‘deemed to be competent to make’ it, the Tribunal indicated that the evidence showed that the complainant had clearly been told that the promisor did not have the required authority. Additionally, from his long period of service, the complainant should have been aware of that lack of authority. In light of these circumstances, the complainant could not continue to believe that the promise was made by someone competent.

¹³⁸ ILOAT 3005 (n 75) consid 13.

¹³⁹ ILOAT 3204 (n 75) consid 10.

¹⁴⁰ ILOAT Judgment No. 2779 (2009) consid 6.

Therefore, it seems that someone will be deemed to be competent only where such belief is objectively reasonable.

This acceptance of deemed authority as satisfying the criterion contrasts with the authority criterion applied by English courts, which is generally limited to effective authority. Indeed, as Lord Simon Brown expressed in *Baker*, a promise or undertaking cannot be upheld under English law if as a result the official or organization concerned would exercise its power in a manner ‘inconsistent with the statutory duties imposed upon it’.¹⁴¹ Similarly, in EU law, promises ‘cannot be relied upon against an ambiguous provision of EU law’,¹⁴² which constrains legitimate expectations to the promisor’s sphere of authority.

Lastly, it is worth noting that the subsequent implicit confirmation of a decision made by someone lacking authority will not remedy that lack of authority and validate the promise made. In a recent ILOAT case, the claimant alleged that a subsequent decision by the organization to create a permanent post corroborated the promise made to her. The ILOAT dismissed that contention, noting that:

While the creation of a post may in certain circumstances corroborate the assertion that a promise was made, where the promise is alleged to have been made by a person competent to make the promise, it does not in the present case overcome the fact that the promise was not made by someone competent to make the promise.¹⁴³

On the other hand, the confirmation of a promise by someone without authority to make it in the first place does not displace the initial promise when the circumstances show that it was effectively made. In *Rogatko*, the complainant had left a permanent position for a fixed-term contract with the World Health Organization. He telephoned the Chief of the Unit to explain that he was not interested in a short-term commitment, and apparently the Chief replied that the project was a long-term one and that short-term contracts were all renewed.¹⁴⁴ These statements were later confirmed in a grant application signed by the organization, and in a written statement

¹⁴¹ *Baker* (n 13) 88.

¹⁴² *Eesti Pagar* (n 30) 104.

¹⁴³ ILOAT 3005 (n 75) consid 13.

¹⁴⁴ ILOAT Judgment No. 1278 (1993) consid 13.

of the Chief of Unit. The organisation challenged the authority of the Chief of Unit to make that statement and the promise, but the ILOAT determined that it was not an issue because the statement, even if made without authority, evidenced ‘the position as it was when he complainant took up duty with the organization’.¹⁴⁵

To sum up this second criterion, the promise will only be enforceable if the person making it has the authority to do so or, at least, can objectively be deemed to have such authority.

2.3 Third criterion: reliance and injury

The third criterion is ‘that the breach of the promise would cause injury to the person who relies on it’. This criterion ‘has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of nonfulfilment of the promise’.¹⁴⁶

The fact that a statement or other declaration is forwarded to the complainant or intended to be seen by him is often important in finding reliance. In *Annabi*, for instance, the complainant requested the conversion of his fixed term contract into a contract without limit of time, arguing that the ILO had broken a promise made to him at the time of his recruitment. He argued that a telex sent by the ILO to the FAO at the time of his recruitment, which mentioned that he ‘[could] expect to receive’ a contract without limit of time was binding on the organization. The ILOAT noted among other things that ‘the obvious intent was that he should see it and be induced thereby to accept the offer’.¹⁴⁷ The fact that the complainant had been made aware of the telex was therefore an important element in the decision.

In contrast, in *De*, the complainant claimed that his termination was irregular, among other things because of an alleged promise made in a letter sent to the Korean authorities. The ILOAT rejected his claim, notably because that letter did ‘not imply any such promise, particularly since it was

¹⁴⁵ *ibid.*

¹⁴⁶ ILOAT 3619 (n 82) consid 14. See also ILOAT 3204 (n 75) consid 9.

¹⁴⁷ ILOAT 1481 (n 89) consid 5.

not addressed to the complainant'.¹⁴⁸ The fact that the complainant had not seen the letter at the time was thus quite important in concluding that there was no promise or, at least, that the promise was not relied upon.

The absence of reliance may also be shown by the surrounding circumstances, including the relative inaction of the employee in securing the promise. In *Baigrie*, for instance, the complainant claimed that she was not informed at the time of her appointment that her position was of limited duration, and thus challenged her termination and asked for a permanent reinstatement.¹⁴⁹ The ILOAT dismissed the claim, because it was not satisfied 'that the want of information influenced the complainant one way or the other'.¹⁵⁰ Indeed, 'since she never asked at the time the matter seems not to have troubled her'.¹⁵¹

Most recently, in *P v EPO*, the complainant argued, as previously discussed, that she was entitled to a permanent appointment. The ILOAT dismissed the claim on the basis that 'there [was] nothing to suggest that the complainant relied on the [...] promise, even if it was a promise'.¹⁵² Additionally, the ILOAT noted that 'there [was] nothing advanced by the complainant by way of evidence, to suggest that, even if she relied on the promise, she [had] sustained an injury'.¹⁵³ Importantly, the ILOAT emphasized that 'the mere failure to honour [a] promise does not, of itself, constitute injury' justifying an award of damages.¹⁵⁴

Even when someone initially relied on a clear promise, it remains possible for that person to waive the benefits of the promise. However, such a renunciation must be clear and unambiguous to be enforced. In *Nasrawin*, the organization claimed that the complainant had renounced his claim based on the alleged promise, 'because he had accepted the moratorium exceptionally extending his appointment for two months and the indemnity paid in lieu of notice'.¹⁵⁵ But the ILOAT concluded that the extension contained no

¹⁴⁸ ILOAT Judgment No. 267 (1976) consid 1.

¹⁴⁹ ILOAT 1526 (n 127).

¹⁵⁰ *ibid* 2.

¹⁵¹ *ibid*.

¹⁵² ILOAT 3619 (n 82) consid 17.

¹⁵³ *ibid*.

¹⁵⁴ *ibid*.

¹⁵⁵ ILOAT 2112 (n 105) consid 6.

‘extra-judicial transaction in which the complainant [...] would by implication abandon any other claims’.¹⁵⁶ Without such clear implication, the acceptance of an extension by the complainant could not be taken as a renunciation.

Lastly, even if reliance appears to be a universally-accepted criterion amongst international administrative tribunals, we note that removing it from the applicable test would perhaps foster greater trust in the management of international organizations. As various authors have noted in relation to English and EU law, legitimate expectations could be upheld even in the absence of knowledge or reliance.¹⁵⁷ In any event, the complainant would still have to show some injury flowing from the denial of the expectation.

2.4 Fourth criterion: unchanged framework

The fourth and last criterion is ‘that the position in law should not have altered between the date of the promise and the date on which fulfilment is due’.¹⁵⁸

This criterion stems from the sovereignty of the governing bodies of international organizations, who enjoy the prerogative of adopting the applicable statutes and regulations. Where such a sovereign body decides to alter the framework, all promises altered by the changes are necessarily discarded.

In *Berlioz* (No. 2), for instance, the complainant alleged among other things that a six-month delay imposed before his pay was aligned with the pay of other international organizations was in breach of the regulations of the organization. The ILOAT concluded that this change was valid and trumped any contrary promises:

Though an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations either directly or by incorporating the rules of the common system. In the present economic context and if, like many others, it is in financial straits, it may want to cut costs. There is nothing wrong with the common system’s having rules that enable it to do so.¹⁵⁹

¹⁵⁶ *ibid.*

¹⁵⁷ (n 52) and accompanying text.

¹⁵⁸ ILOAT 782 (n 73) consid 1.

¹⁵⁹ ILOAT Judgment No. 1641 (1997) consid 7c.

This shows that a promise can only exist within and in conformity with the statutory and regulatory framework in force at the time it was made. It is clear that ‘no legitimate expectation can arise in contravention of a written rule’.¹⁶⁰

Similarly, the Administrative Tribunal of the Organization for Economic Co-operation and Development considered in a case whether an employee placed on non-active status after taking the maximum entitlement of sick leave had rightly seen his employment terminated on his return because no vacant post was available. Although the regulations in force at that time provided for such termination, the employee attacked the decision based on general principles, including the fact that previous decisions had given him a legitimate expectation that there was a practice of granting an indemnity for loss of employment in such circumstances. The Administrative Tribunal however held that the applicable framework had changed in the meantime, and that the unclear regulation that had led to the alleged practice was now perfectly clear and could therefore not support a legitimate expectation:

The earlier lacuna in the Regulations in the case of officials on non-active status has now been at least partially filled, and it is not for the Tribunal to seek to go further in completing them by reference to ‘general principles of law’. [...] In the absence of evidence of discrimination or bad faith, an agent cannot have a legitimate expectation of being treated in a way other than that which the applicable regulations clearly and expressly envisage.¹⁶¹

Another cautionary note regarding the survival of legitimate expectations in a changing legal environment is the decision of the Administrative Tribunal of the Organization for Economic Co-operation and Development in cases number 85, 86, 88 and 89. These cases concerned the challenge of a decision by the organization to increase the contribution required of former employees to maintain membership in its global medical and social system, OMESYS. The tribunal dismissed the argument that the increase violated

¹⁶⁰ ILOAT Judgment No. 3776 (2017) consid 11. The situation is similar for practices, the ILOAT having concluded that ‘a practice cannot become legally binding if it contravenes a written rule that is already in force’; ILOAT Judgments Nos 2959 (2011) consid 7; 3544 (2015) consid 14; 3601 (2016) consid 10; 3883 (2017) consid 20.

¹⁶¹ ATOECD Judgment No. 40 (1999).

the employees' legitimate expectations, noting that 'no promise, assurance or expectation was given to former officials that the administration's tolerance would constitute a rule of law if the financial situation of the pension scheme were to deteriorate to the point of requiring a review of practices'.¹⁶² In effect, the Tribunal confirmed the right of the organization to change its pension scheme, noting that 'this type of benefit [...] does not lend itself well to indefinite compliance with a practice'.¹⁶³

This is where the distinction between the protection of promises and the protection of acquired rights becomes important. As we have seen, a promise will only be protected if the framework, rules and statutes within which it has been made remains unchanged. On the other hand, an acquired right exists 'when he who has it may require that it be respected notwithstanding any amendment to the rules'. The circumstances in which that may happen is when a right 'arises under an official's contract of appointment and which both parties intend should be inviolate', or when a right 'is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment'.¹⁶⁴

These criteria have been clarified in a recent decision of the ILOAT, in which it held the following:

According to the case law established for example in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to her or his detriment without his or her consent constitutes a breach of an acquired right *only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on*. In order to decide whether there may have been a breach of an acquired right, it is therefore necessary to determine whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832 (emphasis added).¹⁶⁵

¹⁶² ATOECD Judgment No. 86/89 (2018) para 127.

¹⁶³ *ibid* 129.

¹⁶⁴ ILOAT Judgment No. 365 (1978).

¹⁶⁵ ILOAT Judgment No. 3944 (2018). See also ILOAT Judgments Nos 61 (1962); 832 (1987); 986 (1989); 3571 (2016); 3876 (2017).

The Administrative Tribunal of the Council of Europe similarly distinguished the notions of legitimate expectations and acquired rights in a decision in which staff members had been prevented from applying to internal competitions for positions, due to the internal rule of the organization according to which they were limited to a five-year term and could not apply for other positions:

The Tribunal also points out that a right is acquired if its holder can enforce it, regardless of any amendments to a text. *A right conferred by rule or regulation and significant enough to have induced someone to join an Organisation's staff must be deemed an acquired right.* Curtailment of that right without the holder's consent is a breach of the terms of employment which civil servants are entitled to assume will be honoured. [...] The position of staff members employed by the Organisation on the basis of fixed-term contracts was clarified by the introduction of Article 20bis of the Regulations on Appointments, which took effect from 7 July 2010 [...]. *However, bearing in mind the aforementioned principle of acquired rights the Tribunal believes that this rule could not validly be applied to the appellants' case, since they had been recruited two years previously when the content of the old Article 20 of the Regulations on Appointments gave them a legitimate expectation of being able to continue their respective professional careers with the Council of Europe, one option being that they would be able to take part in a new recruitment competition (emphasis added).*¹⁶⁶

From this excerpt, we see that the doctrine of acquired rights has the effect of protecting legitimate expectations that are so fundamental to the employment of the staff member concerned that they cannot be changed even by an amendment of the applicable rules. Clearly, the overlap between the two notions is considerable. A right which is 'of decisive importance to a candidate for appointment' necessarily creates a legitimate expectation, which may then be protected. But the main difference between the two doctrines seems to be the difference between a 'right' and a 'promise'. While the 'right' – which is clearly inscribed in the contract of employment or in the applicable rules – may withstand the change of rules and statutes in some

¹⁶⁶ ATCE Decision No. 2014/548-553 paras 66, 69. See also ATCE Decision No. 2011/492-497 paras 53-54.

circumstances, a ‘promise’ – which is simply made verbally, or in writing but not in a contractual or statutory document – will only be protected within the framework of rules in which it was made.

3. *Damages*

Lastly, we briefly turn to the measure of damages awarded in cases of legitimate expectations, which depends primarily on the type of expectation protected.

For instance, if the legitimate expectation that was not respected was to be appointed for another term, damages may reflect the expected term of renewal. However, in case where there was no direct expectation of renewal or appointment, tribunals have concluded that the only type of damages that could be awarded were damages for the loss of the expectation itself, and not the expected employment. In Halliwell, the ILOAT concluded that the claimant had wrongly been denied two positions, in light of the Staff Regulations which gave preference to ‘persons already in the service’ of the organization.¹⁶⁷ However, the ILOAT held that the compensation awarded could not ‘consist [...] of restitution of salary and pension rights’ since the claimant had ‘not been deprived of any contractual rights to salary or pension, but only of expectation of further employment’. The ILOAT awarded 8,000 Swiss francs, plus the reimbursement of the complainant’s costs.¹⁶⁸

The ILOAT concluded that it is only in exceptional circumstances that the wrongful non-renewal of a contract should give rise to full compensation for the expected contract itself. In a case where the ‘expectation was very solid’ and where the complainant’s career had ‘been destroyed by an act of personal revenge’, the ILOAT held that such circumstances existed.¹⁶⁹ However, it is worth noting that in earlier decisions, the ILOAT seemed to be less reluctant to award full compensation. In Gieser, for instance, where no particularly shocking fact was alleged, the ILOAT concluded that the organization had to ‘grant the complainant an indefinite appointment or

¹⁶⁷ ILOAT Judgment No. 415 (1980).

¹⁶⁸ ILOAT Judgment No. 1351 (1994).

¹⁶⁹ ILOAT Judgment No. 427 (1980) consid 19b.

pay him 150,000 Deutschmarks in damages', which corresponded approximately to the anticipated loss of earnings.¹⁷⁰

In any event, any compensation awarded will usually be reduced by the amount of financial gains which the complainant has or could have made from other employment.¹⁷¹ This is simply an application of the usual doctrine of mitigation of damages.

Lastly, in some cases, while no promise is effectively made out based on the available evidence, the behavior of an organization may still lead to an award of damages. In *Bourgeois*, for instance, the ILOAT concluded that no promise had been breached, but that the organization took too long to expose its position to the employee, which caused him moral injury.¹⁷²

IV. Conclusion

Based on the jurisprudence reviewed in this article, it is clear that the legitimate expectations of employees in most domestic jurisdictions, as well as international civil servants, are protected. In the realm of international organizations, this general principle is applicable to all organizations and is justified by their duty to act in good faith and with fairness towards their employees. However, that protection is not unfettered and can only be granted when the applicable criteria are satisfied.

In that regard, while the tribunals of various international organizations do not express the criteria with the exact same wording, they apply substantially similar conditions across their organizations. Since the four criteria are cumulative, it often happens that tribunals focus on one criterion that is dispositive of the claims. In such cases, tribunals do not set out the applicable framework as clearly as the ILOAT, which does not mean, however, that they do not agree with it. In any event, it seems that the framework established by the ILOAT is the most comprehensive and representative of the state of the law, and should therefore be used across international organizations, wherever possible.

¹⁷⁰ ILOAT 782 (n 73).

¹⁷¹ ILOAT 427 (n 169) consid 19b.

¹⁷² ILOAT Judgment No. 1090 (1991) consid 7.

Under that framework, four main elements must cumulatively be established in order for a promise to be binding: (i) a clear and effective promise, which means that it must exist and be unqualified, among other things; (ii) the actual authority of the promisor or, alternatively, the objective belief that the promisor had the required authority; (iii) the promisee's reliance on the promise, and the injury that resulted from that reliance; and (iv) the stability of the relevant applicable framework from the making of the promise until the complainant's claim.

These limitations imposed on the protection of legitimate expectation serve important purposes. The criterion of authority, for instance, protects organizations from being prejudiced by promises made at a lower level of management, without the authorization of those actually in power. The need to establish the existence of a clear and effective promise ensures predictability by limiting promises to those that were clearly made, and were not subject to any condition precedent. And the fourth criterion ensures that when an organization changes its rules, promises made within the previous framework do not subsist as acquired rights, but rather cease to exist to allow organizations to start afresh. The only criterion that could perhaps be removed from the test is the reliance of the promisee on the promise, although injury would still need to be shown.

Lastly, the concerns and rights of third parties, including other employees, should not be disregarded. As demonstrated by at least one case, promises made to some employees but not all can sometimes be considered as impermissibly favoring one over the others. This may lead, in some cases, to allegations of discrimination, which could create even more problems for international organizations than allegations of broken promises.

The Contribution of the ILO Administrative Tribunal to the Development of Staff Dispute Settlement Within International Organizations

*August Reinisch**

I. Introduction

The International Labour Organization's Administrative Tribunal (ILOAT), based on the former staff tribunal of the League of Nations, has been very important to the development of dispute settlement processes involving staff members of international organizations and their employers, the international organizations. This is true for various procedural issues as well as for an important body of substantive law, which complements the formally applicable staff rules and regulations. In regard to the substantive law applied by the ILOAT, recourse to general principles of law has been particularly fruitful.¹

* The author wishes to thank Céline Braumann and Mary Margaret Quinn for their excellent research assistance.

¹ ILOAT Judgment No 1333 (1994) consid 5: 'The law that the Tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organization but the general principles of law and basic human rights'.

II. Administrative tribunals as tools for international organization accountability and developers of notions of fair trial and due process

This contribution takes the perspective of a generalist in public international law and will focus on two areas: 1) the general problem of ensuring the accountability of international organizations in employment matters and 2) the development of core notions of a fair trial and due process.

I. *Quis custodiet ipsos custodes?*

We tend to think that the question of the accountability of international organizations is a recent one. Indeed, the term ‘accountability’ in this context and the academic debate concerning the concept was probably triggered by events such as the UN embargos against Iraq and others during the so-called sanctions decade² of the 1990s and the only partially successful advent of ‘smart’ sanctions, such as UN Security Council black-listing of terrorists and the defects of the de-listing procedure.³ Such events led to fundamental questions like whether the UN Security Council is bound by international law and who may review Security Council resolutions. The International Law Association devoted a study group⁴ and a committee⁵ on the topic of the accountability of international organizations, and the

² David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner 2000).

³ Bardo Fassbender, ‘Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter: Study Commissioned by the United Nations Office of Legal Affairs and Follow-Up Action by the United Nations’ (2006) 3 *International Organizations Law Review* 437.

⁴ International Law Association, *Responsibility of International Organizations Study Group (2005-2012)* <<http://www.ila-hq.org/index.php/study-groups>>. The Study Group’s mandate was to contribute to the work of the International Law Commission on the *Draft Articles on the Responsibility of International Organizations* and to monitor the practice of international organizations on the basis of the 2004 International Law Association Report on the Accountability of International Organizations.

⁵ International Law Association, *Accountability of International Organizations Committee (1996-2004)* <<http://www.ila-hq.org/index.php/committees>>. The Committee was established with the mandate ‘to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international Organizations to their members and to third parties, and of members and third parties to such Organizations.’

International Law Commission addressed the issue of the responsibility of international organizations between 2001 and 2011.⁶

However, the old adage ‘who guards the guardians?’ was, in fact, already the underlying question answered by the International Court of Justice (ICJ) in its famous 1954 advisory opinion on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*. In that opinion, the ICJ pointed out, in regard to the establishment of the administrative tribunal of the UN, that:

[it would] hardly be consistent with the expressed aim of the [UN] Charter to promote freedom and justice for individuals [...] that [the UN] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.⁷

One can hardly overemphasize the wisdom of this statement. The international organization promoting human rights, including access to justice, and demanding that this standard be offered by its member States, is reminded that it must also comply with these demands.⁸

In the case at hand, the ICJ assessed the issue of access to justice for UN staff members seeking redress against their employer, the UN, which was, of course, not available before the ordinary courts at the UN’s seat as a result of the UN’s immunity from every form of legal process.⁹ The ICJ

⁶ International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries 2011*. The draft articles were adopted by the International Law Commission at its sixty-third session and submitted to the General Assembly as a part of the Commission’s report covering the work of that session; *Report of the International Law Commission: Sixty-Third Session*, UN Doc A/66/10 (2011).

⁷ *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954, I.C.J. Reports 1954, 57.*

⁸ See also *Manderlier v Organisation des Nations Unies et l’État Belge (Ministre des Affaires Étrangères)*, Brussels Appeals Court (1969) 69 ILR 139, para 69: ‘In the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations’ and this situation ‘does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights’.

⁹ See, for instance, Convention on the Privileges and Immunities of the United Nations, article II, section 2: ‘The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution’; 1 UNTS 15.

held that the UN General Assembly lacked the right to refuse to give effect to an award of compensation made by the UN Administrative Tribunal in favour of a UN staff member whose contract of service had been terminated.

Today, due in particular to the *Waite and Kennedy* doctrine, named after a European Court of Human Rights (ECtHR) landmark case, it is widely recognized that immunity of international organizations from domestic jurisdiction has the potential to deprive claimants of their right of access to court.¹⁰ This was not always recognized, and the view of the European Commission on Human Rights, that an international body's immunity accorded by the Netherlands constituted a restriction of national sovereignty that did not give rise to an issue under the European Convention on Human Rights (ECHR),¹¹ is still reflected in decisions of some national courts.¹²

In fact, it was the ICJ that had already recognized in 1954 that there is a friction between access to court and immunity, and that had upheld the UN's pragmatic answer to that friction, thus avoiding any conclusion that such immunity was incompatible with human rights demands per se. That pragmatic answer had been effected by the UN General Assembly, which had set up an administrative tribunal, modelled after the ILOAT, and

¹⁰ *Waite and Kennedy v Germany* (1999) ECtHR 13, para 67: 'The Court is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'.

¹¹ *Spaans v The Netherlands* (1988) 58 DR 119, 122, where the European Commission of Human Rights regarded the grant of immunity from suit to the Iran-United States Claims Tribunal by the Netherlands as a restriction of national sovereignty which did not give rise to an issue under the Convention: 'The Commission notes that it is in accordance with international law that States confer immunities and privileges to international bodies like the Iran-United States Claims Tribunal which are situated in their territory. The Commission does not consider that such a restriction of national sovereignty in order to facilitate the working of an international body gives rise to an issue under the Convention'.

¹² See, for instance, *Entico Corporation Ltd v United Nations Educational Scientific and Cultural Association (UNESCO)* (2008) 2 All ER (Comm) 97.

certainly inspired by the UN's 'obligation' contained in the Convention on the Privileges and Immunities of the United Nations to 'make provisions for appropriate modes of settlement of [...] disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'.¹³ This subsequently led to the development of case law concerning the availability of 'equivalent alternative' forms of dispute settlement for aggrieved staff members of international organizations.

It was, in particular, the case law of the ECtHR, such as the case of *Waite and Kennedy*,¹⁴ which made clear that there is not just an inherent tension but a real conflict between access to court and the immunity of international organizations. The ECtHR in *Waite and Kennedy* notoriously said that:

a material factor in determining whether granting ESA [the European Space Agency] immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the [ESA] Convention.¹⁵

In that case, the ECtHR took into account that alternative means of legal process were available to the applicants under the ESA Convention, holding that the limitation on their access to German courts, which resulted from ESA's immunity, did not violate their right of access to court under article 6 of the ECHR.¹⁶

The notion that individuals have a right of access to justice concerning the determination of their rights and obligations vis-à-vis international organizations is not only a European approach limited to the Contracting Parties of the ECHR. It has also been expressed by and before other

¹³ Convention (n 9) article VIII, section 29(a).

¹⁴ See, for instance, *Beer and Regan v Germany* (1999) ECtHR 6.

¹⁵ *Waite* (n 10) para 68.

¹⁶ *ibid* para 73: 'In view of all these circumstances, the Court finds that, in giving effect to the immunity from jurisdiction of ESA on the basis of section 20(2) of the Courts Act, the German courts did not exceed their margin of appreciation. Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their 'right to a court' or was disproportionate for the purposes of Article 6§1 of the Convention'.

national¹⁷ and international courts and tribunals¹⁸ as well as administrative tribunals of international organizations which have recognized the ‘general principle’ that employees should have access to some form of employment dispute settlement.¹⁹

Since *Waite and Kennedy*, scholars and courts have been split on whether the wording used in that case implies that the absence of any alternative means at all or of any reasonable alternative means²⁰ should make an international organization lose its immunity from suit before national courts.²¹

ECtHR jurisprudence and a number of national courts have de-linked the two concepts, insisting that immunity is not conditioned by the availability of alternative remedies. This approach may be contrasted with the solution adopted by *Siedler v Western European Union*²² and other cases, whereby immunity will not be available if no alternative remedies that adequately comply with due process requirements are available.²³ In subsequent cases, the Strasbourg Court has held that it does not follow ‘that

¹⁷ *Consortium X v Swiss Federal Government (Conseil fédéral)*, Swiss Federal Supreme Court, First Civil Law Chamber (2004) BGE 130 I 312, ILDC 344 (CH 2004): ‘a conflict between, on the one hand, the immunities from jurisdiction and enforcement of international organizations and, on the other hand, the right to an equitable procedure insofar as it relates to the fundamental right of access to a judge’.

¹⁸ *Effect of awards* (n 7). See also the opinion of Advocate General Tesouro in Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* (1994) ECR I-43, para 6, stressing the ‘inadequacy of the proposition that ascribes absolute immunity to such organizations [...] taking into account, moreover, of the need not to deprive individuals of the protection afforded to subjective rights that might be impaired by the activities of international organizations’.

¹⁹ See, for instance, ILOAT Judgment No 1644 (1997) consid 12, referring to the principle ‘that an employee of an international organization is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer’.

²⁰ See, most famously, *Siedler v Western European Union*, Brussels Labour Court of Appeal, Fourth Chamber (2003) Journal des Tribunaux 617, ILDC 53 (BE 2003), finding that the WEU personnel statute did ‘not offer all the guarantees inherent in the notion of due process’ and that therefore ‘the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the WEU [was] incompatible with Article 6(1) of the ECHR’. Affirmed by *Western European Union v Siedler (Appeal Judgment)*, Belgium Court of Cassation (2009) Case No S 04 0129 F, ILDC 1625 (BE 2009).

²¹ August Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’ (2008) 7 Chinese Journal of International Law 285.

²² *Siedler* (n 20) 7.

²³ See *infra* jurisprudence (n 31, 32 and 33).

in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court', noting that *Waite and Kennedy* could not be interpreted as requiring such a conclusion.²⁴ Most recently, in the *Haiti Cholera* case, a United States appellate court held that the lack of alternative remedies does not automatically lead to a loss of immunity from suit.²⁵

What is most important in practice, though, is that the availability of an effective alternative means to protect the rights of individuals will forestall any questioning of the immunity of international organizations.

In this regard, the performance of administrative tribunals and, in particular, of the ILOAT has been crucial in warding off such questioning. Many courts have considered that the adequacy of the ILOAT is sufficient to avoid any discussion of whether immunity should be granted before national courts to the ILO or other international organizations subject to the jurisdiction of the ILOAT. Illustrative of this 'restrained' review is a 2006 decision of the German Federal Constitutional Court regarding the ILOAT, which held that:

The proceedings before the ILOAT are independent of the internal appeals proceedings. The Tribunal decides on the basis of its legally defined jurisdiction and by way of a proper legal procedure, solely in accordance with legal principles and rules. Pursuant to Article III of the Statute of the ILOAT, its judges are under a duty to be independent and free from bias. Thus, the Federal Constitutional Court has decided that the status and the principles of procedure of the ILOAT satisfy

²⁴ *Stichting Mothers of Srebrenica v The Netherlands* (2013) ECtHR para 164.

²⁵ *Georges v United Nations*, 834 F 3d 88 (2nd Cir, 2016) 94-95: 'plaintiffs argue that 'the UN's post-ratification [...] practice pursuant to [...] Section 29 [...] demonstrates that entitlement to immunity is premised on the provision of alternative dispute settlement'. Plaintiffs' chief example of this supposed practice is the UN's statement before the International Court of Justice that the UN's immunity 'does not leave a plaintiff without remedy [because] in the event that immunity is asserted, a claimant seeking redress against the Organization *shall* be afforded an appropriate means of settlement [under Section 29]'. This statement, however, suggests at most that the UN views Section 29 as 'more than merely aspirational' – as 'obligatory and perhaps enforceable'. It does not in any way suggest that the UN views Section 29 as a condition precedent to Section 2'.

both the international minimum standard of fundamental procedural fairness and the minimum rule of law demands of the Basic Law.²⁶

Accordingly, the court determined that the status and the procedural principles of the ILOAT satisfied both the international minimum standard of elementary procedural justice as well as the minimum requirements for the rule of law pursuant to the German constitutional law demands of the Basic Law. Therefore, the Court concluded that the plaintiffs had not substantiated their claim that a structural deficit of legal protection existed which would need to be addressed. Basically, this case confirmed the Court's earlier jurisprudence in cases like *Hetzel v Eurocontrol*²⁷ in which it had upheld the defendant organization's immunity because the ILOAT had provided an adequate alternative remedy.²⁸

Other examples of national courts coming to similar conclusions are an Italian court's assessment of the international staff dispute settlement mechanism concerning the European University Institute in Florence²⁹ and the French Court of Cassation's assessment of the Administrative Tribunal of the Organization for Economic Co-Operation and Development.³⁰

²⁶ *B et al v European Patent Office*, Germany, Federal Constitutional Court, Second Chamber (2006) 2 BvR 1458/03, 23.

²⁷ *Hetzel v Eurocontrol*, Germany, Federal Constitutional Court, Second Chamber (1981) BVerfG 59, 63. See on the background of *Hetzel v Eurocontrol* and the related case of *Strech v Eurocontrol*, Arbeitsgericht (Labour Court) Karlsruhe (1978) 2 Ca 119/78, Landesarbeitsgericht (State Labour Court) Baden-Württemberg (1979) 6 Sa 33/79 (unpublished): Albert Bleckmann, *Internationale Beamtenstreitigkeiten vor nationalen Gerichten* (Duncker and Humblot 1981); Ignaz Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen* (Duncker and Humblot 1981).

²⁸ *Hetzel* (n 27) 91: 'status and procedural principles conformed to an international minimum standard of basic procedural fairness as it results from developed legal orders following the rule of law and from the procedural law of international courts'.

²⁹ *Pistelli v European University Institute*, Italy, Corte di Cassazione (2005) para 14.3: 'As has been noted, the body for settling disputes is a truly jurisdictional body. The selection of the members of the Committee from a list compiled by an international judicial organ of international legal organizations satisfies the requirements of independence and impartiality for the body charged with resolving disputes between staff and the Institute, a body, as has been said, which is considered equivalent to the Court of Justice of the European Communities'.

³⁰ *Illemassene v OECD*, France, Cour de cassation, Chambre sociale (2010): 'Mais attendu que la cour d'appel a constaté d'une part, qu'aux termes des articles 16 et 22 du statut du personnel de l'OCDE, il a été institué au sein de cette organisation un tribunal administratif [...] faisant apparaître que le personnel de l'OCDE [...] disposait, pour le règlement

That national courts actually deny an international organization's immunity occurs regularly only in cases where no alternative dispute settlement mechanism is available at all. This happened, for instance, in the 1997 French case of *UNESCO v Boulois*,³¹ where a French appellate court refused to accord immunity to the United Nations Educational, Scientific and Cultural Organization because the claimant would have been deprived of a forum to hear his claims.³² Similarly, in *Banque africaine de développement v M.A. Degboe*,³³ the French Court of Cassation held that the lack of access to justice, arising because the African Development Bank had no administrative tribunal, would have constituted a denial of justice. Thus, it disregarded the organization's immunity from suit.

The famous *Siedler* case is one of the few cases in which a Belgian appellate court actually denied an international organization immunity even though there was an alternative available in principle.³⁴ However, in the eyes of the court the alternative available could not be squared with the demands of actual fairness and impartiality required under the *Waite and Kennedy* standard and under the inherent requirements of article 6 of the ECHR. The court found that the internally available procedures for the settlement of staff disputes within the Western European Union (WEU) did 'not offer all the guarantees inherent in the notion of due process' and that thus 'the limitation on the access to the normal courts by virtue of the jurisdictional immunity of the WEU [was] incompatible with article 6(1) ECHR'.³⁵

In this case, the WEU did have an internal procedure for staff disputes, known as the internal appeals commission. The issue before the Belgian

de ses conflits de travail, d'un recours de nature juridictionnelle comportant des garanties d'impartialité et d'équité [...] la cour d'appel a exactement décidé que cette organisation était fondée à revendiquer le bénéfice de son immunité de juridiction'.

³¹ *UNESCO v Boulois*, France, Tribunal de grande instance de Paris (1997) Rev Arb 1997 575; Cour d'Appel Paris, 14^e Ch. A (1998) XXIV a Yearbook Commercial Arbitration (1999) 294.

³² *ibid* 295: 'UNESCO's immunity 'would inevitably lead to preventing [the claimant] from bringing his case to a court. This situation would be contrary to public policy as it constitutes a denial of justice and a violation of the provisions of Article 6(1) of the [ECHR]'.

³³ *Banque africaine de développement v M.A. Degboe*, France, Cour de Cassation, Chambre sociale (2005) 04-41012, (2005) 132 Journal du droit international 1142.

³⁴ *Siedler* (n 20).

³⁵ *ibid* para 62 et seq.

court was whether the availability of the commission meant that granting immunity to the WEU would contravene article 6(1) of the ECHR. The court held that it was required to assess whether the commission's substantive qualities complied with the requirements of a fair trial. It was insufficient to rely on the fact that the commission's establishing instrument labelled it as independent. Instead, the court considered that members were appointed by the WEU's intergovernmental committee and only for short terms of two years. For those and other reasons, the court concluded that the commission lacked sufficient independence from the WEU.³⁶ The court thus held that the mere availability of an alternative dispute settlement mechanism was insufficient to meet the requirement in *Waite and Kennedy* of 'reasonable alternative means [available] to protect effectively [the individual's] rights under the Convention'. For an international organization's immunity to be justified in a manner that did not violate article 6 of the ECHR, the alternative means had to comply with substantive due process and fair trial requirements.

Of course, this case did not involve an organization subject to the ILOAT. Nevertheless, the Belgian court's analysis of the lack of adequacy of the respective alternative dispute settlement mechanism is remarkable.

2. *The development of core notions of fair trial as part of a broader principle of fairness*

When looking at the major contributions of the ILOAT to staff dispute settlement it is, in particular, the case law arising from that tribunal that has been central to the identification of general principles of law protective of employee rights. Acquired rights, proportionality, legitimate expectations; all of these reflect core elements of the rule of law that can protect individuals who are not only subject to the overwhelming economic power of international organizations as employers but, more specifically, the regulatory power of international organizations that function as quasi-sovereigns. As an observer of both the law of international organizations and international investment law, I think there are highly interesting and still under-researched parallels between the development of fair and equitable treatment elements of international investment law and the

³⁶ *ibid* para 53.

general principles identified by administrative tribunals. In this regard, it is specifically the common, underlying rule of law concept that can be used. Non-retroactivity, non-discrimination, proportionality, good faith, stability and predictability³⁷ – all these concepts sound very familiar to the investment lawyer but also to the practitioner before ILOAT.

Both the concepts of the rule of law and fairness can be re-linked to the UN's attempts to make the notion of the rule of law more operative. In his 2004 *Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,³⁸ the UN Secretary-General presented a rather precise and important definition of the rule of law. As the name suggests, this Report focuses on the rule of law not on the international level, but rather on the internal, domestic level. The Report refers, inter alia, to the rule of law as requiring fairness in the application of the law, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³⁹

This statement can be taken to constitute a minimum of demands for the conduct of host States in the context of investment protection, but it can also be viewed as the required minimum in the settlement of staff disputes.

Another interesting parallel between international investment law and the law of administrative tribunals again reminds us of the already mentioned problem of 'who guards the guardians?'. While due process requirements have traditionally been seen as part of the treatment obligations of States, particularly under fair and equitable treatment clauses in international investment agreements which investment tribunals are

³⁷ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *The Law Quarterly Review* 195; Brian Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232.

³⁸ United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (2004) UN Doc S/2004/616.

³⁹ *ibid* para 6: 'The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'

empowered to scrutinize, those investment tribunals themselves have become increasingly subjected to similar scrutiny. What started out as a backlash against investor-State arbitration has been taken up by the United Nations Commission on International Trade Law (UNCITRAL) in its Working Group III on Investor-State Dispute Settlement Reform⁴⁰ and has led to proposals to replace the existing system of ad hoc arbitrations by a multilateral investment court.⁴¹

Similarly, many of the due process requirements developed by the ILOAT and other administrative tribunals, mainly in regard to internal dispute settlement mechanisms such as appeal boards, have been used to challenge the administrative tribunals themselves. In the well-known case of the UN Administrative Tribunal, such challenges led to the complete overhaul of the system in accordance with suggestions of the Redesign Panel, including its replacement with the UN Dispute Tribunal and the UN Appeals Tribunal.⁴² As a result of the above-mentioned *Waite and Kennedy* and *Siedler* jurisprudence, the due process accorded before administrative tribunals themselves has come increasingly under scrutiny.

⁴⁰ UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Seventh Session (New York, 1-5 April 2019)* (2019) UN Doc A/CN.9/970.

⁴¹ UNCITRAL, *Possible Reform of Investor-State Dispute Settlement: Note by the Secretariat* (2019) UN Doc A/CN.9/WG.III/WP.166, paras 21-23 (discussing proposals for a standing first instance and appellate investment court, with full-time judges).

⁴² *Report of the Redesign Panel on the United Nations System of Administration of Justice* (2006) UN Doc A/61/205, paras 5-14, finding that the administration of justice in the UN is 'neither professional nor independent' and proposing the establishment of 'a new, formal system of justice' comprising 'a professional and decentralized first-instance adjudicatory body that issues binding decisions that either party can appeal'. See also General Assembly resolution 61/261 (2007) *Administration of Justice at the United Nations*, para 4, deciding 'to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice'; General Assembly resolution 62/228 (2008) *Administration of Justice at the United Nations*, para 39, deciding 'to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal as from 1 January 2009'; General Assembly resolution 63/253 (2008) *Administration of Justice at the United Nations*, Annex I (Statute of the UN Dispute Tribunal) and Annex II (Statute of the UN Appeals Tribunal).

2.1 Independence and impartiality of adjudicators

The independence and impartiality of adjudicators is a core aspect of the right to a fair trial and due process as contained in most human rights instruments,⁴³ arbitration rules,⁴⁴ and statutes of administrative tribunals.⁴⁵ Especially in the field of investor-State arbitration, the alleged pro-investor bias of arbitrators has cast doubt on whether arbitrators are sufficiently independent and impartial.⁴⁶ The institutional answer in the context of

⁴³ Many human rights instruments speak of ‘independent and impartial tribunals’. See, for instance, European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6(1): ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’; International Covenant on Civil and Political Rights, article 14(1): ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’; 999 UNTS 171; Universal Declaration of Human Rights, article 10: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’.

⁴⁴ See, for instance, UNCITRAL Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) article 6(7): ‘independent and impartial arbitrator’; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, article 14(1): ‘persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment’; 575 UNTS 159; Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2017) article 18(1): ‘Every arbitrator must be impartial and independent’; London Court of International Arbitration, LCIA Arbitration Rules (2014) article 10.1: ‘The LCIA Court may revoke any arbitrator’s appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator’s impartiality or independence’; Singapore International Arbitration Centre, SIAC Investment Arbitration Rules (2017) article 10.1: ‘Any arbitrator appointed in an arbitration under these Rules, whether or not nominated by the Parties, shall be and remain at all times independent and impartial’.

⁴⁵ For example, to be eligible for appointment as judges of the UNDT and UNAT, persons are required to be ‘of high moral character and impartial’; see Statute of the UNDT, article 4(3)(a) and Statute of the UNAT, article 3(3)(a).

⁴⁶ See generally August Reinisch and Christina Knahr, ‘Conflict of Interest in International Investment Arbitration’ in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Governance: An Interdisciplinary Outlook on the Global, Public, Corporate and Financial Sphere* (Cambridge UP 2012) 103.

investor-State arbitration has been the creation of a set of rather strict conflict-of-interest rules, most prominently the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.⁴⁷ Some are currently going even further by recommending that investors should have no right to appoint arbitrators at all and calling for the establishment of a permanent investment tribunal.⁴⁸

Also, in the discussion about the functioning of administrative tribunals, independence and impartiality are important issues.

A constant point of criticism has been the fact that judges on administrative tribunals often serve on renewable and sometimes short terms of office. Since such judges are usually appointed by the governing bodies of the organizations, this could create an incentive to rule in favour of those organizations to attain reappointment.⁴⁹ In the reform of the UN internal

⁴⁷ International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014).

⁴⁸ See, for instance, Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 *Yearbook of European Law* 209, 211-12: 'Moving from arbitration to a judicial system to settlement of investment disputes addresses critiques of conventional ISDS in the following ways: [...] (3) independence from the parties to the dispute that comes from state appointment of standing judges and strict ethics/conflict of rules tackle criticisms or perceptions that arbitrators are not truly independent, and are influenced by other professional roles such as counsel in similar cases, or standing professional and business relationships with other arbitrators or counsel, or even clients in other matters'.

⁴⁹ Osmat A. Jefferson and Innokenti Epichev, 'International Organizations as Employers: Searching for Practices of Fair Treatment and Due Process Rights of Staff' in Kim Rubenstein and Katharine G. Young (eds), *The Public Law of Gender: From the Local to the Global* (Cambridge UP 2016) 489, 496: 'Article III(2) [of the ILOAT Statute] states that the Tribunal's seven judges be appointed on three-year renewable contracts by the Conference of the ILO. [...] Arguably, this is an obvious inducement for the ILOAT judges to decide cases in ways that won't offend the Conference reappointing body – this becomes even more significant given there are no prescribed limits on the number of terms that a judge can serve'; Geoffrey Robertson QC, *ILOAT Reform: Opinion Prepared for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters* (2002) <<http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm>>: 'Tribunal members are 'contract judges', whose well-remunerated employment is contingent upon the regular approval of the very body which is a defending party to their proceedings. This position is plainly incompatible with the rule that requires the judiciary to be independent, and which is breached by any arrangement which offers an inducement to the judges to decide cases in ways which will not upset the re-appointing body'. See also Niamh Kinchin, *Administrative Justice in the UN: Procedural Protections, Gaps and Proposals for Reform* (Edward Elgar 2018) 83, noting that 'the increasing use of *ad litem* judges (judges whose

justice system, the answer was the creation of a two-level mechanism with judges for long, non-renewable terms.⁵⁰

2.2 Due process and ‘equality of arms’

Another central aspect of the right to a fair trial and due process is the requirement that judicial or arbitral procedures must provide thorough, fair and efficient scrutiny of the facts and legal allegations raised by the parties and provide them with an equal opportunity to present their case. In international arbitration, the principle of ‘equality of arms’ has long been considered a cornerstone of due process.⁵¹ Equality before adjudicatory bodies is equally required under many human rights treaties.⁵²

Investment tribunals have characterized a fair procedure as one which ‘include[s] the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias’.⁵³

Also, in the jurisprudence of administrative tribunals, due process and the equality of the parties feature as important principles.

contracts are extended on a yearly basis) [in the UN Dispute Tribunal] has the potential to degrade the impartiality inherent in non-renewable judicial appointments. Although *ad litem* judges are useful in addressing workload issues, the motivation to be reappointed may influence decision-making to be simpatico with the priorities of the Administration’; Nassib Ziadé, ‘Conflicts of Interest in International Administrative Law’ in Elias Olufemi (ed), *The Development and Effectiveness of International Administrative Law on the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Brill 2012) 387, 389: ‘There is today a growing opinion among experts that judges should be appointed for a long (say ten- or twelve-year) but non-renewable term’.

⁵⁰ In the UN Dispute Tribunal and the UN Appeals Tribunal, judges are appointed for a non-renewable term of seven years, and are ineligible for any non-judicial role within the UN for five years following that appointment: Statute of the UNDT, articles 4(4) and 4(6) and Statute of the UNAT, articles 3(4) and 3(6). Judges can only be removed by the General Assembly in cases of misconduct or incapacity; Statute of the UNDT, article 4(10) and Statute of the UNAT, article 3(10).

⁵¹ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn, Oxford UP 2009) 6.11 et seq; Thomas Wälde, ‘Equality of Arms in Investment Arbitration: Procedural Challenges’ (2011) *Transnational Dispute Management* 1.

⁵² Human Rights Committee, General Comment No 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial (2007) UN Doc CCPR/C/GC/32.

⁵³ *Victor Pey Casado and President Allende Foundation v Republic of Chile (Annulment)*, ICSID Arbitral Tribunal, Case No ARB/98/2 (2012) para 73.

For example, the ILOAT has noted that:

in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies such as the JAB [Joint Appeals Board of the International Atomic Energy Agency] must strictly observe the rules of due process and natural justice and that those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence.⁵⁴

The ILOAT has also affirmed the principles of due process relating to the requirement to disclose relevant information to a staff member:

in keeping with consistent case law of the Tribunal, a staff member of an international organization must, as a general rule, have access to all evidence on which an authority bases or intends to base its decision against her or him. In normal circumstances such evidence, which is peculiarly in the organization's control, cannot be withheld on grounds of confidentiality unless there is some special case in which a higher interest stands in the way of the disclosure of certain documents. However, such disclosure may not be refused merely in order to strengthen the position of the Administration or one of its officers. The principle of equality of arms must be observed by ensuring that all parties to a case are provided with all of the materials used by an internal adjudicating body, the JARB [Joint Administrative Review Board of the International Organization for Migration] in this case. The failure to disclose them constitutes a breach of due process, as it would render its examination of the case incomplete and prevent it from properly considering the facts. This would not only violate due process but also the organization's duty of care causing the impugned decision to be set aside.⁵⁵

The issue of the equality of arms also arose in the context of the previous asymmetry in the ability of parties to seek advisory opinions from the ICJ in relation to the jurisdiction of the ILOAT. Prior to mid-2016, Article XII of the ILOAT Statute (and Article XII of the Annex to the Statute) provided that the international organization subject to the ILOAT had the ability to seek an advisory opinion from the ICJ on the ILOAT's competency to

⁵⁴ Judgment No 2513 (2006) consid 11.

⁵⁵ Judgment No 3948 (2018) consid 10, citing Judgment No 3586 (2016) paras 16-20.

hear a case.⁵⁶ This mechanism was not available to staff members and thus was inherently one-sided, favouring international organizations.⁵⁷ The one-sided nature of the power to seek advisory opinions was criticized as limiting the equality of arms and equality of access to justice. For example, the ICJ stated in a 2012 advisory opinion that:

according to the [Human Rights] Committee, [the] right to equality guarantees equal access and equality of arms. [...] If procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds. In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decision.⁵⁸

The ICJ continued, noting that the principle of equality of the parties

⁵⁶ Article XII(1) stated that: 'in any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice'. Article XII(2) provided that the opinion given by the ICJ 'shall be binding'. Article XII of the Annex to the Statute provided that '1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice. 2. The opinion given by the Court shall be binding'. In turn, Article II(5) provided that 'the Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex'.

⁵⁷ *Jefferson and Epichev* (n 49) 494: 'The entitled advisory proceedings before the International Court of Justice would seem to remove equality between the employer and the employee "in the origin and in the process of the proceedings" and thus weaken the position of the staff to negotiate or challenge the Tribunal's decision, which, according to Article VI, cannot be appealed'.

⁵⁸ *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, 10, para 39, citing Human Rights Committee (n 52) paras 8-9, 12, 13. See also Christian Vidal-León, 'Inequality of the Parties before the International Court of Justice: Reflections on the Appellate Jurisdiction over ILOAT Judgments' (2014) 5 *Journal of International Dispute Settlement* 406.

must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds. [...] Questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it.⁵⁹

In response to such criticism, and having consulted with the international organizations subject to the ILOAT, in June 2016, the International Labour Conference at its 105th Session adopted amendments to the ILOAT Statute so as to remove the ability of defendant organizations to seek advisory opinions from the ICJ. The amendments had been approved in March 2016 by the ILO Governing Body at its 326th Session. The amendments involved removing article XII of the Statute and article XII of its annex. Article VI was also amended. While it still provides that judgments ‘shall be final and without appeal’, it also provides that the ILOAT may itself consider applications for interpretation, execution or review of a judgment.

2.3 Effective and affordable access to dispute settlement and costs

Access to dispute settlement is an important element of a fair trial and due process. But, in many cases of international dispute settlement systems, such access is limited to certain groups of claimants only.

In the case of investor-State dispute settlement, the limitation of potential claimants to foreign investors that possess the nationality of the treaty partner of the host State has been criticized and challenged as leading to reverse discrimination of a host State’s nationals.⁶⁰ The Calvo doctrine,

⁵⁹ *Judgment No 2867* (n 58) para 44.

⁶⁰ See, for instance, Nicolette Butler and Surya Subedi, ‘The Future of International Investment Regulation: Towards a World Investment Organization?’ (2017) 64 *Netherlands International Law Review* 43, 49: ‘National Treatment provisions usually provide that foreign investors will be treated no less favourably than domestic investors in like circumstances. However, in reality the investment protections available to foreign investors can often exceed those legal protections available to domestic investors, leading to reverse discrimination. For example, foreign investors usually have the ability to effectively sue the investment host state

by contrast, provides that international investment disputes are to be resolved in local courts within the State where the investment is based. Today the need for equality is reinforced by non-discrimination obligations under European Union (EU) law that may make privileged access to dispute settlement incompatible with EU law, at least among EU members in so-called intra-EU-bilateral investment treaties.⁶¹ But, of course, there is also a problem in regard to the actual affordability of investor-State dispute settlement. Arbitration is just often too expensive to offer an effective remedy for individuals or small and medium-sized enterprises.

Similar problems of effective and affordable access to dispute settlement arise before administrative tribunals. Access to ILOAT and other administrative tribunals is limited to officials, namely to persons who have the formal status of staff members. This implies that many contractors, whose percentage of the total 'workforce' in international organizations varies but is usually quite substantial, do not have access to such administrative tribunals.⁶²

That limiting access to employees that are staff members is problematic as it has been observed by some administrative tribunals, which have tried

government through ISDS, whilst domestic investors will most likely have to pursue any arising dispute in the national courts. Access to investment arbitration is considered to be a significant advantage for investors'.

⁶¹ Case C-284/16 *Slovak Republic v Achmea BV* (2018) ECJ, holding that an arbitration clause in a bilateral investment agreement between EU Member States (the Dutch-Slovak BIT) was incompatible with EU law. However, the Court left open the question whether the provision of investor-State dispute settlement in intra-EU BITs constitutes discrimination under Article 18 of the Treaty on the Functioning of the European Union. The European Commission issued a Communication on 19 July 2018 stating that 'intra-EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the principle of non-discrimination among EU investors within the single market under EU law. In addition, by setting up an alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law. They entrust this litigation to private arbitrators, who cannot properly apply EU law, in the absence of the indispensable judicial dialogue with the Court of Justice. For these reasons, the European Commission has consistently taken the view that intra-EU BITs are incompatible with Union law'; Commission, 'Protection of Intra-EU Investment' (Communication) COM (2018) 547 final, 2.

⁶² United Nations Joint Inspection Unit, *Use of non-staff personnel and related contractual modalities in the United Nations system organizations* (2014) JIU/REP/2014/8.

to interpret the notion of ‘staff member’ broadly;⁶³ still, in the absence of a clear legislative mandate that extends to contractors, problems will remain.

This issue is reinforced by the broad immunity from suit enjoyed by the employer, i.e. the international organizations. Some international organizations have reacted to this by offering arbitration to ‘non-staff’ employees or contractors as an alternative remedy. From the institutional arbitration side, the revised Arbitration Rules of the Permanent Court of Arbitration, which also allow for cases between international organizations and private parties,⁶⁴ may have helped a little to facilitate access to justice for contractors. Yet, as one can see from the practice, such ad hoc arbitration may be too costly to be an alternative remedy compared to the efficient functioning of the existing administrative tribunals.

Thus, a challenge that may have to be tackled by statutory reform and incremental judicial answers is the problem of a growing number of people who work for international organizations on the basis of renewable short-term contracts. This implies that they are not able to access administrative tribunals and their precarious employment position makes them highly vulnerable.

It is almost ironic that the principle recognized in *Waite and Kennedy* arose from such a situation. In that case, the applicants had been engaged on repeated short-term contracts and sought to gain recognition under the host State legislation of a permanent employment relationship with the ESA.⁶⁵ EU and ILO instruments equally have sought to respond to criticism of renewable short-term employment contracts by regulating them so as to

⁶³ For example, the ILOAT held that 24 successive short-term contracts gave rise to a legal relationship between the complainant and the organization equivalent to that of a permanent staff member: Judgment No 3090 (2012), followed in Judgment No 3225 (2013).

⁶⁴ Permanent Court of Arbitration, Arbitration Rules 2012, incorporating Permanent Court of Arbitration, Optional Rules for Arbitration between International Organizations and Private Parties 1996.

⁶⁵ *Waite* (n 10) para 71: ‘The significant feature of the instant case is that the applicants, after having performed services at the premises of ESOC in Darmstadt for a considerable time on the basis of contracts with foreign firms, attempted to obtain recognition of permanent employment by ESA on the basis of the above-mentioned special German legislation for the regulation of the German labour market [the German Provision of Labour (Temporary Staff) Act]’.

prevent their abuse.⁶⁶ The legitimacy of the practice of successively renewing short-term contracts in international organizations is thus highly doubtful.

In regard to the need to provide effective and affordable access to justice, it is evident that the ILOAT, as a permanent tribunal with affordable de facto access, represents a better solution than ad hoc arbitration.

2.4 Transparency of dispute settlement

An issue linked to the consistency of dispute settlement outcomes is the problem of transparency in investment arbitration. Only if at least the outcomes of investor-State arbitration do not remain confidential, but are made public, will subsequent tribunals be in a position to take them into account. Thus, the publication of dispute settlement outcomes is an important prerequisite to ensure the crucial rule of law values of predictability and certainty of investment arbitration. Crucial improvements in transparency in investment arbitration have been made over the last decade. For example,

⁶⁶ See Council Directive (EC) 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (1999) OJ L175/43. Clause 5 of the framework agreement states that ‘to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States [...] shall, where there are no equivalent legal measures to prevent abuse, introduce [...] one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships’. See also ILO’s Termination of Employment Convention, 1982 (No. 158), article 2(3) of which provides that ‘adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention’. See also the accompanying Termination of Employment Recommendation 1982 (No. 166), para 1(3)(1) of which reads: ‘Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation. (2) To this end, for example, provision may be made for one or more of the following: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration; (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration’. See also, *Note on Convention No. 158 and Recommendation No. 166 concerning Termination of Employment* (ILO 2009).

the UNCITRAL Transparency Rules have reversed the traditional confidentiality paradigm by calling for far-reaching transparency.⁶⁷ A further, even more recent development is the Mauritius Convention, which applies the same principles to investment treaties concluded prior to the date upon which the UNCITRAL rules became effective.⁶⁸

In the field of administrative tribunals, the ILOAT has specifically contributed to an increased transparency of the outcome of proceedings. Its case law is easily accessible online – through the very successful Triblex case law database⁶⁹ – and such a system of transparency of judgments should be followed by other administrative tribunals. Compared to many domestic legal systems there is often no equivalent to the availability, and thus transparency, of the ILOAT case law.

Of course, the transparency effected by such systems is limited to the resulting judgments. It would also be highly useful for tribunals to hold hearings at which oral evidence is taken, particularly where traditional employment disputes, involving allegations of harassment or mobbing, are concerned. It is hard to understand how a judicial decision-maker can familiarize him or herself with the actual fact pattern, and make findings on contested factual matters, in the absence of oral evidence from the witnesses involved.

III. Conclusion

The ILOAT, as the continuator of the League of Nations Administrative Tribunal, has become a guarantor of the effective access to independent and impartial dispute settlement for staff members of the ILO and many other international organizations. Its jurisprudence has provided a crucial contribution to the identification and development of general principles of employment relations within international organizations and has specifically developed rule of law notions on which such relations must be based.

⁶⁷ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

⁶⁸ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2015) also known as the 'Mauritius Convention'.

⁶⁹ See ILO, *Triblex Case-Law Database* <<https://www.ilo.org/dyn/triblex/triblexmain.bySession>>.

VII

**PROMOTING UNIVERSAL RESPECT
FOR SOCIAL AND LABOUR RIGHTS:
THE SEARCH FOR SYNERGIES
AND IMPROVED EFFICIENCY
IN THE HUMAN RIGHTS LANDSCAPE**



Beyond a Boundary: On Transnational Labour Law, Discontent, and Emancipatory Social Justice

*Adelle Blackett**

I. Introduction

Late in November 2018, Harry Leslie Smith died at 95. The British born son of a coalminer emigrated to Canada in the 1950s, had authored many books, visited refugee crossings at La Colle, Quebec and refugee camps in Calais to show solidarity with migrants shortly before his death. He tweeted his core message with a sense of urgency, responsibility, and optimism: *Don't Let My Past Be Your Future*. His life's work was a reminder of the ardors of life for ordinary working people in Britain who all too frequently watched helplessly as their family members, like his 10-year-old sister, died of treatable illnesses like tuberculosis for lack of decent working conditions and proper public health care. Smith likens his past to the present of many people in the global South. His message tracks that of the International Labour Organization, which has sought to build a foundation of social justice including decent work, based on social citizenship rights that included representation and voice in the workplace, social welfare entitlements and good working conditions. And Smith warned that these hard-fought gains of the 20th century were being actively dismantled in an era increasingly framed as neoliberal. Mostly, he insisted that austerity in England was an entirely preventable tragedy, one that

* The author is grateful to Lian Francis and Zakia Jahan, LL.B. and B.C.L. candidates, and Cassandra Richards, LL.B. and B.C.L., 2019, McGill University, for able research assistance in finalizing this text for publication.

elicits anger as ‘people are wise enough to know that a better life has been denied to them’.¹

Increasingly, commentators opine that it is the social welfare State that emerged after the Second World War, in some parts of the global North, that might be the historical aberration.² The short-term mediation of the social in the economic during the period of embedded liberalism – trade liberalization regulated transnationally, with social redistribution remaining a domestic law matter – is increasingly challenged. Without jettisoning the social justice acquis of the past, this work is sanguine about the exclusions that persisted throughout the heyday for social democracy, and that have hastened embedded liberalism’s unravelling. I argue not for a return, but for a re-embedding of the social in the economic, transnationally – not side-stepping the State, but not reifying it either. The argument is that labour law’s undoing notably through trade liberalization is in many ways its continued acceptance of the legitimacy of treating labour as a purely domestic governance matter, without adequately attending to the distributive justice concerns that must accompany open market policies. It deliberately invites a reflection beyond the State, and is an explicit call to rethink the appropriate governance level of our social justice concerns. It is one of the potential transnational futures of international labour law.

The transnational futures of international labour law (TFILL) is the title given to the 12-week, bilingual course taught at McGill University in winter 2019,³ the place where the ILO took wartime refuge from 1940 to 1948. In its 1919 constitution, ILO members affirm that ‘universal and lasting peace can be established only if it is based on social justice’. In the 1944 constitutional annex, the Declaration of Philadelphia, the ILO goes

¹ Harry Leslie Smith, *Don't Let My Past Be Your Future: A Call to Arms* (Constable 2017). See also UNHRC, Special Rapporteur on extreme poverty and human rights Philip Alston, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc A/HRC/41/39/Add.1 (2019).

² See, for instance, Sven Beckert, *Empire of Cotton: A Global History* (Alfred A. Knopf 2014) 438 (‘globalization is nothing new [...] but the ability of [transnational enterprises] to utilize a number of States and thus remain free of the demands of all of them, is new’).

³ The archive of the live, webcast course features leading academics, a judge of the Supreme Court of Canada, supervisory body members and senior ILO legal officials <<https://www.mcgill.ca/ldrl/what-we-teach/tfill>>. Special guest-edited issues of *AJIL Unbound* (2019) and the *International Labour Review* (2020) are forthcoming.

further to espouse a vision that might be considered transnational – the war against want is to be waged not only within each nation, but by ‘continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare, of all human beings, irrespective of race, creed or sex, who have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity’. The TFILL seeks to speak to the laid off General Motors autoworker in Oshawa whose father was an autoworker, and whose grandfather was an autoworker, and who, faced with a decent lifestyle that is falling apart, proclaims: ‘the market plays with peoples’ lives’. The TFILL seeks at the same time to speak to the destitute worker in Mexico who hopes the job will be his and who migrates internally, with 100 more people all in search of that one job that will not be at conditions anything like the conditions of that GM worker in Oshawa.

II. On discontent

Looming around the TFILL course from the beginning to the end was the challenge of this particular, populist and neoliberal moment, in which in Judith Butler’s words, it is hate that has been emancipated. We could not even discuss themes like resistance, voice and international solidarity without invoking their potentially ugly, exclusionary underbelly. We recognized at once the importance of naming the moment, and the need to refuse to normalize it. It poses a conundrum.

On the one hand, it is critically important to guard against the arrogant perspective that populations simply misunderstand the benefits of open societies, and in particular the benefits of trade liberalization. This approach turns attention away from growing inequality within and between States, and in particular away from the extent to which risk has shifted, and is borne by individual workers. Workers increasingly know that they are amongst the losers of trade. To deny their knowledge, to ignore the disruption, even to consider them the ‘relatively privileged’ compared to non-unionized, precarious workers in the global North and the global South is to enable particular forms of capture of deep-seated discontent.

On the other hand, it is a tragic mistake to speak to the text of the far right, populist embrace of the morality of working class legitimacy claims, without acknowledging the unmistakable subtext: the current populist politicking ‘emancipates hatred’ – in philosopher Judith Butler’s terms⁴ – by naming and claiming victim status – an old and dangerous strategy. In the process, these movements appear to consolidate, rather than challenge, global capital’s ability to capture traditional democratic channels, as if affirming Stuart Hall’s insight that capitalism advances on uneven or divided terrain.⁵ That terrain is divided on the basis of the very present past – the legal, transnational institution that was the transatlantic slave trade, slavery was settler colonialism’s handmaiden, and both systems perpetuate ongoing dispossession alongside the contemporary othering of other constituencies – including migrants. We have lost the battle for emancipatory social justice once majority demographics decide that they do not need to care about others even when those others are being faced with a barrage of hate and conditions that threaten their – and consequently everyone’s – humanity. This stems from a concern for distributive justice both for those who have been ‘othered’ within and ‘othered’ beyond the State. Based on his own life experience in ‘a world that wasn’t uncomfortable with seeing children faint from lack of nutrients, [...] or perish from diseases [...] and showed great resentment when the poor and the unemployed demanded greater attention to their needs’,⁶ the late Harry Leslie Smith understood this, naming how populists ‘seem to do best at dehumanising us and causing divisions so that we don’t have either the numbers or the strength to demand real change’,⁷ and lamenting the loss of the ‘capacity to be outraged about real injustice’.

⁴ Judith Butler: ‘Trump is Emancipating Unbridled Hatred’ (Zeit Online 2016) <<https://www.zeit.de/kultur/2016-10/judith-butler-donald-trump-populism-interview>>.

⁵ Stuart Hall, ‘The Local and the Global: Globalization and Ethnicity’ in Anne McClintock, Aamir Mufti and Ella Shohat (eds), *Dangerous Liaisons: Gender, Nation, and Postcolonial Perspectives* (Minnesota UP 1997) 180. See also Stuart Hall, *The Fateful Triangle: Race, Ethnicity, Nation* (Harvard UP 2017) 119 (arguing that ‘capitalist modernity has always advanced as much by way of the production and negotiation of difference as it has through enforcing sameness, standardization and difference. It is the exploitation of difference – the taking advantage of differentials, and not the standardization of economic variables – that pushes the story of capitalist modernity remorselessly onward’).

⁶ Smith (n 1).

⁷ *ibid.*

III. Beyond a boundary

To get past the conundrum, it is important to name and address a boundary in transnational futures of international labour law. Trade law and labour law relate to structural inequality that has increasingly been acknowledged, both within and between States – as authors from Piketty⁸ to Milanovic⁹ have demonstrated. Inequality cannot fully be grasped only in economic items. Attention must also be paid to the social stratification embodied in histories of racialization that are so central to the history of transnationalization through trade and the establishment of capitalist economic relations that they paradoxically often remain unseen.

The argument surrounds a place and time beyond a boundary that we have allowed to ‘fester under the surface’ until it becomes its own ‘source of corruption and hypocrisy’.¹⁰ C.L.R. James, the foremost historian of slavery and revolution in Haiti, offers pivotal insights into the world of work and the lifeworlds of colonialism through an ‘unending allegory’ of cricket, a sport that ‘in lands far from that which gave it birth, could encompass so much of social reality and still remain a game’.¹¹ The sport – indeed, he calls it an art – was deeply intercolonial and in that sense, transnational, at least in Philip Jessup’s sense as including all law that regulates actions that transcend national frontiers,¹² and encompassing Terence Halliday and Gregory Shaffer’s framing of the formation of social orders that are legalized transnationally into discrete domains, or transnational legal orders.¹³ The States or regions did not disappear, but boundaries were regularly crossed or transgressed. Intercolonial cricket was organized like so much of colonial exchange: by organizations, corporations and clubs that were largely private and highly monopolistic. Mostly, this transnational activity was passionately engaged with by an entire population, and while at some level a strategy of containment – a mythical space ostensibly unblemished by racial

⁸ Thomas Piketty, *Capital in the 21st Century* (Harvard UP 2014).

⁹ Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard UP 2016).

¹⁰ C.L.R. James, *Beyond a Boundary* (Duke UP 1963/2013) 252.

¹¹ *ibid* 91.

¹² Philip C. Jessup, *Transnational Law* (Yale UP 1956).

¹³ Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge UP 2015).

exclusion – James’ ‘special contribution’, in commentator Brian Alleyne’s words, is ‘how the colonised turned the strategy of containment towards insurgent ends.’¹⁴ James’ masterful exploration of the boundaries of race and class is about agency and movement, not sidestepping, not ignoring, not refusing to name the obvious but rather *engaging with* and moving beyond a boundary. Writes James:

Time would pass, old empires would fall and new ones take their place, the relations of countries and the relations of classes had to change, before I discovered that it is not quality of goods and utility which matter, but movement; not where you are or what you have, but where you have come from, where you are going and the rate at which you are getting there.¹⁵

By the end of James’ book, when he openly addresses the extent of racial discrimination in the sport, he himself has moved to break the code of the game – that is, the colonial version of the code under which cricketers and commentators were to show themselves a ‘true sport’ by not making a fuss – that wasn’t cricket. His work went beyond a boundary, and ultimately challenged that colonial code that lay deep inside himself.

In mainstream approaches to labour law at its heyday, that boundary may have been allowed to seem tangential. It is not a coincidence that increasingly, scholars are turning their attention to the relationship between slavery, colonialism (including settler colonialism) and labour law.¹⁶ Particularly in this moment of discontent, the time and space to pay close attention to the boundary appear to converge and enable the following three points to be explored carefully. First, there is a mismatch between the ‘social dimensions’ approach to labour in trade represented

¹⁴ Brian Alleyne, ‘C.L.R. James, Critical Humanist’ in Christopher Gair (ed), *Beyond Boundaries: C.L.R. James and Postnational Studies* (Pluto Press 2006) 175, 187.

¹⁵ James (n 10) 113.

¹⁶ Adelle Blackett, ‘Decolonizing Labour Law: Contributions to an Emergent Transnational Labour Law’ (2018) 33 *Canadian Journal of Law and Society* 111; Adelle Blackett, ‘Introduction: Labor Law and Development: Perspectives on Labor Regulation in Africa and the African Diaspora’ (2010) 32 *Comparative Labor Law and Policy Journal* 303; Adelle Blackett, ‘Decolonizing Labour Law: A Few Comments’ (2016) 92 *Bulletin of Comparative Labour Relations* 89; Adelle Blackett, ‘Emancipation in the Idea of Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford UP 2011) 420.

in side agreements and labour chapters, and the way that the relationship between trade and labour is lived by those who bear the risk of trade liberalization. Second, the mismatch arises out of a methodological nationalism that prevents us from seeing the ways in which labour has in historical, institutional and trade theoretical terms been appropriately addressed as a transnational concern. Third, redressing the mismatch by moving beyond a boundary offers counterhegemonic alternatives to attempts to turn away from deep integration across borders and through trade. It refuses to reify a return to closed border, beggar thy neighbour politics. It also refuses to self-censor in the face of all too prevalent critique, namely that it is impossible to achieve consensus by sovereign States to reimagine labour transnationally. It offers instead, patient yet overdue theorizing and legal analysis, alongside concrete policy proposals. The guiding intuition is that trade builds relationships, communities of exchange. Those communities need to be constructed to take the transnational – often mediated through a tapestry of regional constructions – seriously.

IV. On mismatch

1. *Protectionism or social protection?*



It should not be as hard as it has become to explain the difference between social protection and protectionism, as the image above suggests. The unsatisfactory response that has been delivered up until now in the interface between trade law and labour law is witnessed in side agreements and now labour chapters in trade agreements. They have proliferated since

the NAFTA side agreements on labour and environment¹⁷ that have led to a particular path dependency in the approach to addressing the interface. It is here that the mismatch is particularly stark, and much has been written about the texts.¹⁸ When claims for a social clause in multilateral and regional trade started to get voiced, proponents were immediately chastened with the charge that their objectives if not their means were protectionist. Side agreements and the generations of labour chapters that have followed were designed to retain the domestic character of labour law in each country, and focused largely on carrot and stick based approaches to ensure that local labour law would be enforced. They were evocative of an understanding of a relationship – that effort would be placed into making sure that labour conditions would not be reduced in the face of trade integration, which also came to include investment rights. For a while, they kept labour busy. As civil society groups turned their energies toward using the often lengthy consultative mechanisms, they came to see how truly loosely related they were to the ways in which trade law and policy actually affect the world of work.¹⁹ It is not that nothing happened – it is just that these mechanisms were terribly far from what workers continue to be told they are about: are they a response to unfair competition or a response to trade-related unemployment, or a response to the calls to promote employment and social protection? In other words, they have done little at all to address legitimate discontent, which has continued to be considered a matter of domestic redistributive concern. The argument was that trade agreements should not have much to say – about the closure of an automotive plant in one country or

¹⁷ *North American Agreement on Labour Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States*, 13 September 1993, 32 *International Legal Materials* 1499; *North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 14 September 1993, 32 *International Legal Materials* 1480.

¹⁸ See, for instance, Lance Compa, 'The North American Free Trade Agreement (NAFTA) and the North American Agreement on Labor Cooperation (NAALC)' in Roger Blanpain (ed), *International Encyclopedia of Laws, Labour Law and Industrial Relations* (Kluwer 2001); Adelle Blackett, 'Toward Social Regionalism in the Americas' (2002) 23 *Comparative Labor Law and Policy Journal* 901.

¹⁹ See, for instance, Adelle Blackett, 'Trade Liberalization, Labour Law and Development' in Tzchaynesh Teklè (ed), *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2010) 93, 110–11.

another, or other trade-related dislocations. Those were matters at best to be adjusted for, domestically.

The US Central American and Dominican Republic Free Trade Agreement panel report *In the Matter of Guatemala*²⁰ was rendered public in June 2017, and came to embody that concern. When the case was first launched as a dispute resolution matter under Chapter 20 of the Agreement, then US Ambassador Froman remarked that ‘the labor enforcement case [...] underscores one of the core principles of our trade policy: that we can – and must – shape the terms of trade so that its benefits are broadly shared.’²¹ He was speaking to the losers of trade. Could he really though? The Guatemala case was the first decision issued by an arbitral panel to have proceeded past consultations to a hearing and final report interpreting a labour clause in a free trade agreement in the 25-year history of such clauses – and it could hardly have crystallized better concerns that there is a profound mismatch between trade and labour. It is not just that it took nine years. It is bad enough that the focus on workers at a major port that handles exports destined for the United States, and companies that export primary commodities – coffee – and textile manufacturing – emblematic of North-South trade – was deemed insufficient to meet the criteria ‘in a manner affecting trade’, which was interpreted in a rather exacting manner to require the conferral of a competitive advantage on an employer or employers engaged in trade between the Parties²² – a definition that the new USMCA rejects.²³ It is not even that the US trade representative decided that the cases of the murder of trade unionists should not be raised in this context and that international labour law was not invoked. It is of particular concern that at an interpretative level, the panel does not seem to see how the very existence

²⁰ Final Report of the Panel, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (2017) <[https://www.trade.gov/industry/tas/Guatemala%20-%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20June%2014%202017.pdf](https://www.trade.gov/industry/tas/Guatemala%20-%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20June%2014%202017.pdf)>.

²¹ ‘Remarks by Ambassador Michael Froman on Labor Enforcement Case Against Guatemala’ (18 September 2014) <<https://ustr.gov/about-us/policy-offices/press-office/speeches/2014/September/Remarks-by-Ambassador-Froman-on-Labor-Enforcement-Case-Against-Guatemala>>.

²² Final Report (n 20) paras 171–75.

²³ See *Agreement Between the United States of America, the United Mexican States, and Canada*, 30 November 2018, art 23.3, n 4.

of a labour chapter itself in the body of the Agreement should inflect upon the interpretation of the overall objectives of the trade agreement in the first place, including the objective to ‘promote conditions of fair competition in the free trade area’.²⁴ It should contribute to the perspective that labour is not a mere trade ‘add on’, and result in greater interpretative space for a decision-making panel. And ultimately, the weight of this decision is in what it reveals about the heavy expectations placed on labour chapters in the first place. There remains a mismatch between the ‘social dimensions’ approach to labour in trade that the decision exemplifies – a side by side relationship rather than an interface, and the way in which the relationship between trade and labour is lived by those who bear the risks of and ultimately the losses from trade liberalization.

It is the bargain that was at the centre of labour law, largely understood through the work of economist Karl Polanyi. Sure, trade would progressively be liberalized. But writing in 1944, Karl Polanyi considered fascism in Europe to have been intimately connected to the rise of market liberalism.²⁵ Polanyi reminds us that ‘labor and land are no other than the human beings themselves of which every society consists and the natural surroundings in which they exist’.²⁶ While they are organized into markets, the ‘alleged commodity labor power cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual’,²⁷ so individual States would be allowed – indeed expected – to mediate the social in the economic, to enshrine social citizenship rights and social welfare entitlements for paradigmatic workers in the global North, in exchange for the progressive liberalization of the economy beyond national borders, what international relations specialist John Ruggie has referred to as ‘embedded liberalism’.²⁸ And I do mean paradigmatic – for example, when labour laws in the US excluded farm workers and domestic workers, this was not coincidental or neutral – they overwhelmingly excluded African American

²⁴ *The Dominican Republic–Central America–United States Free Trade Agreement*, 5 August 2004, art 1.2.1(c).

²⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944/1957) 29–30, 237ff.

²⁶ *ibid* 71.

²⁷ *ibid* 73.

²⁸ John G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36 *International Organization* 379.

workers – a history that colours Canada’s US Wagner Act-inspired labour laws here in Canada and that surrounded a decade of litigation for farm workers’ rights.²⁹

But deepened liberalization, and a turn to a set of Washington Consensus-informed policies emblematic of neoliberalism displaced the embedded liberal bargain. This has been true even in social Europe, which early aspired only to an asymmetrical form of harmonization with a focus on detailed but ultimately limited regulation of the portability of social security rights.³⁰ The bargain has been unstable, and fundamental labour rights – notably linked to the freedom of association – have faced severe challenge when confronted with cases that pit market freedoms like the right of establishment against them.³¹ And while the ‘welfare State’ of the global North was part of what newly independent States of the global South wanted to be able to offer when they claimed permanent sovereignty over natural resources and tried to negotiate commodity agreements, the embedded liberal bargain was rarely a realistic option economically for most.³²

The upshot is that this has led to a dramatic movement in the allocation of risk, away from the builders of cars or investors in pipelines or financiers of other transnational services, and onto the shoulders of individual workers, who are increasingly expected to bear the risks of globalization, alone. Those risks are, further, disproportionately borne by those who have fallen outside of the paradigmatic, standard employment relationship that modern labour law concerned itself with – to the exclusion of those disproportionately but not coincidentally represented in work on the peripheries, to which labour law often did not or was not applied. The space of the ‘transnational’ has

²⁹ See generally Fay Faraday, Judy Fudge and Eric Tucker (eds), *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Irwin Law 2012).

³⁰ See generally André Sapir, ‘Trade Liberalization and the Harmonization of Social Policies: Lessons from European Integration’ in Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade – Volume 1, Economic Analysis* (MIT Press 1996) 543.

³¹ See, for instance, C-341/05, *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; C-438/05, *International Transport Workers’ Union v Viking* [2007] ECR I-10779.

³² John G. Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’ (2003), New York University School of Law, Institute for International Law and Justice Working Paper <http://iilj.org/wp-content/uploads/2016/08/Ruggie-Taking-Embedded-Liberalism-Global-IILJ-WP-2003_2-HTIL.pdf>.

grown, just as the space for individual States to provide social protection to their citizens appears to have shrunk. Argues economist Dani Rodrik: the failure to take issues like labour on board is doing greater damage than any fear of the slippery slope of ‘protectionism’.³³

2. *Labour is not a commodity?*



No one bears the risk more than the people – the workers in the image above. And nothing captures more starkly the dichotomy between the way that trade in goods is governed, and the precarious, inhuman nature of the movement of persons – an infinitely malleable notion – when the starting assumption is that labour remains immobile. We have seen worse images, and it is disconcerting that the commodities in the second image seem to travel with greater security and protection than the workers in the first image. Is labour less than a commodity in this era of global discontent? Although migration is treated as largely a matter of domestic law, and legally, labour is kept immobile and to be regulated by nation States as part of their domestic sovereignty, people exercise incredible agency, exercise their disruptive power in the face of deep-seated inequality both within and between States – by risking their lives to move.

Political philosopher Roberto Unger poignantly captures the problem with framing trade as free trade without challenging the internal

³³ Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton UP 2018).

inconsistency of holding some factors of production immobile. He singled out labour, or the movement of persons.³⁴ For the late, leading scholar of transnational labour law, Sir Bob Hepple, the simplest response to the development divide would have been to liberalize the movement of persons.³⁵ Both acknowledge, of course, what it is plain to see – just how politically destabilizing this proposition is, so much so that some liberal commentators have been trying to find a way to back themselves out of a corner painted by far right-wing populists who unequivocally propose closed border strategies – building walls, stopping caravans, harkening back to some fabled time where borders were stable and distributive consequences of deeply unequal inter-State exchange unchallenged.

Migration is not a new phenomenon, however. Frédéric Mégret elucidates a not so distant time when movement was more likely to be the legal norm than jealously guarded national borders.³⁶ What has changed is the terms – from permanent migration with the possibility of citizenship rights, to an unmanaged temporariness that constructs precariousness, in a migration that is facilitated and even fostered, by the breakdown of a bargain that emerged and that was nourished in the postwar period through the so-called Golden Years, and that was supposed to make it possible to imagine the open society reflected in the image on the right, without having to worry about the kind of unplanned, treacherous openness signifying a breakdown in the image on the left. More could be said but the point is clear: we need few examples to see that there is a mismatch, which allows risk to shift back onto the shoulders of the most disenfranchised, and that perpetuates globalization's discontents just as it enables others to kindle them.

³⁴ Roberto Mangabeira Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princeton UP 2007).

³⁵ Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005).

³⁶ Frédéric Mégret, 'Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law' (2017) 111 *American Journal of International Law* Unbound 13.

V. Beyond the limits of methodological nationalism

The second part of the argument focuses on the limits of methodological nationalism. We can ill afford to ignore these limits, or pedal backward to a mythic time when labour was truly domestic. Work on the transnational futures of international labour law is a challenge to the assumption that labour law is somehow naturally and exclusively a domestic regulatory matter, non-severable from individual, domestic State action.

The argument relies on political philosopher Nancy Fraser's invitation to consider present futures, which are historically rooted and acknowledge the weight of the past on our present.³⁷ Fraser captures a challenge that in my opinion is central to contemporary labour regulation – the misframing of issues as national in scope, and to be resolved at the level of the Westphalian, distributive State, rather than at the level that best befits the analysis. Fraser does not send everything metaphorically up to the global, but she does recognize the importance of explicitly naming the transnational in social justice claims. In this regard, she cautions against political misrepresentation. Depending on the subject matter, the level or scale of the justice claim may need to be readjusted.

Two examples warrant consideration. The first can be posited as a provocative reminder: the quadracentennial of the centuries-long transatlantic slave trade was an early reminder that labour has been transnationalized for centuries and coexisted with the emergence of capitalism.³⁸ Of course, this evocation warrants close analytical attention, in light of the way in which relationships across territory and with Indigenous populations were reconceived, well before an age of empire.³⁹ To posit the reminder is to challenge the assumption that a purely domestic understanding of labour regulation should be normatively controlling.

Moreover, when the slave trade came to an end and slavery was abolished, there was a form of trade adjustment made, to compensate the 'losers'.

³⁷ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia UP 2009).

³⁸ Eric Williams, *Capitalism and Slavery* (Ian Randle 1944/1994). See also Beckert (n 2); Blackett (n 19).

³⁹ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP 2005).

The redistribution was substantial, as leading trade law scholar, Michael Trebilcock, underscores analogizing it to the various forms of trade adjustment that are often called for to help workers adjust from job losses.⁴⁰ To be clear, the adjustment for slavery did not go to the slaves, but rather to the slave owners as compensation for lost property. Thanks to the careful work of economic historian Catherine Hall, who has chronicled this source of wealth that very directly contributed to industrialization,⁴¹ we are able to confirm the core of Trinidadian historian and former prime minister Eric Williams' 1944 thesis – that the profits from the triangular trade increased investment in the British Empire, which in turn increased income in England that helped to finance the Industrial Revolution.⁴² Juxtaposing Trebilcock and Hall's work offers an important caution: some appeasement bargains to those with the power to claim that they are 'losers' and threaten to act in rage may be instituted to make change palatable, but at the same time, might perpetuate inequality and unequal exchange.

There is also a rather surprising juxtaposition to be made with policies on adjustment assistance. Trade economist Max Corden emphasized the importance of thinking not just about trade liberalization, but also about adjustments that might allow people to recover if they lose their job.⁴³ He spoke of the conservative social welfare function, offering adjustment policies as second-best strategies to prevent all of the risks of open societies from falling on the shoulders of individual workers.⁴⁴ The theory is complex but the idea is simple – people do not like feeling that they are losing ground, that their children will have lives with fewer opportunities than their own. Second-best policies should be put in place to allow them to transition. The ideas were popularized in the 1970s after the oil crisis and the Tokyo Round of world trade, amongst those industrialized market economies that could afford it. The programs – often very narrowly framed – were carried out by individual States able to do so – generally industrialized market economies,

⁴⁰ Michael J. Trebilcock, *Dealing with Losers: The Political Economy of Policy Transitions* (Oxford UP 2014).

⁴¹ Catherine Hall et al, *Legacies of British Slave-Ownership: Colonial Slavery and the Formation of Victorian Britain* (Cambridge UP 2014).

⁴² Williams (n 38). See also B. L. Solow and S. L. Engerman (eds), *British Capitalism and Caribbean Slavery: The Legacy of Eric Williams* (Cambridge UP 1987/2004).

⁴³ Max Corden, *Trade Policy and Economic Welfare* (2nd edn Oxford UP 1997).

⁴⁴ *ibid.*

and in the US example, not terribly generously. Although in this moment of discontent, there have been some calls to reinstate or reinvigorate adjustment policies, for trade economist Dani Rodrik, this is an idea whose time has gone. Instead, he calls us back to basics, to ‘subsidiarity’ as a guiding principle – so that democracies have space to set their own policy prescriptions in a range of areas – he even includes agricultural subsidies within this frame, and weak property rights regimes.⁴⁵

A core problem with his approach, however, is that it offers nothing to those States – like small open economies of the global South – who might be willing but unable to adjust, even if the terms of the competition are fair. Consider briefly the case of banana industry workers – juxtapose the mostly small-scale producers – with heavy fair trade certification – in the tiny open democracies of the Caribbean, with the largely US financed dollar bananas of several historically deeply-unstable Central American countries. In both cases, the industries are central to the economies of the global South countries in which they are based. Yet the former’s industry has suffered many setbacks in trade dispute resolution that has helped to chip away at the preferential schemes in place with the EU.⁴⁶ One of the questions, surely, is for trade treaty interpretation – should conditions of production affect whether we consider the products to be like products?⁴⁷ That is a distributive justice question, with development consequences for both States at its core. But the question of central concern to this example is the scope for thinking about the consequences of ‘losing’ – losing a pivotal industry, losing a livelihood, and whether this raises distributive justice questions across borders to which trade adjustment should apply.⁴⁸ The question is particularly pertinent across North-South development lines, fostered through trade relationships. The concern is transnational, and requires a transnational response.

⁴⁵ Rodrik (n 33).

⁴⁶ Blackett (n 19) 112–14.

⁴⁷ Adelle Blackett, ‘Defining the Contemporary Role of the State: WTO Treaty Interpretation, Unilateralism, and Linkages’ in C. Carmody, Y. Iwasawa and S. Rhodes (eds), *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (2003) 3 American Society of International Law 289.

⁴⁸ J. Bhagwati, *Mismanaging the Banana Dispute: In the Wind of the Hundred Days – How Washington Misanaged Globalization* (MIT Press 2000) 203.

A second example lies with international institutions – the WTO and the ILO. The WTO has since 1977 occupied the palatial space on the border of tranquil Lake Geneva that was built for the ILO in the 1920s but which it had to leave for a larger, more industrial looking building that could accommodate its post-decolonization tripartite constituency near the end of the golden era of social welfare and industrial development, in 1975. A visitor to the WTO would be greeted by a plaque on the founding stone, which proclaims that ‘if you seek peace, cultivate justice’ (*si vis pacem, cole justitiam*). Remarkable also are life-size murals representing in their own way, the dignity of work. The images may seem out of place at the WTO, but they might not have if the originally conceived institution, the International Trade Organization (ITO), had come into being under the Havana Charter negotiated from 1946 to 1948.⁴⁹ At the time, coming out of the Great Depression and World War, liberalized trade was understood to be a means of increasing employment and general social well-being.

The first public proposal was the 1945 document entitled ‘Proposals for Consideration by an International Conference on Trade and Employment’,⁵⁰ and the Final Act of the United Nations Conference on Trade and Employment (the Havana Charter) was issued in 1948. A premium was placed on space for collaboration, that is, the indispensable character of ‘regular exchange of information and views among Members [...] for successful co-operation’,⁵¹ and would even have been empowered to ‘initiate consultations among Members with a view to their taking appropriate measures against the international spread of a decline in employment, production or demand’.⁵² It was recognized that unemployment and underemployment were not matters of domestic concern alone. The transnational was contemplated at the interface between labour and trade. ‘Fair labour standards’ were framed as part of the recognition that ‘all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and

⁴⁹ Havana Charter for an International Trade Organization, 24 March 1948, UN Conference on Trade and Employment, Final Act and Related Documents, UN Doc E/CONF.2/78.

⁵⁰ US Department of State, *Proposals for Expansion of World Trade and Employment*, Pub No. 2411, Commercial Policy Series 79 (Washington: Department of State, 1945) 8.

⁵¹ Havana Charter (n 49) art 2(3).

⁵² *ibid* art 5(2).

working conditions'.⁵³ Members would be expected to engage in 'appropriate and feasible' action to eliminate unfair labour conditions.⁵⁴ The undertaking was not only subject to cooperation with the ILO, but also to the ITO's own nullification and impairment provisions. This vision of trade in the ITO chapter seems to map onto the founding principles of the ILO within the ILO's constitution, including its 1944 constitutional annex, the Declaration of Philadelphia.

The international legal scholar who would become the ILO's Director-General from 1970 to 1973, and who was part of the team of international labour officials in Montreal, Wilfred Jenks, did not appear to conceive the embedded liberal compromise as operating in stark dichotomy between a slow, selective and progressively operationalized economic liberalization through multilateral trade, and redistributive domestic policies, operating in mutual isolation at the domestic level.⁵⁵ Rather, Jenks sought to build a more complete international social policy into the international legal architecture at the UN and the ILO and as we see in what would have been the ITO – full employment was central to this international framing.

But we did not get an ITO, and instead the carved-out General Agreement on Tariffs and Trade was ushered in alone under a model sometimes described as contractarian. Under the current WTO there are some limited spaces through which social policy concerns have been addressed, but hardly in a direct and fulsome manner, through treaty interpretation. In this moment, few actively call for the WTO to be given a full mandate on the social, seeking alternative avenues for cooperation with institutions like the ILO and regional prospects. Its current and troubling political undermining in this fraught moment further gives pause.

⁵³ *ibid* art 7(1).

⁵⁴ *ibid*.

⁵⁵ C.W. Jenks, 'Human Rights, Social Justice and Peace: The Broader Significance of the I.L.O. Experience' in A. Eide and A. Schou (eds), *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium* (Interscience 1968) 227.

VI. Relationships of exchange, or emancipatory social justice

Taking Fraser's invitation to think transnationally does not require a sacrifice of the solid intuition that the truly local – that is, the workplace – should remain a crucial governance site – but as the ILO's decent work prize winner, Emeritus University Professor Harry Arthurs, has carefully elucidated in his work, its source has never really been the State. The State may of course support that collective autonomy, through surrounding, supporting, but increasingly fragile, institutions.⁵⁶ The transnational is not simply 'out there' – rather, the transnational interacts immediately, intensely with and on the local. The line between the local and the transnational is thin. But it is precisely in those moments when workers seem to seize on the narrow distance between governance orders, to operate at one level to obtain concessions at another.⁵⁷

Two policy areas show room for some movement. First, it is critical to theorize notions of international solidarity – developed within the framework of the third generation, international right to development, and increasingly framed independently and with a view to thinking about its relationship to broader economic participation rights, and tying it to specific forms of policy action that are available. I posit that it is in regional governance spaces that alternative spaces of distributive justice may be identified. The idea is familiar: while regional agreements – like trade agreements – are creatures of States, they create distinct, privileged or prioritized relationships across time, that are meant to yield preferential, distributional consequences between their members.⁵⁸ My work on social regionalism seeks to operationalize those spaces, as spaces through which trade adjustment may be rethought.⁵⁹ The European Union, including the European global adjustment funds, offer an example.

⁵⁶ H.W. Arthurs, 'Labour Law Without the State?' (1996) 46 *University of Toronto Law Journal* 1.

⁵⁷ A remarkable example is seen in the domestic workers' social movements, which advocated for the Domestic Workers Convention, 2011 (No. 189) and Recommendation, 2011 (No. 201). See generally Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Cornell UP 2019).

⁵⁸ Blackett (n 19) 116, 131–32.

⁵⁹ See Adelle Blackett and Christian Lévesque (eds), *Social Regionalism in the Global Economy* (Routledge 2011).

The second requires thinking to be sectoral, and is mapped onto governance initiatives like the ILO and World Bank funded Better Work program in the textile industry, which ensures that the production of clothing coming from a member country – like Bangladesh or Vietnam, Lesotho or Haiti – no matter the label, is monitored for respect of local labour codes to international labour standards.⁶⁰ Better Work commits each firm in the country to a process of continuous improvement. It is a strong initiative, but its weak point is the weak point in international labour standards: the absence of a living wage requirement. Thinking labour law transnationally would entail creating space in time – internationally, notably at the ILO which has started discussions about the living wage in the textile industry⁶¹ – for the concerned industry actors including the mostly female global South workforces to negotiate one or several living wages that take account both for local cost of living and factors of international competition. The logic would be to build complementarity while reducing the race to the bottom amongst the small open economies that participate.

VII. Conclusion

The strategies are an important part of a counterhegemonic approach to globalization. In other words, transnational labour law must not only be alive to laden historical divisions that prevent transnational solidarity, but its proponents have the courage to build movement beyond those boundaries.

One of the implicit affirmations of this chapter has been that it is dangerous to avoid or to try to deny that boundaries exist. At the very least, emancipatory social justice claims must avoid easy denials that ‘identity’ matters. The denials do not erase the past; they simply ensure its invisibility, and

⁶⁰ See generally Drusilla Brown et al, ‘The Impact of Better Work: A Joint Program of the International Labour Organization and the International Financial Corporation’ (2016) <<https://betterwork.org/dev/wp-content/uploads/2016/09/Tufts-University-Final-IA.pdf>>. See also Adelle Blackett, ‘Social Regionalism in Better Work Haiti’ (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 163.

⁶¹ ILO, *Global Dialogue Forum on Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries: Points of Consensus* (ILO 2014) <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_311155.pdf>.

therefore, its persisting power to prevent the kind of lasting national – and transnational – solidarity that is critically necessary for paradigm-shifting responses. It is perhaps particularly through the international policy work, including that on migrant domestic workers' rights that emerges the realization that to work carefully, steadfastly, and collectively, it might not be quite as impossible to achieve understanding and consensus in the specific as we are sometimes led to believe.

The late Harry Leslie Smith ended his book by calling for people to believe in social justice and our responsibility to be each other's keeper.⁶² Consider someone who came from the other side of the Atlantic and did not have Smith's longevity but shared his conviction about the dignity of labour. In his short, courage-filled life that came to an end 50 years ago, on 4 April 1968, the Rev. Dr. Martin Luther King Jr. had given his all to fight for social justice, global, racial equality, and the poor. He died 50 years ago while in Memphis supporting the struggle for social justice – decent, safe, dignified working conditions – for some of the most dispossessed workers, sanitation workers, who were exercising a hallmark of ILO principles, their right to strike. His last book⁶³ pays a reread in the current dangerous and turbulent times. Dr. King's words on social justice as essential to lasting peace offer a fitting conclusion: 'power at its best is love implementing the demands of justice. Justice at its best is love correcting everything that stands against love'.⁶⁴

⁶² Smith (n 1).

⁶³ Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community?* (Beacon Press 1968).

⁶⁴ *ibid* 8.

Right to Work and Rights at Work: Is There a Role for the Human Rights Treaty Bodies?

Virginia Brás Gomes

I. Labour rights in core international human rights treaties

The right to work and rights at work are an integral element of human rights and fundamental freedoms. The Universal Declaration on Human Rights (UDHR) and core human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), include provisions on the right to work and rights at work establishing clear obligations for States parties regarding free choice of employment, just and favourable conditions of work, protection against unemployment, as well as the right to form and to join trade unions for the protection of workers' interests.¹

The UDHR also recognizes that everyone who works has the right to a just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. This is indeed a holistic and far-ranging provision in so far as it highlights the universality of the right, the importance of a just remuneration for workers and their families to live in dignity, with recourse, if necessary, to other social protection measures.

Comprehensive anti-discrimination treaties such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) establish the obligation for States to eliminate discrimination in the enjoyment of human rights, including the right to work and rights at work.² The Convention on the Rights of the Child (CRC)

¹ Articles 23 and 24 of the UDHR; Articles 6 to 8 of the ICESCR.

² Article 2 read in conjunction with article 5 in the context of the CERD and article 11 in its entirety in the CEDAW.

establishes the prohibition for children to perform any work that is harmful to their education, health and development.³

Years later, in 1990, the Convention on the Rights of all Migrant Workers and Members of their Families (CMW) established that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration, other conditions of work and terms of employment. Moreover, it requires States parties to take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, it stipulates that employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity. The right to join any trade union and to seek its aid and assistance is also included in this Convention.⁴

In turn, the Convention on the Rights of Persons with Disabilities (CRPD) recognizes their rights to work and employment on an equal basis with others including the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States parties must ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.⁵

There can be no doubt that at the time of negotiating the various human rights treaties, over a span of fifty years, States recognized the relevance of the right to work and rights at work for all those living under their jurisdiction. The realization of these rights evolved along the years to reflect on-going challenges in general but also contemporary trends related to the protection of specific groups such as migrant workers or persons with disabilities. Treaty bodies, therefore, have a mandate to interpret and monitor the right to work and rights at work in their respective treaties even running the risk of duplicating recommendations in their Concluding Observations, as States parties to the different treaties often claim.

³ Article 32 of the CRC.

⁴ Articles 25 and 26 of the CMW.

⁵ Article 27 of the CRPD.

Human rights treaty bodies have a triple role to play – monitoring, standard-setting and considering individual communications related to compliance with specific treaties. In these areas, some synergies exist (too few, in my opinion) among treaty bodies themselves, with other human rights mechanisms as well as with UN agencies and specialized bodies.

II. The right to work and rights at work in the ICESCR

The ICESCR deals more comprehensively than any other instrument with the right to work and rights at work. It proclaims the right to work in a general sense (article 6). It is not a simple philosophical principle but it should also not be understood as an absolute and unconditional right to obtain employment. It encompasses all forms of work, whether dependent wage-paid work or independent work. The Covenant explicitly develops the individual dimension of the right to work through the recognition of the right of everyone to the enjoyment of just and favourable conditions of work (article 7). The collective dimension of the right to work is guaranteed by the right of everyone to form trade unions and join the trade union of his choice, as well as the right of trade unions to function freely and the right to strike (article 8). Since the right to work cannot be fully realized without taking into account rights at work, articles 6, 7 and 8 of the Covenant are interdependent and interconnected.

The UN Committee on Economic, Social and Cultural Rights (CESCR) and the ILO should be in a mutually reinforcing relationship, because both the Covenant and ILO instruments include human rights principles, cross-cutting provisions and the duties of States.

The principles of universality, indivisibility and interdependence of all human rights are reflected in a number of ILO Conventions and Recommendations. One of the instruments that immediately comes to mind is the Social Protection Floors Recommendation, 2012 (No. 202).

The ICESCR cross-cutting provisions of non-discrimination and gender equality⁶ are also part and parcel of ILO instruments, whether specifically

⁶ Article 2.2 reads: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination

focused on non-discrimination and equality or of a more general nature but with provisions intended to combat discrimination on various grounds.

Turning now to the obligations of States parties that have ratified the ICESCR, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure the full realization of economic, social and cultural rights, including the rights to work and at work.

With a different scope and formulation grounded in tripartism and social dialogue, the ILO international labour standards are legal instruments setting out basic principles and rights at work. In a number of areas, there is a considerable similarity of purpose. One example is the specific obligation of States that have ratified the ICESCR to recognize the right to work in national legal systems and to formulate and implement a national employment policy with a view to ‘stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment’.⁷

The often repeated call to States by the CESCR to adopt and implement a National Employment Strategy or Plan of Action on the basis of a participatory and transparent process that includes not only employer and worker organizations but also other organizations in representation of rights holders,⁸ with clearly identified objectives, targeted measures and an inbuilt monitoring system with indicators and benchmarks to evaluate

of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Article 3 reads: ‘The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant’.

⁷ Article 1 of the ILO Employment Policy Convention, 1964 (No. 122) is cited in the CESCR General Comment 18 (2006) para 26.

⁸ All rights holders, in particular the most disadvantaged, should be guaranteed the means to participate in decisions that affect the enjoyment of their rights. In paragraph 56 of its General Comment 23 (2016), on the right to just and favourable conditions of work, the CESCR underlines the importance of consultation in formulating, implementing, reviewing and monitoring laws and policies related to the right to work and rights at work not only with traditional social partners such as workers and employers and their representative organizations, but also with other relevant organizations, such as those representing persons with disabilities, younger and older persons, women, workers in the informal economy, migrants and LGBTI persons, as well as representatives of ethnic groups and indigenous communities.

progress and take corrective measures when needed, is also reflected in ILO's Employment Policy Convention, 1964 (No. 122), stating that 'each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment' with the corresponding Employment Policy Recommendation, 1964 (No. 122) and other related instruments providing guidance on a number of elements, such as vocational training and job creation.

III. Decent or precarious work?

Work as specified in articles 6, 7 and 8 of the Covenant must be decent work that respects the fundamental rights of the individual as well as the rights of workers and which provides an income to enable workers to earn a living for themselves and their families. The ILO's concept of decent work that is about opportunities for women and men to obtain productive employment in conditions of freedom, equity, security and human dignity conveys an equally powerful message.

The concept of work and the definition of workers have evolved from the time of drafting of the Covenant to include new categories, such as self-employed workers, workers in the informal economy, agricultural workers, migrant and refugee workers, and unpaid workers. All of them are entitled to the protection of their rights.

However, for old and new categories of workers, the importance of the right to just and favourable conditions of work has yet to be fully realized. More than fifty years after the adoption of the Covenant, the level of wages in many parts of the world remains low. Annually, millions of workers are victims of accidents at work and professional diseases. Almost half of all countries still regulate weekly working hours above the 40-hour work week, with many establishing a 48-hour limit without the required rest and leisure conditions. Workers in the informal economy as well as in special economic, free trade and export processing zones, are often denied the right to just and favourable conditions of work through non-enforcement of labour legislation and lack of access to social protection.

The gender pay gap is a persistent and global problem. Progress on the three key interrelated indicators for gender equality in the context of labour rights – the glass ceiling, the sticky floor and equal pay for work of equal

value – remain far from satisfactory. Intersectional discrimination, the absence of a life-cycle approach regarding the needs of women as well as the lack of holistic policies to ensure the reconciliation of professional and family lives through public and private support measures and social services, lead to accumulated disadvantages that have a negative impact on the enjoyment by women of their rights.

Economic, fiscal and political crises have led to blanket cuts in social spending and austerity measures that claw back advances. The increasing complexity of non-standard forms of employment and work contracts, such as short-term and zero-hour contracts, as well as an erosion of national and international labour standards, collective bargaining and working conditions, have resulted in insufficient protection of workers of all ages.

Decent work deficits become evident when opportunities for remunerated work are limited to certain groups at the expense of others, when social and labour conditions increase workers' exposure to risk rather than protect them from it and when lack of productive work keeps workers and their families in a cycle of poverty and powerlessness in the face of violence and abuse.

These deficits result in precarious work described by the ILO as having four dimensions: uncertainty as to the continuing availability of the work/job; limited control (individually and collectively) over working conditions, the labour process and pace of work; limited access to legal and regulatory protection and to social protection; low-wage jobs and a high degree of economic vulnerability.⁹ They are often at the root of human rights violations that require effective remedies.¹⁰ As we go forward, issues such as

⁹ See 'Meeting the Challenge of Precarious Work: A worker's agenda' (2013) 5 *International Journal of Labour Research*.

¹⁰ Access to justice is an important human rights principle since it enables the rights holder to access an entitlement rather than being a mere receiver of policy benefits depending on political will and resource allocation. All rights holders should have full access to effective remedies in case of violation of their rights. Such remedies include reparation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. The right to an effective remedy need not always be interpreted as requiring a judicial remedy. Administrative remedies will in many cases be adequate, and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of human rights principles in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective.

automation and the impact of artificial intelligence on the world of work, and how they all affect human rights, will call for a renewed joint commitment to strengthen the human rights dimensions in the new world of work.

IV. Minimum wage, health and safety at work, violence and harassment

The realization of rights at work carries a number of obligations for States such as the minimum wage; equal pay for work of equal value; a national policy for the prevention of accidents and work-related injury; work and rest periods, paid annual leave and other leaves; flexible working arrangements; trade union affiliation and collective bargaining.

The minimum wage should provide all workers with a decent living for themselves and their families enabling them to enjoy other rights, such as education, health and an adequate standard of living. The elements to be taken into account in fixing the minimum wage are flexible but should include the general level of wages in the country, the cost of living, social security contributions and benefits and relative living standards.¹¹

The concerns of the CESCR about the insufficient amount of the minimum wage that does not enable workers and their families to enjoy a decent living, or minimum wages that do not apply equally to all workers, or minimum wages by sector and industry that are lower than the national minimum wage, or the absence of a permanent structure with the participation of the social partners for a regular review of the minimum wage, are all aspects that are reflected in a number of ILO wage-fixing and wage-protection conventions and recommendations as well as in the discussions on the living wage.

Under article 7 of the ICESCR, States should adopt a national policy for health and safety at work. An important element of such a policy is the freedom from any kind of harassment, including sexual harassment. Legislation, such as anti-discrimination laws, the penal code and labour legislation, should define harassment broadly, with explicit reference to sexual and other forms of harassment. A specific definition of sexual

¹¹ CESCR General Comment 23 (2016) paras 18, 20 and 21.

harassment in the workplace is appropriate, and legislation should criminalize and punish sexual harassment as appropriate.

National reports of States parties to the Covenant reflect a variety of shortcomings, such as the lack of a clear definition of sexual harassment in the workplace, the fact that it does not constitute a specific criminal offence (in most cases it is considered sufficient to include it in the anti-discrimination legislation and the penal code), and the insufficiency of prevention mechanisms, procedures for complaints and avenues for redress and reparation.

The ILO's Violence and Harassment Convention, 2019 (No. 190) finally constitutes an international instrument to deal with an issue that is universal in nature and bound to acquire even more complex facets in the changing world of work. Its adoption has enabled ILO's tripartite constituency to successfully conclude the multi-year process of discussion and negotiation and proceed to adopt a much-needed standard with an inclusive, integrated and gender-responsive approach. It requires member States to address violence and harassment in the world of work in labour and employment, occupational safety and health, equality and non-discrimination law, and in criminal law, where appropriate, and it includes a number of enforcement measures and possible remedies, as well as awareness-raising, guidance and training initiatives. Only its future implementation will allow for an assessment of how effective it is in combatting all forms of violence and harassment in the workplace.

V. Specific categories of workers as rights holders

The full enjoyment of the right to work and rights at work is particularly difficult for certain categories of workers due to the nature, and the lack of economic and social recognition, of the work they perform. Among these workers that are entitled to protection under the ICESCR as well as ILO instruments, are workers in the informal economy and domestic workers.

“The term informal economy refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that although they

are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs'.¹²

The terms 'informal economy', 'informal sector' and 'informal employment' are often used interchangeably. Though there may be technical differences in the definition, there is one common reason for their existence and that is unemployment, underemployment and lack of opportunities in the formal labour market.¹³ Men and women live and work in the informal economy because of their need to survive rather than as a matter of choice. Women workers are over-represented in the informal economy as casual workers, home workers or own account workers. Millions of them are engaged in unpaid work in the home or in family enterprises without income guarantee or social protection.

States, therefore, must make all efforts to transition to the formal economy, through concerted efforts across several policy areas and with the collaborative engagement of several authorities, and public and private institutions and partners. It is a long-term endeavour that is not moving as swiftly as one would envisage some years ago, when economic growth was more reliable and policies were more conducive to the realization of human rights. On the contrary, the informalization and casualization of what was previously regular employment even in high-income countries, seems to point in the opposite direction. In the meantime, informal economy workers have to be protected more than ever from huge decent work deficits, such as ambiguous or disguised employment status, high illiteracy, low skill levels and lack of training opportunities. They are exposed to inadequate and unsafe working conditions and excluded or not reachable by social security schemes that ensure maternity benefits or pensions. They are also not

¹² ILO Resolution (2002) concerning decent work and the informal economy.

¹³ The resolution of 2002 concerning decent work and the informal economy was complemented by the Resolution concerning decent work in global supply chains (2016) that lists the opportunities and challenges for the realization of decent work and inclusive development emerging from global supply chains. Among the challenges, reference is made to failures at all levels within global supply chains that have contributed to decent work deficits in occupational safety and health, wages and working time with a negative impact on the employment relationship and the protections it can offer. Such deficits have also contributed to the undermining of labour rights, particularly freedom of association and collective bargaining.

covered by health, safety and other labour regulations, including freedom of association and collective bargaining.

In its dialogue with States, as well as in its Concluding Observations, the CESCR has often referenced ILO's Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) as a source of guidance to be taken into account to facilitate the transition, promote the creation and sustainability of decent jobs in the formal economy and prevent the informalization of formal economy jobs.

Domestic workers have traditionally lacked recognition as real workers and this is deeply rooted in the perceptions of employers, policy makers and society at large. The vast majority of domestic workers are women and many belong to disadvantaged communities. Since domestic workers mirror unpaid work that has traditionally been carried out by women in their own homes, it is often looked down upon as having no economic value leading to these workers being out of the purview of labour rights. They are often subject to discrimination, violence and abuse, not allowed to join trade unions, and not entitled to the minimum wage, to the limitation of daily and weekly working hours and to social security benefits. Lack of monitoring of domestic work by labour inspectorates hinders filing of complaints, due investigations and access to remedies, often rendering these workers fully dependent on unscrupulous employers.

It is the recognition that domestic workers make important contributions to the functioning of households and labour markets and that their rights to work and fair working conditions need to be respected, protected and fulfilled that lies at the heart of the ILO's Domestic Workers Convention, 2011 (No. 189) that established international labour standards for domestic work.¹⁴ The CESCR frequently requests States to ratify this Convention in order to mitigate unfair working conditions that plague many of these workers.

Perhaps the most consistent reliance of the CESCR on ILO Conventions to strengthen its Concluding Observations to States parties

¹⁴ For the purpose of Convention No. 189, the term 'domestic work' means work performed in or for a household or households and domestic worker means any person engaged in domestic work within an employment relationship.

at the end of the reporting cycle is under article 8 on trade union rights. Over-stringent restrictions to the enjoyment of these rights, including the right to strike and acts of discrimination, violence, harassment and intimidation against trade union leaders, activists and workers on strike that need to be duly investigated, are part of many of the CESCR Concluding Observations. So is the recommendation for States to ratify ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

This is one of the areas where there has been little progress on the part of States, even though these two Conventions are included among the eight ILO fundamental Conventions that identify core principles and rights in the workplace, and all ILO member States are required to respect, to promote and to realize, in good faith, the principles included therein, even if they have not ratified the Conventions in question.

Perhaps in the future there could be a joint campaign by the Office of the High Commissioner for Human Rights and the ILO to push for the ratification of the eight fundamental Conventions as part of the core obligations of States parties to the ICESCR to guarantee a minimum essential level of the rights to work and at work, ensure non-discrimination in the enjoyment of these rights and prohibit forced labour and child labour.

VI. Complementarity in standard-setting

Turning briefly to the standard-setting role of treaty bodies and to a recent example of harnessing the potential of ILO instruments to further the interpretation of the rights in the Covenant, reference should be made to General Comment 23 (2016) of the CESCR on just and favourable conditions of work, in which the corpus of ILO instruments functions as a kind of operational guidance to the normative interpretation of article 7 throughout the text. In addition to a list of 23 ILO instruments footnoted as relevant by the CESCR,¹⁵ ILO statistical data and studies, as

¹⁵ Although many ILO conventions relate directly and indirectly to just and favourable conditions of work, for General Comment 23, the Committee has identified the following as relevant: Hours of Work (Industry) Convention, 1919 (No. 1); Weekly Rest (Industry)

well as references to specific Conventions, are included in the text of the General Comment to support the interpretation of the Committee. The ILO's Occupational Safety and Health Convention, 1981 (No. 155) and its Protocol of 2002 were especially useful in establishing the obligations of States to ensure safe and healthy working conditions and in identifying the technical and operational elements and the appropriate monitoring and enforcement provisions that should be incorporated in a national policy for the prevention of accidents and work-related health injury. ILO instruments were also useful for the Committee to elaborate on just and favourable conditions of work for specific categories of workers, including women workers, young and older workers, workers with disabilities, workers in the informal economy, migrant workers, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.

The second example of enhanced synergies is provided by the CESCRC Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals (2015), adopted in the run up to the negotiation of the SDGs, in which the Committee reiterated the mutually reinforcing nature of its General Comment 19 (2007) on the right to social security and ILO's Recommendation No. 202.¹⁶

Convention, 1921 (No. 14); Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47); Protection of Wages Convention, 1949 (No. 95); Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99); Equal Remuneration Convention, 1951 (No. 100); Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Wage Fixing Convention, 1970 (No. 131); Holidays with Pay Convention (Revised), 1970 (No. 132); Minimum Age Convention, 1973 (No. 138); Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153); Occupational Safety and Health Convention, 1981 (No. 155); Protocol of 2002 to the Occupational Safety and Health Convention, 1981; Workers with Family Responsibilities Convention, 1981 (No. 156); Night Work Convention, 1990 (No. 171); Part-Time Work Convention, 1994 (No. 175); Maternity Protection Convention, 2000 (No. 183); Convention concerning the Promotional Framework for Occupational Safety and Health, 2006 (No. 187); and Domestic Workers Convention, 2011 (No. 189).

¹⁶ The SPF is a comprehensive set of measures that comprises basic social security guarantees to ensure at a minimum that, over the life cycle, all in need have access to: (a) a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality; (b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;

In reality, what the CESCR highlighted was that the set of basic social security guarantees that ensure universal access to essential health services and basic income security constitutes the core obligation of States to provide a minimum level of benefits to all individuals and families to enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education. Recommendation No. 202 is thus instrumental in providing a tool to make the human rights narrative real on the ground by offering all States the possibility to put in place Social Protection Floors (SPFs).

ILO studies have found that it is possible to finance such a SPF, or at least some of its components, even in low-income countries. States should, therefore, in accordance with national circumstances, establish as quickly as possible and maintain SPFs for all residents. For an incremental approach, a national social security strategy and a diagnosis of priority needs can help. Progressive realization under the Covenant would be well-served by such strategies for the extension of social security that should progressively ensure higher levels of protection to as many people as possible.

Recommendation No. 202 is also an important call to attention regarding the inclusion of workers in the informal economy, most of whom are women. Several of the basic guarantees, such as maternal health, child-care and maternity benefits, and pensions contribute towards establishing universal benefits that decrease gender inequalities.¹⁷

The philosophy and the content of SPFs were also at the heart of the letter from the Chairperson of the CESCR to States parties in 2011 on austerity measures. The letter alerted policy makers to the fact that any proposed policy change or adjustment to the enjoyment of Covenant rights as a consequence of austerity measures, should identify the minimum core content of rights or a social protection floor, as developed by the ILO and ensure the protection of this core content at all times.

(c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and (d) basic income security, at least at a nationally defined minimum level, for older persons.

¹⁷ CESCR Statement on Social Protection Floors: an essential element of the right to social security and of the sustainable development goals, para 9.

In February 2019, the ILO Committee of Experts on the Application of Conventions and Recommendations prepared a General Survey on Social Protection Floors and Recommendation No. 202. It documented the implementation of the Recommendation in law, policies and practice, based on the reports from 114 governments and the observations of employers' and workers' organizations. As indicated in its executive summary, the fact that it focused on a single stand-alone recommendation, allowed for a detailed monitoring exercise on what was intended as a major step towards the guarantee of a life with dignity for all, in particular for those most in need of the protection of the State, through the fulfillment of a number of rights under the general protection of a public social security system.

Since 2012, the establishment of SPFs and of the strategies to progressively achieve universal social protection are part of the dialogue of the CESCR with States in the context of the full realization of the right to social security. States that are already working on the implementation of a SPF are encouraged to strengthen their efforts by increasing the personal and material coverage of contributory and not contributory schemes to ensure access to health care, basic services and income security throughout the life cycle. At times, States are not sufficiently familiar with the recommendation although they do have social protection programs and measures in place. They may be fragmented and unsustainable in the medium term for lack of a holistic approach to a public social security system, governance issues and inadequate funding. However, as reflected in the Committee's Concluding Observations to these States, with a more informed understanding of Recommendation No. 202 and technical assistance from the ILO, these programs and measures could constitute the floor and boost public investment in progressively broadening the floor and moving upwards to build the walls of the system.

In a number of countries with a relatively acceptable general level of social protection, a drastic decrease in social spending due to austerity budgets resulted in measures that clearly led to the lowering of social protection standards. Though such measures were meant to be temporary, in reality States that are out of the public deficit period and on the way to economic recovery have not returned to the pre-crisis level of public spending for the implementation of social policies. That is not the spirit of the Recommendation and that is why the insistence on progressive realization by mobilizing additional resources and setting targets and timeframes as

one of the key messages in the General Survey is particularly welcome. Welcome are also the references to the need for a social protection expenditure floor and to core social protection spending to be guaranteed by States at all times thereby protecting individuals and families against fiscal and economic austerity measures.

It is encouraging to note that the implementation of Recommendation No. 202 has led to the recognition of the importance of a national consensus that requires full participation of all relevant stakeholders including social partners, civil society organizations and representatives of rights holders. Participation of those to whom the policies are addressed and the accountability of the duty bearers in implementing and evaluating the measures taken, identifying gaps and any unexpected negative results and making the adequate changes in policies and practices are essential human rights principles but they are also success factors that need to be made visible.¹⁸

The General Survey comes at a very good time in making available information to identify the present situation and help countries move towards achieving the SDGs, in particular Goal 1 on ending poverty and all the co-related Goals. Target 1.3 that refers specifically to the implementation of nationally appropriate social protection systems and measures for all, including floors, also refers to the achievement by 2030 of substantial coverage of the poor and the vulnerable. Assessing the degree of achievement of this target and other related targets requires a comprehensive and disaggregated collection of data. Since it is the ILO that holds the custodianship for the compilation of data to track progress towards the achievement of this target it will certainly be in a position to help States improve their data collection systems using the results of the implementation of Recommendation No. 202 as useful indicators.

This General Survey is a great contribution to the celebration of the ILO's centenary. Many ILO Conventions were milestones on the road to the achievement of social rights. Recommendation No. 202 will hold pride of place among the 21st century instruments to push for the universal realization of these rights in all countries of the world irrespective of their stage of economic and social development.

¹⁸ Participation of rights holders calls for accountability on the part of duty bearers at all levels that needs to be exercised in an accessible, transparent and effective manner.

VII. Human rights indicators

The assessment of the impact of economic and social policies on the enjoyment of human rights is not possible without indicators and benchmarks that are disaggregated, comparable, accurate, measurable, timely and easy to understand and apply. Only then will they be recognized and jointly owned by all the stakeholders.

The Office of the United Nations High Commissioner For Human Rights (OHCHR) has developed a framework with a list of illustrative indicators on several civil, political, economic, social and cultural rights including the right to work. These lists, encompassing three types of indicators,¹⁹ are being adapted to the country-specific context and applied by national governments, national human rights institutions and non-governmental organizations.

Together with other relevant indicators on the right to work such as the ILO decent work indicators²⁰ and those included in the recently adopted indicators to report on the SDGs,²¹ they constitute a sound framework for the assessment of compliance of States with their human rights obligations, policy measures and efforts to achieve the sustainable development goals.

¹⁹ Structural indicators reflect the ratification of legal instruments, the existence of institutional mechanisms and the adoption of national policies for the promotion and protection of human rights; Process Indicators that link institutional mandates to results thereby allowing for the measurement of the efforts of governments as main duty bearers; and outcome indicators demonstrate tangible results for the rights holders. The concept of human rights indicators is not only to place all human rights on the same footing but also to unpack the normative content of each right into characteristic attributes. In the case of the right to work, the four attributes are: access to decent and productive work; just and safe working conditions; training, skills upgrading and professional development; and protection from forced labour and unemployment; see *Human Rights Indicators. A Guide to Measurement and Implementation* (OHCHR 2012) 95 <<https://www.ohchr.org/EN/Issues/Indicators/Pages/documents.aspx>>.

²⁰ *Decent Work Indicators Concepts and Definitions Manual* (ILO 2013).

²¹ *Indicators and a Monitoring Framework for the Sustainable Development Goals*, Revised Working Draft (2015) 50-52, 76-77, 161-165.

VIII. Conclusion

How do synergies and efforts to reiterate the mutually reinforcing recommendations of a treaty body and the ILO help to improve efficiency in the human rights landscape? In other words, are there any benefits for rights holders on the ground? Much less than expected, unfortunately. The reasons are many but, in my public policy experience, the one reason that is at the heart of many others is the fact that we still work in silos and in our respective field of intervention we want to be all knowing and self-sufficient.

There can be no fulfillment of human rights without sound public policies; public policies can only be sound and sustainable if they have human rights at their core; and both human rights and public policies are pre-requisites for sustainable development. The one fundamental requirement that is still not complied with is the mainstreaming of human rights obligations across all public policies. The implementation of coherent and effective cross-cutting public policies remains weak and fragmented. The holistic approach at national level – that brings together systematically the recommendations of a human rights treaty body and of the ILO, or any other international specialized agency with a human rights mandate, for that matter – needs to be under permanent scrutiny in order to be strengthened.

Much to our regret, in the last couple of years, the general institutional and technical exchange between the UN Committee on Economic, Social and Cultural Rights (and probably other treaty bodies) and the specialized agencies, including the ILO, has decreased in frequency and intensity. The reason invoked by the agencies is resource constraints. I would consider it more as a shift in priorities in what the agencies probably consider as a strategic realignment and the renewed commitments for the achievement of the Sustainable Development Goals.

The ILO's centenary celebration is a great window of opportunity for some practical suggestions: closer cooperation at all levels, joint advocacy campaigns, joint technical workshops, and sharing of successful practices as tools that may help to consolidate the alliances in order to bring reality a little closer to the long term vision of universal respect for human rights and social justice in a world that is in dire need of both.

Looking towards the future, in its executive summary, the report of the Global Commission on the Future of Work that was published as part of the centenary celebration, identifies people's capabilities, institutions of work, and decent and sustainable work as the three areas that deserve increased investment. From the human rights perspective, an essential element is the call for a universal labour guarantee which would include fundamental workers' rights and basic working conditions. Freedom of association and the effective right to collective bargaining are to be guaranteed to all workers, irrespective of their status or contractual arrangements, as well as freedom from forced labour, child labour and discrimination. For all workers, guaranteed working conditions must include an adequate living wage, limits on hours of work and safe and healthy workplaces. The very recent resolution adopted by the United Nations General Assembly welcoming the 2019 ILO Centenary Declaration for the Future of Work and calling on UN bodies to consider integrating the Declaration's policy proposals into their work is an important step further.

The human rights treaty bodies should remain fully engaged in this discussion and follow the implementation of the report very carefully to hold States to account in how they respect, protect and fulfill the right to work and rights at work so as to give everyone a level playing field and to leave no one behind.

There are no doubt complex and crucial links between trade, financial, and economic and social policies. But above all, is the goal of equality of rights, conditions and opportunities, which refer broadly to ways in which individuals, families and groups are able to participate fully in society as citizens, to exercise their entitlement to resources, and their ability to contribute to the well-being of themselves, their families and their communities.

It is indeed a huge endeavour but also one from which no one is exempted.

The Political Economy of Decency

Brian Langille

I. Thinking

Invitations to a 100th birthday party are rare. They inspire reflection about, and celebration of, a long life. But institutions, unlike humans, have no natural lifespan and an invitation to celebrate the ILO's centenary is one which demands that we consider the future. In this venture, the past is to be considered not as a subject in itself but as a possible means for helping us identify and face up to the real issue which should command our attention – what lies ahead.

Academic reflection on this sort of issue has its own methodology. It is not undertaken with a view to advancing any agenda, or representing any set of interests, or on behalf of any constituency, or in the name of an outcome. This means that such inquiry has the invaluable advantage of proceeding free of political, social, and ideological constraints, both formal and informal. Some object that this means that the academic mode of existence is one divorced from 'the real world'. But, to my mind, and especially in the world as we now find it, the opposite seems closer to the mark. The academic world is precisely not the world of 'fake news', the received wisdom, popular opinion, echo chambers, consumer ratings, slanted advertising, hidden agendas, facilitators, influencers, what everybody knows, 'reality' TV, 'social' media, big data, opinion polls, political demands, corruption, the mob, what you are allowed to say, what is convenient – and all of the unfortunate, if familiar, rest. The academic mission is, rather, to try to see and understand our world free from such external fetters, distractions, illusions, and constraints.¹ On this view are no guarantees, but also no boundaries. There is

¹ But it is, perhaps as always, under attack from both outsiders and insiders. On the latter phenomenon, see Anthony T. Kronman, *The Assault on American Excellence* (Free Press 2019).

also no question that such an approach, and the human ability and duty to undertake it, is taken as fundamental. Bedrock. This is not a recipe for consensus on all or indeed any matters. It is simply a method of, and insistence upon, evidence based and principled independent thought.

Thus, on the academic view, we must, and we are allowed to, start with some basic questions, such as ‘what kind of a world do we wish to live in – do we wish our children to inherit?’ But, in addition to this sort of basic, first order question, there are other, second order questions, such as ‘how should we go about answering such basic questions?’, and ‘what is the ILO’s possible role in shaping that process?’ One of the greatest thinkers of our time, Amartya Sen, offers a valuable example to all of us on both of these points. At the base of Sen’s thinking is the idea that many of our problems in addressing our most basic first and second order questions flow from our failure to sort out our true ends from our means for advancing them. Sen then provides just this sorting out and this has, in my view, particular and fundamental importance for thinking about the role of the ILO. At the end of this essay I return to this point.

But part of what I think it is important to say on the ILO’s 100th birthday, and about its future, concerns an issue which is prior to a consideration of the possible relevance of Sen’s, or anyone else’s, thinking. The fundamental and prior problem is that it is this whole approach – the very idea of understanding the world, asking the right sort of questions, thinking about how we might go about addressing them, coming up with decent answers, and then pragmatically advancing their cause – which has been brought into question in the world as we now find it. I begin by touching upon this very troubling prior issue in Part II. In Part III, I turn to the substantive issues of how best to understand our current situation and the nature of the external problems and threats we all, along with the ILO, face. Here I deploy a metaphor invoked by Harry Arthurs – the idea of shifting ‘tectonic plates’ of the international economy. I then describe in Part IV, the state of a contemporary and distressing debate about whether we can ‘get a handle on’ these forces or whether it is ‘too late’. In Part V, I rely on a fundamental insight of Dani Rodrik – that our best understanding of all of this anxious reflection is that we face a ‘trilemma’ – and take the view that this is the best way of not only framing, but sorting out, our current circumstances. In Part VI, I argue that in addition to the large ‘external’

threats best captured by Rodrik's formulation, the ILO in particular, and labour law in general, face an 'internal threat' of their own making. The external and internal threats are linked, and solving the internal threat is a necessary, and available, part of a sustainable way forward. Here I rely upon Sen's thinking. In the conclusion, I return to my basic point that the academic way of thinking, currently under serious attack, is not only necessary, but possible.

II. Truth

At the University of Toronto, about thirty, or perhaps thirty-five, years ago, Bruce Ackerman, the distinguished Yale law professor, was asked a rather precocious question: 'What is the most important issue in the law today?' His answer was immediate, but also one which mystified many who were there to hear it: 'The future of the enlightenment project'. It was a terrifically important answer – unfortunate, true, and well ahead of its time.

Few would find that answer mystifying today. In our world of fake news, alternative facts, a thoroughgoing anti-intellectual, anti-'elite', anti-science, anti-evidence, anti-expert, anti-knowledge, scepticism, which appears often to be combined with equally thoroughgoing gullibility about anything labelled 'alternative', has become somewhat mainstream as an approach to the world and the problems we face. From this 'populist' view, the basic idea of rational processes of human government (whether national, regional, or global) are viewed with great suspicion and contempt. The very basic ideas that human beings can make, and have made, sense of our world and that we can also apply, and have applied, our minds to making it a better one – are ones that both need, and are receiving, serious defending, in the world as we now find it. That Steven Pinker's wonderful book on enlightenment² is both required reading and a best seller, reveals just how far down the anti-enlightenment path, which Ackerman saw coming, we now find ourselves. And in many parts of the world we are a long, disturbing way down that path. Joseph Stiglitz very recently wrote, after a lengthy diagnosis of the comprehensive assault on American democracy and a decent capitalism,

² Steven Pinker, *Enlightenment Now: The Case for Reason, Science, and Humanism and Progress* (Viking 2018).

‘perhaps the most dangerous aspect of the Trump administration is its attack on epistemology’.³ The key word is ‘attack’. Stiglitz’s view is that it is in the economic, and hence political, self-interest of a few to attack not just the truth, but also those who seek to defend it – in what he calls ‘truth telling’ institutions.⁴

We need to keep in mind that this attack on enlightenment values is our prior problem. It is perhaps useful to focus upon Stiglitz’s use of the word ‘attack’. There is cause for some hope here. Truth is not disappearing – it is ‘being disappeared’ by way of an organized, self-interested political assault, and there is nothing natural or inevitable about this.

III. Tectonics

But even as we attend to Ackerman’s admonition, we cannot also help seeing something more immediate and visible. Not about a cynical epistemology, but about populist politics which ride unreflectively on its tide. First, and at a superficial level, it cannot escape our attention that it is precisely institutions such as the ILO which are held in popular contempt. Davos may be the populists’ gold medalist when it comes to such affairs, but in the eyes of many we are playing the same sport, if not in the same league. But more importantly, many observers of our current controversies see a direct link between the processes and substantive issues at the centre of the ILO’s mandate, and our current political discontents. This is because the popular and populist package of views, our fellow citizens who hold them, the political leaders who trade in and profit from them, did not come from nowhere, did not ‘just happen’. As Harry Arthurs put it, wonderfully, ‘nothing just happens’.⁵ Like the making of the English working class, this new class, this new political identity, was present at its own making⁶. As E.P. Thompson also noted:

³ Joseph E. Stiglitz, *People Power and Profits: Progressive Capitalism for an Age of Discontent* (W. W. Norton & Company 2019) 234.

⁴ *ibid* 15.

⁵ Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985) 1.

⁶ ‘The working class did not rise like the sun at an appointed time. It was present at its own making’; E. P. Thompson, *The Making of the English Working Class* (Vintage 1966) preface, first paragraph.

class happens when some men, as a result of common experiences (inherited or shared), feel and articulate the identity of their interests as between themselves, and as against other men whose interests are different from (and usually opposed to) theirs.⁷

Much has been written recently, and is being written now, about the ‘opposition of interests’ which underwrite the political unrest and dissatisfaction we observe in our times. On my view, no one can come to Geneva on the ILO’s 100th birthday, and have something useful to say about the future of the ILO, or labour law, without confronting the source of this opposition of interests, which has led to the clearly observable breakdowns in faith in our current politics. Furthermore, we need to pause, as labour lawyers, and make the following, very uncomfortable, observation and connection: that the recent sceptical turn in our general politics looks very much like a more encompassing and time-delayed version of the specific and earlier scepticism labour lawyers have been expressing for some time, about the viability of their enterprise both as a matter of national politics and international relations.⁸ The sources of these general, and our specific, discontents must be our focus. It is not a happy focus. There is much to worry about.

Many thinkers who should be taken seriously and whose thinking is relevant to labour and labour law, have indeed been worried and often alarmed. At the core of their concerns are the following well appreciated and much rehearsed observations. In our world, labour law is now at the mercy of a number of large economic forces which influence in a very negative fashion, both the ability of labour to secure decent terms of work in the labour market, and the ability of nation States to intervene with laws and policies with the same purpose. Both private law and public law fail us. This represents a shift which many at the ILO, and in many other places, have been studying and contesting for some time.

A critical point in our debates is the observation that this undermining of our private and public labour law is the result of forces, often legal forces,

⁷ *ibid.*

⁸ See the essays in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart 2006) and Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford UP 2011).

outside of what we have been inclined to think of as labour law. Harry Arthurs has invoked the metaphor of ‘plate tectonics’ to suggest a necessary broadening of the concerns of labour lawyers. These plates provide the foundations, the space for labour law – the ‘powerful forces of political economy that are invisible or at least unmarked on conventional maps of labour law’ and which implicate many areas of law – tax law, trade and investment law, immigration law, social welfare law, as well as corporate, securities, bankruptcy, and intellectual property law. He then labels all of this ‘the law of labour market regulation.’⁹ These large features of our political economy are what really drive the concrete day-to-day issues of labour law. Unless we pay attention to plate tectonics, and lift our eyes from our traditional map of labour law drawn at a smaller scale, we will be forever distracted from the real action.

IV. Time and space

But Harry Arthurs means to go even further. Even if we were to see the need for, and actually chart a new map, it might be too late to plot upon it a new course for labour law. The space which labour law occupied is disappearing, or, rather, also ‘being disappeared’. Arthurs makes this point sharply when he observes:

the most important labour law decision of the US Supreme Court in the past fifty years, I argue, was its recent holding that Congress cannot limit political expenditures by corporations. Laws are made by elected legislators; the judges who interpret them are appointed by elected presidents. If corporations can dominate the electoral process through their control of campaign financing, labour will have little chance of securing favourable labour legislation and little prospect of winning cases before sympathetic judges.¹⁰

This is simply one concrete example but it points to a larger issue, and also in the direction of a real dilemma and real despair. On this view we

⁹ Harry Arthurs, ‘Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation’ (2011) 34 Dalhousie Law Journal 1, 14.

¹⁰ *ibid* note 51 referring to the 2010 decision of the US Supreme Court in *Citizens United v Federal Election Commission*, 130 S.Ct. 876 (2010). See also Stiglitz (n 3) 169-72.

face not one but two sets of questions. First, identifying the changes we need to get us back on the road to decent labour market regulation. Second, answering the question of whether it is actually too late to do anything about it. The negative answer to this question rests on the view that the problem we face is not simply that we have the wrong rules, or the wrong political leaders – but that the forces (the ‘opposition of interests’) which brought them into play have also simultaneously eliminated the space in which, and institutions through which, we might reflect upon our true ends and then advance that cause. Those spaces are, essentially, those of democracy and law. On this view the issue with Trump is not Trump; with Brexit, not Brexit, and so on. It is the question of whether the tectonic forces which made them possible grind only in one direction and are now beyond our control. An alternative view is that we should take something positive from the fact that those who have lost much in recent times are awakening to realities of their place in the current dispensation. We do need to take into account shards of positive light, where they exist. The basic idea can, to invoke another geological metaphor, be put as follows: the pressures at work on our tectonic plates are not natural or inevitable ones – they are the product of human decisions. That is, to invoke another geological metaphor, what we see here is not a form of natural ‘fissuring’ of our labour law, but of the human activity of ‘fracking’.

But pessimism about the possibilities for labour law is not only deep but also wide in the world we now confront. For those of us, like me, who came of age and studied labour law during the *Les Trente Glorieuses*, as they like to say in France – or in the ‘post-war Golden age’ as people elsewhere like to put it (and meaning roughly 1945/50 – 1975/80) – it is deeply disconcerting to learn that our era might well be the exception rather than the norm. But there is growing consensus, among those whose thinking about these matters we should take into account,¹¹ that this might be so.

Among thinkers taking this line, there is a consensus about the large and important reasons for these discontents in general, and regarding labour law in particular. But there is less agreement about whether we can do anything about them. Some think that there are measures we can take and margins we can work on – that nothing is ever inevitable, that our current

¹¹ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard UP 2014).

situation is one of our own making – the result of rule and policy choices that we have made and thus can unmake.¹² These tectonic plates are of our own making and can be unmade or changed. Others disagree and see a longer game between capitalism and democracy being played out, with now entrenched structural barriers to realizing such positive changes, and with a bitter end game in sight.¹³ Others are uncertain, but agree on the issue.¹⁴

This may be in itself a positive thought – at least there is some agreement on a starting point, our current predicament. A common and helpful way of locating our problem is to observe that the post-war golden era was underwritten by an accommodation between capitalism and democracy – made at least available and perhaps politically necessary by the situation capitalists and democrats found themselves in, as they stood in the wreckage of what Hobsbawm has labelled ‘the age of catastrophe’¹⁵ (the period of 1914–45 in which the world witnessed the breakdown of the ‘western civilization of the 19th century’¹⁶) and facing a new cold war. This compromise has been called many things, including at the transnational (as well as domestic) level, ‘embedded liberalism’.¹⁷ Streeck calls it the ‘standard model of democracy’.¹⁸ And Baccaro and Howell ‘historical compromise’.¹⁹

Mark Blyth has recently and economically expressed the core issue, its solution in the post-war arrangement, the source of that solution’s breakdown which heralded the end of the golden era, and the world as we now find it. He argues as follows: there is an ‘inherent tension [...] between capitalism and democratic politics; capitalism allocates resources through

¹² See, for instance, Martin Wolf, ‘The Case Against the Collapse of Capitalism’, *Financial Times*, 2 November 2016; Robert B. Reich, *Saving Capitalism: For the Many, Not the Few* (Knopf 2015); Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton UP 2017); Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford UP 2013); Facundo Alveredo et al (eds), *World Inequality Report 2018*, Part V.

¹³ Wolfgang Streeck, *How Will Capitalism End? Essays on a Failing System* (Verso 2016).

¹⁴ Lucio Baccaro and Chris Howell, *Trajectories of Neoliberal Transformation* (Cambridge UP 2017) 222.

¹⁵ Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914–1991* (Vintage 1996) part 1.

¹⁶ *ibid* 6.

¹⁷ John G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Post-war Economic Order’ (1982) 36 *International Organization* 2.

¹⁸ Streeck (n 13) 21.

¹⁹ Baccaro and Howell (n 14) 200.

markets, whereas democracy allocates power through votes [...] how democratic politics and capitalism fit together determines today's world'. Further, 'in the three decades that followed World War II, democracy set the rules, taming markets with the establishment of protective labor laws, restrictive financial regulations, and expanded welfare systems. But in the 1970s a globalized, deregulated capitalism, unconstrained by national borders, began to push back. Today, capital markets and capitalists set the rules that democratic governments must follow'. This 'dominance of capital' has 'produced a backlash'. As inequality has widened and real wages for the majority have stagnated – all while governments have bailed out wealthy institutions at the first sign of trouble – populations have become less willing to accept the so-called 'costs of adjustment' as their lot. People victimized by markets reclaim the powers of the state to protect them. The rise of Bernie Sanders and Donald Trump is a product of this reaction, as is the strengthening of populist parties in Europe'.²⁰

This is now a commonly told tale. These tellings have a particularly familiar ring for labour lawyers because they are often – as in Blyth's and Streeck's versions – explicitly tied to Polanyi's fundamental labour text²¹ and its account of 'the social limits of market expansion'.²² In particular, they are tied to the Polanyian ideas of the 'fictitious commodities' of labour, land (nature), and money (all three of which cannot be completely commodified at the peril of destroying them, or making them unusable) and, critically, also to the idea of 'double movement' – of the rise of constraining institutions which prevent the market from undermining itself.

Our large question, phrased in these terms, is whether it is possible, this time, to effectively reclaim the powers of the state to establish such a Polanyian double and constraining movement. Or is it too late? To go back to our basic first and second order questions: our problem now is not simply with our first order questions ('what sort of world do we wish to live in?')

²⁰ Mark Blyth, 'Capitalism in Crisis' (July/August 2016) *Foreign Affairs* 172. Of course this account (in this case an American version of a wider problem) must be, as is by Blyth, tempered with some other truths – that many in the developing world have been, at more or less the same time, lifted out of absolute poverty.

²¹ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944).

²² Streeck (n 13) 61.

but that we may have lost the space in which we could possibly ask, let alone answer, them. Are we out of time?

Wolfgang Streeck's view is that it is too late – in each of the three 'Polanyian crisis zones'²³ (labour, land/environment, and money), the excessive commodification of the natural environment, of money (financialization), and of labour (people) are all at critical points. Worse, these three negative tendencies are mutually reinforcing. Capitalism is dying from a 'long and painful period of cumulative decay'²⁴, having now been successful in debilitating or destroying the constraining institutions necessary to sustain itself. We are headed, slowly, into a new dark age.

The mechanics of all of this are, in Streeck's view, complex.²⁵ Since the end of the post-war golden era in the 1980s, we have witnessed the ascendance of capital ('finance') with the following results: a persistent decline in economic growth, a rise in private and public debt (a remarkable shift in government policy from taxing to borrowing thus further empowering lenders to control politics), a dramatic rise in economic inequality (both in income and wealth), the decline or elimination of trade unions and other market constraining institutions, decline of faith/participation in democratic party politics, rise of populist parties, corruption, oligarchs, and so on. These are realities which interact (inequality impedes improvements in productivity and weakens demand, low growth in turn reinforces inequality by intensifying distributional conflict and making the concessions to the poor costlier to the rich). Perhaps most basic and troubling is the idea that mobile capital, having disciplined politics against tax, then provides the public, and then private debt, as a substitute. Thus, rising debt self-reinforces the shift in control from government to finance, with devastating consequences for democracy's ability to re-establish control – as it had in the post-war era. This in turn leads to doubts for ordinary people about the ability of the state or politics 'to make a difference in their lives', as reflected in common perceptions of deadlock, incompetence, and corruption among what seems an increasingly self-contained and self-serving political class, united in their claim that 'there is no alternative' to them and their policies.

²³ *ibid* 62.

²⁴ *ibid* 72.

²⁵ *ibid*.

The result is ‘declining electoral turnout, combined with high voter volatility, producing even greater electoral fragmentation due to the rise of populist protest parties.’²⁶

In my view, the general consensus that this is, in some way and at a general level, the best way of describing our predicament, is quite striking. The consensus also crosses a lot of space on the political spectrum. Martin Wolfe, a well-known defender of globalization²⁷, in his review in the *Financial Times* of Streeck’s most recent collection of essays, does not disagree with much of Streeck’s view, as to come to an equally distressing conclusion – that it is democracy which is at risk of dying, not capitalism. This seems a credible idea if we take stock of the trajectory of many ‘democratic’ States.

It is remarkable that Wolfe and Streeck share so much in common. It is true that Streeck is focussed on the future of capitalism and Wolfe on the future of democracy. But what is common in their analysis is just the link between the two – and whether the sort of link we need, and used to have, can be re-established. This seems the right question. It is the question Mark Blyth put his finger on.

Nonetheless, is there anything positive to note in the fact that those on the very sharp losing end of the current dispensation have finally had enough of the fact that the productivity gains of the last 30 years have gone to the top ‘one per cent’, that the post-war social contract has been ripped up and thrown in their faces, that they have had enough of the American and other versions of ‘austerity’, that the current basic alignment of democracy and markets is far out of whack and in need of serious re-adjustment, that while the gains from trade are real, so are the costs and distributional effects necessary to secure them?²⁸

²⁶ *ibid* 52. See also Alveredo (n 12). Of course, there are many other voices arguing in a generally similar way and along parallel lines, for example, how governments are driven by investors to undermine democracy directly via investor protection arbitration schemes in ‘free trade’ agreements. Or, documenting the breakdown of the ‘wage/productivity bargain’ which was at the heart of the post-war entente cordiale between capital and labour and the resulting maldistribution of the meagre gains from slow growth to the ‘one percent’. Or, the elimination of trade unions as one of the key elements in the post-war compromise, and so on.

²⁷ Wolfe (n 12).

²⁸ See Dani Rodrik, *The Globalization Paradox* (Norton 2011) 57.

Streeck is still clearly a pessimist over the long term. Finance has a stranglehold on any possible path to reform and the cocktail of interacting negative forces at play leads in one direction – a new dark age. Others, including Martin Wolfe, remain at least open-minded and not ‘defeatist’. Wolfe and others explicitly believe that there is still a space for ‘managing the tensions between the democratic nation state and the global market economy’. In Wolfe’s view our ‘challenges’ include ‘bringing finance under control, rebalancing corporate governance, remedying inequality, sustaining demand, and, above all, managing the tensions between the democratic nation state, and the global market’²⁹ adding that the answers should include ‘a modicum of de-globalization, notably of finance, and greater co-operation among democratic nations, notably on taxation and the provision of public goods’. Others agree in a general approach – Stiglitz, the authors of the World Inequality Report, Bacarro and Howell, Robert Reich, Dani Rodrik,³⁰ and Mark Blyth – and offer views of how we might get out of the box we are in which includes a large measure of shifting from debt to taxes, and in particular international tax recovery.³¹ While their detailed lists of required reforms vary, there is much overlap, and their terrain is just that of Harry Arthurs’ list of labour law’s tectonic plates. Stiglitz has recently offered a comprehensive account, albeit US-centred, of how we might think of all our issues – truth, whether we still have the time to reclaim the space to advance it, what we need to do to reclaim the space, and what to do to redirect the tectonic plates, when we occupy that democratic space.³² There is some optimism around.

V. Trilemma

To my mind, of all the important thinkers who have tried to shed a general and bright light upon our large predicament, it is Dani Rodrik who has provided the most illumination, and in a very accessible manner.³³ His idea that we can see our current problems in terms of a ‘trilemma’ is one of

²⁹ Wolfe (n 12).

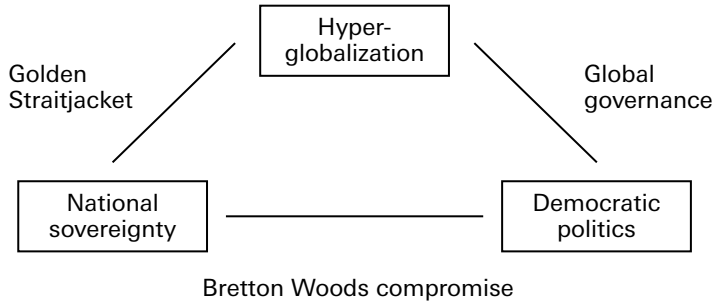
³⁰ *ibid.*

³¹ Blyth (n 12) final chapter.

³² Stiglitz (n 3).

³³ Rodrik (n 12).

the most elegant and arresting insights of our times. He recently³⁴ presented it in graphic form as follows:



Rodrik's well known and very important idea is the idea that we cannot have all three of (i) hyper-globalization, (ii) national sovereignty, and (iii) democratic politics. Of that set of three possible institutional arrangements, we can only have two at a time – and we need to 'choose' which two we prefer. We can and need to choose the world we wish to live in. That is our trilemma. Of course, we only face this trilemma if we still have the three 'choices' available to us. That is, if it's not, as in Streeck's view, 'too late'.

On Rodrik's analysis in the post-war era we chose and created a world of Choice A, namely national sovereignty and democratic politics, but not hyper-globalization. We did so by means of constraining globalization through the 'Bretton Woods Compromise'. That made available a democratic space in which the possibility of a set of domestic policy options linking productivity growth to increased demand were made available to us, and democratically chosen.³⁵ The breakdown in that compromise, the ushering in of the era of hyper-globalization, led to the circumstances in which we now find ourselves. This is a world which now faces the following stark 'choice' – either democracy or the choice of national sovereignty, but not both in a world of hyper-globalization. That is, we can 'choose' Choice B, namely democratic politics and hyper-globalization ('global governance') but at the same time necessarily sacrifice national sovereignty. Or, we can 'choose' Choice C, namely keep national sovereignty

³⁴ Rodrik on Brexit <https://rodrik.typepad.com/dani_rodriks_weblog/2016/06/brexit-and-the-globalization-trilemma.html>.

³⁵ Baccaro and Howell (n 14).

and hyper-globalization, but then we must submit to the great pressure this places upon our ability to actually have national sovereignty ('golden straightjacket').

In Rodrik's terms, it is rather clear that the 'choice' we have 'made' in the 'post golden era' is C, i.e. hyper-globalization in a world of nation States, with the consequent erosion of democracy. This is a simple way of capturing our complex story.

For many people, including Rodrik, choice B remains simply a pipe dream in the world as we now find it.³⁶ The idea of global democracy (to match up with a global economy) is just not politically imaginable. That is the reason it is not a serious possible answer. For others, it is not simply a matter of pragmatism but, rather, a matter of deep normative significance that we retain (an appropriate) attachment to the notion of the nation State.³⁷ Then there is the empirical fact that nationalisms of both the left³⁸ and right³⁹ have great popular support – hence the common use of the phrase 'National Populism', as well as the rarity of the use of the slogan 'International Populism'.

It is a matter of acute importance that we keep our eye on the 'scare quotes' around the word 'choice'. As noted above, this is a rather large and dividing question – do we have a choice, or is it 'too late'?

In answering that question it is critical to be specific about the origins of the democratic deficit forced upon us by globalization. By doing so we can be clear about the actual source, and operational mechanisms, which drive the current politics of populism and nationalism.

One view is that we are dealing with politics of 'the losers' from globalization. The 'left behinds' who are said to be Trump's 'base'.⁴⁰ This is a view of the problem with 'globalization' shared by some trade economists, if not many. On this view the problem is not that there are no gains from

³⁶ Rodrik (n 12).

³⁷ The notion of, not necessarily the current set of instantiations; see, for instance, Martha C. Nussbaum, *Creating Capabilities* (Harvard 2011) 113.

³⁸ Costas Lapavistas, *The Left Case Against the EU* (Polity 2019).

³⁹ See generally, Roger Eatwell and Matthew Goodwin, *National Populism: The Revolt Against Liberal Democracy* (Penguin UK 2018).

⁴⁰ See for an extended personal account J.D. Vance, *Hillbilly Ellegy* (HarperCollins 2016).

the globalization of trade, but that they are unequally shared. While in aggregate there may be gains, there are in fact specific losers and winners. Our problem is that we have not attended to the losers and compensated them for their losses. We have not attended to the adjustment costs borne by some in order to make us all, in aggregate, better off. The distinguished trade lawyer Michael Trebilcock has been sounding this alarm for decades – first in the context of NAFTA negotiations,⁴¹ and in recent times as part of a more general argument about ‘Dealing with Losers’.⁴² But this is, I think, too narrow a view. It is a view which focuses upon the wrong issues – trade in goods with resulting impacts on different groups of workers.

The more important problem posed by our current version of (hyper) globalization needs to be specified: it is not one of conflicting interests of groups of workers at home and abroad, nor is the solution simply one of ‘winners’ (consumers) compensating ‘losers’ (workers) who lose under the current dispensation. The problem is larger. It is the problem which has come home to roost in our politics. It is a problem that drives populism. It is a problem which re-energizes overly strong versions of nationalism – to paraphrase Rodrik, ‘hyper-nationalism’. It is a problem at the bottom of the debate of whether capitalism and/or democracy have reached an end-game. This large problem is one of the alteration of the relationship of capital and labour, and as a result, of the alteration of the nature of our democracies. One of the casualties seems to be⁴³ the very possibility for our labour law.⁴⁴ In a slogan – ‘labour law is not a commodity’. But it has become one, beyond the reach of democracy.

Before explicating this point, it is useful, on the ILO’s 100th birthday, to note the following. In Rodrik’s terms, many in 1919 wished for and imagined that they had designed an institution of ‘global democracy’ – one which would produce global labour laws in the way that national legislators had hitherto created domestic labour legislation. That is, they imagined and wished for a world constituted by Rodrik’s choice B. That turned out to be

⁴¹ See M. Trebilcock et al, *Trade and Transitions* (Routledge 1990).

⁴² M. Trebilcock, *Dealing with Losers: The Political Economy of Policy Transitions* (Oxford 2014).

⁴³ I choose these words carefully, see below.

⁴⁴ This is a matter about which I tried to be specific 25 years ago and about which Dani Rodrik and Nicolas Lamp, among others, have recently drawn attention, see below.

a misconception, as Francis Maupain has reminded us.⁴⁵ The centre of legal gravity for the ILO has always been, from the beginning and remains, its (possible) influence on domestic laws within its member states. But during the post World War II ‘golden era’ this truth was beneficially obscured with the construction of the compromise at the heart of Rodrik’s choice A. The ILO’s problems begin at the same time as all of our problems – with the breakdown of that compromise. That is when the truth about the ILO’s real constitutional structure was ‘outed’.⁴⁶

VI. Not Trade

To sum up, we need to ask ourselves basic questions – what sort of world do we wish to see our children living in – and how should we go about thinking about what to do in order to get there? But our problem now is not only that we seem to be in a mess, but that we seem to have lost our ability to do anything about it. The point I am after here is that we need to be specific about this latter aspect of our current dilemma – about its source.

In approaching this task, it has struck me from time-to-time⁴⁷ that it is useful to start with what may seem like a counterintuitive thought experiment. Imagine a world of autarkic ‘island’ states – with no trade, investment, or migration between them. Further, imagine that they are all reasonably well-ordered democratic States.

What kind of labour law would and should each of these island jurisdictions have? Their democratic governments would, of course, aim at fair, productive, distributively just, democratic labour laws conducive to the development of a decent and flourishing civil society, in which citizens are offered the maximum set of opportunities to live long, healthy, and full lives. In constructing its own particular model of industrial relations and labour law, each jurisdiction would, in effect, be fulfilling the first

⁴⁵ Francis Maupain, *The Future of the ILO in the Global Economy* (Hart 2013).

⁴⁶ See Brian Langille, ‘The Curious Incident of Forced Labour, the ILO, and Myanmar’ in A. Blackett and A. Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 509.

⁴⁷ See, for example, Langille, ‘Seeking Post-Seattle Clarity – And Inspiration’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization* (Oxford UP 2002) 137.

prerequisite, creating for itself an understanding of the virtues and limits of market ordering in labour as preconditions to an economically successful and just society.

Within each such isolated island jurisdiction, precisely how would such a labour law regime be created? It would be a joint process in which labourers, investors, and consumers had equal access to a fair, democratic political regime. Certainly, both capital and labour would have equal access to the democratic fora. Neither side could threaten, in the long run, to refuse to participate in such a regime. Each would be forced to use its political 'voice' in the construction of an appropriate model of labour relations. And, of course, given our second prerequisite, the exact shape of the system created would vary with local conditions, history, and culture.⁴⁸

Then, in our thought experiment, we gradually introduce the idea of trade, then mobile investment. What difference would that make? Exactly 25 years ago, when writing an essay on the occasion of the ILO's 75th birthday, I wrote as follows:

The mobility of capital undermines, in a fairly straightforward way, the traditional arguments of democracy and sovereignty invoked by liberal trade theorists. The legitimacy of the policy choice faced by states contemplating the liberal theory of trade was underwritten by an appeal to democracy. The policy issues were whether to undertake trade liberalization and, if so, whether to compensate the losers with part of the gains. These issues were decided by domestic policy processes. Insofar as government regulatory policy was perceived as a relevant factor endowment that, too, was resolved ideally by democratic means within the state and the political contest between domestic capital, labour and consumers. But now capital has not just the political strategy of 'voice', it has the option of 'exit'. Capital has slipped the moorings of the nation state, but labour has not. In these circumstances, theory predicts and practice bears out the simple idea that the mobile factor will play off the immobile factors against one another. Thus, international regulatory competition is to be expected. But the result of this new regulatory competition, for example in labour policy, is the creation of what may be referred to as a 'democratic deficit'. By acquiring the option of

⁴⁸ *ibid.*

exit, capital is liberated to participate in and establish an international marketplace in regulatory policy. But this is a shift away from a world in which regulatory policy is determined within domestic political processes, entailing a loss of democratic control. Much of the antipathy to proposals for trade liberalization, such as the North American Free Trade Agreement, reflects popular unease over this loss of control.⁴⁹

And elsewhere:

Some observers have commented that this sort of internationalization ‘erodes a people’s capacity to control its own affairs’. This is correct, but only goes part of the distance required. The problem is that such phenomena erode, to some extent, any people’s capacity to control its own affairs, critically so when those affairs are precisely about the scope of market regulation. To claim that this issue should now be settled by the international marketplace is a deep misunderstanding of the problem involved.⁵⁰

Once again it is Rodrik who can assist in seeing clearly a large chunk of the mechanics of how this came to pass – the shift from the virtues of trade to something much more problematic. It is an uncommon virtue of Rodrik’s writing that he is simultaneously a tough-minded economist⁵¹ but also an open-minded one. His ‘What Do Trade Agreements Really Do?’⁵² provides a wonderful and elegant proof of his claim. The core idea is that trade agreements are no longer simply about constraining (at the border, via import tariff and quota reductions) domestic protectionist instincts and interests. Rather than constraining powerful interests, since about 1995 the negotiation of (so-called) trade agreements has been dominated by powerful (corporate) interests, and their content aimed not at constraining them but empowering them. Rodrik concentrates upon the extension of international

⁴⁹ Brian Langille, ‘Labour Standards in the Globalized Economy and the Free Trade/Fair Trade Debate’ in Werner Sengenberger and Duncan Campbell (eds), *International Labour Standards and Economic Interdependence* (ILO 1994) 229.

⁵⁰ Brian Langille, ‘General Reflections on the Relationship of Trade and Labour (or Fair Trade is Free Trade’s Destiny)’ in J. Bhagwati and R. Hudec (eds), *Free Trade and Harmonization* (M.I.T. 1996) 231.

⁵¹ Dani Rodrik, *One Economics, Many Recipes* (Princeton 2007).

⁵² Dani Rodrik, ‘What Do Trade Agreements Really Do?’ (2018) 32 *Journal of Economic Perspectives* 73. See also Paul Krugman, ‘This is not a trade agreement’ *New York Times* 26 April 2015.

‘trade’ negotiations into four areas – intellectual property, cross-border capital flows, investor-State dispute resolution, and harmonization of regulatory standards. Rather than constraining powerful protectionist interests, they constrain governments on issues of real democratic dispute over regulations which are public goods, for which different states do have different preferences, and for which there are no non-political or ‘natural’ benchmarks. Of equal importance is what is not negotiated – regulation of cross border externalities, with real potential for social returns, such as the global tax and subsidy competition which is purely a game, redistributive to capital, and driven by a race to the bottom. Trade agreements could be about freer mutually beneficial trade through exchange of market access, with resulting benefits including labour and environmental regulation. But increasingly they are not.

Nicolas Lamp agrees with Rodrik and teases out larger implications of Rodrik’s analysis.⁵³ A key point is that the shift beyond trade in goods results not in a dispute between or debate about workers here and workers there over jobs, but an alteration of the terms of engagement between labour and capital, affecting workers everywhere. This ‘critical’ narrative goes beyond the naiveté of a Trumpist view, and beyond the orthodoxy of the received economic view criticized by Rodrik. At the core is the idea of the general empowerment of capital, not just in virtue of the specific protections in trade agreements, but simply via the relative mobility of capital and immobility of labour structured by our current version of deep economic integration, and now often enshrined in what many insist upon calling, inaccurately, ‘trade’ agreements.⁵⁴

The complete story would of course be a complex political as well as economic one, having the burden of explaining how the shift in control over the legal construction of the tectonic plates of economic policy – trade,

⁵³ Nicolas Lamp, ‘How Should We Think about the Winners and Losers From Globalization?’ Queen’s University Legal Research Paper No. 2018-102.

⁵⁴ There is also a well-developed, if perhaps heterodox, macro economic account of the rise of neoliberal globalization which tracks all of these accounts rather well. Blythe, Baccaro, and Streeck, for example, trace the changes marking the end of the post-war golden era to the shift from a full employment policy, wage led growth, high wage, low profit, demand fueled, inflationary, regime of greater equality to an anti-inflation policy, profit-led growth, high profit, low wage, low demand, deflationary, greater inequality model – all relying on Kalecki’s ‘Political Aspects of Full Employment’ (1943) 14 *Political Quarterly* 322; see Blythe ‘Global Trumpism’ (2016) *Foreign Affairs*; Baccaro and Howell (n 14) 203-206; Streeck (n 13) 77.

monetary, tax, investment, labour, and so on – was achieved. But any rebalancing within the global economic and the democratic domestic spheres must begin with those elements of hyper-globalization while at the same time confronting the contradictions represented by the actual manifestations of the anti-globalization, nationalist turns of events we see all around us.⁵⁵

VII. Internal threat

We live in a confusing and confused world. But, if we are willing to attend to evidence and persuasive reasoning, we can, with the help of our best thinkers, make sense of it. Further, there is a broad consensus surfacing in recent years, that the institutional arrangements put in place (neo-liberal/hyper globalization) following the demise of the post-war consensus are no longer politically palatable for many, and evidently so for many citizens of the developed world. The populist/nationalist ‘backlash’ is often expressed and defended in precise terms of reclaiming democratic national space, in which a new dispensation can be debated and instituted. But the scepticism animating the nationalist and populist revival is one of a pervasive and deep variety. While it is clear that the current arrangements are unsatisfactory, the ways in which they are seen to be lacking are potentially destabilizing for any reform, even if we could agree on a new, more local and responsive level at which we should operate. And even if it is possible to imagine local reforms, the possibility of achieving some revived version of a non-neoliberal, non ‘hyper’ international order – that is an international, mutually advantageous trade and economic order – seems very remote in our current circumstances. That is, the political space for the sort of reform agenda required to legally structure such a new compromise as contemplated by Rodrik, Stiglitz, and others is at the very least hard to find in the world we now live in. And when we do find it, it is used solely for domestic, and most often regressive political ends – ends contrary to the interests that precipitated current events. Dysfunctional national politics are a recipe for both a failure to achieve a new international compromise, as well as for domestic incoherence in addressing the instincts which drive our current discontents.

But put all of that aside. We can detect some positives – that there is now a political reaction of some sort to neo-liberal globalization, remote

⁵⁵ Eatwell and Goodwin (n 39) offer a somewhat nuanced, if disturbing, account.

elites, lack of democracy, decline in the labour share of productivity gains, grotesque inequality, the 'one per cent' (and the 'point one per cent'), and all the rest. It is clear that new domestic politics are more than possible. Let us imagine that it could be a rational, evidence-based one aimed at making for a better world. Let us imagine that the tectonic plates are available for re-adjustment. Let us imagine that the external threats they pose are tamed, at least to a degree, to make available a reasonable domestic democratic space. Imagine that we have the meaningful, nation state-based domestic and international spaces, in which to ask our important questions – what kind of world do we wish to live in? If all of that is imaginable, then what? What would and should we do? What could and should the ILO do?

As prolegomena to anything else – the ILO and labour lawyers around the world – need to do something very interesting and necessary. Also difficult. We need to consider the way in which we have contributed to our larger problems and how we might avoid doing so in the future.

We need to identify and act upon a threat which would still remain in our new and desirable democratic space. That threat is an internal threat, one of labour law's, and the ILO's, own making. So, if we could imagine a world in which we gain some control over, and can see the possibility of re-arranging the tectonic plates underlying hyper-globalization, labour law would be a problem in our way. Not specific labour laws – but how we think about labour law. That is the threat. Seeing this threat and acting upon it is our first, internal task. There is much to be gained and there is a great possible advantage here. In my view, this is because there is a link between the internal threat and the external threats we have been reviewing. The link is not complete, but it is an important one. The basic idea is this – that there is an internal ILO/ labour law problem and that problem has helped drive, greased the wheels, 'incentivised' (if that is indeed a word, and, if then, one which should be used), the solution to the trilemma we have currently 'chosen'.

The internal threat lies where most important issues are to be found – in the human mind.⁵⁶ In this case it is in the legal mind, in our legal imaginations. The internal threat comes from a way of thinking about and

⁵⁶ Brian Langille, 'Imagining Post Geneva Consensus Labour Law for Post Washington Consensus Development' (2010) 31 *Comparative Labor Law and Policy Journal* 523.

answering the following questions: First, what is the subject matter of labour law, i.e. what part of the world is its concern? Second, what is it for, why do we have it, what justifies it? And third, what are the basic legal categories and concepts we need, to express these ideas in something which looks like law? Our problem is not that we do not have answers to these questions, but that we do. Taken together these answers provide what I have called a ‘constituting narrative’ for the subject of labour law.⁵⁷ This is the internal threat – our current constituting narrative.

The current dominant account of labour law is, roughly and quickly, that it is about regulating contractual relations between employers and employees, in the name of decent standards for employees which would not otherwise be obtained because of the power imbalance between the parties to the contract. Both substantive and procedural re-regulation are, as a result, brought to bear on the contracting process in an effort to secure justice or ‘decency’. ILO standards are instructions to member States as to how this can be done.⁵⁸

Why is this model a problem? The long answer to this cannot be provided here – and I have set it out elsewhere.⁵⁹ In so doing, I rely on Amartya Sen’s views on how to think about our fundamental ends and how we should deliberate about our means for achieving them. But the point I am after here can be expressed economically and without resort to the full development of an alternative constituting narrative. Here is the fundamental problem with the standard account and here is how it ‘drives’ hyper-globalization. Because the account is one which centres on the legal constructs of employer, employee, and contracts of employment, and is animated by a desire to correct for a power imbalance in those contracts, labour law both stunts itself and also helps create the legal space and economic incentives to hyper-globalization. Labour law, our conception of labour law, has been a cheerleader, a machine, for its own undermining.

⁵⁷ Brian Langille, ‘Labour Law’s Back Pages’ in Davidov and Langille (n 8) 13.

⁵⁸ And they are, in light of the narrative, to be constructed on a tri-partite basis.

⁵⁹ See, for instance, Langille, ‘What is International Labour Law For?’ (2009) 3 *Law and Ethics of Human Rights* 47.

Labour law stunts itself by focussing on those with a contract. Those in the informal economy are left out.⁶⁰ So too all forms of non-contractual work. More important, labour law incentivizes hyper-globalization, and its own demise, but insisting upon contractual linkages and thus opening the door to all manner of ‘de-contractualization’ as a method of labour law avoidance. These include franchising, outsourcing, ‘vertical disintegration’, network and chain creation, and so on. The idea is not that these may not have valid economic rationales; rather, that one large, current and undesirable rationale is one which labour law, our current conception of labour law, makes available and which should be removed. This is labour law avoidance. In his book *The Fissured Workplace*,⁶¹ David Weil accurately states that a large part of our current problem is that labour law focusses on ‘the wrong parties’.⁶² This is the case. But the point here is that it is our model of labour law which makes this mistake possible, and incentivizes its exploitation. Labour law avoidance via ‘de-contractualization’ is only available on a contractualized account. An alternative non-contractualized account of labour law is required for many reasons – but an important one is avoiding all of this.⁶³

It is in developing such an account that Amartya Sen proves to be so valuable to labour lawyers. Exploring this connection – what I have called the ‘Capability Approach to Labour Law’⁶⁴ – is again something which cannot be explicated at length here. But the basic idea is as follows: If we start our thinking about labour law where we should – with the large questions set out at the beginning of this essay – then Amartya Sen comes into view, and not just for labour lawyers, but as a thinker who begins by taking those basic questions seriously and by answering them persuasively. His basic idea is that our true end is human freedom – the real freedom, the real world positive, substantive, capability, to lead long healthy lives which we have reason to

⁶⁰ Supriya Routh, *Enhancing Capabilities Through Labour Law: Informal Workers in India* (Routledge 2014).

⁶¹ David Weil, *The Fissured Workplace* (Harvard UP 2014)

⁶² *ibid* 4.

⁶³ Brian Langille, ‘Human Freedom: A Way Out of Labour Law’s Fly Bottle’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford UP 2018). See Collins’ introduction to that volume for a clear-headed statement of the current approach.

⁶⁴ Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford 2019).

value. Labour law has a lot to do with this. Work, productive activity, is an important dimension of life – both as an end in itself and as a means to other elements of human flourishing. Human capability, human capital,⁶⁵ must be fostered and created. Education is key. But it must also be deployed. The law which regulates the deployment of human capital in the name of human freedom and capability is labour law. It is not merely about regulating contracts – although it is about that when they exist. As I have tried to explain:

If we are to adopt this new normativity of human freedom as central to labour law's self-constituting narrative, then everything changes, including the domain of labour law and its central concepts. The contract of employment ceases to be the centre of attention and our central platform for the delivery of labour law. We no longer need to seek employees negotiating with employers in an effort to remedy inequality of bargaining power. We are permitted to see that the very concepts of employer and employee are often a barrier to the realisation of our goals in much of the modern economy. Moreover, if we see labour law as underwritten by the idea of human freedom we not only have a set of reasons for traditional labour law but also for non-contractual approaches to work relations (informality, for example) and for other non-traditional labour law subjects (unpaid work, education, child care, and so on).⁶⁶

A basic idea which Sen insists we pay attention to is the following – we are often focused upon means rather than our true ends, with unfortunate results. This is a particularly acute problem in labour law. Here is an invaluable passage from Sen:

In his *Grundlegung zur Metaphysik de Sitten*, Emmanuel Kant argues for the necessity of seeing human beings as ends in themselves, rather than as means to other ends: 'So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only'. This principle has importance in many contexts – even in analysing poverty, progress and planning. Human beings are the agents, beneficiaries and adjudicators of progress, but they also happen to be – directly or indirectly – the primary means of all production. This

⁶⁵ See Amartya Sen, 'Human Capital and Human Capability' (1997) 25 World Development 1959.

⁶⁶ Langille (n 63) 101.

dual role of human beings provides a rich ground for confusion of ends and means in planning and policy-making. Indeed, it can – and frequently does – take the form of focusing on production and prosperity as the essence of progress, treating people as the means through which that productive progress is brought about (rather than seeing the lives of people as the ultimate concern and treating production and prosperity merely as means to those lives).

This problem is particularly pivotal in the assessment and planning of economic development. The problem does not, of course, lie in the fact that the pursuit of economic prosperity is typically taken to be a major goal of planning and policy-making. This need not be, in itself, unreasonable. The problem relates to the level at which this aim should be taken as a goal. Is it just an intermediate goal, the importance of which is contingent on what it ultimately contributes to human lives? Or is it the object of the entire exercise? It is in the acceptance – usually implicitly – of the latter view that the ends-means confusion becomes significant, indeed blatant.⁶⁷

Labour law's mistake, in these terms, is to have focussed upon one means to our true ends – regulating unfair contracts. Contract, in turn, has become the limits of our labour law. That then makes available the strategy of 'de-contractualization'. Not only made available but energized. Labour law thus created the space for its own undermining – opening the space, pointing in the direction in which the tectonic plates can move, and pushing self-interested parties to mobilize to do so. This is all the result of a classic ends-means confusion.

This is all a product of the human mind, like all law. The point is that we can and must think well. Getting our thinking straight will not bring about a halt or redirection in the movement of the tectonic plates upon which labour law sits. That, at least on the optimistic view that it is not 'too late', is simply a vital project available, in what we hope will be restored and available democratic politics. But without clear thinking, not only have we no idea how we got to our current predicament, we also have no idea of what a better world, one worth the political effort, would look like.

⁶⁷ Amartya Sen, 'Development as Capability Expansion' <<https://studylib.net/doc/8699107/amartya-sen--development-as-capability-expansion>>.

Now, our second order question.

The most general of lessons of the breakdown of ‘support’ for hyper-globalization are that real local democracy matters and that the nation State is the only and best available space for that sort of deliberation. This is critically so when it comes to not only national policy but co-ordination with other nation States on matters, including trade, of mutual advantage – that is, in re-negotiating and re-constructing the international regime. This has large implications for the ILO and its law. The most important of these is that the model of the ILO as a global lawmaker imposing, through hard international legislation, a consensus reached by delegates in Geneva, can now be seen to be even more unsound than it was possible to see just a few years ago.⁶⁸ The lessons of the undermining of hyper-globalization which we are witnessing requires us to affirm the wisdom of the ILO’s reliance on ‘persuasion’ of its member States, of the wisdom of certain policy choices it recommends. Its core mission of persuasion means that it must be equipped to persuade, that is, to secure voluntary, reasoned agreement. The lesson of our current politics reaffirms that this means country-specific, bottom up, capacity building, and development of locally prioritized agendas with which the ILO can assist. To be able to carry out this mission, it must become the world’s leading, multi-discipline, open-minded research institution operating on the academic model.

VIII. We Don’t Need No Education

A final word, perhaps of optimism.⁶⁹ The defining political drama of the last century was the rise and fall, defeat, of major manifestations of both left and right totalitarianism. Those falls, those defeats, seem to have been mis-handled and were prematurely celebrated as the ‘end of history’.⁷⁰ Of course

⁶⁸ Langille (n 57).

⁶⁹ With apologies to Pink Floyd, ‘Another Brick in the Wall Part II’, *The Wall* (Columbia Records 1979). They were right, of course, about ‘Thought control’ and ‘Dark sarcasm in the classroom’. But that is only one, very bad, model of ‘education’. Education on the academic model is about firing a passion for, and helping equip people to take charge of, one’s own thinking; see, for inspiration, Northrup Frye, *On Education* (Fitzhenry and Whiteside 2000); Kronman (n 1).

⁷⁰ Many make this point – for an example see Stiglitz (n 13) 1.

that always entailed a short and narrow view of history.⁷¹ But even on that sort of view we now know we are well beyond ‘the end of end of history’.

One of the most striking results in the literature discussed in this essay, both optimistic and pessimistic, is the following – the importance of education in understanding our current problems and the way forward. Education, understood as the project of animating people’s interest, and then enabling them, in taking charge of their own thinking, is the obvious key to ‘the future of the enlightenment values’. It is also a, if not the, most important locus of the ‘assault on truth telling institutions’. It lies at the core of our ability to imagine renewed democratic political space and institutions which we once had, threw away, and need to re-invent; vital to our ability to understand what happened in the past and how we can think better about our future; and necessary for better creative thinking about labour law and the ILO. Education envelopes all of the elements of this paper. And as Eatwell and Goodwin observe, in their detailed account of many national populisms, ‘the educational divide [is] one of the key factors in national populism’,⁷² ‘far more important than income or jobs’.⁷³ Further, in most serious economic reform agendas, education, and access to education, play large roles.⁷⁴ Finally, and most importantly, from the perspective of the capability approach, ‘education is a key to all capabilities’.⁷⁵

There is a rather large and important truth lurking here. It is that the future of the political economy of decency will play out in just the way the future of the enlightenment values plays out.

⁷¹ See Peter Frankopan, *The Silk Roads* (Vintage 2017).

⁷² Eatwell and Goodwin (n 39) 282. The distinction is between those holding degrees and those not.

⁷³ *ibid* 25.

⁷⁴ For instance, see Alveredo (n 12) 20.

⁷⁵ Martha Nussbaum, *Frontiers of Justice* (Harvard 2006) 322.

Labour Rights, Human Rights and Challenges of Connectivity

Vitit Muntarbhorn

I. Introduction

As the ILO's World Commission on the World of Work reminded us recently, 'labour is not a commodity; nor is it a robot'.¹ The year 2019 is an auspicious year for labour rights as the ILO celebrates its centenary. The ILO dates from 1919 and is far older than the UN, which was established after the Second World War. Today the ILO is part of the UN family; it is one of the specialized agencies with its own Constitution, while belonging to the UN system. 2019 is also a timely moment to take stock of the lessons learned from a century of 'work-on-work', particularly its connectivity with the spectrum of human rights espoused and protected by the UN.²

The connectivity between labour rights and human rights is advanced further by the nexus with peace/armed conflict situations, democratic aspirations, sustainable development and technological innovation, especially artificial intelligence, automation and algorithms (the three A's).³ In today's rapidly changing world interfacing with demographic, environmental and

¹ Global Commission on the Future of Work, *Work for A Brighter Future* (ILO 2019).

² For literature on ILO and human rights, see, for instance, Philip Alston, *Labour Rights as Human Rights* (Oxford UP 2005); Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151; Janice Bellace and Beryl Ter Haar (eds), *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar Publishing 2019).

³ Vitit Muntarbhorn, 'The International Labour Organization and a Century of Connectivity' (2019) *Bangkok Post: Asia Focus* 5; ILO, 'Negotiating the Algorithm: Automation, Artificial Intelligence and Labour Protection' Employment Working Paper No. 246 (ILO 2018).

manpower/ womanpower transitions, how to minimize (destructive) disruption and maximize (constructive) transformation?

At the outset, it may also be asked how the ILO centenary fits into the ongoing discussions of UN reform. Intriguingly, since the momentum for reforms initiated by the 2005 World Outcome document adopted by the world community, there have been efforts to enable the various agencies of the UN to try to deliver programmes at the national level as ‘one UN’, and this endeavor has been tested in various countries participating voluntarily in efforts to make the UN more cohesive.⁴ Yet, in an evaluation on this initiative in the not too distant past, it was found that the results revealed ‘Delivering as if one’ rather than ‘Delivering as one’, indicating major challenges in terms of cohesion and coherence.⁵ While this finding rings a bell of caution of any stocktaking of the work in concert, the recent report of the Global Commission on the World of Work provides many insights and much foresight in the face of the evolving global landscape.⁶ There is a much welcome call for preparedness, adaptability, effectiveness, solidarity and cooperation interwoven with not only the ILO but also the UN system as a whole. The crux is to uphold a human-centred approach – with ‘humans-in-command’.⁷

II. Labour rights – human rights

Labour rights and human rights are complementary, and their connectivity is encapsulated in the affirmation ‘labour rights are human rights’.⁸ Yet, there are nuances at play when the various constituents of such rights are critically analysed. The challenges include those highlighted below.

⁴ See, for instance, World Outcome Document UNGA Resolution 60/1 (2005); ‘Delivering As One’: Report on the High-level Panel on United Nations System-wide Coherence in the areas of development, humanitarian assistance and the environment UNGA Doc. A/61/583 (2006); UNGA Resolution 64/289 (2010).

⁵ Independent Evaluation of Delivering as One: Summary Report (UN 2012) 26.

⁶ Global Commission (n 1).

⁷ *ibid* 43.

⁸ See the Report of the UN Special Rapporteur on Peaceful Assembly and Freedom of Association, Maina Kiai. UN Doc. A/71/385 (2016).

1. *Standard-setting*

The ILO's standard-setting on labour rights is a genesis of human rights in the international arena and has been a pathfinder for the UN system. Today, there are 190 ILO conventions, not counting the various protocols and recommendations on labour issues.⁹ The very first convention was on (limits) on hours of work and this was followed by a number of conventions protecting women and children at work. The value added of this progression has been that ILO conventions provide the specifics on labour protection which naturally cross link with references to labour rights, especially economic, social and cultural rights, under the more general UN human instruments and mechanisms. For instance, the Convention on the Rights of the Child calls for establishment of a minimum age for children at work, but it does not provide the specifics of what the minimum age should be.¹⁰ The ILO's Minimum Age Convention, 1973 (No. 138) fills in the gap in this regard: not less than 15 years of age in ordinary situations and not less than 18 years of age for hazardous work. This was later reinforced by the ILO's Worst Forms of Child Labour Convention, 1999 (No. 182) targeted to eliminate the worst forms of child labour, using the age of 18 as the threshold for child protection.

Another example of the value added offered by ILO instruments is the Indigenous and Tribal Peoples Convention, 1989 (No. 169) (updating an earlier ILO convention) which is the sole international treaty dealing with the rights of indigenous peoples; it advocates both consultation and participation of these communities in programmes of concern to them. By contrast, in the UN arena, the nearest stipulation of the rights of such peoples is found not in a treaty but a less binding instrument in the form of a UN General Assembly Resolution.¹¹

The converse is also true in terms of UN human rights inputs *vis-à-vis* ILO instruments. At times when there is an ambiguity or a dispute concerning the content of some of the ILO instruments, human rights instruments can help to clarify the situation and strengthen the shield of protection. For instance, the International Covenant on Economic, Social

⁹ <<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::>>.

¹⁰ 1577 UNTS 3. See also UN, *The Core International Human Rights Treaties* (UN 2006).

¹¹ Declaration on the Rights of Indigenous Peoples, UN GA Resolution 61/295 (2007).

and Cultural Rights (ICESCR)¹² stipulates explicitly the right to strike. In the ILO arena, however, the Employers' group has questioned the existence of such right under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The position of the ILO's independent expert body, the Committee of Experts on the Application of Conventions and Recommendations (CEACR), is clear: the right to strike is covered by Convention No. 87 even if it is not mentioned explicitly, and it deals with cases in this regard annually.¹³ The stipulation of the right to strike under the ICESCR thus invigorates the position that the right to strike is part of international law, especially as over 100 countries are parties to the ICESCR as well as the ILO convention on the issue.

Another example is how, on the issue of discrimination, the UN system adds to the ILO spectrum. The key ILO instrument in this regard is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); it lists seven types of discrimination, such as in relation to race, religion and sex, to be countered. Developments in the UN system have extended the vistas of protection, including in regard to persons with HIV/AIDS, persons with disabilities and sexual orientation and gender identity and influences the application of the ILO convention likewise.¹⁴ ILO's latest initiative to concretize a convention on the issue of violence in work-related situations¹⁵ inevitably bears in mind the broader understanding of the terms 'sex' and 'gender' which have been developed in the UN context.

2. *Institutions*

The ILO is the main global institution dealing with labour rights, while at first glance, human rights fall particularly under the purview of the UN Human Rights Council (HRC). A key value added of the ILO is its tripartite system which integrates into all activities not only States/governments

¹² 993 UNTS 3. See also UN (n 10).

¹³ See, for instance, Report of the CEACR (ILO 2019).

¹⁴ As seen in the establishment of the mandate of the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity: UN Human Rights Council Resolution 32/2 (2016): Protection against violence and discrimination based on sexual orientation and gender identity.

¹⁵ Violence and Harassment Convention, 2019 (No. 190) <<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::>>.

but also employers' and workers' organizations. This has provided the ILO with an organic system of checks and balances in terms of social dialogue, negotiation and decision-making. While it is true that access by ordinary non-governmental organizations (NGOs) has to be through those tripartite constituents, the way that power is shared in such tripartism has an inbuilt momentum and innate validation where stakeholdership and ownership reach out far beyond State organs.

By contrast, the UN human rights protection system comprises two parts: on one hand, the nine core human rights treaties with their monitoring mechanisms (treaty-based), such as the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) and the Committee on Economic, Social and Cultural Rights under the ICESCR, and on the other, the various mechanisms under the UN Human Rights Council (UN Charter-based).¹⁶ The latter encompasses particularly the Universal Periodic Review, which acts as a peer review process with universal coverage, the range of investigators known as UN Special Procedures (such as UN Special Rapporteurs), and a complaints system for patterns of gross human rights violations. For egregious violations, there are other institutions which come into play in the UN system, not forgetting the UN General Assembly and the UN Security Council.

In reality, however, the UN system is basically government-based (indeed, the executive arm of the government) and State-driven. There has been a struggle for years to have more space for civil society. While today there is more room for comments from NGOs when States' records are vetted under the various human rights treaties and where the UN Human Rights Council interacts with States, the window for civil society is only open to a limited degree. Ironically also, while the UN Charter starts with the words 'We the Peoples', the UN does not yet have an organ, such as a people's assembly or parliament, which enables people's representatives from the national/local level to participate more substantively and meaningfully (as envisaged by those prescient words) in the UN system. The ILO tripartism, which is more participatory than the UN treaty-based and Charter-based systems, invites reflection on the need for more checks and balances in the total UN system itself – to connect more directly with the people at large.

¹⁶ <<https://www.ohchr.org/EN/pages/home.aspx>>.

Pervading these parallel tracks, there is the issue of field presence and the need to access people at the field level. While the ILO has for a long time had regional and country offices worldwide, the presence of country and regional offices emanating from the main UN agency dealing with human rights – the Office of the UN High Commissioner for Human Rights – is less extensive and of more recent origin. The issue of how to deconcentrate/ decentralize UN entities from their New York, Geneva and Vienna bases is of continuing relevance and is an intrinsic barometer for testing the purport, reach and outreach of UN reforms.¹⁷

3. *Implementation*

Implementation is key to all human rights, including labour rights. Implementation measures generally require good laws, policies, programmes, practices, mechanisms/personnel, resources (including exemplary leadership), data/monitoring, education/capacity-building, remedies/accountability, and space for networking/mobilization with a view to reform.

With those entry points in mind, the critique on the implementation process is that often, there is too much emphasis on the call for a (new) law, while the other dimensions are not underlined adequately. At the national level, anomalies may arise also when labour rights issues are relegated to the domain of the Ministry of Labour when they should be interlinked more closely with a whole range of ministries and other stakeholders. For instance, in the case of human trafficking which is covered and countered by ILO treaties, effective measures require the efforts of many more agencies, beyond the Ministry of Labour and at times much more powerful than the Ministry of Labour, to share the workload and to strengthen a coordinated inter-agency response.¹⁸ On the other hand, there is a need to avoid unnecessary duplication. A possible anomaly is that at the multilateral level, there are at least five UN agencies dealing with trafficking issues, inevitably competing for resources to do programming. Bearing in mind the aspiration for the UN to ‘Deliver as one’, a pertinent question is how effective they are

¹⁷ Annual Report of the UN Secretary-General on the Work of the Organization (UN 2018).

¹⁸ The key treaty on the issue of human trafficking today is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

in the utilization of resources which might overlap. Indeed, if catchphrases are needed, there is the call for the ‘whole-of-the-UN’ approach, ‘whole of Government’ approach and ‘whole of society’ approach as a test of connectivity in terms of implementation.¹⁹

4. *Monitoring mechanisms*

The ILO has several tripartite mechanisms to help monitor progress by States in implementing labour standards. An innovation for monitoring implementation, evident from the 1920s, was to invite independent experts to assist. The CEACR started to operate then and it is comprised only of independent experts.²⁰ The Committee has 20 members; it is not tripartite in nature. The Committee has built up a vast portfolio guiding application of labour standards among member States. The monitoring process functions through constructive critical analysis of how States fulfil their obligations, and the basis for the information used is derived from written submissions from the tripartite system. The CEACR may make recommendations to States through Observations which are basically analyses of situations accompanied by advice. It may also send Direct requests as a process of engaging with Members concerned giving more time for discourse and engagement. While the latter are not published, today they are available on the internet. The Committee works in camera, meeting once a year for some three weeks in Geneva. In reality, the Committee does not visit the field, but some members of the CEACR are at times requested by the ILO to undertake some specific missions, such as direct contacts with a country needing special scrutiny.

Beyond the CEACR, complaints by member States and others within the ILO system are generally to be channeled to tripartite constituents, such as the Committee on the Application of Standards, the Governing Body and the International Labour Conference.²¹ With regard to freedom of association cases, there is another tripartite mechanism that can intermedicate in the form of the Committee on Freedom of Association. At the apex of the pressure

¹⁹ These phrases parallel some of the words appearing in the two Global Compacts on Migration adopted in 2018; Global Compact for Safe, Orderly and Regular Migration and Global Compact on Refugees <<https://refugeesmigrants.un.org/migration-compact>>.

²⁰ ILO, *Rules of the Game* (ILO 2019).

²¹ *ibid.*

gauge for redress is the establishment of a commission of inquiry with great pressure for compliance from the concerned State. It has been rarely used.

Using independent experts, a lesson derived from the CEACR, to help analyze situations and provide inputs for follow-up measures connects very substantively with the UN system. Under the treaty-based system, all the monitoring bodies under the core human rights treaties are comprised of independent experts. Under the UN Charter-based system, all the Special Procedures of the UN are independent experts who do not represent any government. Complaints from affected parties can be covered by these structures with resultant recommendations and concomitant pressure for adjustments, even though they are not binding decisions.

While independent experts under the UN Special Procedures system visit the field constantly, access thereto being subject to consent from the States concerned, the various committees under the core human rights treaties rarely visit the field but meet periodically mainly in Geneva. The UN Charter-based mechanisms as well as the treaty-based mechanisms hardly meet with the ILO monitoring mechanisms, such as the CEACR, and the eye contact for cross-fertilization is perhaps missing. One welcome exception was that in the past, for a certain period, there used to be a meeting between the CEACR and the Committee on Economic, Social and Cultural Rights to exchange views annually, but this no longer takes place. Needless to say, some of the work of the latter, including its General Comments, have been enriched by the work of the ILO, and vice versa.

A parallel development in UN human rights circles today is the establishment of several commissions of inquiry also composed of independent experts to address fact-finding and accountability issues, ultimately possibly reaching up to the UN Security Council and connecting with the jurisdiction of the International Criminal Court (ICC).²² They may also have learned from the experiences of the commissions of inquiry set up by the ILO as the older institution.

²² <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx>>. On the ILO side, the best-known commission of inquiry in recent years was that on Myanmar and there is now a commission of inquiry on Venezuela <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_622567/lang-en/index.htm>.

Whether in the ILO or the UN human rights context, a key value added of independent expertise is that it provides a check-and-balance to address States as duty bearers through a more objective lens.

5. *Follow-up/reform*

The ILO monitoring system sustains engagement with member States concerned to render more transparent the prospects of follow-up and reform. Thus, at times several Direct requests are addressed to the State in question before a more definitive Observation is issued. The CEACR can also ask for earlier follow-up reports and can single out cases of non-compliance which might then be taken up by the tripartite Commission on the Application of Standards, the Governing Body or the International Labour Conference. The UN system also provides for engagement through a cyclical process of follow-up reports under the core human right treaties, the Universal Periodic Review and follow-up requests from the Special Procedures.

What of non compliance when ample opportunities have already been provided for reform? The topmost measure under the ILO is action(s) called for by the relevant COI linked with the Governing Body and the Conference. Meanwhile, the UN treaty-based system and Charter-based system depend upon additional pressure from the UN Human Rights Council and the higher echelons of the UN, particularly the General Assembly and the Security Council.

In this leverage, there is convergence between the ILO and general UN human rights system. Ultimately, the pinnacle in terms of enforcement measures relating to both labour rights and human rights concerning violations is the UN Security Council and use of its Chapter VII targeted to State responsibility, with potential cross referral to the ICC.²³ Individual criminal responsibility can also be invoked more readily now due to the presence of the ICC and other international criminal tribunals, as well as possible use of universal jurisdiction at the national level to cover international crimes on the basis of ‘a crime anywhere is a crime everywhere’.

²³ Jennifer Trahan, ‘The Relationship between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices’ (2013) 24 *Criminal Law Forum* 417.

III. Peace/armed conflicts, democracy and sustainable development

How do labour rights and human rights – and related protection – fare in armed conflict situations? Even though ILO instruments have more to do with situations of peace, several elements of labour rights through ILO conventions concern the protection of the rights of humans in armed conflict situations. For instance, ILO Convention No. 182 prohibits the use of child soldiers – a heinous labour situation or practice in times of war. Forced labour, at times found in armed conflicts, is also prohibited under the ILO Forced Labour Convention, 1930 (No. 29). However, many other ILO conventions face an uphill task if the expectation is that they will be (well) implemented, if at all, during the battle between different parties. This is certainly not the fault of the ILO conventions, but it does raise a caveat that if a country is undergoing an armed conflict, the mere fact that the government of the country in question (which is also a party to a particular ILO convention) sends in a report stating that it is implementing labour rights (well?) should be treated with a measure of caution, if not skepticism, given the interface with an armed conflict ravaging inevitably the people and their labour (and other) rights in the vicinity. Thus, in such situations, other rules of international law, particularly international humanitarian law,²⁴ come into play to ensure that there is no protection vacuum, while adding stipulations such as prohibition on the use of various weapons, the key principle of distinction between civilians and military targets, the protection of medical personnel and cultural property, as well as international criminal accountability.

Meanwhile, the UN system on human rights might also fall uncomfortably between two stools if there is an armed conflict situation. While human rights apply even in times of war, effectively much of their coverage is suspended or rendered nugatory at the field level by attacks on civilians and the like, and here again other rules and mechanisms have to be invoked, especially international humanitarian law referred to above, to ensure increased protection in armed conflict situations. Thus a holistic and comprehensive appreciation of international law, rather than fragmentation of such law, is desired.

²⁴ <https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf>.

What of the connectivity between labour rights, human rights and democracy? It is a reality that non-democracies favour the economic/ social/ cultural side of labour rights and the economic/ social/ cultural side of human rights more than the political side of labour rights and of human rights. Thus, they like to promote the ‘bowl of rice’ rather than the ‘basin of rights’. For instance, while labour protection in terms of equal remuneration in the economic sphere (such as in the informal economy and agriculture) may be welcome by non-democracies, there is little or no room for the political space represented by and representing freedom of association. While access to medical care is essential as part of social protection through economic and social rights which may be underlined by a non-democratic regime, the right to freedom of expression and peaceful assembly cum association is much less acceptable to that regime. Thus, the need to advocate the indivisibility of rights which pertains to both labour rights and human rights in the civil, political, economic, social and cultural domains together.

In that spirit, in treaty-making terms, many ILO instruments provide an anchor for democracies. For instance, ILO Conventions No. 87 and No. 98 on the freedom of association and collective bargaining are very much part and parcel of people’s participation and representation which are at the heart of democracies. Likewise, many human rights related treaties such as the ICCPR, and the various monitors under the UN Special Procedures, such as the UN Special Rapporteur on Freedom of Expression and the UN Special Rapporteur on Freedom of Association, leverage for democratic space. They go hand in hand with the economic aspects of labour rights and human rights through standard-setting and related mechanisms, such as the ICESCR and a range of UN Charter-based mechanisms, such as the UN Special Rapporteur on the Right to Food and the UN Special Rapporteur on the Right to Health.²⁵

What then are some of the opportunities for labour rights and human rights from the angle of sustainable development? Auspiciously, it is the 2015-2030 UN Sustainable Development Goals (SDGs) which have enjoyed universal buy-in by all countries – at least in principle – at times, more universally than some of the ILO and human rights conventions. They are interlinked closely with labour rights and human rights in the spread

²⁵ <<https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx>>.

of 17 Goals targeted for implementation, coupled with periodic monitoring. For instance, in 2019, implementation of a number of SDGs with bearing on labour rights and human rights were reviewed by a High Level Political Panel attached to the UN Economic and Social Council. Goals 4 (education), 8 (decent work including elimination of child labour), 10 (inequality), 13 (climate change), 16 (peace/inclusive society) and 17 (cooperation/partnerships) were reviewed through the lens of voluntary reports sent in by countries.²⁶ Already, data indicate that some SDGs are witnessing regression and not progression in various quarters. For instance, through indicators and available data in the Asia-Pacific region, there has been marked increase in inequality/disparity (SDG 10) and a further (small) regression in regard to the aspiration to peace and inclusive society (SDG 16) since the adoption of the SDGs.²⁷ Moreover, the gender lens is all-pervasive, and this is coupled with the presence of intersectional vulnerabilities, compounded by violence and discrimination, which hamper progress.

From the angle of climate change to be reviewed this year also through a global summit, as well as the SDG review, there is the challenging vision of how to promote carbon free, green industrialization. Yet, that vision has also to be grounded in the realities that some jobs will disappear while other jobs might appear, requiring new skills and adaptation by employers and employees. The need to have tripartite social dialogue in the labour sector as a complement to efforts to reduce fossil fuels and carbon emissions in this transition is a necessity which connects between environmentally sound practices and human capability, capacity, solidarity and adaptability.²⁸

In sum, the SDG framework is complementary to the labour rights system under the ILO and the human rights system under the rest of the UN system and they are closely interlinked. The former offers a value added missing from the latter: it provides a timeframe for propelling changes – 15 years, with indicators to measure progress and connectivity with development partners who might not previously have been adequately

²⁶ <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

²⁷ UN Economic and Social Commission for Asia and the Pacific (ESCAP), Asia and the Pacific SDG Progress Report 2019 (UN 2019) <<https://www.unescap.org/publications/asia-and-pacific-sdg-progress-report-2019>>.

²⁸ <https://www.ilo.org/global/topics/green-jobs/news/WCMS_586108/lang-en/index.htm>.

in the labour rights/human rights loop. Thus development actors, such as national development agencies, have to be brought on board beyond the Ministry of Labour covering labour rights and the Ministry of Foreign Affairs and or the Ministry of Justice covering human rights. Cohesion in an intersectoral and interagency tapestry is thus the imprint propelled by the SDGs targeted towards effective implementation of the goals set.

IV. The three A's

The advent of these A's, epitomized by the advance of robots, is shaking the labour market to its core, in terms of both benefits and deficits – transformation and disruption.²⁹ Technologization may offer a more productive workplace. Simultaneously, it may breed a dehumanizing chimera.

The contrasts can be stark. Technology in the form of the three A's can yield rewards, such as to take over repetitive work from workers, thus releasing them to undertake other work. Digitization enables workers' organizations to connect more easily with workers in the informal sector, particularly those in far away lands and distant seas. It can also enable workers to access the where-withal of life and market opportunities more easily, such as access to banking through mobile phones. Yet, concurrently, the arrival of AI and automation is likely to render many human jobs redundant; AI may perform better than human workers on many fronts. Algorithms might lead to breaches of privacy through an insidious surveillance system and discrimination against workers. Efficient (self-)automated machines snooping on employees at work might impinge on rights at work through prying digital eyes, while technological access might infringe employees' 'right to disconnect'.

The Global Commission on the World of Work noted this scenario, replete with ambivalence:

Technology can free workers from arduous labour; from dirt, drudgery, danger and deprivation. Collaborative robots, or cobots, can reduce work-related stress and potential injuries. But technology-driven processes can also render labour superfluous, ultimately alienating workers and stunting their development. Automation can reduce worker control

²⁹ Global Commission (n 1) and ILO (n 3).

and autonomy, as well as the richness of work content, resulting in a potential de-skilling and decline in worker satisfaction.³⁰

Among its many recommendations, the Commission proposed the development of ‘international governance system for digital labour platforms that sets and requires platforms (and their clients) to respect certain minimum rights and protection’.³¹ Due to the cross-border implications of this setting, there are lessons to be learned from the ILO’s innovative Maritime Labour Convention, 2006 to interlink between different spaces through a novel kind of transnational or transversal jurisdiction in terms of labour rights’ protection.

V. Looking ahead

This study has offered an analysis of the connectivity between labour rights and human rights through a variety of entry points such as standard-setting, implementation measures and monitoring mechanisms. It has broadened the discourse on the basis that such rights are not an island but are also challenged by the presence of armed conflicts, non-democracies which might segment rights to their will, sustainable development now impeded by increasing inequality and environmental damage, and the incursions of the three A’s, which might exacerbate a global-local disconnect. Clearly, the stakes are high and the measures needed to stem the tide of negativity depend upon the wisdom of prevention, protection, remediation and participation as our shared destiny. Most immediately, from the angle of the UN family, there is a need for more cohesion and complementarity to maximize use of resources and reduce duplications to overcome the irony of ‘Delivering as if one’.

Directions for the future should include the following:

- (i) Interconnect more closely between ILO institutions/mechanisms and the UN as a part of the ‘whole-of-the-UN’ approach; for example, the various human right treaty bodies and the UN Special Procedures should meet periodically with ILO supervisory bodies, especially where they are composed of independent experts, to share knowledge and good practices;

³⁰ Global Commission (n 1) 43.

³¹ *ibid.*

- (ii) Decentralize international organizations, including the ILO and UN human rights bodies, to reach out to the field with more field presence and or more field visits so as to be accessible to national and local communities, exploring the potential of joint missions where appropriate;
- (iii) Follow through the recommendations of the Global Commission on the World of Work, including establishment of a universal labour guarantee based on fundamental workers' rights with entitlement to life-long education to re-skill and retrain, provisioning/support built into employer-employee relationships, adequate living wages, limits on hours of work, and safe and healthy working conditions;
- (iv) Respond effectively to the gender perspective and vulnerabilities facing different groups, currently threatened by increasing inequality, thus requiring a range of equitable measures to implement labour rights and human rights in their interface with peace/armed conflicts, democracy and sustainable development, including how to tackle climate change through social dialogue and shared responsibility;
- (v) Underline the need to guarantee labour rights/human rights in their interface with the three A's, such as to protect the right to privacy through reasoned regulations, incentives and industry-based initiatives to cover data use and the role of digital platforms, ensure accountability in relation to algorithmic use, and promote a 'human-in-command' approach so that ultimately humans must still retain control over technology, with particular caution *vis-à-vis* self-automated systems which could result in violence and discrimination;
- (vi) Foster multi-stakeholder partnerships in actions to advance labour rights/human rights, building upon the strengths of tripartism and opening the door to more space for civil society in the UN family, perhaps with the future establishment of a UN People's Assembly, with due respect for more South-South cooperation, diagonal cooperation between North-South-East-West with cross-cultural programmes from a young age to nurture inter-community/ inter-faith understanding, and connectivity between civil society, business sector and the State cum other catalysts.

This panorama must be anchored on checks-and-balances between a multiplicity of actors and actions for a world more ready to address the increasingly arduous relationship between humans at work and humans out of work, sustainability and dysfunctionality, environmental regeneration and degradation, and the variability and vagaries of life-changing technology at the heart of such all-pervasive transformation.

VIII

ENHANCING THE IMPACT OF INTERNATIONAL NORMS: WHICH WAY FORWARD?



Benefits and Limits to Labour-Related Corporate Social Responsibility Codes

Shin-ichi Ago

I. Introduction

Standard-setting and supervision of international labour standards through ILO conventions and recommendations have been the principal activities of the ILO in the last one hundred years, and will also continue to be so in the next century ahead. The ILO has transformed itself to an international organization of multifaceted roles, including the promotion of technical co-operation, in particular. The title of the Director-General's report to the 75th anniversary Conference in 1994 'Defending values, promoting change – Social justice in a global economy'¹ is as appealing today as it was then. However, the international community has seen some changes in the past decades and the ILO will have to adapt to recent trends, including new approaches to its original mandate of standard-setting and supervision.

While the tripartite constituents of the ILO have continuously strived to achieve social justice by adopting international labour standards and supervising their application, full attainment of the goals has never been easy. One of the obstacles has been the unsatisfactory number of ratifications of international labour conventions. The international labour recommendations are more than mere non-binding legal instruments, because an important amount of obligations are attached to them through article 19 of the ILO Constitution. However, the obligations are not enforceable as such. Therefore, ratification of all the conventions by all the member States would be ideal. The 1998 Declaration on Fundamental Principles and Rights at Work (the 1998 Declaration) was instrumental in increasing the

¹ International Labour Conference, 81st Session 1994, Report of the Director General, *Defending values, promoting change – Social justice in a global economy: An ILO agenda*.

number of ratifications of eight fundamental Conventions to some extent, but it still faces an uphill task, and conventions of other categories must also be vigorously promoted. It is not only the number of ratifications, but also the quality of the numbers: in the case of conventions concerning migrant workers, for instance, we see that worker-sending States tend to ratify these more than worker-receiving States. This fact discounts the effectiveness of the conventions, which are basically meant to protect workers in labour-receiving countries.

Under these circumstances, what is needed is to look for alternative means to ensure the observance of international labour standards. This paper tries to shed light on the significance of ‘soft’ means to achieve the goal, highlighting the role of corporate social responsibility, in particular.

II. ‘Soft means’ in the application of international labour standards

A ‘soft’ or non-traditional means, by which norms can be effectively applied, is not unknown to the ILO. As a matter of fact, the whole procedure relating to the freedom of association is a good example. Unlike the regular supervision undertaken under articles 22, 24 and 26 of the Constitution, the freedom of association procedure is not based on any constitutional provision, nor a convention. The procedure has been developed by an accumulation of practices, which originated with the adoption of a decision at the United Nations Economic Social Council in 1950 (Resolution 277(X) of 17 February 1950) to set up a Fact-finding and Conciliation Commission on Freedom of Association in co-operation with the ILO.² It was a non-binding decision and only operational when the target country accepted its establishment. Seeing this to happen only infrequently, the ILO then expanded its scope of activities by entrusting the ILO Governing Body’s Committee on Freedom of Association (CFA) – initially meant to decide on the receivability of complaints for the Fact-finding and Conciliation Commission – to enter into the substance of a complaint and come up with some solutions, all in a non-binding manner. As this procedure is based on non-legally binding provisions, its purpose is not to ensure the application of a ratified convention – the Freedom of Association and Protection of the

² ILO Official Bulletin (1950) vol III 74-89.

Right to Organise Convention, 1948 (No. 87) or the Right to Organise and the Collective Bargaining Convention, 1949 (No. 98) but the observance of the ‘principle’ of freedom of association enshrined in the Preamble of the Constitution. In other words, a preamble, a non-operational part of a treaty, is followed up by another set of legally non-binding machineries. Thus, the principle of freedom of association, one of the fundamental principles of international labour standards, is followed up by soft laws. We know that the procedure has accomplished a great deal of improvement in the last 70 years. Experience with the CFA procedure provides hope that observance of international labour standards can be achieved by ‘soft’ means. Theoretically speaking, it is possible that a similar procedure could be designed for ‘principles’ other than the principle of freedom of association, by setting up, for instance, a Committee on Forced Labour or a Committee on Discrimination. However, it would appear easier and quicker to entrust the task to an even softer means.

III. The role of corporate social responsibility to make the referenced legal instrument a soft law

The last two decades saw a rapid growth in the implementation of corporate social responsibility (CSR) policies. The UN Human Rights Council’s resolution endorsing the Guiding Principles on Business and Human Rights (UNGP)³ is one of the key documents, which has a relevance to the ‘soft’ treatment of international labour standards. The UN General Assembly resolution adopting the Sustainable Development Goals⁴ (SDGs) is yet another more general but key document for discussion. In both documents, corporate entities are invited to take up the promotion of social justice at their own initiative. The second of the three pillars of the UNGP, namely the ‘respect’ of the human rights precept, is nothing but an invitation to exercise CSR in corporate activities. Goal No. 17 on partnership of the SDGs is another part, which targets corporate entities and invites them to achieve the goals (including social justice) on their own initiatives.

³ UN General Assembly, Resolution adopted by the Human Rights Council A/HRC/RES/17/4 *Human rights and transnational corporation and other business enterprises* (2011).

⁴ UN General Assembly Resolution A/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* (2015).

CSR is not a law. Nor is it soft law. It is an initiative or a unilateral declaration of a position by an enterprise to pursue certain legal goals, such as the observance of basic human rights.⁵ According to the European Commission, CSR is ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing ‘more’ into human capital, the environment and the relations with stakeholders.’⁶ The ILO Governing Body has defined CSR as ‘a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.’⁷

Most of those instruments cited above either implicitly⁸ or explicitly refer to some other legal instruments which are pertinent to materialize their CSR objectives: UNGP in paragraph 12 specifically mentions the 1998 Declaration. SGD 8 addresses labour matters and it even refers to the ILO’s Global Jobs Pact. Corporate entities often make reference to the Guidelines of the Organisation for Economic Co-operation and Development (OECD), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) and quite frequently to ISO26000, along with the above-mentioned declarations.⁹ Corporate

⁵ As an example, article 10 of the Mizuno Corporation’s Ethical Standard states: ‘Respecting human rights prohibits all acts that may be considered to be discriminatory treatment and/or harassment. Mizuno also guarantees employees’ rights to join a labor organization and group negotiations, and secures equal opportunities in employment’ <<https://corp.mizuno.com/en/csr/employee.aspx>>.

⁶ European Commission, *Green Paper: Promoting a European framework for Corporate Social Responsibility* DOC/01/9, (2001) 6, 8.

⁷ GB.295/MNE/2/1 para 1.

⁸ For instance the Code of Conduct, Puma Co: ‘Vendors and their subcontractors must guarantee the right of their employees to join unions, or other work or industry related associations, and to bargain collectively. These rights must be given without fear of harassment, interference or retaliation.’ <<https://about.puma.com/en/sustainability/social>>; Mizuno corporation (n 5) (another example of implicit reference to ILS).

⁹ OECD Guidelines, ILO Tripartite Declaration and ISO26000 will be discussed in more detail below.

entities also rely on more established norms in international law, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

I would consider the labour rights principles enshrined in those instruments as labour-related CSR codes. They are referred to in the CSR activity of corporate entities, to enunciate their will to achieve certain social goals. In other words, the 1998 Declaration and the MNE Declaration are not directly applied as law, but they perform a role of *de facto* legal reference when used as objectives of an enterprise's CSR activity.¹⁰ In short, the CSR activity acts as a catalyst to make the referenced instrument soft law. We can perhaps consider CSR a 'pre-soft law'. The labour-related CSR codes thus perform soft law functions when they are referred to in CSR activities of enterprises.

As one can cut a bulky beefsteak with even a plastic knife when wielded carefully, soft law can become almost hard law when necessary conditions are met. A century ago, the German constitutional lawyer Georg Jellinek wrote that the effectiveness of a legal rule loses its validity if nobody follows it.¹¹ Conversely, if there are understandings which are followed by many people for many years, these understandings tend to become legal rules.¹²

CSR activities of enterprises are one of the many ways to make a soft instrument harder. The following section describes a way labour-related CSR codes can be made harder by CSR activities of enterprises. In other words, we can observe situations where international labour standards can be effectively applied without being ratified by the country concerned and the relevant national laws enacted.

¹⁰ The Mitsubishi Corporation Code of Conduct provides guidance to its employees worldwide based on local laws and global standards such as the Universal Declaration of Human Rights and the ILO core labour standards. <<https://www.mitsubishicorp.com/jp/en/csr/management/policy/human-right.html>>

¹¹ Georg Jellinek, *Allgemeine Staatslehre*, (Häring Berlin 1905) 330, 334.

¹² *ibid* 331 (reference is made to the customary rule-making in international law).

IV. Mechanisms to make soft law harder

1. Reporting

Reporting is the basic and primary means of ensuring better compliance with norms. The ILO's historical success in its supervisory activities would not have been achieved if articles 19 and 22 of the Constitution had not existed. A 'constructivist' development had taken place to eventually set up a sophisticated mechanism of supervision. Thus, the supervision of the application of international labour standards (though both legally binding conventions and not-totally binding recommendations) materialized by subsequent practice of the Organization. The Constitution only obliges governments to supply reports regularly to the ILO, answering the questions put by the Governing Body in its report forms. The Constitution was silent about what the ILO does after receiving the reports. Actually what happened in the earlier days of the ILO was that the secretariat provided a summary of those governmental reports and forwarded them to the Conference, which in turn acknowledged receipt of the reports. No further action was meant to be taken. When the number of ratifications grew in the first years of the 1920s, the Governing Body and the Conference decided to set up a body to carefully examine the reports and make comments as to whether the ratified conventions were satisfactorily applied. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) had no constitutional basis for its creation. It was an invention by the Governing Body and its mandate gradually expanded as a matter of practice. Wilfred Jenks referred to this development as a cautious but a bold approach.¹³

A similar development is taking place in the contemporary world of business. Enterprises declare certain goals in their websites or annual reports submitted at shareholder meetings. Their goals usually contain a number of labour-related principles, such as forced labour, trade union rights or equality in employment.¹⁴ Those principles are, in my opinion, effectively labour-related CSR codes. Then the reporting comes into operation. In the majority of large-scale businesses, it has become a rule to include a chapter in their annual reports to describe what they have done to achieve the goals voluntarily

¹³ C. Wilfred Jenks, *Social Justice in the Law of Nations – The ILO Impact after Fifty Years* (Oxford UP 1970) 42.

¹⁴ Puma (n 8).

declared in their policy announcements.¹⁵ Certified public accountants are often contracted to review the CSR activities of enterprises.¹⁶ Certain numbers of enterprises avail themselves of the GRI (Global Reporting Initiative) framework to make the reporting exercise more objective.¹⁷

The UN Global Compact (UNGC), the UN initiative to invite enterprises to voluntarily enter into commitments with the Secretary General, by which both public and private entities pledge themselves to adhere to a certain number of principles, had, in its earlier stage, not requested the compacting enterprises to make reports to the UN. However, the UNGC soon introduced a Communication on Progress (COP) mechanism, with which it requested all the participating entities to supply reports covering the ten principles constituting the UNGC.¹⁸ It is interesting to note that the GRI framework has recently been used for establishing reports for the UNGC.¹⁹ The Communication on Engagement (COE) is another tool developed by the UNGC to strengthen the reporting activity under UNGC process.²⁰

2. *Monitoring and certification*

The self-reporting mechanism does not provide a third party assessment of the degree of compliance with the self-declared goals. The Global Compact simply lists participating institutions without making any reference whether they have lived up to their own pledges. Some enterprises

¹⁵ For instance, Sony Corporation <https://www.sony.co.jp/SonyInfo/csr_report/nctrb0000001t8y-att/CSR2018E_PDF_all.pdf>.

¹⁶ 'PricewaterhouseCoopers LLP (PwC) has provided independent assurance of the Unilever Sustainable Living Plan (USLP) and Environmental and Occupational Safety (EOS) performance indicators' <<https://www.unilever.com/sustainable-living/our-approach-to-reporting/gri-index/>>.

¹⁷ GRI is an international non-governmental organization established in 1997. 'Reporting with the GRI Standards supports companies, public and private, large and small, protect the environment and improve society, while at the same time thriving economically by improving governance and stakeholder relations, enhancing reputations and building trust' <<https://www.globalreporting.org/standards>>. It is a non-governmental organization, but has signed an memorandum of understanding with the UN Environment Programme and assisted it in its supervisory activities.

¹⁸ <<https://www.unglobalcompact.org/participation/report/cop>>.

¹⁹ Making the Connection – Using GRI's Guidelines to Create a COP <<https://www.unglobalcompact.org/library/306>>.

²⁰ <<https://www.unglobalcompact.org/participation/report/coe>>.

hire accounting firms to provide their views on the achievement of the enterprises' performance with respect to social goals they had initially proclaimed. However, this kind of check is short on supervision, with the nature of an internal audit. It is obviously better than not having any monitoring at all, but the scene changes when the reviewing institution is an independent third party not hired by the enterprises themselves. An excellent example of this type of third-party assessment is provided by the Better Work Programme of the ILO.

The programme, which is now run in Jordan, Lesotho and Vietnam, started in 2001 in Cambodia known as Better Factories Project. Originally, the project was linked to a trade agreement with the United States that provided market access in return for improving working conditions in the garment sector in Cambodia.²¹ After the expiration of the trade agreement in 2004, the Cambodian government, together with unions and employers, requested that the ILO set up a sustainability strategy to turn Better Factories Cambodia (BFC) into a self-financing local institution, financially supported by the International Finance Corporation. Factories connected with BFC consistently increased compliance with ILO core labour standards and national labour laws in the Cambodian apparel sector.²² The main function of the ILO project was to provide training and monitoring the compliance with international labour standards and national laws.

Similar programs are run by non-governmental organizations. Institutions, such as Social Accountability International (SAI with its SA8000) and the Fair Labor Association (FLA, with its Workplace Code of Conduct), provide certifying services and exercise a third-party assessment of the standards they propose. While this type of certification service may contribute to the betterment of working conditions to some extent, there is no assurance that it is based on the correct interpretation of national laws as well as international labour standards. These are NGOs with serious intentions and some former ILO officials are advising their activities, but they are ultimately not responsible to anybody. We cannot know whether

²¹ This project was particularly effective, because the main buyer of the Cambodian garment products were American companies and the certification by the Better Factories Program was a condition for exporting to the USA. In a way, it was a sort of social clause in the trade agreement.

²² <<https://betterwork.org/where-we-work/cambodia/bfc-programme/>>.

they properly cite international labour standards and interpret them in conformity with the established understanding of the ILO's supervisory bodies. There appears to be many of these private entities now operating in East and Southeast Asia. What the ILO should perhaps do is to certify those certifying institutions and ensure that correct advice is given by them to their clients.

3. *Supply chain management*

When an enterprise adopts certain rules in its corporate conduct rules and, furthermore, obliges its supply chain entities to adhere to the same rules, the CSR codes referred to in the enterprise declaration essentially become binding rules for the suppliers, because they cannot sell their goods or services if they do not accept the relevant CSR codes. There are more and more enterprises, especially multinational enterprises, adopting this kind of supply chain management.²³ The supply chain managing enterprises become *de facto* certifying agencies like those mentioned above. They are even stronger than mere certifications, because it is mandatory for suppliers to fulfil the conditions to obtain contracts. A manager of a garment factory in Ho Chi Minh City confided to me some years ago, when I asked him about the CSR policy of his company, that it was more cumbersome for him to satisfy the inspector sent by a buyer, rather than an inspector coming from the SAI.²⁴ It is obvious that the former is made more effective by a threat that if the company does not abide by the CSR codes, it cannot sell any of its products to the buyer. Supply chain management plays the role of a social clause in a trade agreement, comparable to the situation described above with respect to the Better Factories Project in Cambodia, with a trade sanction behind it. Therefore, the same concern arises here whether the code-imposing enterprise properly refers the CRS codes, such as ILO conventions and other human rights instruments. Certification of supply chain management by the ILO may be called for in the field of labour-related codes.

²³ 'PUMA SE reserves the right to cease trading with any company which is found to violate this Code of Conduct.:' Puma (n 8). 'IWAY is the IKEA code of conduct ... [which] specifies the requirements that we place on suppliers of products and services and details what they can expect in return from IKEA' <https://www.ikea.com/ms/ar_AE/about_ikea/our_responsibility/iway/index.html>; see also <https://www.ikea.cn/ms/en_CN/about_ikea/pdf/SCGlobal_IWAYSTDVers4.pdf>.

²⁴ Viettien Shirts Company, visited in 2009 in Ho Chi Minh City, had been certified by ISO9001, SA8000 and WRAP (Waste and Resources Action Program), at the time of interview.

4. *Global framework agreements*

A Global Framework Agreement concluded between an international sectoral trade union organization (Global Union Federation or GUF)²⁵ and a multinational enterprise, is another means by which labour-related CSR codes are referenced and their application is sought. When we look at the agreement between IKEA and the International Federation of Building and Wood Workers (IFBWW), for instance, we find that many ILO conventions are referred to therein. As a furniture selling company, there is an important meaning for IKEA to conclude such an agreement with an international trade secretariat organizing workers in the construction, building, wood, forestry and allied trades and industries. The agreement becomes binding for a business, in which trade unions affiliated to IFBWW are involved. One of the final provisions of the agreement states, 'that in order to achieve the objectives and undertakings given in the agreement, IKEA and the IFBWW will engage in an on-going dialogue and will meet regularly and as the need arises to examine the implementation of this agreement and any reported breaches of its terms'.²⁶

What is interesting here and worthy of comment is that the agreement is not a simple contract between Company X and Organization Y, covered by a civil code or a commercial code of a particular country. Both parties to framework agreements of this kind are operating internationally. A GUF can cover over 100 countries and many hundreds of affiliated unions. The effect of the agreements thus immediately spreads all over the world and will cover a great many enterprises and workers employed therein. The challenge of this method is the relatively weak mechanism of the agreement's implementation. The basic means to address situations where agreed principles are not applied is only consultation among the parties, in most cases.

²⁵ (EI) Education International, (ICEM) International Federation of Chemical, Energy, Mine and General Workers' Union, (IFBWW) International Federation of Building and Wood Workers, (IFJ) International Federation of Journalists, (IMF) International Metalworkers' Federation, (ITF) International Transport Workers' Federation, (ITGLWF) International Textile Garment and Leather Workers Federation.

²⁶ <<http://www.ifbww.org/index.cfm?n=191&l=2&on=>>.

5. *Public contracts*

The ILO's Labour Clauses (Public Contracts) Convention, 1949 (No.94) embodies the idea of trying to practically enforce application of international labour standards by making use of the leverage of public contracts or public procurement. It is the same idea which lies behind the supply chain management, in that the conditions set by the procurer have the same effects for the recipients of the contracts as if the conditions were laws. The objectives of the use of public contracts are explained to be two-fold: 'First, to remove labour costs being used as an element of competition among bidders for public contracts, by requiring that all bidders respect as a minimum certain locally established standards. Second, to ensure that public contracts do not exert a downward pressure on wages and working conditions, by placing a standard clause in the public contract to the effect that workers employed to execute the contract shall receive wages and shall enjoy working conditions that are not less favourable than those established for the same work in the area where the work is being done by collective agreement, arbitration award or national laws and regulations.'²⁷

An interesting example can be given in an 'international' public contract, in the sense that the procurer is a UN agency. The Food and Agriculture Organization (FAO) in its Food-for-Work program introduced a sort of public contract technique. In paragraph 6.4 of the Guidelines for Public Works Programmes: Cash-, Voucher- and Food-for-Work, FAO covers compliance with national labour norms by stating: 'If the country in which FAO is implementing public works activities has no labour standards or their enforcement is limited, FAO needs to include appropriate clauses in the contract and ensure that they are enforced. These clauses should set the labour standards for the activity, including maximum hours of work per day, safe working conditions, and ensure that there is no child labour, no gender discrimination and no sexual abuse in the workplace. *These clauses should be aligned with international labour standards*' (emphasis added).²⁸

²⁷ Committee of Experts on the Application of Conventions and Recommendations, *General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84)* (ILO 2008) xiii.

²⁸ *Guidelines for public works programmes: cash-, voucher-and food-for-work* (FAO 2013).

V. Labour-related CSR codes incorporating hardening processes

1. *OECD Guidelines for Multinational Enterprises*

In 1976, long before the world started talking about CSR, the OECD adopted the 'Guidelines for Multinational Enterprises' (OECD Guidelines).²⁹ They are nothing but CSR codes in our contemporary usage of the term.³⁰ They provide voluntary principles and standards for responsible business conduct in a variety of areas, including employment and industrial relations, human rights, the environment, information disclosure, competition, taxation, and science and technology. The OECD guidelines were amended in 1979, 1982, 1984, 1991, 2000 and 2011. The amendment of 2000 was extensive and remarkable in our context, because all of the ILO's fundamental Conventions were incorporated into the main principles of the OECD Guidelines. Thus, it can be safely maintained that at least a part of the OECD Guidelines include labour-related CSR codes.

The unique feature of the OECD Guidelines is that they not only address entities which are not nation-States, but also the fact that an implementation mechanism is well established, although the instrument itself is not legally binding. A system of 'National Contact Points'(NCPs) elaborates on the contents of the OECD Guidelines and makes them operational. NCPs are government offices responsible for encouraging observance of the Guidelines at the national level and for ensuring that the OECD Guidelines are well known and understood by the national business community and by other interested parties. They even go further to offer a conciliatory function by investigating the situation and proposing solutions.

Analysis of the outcome of several NCPs' activities reveals an important development. Among several successful cases recorded, two in particular relate to the effective implementation of principles enshrined in the ILO conventions. One is the UNOCAL Myanmar case, which came to a conclusion in 2003. Operations of UNOCAL France, an oil and gas multinational enterprise in Myanmar, were alleged to have violated

²⁹ Relevant documentary resources can be found at the OECD's Home Page: <<http://www.oecd.org/investment/mne/1922428.pdf>>.

³⁰ Shin-ichi Ago, 'Corporate social responsibility and its implication for public international law', in T. Komori, K. Wellens (eds), *Public Interest Rules of International Law* (Ashgate 2009) 409.

a number of provisions under the OECD Guidelines, including prohibition of the use of forced labour and protection of human rights of the people living in the vicinity of the company's pipeline. The French NCP took this case seriously and came up with various recommendations, which eventually made UNOCAL France withdraw its investment from Myanmar.³¹ The second case concerns Nestle Japan. Unfair labour practices (discrimination on the ground of trade union activities) which had not been solved, even after Japanese court rulings in favour of the employees, were brought before the Japanese NCP in 2005. The matter was further transmitted to the OECD and the Swiss NCP eventually recommended in 2007 that Nestle Headquarters instruct Nestle Japan's management to stop the unfair labour practices. The years-long labour dispute was eventually solved by the intervention of the Japanese NCP in collaboration with the Swiss NCP.³²

2. *The ILO's MNE Declaration*

2.1 The MNE Declaration as CSR code

The MNE Declaration, adopted by the ILO Governing Body in November 1977, is a labour-related CSR code in itself as it is used as a reference in many CSR declarations by enterprises. It was adopted a year after the OECD had adopted a similar instrument with a wider coverage not limited to labour issues. As it is stated in paragraph 4 of the MNE Declaration, 'the principles of this Declaration are intended to guide governments, employers' and workers' organizations of home and host countries and multinational enterprises in taking measures and actions and adopting social policies, including those based on the principles laid down in the Constitution and the relevant conventions and recommendations of the ILO, to further social progress and decent work'. Paragraph 10 further states: 'The principles set out in the MNE Declaration are commended to governments, employers' and workers' organizations of home and host countries and to multinational enterprises themselves'.

³¹ 'Recommendations of the French NCP to Companies on the Issue of Forced Labour in Myanmar' (2002), in *Multinational Enterprises Situations of Violent Conflict and Widespread Human Rights Abuses*, OECD Working Papers on International Investment (2002) Annex I.

³² <<http://www.mofa.go.jp/mofaj/files/000194207.pdf>>.

In order to achieve its objectives, the MNE Declaration has been followed-up in three respects: reporting, interpretation³³ and promotional activities.

2.2 Reporting

A reporting exercise began when the Governing Body at its 205th (February-March 1978) Session invited governments to report periodically on the effect given to the Declaration after full consultation with the national employers' and workers' organizations.³⁴ This reporting exercise continued until 2006, when the Governing Body decided to postpone it, in view of concern about the low rate of response to the regular reports, as well as the lack of details contained in the reports.³⁵ In 2014, the Governing Body adopted a new follow-up mechanism on the MNE Declaration, comprised of promotional activities and an information gathering mechanism, thus practically abandoning the periodical review exercise conducted over the previous 30 years. As part of the information gathering process prior to each ILO Regional Meeting, the International Labour Office would collect country-level experiences on harnessing opportunities and addressing challenges related to foreign direct investment and activities of multinational enterprises, as well as opportunities for the promotion of the principles of the MNE Declaration.

2.3 Interpretation procedure

The 'interpretation' procedure,³⁶ which had not existed when the original instrument had been adopted in 1977, provided for the submission of requests for interpretation in cases of a dispute on the meaning and

³³ ILO, Procedure for the examination of disputes concerning the application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by means of interpretation of its Provisions (1986) Official Bulletin vol LXIX, Series A 196. See also ILO, Procedures concerning the effect given to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1981) Official Bulletin, vol LXIV, Series A 89. The 2017 revision, unlike former more technical ones, was of a more substantial nature increasing the total number of paragraphs from 59 (the original 1977 Declaration had 58 paragraphs) to 69 and, more importantly, adding an Annex entitled 'Operational Tool'; GB.329/POL/7, 18-19.

³⁴ GB.205/10/2 para 9.

³⁵ GB.294/10 paras 6-7.

³⁶ ILO (n 33).

application of its provisions. It was not designed to solve conflicts or determine findings or provide recommendations, but to provide guidance for harmonious consultations between the social partners. However, there are not many cases reported in which this procedure was used. The reason may be found in the significant number of restrictions provided as to the scope of the subject matters and the complainant organizations, thereby making the use of the procedure difficult. The restrictive manner of its application, such as limiting the initiator of the interpretation only to the traditional tripartite constituents of the ILO and making such requests receivable only when all other means are not employed, has made the MNE Declaration not user-friendly.

2.4 Promotional activities by setting up a 'National Focal Point'

The 2017 revision of the MNE Declaration introduced a novelty in its Annex promotion at the national level by tripartite appointed national focal points. The term 'national focal points' resembles that of the OECD Guidelines, but it is meant for the promotion of the Declaration and not for conciliation envisaged under the former. On the other hand, the mandate of the national focal points is not clearly defined, and perhaps it can eventually develop into a role played by the OECD's organ of the similar name. We do not know at this stage how this will develop.

Many ILO conventions are now referred to in the OECD Guidelines. The latter, with the relatively well-functioning system of NCPs, appears to have overtaken the ILO in its endeavour to make the labour-related CSR codes more effective. The ILO appears to have shifted the emphasis on promotional activities rather than relying on the reporting exercise and the 'interpretation' method.

VI. Conclusion

The purpose of this paper was to show alternative ways to make international labour standards practically applicable by utilizing various soft law tools. The degree of softness varies depending on the tools: from very soft ones in the case of CSR declarations by enterprises not accompanied by certification, to harder ones, in which supply chain management methods are employed or framework agreements are signed with GUFs. The NCPs

in the OECD Guidelines exercise a sort of conciliation function, which are more effective than the MNE Declaration, which is not accompanied by efficient follow-up mechanisms. We can name a few more methods, which may contribute to a better application of international labour standards, such as the socially oriented use of sovereign funds, promotion of socially responsible investment or ecological and social governance investments.

All these soft means are useful, but they cannot replace the orthodox, treaty-based approach of ratification of ILO conventions and the classic supervision of their application. The soft approach should be promoted only as subsidiary means to fill the gap of non-ratification of important ILO conventions. In the meantime, it would appear necessary to ensure that the agents of the soft approach, be they public entities conditioning public contracts or private enterprises requesting their supply chains to adhere to a set of social goals, are fully conversant with the substantive contents of international labour standards. We may need to certify a certifying entity. There was an example in this regard. The ILO concluded an MoU with the International Organization for Standardization (ISO)³⁷, when the latter initiated ISO26000, and tried to make sure that the ILO would be consulted each time the ISO developed labour-related standards. In this way, ILO could be satisfied that the reference to international labour standards is correctly made.

The use of the soft approach is very attractive for filling the gaps in the prevailing situation of non-sufficient number of ratifications, but it runs the risk of eroding the ILO's authority to develop and monitor the application of international labour standards. The delicate balance between these two approaches is possible to be maintained for as long as the participants remain vigilant as to the potential pitfalls.

³⁷ The International Standardization Organization is basically a universal non-governmental organization with a strong functionalist policy objectives. Along with other standards, such as ISO14001 on environmental management systems, ISO published in 2011 standards known as ISO26000 on Social Responsibility. For further information on recent developments in relation to the implementation of ILO-ISO agreements, see GB.331/INS/10 and GB.331/PV paras 320-321.

The ILO's Centenary Declaration and Social Justice in the Digital Age

Philip Alston and Jackson Gandour

I. Introduction

In June 2019, the International Labour Conference adopted the ILO Centenary Declaration for the Future of Work, which was its fourth landmark declaration over the past century, building upon its 1919 Constitution. This chapter assesses the Declaration's approach to some of the key issues relating to social justice in an age characterized by increasing income and wealth inequality and the rapid spread and growing impact on employment and society at large of artificial intelligence, automation and robotics.

At key historical moments, the ILO has attached greater importance than most international organizations to landmark declarations outlining its policy responses to the major challenges faced by workers worldwide. Its 1919 Constitution was a ringing proclamation of high-minded principles designed to tackle 'conditions of labour [that involve] such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled'. It has been consistently invoked over the course of the past century and has passed the test of time in surprisingly good shape. The 1944 Declaration of Philadelphia laid out not only the role the ILO aspired to play in a much expanded global system, but its overall vision of social justice in the aftermath of World War II. It too promoted a vision that proved to be of enduring relevance in a rapidly changing world. In 1998, the Organization adopted the Declaration on Fundamental Principles and Rights at Work which reacted to the collapse of communism by seeking to entrench basic values common to all States, regardless of their ratification of key ILO conventions. And in 2008, responding as much to the then Director-General's 'decent work' agenda as to the challenges posed by continuing globalization, it adopted a Declaration on Social Justice for a Fair Globalization.

In 2019, the year of the centenary of its founding, the ILO faces challenges that are every bit as complex and consequential as any that it has confronted in the preceding one hundred years. Artificial intelligence, machine learning, automation, robotics, and other developments coming out of the information and communications revolutions of the current era have combined with climate change and the dominant influence of neoliberal economic policy assumptions to pose fundamental challenges not just to the future of work around the globe, but also possibly to the future of the ILO itself.

Unsurprisingly, given the pace and scope of changes in the labour market as well as in society at large, the leading international organizations working on these issues have all produced major reports in recent years focusing on the future of work. These include *The Future of Jobs Report* (2018) published by the World Economic Forum,¹ a report on the *Future of Work* (2019) by the Organization for Economic Cooperation and Development (OECD),² a World Bank World Development Report entitled *The Changing Nature of Work* (2019),³ and an ILO report produced under the auspices of the Global Commission for the Future of Work, entitled *Work for a Brighter Future* (2019).⁴ While ILO policy documents made clear that the report of the Global Commission was considered to be a major input into the process of drafting the Centenary Declaration, the latter makes no direct reference to the report. But whatever the political reasons might have been for maintaining this separation, the influence of the report is very clear. It thus remains one of the best guides to the policy assumptions that informed the work of the drafters of the Declaration.

This chapter examines some of the Declaration's key policy prescriptions in light of the approach taken by the Global Commission. In order to highlight the significance of some of the key policy choices, the chapter contrasts the ILO's approach with that of the World Bank. The Bank, for example, advocates for less progressive taxation and weakened job security

¹ World Economic Forum, *The Future of Jobs Report* (2018).

² OECD, *Employment Outlook 2019: The Future of Work*.

³ World Bank, *World Development Report 2019: The Changing Nature of Work*.

⁴ Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019).

protections,⁵ while the Global Commission takes the opposite tack. Unsurprisingly, the ILO has long resisted many of the Bank's proposals for deregulatory economic policies which are seen as cutting against 'the ILO's *raison d'être*',⁶ but this makes the contrast all the more instructive for those seeking to locate the Declaration in terms of its policy significance and trying to evaluate its underlying assumptions.

The Bank's report on *The Changing Nature of Work* was two years in the making and the ILO engaged robustly during the drafting process. While some of its inputs were taken into account, the ILO was surprisingly robust in its criticism of the final version.⁷ So too were various other social sector actors. On social protection policy, the two organizations have long had a tense relationship, with the ILO pushing strongly for Social Protection Floors at the national level, while the Bank's energies, if not always its rhetoric, have focused mainly on a much less comprehensive notion of social safety nets and risk management.⁸ The Centenary Declaration avoids a confrontation on that front by calling for 'universal access to comprehensive and sustainable social protection',⁹ but without insisting on the concept of a 'floor' that is central to the ILO Social Protection Floors Recommendation, 2012 (No. 202).

Before examining these specific issues, two general observations are in order. The first is that the phrase 'the future of work' is strangely detached not just from the overarching concerns of the ILO but from some of the major challenges to the overall economic and social systems that are emerging in the digital era. In purely economic terms, the future of work is clearly of major importance, but, from a broader societal perspective, the issue is the future of workers and the future of social justice. Given the

⁵ See, generally, Wolfgang Streeck, 'A New Regime: The Consolidation State' in Desmond King and Patrick Le Galès (eds), *Reconfiguring European States in Crisis* (Oxford UP 2017) 139.

⁶ See, generally, Guy Standing, 'The ILO: An Agency for Globalization?' (2008) 39 *Development and Change* 355.

⁷ ILO, Statement (2018) <https://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_646884/lang-en/index.htm>.

⁸ Bob Deacon, 'The Social Protection Floor and Global Social Governance: Towards Policy Synergy and Cooperation Between International Organizations' (2013) 66 *International Social Security Review* 45.

⁹ Centenary Declaration, III A(iii).

nature of the challenges being confronted, it is increasingly difficult to separate discussions of these different dimensions.

The second and related issue is that the Declaration, for all of its initial aspirations, ends up being somewhat narrowly focused on the impact of technological innovations, and the direct consequences of those for future work. Its opening paragraphs suggest a much broader focus by proclaiming that this is ‘a time of transformative change in the world of work’. But it immediately moves beyond the immediate sphere of work and identifies a range of broader factors that ‘have profound impacts on the nature and future of work, and on the place and dignity of people in it’. These are technological innovations, demographic shifts, environmental and climate change, globalization, and persistent inequalities.¹⁰ However, the nature of these individual challenges is not spelled out, and nor is their likely or even possible impact on the future of work addressed explicitly. The most significant issues that are given relatively short shrift are climate change and inequality.

Climate change is mentioned only once, and, even then, it is lumped in with broader environmental change. This seems extraordinary given that the great majority of those who focus on the future of societies, whether at the local, national or global levels, predict that climate change will radically affect not only the capacity of humans to work and the types of work that will be available to them, but also the overall economic systems.¹¹ The ILO has undertaken research on some aspects of the climate change issue,¹² including some directly linked to its focus on the future of work,¹³ but, for the most part, it has remained a concerned bystander rather than an active contributor to the debate. It may well be that the tripartite composition of the Organization and the reluctance of many employers’ organizations to face up to the challenges explain why this is so, but the bottom line

¹⁰ Centenary Declaration, I A.

¹¹ Philip Alston, *Climate Change and Poverty – Report of the Special Rapporteur on extreme poverty and human rights* (2019) UN Doc A/HRC/41/39.

¹² See, for instance, *Working on a Warmer Planet: The Impact of Heat Stress on Labour Productivity and Decent Work* (ILO 2019).

¹³ See, for instance, Guillermo Montt, Federico Fraga and Marek Harsdorff, *The future of work in a changing natural environment: Climate change, degradation and sustainability* (ILO 2019).

is that Green New Deal type approaches and other transformative scenarios that are likely to dominate not just environmental, but economic and social, policy discussions in the decade ahead can hardly be ignored in a consideration of the future of work as the ILO enters its second century of existence.¹⁴

Inequality fares little better. It too is given fleeting recognition in a pre-ambular paragraph warning that ‘persistent poverty, inequalities and injustices, conflict, disasters and other humanitarian emergencies in many parts of the world’ threaten historic advances in economic and social conditions. The only other reference in the Centenary Declaration is the statement that ‘decent work is key to [...] addressing income inequality’. And yet, in many societies, the growth of extreme inequality is widely considered, even by the International Monetary Fund, to be a major challenge to the achievement of many of the goals spelled out in the Declaration.¹⁵

But rather than dwelling further on the Declaration’s omissions, it is perhaps more helpful to look at the way in which it addresses some of the key issues in the more focused debates over the future of work.

II. The future of work: The prognosis

The extensive recent debates about the future of work tend to focus on two strands: the extent of jobs likely to be lost to automation, and the potentially poor conditions of work for those who continue to be employed after large-scale restructuring. In 2013, Oxford academics predicted that automation would put 47 percent of all jobs in the United States at risk. In a follow-up study in 2016, they extended the scope of their analysis, using World Bank data, to conclude that in the OECD 57 percent of jobs were susceptible to automation, with estimates of 69 percent for India and 77 percent for China.¹⁶ While the OECD’s own estimate was that only 14 percent of all jobs in OECD countries were at high risk of automation, an

¹⁴ ‘Green New Deals: The Obstacle Course’ (The Economist 21 September 2019) 31.

¹⁵ Michèle Lamont and Paul Pierson (eds), ‘Inequality as a Multidimensional Process’ (2019) 148 *Daedalus*, special issue.

¹⁶ Carl Frey, Michael Osborne and Craig Holmes, *Technology at Work v2.0: The Future Is Not What It Used to Be* (Citi 2016) <https://www.oxfordmartin.ox.ac.uk/downloads/reports/Citi_GPS_Technology_Work_2.pdf>.

additional 32 percent of jobs were at a significant risk, making a total of 46 percent.¹⁷ The OECD and the Oxford academics were equally concerned about both the quality of available work in the course of the resulting transition and the time it would take for an acceptable equilibrium to emerge.¹⁸

The Centenary Declaration more or less avoids the specifics of these debates, and instead takes the position that the overriding challenge is ‘to shape a fair, inclusive and secure future of work with full, productive and freely chosen employment and decent work for all’.¹⁹ In other words, the assumption is that a dramatic rupture with the existing situation can be avoided and that approaches can and must be devised which will navigate the complexities introduced by new technologies and ensure equitable outcomes for all workers.

What many might see as an unduly complacent set of assumptions is in fact supported by both the Global Commission and the World Bank reports. Both view new technology as the central force changing the employment relationship and the economy as a whole, especially by altering the types of skills valued in the economy and express the concern that ‘those who lose their jobs in [the transition] may be the least equipped to seize the new opportunities’.²⁰ In particular, routinized, low-skill, physical labour is particularly vulnerable to replacement,²¹ while ‘high-order’ cognitive skills like critical thinking and behavioral skills like teamwork could become increasingly in demand.²² While their recommendations vary in terms of the particulars, this shared prognosis grounds both the Bank’s and the Commission’s emphasis on skills development and continuing education.

While acknowledging some of the pessimistic predictions on the employment impacts of automation, both reports remain optimistic that the jobs created by new technology will outpace the number destroyed. Although the Bank states that ‘the threat to jobs from technology is

¹⁷ OECD, *Job Creation and Local Economic Development 2018: Preparing for the Future of Work* (OECD 2018).

¹⁸ Carl Frey, *The Technology Trap: Capital, Labor, and Power in the Age of Automation* (Princeton UP 2019).

¹⁹ Centenary Declaration, I B.

²⁰ Global Commission (n 4) 18; World Bank (n 3) 23.

²¹ World Bank (n 3) 24.

²² Global Commission (n 4) 30; World Bank (n 3) 13.

exaggerated – and history has repeatedly taught this lesson²³ – the Commission is less confident but nonetheless states that ‘advances in technology are expanding choices about where and when to work, but are also creating new and better jobs.’²⁴

There are, however, many analyses that would suggest a much less optimistic outcome and would warrant a more radical rethink of the employment relationship than is assumed in the Centenary Declaration.²⁵

III. Gender equality

The Centenary Declaration gives some prominence to the importance of ‘achieving gender equality at work through a transformative agenda’. This is stated to include equal opportunities, equal participation and equal treatment, the sharing of family responsibilities, better work-life balance, and increased investment in the care economy.²⁶ However, this list does little to pick up on the call by the Commission for novel ‘game-changing’ approaches in this area, given the inadequacy of the standard policies pursued in recent years. The game-changers were spelled out in an earlier ILO report: ‘(i) transforming adverse gender norms and attitudes; (ii) amplifying women’s voices, representation and leadership; (iii) valuing and redistributing unpaid care work; (iv) ensuring equal opportunities and treatment of women in future jobs and sectors; and (v) reinforcing accountability for progress on gender equality.’²⁷ The first of these approaches, which follows the explicit call in article 5(a) of the UN Convention on the Elimination of All Forms of Discrimination against Women for measures ‘to modify

²³ World Bank (n 3) 6.

²⁴ Global Commission (n 4) 21.

²⁵ Forrester, *The Future of Jobs 2017: Working Side by Side with Robots* (2017) (finding that 24.7 million jobs will be destroyed and 14.9 million created). For a comparison chart showing the employment impact estimates of 19 different studies, see Erin Winick, ‘Every Study We Could Find on What Automation Will Do to Jobs, in One Chart’ (2018) M.I.T. Technology Review <<https://www.technologyreview.com/s/610005/every-study-we-could-find-on-what-automation-will-do-to-jobs-in-one-chart/>>. See also Cynthia Estlund, ‘What Should We Do after Work? Automation and Employment Law’ (2018) 128 *Yale Law Journal* 254, 263-64; and Ekkehard Ernst, Rossana Merola and Daniel Samaan, *The Economics of Artificial Intelligence: Implications for the Future of Work* (ILO 2018) 11.

²⁶ Centenary Declaration, II (vii).

²⁷ ILO, *Game Changers: Women and the Future of Work in Asia and the Pacific* (ILO 2018).

the social and cultural patterns of conduct of men and women' seems especially important. Its absence from the Declaration appears to be a missed opportunity to underscore the truly transformative nature of the changes required if gender equality is to be realized. The other element that deserves to be highlighted is the call for accountability, which will ideally be an even-stronger focus of ILO approaches in the years ahead.

IV. Lifelong learning

The Declaration calls for effective lifelong learning and quality education for all,²⁸ thus reflecting the conclusions reached by both the Bank and the Global Commission which emphasize that the skills needed for the jobs of the future will change significantly. These include 'socio-behavioral skills such as empathy and teamwork' as well as advanced critical thinking and general problem-solving skills. Since such skills often 'cannot be replaced by robots', the challenge will be for workers to 'adapt to labor market changes'.²⁹ Consequently, both reports recommend increasing investment in education and 'lifelong learning' to enable workers to cope with the anticipated technologically-driven disruptions.³⁰ But this 'consensus' obscures crucial differences in the approach to lifelong learning by the two organizations.

While the Global Commission report recommends investment in early childhood education and increased support for those transitioning from school to work,³¹ its main thrust is on adult education and retraining. Employers, labour organizations, and governments are encouraged to create a 'universal entitlement [...] that enables people to acquire skills and reskill and upskill throughout their lives'.³² This includes both 'foundational' and portable cognitive skills, as well as 'the skills needed for specific jobs, occupations or sectors',³³ and much of the cost is to be borne by employers.³⁴

²⁸ Centenary Declaration III A(ii).

²⁹ World Bank (n 3) 6, 23. See also Global Commission (n 4) 30 and David J. Deming, 'The Growing Importance of Social Skills in the Labor Market' (2017) 132 *Quarterly Journal of Economics* 1593 ('social interaction has – at least so far – proven difficult to automate').

³⁰ World Bank (n 3) 69–85; Global Commission (n 4) 30–33.

³¹ Global Commission (n 4) 11, 30.

³² *ibid* 11, 30–31.

³³ *ibid* 30.

³⁴ *ibid* 31.

However, the efficacy of adult learning and reskilling programs is more contested than the Commission's approach might suggest. A 2008 U.S. Department of Labor study of such programs concluded that the 'ultimate gains from participation are small or nonexistent'.³⁵ Adults face numerous barriers to learning new skills, including the stress of family life, financial insecurity, cognitive changes, and self-doubt.³⁶ Even where skills are prima facie transferable, workers have to be in a position to leave their homes and move to regions where employment opportunities exist.³⁷ Additionally, artificial intelligence always threatens to make newly taught specialized skills redundant given that it seeks precisely to make expert knowledge available to non-specialists.³⁸ While adult learning can provide a 'generic understanding' of how to operate technology,³⁹ the resulting jobs are likely to be low-paying.⁴⁰

The Commission endeavours to make adult learning more attractive and perhaps feasible by proposing that employers establish improved internal training programs and that those participating in adult learning programs should ideally be guaranteed 'continuity of income'.⁴¹ Getting employers to provide effective training programs, however, will require firms to shift their current priorities, since, as noted by the World Economic Forum, 'to date, many employers' retraining and upskilling efforts remain focused on a narrow set of current highly-skilled, highly-valued employees'.⁴²

The Commission also calls for workers to be taught more 'portable' general cognitive skills as well as social skills which are harder to automate.⁴³

³⁵ Richard Martin, 'Can We Help the Losers in Climate Change?' (2016) 119 M.I.T. Technology Review 100, 102-103.

³⁶ See, generally, Marina Falasca, 'Barriers to Adult Learning: Bridging the Gap' (2011) 51 Australian Journal of Adult Journal 583. Cognitive changes include potential declines in memory and problem-solving skills, though the issue is debated; Brian Findsen and Marvin Formosa, *Lifelong Learning in Later Life: A Handbook on Older Adult Learning* (Sense Publishers 2011) 63-75.

³⁷ Martin (n 35) 103.

³⁸ Ernst (n 25) 11, 18-19.

³⁹ *ibid* 19.

⁴⁰ Juergen Koeneemann, 'Artificial Intelligence and the Future of Work' in Douglas Schuler and Jonathan Jacky (eds), *Directions & Implications of Advanced Computing* (Ablex Publishing 1989) 65, 78.

⁴¹ Global Commission (n 4) 31.

⁴² World Economic Forum (n 1) 13.

⁴³ Global Commission (n 4) 30. See also Ernst (n 25) 19-20 and Deming (n 29).

This will again require shifting current attitudes, as workers in job transitions face strong pressure to focus ‘on a speedy return to employment rather than a more long-term sustainable solution to any shortcomings in skills.’⁴⁴ More fundamentally, however, many social skills, such as the empathy required to work in the automation-resistant care sector, ‘are far from scarce in the labor force’, so while they may help displaced workers find new work, that work is likely to be low-paying.⁴⁵ The Commission’s response is to recommend greater investment in care work and improved working conditions in the sector.⁴⁶

For its part, the World Bank is far less sanguine about the prospects of adult learning programs, noting that the stresses of family, childcare, and work can impede learning, and that ‘the brain’s ability to learn lessens with age.’⁴⁷ It also notes the high cost of adult learning, and cites a U.S. program that costs \$1,650 per person but only increased earnings by \$11 a month.⁴⁸ The Bank acknowledges that adult learning ‘is an important channel for readjusting skills to fit in the future of work’, but calls for a serious rethinking of the approach,⁴⁹ such as providing financial assistance to facilitate training, making programs more ‘flexible’ and delivering them ‘in short modules [on] mobile applications.’⁵⁰ Some of these ideas are in tension with the Commission’s position that any use of such digital programs ‘must be in the context of access to universal quality education, delivered by [...] teachers, whose skills [...] and mentorship cannot be replaced by technology.’⁵¹

⁴⁴ Ernst (n 25) 20.

⁴⁵ Estlund (n 25) 269.

⁴⁶ Global Commission (n 4) 46.

⁴⁷ World Bank (n 3) 84. As discussed above, adult learners may face cognitive barriers, but many researchers would dispute such a blanket statement. See, for instance, Findsen (n 36) 75, for whom ‘barring physiological and psychological impediments people [can] continue learning well into extreme old age. Indeed, older persons actually possess a number of compensatory factors – such as [...] the accumulation of knowledge and experience [...] – which may even give older learners an edge over younger peers.’

⁴⁸ World Bank (n 3) 83.

⁴⁹ *ibid* 81.

⁵⁰ *ibid*.

⁵¹ Global Commission (n 4) 31. The Bank also proposes ‘explicitly link[ing]’ adult learning to specific employment opportunities (World Bank (n 3) 85), though this runs the risk that skills workers gain would not be general and portable and could thus be quickly made redundant by technology.

Rather than adult learning, the Bank emphasizes early childhood education, given that from birth until age five ‘the brain’s ability to learn from experience is at its highest level’.⁵² It advocates provision of access to quality pre-primary schooling to ensure that children acquire the foundations for the automation-resistant ‘cognitive and socio-behavioral skills’ which become harder to build at later ages.⁵³ Early childhood education programs are also said to be more efficient by offering a greater return on investment than investments in the later stages of education.⁵⁴

Although the Bank’s early childhood education focus is primarily targeted at low-income and middle-income countries,⁵⁵ it would also seem to be especially pertinent in some industrialized countries. In the United Kingdom, for example, a strong governmental priority for adult education in the form of upskilling exists side by side with child poverty rates of 35 percent and higher.⁵⁶ While the ILO criticized the Bank’s report for ‘lack[ing] a substantive discussion of the concept of lifelong learning’,⁵⁷ it could also be argued that the ILO is more concerned with adult learning because workers, rather than children, are the principal focus of its endeavours.

V. Informality, technology, and flexible work

One of the key aspects of the Centenary Declaration is its call upon the ILO to promote ‘the transition from the informal to the formal economy’.⁵⁸ Yet the spectre of greatly increasing informality is one of the major challenges to the future of work, and both the World Bank and the Global Commission recognize this.⁵⁹ Although the evidence is mixed,⁶⁰ many

⁵² World Bank (n 3) 73-75.

⁵³ *ibid* 73, 75.

⁵⁴ *ibid* 75.

⁵⁵ *ibid* 74–75.

⁵⁶ Philip Alston, *Report of the Special Rapporteur on extreme poverty and human rights on his visit to the United Kingdom of Great Britain and Northern Ireland* (2019) UN Doc A/HRC/41/39/Add.1; Paul Lewis, ‘Upskilling the Workers will not Upskill the Work. Why the Dominant Economic Framework Limits Child Poverty Reduction in the UK’ (2010) 40 *Journal of Social Policy* 556.

⁵⁷ ILO (n 7).

⁵⁸ Centenary Declaration II A(xiv).

⁵⁹ World Bank (n 3) 9, 26; Global Commission (n 4) 23, 24.

⁶⁰ See, for instance, ‘Contingent and Alternative Employment Arrangements Summary’ (USDL Bureau of Labor Statistics 2017).

commentators think that contingent and irregular ‘non-standard’ work will become steadily more prevalent as technology – digital platform work in particular – enables more outsourcing and temporary working arrangements.⁶¹ One recent study suggests that freelancers could become the majority of the U.S. workforce within the next decade.⁶² Additionally, technological advancements are likely to exacerbate ‘fissuring’, the practice by which firms obtain more and more of their labour needs by contracting with outside supplier firms.⁶³ These firms generally pay lower wages, are more likely to violate labor regulations, and provide more contingent, precarious employment than the large, vertically-integrated firms that previously employed many low-skilled workers.⁶⁴ This phenomenon is often associated with large firms which currently ‘account for most formal jobs in an economy’.⁶⁵ However, some have suggested that the proliferation of digital platforms could allow ‘even small and medium-sized firms [to] engage in outsourcing through microtransactions’.⁶⁶

Before exploring why the Bank and the Global Commission take greatly divergent approaches to informality, it is important to review how this concept has been defined at the international level.

1. *A history of ‘informality’*

While both the Bank and the Global Commission use the ILO’s definition of informality,⁶⁷ the latter is by no means unproblematic. The concept of the informal sector was developed in the early 1970s by anthropologist Keith Hart in his studies of economic life in urban Ghana.⁶⁸ Drawing on the

⁶¹ See *Issue Note: The emergence of New Forms of Work and Their Implications for Labour Relations* (OECD 2018) 5-9.

⁶² Edelman Intelligence, *Freelancing in America* (Edelman Intelligence 2017) 18.

⁶³ See, generally, David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and What can be Done to Improve It?* (Harvard UP 2014). See also Estlund (n 25) 283–89 and World Bank (n 3) 36.

⁶⁴ Weil (n 63) 17, 282.

⁶⁵ World Bank (n 3) 38.

⁶⁶ OECD (n 61) 2.

⁶⁷ World Bank (n 3) 94, footnote 5 (citing the ILOSTAT database when discussing the prevalence of informality); Global Commission (n 4) 18 and footnote n 4 (citing *Women and Men in the Informal Economy: A Statistical Picture* (ILO 2018) 3–12).

⁶⁸ See, generally, Keith Hart, ‘Informal Income Opportunities and Urban Employment in Ghana’ (1973) 11 *Journal of Modern African Studies* 61.

work of Max Weber, Hart defined informality as work lacking the ‘bureaucratic rationalization’ of the modern capitalist enterprise,⁶⁹ which requires production to be ‘stable, strict, intensive, and calculable’, thus engendering formalization.⁷⁰ Shortly after Hart introduced the term, the ILO adopted it.⁷¹ Throughout the 1950s and 1960s, the Organization was focused on ‘underemployment’, but struggled to adopt an adequately objective and statistically useful definition of the term.⁷² This was most problematic in developing States, where ‘most work was not organized via a wage relation’⁷³ and where basic statistical definitions, such as ‘labour force’, were neither ‘meaningful nor measurable’.⁷⁴ However, unlike Hart’s definition, the ILO did not focus on the theoretical features of informality, but rather on its effects – the small scale, the ease of entry, and, most crucially, the lack of government regulation.⁷⁵ While its initial depictions of the informal sector were fairly positive,⁷⁶ the ILO would later come to associate it with poverty, irregular incomes, and low productivity.⁷⁷

In the 1970s and beyond, the term was used to describe a questionably wide array of work arrangements,⁷⁸ and by the turn of the century, it had

⁶⁹ *ibid* 68.

⁷⁰ See, generally, Guenther Roth and Claus Wittich (eds), *Max Weber, Economy and Society: An Outline of Interpretive Sociology* 223, 1395 (Berkeley University of California Press 1978); Tim Allen, ‘From Informal Sectors to Real Economies: Changing Conceptions of Africa’s Hidden Livelihoods’ (1998) 4 *Contemporary Politics* 357, 358 (discussing Hart’s application of Weber’s theory to informal work); see, also, Keith Hart, ‘Bureaucratic Form and the Informal Economy’ in Basudeb Guha-Khasnobis, Ravi Kanbur and Elinor Ostrom (eds), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford UP 2006) 21, 25.

⁷¹ See, generally, Aaron Benanav, ‘The origins of informality: The ILO at the Limit of the concept of Unemployment’ (2019) 14 *Journal of Global History* 107, 116-17.

⁷² *ibid* 111-13.

⁷³ *ibid* 116.

⁷⁴ *ibid*.

⁷⁵ ILO, *Employment, Incomes, and Equality: A Strategy for Increasing Productive Employment in Kenya* (ILO 1972) 6.

⁷⁶ *ibid* 5 (describing the informal sector as largely ‘economically efficient and profit making’). See also Paul E. Bangasser, *The ILO and the Informal Sector: An Institutional History* (ILO 2000) 10.

⁷⁷ ILO, *The Dilemma of the Informal Sector, Report of the Director-General* (ILO 1991) and Bangasser (n 76) 11.

⁷⁸ Hart (n 68) 68; ILO (n 75) 225; Alice Sindzingre, ‘The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal’ in Guha-Khasnobis (n 70) 58.

become clear that the Third World origins of the term and its identification with small-scale, marginally productive enterprises ‘failed to capture the growth of informal employment relationships within the formal sector’,⁷⁹ especially following the wave of deregulation in the 1980s and 1990s that affected both developed and developing economies.⁸⁰ To address the prevalence of informal workers in ostensibly formal, large enterprises, the concept of the ‘informal sector’ was replaced by the ‘informal economy’,⁸¹ which was split into the informal *sector* (describing the characteristics of *enterprises*) and informal *employment* (the characteristics of each worker’s individual *job*).⁸² Individuals are classified as informal if they either work in the informal sector or have informal employment in the formal sector.⁸³ Though the size of the enterprise can still be relevant, what makes a given sector or employment relationship informal has been defined primarily in terms of its relation to governmental labour regulation. Thus, the ILO’s current definition of the informal economy is ‘all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements’.⁸⁴ However, despite the inclusion of de facto informal relationships, the ILO has in practice focused largely on the provision of social security benefits and registration with government authorities. Thus, an enterprise or ‘own-account worker’⁸⁵ is necessarily formal if registered with social security or tax authorities at the national level, and a worker in the formal sector is necessarily formally employed if their employer contributes to a social security scheme on their behalf.⁸⁶

⁷⁹ Benanav (n 71) 124; ILO, *Decent Work in the Informal Economy* (ILO 2001) 2-3, 121.

⁸⁰ Benanav (n 71) 124. See, generally, Jan Breman and Marcel van der Linden, ‘Informalizing the Economy: The Return of the Social Question at a Global Level’ (2014) 45 *Development and Change* 920, 937.

⁸¹ ILO (n 79) 27.

⁸² See, for instance, ILO (n 79) 121–25; *Women and Men in the Informal Economy: A Statistical Picture* (ILO 2018) 3–12.

⁸³ ILO (n 82) 11; ILO (n 79) 127.

⁸⁴ *Transition from the Informal to the Formal Economy Recommendation, 2015* (No. 204). See, also *Informality and Non-standard forms of Employment* (ILO 2018) 1.

⁸⁵ Own-account workers are often called independent contractors.

⁸⁶ ILO (n 82) 10.

2. *Informality and employment flexibility*

Although the ILO has broadened its definition to capture increasing informality in otherwise formal enterprises, the focus on fairly narrow categories of government regulation means that various forms of flexible, non-standard work – despite having many of the negative features of informal work – are still classified as formal.⁸⁷ This result has led critics to claim that the approach is ‘often inadequate to capture the complexities of contemporary employment practices designed to (a) reduce costs, (b) limit or reduce the permanent workforce, (c) maximize employers’ flexibility, and/or (d) shift employment risks to workers’.⁸⁸

These limitations become especially problematic when applied to the contemporary economy in which technological developments have blurred the divide between formal and informal work.⁸⁹ Many digital platform workers in the so-called ‘gig economy’, such as drivers for Uber and Lyft, would likely be classified as informal. Because their remuneration is ‘not directly dependent on the revenue of the employer’, they are employees for ILO purposes.⁹⁰ Nevertheless, in jurisdictions like the United States, they are frequently classified as independent contractors for whom no social security contributions are made.⁹¹ The situation for other gig economy services is less clear. Freelance labor sites like TaskRabbit, Fiverr, and Upwork, for instance, allow workers to set their own prices, arguably making them ‘own-account’ or self-employed workers. Insofar as they pay their own social security taxes, such workers could be regarded as formally employed.⁹² However, workers on freelance platforms must fund their own retirement, social security, and health insurance. They are thus particularly vulnerable to illness, have unpredictable incomes and relatively weak

⁸⁷ ILO (n 79) 52.

⁸⁸ Arne L. Kalleberg and Kevin Hewison, ‘Precarious Work and the Challenge for Asia’ (2013) 57 *American Behavioral Scientist* 271, 273.

⁸⁹ World Bank (n 3) 27.

⁹⁰ International Conference of Labour Statisticians, *Resolution concerning the International Classification of Status in Employment (ICSE)* (1993) paras 6, 8. See also <<https://www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/status-in-employment/current-guidelines/lang--en/index.htm>>.

⁹¹ ILO (n 82) 10.

⁹² *ibid.*

redress mechanisms when clients refuse to pay.⁹³ Despite being classified as formally employed, such workers suffer from many of the same issues as ‘informal’ gig workers.⁹⁴ Consequently, merely ensuring registration with government authorities may do little to address the ills of much contemporary platform work.

3. *Policy responses*

The Global Commission recommends the establishment of a universal labor guarantee (ULG), which secures minimum rights and standards in relation to wages, hours, workplace safety, job security, and freedom of association.⁹⁵ It would extend to ‘all workers, whether they are in full-time employment, executing microtasks online, engaged in home-based production for global supply chains or working on a temporary contract’.⁹⁶ Despite applying to both informal and formal non-standard workers, it is explicitly premised on the notion that the ‘employment relationship remains the centerpiece of labour protection’.⁹⁷ In practice, however, its protections would seem most beneficial for employees working for a single employer, a situation which could become increasingly rare in the coming decades. Maximum hours legislation, for instance, while undoubtedly important, could fail to address the income insecurity that many freelance and gig workers face because of the lack of consistent work.⁹⁸ Wage regulation, too, is arguably most relevant when workers are able to work full time for a single employer. While aspects of the ULG might offer significant benefits for so-called ‘dependent independent

⁹³ See, for instance, David Peterson, ‘The Problems with Freelancing and How Blockchain Can Help’ (Forbes 2018); Pawel Popiel, ‘“Boundaryless” in the Creative Economy: Assessing Freelancing on Upwork’ (2017) 34 *Critical Studies in Media Communication* 220, 226. Sites like Upwork guarantee payment even when a client refuses, but only if a worker submits to draconian surveillance, including keystroke recording and potential webcam monitoring; Ifeoma Ajunwa, Kate Crawford, and Jason Schultz, ‘Limitless Worker Surveillance’ (2017) 105 *California Law Review* 735, 746-47.

⁹⁴ See, generally, Patrick Collinson, ‘How do Deliveroo and Uber Workers Cope with Precarious Pay?’ (The Guardian 2018).

⁹⁵ Global Commission (n 4) 39.

⁹⁶ *ibid* 38.

⁹⁷ *ibid*.

⁹⁸ Edelman Intelligence (n 62) 51.

contractors’ – or contractors who are economically dependent on a single enterprise⁹⁹ – they may only offer limited stability to a platform worker who is unable to count on such a consistent income stream. Moreover, these regulations may do little to address broader, technology-induced structural changes within firms such as fissuring. This form of outsourcing enables firms to disclaim legal duties toward workers, while at the same time using ever more intrusive technologies to monitor and micro-manage workers’ conduct and performance.¹⁰⁰

The World Bank’s approach to reducing informality is almost the exact opposite of the ILO’s. Rather than impose stricter labor standards on all employers, the Bank extols the virtues of informality, especially in developing countries, where it surmises that all but the most productive workers would prefer informality rather than a system with a ‘minimum wage, required benefits, and other taxes and regulations’.¹⁰¹ In general, it calls for more flexible labor markets, the weakening of termination protections¹⁰² and universal social protection, regardless of employment status, to make up for lower wages, limited employer benefits, and reduced job security. In essence, its answer to automation is to rely not on labour regulation but rather on direct, State-provided support.¹⁰³ In response, the ILO has criticized the Bank for what it sees as an empirically unsupported claim that ‘labour market institutions are a fundamental obstacle to the formalization of the informal economy’.¹⁰⁴ Other organizations have raised concerns that such unburdening strategies let ‘those who profit from the work of others [...] off the hook for contributing to the welfare of those workers’.¹⁰⁵

⁹⁹ OECD (n 61) 8. The OECD notes dependent independent contractor employment has increased in all G20 countries from 2010 to 2015.

¹⁰⁰ Brishen Rogers, *Beyond Automation: The Law & Political Economy of Workplace Technological Change* (Roosevelt Institute 2019).

¹⁰¹ World Bank (n 3) 31.

¹⁰² *ibid* 116.

¹⁰³ *ibid* 31.

¹⁰⁴ ILO (n 7).

¹⁰⁵ Laura Alfery, ‘How the Draft WDR 2019 Got it Wrong: Rethinking and “Relinking” Social Protections for the Future of Work’ (WEIGO 2018).

4. *Towards a new definition*

The Centenary Declaration rightly emphasized the importance of reversing the trend towards informality, but it is not clear that either the ILO or the World Bank has arrived at a satisfactory solution to this challenge. Despite its apparently flexibility, the ILO's definition, which prioritizes registration with government authorities, is unlikely to respond adequately to the relevant trends in today's labour markets. The Bank, by stressing for its part the need to weaken labor regulations in order to incentivize formalization, risks replicating in the formal economy the 'decent work deficits' which plague informal work.¹⁰⁶

Whatever the attraction of the Global Commission's ULG, it seems to depend unduly on the existence of a stable employment relationship which appears increasingly anachronistic in the face of decades of fissuring and the rise of digital platform work. By failing to address new forms of work, the ULG fails to provide a feasible solution for improving the kinds of informal and non-standard work which are likely to become increasingly prevalent in the future.¹⁰⁷

VI. Economic policy

Grand schemes for future renewal, or even more modest ones such as those in the Centenary Declaration, require resources and political will. In other words, we need to have some sense of the overall political economy assumptions against which the envisaged future might unfold. This in turn raises questions as to the strategy for achieving change and particularly the identification of the driving forces that might welcome and even propel the change sought. Most prosaically, deep change requires a fiscal strategy that reflects not only the resources available to governments, but on how tax, labour-market, privatization and related policies will empower, enable or restrain the key actors in the economy. It must of course be conceded that expecting the Centenary Declaration to say very much about these

¹⁰⁶ ILO (n 79) 4, 44; International Trade Union Confederation, 'World Development Report 2019: World Bank's unhelpful contribution to debate on the future of work' (ITUC 2019), criticizing the Bank's deregulatory approach.

¹⁰⁷ Estlund (n 25) 287.

dimensions is asking a lot. This being said, it seems reasonable to demand more from the major reports that have been given the task of exploring all options for the future of work. As Frey observes, ‘in a world where technology creates few jobs and enormous wealth, the challenge is a distributional one’.¹⁰⁸

At the end of the day, however, we are left largely to our own devices to identify the implicit assumptions that underpin both the recommendations of the Global Commission and the content of the Declaration. The *de facto* exclusion from the Declaration of the debate over how to address the climate catastrophe that is already in full-swing has two especially problematic consequences. First, it means that some of the most challenging issues around the future of work are not given the prominence they deserve. These include the dramatic shifts in the geography of employment, the threat to the future viability of certain large-scale industries, the consequences of zero-carbon economic strategies, the impacts of huge population transfers domestically and internationally, the changing nature of infrastructure needs, and the dislocations flowing from the embrace of renewable energy and the necessarily dramatic reductions in fossil fuel reliance. Thus, despite the Declaration’s opening reference to the various ‘transformative changes’ driven by *inter alia* ‘environmental and climate change’, its provisions are hardly at all responsive to the magnitude of the challenges posed in this regard.¹⁰⁹

The second consequence is that neither the Global Commission nor the World Bank address themselves to the various proposals for economic and social transformation that have been put forward by diverse actors under the rubric of a ‘green new deal’ or similar concepts. While the Bank proposes both a ‘global New Deal’ at the international level and the creation of a ‘new social contract’ at the national level, neither of these grand projects reflects significant environmental dimensions. The Global Commission also devotes considerable attention to the need for a reinvigorated social contract which is equally blind to environmentally-driven needs. The Declaration seems to follow this neglect by assuming either that deep transformations will not occur or that they will have relatively little impact on the outlook for employment and labour markets in the decades ahead.

¹⁰⁸ Frey (n 18) 366.

¹⁰⁹ Alston (n 11).

Leaving aside the implications of climate change, there are of course important political economy assumptions built into the Declaration and the Bank and Global Commission reports. It is important to identify these since they will have an outsized impact on the viability and feasibility of many of the policy prescriptions.

One starting point is to note that both of the reports assume the need for significant increased expenditures on the labour market and the broader social sector. At the same time, neither explicitly acknowledges the strait-jacket that exists as a result of the almost global embrace of standard neoliberal economic policies. Even without going as far as Branko Milanovic who argues that ‘the entire globe now operates according to the same economic principles [according to which production is] organized for profit using legally free wage labor and mostly privately owned capital’,¹¹⁰ the future global economy seems certain to be characterized by growing inequality, shrinking government budgets,¹¹¹ a heavy reliance on the private sector, a reluctance to regulate, and diminishing solidarity with the less well off. Yet, both the Bank and the Global Commission envisage significant additional public expenditure. They propose greatly expanded social protection coverage by decoupling benefits from employment as well as establishing a ‘social protection floor’,¹¹² and acknowledge that this will necessitate a ‘stronger role for governments’ and significantly higher social spending, especially in developing countries.¹¹³ In addition, their lifelong learning and gender inequality programs are both expensive and premised on a major governmental role. Other core policy proposals also envisage greater social spending. Both the Commission and the Bank’s lifelong learning approaches rely, at least in part, on State-financed or State-provided services.¹¹⁴

There is also an unresolved tension between the role envisaged for the public and private sectors. The Centenary Declaration avoids taking any

¹¹⁰ Branko Milanovic, *Capitalism Alone* (Harvard UP 2019) 2.

¹¹¹ See *World Social Protection Report 2017–2019* (ILO 2017) 181. See also Isabel Ortiz, Matthew Cummins, Jeronim Capaldo and Kalaivani Karunanethy *The Decade of Adjustment: A Review of Austerity Trends 2010–2020 in 187 Countries* (ILO 2015) 2.

¹¹² Global Commission (n 4) 35–36; World Bank (n 3) 106.

¹¹³ World Bank (n 3) 107. The current average in developing countries is just 1.5 percent of GDP; Global Commission (n 4) 36.

¹¹⁴ Global Commission (n 4) 31 and 34; World Bank (n 3) 74–76 and 127.

clear position by ‘supporting the role of the private sector as a principal source of economic growth and job creation’ and in the following paragraph ‘supporting the role of the public sector as a significant employer and provider of quality public services’.¹¹⁵ While both positions are defensible, one of the most important policy issues for the future of work concerns the appropriate mix between the public and private and how that should be determined.

Both the Bank and the Global Commission approach the question of expanding the available revenue base in a rather tentative and arguably over-optimistic way. The Commission decries the fact that ‘OECD economies have, on average, reduced corporate tax rates from around 45 percent in the mid-1980s to 24 percent in 2018’.¹¹⁶ But rather than call for higher tax rates or new forms of taxation, it advocates ‘equitable’ tax systems that are consistent with ‘economic growth and enterprise development’,¹¹⁷ and puts great store in international efforts to address tax evasion to raise the necessary revenue.¹¹⁸

The Bank also avoids calling for tax increases and argues that needed additional resources can ‘come from improved capacity in tax administration and policy changes, particularly to value added taxes and through expansion of the tax base’.¹¹⁹ Similarly, it relies on enhanced compliance with corporate taxes to generate additional revenue, and is wary of higher payroll or other business taxes that could raise the cost of formalization.¹²⁰ Instead, it embraces a value-added tax as a ‘first line of reform’ for revenue generation, which could be crucial for financing a guaranteed social minimum and the Bank’s early childhood development recommendations.¹²¹ This is despite warnings by the ILO and others about the regressivity of value-added taxes and other consumption taxes.¹²²

¹¹⁵ Centenary Declaration, II (ix) and (x).

¹¹⁶ Global Commission (n 4) 31.

¹¹⁷ Global Commission (n 4) 49-50.

¹¹⁸ *ibid* 50.

¹¹⁹ World Bank (n 3) 10-11.

¹²⁰ *ibid* 95-96.

¹²¹ World Bank (n 3) 130-33.

¹²² ILO (n 111) 184.

VII. Conclusion

The ILO's Centenary Declaration, like the Global Commission report that underpins much of it, reaffirms the continuing validity of many of the goals that have been pursued over decades and even a century of ILO advocacy for social and economic justice. They include decent work opportunities for all, lifelong learning and support for both younger and older workers, gender equality, a strong public sector, improved labour administration and inspection, less informality in the economy, and various forms of political and economic redistribution and sharing of the benefits of growth.

Nonetheless, the Declaration seems to be premised on a degree of continuity in economic and social life that takes all too little account of the main trends that threaten deep and enduring disruptions to the current order. These include the fundamental restructuring of economies that will be required in response to catastrophic climate change, the huge reordering of the world of work that will be produced by automation, artificial intelligence, and machine learning, the consequences of rapidly growing inequalities of wealth and income, and the huge disparities in economic and political power being generated by the dominance of a handful of Big Tech companies across the world.

While the Centenary Declaration serves as an important restatement of the continuing relevance of the basic principles of justice at work and beyond, the question of how these goals can be reconciled with the major shifts that are underway in the global economy remain to be adequately addressed. In particular, it will be necessary to articulate a theory of change by which the goals identified in the Declaration can be achieved in the face of the global dominance of neoliberal policies premised on continuing fiscal consolidation, lower taxes and shrinking public sector budgets, large-scale privatization, and deregulation. In the case of the ILO, identifying policies that will enable its enduring goals to survive and adapt in the face of fundamental and deeply disruptive changes will require creative rethinking of many of the assumptions on which it currently operates.

International Law in the Making: The OECD Experience

*Nicola Bonucci**

I. Introduction

For a long time, the role of the Organisation for Economic Co-operation and Development (OECD) as a global standard-setter was not fully recognized even though, since its creation in 1961, the OECD has placed itself at the centre of international standard-setting, developing highly visible and innovative international instruments. This paper, based on the OECD experience and perspective, seeks to present, albeit briefly, how an international organization like the OECD has sought to shape international law.¹

The 1960 Convention establishing the OECD provides, in article 5, that ‘in order to achieve its aims, the Organisation may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations’. The Convention therefore gives the Council, the governing body of the OECD, the power to adopt both soft law (Recommendations) and hard law (Decisions). The power to adopt legally binding decisions to be applied by all OECD Members within their respective territories is rather unique, even if this power has been used sparingly and not in recent years.

* This paper and the opinions it contains are attributable to the author and do not necessarily reflect those of the OECD or of its members. The author would like to thank Clement Gary and Adele Rae for having reviewed the paper.

¹ For a more detailed analysis of the normative role of the OECD, see Société Française pour le Droit International/OCDE, *Le pouvoir normatif de l’OCDE* (Pedone 2019). See also ‘Toward Coherence in International Economic Law: Perspectives at the 50th Anniversary of the OECD’ (2011) 43 *George Washington International Law Review*.

II. The OECD as a leading global standard-setter

Throughout its almost sixty years of existence, the OECD has constantly made use of this power, even as its focus was shifting over the years. In the sixties, some of the OECD's key legal instruments were developed, in particular in the areas of investment (through two OECD Council Decisions) and taxation (through the development of a Model Tax Convention to avoid double taxation). Incidentally, it is on those instruments that a number of bilateral treaties are still based.² During the seventies and eighties, the main production of OECD standards came from the environmental sector. The 'Polluter Pays' Principle was first enshrined in an OECD Recommendation of 1974,³ twenty years before its universal recognition through the 1992 Rio Declaration on Environment and Development.⁴ In the nineties and 2000s, the normative activities of the Organisation had been mainly around the concept of good governance, be it public or private.

Given the multidisciplinary nature of the Organisation, such standards cover a wide range of topics from trade to statistics, from international investment to the environment, and from public governance to the fight against corruption. A breakdown of the OECD Decisions, Recommendations, Declarations and other OECD legal instruments in force today shows the following: 25 Decisions; 177 Recommendations; 28 Declarations; 10 International Agreements; and 14 Other legal instruments (e.g. the Arrangement on Officially Supported Export Credits).⁵ As shown below, the OECD has always aimed at being a global standard-setter and public policies influencer with a reach well beyond its membership. Thus the OECD has developed flagship legal instruments in a number of

² More than 3000 by the end of 2017 <<https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>>.

³ Recommendation of the Council on the Implementation of the Polluter Pays Principle, 1974 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0132>>.

⁴ <http://www.unesco.org/education/pdf/RIO_E.PDF>.

⁵ OECD legal instruments can be found in the Compendium of OECD Legal Instruments managed by the OECD Directorate for Legal Affairs <<https://legalinstruments.oecd.org/en/>>. For a brief description of the various forms of OECD legal instruments, see Nicola Bonucci, *The legal status of an OECD Act and the Procedure for its Adoption* (OECD 2004) <<http://www.oecd.org/education/skills-beyond-school/31691605.pdf>>.

policy areas: the Anti-Bribery Convention,⁶ the OECD/G20 Principles on Corporate Governance⁷ and the Guidelines for State-Owned Enterprises,⁸ the Investment Declaration⁹ and its Guidelines for Multinational Enterprises¹⁰ and the Arrangement on Export Credits,¹¹ to name but a few.

Many of these standards are key reference points for other international organizations and groupings, including the G20, the Financial Stability Board and the WTO. In the area of taxation, the OECD has been able to react quickly to the global challenges of tax avoidance and evasion by setting new standards and bringing countries to the table far beyond its 36 Members – now 158 in the Global Forum on Tax Transparency and over 130 in the BEPS Inclusive Framework.¹² OECD standards, like other multilateral standards, have led to concrete benefits for both governments and citizens: the OECD system of mutual acceptance of chemical test data saves governments and industry over 300 million euros each year and, according to data from the US State Department, the Export Credits Arrangement saves United States taxpayers alone an estimated 800 million dollars per year.

⁶ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293>>.

⁷ Recommendation of the Council on Principles of Corporate Governance, 2015 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0413>>.

⁸ Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises, 2015 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0414>>.

⁹ Declaration on International Investment and Multinational Enterprises, 1976, last amended in 2011 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144>>.

¹⁰ Decision of the Council on the OECD Guidelines for Multinational Enterprises, 2000, last amended in 2011 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0307>>.

¹¹ Arrangement on Officially Supported Export Credits, 1978, last amended in 2019 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-5005>>.

¹² Base erosion and profit shifting (BEPS) refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax. BEPS practices cost countries USD 100-240 billion in lost revenue annually. Working together within OECD/G20 Inclusive Framework on BEPS, over 130 countries and jurisdictions are collaborating on the implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment <<https://www.oecd.org/tax/beps/about/>>.

1. *Unique features of OECD standard-setting*

The OECD has some unique characteristics that make it ideally placed to broker consensus solutions to emerging global challenges. First, policy alignment among participating countries and streamlined working methods allow the OECD to move quickly to address new issues and fill regulatory gaps. Second, the OECD's bottom-up, consensus-based approach to standard-setting ensures that OECD standards enjoy broad support and ownership that is built progressively from the earliest stages of their development. Third, the technical expertise of the OECD expert committees composed of representatives of all OECD Members (and more and more often of non-Members also), and the valuable input of multi-stakeholder engagement processes, gives OECD instruments both legitimacy and credibility. Fourth, the committees' standard-setting work draws on the OECD Secretariat's expert policy analysis and trusted OECD data, in line with the evidence-based approach that characterizes the Organisation.

2. *How have OECD standards become global standards?*

The OECD has often been an innovator. The OECD Codes of Liberalisation is a case in point; adopted in 1961, they remain today the only multilateral instrument regulating the full range of international capital movements. While not being international treaties, the 'Codes' take the form of two separate OECD Decisions. Henceforth, they are legally binding for all their adherents, be they OECD or non-OECD Members.

The OECD Convention on Mutual Administrative Assistance in Tax Matters (1988) should also be mentioned. The Convention was so advanced that it had hardly any ratification during the first twenty years of its existence. Today, 130 jurisdictions (countries and other territories with taxation rights) participate in the Convention, including 18 jurisdictions covered by territorial extension.¹³ The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which opened for signature in 1997 and which is the only global convention dealing with the 'supply side' of transnational bribery, provides another

¹³ Status <https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf>.

striking example. Indeed, its basic principle – the criminalization of active foreign bribery – has been incorporated in article 16 of the United Nations Convention Against Corruption adopted eight years later.

Moreover, the OECD has been a source of international standards through, typically, three different forms. Firstly, OECD standards may be adopted by international communities and other international bodies. For instance, originally developed by the OECD in 1999 and updated in 2015, the Principles of Corporate Governance¹⁴ provide an indispensable and globally recognized benchmark for assessing and improving corporate governance. The Principles have been endorsed by the Leaders of the G20 and by the members of the Financial Stability Board (FSB), which have designated the Principles as one of the FSB's Key Standards for Sound Financial Systems. They have also been used by the World Bank Group.¹⁵

Secondly, OECD norms may be incorporated into other legal frameworks. For instance, the Arrangement on Officially Supported Export Credit,¹⁶ adopted in the OECD framework in the seventies and defined as a Gentlemen's Agreement, as it is itself described, has been 'hardened' by three different actions – a reference to it in the WTO Agreement on Subsidies and Countervailing Measures (ASCM), its inclusion in EU law, and its consideration in the WTO panels dealing with the aircraft disputes between Canada and Brazil. In particular, the inclusion of the Arrangement in the ASCM has not only made it an instrument of reference in a legally binding treaty, but it has also 'multilateralized' its scope of application. Any WTO Member acting in the framework of the Arrangement, even without being a formal Participant to it, would be deemed to comply with WTO obligations. In this respect, the Arrangement has become a world-wide standard.¹⁷

¹⁴ Principles (n 7).

¹⁵ *Report to G20 on the implementation of the G20/OECD Principles of Corporate Governance* (OECD 2019) <<https://www.oecd.org/daf/ca/G20-Report-Implementation-Corporate-Governance-Principles-2019.pdf>>.

¹⁶ Arrangement (n 11).

¹⁷ Nicola Bonucci, *OECD Work on Export Credits – A Legal and Institutional Laboratory in Smart Rules for Fair Trade: 50 Years of Export Credits* (OECD 2011) <<https://www.oecd-ilibrary.org/docserver/9789264111745-9-en.pdf?expires=1573488808&id=id&accname=o-cid84004878&checksum=5DC16C166164051E9459F57746630A73>>.

Thirdly, OECD may serve as a forum for international negotiations. This has been traditionally the case for trade-related issues throughout the period that preceded the establishment of the World Trade Organisation. More recently, the OECD has been used as the forum for negotiation of new international standards on taxation.¹⁸

III. How to maintain the effectiveness and impact of OECD standards?

Intergovernmental organizations are often better at developing new norms, rules and standards than at monitoring their implementation or assessing their continuous relevance and impact. In the last few years, the OECD embarked on a double exercise looking at these questions through two complementary initiatives, one internal and one external, in partnership with a number of other international institutions.

1. *The OECD Standard-Setting Review (SSR)*

Like all intergovernmental organizations, the OECD is facing increased scepticism regarding multilateralism and international standard-setting. It is, therefore, vital that multilateral standards respond to the challenges of a globalized world and shape the global economy to ensure it works – and is seen to work – for all and not just the few. It is within this difficult context that in May 2016 the OECD Secretary-General launched an OECD-wide Standard-Setting Review (SSR) to strengthen the relevance and impact of OECD standards.

In the first phase of the review, which was concluded in 2017, each OECD committee was requested to develop its own action plan with a view to assess existing standards and how they are still ‘fit for purpose’, as well as to consider developing new standards.¹⁹ The end of the first phase

¹⁸ This process, which started some ten years ago is still ongoing as the OECD looks at the taxation issues stemming from the digitalization of the economy <<https://www.oecd.org/tax/oecd-leading-multilateral-efforts-to-address-tax-challenges-from-digitalisation-of-the-economy.htm>>.

¹⁹ These are technical bodies established by the Council and composed of representatives of all OECD countries in charge of developing public policies and standards in their area of competence. As of this year, there are more than 300 committees, expert and working groups which cover almost all areas of policy making.

led to the abrogation of 32 OECD instruments (around 12 per cent of all OECD legal instruments in force in 2016).

In the second phase, currently ongoing and due to be concluded in 2021, OECD technical committees are reviewing, revising and monitoring 134 other legal instruments, some of which date back to the 1960s and 1970s. OECD committees are also working to identify possible new areas in which the OECD can usefully develop new standards. This second phase has already led to the adoption of 14 new legal instruments and the revision of eight others.

This SSR is also an opportunity to take a step back and reflect on how the OECD could improve its standard-setting practices. The Organisation is actively pursuing new initiatives to enhance its processes for the development and revision of standards on a practical level around five pillars:

Visibility of standards – The Review has already helped broadening awareness and understanding of OECD standards across the Organisation itself and the OECD is working actively to disseminate its standards and to increase their acceptance and visibility beyond OECD membership. In this context, a new and more interactive website on OECD legal instruments was developed and is now accessible.²⁰

Transparency and legitimacy – Greater cooperation and consultation across OECD committees in the development of new instruments has increased synergies among different policy communities within the OECD. Many OECD committees have developed innovative methods of conducting consultations with stakeholders that increase transparency in how standards are developed. These initiatives are now shared within the OECD as ‘best practices’.

Measuring and boosting implementation – More regular monitoring and increased support for Adherents through toolkits and companion documents will help strengthen the implementation of OECD standards.

Global reach – A reflection is ongoing on how best to encourage meaningful participation by non-Members in standard-setting to extend the

²⁰ <<https://legalinstruments.oecd.org/en/>>.

reach and impact of standards beyond OECD membership while at the same time preserving the credibility of the standards.

Ensuring relevance over time – Finally, the introduction of more regular and systematic stock-taking of OECD legal instruments along with strategic discussion of new areas for standard-setting will ensure the relevance and impact of OECD standards in the future.

2. *A collaborative approach: The international organizations partnership and international regulatory cooperation*

Another important facet of the OECD's standard-setting strategy is enhancing cooperation with other international institutions, including the ILO.²¹ Indeed, while it is true that each organization has its own history and specificity, it is equally true that international organizations are all facing a number of common challenges.²²

Firstly, most international organizations place a lot of emphasis on the development of international rules and on the rule-making process but much less on implementation and impact. Thus, only a few of them systematically track the implementation of their instruments. When doing so, the most common approach is to rely on voluntary reporting. Similarly, international organizations monitor the use of their tools, but much less attention is given to their actual impacts, largely because of methodological challenges and lack of resources. Secondly, while in recent years international organizations are showing greater transparency and are increasingly reaching out to stakeholders, their practice in this regard is not always consistent and systematic and all international organizations face significant challenges. There is an inherent tension between transparency and efficiency. Thirdly, international organizations operate in institutionally crowded areas and coordination efforts among them remain largely informal and dependent on the good will of people rather than on established coordinating mechanisms.

²¹ For instance, in the margins of the 71st World Health Assembly in May 2018, the ILO, the OECD and the World Health Organization signed a memorandum of understanding operationalizing the Working for Health Multi-Partner Trust Fund <<https://www.who.int/hrh/news/2018/WHO-ILO-OECD-sign-MoU-Work-for-Health/en/>>.

²² See *International Regulatory Cooperation: Adapting rulemaking for an interconnected world* (OECD 2018) <<https://www.oecd.org/gov/regulatory-policy/international-regulatory-cooperation-policy-brief-2018.pdf>>.

Increased collaboration between international institutions permit to learn from each other's experiences and best practices in standard-setting. In addition, greater coordination helps to avoid duplication or unnecessary competition, including in the development of standards, increases effectiveness and provides better value for money to members. With this goal in mind, the OECD launched an international organizations partnership in 2014, bringing together some 50 international organizations to promote and discuss the conditions for greater quality, effectiveness and impact of international rule-making.²³ Thus in April 2019 in New York, the OECD convened the Sixth Annual Meeting of International Organisations, which had as its central theme 'The contribution of international organisations to the international rule-based system'.

This collective effort has led to an unprecedented collection of information on the rule-making activities of international organizations and aims at ensuring effective stakeholder engagement, strengthening the implementation and evaluation of international instruments and improving coordination between international organizations. In fact, this international partnership promoted by the OECD and the OECD's own Standard-Setting Review work hand in hand. They strive to make international rules and standards *more effective*, through better monitoring and evaluation; *more inclusive*, through increased transparency and consultation of stakeholders; and *more relevant*, with better coordination within and across international governance actors to efficiently address emerging issues.

IV. Conclusion

We are living in a time of paradox. While the world has become interdependent and the international community requires more and more common solutions and global standards, an increasing number of governments, within and outside the OECD area, appear to be more focused on short-term benefits and inward agendas. International organizations are diverse in their nature, membership and activities, and the OECD's experience as a standard-setter reflects its own unique characteristics. At the same time,

²³ See *A partnership for effective international rule-making* <<http://www.oecd.org/gov/regulatory-policy/a-partnership-for-effective-international-rule-making.htm>>.

international organizations share many features in their respective standard-setting practices and in the challenges they face in remaining relevant, efficient and accountable, as highlighted in a recent OECD publication.²⁴

As recalled by the Secretary-General of the United Nations at the opening of the 74th session of the United Nations General Assembly, ‘it is vital that the world has strong and effective multilateral institutions and architecture, and that international relations are based on international law’.²⁵

The ILO showed us the way one hundred years ago. As recalled in the Declaration of Philadelphia (1944), ‘in discharging the tasks entrusted to it the International Labour Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate’. This is not an easy task in today’s context. However, to quote the former Prime Minister of Canada, Lester Pearson, ‘we must keep on trying to solve problems, one by one, stage by stage, if not on the basis of confidence and cooperation, at least on that of mutual toleration and self-interest’.

²⁴ See *The Contribution of International Organisations to a Rule-Based International System* (OECD 2019) <<https://www.oecd.org/gov/regulatory-policy/IO-Rule-Based%20System.pdf>>.

²⁵ Secretary-General’s remarks at opening of the 74th Session of the UN General Assembly <<https://www.un.org/sg/en/content/sg/statement/2019-09-17/secretary-generals-remarks-opening-of-the-74th-session-of-the-un-general-assembly-delivered>>.

Enhancing the Impact of International Norms with Special Reference to Women's Labour Rights and the Women, Peace and Security Agenda

Christine Chinkin

I. Introduction

This chapter examines three international normative standard-setting agendas which have been interwoven into the tapestry of the ILO since its outset but are rarely considered in conjunction with each other: post-conflict reconstruction for peace; women's human rights, in particular participatory rights and equality; and the Security Council's resolutions on women, peace and security (WPS).¹ In each case, impact has been less than optimum. The central argument is that to enhance the impact of the international norms, they should each be considered in conjunction with the other relevant agendas. The long history and experience of the ILO in these areas should be more fully integrated into other international legal regimes while the ILO's own, somewhat variegated approach, might be strengthened by fresh thinking drawn from other bodies. Institutional and substantive separation and siloing could be ameliorated by coherence, mutual reinforcement and a co-ordinated and strong reassertion of shared and complementary international norms, which might in turn support stronger implementation.

* The author acknowledges the UK Arts and Humanities Research Council for its funding of a project on A Feminist International Law of Peace and Security under which this chapter has been written.

¹ There are nine WPS resolutions: UN SC Resolution 1325 (2000); UN SC Resolution 1820 (2008); UN SC Resolution 1888 (2009); UN SC Resolution 1889 (2009); UN SC Resolution 1960 (2010); UN SC Resolution 2106 (2013); UN SC Resolution 2122 (2013); UN SC Resolution 2242 (2015); UN SC Resolution 2467 (2019).

Each of these themes appeared in the ILO's early history. The paper first sketches their inclusion into the ILO Constitution and the role of women activists in ensuring that women had at least some place in the newly created Organization. It then briefly examines the scant provision for ensuring women's livelihoods in post-conflict settings in the WPS resolutions, the fuller recommendations by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the limited reference to other sources of women's rights when, in 2017, the ILO turned to post-conflict reconstruction in its Recommendation No. 205 concerning employment and decent work for peace and resilience. It concludes that implementation remains a consistent challenge to all these normative standard-setting agendas but that drawing upon their commonalities might allow for greater impact through fostering dialogue, mobilizing disparate constituencies, encouraging diversity in thinking about compliance mechanisms and providing at least some bulwark against pushback.

II. Women at the ILO

Women were present at the outset of the ILO as a consequence of the transnational organizing by women's movements from the mid to late 19th century onwards for networking and lobbying with respect to three main substantive issues – peace, labour conditions for working women and suffrage. Many groups seeing these as inter-connected actively sought all three as when, for instance, the International Women's Suffrage Alliance delivered a manifesto to the British Foreign Office signed on behalf of 12 million women in 26 countries appealing it not to 'leave untried' any form of conciliation or arbitration 'which may help to avert deluging half the civilised world in blood'² and women's unions joined with suffrage groups in a 'Women's Rally for Peace' on the eve of the outbreak of World War I.³

In 1919, women were present at two especially significant gatherings that made demands to the peacemakers in Paris relating to labour, to conditions for peace and women's status. In February, women attended the 'peace conference of the International and Labour Movements' that adopted the

² Jill Liddington, 'The Women's Peace Crusade' in Dorothy Thompson (ed), *Over Our Dead Bodies Women against the Bomb* (Virago Press 1983) 180.

³ Vivien Newman, *Suffragism and the Great War* (Pen and Sword 2018) 85.

International Labour Charter for submission to the Labour Commission in Paris. But women's attendance in Berne did not denote access at Versailles. George Barnes, a member of the British War Cabinet and delegate to the Labour Commission, expressed his 'angry astonishment' that Sophy Sanger, 'the greatest expert on these subjects in the country'⁴ was not invited to meet the British representatives to the Labour Commission when she passed through Paris on her way to Berne.⁵

Unlike the Berne labour conference where some women participated in a predominantly male event, the other meeting was all women – the second Congress of what became the Women's International League for Peace and Freedom (WILPF).⁶ The League had been founded during the war at the Women's Congress in The Hague in 1915 and is now the oldest women's peace organization. In Zurich, in 1919, it adopted a set of Resolutions that delegates presented to the Peace Conference. The Resolutions comprised both a peace and a women's human rights agenda. In terms of peace they expressed the dismay of the Women's Congress that the proposed peace treaty 'so seriously violated the principles upon which alone a just and lasting peace [could] be secured'⁷ and urged such policies as an immediate reduction in armaments, the end of conscription and machinery for arbitration and conciliation. The Resolutions also called for the insertion of a Women's Charter into the Peace Treaty. The proposed Women's Charter included wide-ranging principles such as recognition of women's social, political and economic status, that women should have the same opportunities as men for training, for entering industry and professional life, should receive equal pay for equal work, that mothers should have equal rights of guardianship over their children and that married women should have the same nationality rights as men. These – and other – rights have since been brought into

⁴ Alice Maud Allen, *Sophy Sanger: A Pioneer in Internationalism* (Robert Maclehose 1958).

⁵ In 1919, Sophy Sanger became the first chief of the legislative section of the ILO until 1924. Her paper on the unique aspects of the ILO included the prescient conclusion that 'even if the League of Nations itself should collapse, it strikes one as very unlikely that the labour organisation will be allowed to die with it'; Sophy Sanger, 'The International Labour Organisation of the League of Nations' (1919) 5 *Transactions of the Grotius Society* 153.

⁶ The association was first called The International Committee for Permanent Peace; Congress of Zurich 1919, <<https://wilpf.de/docs/Congress-of-Zurich-Fertig.pdf>>.

⁷ WILPF Resolutions, Congress of Zurich 1919, <https://wilpf.org/wp-content/uploads/2012/08/WILPF_triennial_congress_1919.pdf>.

international human rights notably within the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

Broad demands for women's political participation disconcerted the peacemakers when they were brought before them. Early in 1919, President Woodrow Wilson told his colleagues in the Supreme War Council of a proposal that he had received from 'a group of ladies representing the Suffrage Associations of the Allied Countries' that the Peace Congress appoint a separate Commission to report on the condition and legislation concerning women and children worldwide.⁸ President Wilson expressed his 'sincere desire' to give effect to this proposal but his colleagues were not enthusiastic. Prime Minister Clemenceau questioned whether this could not be dealt with by the Conference's Commission on International Labour Legislation. Baron Sonnino did not think it would be good politics to take up the question. Balfour felt 'considerable alarm' at the prospect of the Conference extending its reach in this way (although he added that he was in favour of women's suffrage). Clemenceau further indicated that while he had no objections to an enquiry into female and child labour, he would 'strongly object' to any consideration of the political status of women. After pointing out that this was exactly what the women wanted but realizing that there was no unanimity among his colleagues, Woodrow Wilson withdrew his proposal. Nevertheless, as a result of further requests to Woodrow Wilson, Lady Aberdeen, leader of a joint delegation of the International Council of Women and the Inter-Allied Conference of Women Suffragists made a number of requests to a plenary session of the Commission drafting the Covenant including that women be eligible for all posts in the League,⁹ arms control and reduction and recognition of women's suffrage. The last again caused consternation; delegates 'protested their devotion to the cause of women but unanimously declared that the League Covenant was not the place to deal with women's political rights'.¹⁰

Women's demands with respect to the proposed Labour Organization also centred around participation, albeit in a narrower sense than with

⁸ Records of the Supreme War Council, January-February 1919.

⁹ Covenant of the League of Nations, article 7: 'All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women'.

¹⁰ Carol Riegelman Lubin and Anne Winslow, *Social Justice for Women: The International Labour Organization and Women* (Duke UP 1990).

respect to political status. As the new and progressive idea of representation to the ILO was being determined women sought guaranteed places in country delegations and its staffing. For instance, the Zurich Resolutions of the Women's Congress had noted that the new Organization's work would affect women wage earners worldwide and urged that in their interests the proposal in the report of the Commission on International Labour Legislation that each country should have two delegates – one representative of employers and one of employees – be amended to provide that one of these be a woman. Women made their case to individual peacemakers. Two American women met with Woodrow Wilson who considered 'quite reasonable' their demand for such inclusion.¹¹ A British TUC General Council member, Margaret Bondfield, lobbied George Barnes to put forward the proposition that when any question concerning women was under discussion a woman adviser should be present and that the Director of the future Labour Organization should employ a 'certain number of women on his staff'. These proposals were essentially brought into articles 389¹² and 395¹³ of the Treaty of Versailles.

Nevertheless, at the International Congress of Women Workers (ICWW) held later in 1919, simultaneously with the first Annual Conference of the male-dominated ILO and also in Washington DC, women labour leaders from around the world recommended to the ILO Conference that the number of delegates from each country be increased from four to six and that two of the six be women. The ICWW's position was not accepted and articles 389 and 395 of the Treaty of Versailles lack the precision of both this proposal and those of the Women's Congress. Article 389 provides only for a woman 'adviser' rather than a representative and stipulates that such an adviser need only be present for consideration of questions that 'affect' women, a limited compromise that fails to realize that this is the case for all work-related matters. Article 395 does not spell out a specified number or percentage of staff members but stipulates only that

¹¹ Geert Van Goethem, 'An International Experiment of Women Workers: The International Federation of Working Women, 1919-1924' (2006) 84 *Revue Belge de Philologie et d'Histoire* 1025.

¹² 'When questions specially affecting women are to be considered by the Conference, one at least of the advisers should be a woman'.

¹³ 'The staff of the International Labour Office shall be appointed by the Director [...] A certain number of these persons shall be women'.

a 'certain' number be appointed. Nor do the articles provide for diversity between women. Nevertheless, these provisions allowed for some women's participation including on specialist Commissions and in preparation of ILO Conventions and Recommendations. For instance, within the British delegation Margaret Bondfield was the representative on the Commission on child employment, Mary MacArthur on that on childbirth and maternity and Constance Smith also participated in the latter Commission, replacing a male delegate.¹⁴ Along with the preambular assertion of the importance of improving working conditions for the 'protection' of women and recognition of the principle of equal remuneration for work of equal value, articles 389 and 395, although limited, make the ILO the only international organization founded before or immediately after World War II to include women-specific provisions. This is an added reason for celebration of the 100-year anniversary of the ILO.

It is not possible in this paper to develop further the history of women in the ILO,¹⁵ or of the continued lobbying by women's groups to the Organization and to the International Labour Conferences. But one substantive point should be highlighted. There were from the outset differences of opinion, including amongst the women advocating for improved conditions for women workers, as to the best approach for addressing their situation.¹⁶ On the one hand was the demand for equality and on the other the alternative approach of ensuring protection of women, in particular of their supposed vulnerabilities, reproductive capacities and ideals of womanhood through their role as mothers.¹⁷ Or, to put it another way, there was disagreement as to whether the interests of women in the workforce would be better advanced through giving 'special attention' to women's 'special needs'¹⁸ or

¹⁴ Stephen Sanders, *The International Labour Organisation of the League of Nations* (Fabian Tract No. 197 Fabian Society 1921).

¹⁵ ILO Brochure, Women's empowerment: 90 years of ILO action! <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_105088.pdf>; Riegelman Lubin and Winslow (n 10).

¹⁶ Other early points of discussion included which women should be designated as workers, an especially pertinent issue in light of women's unpaid work and work in the informal economy.

¹⁷ Hilary Charlesworth, 'Women' in Simon Chesterman, David M. Malone, Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford UP 2019) 249.

¹⁸ Sandra Whitworth, 'Gender, International Relations and the Case of the ILO' (1994) 20 *Review of International Studies* 389.

through the gender neutral language of equality, with the norm remaining that of the male worker and the workplace designed around male working lives. This reflects and foreshadows the still ongoing debate as to whether women's rights are better upheld through specialist women-centred institutions with the corresponding risks of essentialism and marginalization, or through gender mainstreaming with the different risk of submergence and loss. Over time the ILO has moved towards the second substantive approach,¹⁹ while also taking some account of the need both for targeted interventions to redress structural obstacles to achieving women's workplace equality²⁰ and to address forms of work that are dominated by women.²¹ However, as a mainstream labour institution it has not fully aligned its work with the specialist women's agendas such as CEDAW or the 1995 Beijing Declaration and Platform for Action and follow-up instruments.

III. The ILO as a peace agenda

The post-conflict search for peace and security was precisely the context in which the ILO was conceived. Fears stoked by the Bolshevik revolution made the Powers at Versailles receptive to demands for improved labour conditions for workers so that the 1919 peace package proclaimed the 'peace and harmony of the world [to be] imperilled' by harsh and unjust conditions of labour and the centrality of social justice for the achievement of universal and permanent – what we would probably now call sustainable – peace.²² These aspirational words about peace were not, however, necessarily internalized by the peacemakers or subsequently by ILO personnel. Edward

¹⁹ Key moments were the adoption of the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951 (No. 100) and the Convention on Discrimination (Employment and Occupation), 1958 (No. 111).

²⁰ For instance, Resolution concerning ILO action for women workers, 25 June 1991. The Resolution notes slow progress in promoting equality for working women and calls for 'comprehensive strategies to eliminate the continuing barriers to the equal participation of women in employment, including the desegregation of the labour market, the proper recognition and fair valuation of all work, including work which has traditionally been done predominantly by women, and the adoption of measures to help women and men to reconcile work with family responsibilities'.

²¹ For instance, Domestic Workers Convention, 2011 (No. 189).

²² Treaty of Versailles, 28 June 1919, Part XIII, Constitution of the International Labour Organisation.

Phelan, Secretary to the British delegation to the Peace Conference and subsequently ILO Director-General from 1941 to 1948, wrote that the Peace Conference accepted the recommendations of the Labour Commission with little concern about the structural or operative details of the proposed new Organization, nor with any reflection about what these lofty principles might mean in practice.²³ As the Organization developed its work, it gave little attention to how it contributed to peace, although WILPF members and other women's bodies continued to press the issue. It was not until World War II made the association pertinent that the ILO directly addressed the role of labour in the maintenance of security in the transition from war to peace. The Philadelphia Declaration, adopted while World War II was ongoing, reaffirmed the aims and purposes of the Organization and the 'truth' of the statement that 'lasting peace can be established only if it is based on social justice'. Its language was gender neutral apart from a general assertion of the 'right of all human beings, irrespective of race, creed or sex [...] to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'. Women's 'special needs' were catered for through provision for maternity protection. Phelan's assessment was that these words added weight and renewed authority to the asserted link between social justice and peace.²⁴

The associated and 'visionary' Employment (Transition from War to Peace) Recommendation, 1944 (No. 71) was primarily concerned with the re-employment of demobilized military personnel and all those working in the war effort, identifying a range of measures to this end. Most provisions were specified as applying to men and women but the following was included among the General Principles and was also developed in Part XI on the employment of women: 'The redistribution of women workers in each national economy should be carried out on the principle of complete equality of opportunity for men and women in respect of admission to employment on the basis of their individual merit, skill and experience, and steps should be taken to encourage the establishment of wage rates on the basis of job content, without regard to sex'. That this concerned only

²³ Edward Phelan, 'The Contribution of the ILO to Peace' (1949) 59 *International Labour Review* 607.

²⁴ *ibid* 611.

the specific situation of women who had undertaken traditional male roles to support the war economy, necessitated by the absence of large numbers of men, and did not consider 'modern concerns over gender equality' was subsequently given as one of the reasons for replacing the Recommendation with one more appropriate for contemporary conditions.²⁵

IV. Labour rights within the women peace and security agenda

The ILO did not again engage with post-conflict situations until 2017 when it adopted the Employment and Decent Work for Peace and Resilience Recommendation (No. 205). In the meantime, the body with the primary responsibility for the maintenance of international peace and security,²⁶ the UN Security Council, turned its attention to the protection of civilians during and in the aftermath of conflict. In this vein and at the behest of women's activists, including the WILPF, it commenced its agenda for WPS through the adoption of Resolution 1325 of 31 October 2000. As with the Resolutions adopted by the WILPF Women's Congresses in 1915 and 1919, Security Council Resolution 1325 is a programme for progressing peace and women's human rights.²⁷ It recognizes that conflict is gendered, impacts differently on people according to their gender, and avows the importance of taking account of women's experiences as well as those of men in legal and policy decision-making about conflict. It brings into conflict and post-conflict settings the two themes that were raised by women with respect to work-related matters in 1919 – the importance of women's participation and representation and protection of women taking account of their 'special' needs.²⁸

WPS also has a pillar on what is termed relief and recovery, which might seem to reflect the ILO language of social justice that was deemed essential

²⁵ International Labour Conference 105th Session 2016, Report V(1), *Employment and decent work for peace and resilience: Revision of the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71)* para 140.

²⁶ UN Charter, 1945, article 24.

²⁷ 'It must not be forgotten that resolution 1325 was conceived of and lobbied for as a human rights resolution that would promote the rights of women in conflict situations'; *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of Security Council Resolution 1325* (UN 2015) 15.

²⁸ UN SC Resolution 1325 (2000) refers six times to women's 'special' or 'particular' needs.

to peace in 1919 and which was reaffirmed in 1944 but has been largely lost in the neo-liberal model of peacebuilding of the past decades,²⁹ into which political framework WPS is located. The WPS approach to relief and recovery is narrow, focuses primarily on access to humanitarian services and makes little reference to the relevance of ensuring women's access to secure livelihoods post-conflict. The first three WPS resolutions make no mention of livelihoods. The fourth Resolution, 1889 in 2009, recognizes in its preamble 'the particular needs of women and girls in post-conflict situations, including, inter alia, physical security, health services [...] ways to ensure their livelihoods, land and property rights, employment' but does not continue with any practical application in the operative paragraphs. The next Resolution, 1960 in 2010, again omits any statement about livelihoods. Resolution 2106, adopted in 2013, urges the provision of livelihood support to survivors of sexual violence and Resolution 2122, adopted later the same year, makes preambular reference to livelihood services for women affected by armed conflict and post-conflict situations. Resolution 2242, adopted in 2015, 'recognizes the importance of integrating gender considerations across humanitarian programming by seeking to ensure the provision of access to protection and the full range of services', including livelihood services, through ensuring women's meaningful participation and support for their leadership in humanitarian action. As for the most recent WPS Resolution 2467, adopted in April 2019, it 'affirms that victims of sexual violence, committed by certain parties to armed conflict, including non-state armed groups designated as terrorist groups, should have access to national relief and reparations programmes, as well as health care, psychosocial care, safe shelter, livelihood support and legal aid'.

The provisions pertaining to relief and recovery are sparse and largely limited to specific women (survivors of sexual violence, including that inflicted by terrorist groups) and for particular ends (humanitarian programming and delivery). They are not consistently reiterated and are not always included into the operative paragraphs. They recommend no practical steps for their implementation. The Security Council has taken no account of the concepts developed by the ILO such as 'decent work', 'income

²⁹ For discussion of the 'liberal peace', see Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge UP 2017) chapter 9.

security' or the principle of social protection floors.³⁰ Since the last is aimed specifically at preventing poverty and reaching informal workers, it is especially applicable for women in the aftermath of conflict. The later WPS resolutions offered an opportunity for the Security Council to integrate the concept of social protection floors into its WPS agenda along with a gender analysis that ILO Recommendation No. 202 had failed to develop.³¹

Nor does the Security Council turn often to the language of universal rights, generally preferring that of 'services' or 'support'.³² General recommendations of the CEDAW Committee could have been used for guidance. In 1992, in its General Recommendation No. 19 the Committee had acknowledged the vulnerabilities that conflict creates for women in that it often leads to 'increased prostitution, trafficking and sexual assault and requires specific protective and punitive measures'.³³ The Committee did not at that time assert the importance of access to decent work and working conditions as a means of prevention and protection against these harms although it did recommend training and employment opportunities. Two decades later in its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations³⁴ the Committee went much further. It contextualized the realities of conflict and its aftermath for women through such factors as the increase in female-headed households, the breakdown of services and the lack of employment opportunities. Some women are made especially vulnerable – 'widows, women with disabilities, older women, single women without family support and female-headed households', as well as women in rural communities. Family survival comes to rest heavily on women who are forced to look for sources of livelihood. Although regeneration of employment is a high priority 'in building a sustainable post-conflict economy, formal-sector employment generation

³⁰ ILO Social Protection Floors Recommendation, 2012 (No. 202).

³¹ Sandra Fredman, *Working Together: Human Rights, the Sustainable Development Goals and Gender Equality* (British Academy 2018).

³² UN SC Resolution 2467 (2019) does use some rights-based language referring explicitly to CEDAW and the UN Convention on the Rights of the Child in its operative paragraph 18 and to 'the applicable provisions of international law on the right to an effective remedy for violations of human rights' in paragraph 17.

³³ CEDAW Committee, General Recommendation No. 19: Violence against women, 11th session, 1992, para 16.

³⁴ CEDAW/C/GC/30, 18 October 2013.

initiatives tend to neglect women and focus on demobilized men.’ In its women’s rights-based approach to post-conflict recovery in accordance with the Convention, the Committee recommended that States promote gender equality throughout economic recovery strategies, target women working in both the formal and the informal employment sectors and ensure women’s participation in the design and monitoring of strategies and programmes. The Committee emphasized that implementation of WPS must be premised on States’ obligations under the Convention and the need for a ‘concerted and integrated approach’ between the WPS agenda and the Convention. In its concluding observations to member States, the Committee regularly calls for implementation of WPS in accordance with the Convention but has not linked this directly to recommendations relating to employment opportunities as implicated in its General Recommendation No. 30. It did not reference ILO concepts of work, although in its concluding observations it does refer States to relevant ILO Conventions especially with respect to implementation of CEDAW, article 11 on the elimination of discrimination in the field of employment.

In addition to the work of the CEDAW Committee, the Security Council has been made directly aware of the importance to women of decent and secure work post-conflict when the number of female-headed households typically increases and women’s caring responsibilities are exacerbated by the collapse of social institutions. In 2015, a Council-commissioned Global Study on WPS reported that in consultations with women – especially in Africa and Asia – though many acknowledged the need to deal firmly with combating impunity and sexual violence, more often the conversation would turn to reparations, livelihoods, and economic empowerment. The Global Study explained the linkage between women’s livelihood, development and post-conflict sustainable security in these words:

without livelihoods and economic empowerment, as the percentage of female-headed households surges during and after conflict, women and girls are forced into low-reward, high-risk work like survival sex, slowing community recovery and normalization, and deepening the poverty and resentment of children. With access to income generation and economic security as a result of just peace agreement outcomes, however, women tend to be quicker to invest in child welfare and education, to build

food security, and to rebuild rural economies, greatly contributing to longer term stability.³⁵

Furthermore, ‘livelihood interventions targeting young women and adolescent girls have been shown to have positive effects on girls’ sense of safety, rates of unwanted sex, risky sexual behaviours, early marriage, intimate partner violence and bargaining power associated with HIV risk’.³⁶ The Global Study concluded that ‘in order for economic recovery to transform underlying gender inequalities, women must be presented with livelihood options that avoid further entrenching gender inequalities and stereotypes’.³⁷

Instead of taking account of what women in conflict-affected places say they want, what the women’s human rights expert Committee has recommended and its own commissioned Global Study has urged, the Security Council in its top-down WPS Resolutions has emphasized security rather than peace, which it denotes for women as protection against and prevention of sexual violence, enhancing perpetrator accountability and combating impunity. The linkage between the incidence of conflict-affected sexual violence, especially but by no means exclusively directed against women and girls, and international peace and security is important but this narrow understanding of security reverts to essentializing women as victims of sexual violence and protecting their ‘special needs’. The later WPS resolutions affirm the importance given to gender equality and women’s empowerment in the Sustainable Development Goals (SDGs)³⁸ and as critical to international peace and security,³⁹ but make no connection with social protection through access to decent work and secure livelihoods.

³⁵ *Preventing Conflict* (n 27) 42.

³⁶ *ibid* 82.

³⁷ *ibid* 172.

³⁸ UN GA Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, 25 September 2015. The CEDAW Committee highlights that the SDGs must be realized in accordance with CEDAW; e.g. CEDAW Committee, Concluding Observations on the ninth periodic report of Colombia, CEDAW/C/COL/CO/9, 14 March 2019, para 7.

³⁹ For instance, UN SC Resolution 2242 (2015): ‘Welcoming the emphasis placed on achieving gender equality and the empowerment of women and girls in the recent adoption of the 2030 Agenda for Sustainable Development, reaffirming that women’s and girls’ empowerment and gender equality are critical to conflict prevention and broader efforts to maintain international peace and security’.

While the Security Council does not directly endorse the austerity and privatization reform packages that are commonly made integral to contemporary post-conflict reconstruction in accordance with neoliberal economic policies, it does not affirm the importance of women's human rights, especially economic and social rights, in creating a firm basis for the transition from conflict to peace.⁴⁰ Nor does it consider how cohesion between these objectives could facilitate transitional – even transformative – justice and peace.⁴¹

In June 2017, the International Labour Conference adopted Recommendation No. 205 concerning employment and decent work for peace and resilience. The Recommendation supersedes the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71) in light of the changed conditions of work, conflict and responses to conflict, displacement and disasters with their 'multiple, devastating impacts [...] on lives and livelihoods, societies and economies'.⁴² The process prior to adoption included a questionnaire to which States were invited to respond expressing their views on the scope and content of the proposed instrument after consultation with representative organizations of employers and workers. Along with other international bodies, UN Women submitted a response but the subsequent ILO report does not indicate any of its views.

ILO Recommendation No. 205 is long and detailed. It lies at the interface of the three agendas: WPS, CEDAW and General Recommendations of the CEDAW Committee, and the ILO's own agendas relating to decent work and social protection floors. It encompasses crisis situations following

⁴⁰ For instance, Jacqui True, Christine Chinkin, Madeleine Rees, Nela Porobić Isaković, Gorana Mlinarević and Barbro Svedberg, *A Feminist Perspective on Post-conflict Restructuring and Recovery: The Case of Bosnia and Herzegovina* (WILPF 2017).

⁴¹ The Global Study explains that 'justice in conflict and postconflict settings must be transformative in nature, addressing not only the singular violation experienced by women, but also the underlying inequalities which render women and girls vulnerable during times of conflict and which inform the consequences of the human rights violations they experience'; *Preventing Conflict* (n 27) 15.

⁴² ILO Brochure, Recommendation No. 205 – Employment and decent work for peace and resilience (2018) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/-ifp_crisis/documents/publication/wcms_631491.pdf>.

both conflict⁴³ and disasters.⁴⁴ Where the recognition of conflict as gendered is implicit in Security Council Resolution 1325, Recommendation No. 205 asserts at the outset that crises have differential impact on women and men and the importance of ‘gender equality and the empowerment of women and girls in promoting peace’ it is presented as being at the cusp of developmental, humanitarian and peacebuilding initiatives.⁴⁵ Women are present throughout the Recommendation, especially in Part V on rights, equality and non-discrimination. Indeed although this section is broadly labelled it is primarily focused on the male/female binary and on promotion and realization of ‘equality of opportunity and treatment for women and men without discrimination of any kind’. Other categories are given specific attention including children, persons with disabilities, elderly persons, migrants and refugees, minorities, indigenous and tribal peoples, internally displaced persons. This list is not as extensive as some other contemporary instruments and it takes no account of intersecting and multiple discrimination.⁴⁶

ILO Recommendation No. 205 emphasizes the promotion and protection of the human rights of women and girls and the need for taking a gender perspective in all crisis and conflict prevention and response design, implementation, monitoring and evaluation activity. It incorporates both women’s ‘special needs’ and equality, for instance through recommending that women’s ‘needs and interests are prioritized in strategies and responses’

⁴³ There was agreement that the Recommendation should be broader than ILO Recommendation 71 in that it would include both international armed conflict and non-international armed conflict; ILO (n 25) 3.

⁴⁴ The CEDAW Committee has since addressed the application of women’s rights in the context of natural disasters; CEDAW Committee, General Recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37, 13 March 2018. It includes the recommendation that States ‘guarantee women’s equal rights to decent and sustainable employment opportunities as provided for in article 11 of the Convention and apply these in contexts of disaster prevention, management and recovery and in connection with climate change adaptation in both urban and rural areas’.

⁴⁵ ILO (n 25) 47.

⁴⁶ For instance, CEDAW Committee General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC 28, 16 December 2010, notes that ‘the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity’.

as well as the promotion of women's human rights. It implicitly acknowledges that simply providing for women's participation is inadequate for measures should be taken that 'ensure that women are empowered to effectively and meaningfully participate in decision-making processes in the context of recovery and building resilience'. Like the Security Council it does not expand on what women's empowerment might entail. ILO Recommendation No. 205 states that Members should 'prevent and punish all forms of gender-based violence, including rape, sexual exploitation and harassment, and protect and support victims' but, as does the CEDAW Committee, it goes beyond the Security Council in its identification of other ways in which crisis and conflict are gendered.⁴⁷ It thus stresses that States should 'pay special attention to single-headed households, in particular when they are headed by children, women, persons with disabilities or elderly persons' and should 'take measures to ensure that women who have been employed during a crisis and have assumed expanded responsibilities are not replaced against their will when the male workforce returns'.⁴⁸ Interruption to education is also addressed in the provision that Members should 'enable women and men whose education and training have been prevented or interrupted to enter or resume and complete their education and training'.⁴⁹ The recommendation that emergency responses in the immediate aftermath of crisis should include social protection, livelihood support and employment opportunities to all those made vulnerable by the situation accepts that people – women – are not inherently vulnerable but are made so by crisis and conflict and that livelihood assistance should be made available to all, not just to victims of sexual violence.

⁴⁷ For a more detailed analysis of the 'multiple disadvantages' women face in conflict and crisis, see ILO (n 25) para 94.

⁴⁸ Although not referenced, this echoes the CEDAW Committee General Recommendation No. 30, para 49: 'Even though during conflict women take on roles previously held by men in the formal employment sector, it is not uncommon for women, in the post-conflict settings, to lose formal-sector jobs and return to the household or to the informal sector during post-conflict settings'.

⁴⁹ The CEDAW Committee also notes that 'in conflict-affected areas, schools are closed owing to insecurity, occupied by State and non-State armed groups or destroyed, all of which impede girls' access to school. Other factors preventing girls' access to education include targeted attacks and threats to them and their teachers by non-State actors, as well as the additional caregiving and household responsibilities which they are obliged to take on'; CEDAW Committee General Recommendation No. 30, para 48.

ILO Recommendation No. 205 has been described as ‘the only international normative framework focusing on the role of employment and decent work in response to some of the most pressing challenges of our time’.⁵⁰ This is a fair assessment although there is much that resonates with CEDAW Committee General Recommendation No. 30 (and now General Recommendation No. 37). Despite these commonalities and the essentially rights-based approach, CEDAW has no place in the Recommendation and neither is there any reference to WPS.

V. Concluding thoughts

There are many explanations for the lack of substantive crossover between WPS, ILO Recommendation No. 205 and the work of the CEDAW Committee: the New York/Geneva institutional divide remains in place and within it the ILO remains somewhat outside the UN’s human rights framework; the promotion and protection of human rights is not within the Security Council’s express mandate and the antipathy of the United States to economic and social rights is well known; Russia and China have an ambivalent attitude toward women’s human rights and concepts of gender equality⁵¹ and argue that the Council should not confuse security and rights. CEDAW too is for some the ‘poor relation’ of human rights instruments; the CEDAW Committee has not emphasized women’s rights in relation to work, for instance through preparing a General Recommendation on article 11; and the Committee is seeking to integrate WPS into the Convention with little reciprocal response from the Council.⁵² Both the ILO and the CEDAW Committee have developed specialist expertise that they might apprehend becoming diluted through greater integration. The Security Council has a narrow understanding of security and demonstrates little, if any, understanding of peace, or of what peace might mean for differently situated women. It equates ‘gender’ with women and addresses women in conflict and post-conflict primarily in terms of women’s vulnerability to sexual violence and their associated

⁵⁰ ILO (n 42).

⁵¹ Russia and China both abstained from the adoption of UN SC Resolution 2467 (2019) while the United States insisted on weakening provisions relating to reproductive rights.

⁵² Nor is the United States a party to CEDAW.

‘special needs’. Its promotion of women’s empowerment is in a vacuum, devoid of any connection with gender relations, social conditions and justice. In Recommendation No. 205 the ILO has taken a more progressive stance and might fear compromise or co-option if it aligned itself with the WPS agenda. The institutional divide is replicated in many instances between NGOs, which tend to centre their work on peace activism, or human right, or workers and trade union rights, or development, or humanitarian delivery rather than on the overlap between these functions.

But is this disconnect and silence across the different agendas important? What might be lost or gained through greater normative co-ordination? Or do budgetary and operative realities make any such co-ordination simply impracticable? There are different responses. On the one hand, silence between institutions contributes to the perpetuation of conflict and conflict-affected gender-based violence; it allows the Security Council to ignore the gendered realities, for instance the economic and physical insecurity of those of households headed by single women post-conflict and that without women being able to access decent and secure work post-conflict their vulnerabilities to exploitative sex work and being trafficked are heightened. It does not make the ILO challenge more strongly the gendered power relations that continue to inhibit equality at work and thus contributes to the continuum of discrimination and violence across war and peace.⁵³ Through interaction the ILO could remind the Security Council (perhaps through an Arria-formula meeting) that the WPS resolutions rest on existing normative standards and that access to decent work and livelihoods are essential underpinnings to the fight against impunity and securing accountability for war crimes and crimes against humanity.⁵⁴ In turn, it would bring the Council’s authority to bear on the ILO Recommendation. But the price might be too high. Critics of WPS have pointed to how the Security Council’s understanding of security through a military lens has led to the securitization of women’s human rights to the detriment of a

⁵³ Cynthia Cockburn, ‘The Continuum of Violence: A Gender Perspective on War and Peace’ in Wenona Giles and Jennifer Hyndman (eds), *Sites of Violence: Gender and Conflict Zones* (University of California Press 2004) 24.

⁵⁴ Madeleine Rees and Christine Chinkin, ‘Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights’ (2016) 48 *New York University Journal of International Law and Policy* 1211.

feminist peace agenda as expounded as long ago as 1915 and at the origins of the ILO.⁵⁵ The same could eventuate with respect to the ILO's commitment to decent work.

Implementation remains the strongest challenge to all three of these normative agendas. Emphasis on their commonalities might allow for greater use of their different arrangements for monitoring, and thus enhancing, compliance. Violation of fundamental labour standards in armed conflict, for instance through forms of human trafficking, can constitute an international crime⁵⁶ and thus may be potentially subject to listing and sanctioning in accordance with WPS resolutions and the work of the Special Representative of the Secretary-General on Sexual Violence in Conflict.⁵⁷ The CEDAW Committee has already taken steps in this direction through its urging of States to take account of WPS and the SDGs in their reporting to the Committee, and, importantly, vice versa. A similar approach could be taken by the other treaty bodies or within the Universal Periodic Review. The ILO supervisory and complaints mechanisms could be opened to issues relating to labour, peace and security.

Other bodies have supported greater integration. The Global Study on the implementation of Resolution 1325 concluded in 2015 that in order to realize the human rights obligations of WPS all inter-governmental bodies and agencies must act in synergy. It recommended that civil society submit information to the treaty bodies on States' performance of their WPS obligations allowing the issue to be included into the constructive dialogue around state reports and concluding observations of the relevant Committee. This could be expanded to incorporate especially livelihoods and the other elements of ILO Recommendation No. 205. UN Human Rights Council special procedures too could include conflict and gender analysis in their work in conflict-affected countries.⁵⁸ ILO

⁵⁵ Dianne Otto, 'Women, Peace and Security: A critical analysis of the Security Council's vision' (London School of Economics and Political Science 2016) <<http://www.lse.ac.uk/women-peace-security/assets/documents/2016/wps1Otto.pdf>>.

⁵⁶ The Report of the UN Secretary-General on Conflict-Related Sexual Violence, 2019 includes human trafficking as a form of conflict-related sexual violence. It may also be a form of forced labour.

⁵⁷ Mandated by SC Resolution 1888 (2009).

⁵⁸ *Preventing Conflict* (n 27) 415.

Recommendation No. 205 similarly posits a multitrack approach with comprehensive strategies for promoting peace and enabling recovery. It provides guidance on international cooperation, coordination and coherence, and calls on the ILO to play a leading role in crisis response ‘centred on employment and decent work, focusing on employment promotion, labour market access and integration, capacity development and institution building, in close cooperation with regional and international institutions’.

ILO Recommendation No. 205 has been described as ‘a real tool that was available to achieve peace’⁵⁹ through its application by humanitarian and development actors and institutions engaged in crisis response. Its value and authority would be enhanced through synthesis and co-ordination coupled with thorough and ongoing gender analysis and development of shared practices understood to be based on common normative standards. Many years ago Edward Phelan argued that the ILO’s contribution to peace was founded in its never ceasing work of ‘study, consultation, consideration and decision – perpetual adjustment of conflicting interests simultaneously carried on on the national and international plane, in which great numbers of individuals participate, representing and responsive to, immeasurably greater numbers whose interests are affected’.⁶⁰ Bringing together people from across these different normative standard-setting agendas with their diverse perspectives and specialist expertise could change the discourse in each, shift attitudes, and facilitate a pooling of resources for strengthening the overall impact. This is especially to be sought in the contemporary climate of retreat from multilateralism and pushback from women’s human rights.

⁵⁹ Statement of the Government member of Argentina, International Labour Conference, 106th Session 2017, Provisional Record No. 13-2(Rev) para 2059.

⁶⁰ Phelan (n 23) 619.

IX

THE LAW OF INTERNATIONAL ORGANIZATIONS BETWEEN FRAGMENTATION AND COHERENCE



Addressing Corruption: The IMF's New Policy

Sean Hagan

I. Introduction

While systemic corruption generates moral outrage, there is also considerable evidence that it can have devastating economic and social consequences. It is for this reason that the IMF – an international organization charged with supporting financial stability and sustainable growth – has been paying much more attention to this issue, both in the context of its financial support and its regulatory assessments.¹ In April of 2018, the Fund adopted a new governance policy that will guide all of its activities in this area.² This paper will discuss how systemic corruption undermines economic performance and provide an overview of the IMF's new policy in this area. Relying on the IMF's experience to date, it will also identify the key elements of an effective anti-corruption strategy.

II. Understanding corruption and its costs

While corruption exists in all societies, there is considerable evidence that when corruption becomes systemic – i.e. when it becomes the norm of behavior, rather than the exception to the norm – it can have a debilitating

¹ The IMF's financial activities are carried out pursuant to article V, section 3(a) of the Articles of Agreement, while its core regulatory function (referred to as 'IMF Surveillance') is carried out pursuant to article IV, sections 1 and 3; see IMF Articles of Agreement <<https://www.imf.org/external/pubs/ft/aa/index.htm>>.

² See Framework for Enhanced Fund Engagement on Governance <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/20/pp030918-review-of-1997-guidance-note-on-governance>>.

economic impact.³ Prior to the adoption of the new policy in 2018, the IMF conducted a study of the impact that systemic corruption can have on various State functions (IMF Study).⁴ As is set out in the IMF Study, there is considerable evidence that, for example, systemic corruption can undermine a country's fiscal capacity. When tax evasion is pervasive and where the tax authorities are complicit in the practice, this practice can have the effect of completely delegitimizing the tax system. In these circumstances, governments are unable to carry out their functions without incurring significant debt, which can lead to financial crisis. On the expenditure side, systemic corruption can result in both waste and – perhaps more importantly – distortions in the decision-making process. Instead of investing in schools and public health, both of which are necessary to support sustainable inclusive growth, corrupt officials will prefer to build conference centers where kickbacks can be generated. Perhaps not surprisingly, systemic corruption is highly correlated with poverty and extreme inequality, since the poorest groups are effectively deprived of the social services that are no longer a priority for the government.

In addition, systemic corruption undermines investment. When a governmental official demands a bribe in exchange for the granting of a foreign investment license, it not only makes the investment more expensive but, perhaps more importantly, creates uncertainty regarding the future of that investment. Will the investor be requested to pay continuous bribes throughout the life of the investment? Moreover, when corruption is systemic, one of the institutions that is the least reliable is the judiciary, and this

³ While there are different definitions of corruption, one that is generally accepted is 'the abuse of public office for private gain'. Two aspects of this definition are worthy of note. First, what types of 'abuse' are covered? At a minimum, the definition includes those acts that are universally understood as criminal – in particular, bribery and embezzlement; i.e. the theft of funds. There is a view – albeit not a universal one – that corrupt behavior should also include acts which, although not illegal, result in public policy being unduly compromised by private interests. This is particularly relevant in the political sphere, including in the area of electoral finance. Second, the abuse must involve a 'public' office. Accordingly, abuses that take place entirely within the private sector are not included. Private actors are, of course, subject to criminal sanction to the extent that they offer bribes to public officials.

⁴ See International Monetary Fund, *Combating Corruption: Costs and Mitigating Strategies* (2016) <<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Corruption-Costs-and-Mitigating-Strategies-43888>>.

can have a very harmful impact on the predictability of the enforcement of contractual claims

When regulators abuse their public office for private gain, their actions can also give rise to financial instability. A notable example is the Asian Financial Crisis of 1998, when a number of the regulators in the stricken countries had failed to exercise adequate supervisory oversight of large financial institutions. They were effectively ‘captured’ by these institutions, who brought pressure to bear (including through ‘incentives’) on public officials to ignore the build-up of unsustainable debt.

As noted in the IMF Study, systemic corruption can also lead to political instability and armed conflict, with devastating economic consequences.⁵ Although beyond the IMF’s mandate, there have been studies that demonstrate the extent to which it can fuel radicalization and terrorism. It is much easier for terrorist groups to recruit when the general population has been humiliated by ‘shakedowns’ from public officials. Moreover, terrorists often achieve penetration through kickbacks and also use corruption as a means of financing their activities.⁶

III. The IMF’s new policy

While the IMF had been addressing corruption in the context of both its surveillance and the use of its resources for a number of years, it recognized that it needed to take a more robust and systematic approach when dealing with this complex problem. The Framework for Enhanced Fund Engagement adopted in 2018 (the ‘2018 Framework’) is designed to achieve this objective.⁷ In addition to recognizing the need to bring greater attention – and candor – to this issue, it was recognized that the coverage of corruption by the IMF had varied significantly, even among countries facing similar corruption challenges. Accordingly, one of the objectives of the new

⁵ *ibid* 14.

⁶ See OECD, *Corruption, Terrorism and the Criminal Exploitation of Natural Resources* (2017) <<https://www.oecd.org/investment/Terrorism-Corruption-Criminal-Exploitation-Natural-Resources-2017.pdf>>.

⁷ IMF, *Review of 1997 Guidance Note on Governance – A Proposed Framework for Enhanced Fund Engagement* (9 March 2018) Annex I <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/20/pp030918-review-of-1997-guidance-note-on-governance>>.

policy was to achieve greater evenhandedness in the IMF's engagement with countries.

As set forth in the 2018 Framework, the IMF's approach is guided by a number of principles.

First, the Fund should continue to engage with its members on governance and corruption issues in bilateral surveillance and in the use of Fund resources when these issues are deemed sufficiently severe that they become relevant under those activities. Accordingly, the Fund would continue to be guided by its mandate and, therefore, only engage on these issues where governance or corruption weaknesses would have significant impact on macroeconomic performance and the ability of the government to credibly pursue policies aimed at external viability and sustainable growth.

Second, when weaknesses in this area become relevant for surveillance and use of Fund resources, the Fund's assessment of governance vulnerabilities would not be limited only to those arising from corruption. The IMF recognized that, although corruption can have a particularly pernicious effect on economic performance, other types of governance vulnerabilities – including those that arise exclusively from a lack of capacity – could also affect economic performance. Moreover, it was recognized that an assessment of broader governance weaknesses could bolster an assessment of the severity of corruption, the latter being more difficult to demonstrate due to its hidden nature.

Third, while many of the relevant areas of governance are within the Fund's expertise (for example, in the fiscal area), the Fund would need to rely on the work of other institutions when this is not the case. In a number of areas – including, for example, procurement – it would be necessary for the IMF to rely on the comparative advantage of other institutions, especially the World Bank.

Fourth, an effective strategy requires action to curb the facilitation of corrupt practices by private actors, particularly in the transnational context. Importantly, the IMF recognized that these practices may originate in countries other than the country that is experiencing severe corruption. Accordingly, it would be necessary to engage with these countries to ensure that they have in place effective systems designed to deal both with the 'supply side' of corruption (i.e. the prosecution of the bribery of foreign

officials) and the ‘concealment’ by foreign officials of the proceeds of corruption in major financial jurisdictions.

Fifth, in making assessments on governance issues, the Fund should continue to avoid interfering in domestic or foreign politics of a member or expressing views on the design of particular political systems. This is a particularly sensitive issue. It has always been recognized that the distinction between economic and political issues can be difficult when dealing with governance issues. Nevertheless, there was a concern that IMF engagement not involve the staff making judgments regarding the design of political frameworks; e.g. electoral systems. Of course, to the extent that public officials engaged in embezzlement, extortion or intimidation, the Fund would not be precluded from expressing a view, since such activities involve the criminal abuse of office by specific individuals or groups, rather than from the design of a particular political system.

Finally, the Fund should continue to avoid interference in individual enforcement cases. This was also a sensitive issue. In the past, there had been instances where a particular corruption case had significant macro-economic implications – either because of the magnitude of the amounts involved or because it is perceived as signaling broader systemic problems. Even in such cases, however, the Fund has focused on system-wide reforms and has refrained from getting involved in the investigation or prosecution of the particular case.

In light of these principles, the 2018 Framework contains a number of elements that are intended to guide the Fund when it engages with members on governance issues.

1. Assessing the severity of the weakness

The first element involves an assessment by the Fund of the nature and severity of governance weaknesses – including corruption – on a systematic basis. Each of the IMF members will be evaluated in the context of the IMF’s annual surveillance activities and, where relevant, in the context of the use of the IMF’s resources. Those areas to be assessed are those that are most relevant to the Fund’s mandate of promoting sustainable growth and financial stability. Accordingly, the areas of focus are (i) fiscal governance; (ii) financial sector oversight; (iii) central bank governance and operations;

(iv) quality of market regulation; (v) rule of law; and (vi) anti-money laundering and the combatting of financing of terrorism. In addition, a separate assessment of the level of corruption is to be made, relying on a range of third-party indicators. Because the Fund is reluctant to rely exclusively on third-party indicators for purposes of assessing corruption, it is recognized that the assessments of governance weaknesses, described above, would be used to 'test' the reliability of any preliminary findings on corruption.

2. *Assessing the economic impact*

The second element involves an assessment by the IMF as to whether the governance/corruption weaknesses identified in the first step actually had sufficient economic impact to justify IMF intervention in the context of either surveillance or an IMF-supported financial program. As noted in the relevant staff paper that proposed the Framework, the standard applicable to an IMF-supported program is relatively clear: are the governance/corruption weaknesses so severe that they are an important contributor to the member's balance of payments problems? If they are, correcting them would be 'of critical importance for achieving the goals of the member's program' within the meaning of the IMF's Guidelines of Conditionality.⁸ With respect to the IMF's surveillance, the standard is also clear. Under the relevant Surveillance Decision, a member's policies – or policy weaknesses – should be covered under surveillance when 'they can significantly influence present or prospective balance of payments and domestic stability'.⁹ As noted in the relevant staff report, although the time horizon for assessing this standard has traditionally focused on the short- to medium-term (up to five years), the IMF has, in recent years, also focused on longer-term risks to domestic stability, including ageing, inequality, climate change and gender issues. The IMF staff paper argued that there was adequate empirical evidence to support the conclusion that, if governance and corruption weaknesses are sufficiently severe (using the assessment set

⁸ IMF, Selected Decisions and Selected Documents of the International Monetary Fund, Thirty-ninth issue, *Guidelines on Conditionality* (March 2017) <[https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=12864-\(02/102\)](https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=12864-(02/102))>.

⁹ IMF, Selected Decisions and Selected Documents of the International Monetary Fund, Thirty-ninth issue, *Decision on Bilateral and Multilateral Surveillance* <[https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=12864-\(02/102\)](https://www.imf.org/external/SelectedDecisions/Description.aspx?decision=12864-(02/102))>.

forth in the first step above), it would be reasonable to conclude that such weaknesses would also have a present or prospective balance of payments and domestic stability.¹⁰ Importantly, this would obviate the need to make a separate economic assessment of the weaknesses at the time of each Article IV Consultation. Rather, the key assessment would be the assessment of the severity of the governance/corruption weakness described in the first step.

3. *Providing guidance on reform*

In the event that, as a result of the first two steps, the IMF determines that engagement is justified (in the context of either the use of IMF resources or IMF surveillance), the third element under the Framework is designed to provide general guidance as to the type of advice to be given to the member. Specifically, the Framework provides that ‘where governance weaknesses, including corruption, are judged to be sufficiently severe to be relevant for bilateral surveillance and use of Fund resources, the Fund’s policy advice would be guided by its diagnosis of the nature of the weaknesses in the country in question. With regard to engagement on corruption, experience demonstrates the need for the implementation of a multi-pronged strategy that requires not only anti-corruption measures but also broad-based regulatory and institutional reforms.’¹¹ The final section of this paper seeks to provide further detail as to the author’s own experience as to how to design and implement an effective anti-corruption strategy.

4. *Addressing the “supply side” and concealment*

The final element of the Framework involves an assessment – in the context of surveillance – of the policies of those member countries who – even if they may not suffer from systemic corruption – facilitate corruption in other countries. Foreign investors from many advanced economies – countries which may not be systemically corrupt themselves – are often part of the problem. Specifically, companies that reside in these countries have been involved in bribing foreign officials in order to gain access to the market in question. Moreover, once the bribe has been given, the public officials do not generally invest the proceeds of these crimes in their own countries; rather

¹⁰ Review (n 7) 19-21.

¹¹ *ibid* 39.

they choose major financial jurisdictions as a concealment destination. For this reason, the final element of the Framework involves monitoring key jurisdictions in their adherence to the OECD Anti-Bribery Convention, signed by all OECD countries, which requires countries to criminalize the bribery of foreign officials and is the leading legal instrument in this area. These countries will also be assessed against the 40 Recommendations of the Financial Action Task Force, which are designed to prevent the laundering of funds of 'politically exposed persons', which includes foreign public officials. A number of major jurisdictions have volunteered to have their systems assessed against these international standards in the context of IMF Surveillance.

IV. Designing and implementing an anti-corruption strategy

As noted above, given the complexity of the issue, experience demonstrates that an effective anti-corruption strategy requires a holistic and multi-faceted approach. Moreover, since the societal forces that shape systemic corruption in different countries will vary, any anti-corruption strategy needs to take into account these differences. Notwithstanding the need to tailor one's approach, it is possible to provide some general observations as to what steps are likely to be effective – and which ones will be less so.

While a credible threat of prosecution is critical, an effective anti-corruption strategy cannot be based exclusively on criminalization. Even if the criminal law on bribery, embezzlement and abuse of power is in place in a particular country, the enforcement of these laws will be often be compromised because the relevant enforcement institutions – the police, the prosecution, and the courts – are often the most corrupt. While strengthening these institutions will be a priority, it needs to be recognized that this will take considerable time. Moreover, there is a risk that criminal enforcement will simply become politicized, with the incoming government using this strategy to prosecute – and weaken – members of the previous one.

Indeed, experience demonstrates that, where corruption is systemic, the underlying problems are often a function of broader structural forces that require broader regulatory and administrative reform. Many of these reforms will not, in fact, be corruption specific and will have broader benefits. Excessively complex and opaque regulatory systems often exist for

the sole purpose of giving government officials the opportunity to extract bribes. Accordingly, simplifying or paring back these systems is not only an effective anti-corruption tool, but also has broader efficiency benefits. There are, of course, limits to this approach. An independent and effective regulatory framework in critical areas is essential and, in those cases where regulators have been captured by private interests, the appropriate policy response is to strengthen – not cut back – this authority.

Comprehensive reform of the civil service must also play a central role. Creating a cadre of well-trained public officials who are proud of their independence will often require not only increases in salaries but also the implementation of effective performance management systems. In Georgia, both aspects were central: for example, although a large number of corrupt police officers were dismissed, those who were retained received significant salary increases.¹²

It should be noted, while there is an international consensus on the criminal, regulatory and administrative steps that need to be taken to address systemic corruption, the key challenge is implementation, a challenge that often arises from the absence of domestic political will. Although corruption creates many losers in society (as we have discussed), it also generates a small number of winners, who are able to translate their economic power into political influence, influence that is used to defend the status quo. In these circumstances, an effective corruption reform often requires fundamental political reform. In Indonesia, although there had been numerous attempts to address corruption, the breakthrough only came following the ouster of President Suharto and the constitutional reforms that led to direct Presidential elections. Importantly, while the IMF is not an institution with a political mandate, it has always been cognizant that comprehensive and meaningful reform in an area that effects sustainable growth and financial stability will often have political implications.

¹² For an extensive analysis of the regulatory and administrative reforms introduced in Georgia to address systemic corruption, see *Fighting Corruption in Public Services*, World Bank (2012) <<http://documents.worldbank.org/curated/en/518301468256183463/pdf/664490PUB0EPI0065774B09780821394755.pdf>>.

International Organizations and the Problem of Privity: Towards a Supra-Functionalist Approach

Jan Klabbers

I. Introduction

There is a curious conceit at the heart of legal thinking about international organizations. International organizations lawyers (and in their wake many others) tend to think that international organizations are created by States to do the things States cannot or do not want to do on their own. The prevailing idea is that States are capable of nasty behavior working to protect and promote their particular interests. By contrast, international organizations are inherently good, somehow working in the common interest and thus, where necessary, against the particular interests of the very same States that create them and are nominally in charge. International organizations are seen by lawyers and political scientists alike as agents,¹ set up by and acting on behalf of, a principal: their member States.² Hence, in an Orwellian mantra that resonates throughout the discipline, it is commonly accepted that States are bad, and international organizations are good.

What compounds the situation is that international organizations increasingly have started to act autonomously. International organizations do a lot of things without a specific mandate, and this includes entering into all sorts of relations with each other above and beyond what their

¹ Darren G. Hawkins et al. (eds), *Delegation and Agency in International Organizations* (Cambridge UP 2006).

² For legal elaboration, see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9.

constitutions prescribe.³ Some of this can be explained with the help of the implied powers doctrine, in particular in the broad version prevailing since the International Court of Justice rendered its advisory opinion in the *Reparation for Injuries case*,⁴ but not all of it can be explained on this basis.⁵ And even if it could, if most of the activities of international organizations would need to be explained through the implied powers doctrine, the doctrine would be stretched beyond its breaking point. It was always expected to complement explicit mandates, and justified on that basis – but it was never meant to replace constitutional mandates.

Hence, nasty States set up benign creatures, and those creatures take on an autonomous, well-nigh uncontrolled (and possibly uncontrollable) existence from their very member States. That raises an obvious question: why would States, nasty, cold, and calculating as they are, create entities to work for the common interest and, what is more, become uncontrollable? The proposition I aim to explore in this paper is that one motivation to do so, and perhaps the strongest one, is to overcome problems of privity, broadly conceived.⁶ International organizations are set up because the organizational form offers certain advantages to political actors: the organizational form makes it easier to expand the reach of a regime, both in terms of persons and in terms of substance.

Those advantages have to do with problems of scope (or economies of scale, to use a term from a different vocabulary). The main alternative to the form of the organization is the form of the treaty, but the treaty is, so to speak, a ‘thing between the parties’ (*res inter alios acta*). This is a fundamental assumption concerning treaties which renders treaties useful for some purposes (exchange transactions), but less useful for others. The circumstance

³ For an overview of pertinent legal issues, see Jan Klabbbers, ‘Transforming Institutions: Autonomous International Organisations in Institutional Theory’ (2017) 6 Cambridge International Law Journal 105.

⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion ICJ Reports 1949, 174.

⁵ The different manifestations of the implied powers doctrine are discussed in Jan Klabbbers, *An Introduction to International Organizations Law* (3rd edn Cambridge UP 2015) 56–63.

⁶ A recent contribution on privity generally is Michael Waibel, ‘The Principle of Privity’ in Michael J. Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 201.

that the treaty is a thing between the parties makes it difficult for treaty regimes to radiate outwards, and treaties being relatively stable, makes it difficult for treaty regimes to take on new challenges. It is not that taking on new challenges and radiating outward are strictly impossible: the law of treaties has developed techniques to facilitate this, including amendment or adjustment procedures, inviting additional parties to join, combining framework agreements with additional protocols, etc. But while regime growth is possible, it is cumbersome, and this is where the form of the organization has a distinct advantage over the form of the treaty.

II. Sites of political struggle

When international lawyers think and talk about international organizations, they usually view them as emanations of State cooperation: what gets emphasized is the adjective ‘international’ in the expression ‘international organization’. And this leads, almost inevitably, to the proposition that international organizations are inherently benign. After all, international organizations embody international cooperation in an environment often characterized as selfish and anarchic,⁷ and cooperation is thought to have a moral value in and of itself. This position is considered highly attractive, but ultimately difficult to defend, as cooperation can also be engaged in for untoward purposes, as a moment’s reflection should clarify. It would be uncommon to praise criminals for cooperating with one another; one does not applaud the mafia for being an organization; and it is not for nothing that the cooperation between Stalin’s Soviet Union and Hitler’s Germany, embarked on in 1939, has been called an ‘unholy alliance’.⁸ Much the same applies to international organizations: it is no coincidence that Mussolini proposed to establish a great power directorate in the 1930s – the Four Power Pact – precisely in the form of a semi-permanent entity, i.e. an international organization⁹ and it is useful to remember that

⁷ Highly influential is Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Macmillan 1977).

⁸ Geoffrey Roberts, *The Unholy Alliance: Stalin’s Pact with Hitler* (Tauris 1989).

⁹ Remco van Diepen, *Voor volkenbond en vrede: Nederland en het streven naar een nieuwe wereldorde 1919-1946* (Bert Bakker 1999) 142-143.

King Leopold's exploitative activities in the Congo had first taken the form of an international organization as well.¹⁰

International relations theorists have provided the start of an answer as to why States may create international organizations, and for the better part these amount to rationalist propositions: these are considerations that will appeal to rational actors. International organizations enhance efficiency; they reduce transaction costs; they help to create stability in their field of activity, and make sure that the wheel does not need to be re-invented time and again. In more abstract terms, as Abbott and Snidal have theorized, international organizations are distinguished from other institutions by two characteristics: centralization and independence.¹¹ They offer, in other words, a stable administrative apparatus, with some authority to act autonomously. The more autonomous they work, however, the less adequate and appropriate traditional thinking about organizations is – the less apt the characterization of member States as 'principal' and international organizations as 'agent' becomes. In short, the increasing autonomy of international organizations challenges the dominant theoretical framework.¹²

With this in mind, there might be merit in trying to formulate a different approach to international organizations law. The traditional approach – the dominant theoretical framework – is often labelled functionalism (not to be confused with the integration functionalism developed by social scientists, although the two share some basic assumptions¹³) and, as recent scholarship suggests, has its limits. Functionalism, being a principal-agent theory, is limited to discussing relations between organizations and their member States, but the more autonomous organizations start to operate, the less relevant those relations become. Put concretely: functionalism has something to say about how the World Health Organization (WHO) relates

¹⁰ Madeleine Herren, *Internationale Organisationen seit 1865: Eine Globalgeschichte der internationalen Ordnung* (WBG 2009) 29.

¹¹ Kenneth W. Abbott and Duncan Snidal, 'Why States Act though Formal International Organizations' (1998) 42 *Journal of Conflict Resolution* 3.

¹² For an early exploration, see Richard Collins and Nigel White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011); see also Jan Klabbers and Panos Koutrakos (eds), 'An Anatomy of Autonomy' (2019) 88 *Nordic Journal of International Law*, special issue.

¹³ Seminal is David Mitrany, *A Working Peace System* (Royal Institute of International Affairs 1943).

to a member State such as, say, Denmark, or Angola. But it has little to say about how the same WHO interacts with the World Trade Organization or the United Nations Security Council or the Gates Foundation, or how its plenary and executive organs relate to each other, or how the organization relates to individuals struck down by an outbreak of Ebola, or even how it relates to its member States when these act in a capacity other than that of member States, for instance as treaty partners.¹⁴ Functionalism can explain why the member States have given specific tasks to their organization, but has little or nothing to say beyond that particular relationship.¹⁵

Hence, a different approach is required, and such an approach might well be labelled 'supra-functionalist', if only to prevent the baby from being thrown out with the bathwater. For while functionalism's explanatory power is limited, it is not altogether absent, and there is merit in trying to retain some of its more useful elements. As noted, a starting point is to focus not on the 'international' in international organization, but rather on the 'organization',¹⁶ and ask the question what it is, in all generality, that international organizations do – what do international organizations really do? On a high level of abstraction, they regulate, manage, and monitor, and on yet a higher level of abstraction, international organizations, like all organizations,¹⁷ allocate costs and benefits; they allocate scarce goods or, in more abstract terms still, reminiscent of classic studies on political systems, they allocate values.¹⁸ And while systems theorists typically said little about the

¹⁴ This became painfully clear in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73.

¹⁵ Jan Klabbers, 'Theorising International Organisations' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford UP 2016) 618.

¹⁶ There is, surprisingly perhaps, a dearth of literature on the legal aspects of organizations generally, at least if one does not count corporations. Seminal is Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press 1986), as well as (although less specifically legal) Dennis F. Thompson, *Political Ethics and Public Office* (Harvard UP 1987).

¹⁷ Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Russell Sage Foundation 1992).

¹⁸ David Easton, *The Political System: An Inquiry into the State of Political Science*, (2nd edn Knopf 1971) 135: 'A minimum condition for the existence of any society is the establishment of some mechanisms, however crude or inchoate, for arriving at authoritative social decisions about how goods, both spiritual and material, are to be distributed, where custom fails to create other patterns.'

emergence of specific political systems (they would often start by positing the existence of a system rather than interrogating its origins), international organizations students have always realized, however intuitively perhaps, that underlying each and every international organization is a specific act of creation, which is itself the result of political drive, political impetus, and political struggle. International organizations represent a world that is made, rather than found; they represent a world that is designed, rather than spontaneously erupted.¹⁹ This raises questions as to why they are created, and for whose benefit: *cui bono*?

The idea of international organizations as distributors of values, costs and benefits may sound abstract, but is easily recognizable in concrete practices. A decision by the World Trade Organization's Appellate Body according to which China has violated its trade law obligations will have distributive consequences. A decision by the UN Security Council to impose sanctions on North Korea or Iran will have distributive consequences, and even non-decisions have such consequences: think of the seeming acquiescence in Russia's annexation of Crimea.

Traditionally, the way international organizations conceptualized their craft suggested that those allocative consequences would affect member States, and it has always been the case that the advantages of international organizations were discussed as advantages or disadvantages for their member States. This goes back to at least the late nineteenth century,²⁰ and still informs much scholarship, both in the legal and political sciences.²¹ But thinking only in terms of costs and benefits to member States is too simple – far too simple. Think only of the International Labour Organization: any decision on any substantive topic will impact on employers or employees – it will have distributive effects, turning the ILO into a site of political struggle. Protecting the rights of domestic workers, for instance, most likely comes at the expense of their employers. Limiting the right to strike might generally benefit employers, but will demand a sacrifice of sorts

¹⁹ See, for instance, Dean Acheson, *Present at the Creation* (Norton 1969); Lloyd C. Gardner, *Architects of Illusion: Men and Ideas in American Foreign Policy 1941-1949* (Quadrangle 1970).

²⁰ Louis Renault, 'Les unions internationales: leurs avantages et leurs inconvénients' (1896) 3 *Revue Générale de Droit International Public* 14.

²¹ See, for instance, Abbott and Snidal (n 11).

from employees. Protecting migrant labour may be good for migrants, but might come at the expense of non-migrant labour. The founding fathers of the ILO realized this all too well and created, following the British model, a tripartite structure: making sure that labour and employers would be part of the decision-making process in order to take the sting out of that antagonistic relationship,²² even if within those groups struggles might continue – trade unions, for instance, have fought over the right to be the union chosen to represent workers within a national delegation.²³

The same applies to international organizations generally. Whenever the WHO announces a health pandemic, its decision radiates across the private sector. Pharmaceutical companies that have their vaccines ready to be put on the market can make a handsome profit; those whose vaccines are still in development lose out: hence, the decision to declare a pandemic, and its timing, can have huge distributive consequences. In addition, tourist destinations close to the source of a pandemic might suffer, benefiting tourism to other places. In similar fashion, the pending United States withdrawal from the Universal Postal Union (UPU) suggests that at the heart of American discontent is the issue of distributing benefits. United States President Trump's decision to withdraw is inspired by the circumstance some companies suffer from UPU rates (terminal dues, in jargon) but, importantly, not all: those engaged in export will generally benefit from UPU postal rates and terminal dues. The ones who suffer are those whose business is mainly domestic, as it turns out to be more expensive to ship products within the United States than it is to send them to or receive them from elsewhere.²⁴ The United States has also recently withdrawn from UNESCO (as has Israel), out of frustration over Palestine. Whether this has material redistributive effects remains to be seen, but their withdrawal is a response to

²² Cox, himself a former ILO employee, suggests that the ILO's tripartite model often morphs into 'substantive state corporatism'; Robert W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (Columbia UP 1987) 101.

²³ Also in other settings, for instance, with respect to trade union representation with the Consultative Committee of the erstwhile European Coal and Steel Community: see European Commission of Human Rights, application no. 8030/77, *Confédération Française Démocratique du Travail v European Communities, alternatively their Member States*, decision of 19 July 1978.

²⁴ Elliot Kim, 'Withdrawal from the Universal Postal Union: A Guide for the Perplexed' <<https://www.lawfareblog.com/withdrawal-universal-postal-union-guide-perplexed>>.

UNESCO bestowing the scarce good of legitimacy on Palestine by allowing the latter to join the organization. In the end, none of this should come as a surprise: already 150 years ago writers such as Victor Hugo and Louisa May Alcott petitioned for a copyright union to protect their interests as authors, at the expense of readers and possibly copycats.²⁵ And by the same token, plant breeders started to clamour for an international organization to protect their position from the 1950s onwards, as soon as it became clear that plant breeding could become big business – the result is the International Union for the Protection of New Varieties of Plants, established in 1961.²⁶

This suggests another important circumstance. International organizations become the sites of politics and, as such, are typically the brainchild of individuals or groups with a particular project, rather than inspired by lofty thoughts about the common good or universal peace. International organizations are formally set up by States, but usually result from the projects of persevering individuals. The UPU, for instance, was born out of the frustrations of the United States postmaster general, Montgomery Blair, who in 1862 voiced his discontent in a letter sent to all States with which the United States entertained diplomatic relations. This resulted in a conference held in Paris later that year, and eventually in a proposal for a postal union, proposed in 1868 by Blair's German counterpart, the Superior Privy Councillor of Posts. The outbreak of the Franco-Prussian war delayed matters a little, but eventually the UPU held its first meeting in Berne in 1874.²⁷

Much the same applies to other international organizations. The ILO owes something to the international labour movement of the early twentieth century and to driven individuals like Swiss civil servant Emile Frey and to Albert Thomas, its first Director.²⁸ The International Organization for Migration (IOM) owes its existence to the Cold War and the political

²⁵ Craig Murphy, *International Organization and Industrial Change: Global Governance since 1850* (Polity 1994) 73-74. Victor Hugo was the president of the Association Littéraire Internationale, whose origins are discussed with an eye for poetic detail in in Gunnar Karnell, 'ALAI – Initiator and Berne Copy-right Watchdog – Viewed from a Personal and Slightly Nordic Perspective', in Gunnar Karnell et al. (eds), *Liber Amicorum Jan Rosén* (Eddy.se 2016) 409.

²⁶ Kal Raustiala and David Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organization* 277.

²⁷ John F. Sly, 'The Genesis of the Universal Postal Union' (1927) 233 *International Conciliation* 395.

²⁸ Frey is mentioned in Murphy (n 25) 73.

impetus not to send Eastern Europeans back to communist countries.²⁹ Even the League of Nations owed much more to Woodrow Wilson than it did to the United States.³⁰ It may be States who formally set up international organizations, but usually on the initiative of some individual or group, and this can even apply to the re-invigoration of existing international organizations. The European Union's drive to the completion of its internal market owed much to the European Round Table of Industrialists set up in the early 1980s, and was therewith effectively the brainchild of the chief executive officers of in particular Dutch electronics giant Philips and Swedish and Italian car manufacturers Volvo and Fiat: Wisse Dekker, Pehr Gyllenhammar, and Umberto Agnelli, respectively.³¹ And it has been very well documented how a coalition of United States pharmaceutical and entertainment industries inspired the addition of an intellectual property pillar to the envisaged World Trade Organization during the late 1980s and early 1990s.³²

Perhaps the best illustration of how international organizations are the sites of distributive struggles is the story of the relationship between the United States and the Bureau International des Expositions (BIE), the international organization coordinating and steering the organization of world exhibitions, of the sort that kicked off the modern age in London's Crystal Palace in 1851.³³ The United States had originally joined the BIE in 1968, only to withdraw in 2001. Surprisingly though, it rejoined in 2017, during the presidency of President Trump, not otherwise known for his desire to join international organizations. The main reason for rejoining was, it seems, inspired by plans to organize a world expo in Minneapolis: the bill to facilitate the rejoining was called, not coincidentally, the 'US Wants to Compete for a World Expo Act'. In other words: the United States rejoined, in an era of general withdrawal from international organizations,

²⁹ For a brief history of the IOM, Richard Perruchoud, 'From the Intergovernmental Committee for European Migration to the International Organization for Migration' (1989) 1 *International Journal of Refugee Law* 501.

³⁰ Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (Random House 2001).

³¹ <<https://www.ert.eu/about-us#ERT-Mission>>.

³² Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge UP 2003).

³³ On the 1851 London Fair see, for instance, Emily S. Rosenberg, *Transnational Currents in a Shrinking World 1870-1945* (Harvard UP 2012) 88-93.

because it realized that organizing a world expo would depend, for all practical purposes, on membership of BIE: the BIE distributes world expos authoritatively.³⁴

III. The organizational form

Traditional functionalist international organizations law theory revolves around the notion of function, but does so in ambivalent manner. By and large it suggests that organizations are set up to perform certain functions, and those functions are worthy of facilitation and protection by international law. On such a line of thought, granting privileges and immunities to international organizations becomes justifiable. As Blokker recently re-stated the underlying philosophy: ‘The immunity of international organisations is generally founded on the principle of functional necessity: international organisations need immunity in order to be able to perform their functions’.³⁵

This functional justification presupposes that those functions that international organizations exercise are morally good, by definition, but this is eventually an untenable proposition – as noted, Mussolini foresaw a fascist directorate in the 1930s, and the scandalous exploitation of the Congo also took the form of an international organization for a while. In addition, one can also think of contemporary examples of international organizations that not everyone is happy with, for whatever reason: one example that comes to mind is the Shanghai Cooperation Organization.

It is no surprise then that doctrine realized early on³⁶ that the mere specific function of an organization could not always justify its privileged treatment, and realized that on a higher level of abstraction, organizations

³⁴ The story is culled from a passionate plea by an established international law professor, Steve Charnovitz, ‘Why the International Exhibitions Bureau Should Choose Minneapolis for Global Expo 2023’ <<https://ssrn.com/abstract=3053623>>. Incidentally, the bid failed; the 2023 global expo will take place in Buenos Aires.

³⁵ Niels M. Blokker, ‘Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges’ in Tom Tuys and Nicolas Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge UP 2019) 185, 186.

³⁶ See already Paul S. Reinsch, *Public International Unions, Their Work and Organization: A Study in International Administrative Law* (Ginn and Co 1911).

manifest cooperation between States (which has a moral value of its own) and, as such, create ‘networks of interdependence’³⁷ which inexorably will result in ‘swords’ being turned ‘into plowshares’³⁸ or, as a future President of the International Court of Justice once put it with some *aplomb*, would result in the ‘salvation of mankind’.³⁹

The problem then is, however, that on closer scrutiny these higher-level functions do not hold much water either: in particular the contribution to universal peace can only remain an expectation but lacks empirical support, and whatever moral value might attach to cooperation is gainsaid by the realization that criminals too can collaborate, and that disagreement too can lead to morally acceptable results.⁴⁰ This eventually entails that the acceptability (vel non) of an international organization will come to rest once again on its specific function. This is no surprise: international organizations share this with other social institutions, and the normative dimension they might have ‘will be possessed (especially, though not exclusively) by virtue of the particular moral/immoral ends (goods) that an organization serves, as well as by virtue of the particular moral (or immoral) activities that it undertakes’.⁴¹

None of this means that the specific function of any particular international organization should be ignored or discarded; quite the opposite. The specific function of the organization is of the utmost importance for any approach, functionalist or supra-functionalist, including for purposes of attributing responsibility.⁴² But it does mean that the role of any particular international organization is limited to that specific function, and the function does not include the ‘salvation of mankind’ – that would perhaps be

³⁷ Harold K. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System*, (2nd edn Norton 1984).

³⁸ Inis L. Claude, jr., *Swords into Plowshares: The Problems and Progress of International Organization* (2nd edn Random House 1959).

³⁹ Nagendra Singh, *Termination of Membership of International Organisations* (Stevens and Sons 1958) vii.

⁴⁰ Jeremy Waldron, *Law and Disagreement* (Oxford UP 1999).

⁴¹ Seamas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge UP 2010) 49.

⁴² Jan Klabbers, ‘Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act’ (2017) 28 *European Journal of International Law* 1133.

rather too much to expect from the World Meteorological Organization or International Bureau of Weights and Measures at any rate.

While the organization revolves around its assigned function (instead of an unassigned meta-function), this is not what makes it stand out. What makes the organizational form attractive, when compared to other possible legal forms and in particular the treaty form, is that the organizational form has the potential for expansion that other forms lack or, at best, possess to a considerably lesser degree. First, the organizational form makes it possible to affect not just member States, but also reach individuals and companies. The normative instruments adopted by the International Labour Organization exist not solely to affect Denmark or Ghana in their capacity as member States (although they will affect them), but exist first and foremost to affect the behavior of Danish or Ghanaian employers and employees. Merely concluding a treaty endorsing a particular kind of treatment might not be terribly effective for this purpose. On the practical level (if not necessarily the level of legal principle) the member States of international organizations tend to be far less insistent about shielding their legal orders against the influence of international organizations than they are with the norms laid down in treaties, and far more open to accept the epistemic authority of those organizations as having some direct effect in their legal orders – in all likelihood because the activities and sphere of competences of international organizations are typically described as technical, a-political, and effectively cost-free. Technically, considerations of monism and dualism may remain in place – even the Dutch constitution, when providing for the direct effect of international law in the Dutch legal order, mentions treaties and decisions of international organizations in the same breath.⁴³ But as a practical matter, States and their courts are far more judicious in patrolling the border between international law and domestic law when it comes to treaties than with respect to the activities of international organizations. Plus, organization can exercise epistemic authority in ways that mere treaty regimes cannot. Put differently and perhaps somewhat graphically: the WHO can exercise influence by means of providing training courses for nurses; the Framework Convention on Tobacco Control cannot. The IOM is in a position to offer airport migration services and therewith

⁴³ Constitution of the Kingdom of the Netherlands, articles 93-94.

directly affect people; a convention on migration is in no position to do so.⁴⁴ The form of the organization offers a great advantage for people with political projects.

To this might be added the circumstance that international organizations might find it easier to attract additional member States than treaty regimes, precisely because the form of the organization offers something beyond mere participation in a fixed normative regime. Put differently, States are keen to join the World Trade Organization not so much, it may be presumed, because they appreciate its rules on subsidies, or have a keen interest in anti-dumping rules, and not even solely because of its sophisticated dispute settlement mechanism, but also because it allows them to consider themselves, and be considered by others, as partners in the global trading system. This is most visible, and sometimes lamented,⁴⁵ with respect to the UN, which has become an entity bestowing the scarce resource of legitimacy on its members: joining the UN means joining the ranks of statehood, and becoming a member of the international community of States.⁴⁶ In Europe, much the same applies to the EU and the Council of Europe: it was no coincidence that the new regimes in eastern Europe twenty years ago were very keen on joining those organizations, not just because the work of those organizations on, say, equal treatment in the workplace, or the liberalization of capital flows, or the protection of national minorities, but precisely because they offer something additional – and this ‘something’ is a currency that treaties (or other forms of cooperation, for that matter) are, with few exceptions,⁴⁷ generally unable to offer. And in its own peculiar way, even Brexit makes much the same point: Brexit is inspired to a far greater degree by symbolic politics than by any rational calculation about

⁴⁴ Jan Klabbbers, ‘Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration’ (2019) 32 *Leiden Journal of International Law* 383.

⁴⁵ The classic lament is Thomas D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Martinus Nijhoff Publishers 2009).

⁴⁶ UN membership is also often seen as collective recognition: see John Dugard, *Recognition and the United Nations* (Grotius 1987).

⁴⁷ Human rights treaties may work in similar ways, in that their main attraction resides in the political legitimacy they may bestow on their parties, rather than more instrumental concerns. Which is not to say that those do not play any role: there is some plausibility in the proposition that governments may wish to tie their successors to the mast.

the instrumental, economic, benefits and costs of EU membership for the United Kingdom.⁴⁸

This ties in, second, with that other promise carried by the organizations form: it makes it possible to expand regimes substantively. Treaty regimes can engage in ‘mission creep’ only with great difficulty.⁴⁹ Typically treaties require amendment in order to develop, and amendment typically requires widespread, sometimes unanimous, approval by all parties. Alternatively, the parties to a treaty may agree on a progressive, teleological interpretation or even an interpretation beyond what the provision proper can bear, but again, this requires quite an effort. It requires that one or a handful of parties initiate such a new understanding; and it requires that most other parties come to accept it, or at least acquiesce in it, and especially the latter may take time. Hence, unless the treaty sets up a court to render authoritative interpretations and facilitate a view of the treaty as a ‘living instrument’, most treaty regimes do not show many signs of vivaciousness. It can hardly be a coincidence that where treaties do turn out to be living instruments, there is a court to help out, as is the case with the European Convention on Human Rights, or these treaties are the constituent instruments of international organizations – the textbook example⁵⁰ is how the Security Council gave a new meaning to the terms of article 27, paragraph 3, of the UN Charter, and how this was accepted as practice of the organization by the International Court of Justice.⁵¹ The organizational form makes it far easier for political projects to be deepened and expanded; often the secretariats of international organizations play a driving role.⁵² Member States can also influence expansion, but need not themselves be very active. Again

⁴⁸ On symbolic politics, see the classic by Murray Edelman, *The Symbolic Uses of Politics* (University of Illinois Press 1985).

⁴⁹ See, for instance, Irina Buga, ‘Subsequent Practice and Treaty Modification’, in Bowman and Kritsiotis (n 6) 363.

⁵⁰ For other examples, including the Refugee Convention and the WTO Agreement, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford UP 2012).

⁵¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16.

⁵² John Mathiason, *Invisible Governance: International Secretariats in Global Politics* (Kumarian Press 2007).

then, it is the form that helps to steer things, and this is what integration theorists such as Mitrany already saw clearly seven or eight decades ago: once an international organization exists, it can expand with relative ease.⁵³

As good an illustration as any of the advantages of the organizational form resides, curiously perhaps, in those treaty regimes where the organizational form is only loosely adopted. For many, the idea of establishing a formal organization, seems difficult to accept: the organizational form, so it is sometimes thought, comes with rigidity, with a lack of flexibility, with formalities. These concerns are most likely exaggerated, but have resulted in the circumstance that in some regimes, formal ‘organizationhood’ is shunned, and replaced by an organizational structure that is considered less restrictive. The classic examples are the various multilateral environmental agreements, which do not give rise to the creation of a formal organization, but which nonetheless give rise to a secretariat and a regularly meeting plenary body, typically named Meeting of the Parties or Committee of the Parties.⁵⁴ Increasingly, such mechanisms are also to be found elsewhere. The International Criminal Court, for instance, has an annual Assembly of States Parties. The Framework Convention on Tobacco Control has a secretariat and a Conference of the Parties which meets every two years and has the power to establish subsidiary bodies as well a certain decision-making powers, making it well-nigh indistinguishable from a ‘regular’ international organization. And much the same applies to a host of other conventions – whether these are to be considered ‘formal’ organizations is not all that relevant; what is relevant, by contrast, is that the parties to them have added an institutional framework precisely, one may assume, in order to adopt the advantages normally associated with the organizational form.⁵⁵

⁵³ Mitrany (n 13).

⁵⁴ Seminal is Robin Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law’ (2000) 94 *American Journal of International Law* 623.

⁵⁵ There are generally sound reasons to question the legal relevance of any distinction between formal and informal organizations: see Jan Klabbers, ‘Formal International Organizations’ in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford UP 2017) 133.

IV. Concluding remarks: A supra-functionalist primer

To conclude, a supra-functionalist approach to international organizations law comprises at least the following elements. It starts by realizing that while international organizations are the result of cooperation between States, they are not created in order to cooperate. Instead, their role is akin to that of State agencies which just happen to involve several States. The point of UPU or WHO or the UN, if any, is not to cooperate – cooperation is a necessary condition, but not the be all and end all of UPU, the WHO or the UN. These exist not to cooperate, but do whatever it is they do through cooperation. Hence, the fact of international organizations embodying inter-State cooperation, nice as it is, ought not to be overemphasized, and ought most assuredly not to be allowed to be the theoretical heart of international organizations law.

As the current label ‘functionalism’ suggests, the function of the international organization plays an important role, and should continue to do so: supra-functionalism is wary of throwing out the baby with the bathwater by dismissing the notion of function altogether. But as with cooperation, the notion of function, properly understood, refers to the specific function of each specific organization rather than a general and abstract function such as the ‘salvation of mankind’. The philosopher Jon Elster once pointed out that there are things in life we cannot intend to achieve, but may nonetheless be able to arrive at as by-products of other acts that can be intentional: most of us are unable, for instance, to order ourselves to fall asleep. Sleep will come when we assume a sleeping position, have no distraction, etc, but can hardly be achieved upon command, in much the same way that we cannot order ourselves to be spontaneous or fall in love.⁵⁶ The same applies, it would seem, to notions such as achieving universal peace, or the salvation of mankind: if lucky, these can be achieved as by-products, but cannot be central tasks for international organizations practically dedicated to regulating postal services or organizing the exchange of meteorologically relevant information.⁵⁷

⁵⁶ Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge UP 1983).

⁵⁷ See also Jan Klabbers, ‘On Epistemic Universalism and the Melancholy of International Law’ (2018) 29 *European Journal of International Law* 1057.

International organizations law should also come to terms with the circumstance that, like most other organizations, international organizations allocate costs and benefits. There is no doubt that organizations do other things as well: they regulate in their sphere of activities; they monitor activities taking place within their sphere of activities – it is not the case that they only allocate costs and benefits. But that they allocate costs and benefits is nonetheless an important, and thus far overlooked, aspect of what they do. Some international organizations are given a specific task to do so: this might apply, for instance, to the International Seabed Authority, one of whose formal tasks is to distribute licenses related to deep seabed mining. More often though, the allocative aspect appears in anything the organization does, as most activities tend to have distributive effects – most activities will benefit some while not benefiting some others, or perhaps even at the expense of others. Those costs and benefits can be material (financial), but can also be of a different kind, and consist of values, including legitimacy.

Instead of focusing on the adjective ‘international’, as set out above, international organizations scholars (and especially international organizations lawyers) should realize that their objects of study are organizations, i.e. more or less formal and more or less artificial groups of people brought together for a particular purpose. The organizational form is by no means accidental: the founding fathers of any organization utilize the organization form for a reason, and that reason resides in the facility that the organization form helps to overcome privity problems: it helps the organization to expand a regime both in terms of substantive coverage and in terms of personal reach.

It is often posited that the modern State as we know it, the State shaped by technology, characterized by being part of a global economy and taking part in trade and immigration, goes back to 1850s and 1860s.⁵⁸ The era marked the starting point of a proper wave of globalization, and demarcates the ‘shift from State mercantilism to open, free-trading policies, and the development of far-reaching improvements in technology’, as one prominent

⁵⁸ See, for instance, Ben Wilson, *Heyday: Britain and the Birth of the Modern World* (Basic Books 2016).

historian summarizes matters.⁵⁹ These States needed agencies to perform some public functions, and it was only a matter of time before they realized that some of these functions required cooperation with other States: hence, the international organization, a phenomenon that also started to take off seriously and revolved, as Jellinek would write in 1882, around a *Verwaltungszweck*, a function.⁶⁰ If chronologically there seems to be a large degree of contingency when it comes to the creation of the modern State and the modern international organization, then there might be merit in studying the organization as an organizational extension of a plurality of States exercising particular functions while allocating costs and benefits; this would be a supra-functionalist approach to international organizations law.

⁵⁹ A.G. Hopkins, 'The History of Globalization – and the Globalization of History?' in A.G. Hopkins (ed), *Globalization in World History* (Pimlico 2002) 11, 28.

⁶⁰ Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Hölder 1882).

Is Globalization Finally Re-balancing? Novel Ways of Levelling the Playing Field for Labour

Joost Pauwelyn

I. Introduction

At a time when the World Trade Organization (WTO) as well as the regime of investor-State dispute settlement (ISDS) are under serious review – some would say ‘falling apart’ – or at least in a period of backlash and self-doubt,¹ this paper makes the point that for too long globalization has been unbalanced and that what we are witnessing today may be part of a re-balancing exercise: somewhat less integration in cross-border trade and investment, a limited form of economic decoupling; combined with novel ways to close the governance gap in labour and environmental protection, that is, some strengthening of social protection.

Let me present this hypothesis – and it is a hypothesis, it may be proven wrong – in two steps. Firstly, I will offer some context and a practical example (sections 2 and 3). Secondly, I will provide a brief catalogue, a summary overview, of some (relatively) recent examples of what I call ‘novel ways of levelling the playing field for labour’ (sections 4, 5 and 6). Section 7 draws some conclusions.

¹ On WTO backlash, see, for instance, Joost Pauwelyn, ‘WTO Dispute Settlement Post 2019: What To Expect? What Choice To Make?’ *Journal of International Economic Law* (2019), forthcoming. On ISDS backlash, see, for example, Simon Lester, ‘The ISDS Controversy: How We Got Here and Where Next’ (2016) Cato Institute <<https://www.cato.org/publications/commentary/isds-controversy-how-we-got-here-where-next>>.

II. Re-balancing globalization: It may be happening

Let me start with some context. Globalization is based on ‘arbitrage’.² Capital moves across borders to seek the highest return. Goods and services are out-sourced to places where they can be produced or traded more cheaply. Only labour is, by nature and regulation, largely immobile. Most workers cannot migrate to places where wages would be higher. In this sense, globalization is partial, a-symmetric, un-balanced. Scholars often ask the question whether labour is a commodity. From this perspective, labour is treated worse than a commodity.

International law adds to this imbalance. The ‘hyper-globalization’ in capital, goods and services that was unleashed especially since the 1990s is backed-up by relatively strong rules, and international tribunals, at the WTO and under preferential trade and investment protection treaties. In contrast, most workers are not only denied cross-border movement; when I am harmed as a worker, I generally have recourse only to domestic law and domestic courts, not international law or tribunals. In this sense, globalization is unbalanced, and there is a global governance gap. Here again, labour is treated worse than capital or commodities.

In 2017, John Ruggie presented the problem and the solution as follows:

an enormous governance gap has been created: between the scope and impact of economic forces and actors [think of the WTO or investment treaties], and the capacity of societies to manage the adverse consequences [think of labour or environmental impacts]. The gap will be narrowed one way or another: either through effective cooperation [on, say, labour] or through rollback, otherwise known as protectionism.³

Basically, something needs to give. Re-balancing is inevitable. And it can happen either by ‘levelling the playing field’ for labour – this will be my focus here; and my point is that this is happening, in unorthodox, hard-law, market-based ways – or through a rollback on cross-border trade

² Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard UP 2016).

³ John Ruggie, *Making Economic Globalization Work For All: Achieving Socially Sustainable Supply Chains*, Keynote Address (2017) G20 Labour and Employment Meeting Hamburg <<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Hamburg%2BG20%2B2017.pdf>>.

and investment. And that as well is happening, think of the rise in trade protectionism and foreign investment screening,⁴ signs of ‘peak trade’,⁵ ‘slowbalisation’⁶ or ‘decoupling’⁷ of the US and Chinese economies, as well as the backlash against the WTO Appellate Body and investor-State arbitration.⁸ Ironically, therefore, after many years of other fields ‘envying’ the hardness of trade and investment treaties, what we are witnessing today is more legalization in labour protection, albeit in novel ways; and a softening or less legalization when it comes to efforts to liberalize trade or protect foreign investments.

III. The ‘true cost’ of a t-shirt and the failure to protect labour locally

Let me make this a little more concrete. Think of the last t-shirt you bought. The shop you bought it from probably got it made in a low-wage country like Bangladesh or Ethiopia. Fierce competition amongst the Walmart’s and H&M’s of this world means that brands put enormous price pressure on the garment factory in Bangladesh to stitch the t-shirt for, say, 50 cents instead of 55 cents. If not, the brand will just source elsewhere, say, Ethiopia, where wages may be lower. Capital and goods move swiftly across borders. So the garment factory must cut costs. It may also cut corners on worker safety. Unlike capital or goods, the Bangladeshi worker cannot ‘exit the market’. The end result is that, too often, workers in poor countries are ‘subsidizing’ consumers in rich countries. Indeed, the garment worker in Dhaka, Bangladesh, is probably ‘subsidizing’ me, a well-off consumer, when I go by a t-shirt in Geneva for, say, ‘only’ 10 Swiss francs. These 10 Swiss francs may not internalize the ‘fair labour’ cost, not to speak of the actual environmental cost, of what I bought. Yet, traditionally, and from an ILO perspective, we would expect price correction to come from domestic law (here, Bangladeshi and Ethiopian labour law), collective bargaining, worker

⁴ See, for instance, Philip Blenkinsop, ‘With Eyes on China, EU Lawmakers Back Investment Screening’ 2019 Reuters.

⁵ See, for instance, Shawn Donnan, ‘IMF and World Bank Warn of Peak Trade’ 2014 Financial Times.

⁶ The Economist, ‘Slowbalisation: The Steam Has Gone Out of Globalisation’ 2019.

⁷ Finbarr Bermingham, ‘Decoupling of US and Chinese Economies Is Inevitable and Is Being Accelerated by Trade War, Author Says’ 2018 South China Morning Post.

⁸ Pauwelyn (n 1); Lester (n 1).

safety norms etc., forcing the local garment factory to comply with, at least, minimum ILO standards. In reality, too often, this has failed.⁹

Indeed, it is now well documented that there has been a downward trend in the labour (as opposed to capital) share of global income since the early 1990s.¹⁰ And this in both developed and developing countries, for a variety of reasons including technological progress and, especially for emerging markets, global integration and the expansion of global value chains that contributed to raising the overall capital intensity in production. Trade and investment treaties that focus on the protection of capital rather than labour (e.g. via intellectual property protection and ISDS) may have contributed to this trend.¹¹ In turn, ILO worker rights conventions have not been able to buck the trend. One study, based on data analysis for the period 1981–2011, goes as far as finding that ‘the ratification of core ILO conventions is negatively associated with the level of respect for worker rights’.¹² The authors of the study argue that States ‘have an incentive to ratify ILO Conventions, as they provide a visible signal of support for these standards’ but that since ‘the ILO has no mechanism to enforce labour standards’ ratification may end up to ‘relieve pressure for real change in performance [...] and give States a shield to tolerate further labour rights violations’.¹³

⁹ For more on this example, see National Public Radio, ‘Planet Money Makes a T-Shirt’ <<https://apps.npr.org/tshirt/#/title>> and the documentary ‘The True Cost’ <<https://true-costmovie.com>>.

¹⁰ See, for instance, Mai Chi Dao, Mitali Das, Zsoka Koczan and Weicheng Lian, ‘Why is Labour Receiving a Smaller Share of Global Income? Theory and Empirical Evidence’ IMF Working Paper WP/17/169 2017 and UNCTAD, ‘Trade and Development Report 2018, Power, Platforms and the Free Trade Delusion’ 2018 50-58.

¹¹ Dani Rodrik, ‘What Do Trade Agreements Really Do?’ (2018) 32 *Journal of Economic Perspectives* 73.

¹² Dursun Pekse and Robert G. Blanton, ‘The Impact of ILO Conventions on Worker Rights: Are Empty Promises Worse Than No. Promises?’ (2017) 12 *The Review of International Organizations* 75.

¹³ *ibid* 77. New initiatives within the ILO have also stalled or not materialized; Paul van der Heijden, ‘The ILO Stumbling Towards Its Centenary Anniversary’ (2018) 15 *International Organizations Law Review* (2018) 203 (‘in the past 10-15 years the impact of the [ILO] ... has decreased. Its legislative machinery seems to have come to a standstill [...]. The ILO’s monitoring system via the Committee of Experts is in danger to be weakened [...] The boat that passed by flying the corporate social responsibility (‘CSR’) flag, has been missed’). For a broader ILO critique, see Jan Klabbers, ‘Marginalized International Organizations: Three Hypotheses Concerning the ILO’ in Ulla Liukkunen, and Yifeng Chen (eds), *China*

IV. Levelling the playing field focusing on the multinational company

What I would like to do now, in my second step, is to highlight a couple of new, unorthodox ways of ‘levelling the playing field’, of closing Ruggie’s ‘governance gap’, basically, mostly indirect ways to induce employers to pay and respect ‘fair market value’ wages and standards. Three things stand out: (i) most of these instruments are hard law mechanisms, (ii) outside of the ILO, especially taken unilaterally or bilaterally, and (iii) they are often market-based or market correcting using market principles (treating labour at least as good as commodities).

My aim is descriptive. I am not advocating for or against any of these instruments. The point I do want to make though is that a multitude of creative, unorthodox, approaches is emerging, some of them cooperative, others unilateral. And this raises systemic questions of (i) fragmentation and coherence; (ii) balance between economic and non-economic integration; and (iii) the relative roles of international organizations, like the ILO or WTO, versus regional, bilateral and unilateral initiatives.

I will divide some of these ‘levelling’ instruments into three broad clusters, realizing that these may overlap and are not mutually exclusive, nor exhaustive of what is happening:

- (i) instruments focusing on the multinational parent/sourcing company (in my t-shirt example, say, H&M; further discussed in this section);
- (ii) instruments focusing on the traded product (e.g., the t-shirt shipped from Bangladesh to Switzerland or the US, discussed in section 5);
- (iii) instruments focusing on the worker (in my example, the Dhaka-based garment worker, stitching together what will become my t-shirt, discussed in section 6).

Let us start with efforts that have shifted attention away from the local (garment) producer, i.e. the local contract manufacturer or subsidiary, and tried instead to force or incentivize the multinational sourcing or parent

and ILO Fundamental Principles and Rights at Work (Kluwer 2014) 181: ‘the ILO has turned from a well-respected and highly successful international organization into an organization that has become somewhat marginalized’.

company (e.g. H&M or Walmart) to internalize the ‘true cost’ of labour. Some efforts are focused on domestic law and courts in the home state where the multinational company is based. Other efforts stem from international instruments or arbitration. For each, here are some examples.

1. Domestic developments in home States

In 2017, France enacted the ‘duty of vigilance’ law which forces large multinationals with substantial operations in France to establish mechanisms to prevent human and labour rights violations and environmental impacts throughout their chain of production, including for their subsidiaries and supplying companies under their control operating outside France.¹⁴ These mechanisms must be reported each year as part of a ‘vigilance plan’. Violations may eventually lead to civil liability in French courts. Another development at the domestic level is *Vedanta v. Lungowe*, where the jurisdiction of English courts was confirmed in a case filed by over 1,000 Zambian villagers against UK-based Vedanta and its Zambian subsidiary for environmental harm caused in Zambian mining operations.¹⁵ The substantive question of whether, under the English law of negligence, parent company Vedanta should be liable for the operations of its subsidiary in Zambia still needs to be decided. However, confirming jurisdiction in this case has already opened doors to ‘pierce’ the corporate veil between parent and subsidiary. Like the French ‘duty of vigilance’ law (variations of which have been enacted in several countries), this should incentivize multinational companies to double-check labour standard compliance throughout their operations; if not, they risk having to pay themselves for violations. This, in turn, may improve wages and labour standards in producing or supplying countries, like Bangladesh.

¹⁴ Sherpa, Vigilance Plan Reference Guide 2019 <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf>.

¹⁵ Norton Rose Fulbright, ‘UK Supreme Court Clarifies Issues on Parent Company Liability in *Lungowe v Vedanta*’ (2019) <<https://www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta>>.

2. *International developments*

Worker claims have recently been heard also directly before an international tribunal. Following the 2013 Rana Plaza building collapse, where over 1'000 garment workers perished, trade unions and global fashion brands concluded the so-called Bangladesh Accord. Under this Accord, labour standard compliance, in particular fire and building safety, was made subject to international arbitration, before the Permanent Court of Arbitration in The Hague. In 2016, two global labour unions commenced arbitration against two unnamed global fashion brands and in 2018 obtained a settlement.¹⁶ As multinational companies realize that they may be held liable before domestic courts, as confirmed in cases such as *Vedanta* discussed above, companies may start to regard international arbitration, which has the advantages of confidentiality, speed and specialized arbitrators, as the 'lesser evil' or 'least unattractive option'. In June 2019, a team of legal experts issued Draft Arbitration Rules on Business and Human Rights that affected stakeholders and companies can use to settle disputes.¹⁷ Labour and corporate social responsibility provisions are also increasingly included in State-to-State investment treaties, but mainly to bind host States and, at times, to reduce host state liability (e.g. by means of counterclaims) in case claimant investors have violated labour standards.¹⁸ However, so far, these investment treaties (or trade agreements, further discussed below) do not allow workers or worker unions to file arbitration claims directly against companies.

On the legislative front, and this since 2015 (instigated by Ecuador and South Africa), negotiations are ongoing in the context of the UN Human Rights Council to adopt a legally binding treaty on business and human rights. In July 2019, a second draft was released entitled 'Legally binding instrument to regulate activities of transnational corporations and other

¹⁶ Permanent Court of Arbitration, '*Settlement of Bangladesh Accord Arbitrations*' (Press release 17 July 2018) <<https://pca-cpa.org/en/news/pca-press-release-settlement-of-bangladesh-accord-arbitrations/>>.

¹⁷ The Hague Rules on Business and Human Rights Arbitration (Draft of June 2019) <<https://www.cilc.nl/cms/wp-content/uploads/2019/06/Draft-BHR-Rules-Final-version-for-Public-consultation.pdf>>.

¹⁸ See, for instance, International Institute for Sustainable Development, *Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements* (IISD 2018). <<https://www.iisd.org/sites/default/files/meterial/harnessing-investment-sustainable-development.pdf>>.

business enterprises'.¹⁹ The draft instrument imposes obligations on home and host States to implement domestic legislation providing for certain types of corporate liability for human rights violations. All of these international efforts may put further pressure on multinational companies and, in turn, their local operations, to pay the 'true price' for what they produce or source.

V. Levelling the playing field focusing on the traded product

Instead of forcing or incentivizing either the local producer or multinational company to internalize the 'true cost' of labour (e.g. by awarding damages in case of failure to comply with labour standards), price adjustments could also be made at the level of the traded product. Two examples come to mind: (i) in the field of trade, higher import duties based on a failure to comply with labour standards; (ii) in the field of taxation, an income tax adjustment to account for the 'fair market value' of labour.

1. Higher tariffs on imports

When imported into Switzerland from Bangladesh, import duties on our t-shirt could be increased on the ground of 'social dumping'.²⁰ Unlike awarding damages to workers (or worker unions), discussed in section 4, labour-related tariffs are paid by importers into the budget of the importing country, not the pocket of workers. Still, imposing this cost, albeit downstream, can provide incentives to increase wages or labour standards upstream.

The EU has recently adopted new trade defense instruments and anti-dumping methodologies that, though not directly allowing for duties on the ground of 'social dumping', allow authorities to take into account the cost of (or lack of compliance with) labour or environmental standards.²¹ For the first time, trade unions will also be able to participate in trade defense investigations. The United States, in turn, has threatened to use section 301 of

¹⁹ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

²⁰ Gregory Shaffer, 'Retooling Trade Agreements for Social Inclusion' (2019) Illinois Law Review 1.

²¹ EU Commission, *EU Trade Defence: Stronger and More Effective Rules Enter Into Force*, (EU 2018) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1859>>.

the US 1974 Trade Act to increase duties on Chinese imports on the ground of failure to comply with labour standards in China.²² The United States preferential trading scheme for developing countries (GSP) also includes a conditionality related to labour standards. In June 2019, India was stripped of its GSP tariff benefits for imports into the United States, but labour standards were not invoked as a reason.²³ Also under recently concluded preferential trade agreements, such as the US-Mexico-Canada Agreement (USMCA, bound to replace NAFTA), the United States has insisted on stronger enforcement of labour standard which are now routinely made subject to strict dispute settlement. This means that certain failures to comply with labour standards in, for example, Mexico, may allow the United States to impose retaliatory import duties or to collect a so-called monetary assessment.²⁴ The USMCA also softened certain legal requirements to file and win labour cases which in 2017 had led the United States to lose its first labour dispute (against Guatemala) under a free trade agreement.²⁵ Yet, at this stage, even the USMCA only provides for State-to-State enforcement of labour commitments. No private standing is given to workers themselves or their unions, even though US trade unions and certain Democrats in the United States Congress would want to take that next step.²⁶ Another prominent feature of the USMCA is that car imports will only benefit from zero duties

²² Isabelle Hoagland, 'USTR mulling Sec. 301 investigation into Chinese labour practices' (2018) Inside US Trade <<https://insidetrade.com/inside-us-trade/sources-ustr-mulling-sec-301-investigation-chinese-labour-practices>>.

²³ Amiti Sen, 'India Says US Decision To Withdraw GSP Unfortunate' (2019) The Hindu Business Line <<https://www.thehindubusinessline.com/economy/india-says-us-decision-to-withdraw-gsp-unfortunate/article27399669.ece>>.

²⁴ US-Mexico-Canada (USMCA) Agreement, Chapter 23 (Labour) and Chapter 31 (Dispute Settlement) <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>>.

²⁵ Inu Manak, 'In USMCA Ratification Race It's Much Ado About Labour' (2019) International Economic Law and Policy Blog <<https://worldtradelaw.typepad.com/ielp-blog/2019/04/in-usmca-ratification-fight-its-much-ado-about-labour.html>>. Most importantly, footnote 9 to USMCA article 23.5 makes it much easier to demonstrate that failure to effectively enforce domestic labour laws is 'in a manner affecting investment or trade between the Parties'. For more on the (unsuccessful) United States labour case filed against Guatemala <<https://ustr.gov/issue-areas/labour/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr>>.

²⁶ Doug Palmer, Megan Cassella and Adam Behsudi, 'Trump Courts Democratic Support with USMCA counteroffer' (2019) Politico <<https://www.politico.com/story/2019/09/13/trump-usmca-trade-1733491>>. (Trump's counteroffer is, however, reported

under the agreement in case 75 per cent of the car's value is made in North-America and at least 40 per cent by workers earning at least 16 dollars per hour.²⁷ This is meant to increase wages in Mexico or at least to shift some car production back to the United States or Canada where wages are higher. The EU as well has been using its free trade agreement with Korea to seek improvements in Korean labour standards.²⁸

2. *Income tax adjustments*

A completely different avenue to address the gap between the 'market price' of our t-shirt and its 'fair market value', resulting from labour exploitation in the production of the t-shirt, is a tax instrument that could, according to professors Christians and van Apeldoorn, already be implemented under the prevailing tax laws of many countries.²⁹ The idea is relatively intuitive. Assume our t-shirt is imported and sold in the United States by Walmart, the US parent company ('Walmart parent'). Assume also that the t-shirt was produced by a Walmart subsidiary in, say, Bangladesh ('Walmart sub'). For purposes of calculating income taxes, a decision must be made as to what part of the profits made on the t-shirt to allocate to Walmart parent (in the United States) as opposed to Walmart sub (in Bangladesh). To do so, the core step is to fix an arm's length price for the t-shirt sale between Walmart sub and Walmart parent, under the assumption that they would be unrelated, under so-called transfer pricing rules. Suppose the t-shirt was sold or booked from sub to parent at 5 dollars, but that this price is only 5 dollars and not 5.50 because it was produced in Bangladesh with worker wages below what is in Bangladesh a 'fair market wage'. Suppose, indeed, that had 'fair wages' been paid, the t-shirt's price would have been 5.50 dollars. In

to include procedures 'allowing the U.S. and Mexico to jointly inspect and verify that specific factories are complying with USMCA's labour standards'; in the case of noncompliance 'the U.S. could revoke tariff benefits on the factories' products'.

²⁷ Carrie Kahn, 'Will NAFTA 2.0 Really Boost Mexican Wages?' (2018) National Public Radio <<https://www.npr.org/2018/10/17/657806248/will-nafta-2-0-really-boost-mexican-wages>>.

²⁸ EU Commission, 'EU and the Republic of Korea launch government consultations over labour commitments under the trade agreement' (Press release 21 January 2019) <https://eeas.europa.eu/delegations/south-korea/56833/eu-and-republic-korea-launch-government-consultations-over-labour-commitments-under-trade_en>.

²⁹ Allisson Christians and Laurens van Apeldoorn, 'Taxing Income Where Value is Created' (2018) 22 Florida Tax Review 1.

that case, US tax authorities could reject the 5 dollar transfer price as not being arm's length, reduce the profit to be allocated to Walmart parent (as it should have paid 5.50 dollars, not 5 for the t-shirt) and cut the income tax due by Walmart parent (as it now made a lower profit).

Note that even if this were to happen, Walmart's US income taxes would go down, but it would be for Bangladeshi authorities to correspondingly increase the income tax of Walmart sub in Bangladesh (as sub's profit is now 50 cents higher). Moreover, even if this second step were to happen, it would increase Bangladeshi tax revenues, not increase worker wages in Bangladesh (although some redistribution could occur). That said, whereas higher import duties discussed above, make the importing or consuming country better off (in our example, the United States), if a Bangladeshi tax adjustment is made, the extra money at least goes to the producing country Bangladesh.

VI. Levelling the playing field focusing on the worker or work

A third and final cluster of instruments to level the playing field in favour of labour focuses not on the local producer or multinational company, nor on the traded product, but on the worker or work itself. A first example stems from anti-trust or competition law where it is increasingly realized that market concentration may not only lead to higher product prices (as when only one or two companies compete in a relevant market), but also reduce wages. Indeed, when in a relevant market only a limited number of employers remain, wage competition between these employers may go down, and as a result wages may drop. In other words, low wages may be grounds for an anti-trust violation which, in turn, may force wages to go up.³⁰

A second example can be found in the technology sector, where data is key and determines the revenue stream of tech companies such as Google or Facebook. Even though Google and Facebook can, until now, be used for free, use creates data for the company and, in turn, revenues. This raises the question of whether data is like 'capital' (in the hands of Google, to be

³⁰ Cass Sunstein, 'A New View of Antitrust Law That Favors Workers', 14 May 2018, Bloomberg <<https://www.bnnbloomberg.ca/a-new-view-of-antitrust-law-favors-workers-cass-r-sunstein-1.1076563>>.

used to maximize return) or rather more like ‘labour’.³¹ In the latter event, users ‘make’ data and their ‘labour’ should be compensated. Doing a Google search should then not only be free, but Google should actually pay us when using it. Through this lens, commentators have complained about ‘technofeudalism’ and ‘data slavery’ and are calling for data ‘labour unions’ or their equivalents to protect users, not only in terms of data privacy but also in order to share the value of data between users creating it and companies monetizing it.³² Though far from implemented, any move in this direction would benefit ‘labour’, that is tech users/consumers (which would then be regarded as ‘labour’ or workers), to the detriment of Google or Facebook (that is, companies or ‘capital’).

A third and final example is what Richard Baldwin has called ‘tele-migration’, which would eventually allow (more) labour to cross borders, without workers having to physically move and thus comply with strict migration policies.³³ The first wave of globalization, as Baldwin describes it, allowed for goods to cross borders more easily, because of massively reduced trade costs (e.g. lower shipping costs thanks to containers). The second wave of globalization, in turn, enabled ideas to move more freely between countries, allowing global production along value chains in different countries (e.g. because of lower telecommunication and investment costs). The next wave of globalization, finally, may enable people (or at least their skills or services) to cross borders more easily, because face-to-face costs go down (e.g. thanks to videoconferencing or freelancing platforms like WeWork). If, indeed, labour becomes more mobile and can engage in the (wage) ‘arbitrage’ that only goods and services production and the free flow of capital have exploited so far, the share of global income that goes to labour may increase, and with it globalization’s imbalance to the detriment of labour, described in section 2, may be reduced.

³¹ Eric Posner and E. Weyl, ‘Radical Markets, Uprooting Capitalism and Democracy for a Just Society’ and Imanol Arrieta Ibarra, Leonard Goff, Diego Jiménez Hernandez, Jaron Lanier and E. Glen Weyl, ‘Should We Treat Data as Labour? Moving Beyond “Free”’ (2018) American Economic Association, Papers and Proceedings <<https://www.aeaweb.org/conference/2018/preliminary/paper/2Y7N88na>>.

³² The Economist, ‘Data Workers of the World, Unite – If People Were Paid for Their Data’ (2018) <<https://www.economist.com/the-world-if/2018/07/07/data-workers-of-the-world-unite>>.

³³ Richard Baldwin, *The Globotics Upheaval: Globalization, Robotics and The Future of Work* (Oxford UP 2019).

VII. Conclusion

Globalization as well as global governance, especially since the 1990s, has suffered from an imbalance to the detriment of labour, and in favor of the free flow of goods, services and capital (benefitting disproportionately capital as compared to labour). More recently, however, some re-balancing may be occurring: less liberalization and protection of cross-border trade and investment flows; more protection of labour. This contribution has offered a number of novel, unorthodox instruments that have emerged or have been discussed or proposed that may slowly ‘level the playing field’ in favor of labour. Some are (i) focused on liability of multinational parent or sourcing companies (based in the home State, as opposed to local producers based in the host State, and this at both the domestic and international level), others (ii) target the traded product (be it by means of import duties or income tax adjustments), yet others (iii) concentrate on work or the worker him or herself (anti-trust enforcement in favor of workers; construing ‘data as labour’ or putting in place mechanisms allowing for ‘tele-migration’). These avenues are novel in that they are not focused on employers in the production country, nor centered around ILO conventions with labour commitments on host States and relatively soft compliance mechanisms. Indeed, most of these instruments are market- or technology-based, hard-law instruments embedded in domestic law or arbitration, or in international organizations or treaties outside of the ILO (e.g. the UN Human Rights Council, tax treaties or trade and investment agreements such as the USMCA). As the Global Commission on the Future of Work concluded in its 2019 report *Work For A Brighter Future*, ‘there are strong, complex and crucial links between trade, finance, and economic and social policies. The success of this human-centred growth and development agenda depends heavily on coherence across these policy areas.’³⁴

³⁴ Global Commission on the Future of Work, *Work for a Brighter Future* (ILO 2019) 14.

‘Private Faces in Public Places’: Resolving Actors’ Interests in International Organizations

Hélène Ruiz Fabri and André Nunes Chaib

I. Introduction

1. *The overlap between international organizations’ mandates*

Throughout their long (or short) lives, international organizations adapt their activities to the requirements of the time. Such adaptation comes in many forms, either through reorganization of their objectives, or by the creation of new techniques to attain their old consolidated goals. All these transformations require constitutional changes that, generally speaking, either alter or increase the power international organizations have.¹ Nevertheless, in modern times, international organizations have in many ways realized their own objectives are unattainable if they exercise their powers or act alone. The overlap in mandates of different organizations² has on the one hand showed that some international organizations concerned with certain specific issues were failing to tackle their social and political goals alone; on the other hand, this overlap makes clear that

¹ For such an assessment, see Jan Klabbers, ‘The Transformation of International Organizations Law’ (2015) 26 *European Journal of International Law* 9. See also, Guy Fiti Sinclair, *To Reform the World* (Oxford UP 2017).

² Malte Brosig, ‘The Overlap and Interplay between International Organisations: Theories and Approaches’ (2011) 18 *South African Journal of International Affairs* 147. See also, Stephanie C. Hofmann, ‘The Politics of Overlapping Organizations: Hostage-taking, forum-shopping and brokering’ (2019) 26 *European Journal of Public Policy* 883; Annabelle Littoz-Monnet, ‘Production and Use of Expertise by International Bureaucracies’ in Annabelle Littoz-Monnet (ed), *The Politics of Expertise in International Organizations. How International Bureaucracies Produce and Mobilize Knowledge* (Routledge 2017).

there is an opportunity for different international bodies to join forces to finally materialize some of the constitutional objectives they have set for themselves.

Yet, much of the cooperative efforts between different organizations depend also on their own internal structural governance to allow for other organizations to take effective part in joint work. The purpose of this chapter, therefore, is to inquire into possible new conditions of participation by different actors in the work of the ILO. It considers not only a critique of the current crisis of the ILO's tripartite system (referencing the 2012 right-to-strike crisis), but also assesses the conditions of possibility for coordination with other international organizations concerned with regulating the world economy, such as the World Bank and the International Monetary Fund (IMF).

In the latter case, the chapter aims at assessing the way in which these organizations mutually assist each other not only by means of technical cooperation, but also by means of epistemic exchanges, composing in this way a more concerted structure to deal with general issues relating to social justice (including labour conditions, social protection, amongst others). In this respect, the chapter focuses on the ways in which the ILO, the oldest surviving universal international organization, can provide some space for such a process of political and legal coordination, particularly considering its structural openness not only to States, but also to private actors.

2. *The increase of international organizations' powers*

The starting point of this reflection is what is usually named as the 'international organizations mission creep'. Much has already been said and written about this, the theories on the mission creep or the doctrine of *ultra vires* powers being only some examples of attempts to tackle such issue. However, it seems useful to recall that it is the tendency developed by international organizations not only to materialize to the maximum extent the specifics outlined in their mandates, but also to increasingly engage in activities touching upon policy and legal areas outside their original mandate. In this context, in order to justify its activities in legal terms, the ILO has historically altered the content of its mandate to include more than just the improvement of labour laws around the globe, but also elements typical of macroeconomic governance. This is exemplified by the restatement of

the ILO aims and purposes in the Declaration of Philadelphia in 1944.³ The same has happened for most of other international organizations concerned with the world economy. The World Bank and the IMF also have consistently been engaging in activities and policy-making in areas somewhat outside of their original purposes.⁴ One recent example is the World Bank providing loans for countries in economic difficulties following crisis, rather than direct investment in development projects.⁵ This is one case where the World Bank, for instance, acts in an area typically falling within IMF's remit.

In many cases, however, organizations have found ways to justify the expansion of their powers by means of a rereading of their own constitutive mandates.⁶

As the creatures, instruments, and (increasingly) originators of international law, international organizations incarnate and epitomize its transformative potential. They intervene in its name and subject themselves to its improving influence. They provide important venues for an endless cycle of debate – of proposals and counter-proposals, contestation and compromise – over the meaning and possibility of a just, democratic, and equitable global order. And over the past century, they have themselves been the objects of continuous reform efforts. Indeed, perhaps the most common outcome of reform efforts directed at international organizations has been their assumption of additional powers and expansion into new arenas of activity.⁷

³ As article I of the Declaration reads, 'The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: (a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare'.

⁴ Jessica Einhorn, 'The World Bank's Mission Creep' (2001) 80 *Foreign Affairs* 22.

⁵ For instance, the case of Papua New Guinea in 2016; see 'Mission Creep at the World Bank Must Stop' (2016) *Financial Times*.

⁶ Sinclair (n 1).

⁷ *ibid* 3.

One interesting consequence of the expansion of international organizations' powers is that it has pushed different international organizations to increasingly work together on certain topics, considering their activities began to overlap. Obviously, such overlap has created tensions and critiques from one international organization to the other, with, for instance, the ILO criticizing the World Bank and the IMF for not taking full account of labour standards when preparing their policies.⁸ This has created, nevertheless, the possibility for these organizations to work together and elaborate new ways of tackling economic problems across the world.

More specifically, this chapter looks at how, by expanding its powers to deal with issues beyond the regulation of labour, the ILO has had to engage with other international organizations and in doing so has opened the possibility for a variety of other entities to make their voices heard in the process of regulating economic affairs. For such purpose, the chapter first addresses briefly the modalities of cooperation between international organizations, before underlining three different dimensions in which the ILO and other organizations' works have been connected, namely the technical, normative and epistemic dimensions. For each one of these, a corresponding example is highlighted: the joint work of the ILO and the International Finance Corporation (IFC) in the Better Work Program; the impact of ILO standards on the new Environmental and Social Framework (ESF) of the World Bank; and the discussion between the ILO and the IMF on the content of 'social protection' and its operationalization.

II. Modalities of cooperation between international organizations:

The ILO and other international economic organizations

Cooperation and links between international organizations may take a variety of forms, ranging from conditions of membership of an organization to joint projects carried out with a view of materializing their constitutional objectives.⁹ We focus here on modes of cooperation that consider international organizations singularly in their relationship with each other

⁸ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart 2013) 94.

⁹ Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge UP 2015) 286.

aiming at realizing objectives that are somewhat common to their mandates. What is central to this analysis is the way in which the ILO, in the last decades, has renewed its role as protagonist in these relationships.

The context is well-known: although cooperation between international organizations is put at the forefront, it can remain rather formalistic. Overlapping mandates trigger more easily tensions and competition between organizations for both political and epistemic spaces in the international arena.¹⁰ Also, a kind of *patriotisme d'organisation* tends to make it difficult for certain institutional structures of international organizations to deal properly with the work and information produced by other international organizations.

A very interesting example of such a competition for space in law-making and politics involves the ILO and its Indigenous and Tribal Peoples Convention, 1989 (No. 169). It has been shown that much of the reason behind the elaboration of Convention No. 169 was the fact that the ILO understood that its previous convention, the Indigenous and Tribal Populations Convention, 1957 (No. 107), had become somewhat outdated and that there was growing interest from the United Nations to develop an instrument that could replace it.¹¹ The ILO took the initiative and pushed for the update of its own rules on indigenous peoples, which resulted in Convention No. 169. In one way or another, the idea of the ILO was to 'win the race' against the UN on indigenous matters.¹² This was also the case of the debate between competing models of social insurance represented during the '80s by the Organisation for Economic Co-operation and Development and the ILO.¹³

¹⁰ *ibid* 287-288.

¹¹ Lee Swepton, *The Foundations of Modern International Law on Indigenous and Tribal Peoples – The Preparatory Documents of the Indigenous and Tribal Peoples Convention, and Its Development through Supervision* (Brill 2015) vol I 15-16; Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford UP 2010) 258-259.

¹² Swepton (n 11) 16.

¹³ Matthieu Leimgruber, 'The Embattled Standard-bearer of Social Insurance and its Challenger: The ILO, the OECD and the crisis of the welfare state' in Sandrine Kott and Joëlle Droux (eds), *Globalizing Social Rights: The International Labour Organization and Beyond* (Palgrave Macmillan 2013) 293.

Although the ILO has been largely ignored in the past decades by the other prominent international economic institutions,¹⁴ and has had its times of 'greater and lesser efficacy'¹⁵ it has recently increasingly begun to work together with them. These new ways of dealing with overlapping economic problems pushed these organizations to increase the participation of other entities in their activities. This was particularly the case when joint work was directed to specific localities, but also to global projects. It has taken different forms, more or less formalized in inter-organizational agreements or completely informal, by means of direct (or indirect) recognition of one organization's authority in a specific matter. An example of informal scheme of work is the Oslo Conference, convened by the Norwegian government in 2010, that sought to bring together IMF and ILO experts in order to facilitate exchange of information and promote coordination of work.¹⁶ A consequence of such cooperation between different international economic organizations is a reciprocal reinforcement of these organizations political and epistemic authorities.¹⁷

¹⁴ Maupain (n 8) 76.

¹⁵ Laurence Helfer, 'The Future of the International Labour Organization' (2007) 101 *American Society of International Law Proceedings* 391.

¹⁶ <<https://www.imf.org/external/NP/seminars/eng/2010/oslo/>>. See also 'After the ILO-IMF conference in Oslo, what's next?' <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_144629/lang-en/index.htm>. The September 2010 Oslo Conference – hosted by Prime Minister Jens Stoltenberg of Norway and co-sponsored by the IMF and ILO – brought together leaders from governments, labour, business, and academia to tackle the sharp increase in unemployment and underemployment since the global financial crisis. At Oslo, IMF Managing Director Dominique Strauss-Kahn and ILO Director General Juan Somavia called for a broad international commitment to a jobs-focused policy response to the global downturn.

The Vienna meeting also assessed the areas of collaboration that Strauss-Kahn and Somavia agreed to pursue at Oslo, including a focus on policies to promote employment-creating growth; joint analytical work on social protection floor policies; and an agreement on the importance of social dialogue to build the consensus needed to tackle the adjustment challenges posed by the financial crisis.

The ILO and IMF have pursued cooperation in these areas in several ways. The work on employment-creating growth has focused on the G-20 process, with the two organizations contributing analytical work to the Mutual Assessment Process. The work on social protection floor policies will center on joint analytical work in countries in three regions. The commitment to social dialogue will revolve around consultations with unions and other social partners in a number of countries.

¹⁷ Michael Zürn, *A Theory of Global Governance – Authority, Legitimacy, and Contestation* (Oxford UP 2018) 50-53.

Although many have for the longest time seen the ILO as an ineffective organization,¹⁸ they tend to ignore not only the original innovative structure introduced by the ILO in the beginning of the 20th century, but also modern innovations brought about in past decades in the Organization, precisely with the intention to tackle inefficiencies.¹⁹ The ILO has been forced to readapt its agenda to advance global and local social justice with the prevailing ideology and doctrine of neoliberalism.²⁰ In this context, besides the ILO's well-known and long-standing international standard-setting function, one can draw out two elements that can be seen as modern innovations integral to the ILO being called into partnering with other international organizations – particularly economic organizations – to realize certain projects. These two elements are here considered as the 'comparative advantages' of the ILO.

The first one is the ILO's experience with consultation with social partners other than governments, such as employers' and workers' representatives, but also with local groups, such as indigenous groups, in order to advance specific agendas.²¹ The second one is the ILO's long experience with technical cooperation with local governments and labour representatives, which has been hailed as a fundamental mark of the ILO's work throughout the 20th century. Even though not directly foreseen as one of its central activities in its mandate, it historically developed and became one of its main features.²²

These two elements are integral to bringing different stakeholders into decision-making and policy-elaboration processes. These – most often – private faces are given a different forum to impact the labour governance both locally and internationally. In this respect, one could on the one hand define consultations as a bottom-up process, by which local and private stakeholders influence the agenda and actions of the Organization; on the other

¹⁸ Laurence Helfer, 'Understanding Change in the International Organizations: Globalization and Innovation in the ILO' (2006) 59 *Vanderbilt Law Review* 703.

¹⁹ *ibid* 705.

²⁰ Diane Frey, 'Social Justice, Neoliberalism, and Labor Standards at the International Labour Organization' in Gillian MacNaughton and Diane Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge UP 2018) 287.

²¹ Swebston, (n 11) chapter 4.

²² Sinclair (n 1) 55, 59-60.

hand, technical assistance serves as top-down reaction to these consultation processes, by which the Organization provides different kinds of support to aid in the implementation of actions and agendas. Such elements not only help the ILO in developing cooperation with other organizations to accomplish certain constitutional objectives, but also reflect specific comparative advantages of the structure of the ILO in comparison to other international organizations.

1. *The consultation know-how*

At the ILO, the notion of consultation is more or less solidified. One needs simply to look at the attempt to codify what the term means for the Organization in its Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152). As paragraph 2(3) specifies, 'consultations may be undertaken (a) through a committee specifically constituted for questions concerning the activities of the International Labour Organisation; (b) through a body with general competence in the economic, social or labour field; (c) through a number of bodies with special responsibility for particular subject areas; or (d) through written communications, where those involved in the consultative procedures are agreed that such communications are appropriate and sufficient'.

However, consultation with social partners, as well as with other affected parties by labour policies and legislation, is a fundamental and 'deeply rooted legal concept' within the ILO.²³ The presence and requirement of the consultation process in policy elaboration and legal definition in most of the ILO's conventions and recommendations is a testament to the fact that ILO has always attempted to provide a different kind of governance scheme when dealing with its stakeholders.

Indeed, one fundamental trait of the partnerships established by the ILO has been that of increasing consultation with affected parties and

²³ Examples of consultation processes can be found in different instruments, such as article 1(2) of the Protocol of 2014 to the Forced Labour Convention, 1930; the Employment Policy Convention, 1964 (No. 122); the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) and Convention No. 169. See also María Victoria Cabrera Ormazá, *The Requirement of Consultation with Indigenous Peoples in the ILO* (Brill 2017) 41.

other civil society representatives. Although the ILO has been ignored in economic matters for a long time, its attribute of being able to engage in consultation with different stakeholders catches the eye of other organizations and remains an attractive feature of the Organization, especially for organizations such as the World Bank and the IMF which have not developed such a sophisticated pattern of 'consultations'. Thus, it is only in the last two decades that the World Bank created mechanisms to allow for proper consultation of affected communities (for instance, the World Bank elaborated a world-wide consultation process in order to reform its own operational policies, which culminated in the creation of the new ESF) while the IMF has not created anything in that respect so far.

2. *The technical cooperation know-how*

In order to foster and facilitate the implementation of its conventions and recommendations, the ILO has since the '50s developed mechanisms of technical cooperation that provides the Organization with specific know-how to best impact local realities. Not only has the Organization expanded its reach, by establishing offices all over the world, but it has also managed to develop specific skills in dealing with local stakeholders. Differently, for example, from the IMF, the ILO is able to identify and better relate to local realities in the different continents, which provides it with a better grasp of how to influence and impact them through its work and agenda. Such expertise in technical cooperation is another feature that makes the work of the ILO attractive to other international organizations.

The ways in which the ILO has engaged with other organizations have in different manners attempted to include the participation of other entities in their projects. Local populations, private organizations, amongst others, have somewhat partaken in these ventures. The three examples in which the ILO has engaged, or at least attempted to engage with other international organizations, and on which we revert below illustrate this process in three different dimensions: technical, normative and epistemic. In each one of them, two aspects stand out: one is that the nature of the relationship of the ILO with other international organizations has taken different shapes; the other is that the exchange between the ILO and other international organizations has also resulted in a process of reinforcement of the ILO's authority in different matters.

III. Three dimensions of relationship: Technical, normative and epistemic

These three dimensions of relationship mentioned below stem directly from the comparative advantage the ILO has developed in respect of consultation and its technical assistance capabilities. Such relationships are somewhat molded by not only a particular expertise the ILO has, but also from these specific structural strong-points it has been able to develop over the years.

1. *The technical dimension: The case of the Better Work programme*

The first example of an inter-organizational cooperation happens at the technical level. This is the Better Work Programme.²⁴ This programme brings together the ILO and the IFC, one of the four organizations of the World Bank Group. The programme aims at providing local support to labour agencies and companies with a view to promoting decent work at the same time that it fosters employment and develops the economy. Initially introduced in a few countries in South-East Asia, it has spread to countries in other continents. Amongst the many activities of the programme, there is the advisory function to local companies on how to create better work conditions, and to State labour agencies on how to improve labour regulations.

One very important aspect of the programme is the inclusion in the various decision-making and rule-making processes of private stakeholders, most of which would otherwise be excluded from such practices. In Bangladesh, for instance, the Better Work programme, besides engaging with the local labour inspectorate and the ministry, deals directly with local factories to which big textile brands outsource their work. These brands are also engaged in the whole process of, for instance, elaborating a factory inspection tool for the local labour inspectorate. This is illustrative of how those two elements – consultation and technical cooperation – have allowed

²⁴ Better Work – a collaboration between the ILO and the International Finance Corporation – is a comprehensive programme bringing together all levels of the garment industry to improve working conditions and respect of labour rights, as well as to boost the productivity and competitiveness of apparel businesses. As a result of donor support to the Better Work programme, factories have improved compliance with the ILO core labour standards and national legislation, covering compensation, contracts, occupational safety and health and working time. This has significantly improved working conditions and, at the same time, enhanced factories' productivity and profitability. Currently, the programme is active in 1,300 factories, employing more than 1.6 million workers in Bangladesh, Cambodia, Haiti, Indonesia, Jordan, Nicaragua and Vietnam <<https://betterwork.org/about-us/the-programme/>>.

for the work of the ILO together with the IFC, to include private entities, such as workers' unions, employers' associations, factory owners and brands, in the process of local labour governance design.

If on the one hand, the ILO is able to promote better working conditions for workers, the IFC is able to impact the development of business with its own economic and business expertise. Moreover, both aspects benefit in particular from the consultation and technical cooperation expertise of the ILO, which provides both organizations with better means to influence more directly local realities. The programme has been hailed as a crucial and important example of how different organizations can provide different skills in order to advance their own agendas in a more effective way.

2. *The normative dimension: The relationship between ILO conventions and the World Bank's Environmental and Social Framework*

A second example of exchanges between the ILO and other agencies is the impact of the ILO standards on the creation of the new ESF of the World Bank. Here the impact is on the normative level and showcases how the standard-setting function of the ILO remains relevant.²⁵ The impact ILO standards have had on the World Bank's ESF stems not only from the relevance of ILO conventions and recommendations, but also from the consultation with civil society organizations and the ILO itself. Yet the impact and exchange the ILO has had with the World Bank on a normative level could be already attested in a change of heart the World Bank had in 2013 in respect to its old ideal of deregulation of the labour market, when in its World Development Report, *Jobs*, it indicated the impact, influence and importance of ILO standards not only in securing appropriate labour

²⁵ World Bank, Guidance Note for Borrowers, Environmental and Social Framework for IPF Operations, ESS2: Labor and Working Conditions (2018) 1-2 GN2.2 <<http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=45&zoom=80>>. ESS2 is in part informed by several ILO and UN conventions. For the ILO, these include: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

conditions for workers all over the world, but also in aiding in the development of local economies.²⁶

The process of redesigning the operational policies of the World Bank, which resulted in the new ESF, was conducted by means of a large-scale consultation process with entities all over the world, including members of academia, the private sector, governments and other international organizations. Throughout this process, private entities would set out that certain normative standards should be accorded significant importance as cornerstones for the new ESF. Various ILO conventions were often cited as such by members of the private sector and academia, as well as the ILO itself. Also, a determinant aspect is that the World Bank has – although not directly referencing ILO experience – defined the consultation element as a crucial part of its own policies. This is reflected in the World Bank's Environmental and Social Standard 10, on Stakeholder Engagement and Information Disclosure, where the Bank establishes the concept of 'meaningful consultation' and sets up a process by which throughout the whole development of an investment project, affected parties ought to be given a say in its course.²⁷

²⁶ World Bank, *Jobs*, World Development Report (2013) 25: 'An institutional environment that respects rights is an important ingredient of the rule of law and a foundation for good jobs for development. The ILO's core labor standards provide a floor in the areas of child labor, forced labor, discrimination, and freedom of association and collective bargaining. Health and safety at work also call for attention by governments and employers. Ensuring that standards are applied in practice requires providing access to information to workers and employers. It also implies expanding legal coverage to workers in jobs that fall outside formal laws and regulations. Associations of informal workers can inform them about their rights, help them use legal mechanisms, and offer them collective voice' <<https://openknowledge.worldbank.org/handle/10986/11843>>.

²⁷ See ESS 10 on 'meaningful consultation' which reads:

21. The Borrower will undertake a process of meaningful consultation in a manner that provides stakeholders with opportunities to express their views on project risks, impacts, and mitigation measures, and allows the Borrower to consider and respond to them. Meaningful consultation will be carried out on an ongoing basis as the nature of issues, impacts and opportunities evolves.

22. Meaningful consultation is a two-way process, that:

- (a) begins early in the project planning process to gather initial views on the project proposal and inform project design;
- (b) encourages stakeholder feedback, particularly as a way of informing project design and engagement by stakeholders in the identification and mitigation of environmental and social risks and impacts;
- (c) continues on an ongoing basis, as risks and impacts arise;

This exchange is informative of how the standard-setting function of the ILO remains of relevance. Even though the ILO might have been somewhat left aside in matters of employment and economic policy, the reality is that during the consultation process the World Bank set up for the elaboration of its new ESF, ILO conventions were set out as a fundamental normative benchmark in matters of labour relations. This inevitably revitalized not only the content of the ILO's fundamental conventions, but also renewed the importance of its standard-setting function. Such a process is illustrative of the normative influence and exchange between two different international economic organizations.

3. *The epistemic dimension: The concept of social protection between IMF, the World Bank and the ILO*

Finally, at the epistemic level, the ILO has engaged with other institutions in a process of defining concepts that have a cross-cutting importance in different areas of economic and legal thought. One important example of that sort is the work that has been done over the years to consolidate an understanding of social protection. The ILO is currently part of what is termed the *Social Protection Floor Initiative*, which includes also the UN and the World Health Organization. The idea of social protection floor is a conceptual development opposed to the classical World Bank view of social protection, based on the idea of safety net. The ILO's idea of social protection is well enshrined in its Social Protection Floors Recommendation, 2012 (No. 202).²⁸

(d) is based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information in a timeframe that enables meaningful consultations with stakeholders in a culturally appropriate format, in relevant local language(s) and is understandable to stakeholders;

(e) considers and responds to feedback;

(f) supports active and inclusive engagement with project-affected parties;

(g) is free of external manipulation, interference, coercion, discrimination, and intimidation; and

(h) is documented and disclosed by the Borrower <<http://pubdocs.worldbank.org/en/£837721522762050108/Environmental-and-Social-Framework.pdf#page=111&zoom=80>>.

²⁸ Recommendation No. 202 provides in particular that:

4. Members should, in accordance with national circumstances, establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.

Institutional debate regarding the definition of social protection matters to the extent that international economic organizations are a fundamental source of information and authority for the implementation of economic policies meant to reduce inequality and poverty. In particular, the idea of social protection is of greater importance for the World Bank and the IMF, given their activities in providing loans and guarantees with a set of conditionalities. The inclusion of policies referring to social protection may be determinant to the outcome of those activities.

It is important to note, however, that these conceptual discussions are also heavily impacted by the work of private entities, especially individuals in academia, private sector representatives and think-thanks. Nevertheless, the political nature of the debate means these private faces ought to remain behind the scenes and should not appear as impacting directly the work of these organizations. Recently, the World Bank has come to adopt the ILO's vision of social protection,²⁹ in a joint work with the ILO, confirmed in a conference organized by both institutions in New York in September 2016.

Yet the IMF remains attached to its idea that social protection ought to be tackled only to the extent that it is considered 'macro-critical'.³⁰ A recent

5. The social protection floors referred to in Paragraph 4 should comprise at least the following basic social security guarantees:

(a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;

(b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;

(c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and

(d) basic income security, at least at a nationally defined minimum level, for older persons.

²⁹ 'For the World Bank and the ILO, universal social protection refers to the integrated set of policies designed to ensure income security and support to all people across the life cycle – paying particular attention to the poor and the vulnerable. Anyone who needs social protection should be able to access it'; see ILO, 'A Shared Mission for Universal Social Protection', Concept Note 2 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms_378996.pdf>.

³⁰ An issue is to be considered 'macro-critical' if it directly affects the implementation of specific aspects of macro-economic policies in a country; see IMF, 'Guidance Note for Surveillance under Article IV Consultations' (2015) 36 <<https://www.imf.org/external/np/pp/eng/2015/031915.pdf>>.

assessment of its work in relation to social protection by the Independent Evaluation Office did, however, conclude that the IMF ought to align more with the proposed position of the ILO. Although the IMF might have been resistant, the dialogue between the institutions has been initiated. In this epistemic dimension, the debate has reached a different level and was subject, for instance, of a thorough analysis by Prof. Philip Alston, Special Rapporteur for Extreme Poverty and Human Rights.³¹ Although the ILO and the IMF have positioned themselves at opposite poles, there is increasing debate with a view to agree on a workable definition that ought to serve all international institutions in their policy recommendations. Moreover, besides creating a dynamic exchange between the organizations, such a debate also increasingly reinforces their own epistemic authority on topics related to economic policies and development.

The IMF and the ILO, however, remain at a difficult stage with regard to defining the content of the concept of social protection.³² Nevertheless, it

³¹ Report of the Special Rapporteur on extreme poverty and human rights (2018) A/HRC/38/33 <<https://digitallibrary.un.org/record/1629536>>.

³² As can be illustrated by the following section of the IEO Report on the IMF and Social Protection: ‘The IMF’s collaboration with the ILO on the Social Protection Floor Initiative in 2011-13 was not very successful. The initiative aimed to ensure a basic level of social protection (access to essential services and social transfers for the poor and vulnerable) in every country. The idea for IMF-ILO collaboration originated at a 2010 conference in Oslo jointly hosted by the IMF Managing Director and the ILO Director-General. Three countries – El Salvador, Mozambique, and Vietnam – were chosen as pilot cases. Of the three pilots, this evaluation found effective collaboration only in Mozambique, where the IMF country team strongly believed in the need for greater social protection and worked closely with the ILO social protection specialist to successfully persuade the government to adopt a social protection floor. According to IMF and ILO staff involved, there was no buy-in from Fund staff or the country authorities for the ILO’s social protection floor proposals’.

According to IMF staff interviewed for this evaluation, there was lingering skepticism among staff of the relevance of the initiative to the Fund’s mandate or department work programs and a broad sense that collaboration was difficult because IMF and ILO staffs ‘did not speak the same language’. Nonetheless, an unpublished joint IMF-ILO stocktaking in April 2014 concluded that the pilots had been very successful and proposed expanding the number of countries covered by the exercise. The IMF proposed some additional countries to the ILO in 2014, and the Managing Director’s Global Policy Agenda in the fall of that year included a commitment to ‘[continue] to analyze – jointly with the International Labor Organization – social protection floors, particularly for Africa, ACTs [Arab Countries in Transition], and Latin America’; see IEO, *The IMF and Social Protection* (2017) 29-30 paras 65-66 <<https://ieo.imf.org/en/our-work/Evaluations/Completed/2017-0724-the-imf-and-social-protection>>.

is undeniable that the simple fact that two universal international economic organizations such as the ILO and the IMF have engaged in such a debate on such a topic, not only reiterates the importance of the issue, but also reinforces the epistemic position and authority of these two organizations on the matter. Regardless of whether one or the other position proves 'right' or 'wrong', the fact is that whenever political and legal agents seek to justify or elaborate on their own positions, they shall refer to one of these organizations as holding authoritative positions on the matter of social protection.

IV. Conclusion

The three examples described above ought to display the various ways in which such processes of cooperation may take place at different levels. Despite a variety of difficulties, there is great room for elaborating on modes of bringing international economic organizations together that would either rely on formal, legal, agreements between different organizations, or on broader interpretations of their mandates with a view to understanding that despite their relative autonomy, their work ought also to be coordinated with that of other organizations concerned with the world economy.

Finally, in order to reinforce a process whereby global governance becomes more inclusive, any joint works between the ILO and other organizations should involve increasing participation of private parties. This would not only reinforce the authority of these organizations as proper administrators of global governance, but also favour their legitimacy. These joint works provide a good entry door for such private parties and could make use of an already established concept of consultation utilized by the ILO.

The IMF has not been an active participant in the ILO- and World Bank-led Social Protection Interagency Cooperation Board (SPIAC-B). The SPIAC-B was established in 2012 in response to the G-20 request for international organizations to improve coordination of their efforts to provide social protection financing and technical advisory services to developing countries; *ibid* para 67.

X

**SPECIAL EVENT
WILFRED JENKS LECTURE SERIES**





CLARENCE WILFRED JENKS
(1909-1973)



A Visionary Jurist Dedicated to the Common Law of Mankind

Bruce Jenks

It is a great honour to be here on the occasion of the launch of the *Wilfred Jenks Lecture Series*. On behalf of my mother, my brother and myself, I would like to thank you most sincerely for this tribute to my father.

We are of course celebrating the 100th anniversary of the ILO. We are also celebrating the 100th anniversary of the genesis of the concept of the international civil service as we know it today. These anniversaries are of course linked through the leadership of Albert Thomas. In a real sense, Albert Thomas was the first practitioner of nurturing the political space that Eric Drummond had made possible.

My father was born 110 years ago. At the age of 22, in 1931, he joined the ILO. He faced competition from more senior candidates. But Jean Morellet, then legal adviser, 'wanted someone to cover the common law approach to international law but was also young and keen enough to find legal reasons for doing what should be done rather than searching why, in law, it could not be done'. That is a tribute to my father's spirit from that first day in the ILO in 1931 to his last day in the ILO in Rome on 9 October 1973. Besides his gargantuan laughter and insatiable appetite for work, he also had a raw determination.

A number of years ago, I was invited to dinner with my wife to Judge Schwebel's house in Washington. My wife never knew my father. So half-way through dinner, I asked Judge Schwebel to share some of his best Wilfred Jenks stories so Nancy could get a glimpse of him. Judge Schwebel was smiling broadly when he described my father walking into a lecture hall, I think it was in the Netherlands and, lo and behold, there was one person in the audience. Completely undeterred, my father gave his entire speech and took questions – the essence of a pure and determined work ethic!

In the early days my father was a protagonist in what I will refer to as the 'post' generation – post global war; post depression; post tariffs; post Nazism and Nuremberg.

He must have been one of the very few that attended and participated in some of the most critical moments in the creation of a new world order. In San Francisco for the adoption of the UN Charter. In New Hampshire for the establishment of the Bretton Woods institutions. In Philadelphia for the Philadelphia Declaration. And in Paris for the Universal Declaration of Human Rights.

The Philadelphia Declaration, for the ILO and for my father, reaffirmed the foundational principles of this new world order. Underlying these principles is social justice, the precondition for peace. This resonates as strongly today as it did in 1944 and is embodied in the Agenda 2030. The rule of law provides a necessary and essential framework for the exercise of sovereignty in a world of sovereign States. A core principle is a commitment to strengthen respect for human rights, to support norms and to express these in the form of conventions and standards. Finally is the need to operationalize these conventions and standards at the country level. In 1938, my father led one of the very first technical cooperation missions to revise Venezuela's draft labour act. My father made major contributions in all of these spheres. The issues are as relevant today as they were 75 years ago.

A particular issue that my father wrote about in some detail, and indeed influenced, was the relationship between the agencies and the newly constituted UN. His position was clear. On the one side there were profound reasons for a form of decentralized functionalism. David Mitrany's vision of a system constructed around the concept of building blocks for peace led to very resilient foundations embedded in multiple constituencies. The survival and resilience of the system over so many decades surely owes much to the original design.

On the other hand, it was important to engage in full cooperation with the UN system as a whole. Only cooperation would secure effective international action in the social and economic spheres. The debate around this subject which persists today requires a balanced approach. The base of the system needs to be pluralistic. The fact that the system is based in deeply rooted constituencies is a source of tremendous strength. But there

must also be a capacity to engage strategically on a system-wide level. The challenges of tomorrow will require at times a contribution from the UN as a whole which is greater than what each part can contribute separately.

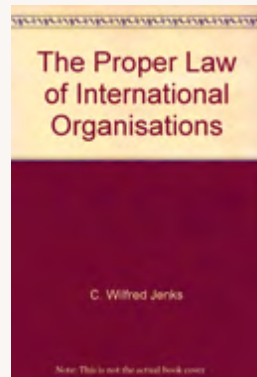
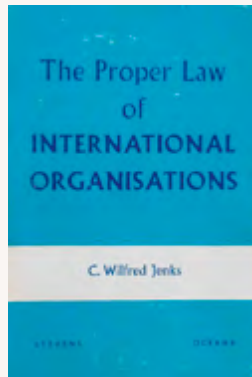
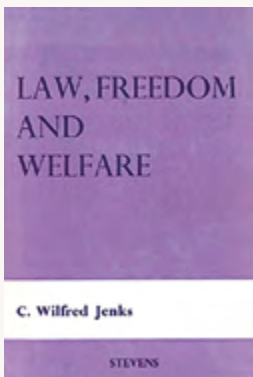
From what I understand, the ILO has participated actively in the discussions that are taking place regarding the Secretary General's proposals related to the repositioning of the United Nations Development System (UNDS). Discussions related for example to how to work together with the Resident Coordinators, how to collaborate on Common Country Analysis (CCAs) and Development Assistance Frameworks (UNDAFs), and how to finance the new arrangements, have been extensive. There appears to be a real sense of the need to collaborate in a spirit of mutual respect. Over the last 75 years, there has been no other workable option.

My father was a prolific writer. According to the biographical note put together by Jaci Eisenberg, there seem to be well over 100 publications in his name.¹ Perhaps the best well-known is the *Common Law of Mankind*.² The guiding idea of that book was the concept that international law, as a law that was primarily a law between States, was becoming superseded by an emerging concept of a common law of mankind in its earliest phase. That was the core vision.



¹ Jaci L. Eisenberg, 'Clarence Wilfred Jenks' in Bob Reinolda, Kent J. Kille and Jaci Eisenberg (eds), *Biographical Dictionary of Secretaries-General of International Organizations* <www.ru.nl/fm/iobio>.

² Clarence Wilfred Jenks, *The Common Law of Mankind* (Stevens & Sons 1958).



That vision may not be shared by all. But what we do have today is Agenda 2030, perhaps the closest we have got to a global normative framework around an agreed set of sustainable development goals. ‘Leaving no one behind’ is in some ways the moral center-piece of this Agenda and this resonates with almost every aspect of the ILO’s work. Of course ‘leaving no one behind’ intersects closely with the ILO’s focus today on the future of work. It also resonates broadly with the need to develop a strong narrative that rebuts the charge of elitism aimed at the international civil service and the need to replace that with a vision of inclusive multilateralism.

In building a new world order, for my father’s generation the driving force was the experience they had suffered. The focus was on correcting the horrors of the past and making sure they could not happen again. It has often been argued that you need a cataclysm to generate the appetite for building a new world order. Today what we face is not a cataclysm from the past but the realities we face anticipating the future. Martin Rees in his book *On the Future – Prospects for Humanity* brings this point home.³

Today, Anthropocene man gives expression to the fact that for the first time we are directly impacting on our destiny. Today, never has the gap been so big between the resources we have at our disposal, what we can do with them, and what we are actually doing. We live in a world after all in which 2,000 billionaires are valued at \$9 trillion. Today technology is advancing at breakneck speed, throwing down challenges and opportunities galore – hence the ILO’s critical work on the impact of artificial intelligence and other breakthroughs on the future of work. And on top of that, and on a point highlighted by Martin Rees, we have a very limited time to change course. Never has the limitation of time loomed so large.

Against this background, it is exciting that the Governing Body is pointing to the need for a Declaration that would equate to the significance of the Preamble of the ILO Constitution and to that of the Philadelphia Declaration. The ambition seems to be leaning heavily in the direction of anticipating the future, including of course the future of work.

³ Martin Rees, *On the Future: Prospects for Humanity* (Princeton UP 2018).

A final word on the other centennial celebration – the creation of an international civil service. My father wrote that Eric Drummond's work on the establishment of an international civil service would end up being one of the most important legacies of the League of Nations.

I think my father's work and the example he set with respect to the responsibilities of the international civil servant is surely one of his greatest legacies. I am very much struck by the complementarity in approaches on this subject between my father's work and the masterful defense of the international civil service made by Dag Hammarskjöld in his May 1961 Oxford speech.⁴ My father's work on the craftsmanship required of the international civil servant has never rung so true. The last chapter of *Common Law of Mankind* should be required reading.

On a closing note, this is the tenth anniversary of the decision of the Geneva City Council to make the 'Cimitière des Rois' my father's final resting place. It was a wonderful ceremony. The then Director General, the mayor of Geneva and the British Ambassador attended among others. On the tombstone is marked:

'Visionary international jurist dedicated to the common law of mankind'

I truly hope that my father's vision for the future will serve as an inspiration for the generations that are committing themselves to the vocation of being an international civil servant. I am delighted that this new lecture series will make a contribution to making this possible.

⁴ Dag Hammarskjöld, 'The International Civil Servant in Law and in Fact' – Lecture delivered to Congregation at Oxford University, 30 May 1961.

XI

ROUNDTABLE DISCUSSION
WHAT FUTURE HOLDS: ARE INTERNATIONAL
NORMATIVE ORGANIZATIONS
STILL RELEVANT?



Challenges and Prospects of International Normative Organizations

On the closing day of the 'ILO100 – Law for Social Justice' Conference, a roundtable discussion was organized with the participation of six eminent academics and legal practitioners to reflect on current challenges and prospects of international normative organizations. The discussion was articulated around three questions. For each question, two of the participants offered initial thoughts while the other participants acted as discussants. Excerpts from the roundtable discussion are reproduced below.

I. Do normative organizations still have an added value?

Do we still need them as fora and do we continue to value their output?

JOSÉ E. ALVAREZ – To go to the future, I think we could start with the past so I have asked the organizers to put up a picture of the Triangle Shirtwaist Factory on the screen – these are the women who worked in that factory as seamstresses. They were at the corner of Washington Place in New York City, roughly three blocks from my home. They were immigrants, most of whom could not speak English. They were all female and principally Russian, Jewish immigrants and Italian. At about 4.45 p.m. on 25 March 1911, a fire broke out after pay envelopes had been distributed on the ninth floor. Because the bosses had kept the doors locked to keep out union organizers, workers were forced to jump out of the windows; 146 people died, mostly women, some as young as 14. This disaster raises issues at the clear intersection of core ILO issues, even before the ILO was born – child labour, workers' health and safety, the equality and protection of women, migrant workers and their all too common vpractice of treating them as less than commodities and less than humans.

For people in this room, it will remind them of a far worse case – the Rana Plaza disaster in April 2013 in Bangladesh. Of course, the ILO was

around for that one, and you all know at least one response – its ability to coordinate an accord on fire and safety that now affects 1,600 factories and over 2 million workers. So one response is – yes, we need international organizations, at a very basic level, to save lives. But the Triangle Factory has had an impact on, not just industrial organization, but other things. For example, our first female Secretary of Labour, Frances Perkins, witnessed the fire. I think it influenced her future career. The Ladies Garment Workers' Union, one of the largest in the United States, saw massive growth as a result of this and it inspired art, including a musical on Broadway called *Rags* and the 1986 Walt Whitman Award for Poetry, *Fragments from the Fire* by Chris Llewellyn. Here is an excerpt from one poem in that collection:

*'The Police Commissioner
points to the Mayor who gripes at
the Governor, "I am appalled,"
who sets on the State labour Commissioner
who blames the National Fire Underwriters
who turn on the Fire Commissioner
who cites the "City Beautiful"
(finding fire escapes ugly)
who then faults the Architects
who place it on the Tenement Housing
who says failure of the Health Department
who then proclaimed conspiracy
between the Utility Companies and
the Police Commissioner'.*

One role for the ILO now and in the future is precisely to enable persons who are too close to the problem to find ways forward beyond pointing the figures of blame at each other. And so, at its best, when it stays on George Abi-Saab's sunny side of the street and goes beyond the international organization's veil, the ILO can use its comparative advantage, its tripartism, to transform those inclined to be merely passive reactors to calamity and crisis to become active compliers with binding transnational law. The ILO can bridge, as we have heard, the interests of capital and labour by drawing on the worldwide common interests of both to delocalize what appears to be local and to have direct, immediate and sometimes crucial impact on the local, where all of us live.

ALAIN PELLET – Je vais essayer de répondre à la question de façon un peu plus générale que José Alvarez. Ce matin, le professeur Klabbers y a déjà largement répondu et je partage presque complètement son point de vue, mais, comme il faut quand même que je justifie ma présence à cette tribune, je vais dire quelques mots en réponse à votre question.

Au fond, à l'exception justement du professeur Klabbers, tous les intervenants sont partis de l'idée que les organisations internationales sont de bonnes choses. Le «dissident» s'est un peu rattrapé de ses vues hétérodoxes en répondant à une question posée à la fin de son intervention qui lui a donné l'occasion de faire une déclaration d'amour aux organisations internationales tout en restant, malgré tout, critique. Qui aime bien châtie bien... Mais, paradoxalement, en dépit de cet enthousiasme consensuel en faveur du phénomène des organisations internationales, on s'est aussi beaucoup lamenté sur le bon vieux temps où les Etats se réclamaient de leur souveraineté, sinon sans limite – à mon avis la souveraineté est une notion qui est par essence limitée comme l'a fort bien dit Georges Abi-Saab – on est souverain, mais on n'est pas souverain par-dessus tout; on est souverain parmi les autres États, qui, eux aussi, sont également souverains... Donc, on a tout de même regretté ce bon vieux temps où les Etats étaient les maîtres du monde, les maîtres du temps, les maîtres des actions humaines. Et beaucoup parmi vous, paradoxalement, tout en proclamant leur affect pour les organisations internationales, ont appelé à un renouveau du rôle de l'Etat. A mon avis, ce n'est paradoxal qu'en apparence parce que, non pas toujours comme Jan Klabbers l'a dit ou a semblé le dire – et là je me sépare de lui, non pas parce que les organisations internationales sont apparues avec les Etats – les Etats sont bien plus anciens (il paraît que les premiers Etats modernes ont été les cantons suisses au XII^e siècle) – mais parce que les organisations internationales sont d'abord des organisations *intergouvernementales*. On ferait peut-être mieux d'ailleurs de dire *interétatiques*. Je persiste à penser que les gouvernements sont les représentants de l'intérêt commun – je suis un peu vieux jeu à cet égard – et que, à partir du moment où les organisations internationales réussissent à être des centres de partage de ces intérêts supérieurs des peuples, une complémentarité entre organisations internationales et Etats s'impose. Et ceci est plus vrai que jamais durant la triste période où nous sommes, durant laquelle les Trump et les Bolsonaro prétendent représenter l'intérêt commun alors qu'ils représentent les intérêts d'une petite ploutocratie. Ceci dit, on n'a jamais trouvé mieux et, à moins d'arriver à une

sorte d'Etat mondial, ce qui me paraît un peu effrayant, il faut se contenter de ce que l'on a. Je pense que, s'il faut réformer quelque chose, ce sont plutôt les Etats que les organisations internationales.

On s'est aussi beaucoup lamenté, pendant toute la conférence, sur le fait que les organisations internationales ne représentaient que les gouvernements. Il y manque la société civile, il y manque les ONG, il y manque les peuples, il y manque les opinions publiques, tout ce que vous voulez. Je pense que les choses sont ce qu'elles sont et qu'on peut espérer que les organisations internationales ne soient pas autistes, qu'elles ne soient pas fermées à d'autres expressions que celles des Etats; mais il n'en reste pas moins que l'interétatisme est précieux; il permet rechercher ce qui est commun aux intérêts nationaux.

Mais, bien sûr, il y a une exception, la brillante exception que vous avez tous encensée, c'est l'OIT. Quand on célèbre un anniversaire, on est toujours positif. Mais cet enthousiasme est-il tout à fait justifié? Je pense qu'il y a de bonnes raisons de dire «*Happy Birthday ILO*». On a évidemment eu raison de souligner que l'OIT sortait justement du pur interétatisme; mais je pense que cela pose quand même une question. En 1914, on vivait dans un monde qui présentait bien sûr ses propres spécificités. Et l'on a construit l'OIT avec en vision ce monde d'avant la Première Guerre mondiale et d'avant le bolchévisme. On y a fait entrer les syndicats qui étaient une force de contestation. Et puis, patatras! Les Bolchéviques ont complètement étouffé les syndicats qui sont devenus un relais du gouvernement soviétique et puis, dans la foulée, dans les pays à peu près démocratiques comme en France, on a assisté à un éclatement syndical. Il n'y a plus de représentativité des syndicats ou elle devient très douteuse.

Donc, à mon avis, dès le départ, le tripartisme dont vous vous gargarisez tous, qui vous semble la meilleure chose du monde devient un trompe-l'œil: les syndicats sont-ils véritablement représentatifs, pour ne rien dire des syndicats de patrons? On a dit, à juste titre, que l'Organisation ne devrait pas s'enfermer dans un superbe isolement mais je ne suis pas certain que le tripartisme soit forcément un modèle indiscutable. Un autre problème se retrouve dans les relations de l'OIT avec les organes de droits de l'homme. Je pense qu'ici encore on a eu raison de souligner – je dis cela comme un citoyen du monde, pas spécialement en tant que juriste – les institutions de droits de l'homme sont populaires, mais qu'en revanche l'OIT n'est

pas particulièrement populaire. Je ne pense pas que l'homme de la rue ait beaucoup d'intérêt pour l'OIT, ni même sache qu'elle existe. Et cela est un vrai problème qu'affronte cette Organisation.

MIGUEL DE SERPA SOARES – The anniversary of the ILO this year, the 75th anniversary of the United Nations next year, and yes, we are still relevant. I wanted to make a general introduction because it seems that the general narrative nowadays is all doom and gloom and that of a multilateralism in crisis. I do not think the crisis is as real as we describe it. It is also true, however, that we are a little bit in a hangover period. We are coming from the nineties and this global optimism period where anything seemed possible; some people called it obtuse optimism. This seems to have lasted since 1989, the end of the Cold War, maybe to the financial crisis of 2008. This narrative of doom and gloom seems to be everywhere nowadays. Yet, things are moving, things are more difficult nowadays but things are moving. It is probably my colleagues – and I see Professor Chinkin – who work on reproductive and health rights of women and young girls who have more difficulties nowadays as we have seen in the last session of the Commission on the Status of Women. The work is not over.

Let me talk about oceans – I always have to talk about them as a good Portuguese citizen. Last year, under the auspices of the United Nations, we have started the negotiation of a new treaty called BBNJ, biodiversity beyond areas of national jurisdiction. This actually means 60 per cent of the oceans which were unregulated until now and I have the pleasure of being the Secretary-General of that inter-governmental conference. I have to share with you the pleasure of sitting in the room and seeing how seriously and how prepared member States are coming to this discussion. The discussion is really complex and touches upon issues such as genetic resources and marine protected areas. So, things are functioning, with probably more difficulties but better times will come. I am more concerned not as an international civil servant but as a global citizen, that we are probably not focusing on the most pressing issues, like climate change and migration. This is my personal frustration. But I do not share this doom and gloom narrative.

FRANCIS MAUPAIN – Je voudrais faire écho aux propos désabusés du professeur Pellet pour dire qu'à mon sens, l'avantage du tripartisme doit être analysé en termes de légitimité. Le rôle de l'Organisation et la valeur de l'activité normative de l'Organisation est de donner chair à des objectifs qui

sont énoncés dans la Constitution mais qui ne sont pas «*self-contained*». Donc, l'une des raisons d'être de l'OIT est de déterminer au fil du temps et selon le contexte le contenu exact desdits objectifs.

Ce qui est particulier à l'OIT c'est la congruence entre la structure de l'Organisation, sa fonction normative et la philosophie qui l'inspire, celle d'une justice sociale fondée sur la conciliation des intérêts en cause par l'intermédiaire de leurs représentants légitimes.

Alors, évidemment, il est possible de dire que la structure de l'OIT et la représentation des intérêts en cause ne «collent» plus exactement aux réalités du monde moderne qui, du côté de la production, sont des réalités transfrontières, et, du côté des travailleurs, des réalités qui ne sont plus seulement celles du salariat. Il me semble cependant que la Constitution offre des possibilités d'adaptation pour tenir compte de ces nouvelles réalités et qu'il ne faut pas jeter le bébé avec l'eau du bain, c'est-à-dire se priver d'une structure sans équivalent pour la légitimité qu'elle confère aux normes qui sont émises au plan universel.

LAURENCE BOISSON DE CHAZOURNES – J'ai aimé ce que José Alvarez a fait en montrant une image qui a beaucoup sensibilisé, notamment aux Etats-Unis. Le monde des organisations internationales est un produit extraordinaire du XX^e siècle grâce aux initiatives d'hommes, mais aussi de femmes, si on pense à Eleanor Roosevelt, qui ont accompagné ce mouvement de création d'organisations.

En repensant à cette architecture, je crois que la prémisse était que des bénéfices découleraient de la coopération. Cela impliquait une répartition des coûts et des avantages. À la clef, on trouvait l'idée de bénéfices issus de la coopération multilatérale et institutionnelle. Si l'on évoque l'OIT, viennent à l'esprit le dialogue et la justice sociale. Il y a encore cependant un long chemin à parcourir. Quand on pense plus généralement au système des Nations Unies et aux organisations universelles qui le composent, les dividendes des bénéfices de la coopération sont présents mais sont-ils bien répartis ? La paix est recherchée, pourtant il y a beaucoup de soubresauts; les fruits du développement ne sont pas palpables par tous. Cela crée des déceptions et des frustrations vis-à-vis du système international dont se nourrissent les mouvements populistes. Des représentants de ces mouvements sont au pouvoir, aux Etats-Unis ou au Brésil, mais aussi dans certains pays européens. Les organisations internationales peuvent être prises comme

boucs émissaires dans un contexte de repli sur soi. Cela va de pair avec un désenchantement par rapport à l'international, par rapport aux soi-disant bénéfiques issus de la coopération internationale. L'une des manifestations de cet état d'esprit est la réduction des contributions budgétaires. Les États demandent des réformes afin de réduire les coûts et in fine, leurs contributions budgétaires tout en demandant aux organisations internationales de toujours faire plus. C'est là que la force de l'image intervient. Une belle image, au sens figuré, devrait permettre de réenchanter le monde des organisations internationales.

Je suis d'accord avec l'idée de dire que ce qui a été édifié est une très bonne chose. Mais si l'on veut véritablement inscrire cet acquis dans le XXI^e siècle, il faut donner un nouveau sursaut au monde des organisations internationales. La participation de la société civile telle que Francis Maupain l'a défendue est juste, mais un grand nombre d'experts note que cela ne suffit pas. Si l'on prend le cas de l'OIT, les nouvelles formes de travail et les nouveaux rapports de travail doivent trouver leur place. Le dialogue social doit intégrer ces dimensions. Tout cela est un appel à un changement sans qu'il y ait besoin pour autant d'une catastrophe pour galvaniser les énergies.

BRUCE JENKS – The advantage of going last is you get to pick what you want to disagree with. I will disagree with my neighbour, the UN Legal Counsel. I actually think that multilateralism is being severely tested today. It is not a passing fad. It is extremely serious and could have all sorts of unintended consequences. The situation is not under control, it has these by-products of being very anti-fact, anti-empirical, giving rise to all sorts of manipulations. I have been a little bit surprised by the fact that this aspect has not featured more prominently in the last couple of days. I would have expected a much more frontal acknowledgement that we are living in a particular period right now that has a very major implication for organizations like the ILO. Now that I am retired for ten years, I am beginning to untrain myself from not saying what I think. We have to get our act together. It is a pivotal moment and it deserves serious attention.

The need for a different narrative which relates norms to a new form of inclusive multilateralism is an ambition which we should have or we should think about. There are two narratives that we need to be concerned with. One is an entity-specific narrative, which we are quite familiar with. Second, is a narrative that relates to the UN in the bigger picture which is not seen

as a threat or a minus at the entity level but rather as the proposition that in the end we want to see the UN as something more than the sum of its parts. That is a very important question, in my view, which did not get as much attention as the issue deserves.

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ERIKA DE WET – How can we make international organizations more directly relevant to the lives of people at the local level? Some of the backlash is absolutely justified because people do not want to be managed and organized by entities which are perceived as being very far away, very elitist and packed with people who very often have no idea what is going on in the local environment, organizations which have expanded their mandates in dubious ways, doing too much, lack modesty and frankly should be cut down to size. Isn't it time to be modest and accept that less is more and that in that way we can actually reach people and go back to what our core mandates are?

DRAŽEN PETROVIĆ – Why do States behave differently in different organizations, including on a normative level? There are, let's say, tensions between the WHO and the ILO on tobacco and tensions between the European Union and the ILO on detached workers. Also, is it still justified to have specialized agencies? Can tourism be regulated without dealing with labour or with the environment?

JOSÉ E. ALVAREZ – I tend to agree with Erika de Wet's provocative question. Less may indeed be more but sometimes less is less! That is, if international organizations are replaced, say by a regional organization or even a subnational body or even a Berkeley city council, are the norms they produce, such as CEDAW, going to be adopted? If international organizations were not around, somebody would still have to exist to pressure local actors to take action. I am thinking, for example, of the backlash against all these international courts, including the International Criminal Court, some of which may indeed be justified. But if the ICC is not here to exert positive complementarity to make sure that human rights prosecutions occur at the local level, who will? We should not just criticize the ICC without proposing alternatives – even if only tort suits using private international law. And we need global organizations like the ILO or the ICC to pressure local actors such as legislatures or courts to act. The secret here, I think, is

to make sure that those organizations are aware of the capacity to work with those more local organizations, to help, assist, and complement them.

ALAIN PELLET – Pourquoi les Etats se comportent-ils différemment dans les diverses organisations dont ils sont membres? D'abord parce que les organisations sont spécialisées mais aussi parce que, à l'intérieur des Etats, ce ne sont pas les mêmes personnes qui s'en occupent. Pour évoquer mes souvenirs d'ancien combattant de Conseiller juridique de l'Organisation mondiale du Tourisme, les «touristiques» étaient enthousiastes de tourisme et appuyaient volontiers les initiatives de l'Organisation. Les budgétaires, en revanche, étaient souvent beaucoup moins allants. Si on veut unifier plus efficacement le système international, les Etats auraient peut-être intérêt à essayer de mieux coordonner leurs positions à la fois dans les différentes organisations auxquelles ils participent, mais aussi à l'intérieur même de chacune d'elles.

L'autre aspect de la question est qu'il serait peut-être mieux si les organisations internationales, y compris du système des Nations Unies, voulaient bien réellement se coordonner, s'il se passait quelque chose aux séances du Conseil économique et social. Au départ, on a quand même conçu l'ECOSOC comme un lieu de concertation et de coordination. La coordination au sein du système est très ratée. C'est à mon sens une question très grave.

Le deuxième volet de ma réponse porte sur le réenchâtement que Laurence Boisson de Chazournes appelle de ses vœux. Cela fait plaisir, les gens sont contents d'entendre ce genre de chose. Mais l'exhortation ne suffit pas. L'important est de savoir comment faire. Le problème ne se pose malheureusement pas essentiellement au niveau des organisations internationales. Il se pose au niveau des Etats, à l'intérieur des Etats. Je crois à la politique, je crois que l'action dans la cité est fondamentale. Ce sont les gouvernements qui réformeront le système des Nations Unies. Et, pour cela, on a besoin de faire de la politique – de la politique dans l'État. Dès lors, je suis assez d'accord avec ce qu'a dit Erika de Wet, qui a bien décrit notamment la crise de l'Union européenne, qui est finalement peut-être encore plus dramatique que la crise au niveau mondial. Je pense qu'il faut vraiment en appeler aux citoyens plus qu'aux organisations internationales, qui ne peuvent pas se réformer elles-mêmes. Elles ne peuvent se réformer que si, à l'intérieur des Etats, on essaie de freiner ce terrible mouvement vers les populismes les plus insensés.

II. Are there any universally shared values around which States are still willing to cooperate and produce norms regulating their behaviour?

BRUCE JENKS – Let me first say a few words about these big picture issues or ‘game changers’ and then come back to the question at hand. The first issue is this attack on multilateralism; the second issue relates to the changes that are taking place in the world, that have taken place over the last ten or twenty years. One can look at the changes in the power structure and the State system, and at the relationship between public and private. If one takes a graph of major international flows and looks at it in about 1990 up to today, the graph will in 1990 have the official development assistance (ODA) line at the top and will then go through remittances, foreign direct investments and various other forms of transfers. Graphs today barely show the ODA line on the table because in order to be able to capture the other flows, one has to reduce it to the extent that it almost merges with the base-line. The growth of global GDP and the speed of technological innovation are transformational in their character.

This reality is going to open up questions about the values and the norms which are going to succeed the current arrangements. We can have extended debates about it but the idea that there can be such incredible changes and that some of the rules of the game are not going to have to change is pretty absurd.

As to whether we are still in business on norms, we should not have to ask the question. The need is there and it is just a question of who is going to perform the function. If there is a UN role in that, which there surely should be, how is that organized and which bits are working and which bits are not working?

There are three tensions which complicate matters. The first is that the commonality around values seems to be diversifying and getting more complicated and that is compared to a situation where there is more need for norms. It is a real complication. I would thus be hesitant if one were looking at this in an organization, to start all the way at the top with values. Debates around values are the most difficult and complicated.

Another tension is, in my view, the conflict between the increasing number of challenges which require a collective response on a historical scale and all the hang-ups around sovereignty which make normative exercises

very complicated. This issue is far from being resolved. Some of you may be familiar with Stewart Patrick who is with the Council on Foreign Relations and who has written a book on *'The Sovereignty Wars'*. He has done a very good analysis with a triangle with authority, autonomy and influence. He basically argues that people love talking about the battles between autonomy and authority or influence and authority. But that is actually a bit of a red herring, the real battle is whether one chooses autonomy or influence as the way to exercise authority. I believe it is quite a useful way to look at it.

Finally, it seems that there is a lot of consensus, at least in the UN, around the critical, major importance of the normative agenda for the future of the UN as a whole, let alone individual entities. All aspects of the reform that have come out over the last five years, over and over again, underline that we must really focus in and deliver on the normative agenda. The tension arises because it is not backed up with anything. I hate to say it but when looking at the funding, the allocation of funds within the system, the normative activities can be found in the 'dump' category of annual reports. It is not peace-keeping, it is not operational, so it was put into the 'others' bucket. The most important asset that the system has cannot be captured and measured when put in the 'dump' category. There is something wrong at the heart of it.

MIGUEL DE SERPA SOARES – I wanted to share with the audience that there is a lot of cooperation among legal advisers of international organizations. We meet annually. Actually our meeting with all legal advisers of specialized agencies is going to take place in a few weeks in early June and our agendas tend to be very focused. So we do not need to discuss the future of the world and other metaphysical questions. We tend to focus on what is troubling us. High on the next agenda are, for instance, issues of data protection, how to react to the entering into force of the new European Union data protection regulation. Cooperation is alive and kicking between us and it is very positive. When we look back, ten years after the foundation of the United Nations, we were already writing books on the performance of the United Nations. This, again, is positive, it is healthy. Our institutions should never lose this capacity of critical self-analysis. What is our action worth? What are we doing well? What should we be doing better?

Now, on the values, one of the main values or main principles in the UN Charter is the peaceful settlement of disputes – war is wrong, conflict

is wrong, peace is good, peaceful settlement of disputes is good. Never has the International Court of Justice been so active in this field. In the last ten years, the Court had an important increase in the number of cases, with currently 16 pending cases. This is fantastic! It is a functional institution.

As regards the production of norms, one area that has been very active lately is international trade law. There is a considerable production of soft law norms. And I have to confess that when I joined the United Nations as a good continental lawyer educated in the German positivist tradition, I had a negative prejudice for soft law. I have changed my mind. There is an immense production of norms in that field. Not everything is doom and gloom. Parts of the system are actually functioning. However, parts of the system are not functioning that well and we have to distinguish what is structural from what is due to the mere circumstances of the moment. A structural aspect may be the general backlash against human rights and why is that? That is what we have to understand and explain, because there may be new global players in the international arena that do not share the same views and the same principles. Now that we have made the diagnosis, how do we deal with that? That is the important question. How are we going to work with all these new players? Are we going to bring them to this system of shared values? There is, I think, something which is important and I wanted to pick on a comment of Professor Klabbers which I find very interesting. If you allow me, I want to be a little provocative, not too much because I am the UN Legal Counsel so I have to remain institutional and that answers Professor De Wet's comment also.

The main danger I see, and I see it in my practice, is to avoid this narrative that States are bad and international organizations are good. For me that is the main problem and I have worked with many different bureaucracies and international bureaucracies. I spent ten years of my life in the European Union, I am now in the United Nations and this idea that we are good and member States are bad is a very dangerous one. Professor Klabbers used an almost religious terminology – salvation. This is precisely the problem; when international civil servants start behaving like high priests interested in the salvation of mankind. That is when it becomes dangerous. This is common. For instance, some of the backlash we have now against human rights comes from this high priest mentality and that is where we have to be careful. And as Professor De Wet

suggested, we have to focus on the core mandates. What are those? Who defines our core mandates? Again, we cannot just pass States, we have to work with States.

There are ways that we can make the process more inclusive, namely by the participation of civil society. That being said, another myth is that NGOs are necessarily good as opposed to States who are necessarily bad. Some NGOs are very good, some others not that much. We need to make the process more inclusive and nowadays, there are no inter-developmental conferences, any multilateral process, without NGOs. In this BBNJ process I referred to, half of the room is filled with NGOs. This is part of the current landscape.

JOSÉ E. ALVAREZ – I completely agree that we have to distinguish the attack on the players versus the attack on the values. The human rights values underlying labour rights are worth defending. As a Catholic, those values include for me free will or what Amartya Sen saw as the respect owed to persons' capacity to make life choices as individuals or as members of groups. There is also agreement, at a basic level, that the values stated in the Universal Declaration, including the first half and the second half, to the extent they protect dignity in a 'Jeremy Waldron sense' and life itself are something that people value and institutions should promote. Labour rights, like human rights, in other words, protect both human autonomy and dignity. This has been seen in the West as a division – I believe this is wrong – between the negative first half of the Universal Declaration versus the more positive second half. The truth is both of them require action, including financial resources by States and by others to make sure that both dignity and individual and group autonomy, free will, are respected so that people can exercise what defines them as a species – choice. With all due respect to those who think animals are no different to humans, that is what makes us different – the capacity to think clearly about our own choices and to exercise those choices to become more fully human.

FRANCIS MAUPAIN – Juste quelques commentaires au sujet des valeurs universelles qui sont inscrites dans les constitutions et le fait que certaines peuvent être remises en cause. Cela soulève la question pour une Organisation aussi vieille que l'OIT de dispositions de sa Constitution qui ne sont plus nécessairement à l'ordre du jour. Vous trouvez des références aux femmes, par exemple, qui sont plutôt condescendantes et qui ne seraient

plus du tout d'actualité. Mais la question pour l'OIT est justement de faire en sorte de s'adapter, sans nécessairement amender sa Constitution – au risque de mettre en péril la Déclaration de Philadelphie et les valeurs très progressistes qui y sont inscrites. Il est intéressant de voir les autres solutions qu'elle a su trouver pour faire une sélection dans les valeurs et principes qui sont inscrits dans la Constitution et la Déclaration de Philadelphie, de façon à mettre en avant celles qui correspondent le mieux aux attentes universelles du moment.

Les deux déclarations qui ont été adoptées en 1998 et en 2008 sont à cet égard des exemples d'adaptation de la Constitution sans amendement constitutionnel; elles introduisent des idées qui sont très importantes, par exemple sur le caractère fondamental de certaines conventions qui sont plus égales que d'autres, bien qu'elles soient toutes des traités. Il en va de même pour la Déclaration de 2008. A ce sujet, je me permets de corriger un point qui avait été fait par le professeur Bonvin avant-hier; il a critiqué la Déclaration de 1998 parce qu'elle semblait introduire la supériorité des considérations de libéralisation des échanges sur la protection des droits fondamentaux. En fait, ce n'est pas la lecture qui s'impose sans équivoque à la Déclaration de 1998 et, au surplus l'équivoque si elle existe a été corrigée par la Déclaration de 2008. Je vous recommande de les lire.

LAURENCE BOISSON DE CHAZOURNES – Je voudrais faire deux observations sur les valeurs et les normes qui portent ces dernières. Au cours du XX^e siècle, l'OIT a favorisé et porté le travail de l'émancipation sociale dans nos sociétés, notamment en défendant le rôle des syndicats et de la liberté d'association. Quant aux Nations Unies, elles ont favorisé l'émancipation politique à partir de la fin des années 1950 et permis l'émergence d'un grand nombre d'États.

Il y a à ce propos une question qui m'a toujours intriguée. Les États membres de l'OIT ont adopté un amendement à la Constitution pour changer la composition du Conseil d'administration afin de permettre une véritable universalisation du processus de décision. Que ce ne soit pas les dix pays les plus industrialisés qui aient toujours un siège, mais qu'il y ait une répartition régionale. Cet amendement a été adopté mais n'est jamais entré en vigueur. N'est-il pas temps que les membres de l'OIT mettent derrière eux le XX^e siècle et qu'ils amorcent le XXI^e siècle dans une nouvelle forme d'universalité ?

La deuxième observation – cela est ressorti de beaucoup de discussions – est que l'une des valeurs fondamentales à l'heure actuelle est l'égalité d'accès et la non-discrimination dans toutes leurs formes, pour l'individu seul mais aussi pour l'individu en groupe. Au sein du système des Nations Unies, l'OIT devrait être le siège de l'expertise sur la non-discrimination. Dans toutes nos sociétés, il y a des problèmes de discrimination. Il y a besoin d'un forum pour favoriser l'égalité d'accès et lutter contre les discriminations.

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CLEOPATRA DOUMBIA-HENRY – I think that something that needs to come out of this meeting before it ends, is how do we look at the developing countries, and I have the feeling that in the past three days we have not really looked at how the multilateral agencies – all of these UN institutions with such considerable mandates – are working together to better support those in need of social justice. We are looking, of course, from the legal framework, but again that is where the law becomes important, law in action and law in practice. But I feel that the host of our major speakers have come from the developed world, not the developing world. Do not forget all of these treaties that we have all put in place by all of the different institutions, they need to be ratified and implemented in law and in practice in all countries, and the developing world is far behind. They are the biggest gap in implementation of our international legal framework and so my question is to us with law for social justice, which we all want to deliver together around a theme where all the UN agencies can have common ground, how can we better work to ensure that we are able to help build the capacity of developing countries? And I know the ILO is strong in technical cooperation and has a lot of ILO offices around the world but again not working together around themes that cross over, whether it is the human rights' part or the social rights' part. One of the big gaps that we cannot continue to miss is how, as UN agencies together with our various mandates, we all come together on the ground and help strengthen, whether it is democracy, human rights, or any other objective UN agencies aim at. Next year the UN will be 75, the IMO 70. How are we all going to do with incredible anniversaries, with such important mandates in terms of being international organizations?

BRUCE JENKS – I will just take one little piece of the questions raised: the UN system getting its act together at the country level and really being able to push together. I am not here to make the case for anybody, I left that ten years ago, but to be fair, there has just been a major reform led by the Secretary-General for a new set of arrangements at the country level. The system is being changed so that there is a senior official reporting to the Deputy Secretary-General. The issue of the specific authorities and how they relate to specific agencies is always going to be complicated, but the idea of pulling everybody together, having a clear Resident Coordinator reporting to the Office of the Secretary-General and the Deputy Secretary-General and the idea of teams that would carry a coherent message, has been a fairly major part of the reform. Some people love it; some people hate it. That is not the issue. The point is that there has been a significant engagement in response to exactly the kind of concern that have been raised here.

MIGUEL DE SERPA SOARES – The reference to the development policy reform is very important. I wanted to say also that it is normal that we, as international lawyers feel so in love with law and international law. That is not, however, the solution for everything. And let's not look at the law as the solution for all these extremely complex issues that we are dealing with. We have to work together in teams with other colleagues with other expertise. Now, in my not obtuse optimist's narrative, I also mention that although we have some positive stories going on, I am personally very concerned about the three key issues on which we should focus for the next 50 years, namely climate change, migration and, of course, the 2030 Agenda. What the United Nations can do is to put forward ideas, policy objectives and try to rally States around those, particularly in the 2030 Agenda. The focus is on development; do not leave anyone behind and how we can formulate policies in a sufficiently exact way with targets that would allow us to address that issue.

On Ms Doumbia-Henry's question, the answer is simple. We just have to do better, we have to self-improve constantly, and do this critical self-analysis to which I referred earlier and never stay happy. We have an example together with UN-Oceans. UN-Oceans is a platform of 23 UN entities, specialized agencies, funds and programmes. We try to select topics, specific topics where we should put our efforts together in order to address a specific issue, illegal fisheries that are extremely damaging for the developing world. So how can we bring FAO with us, with the World Maritime University,

how can we address this together? These types of informal cooperation platforms are very positive and provide an answer, that of self-improvement and sharing of experiences; not for the sake of any metaphysical debates but with a view to resolving specific policy problems.

JOSÉ ALVAREZ – Much as I was thrilled to be invited to this illustrious panel with some of my heroes and heroines, it is a very northern panel and I would gladly have stepped down in favour of others. In fact, three of us could have stepped down given the proportion of the world that is immiserated and not reached by many of the ILO's goals. The question posed reminds us that States are radically unequal in fact if not in law and that inequality is replicated in organizations like the ILO. When the international community wants to take about social justice or inequality powerful States often manage to put the conversation in the World Bank or the IMF. One of the goals of the ILO over its next 100 years needs to be to resist such forms of hegemonic forum selection. The ILO should intrude when it happens. If it is not happy with, for example, the World Bank's approach to decent work, it needs to not only express a different view but do something about it. It needs to jump in aggressively and hold the Bank's feet to the fire.

III. Is it likely that the traditional methods for creating and supervising norms may change in the future and which factors might spark change?

LAURENCE BOISSON DE CHAZOURNES – Réfléchissant à cette question, j'ai pensé à un gâteau français qui s'appelle le millefeuille. Cela m'a permis de réaliser comment le droit international avait été façonné au cours du XX^e siècle? C'est par des superpositions de conventions internationales ou d'instruments dits de soft law sur lesquels je reviendrai. C'est une approche importante parce que cela a permis de raffermir la règle de droit international. Un langage universel a été élaboré, celui du droit international commun à toutes les régions du monde. En cela, je pense que ce millefeuille est assez réussi.

Ce qu'a fait le BIT, mais aussi semble-t-il, l'OCDE, a été d'un peu rabaisser ce millefeuille, de supprimer les conventions endormies, de resserrer les liens entre les instruments. Cela a été une entreprise très intéressante. Maintenant, la question est celle de savoir si cette manière de faire

du droit en négociant de nouvelles conventions est toujours possible. Sans doute. Mais à mon avis, en moins grand nombre en raison d'un phénomène de *'treaty fatigue'*. Il existe peu d'appétit pour les conventions universelles, sauf pour certains sujets. Les instruments de ce qu'on appelle le droit mou, la soft law, constituent un palliatif. Ce sont des instruments importants car ils permettent la sédimentation des acquis, de forger la volonté et aident à atteindre un consensus. Toutefois, ce que l'on voit maintenant c'est que même ce droit mou est décrié par nos sociétés. Je pense à l'exemple du Pacte de Marrakech sur les migrations. Ce qui s'est passé a été déconcertant parce que, finalement, ce pacte n'était qu'une manière de reprendre les grands principes existants. Mais il y a eu des contestations très fortes. Des représentants gouvernementaux ne se sont pas rendus à la conférence de Marrakech. Qui plus est, à l'heure actuelle, les représentants se méfient du droit mou et veulent s'assurer de ne pas être engagés sans leur consentement. Il y a une réflexion à mener sur la façon de faire du droit international au plan universel.

Ma deuxième réflexion a trait au contrôle. L'OIT est une organisation exemplaire par ses mécanismes de contrôle. Ainsi, les commissions d'enquête sont un phénomène très particulier dans le monde des organisations internationales. Il en est issu des résultats significatifs. Les autres mécanismes de contrôle de l'OIT attirent l'attention. Même s'il y a des lenteurs, cela ne doit en rien porter atteinte au crédit de l'OIT. Ce sont des questions qui peuvent se régler en interne.

Je voudrais également me pencher sur un autre problème. Aux côtés de l'universel et du peu d'appétit pour l'universel – il y en aura de moins en moins – on voit poindre un phénomène de bilatéralisation. On a très peu parlé par exemple de l'initiative des routes de la soie (*Belt Road Initiative*). C'est une approche nouvelle, à la fois unilatérale, bilatérale et plurilatérale. Elle est en train de changer les rapports entre les pays concernés. Quels sont les contre-pouvoirs à cette approche ? Evoquons aussi les accords de libre-échange. Ils florissent du fait notamment des blocages que connaît à l'heure actuelle l'Organisation mondiale du commerce. Mais qui surveille ces accords de libre-échange, notamment lorsqu'ils incluent des chapitres sociaux sur le droit du travail ? Il y a un nouveau rôle à jouer pour l'Organisation internationale du Travail. Elle doit être proactive, elle doit sortir de son cadre régulier d'activités et porter sa voix auprès de toutes ces nouvelles initiatives. Il y a là, je pense, une régionalisation plus forte à instaurer au sein

de l'OIT. La dimension régionale n'est pas assez développée. Elle donnerait la possibilité à l'Organisation d'être plus présente auprès de ces différents acteurs. La Chine – on en a très peu parlé – est devenue un acteur majeur à l'échelle économique, avec lequel il faut converser.

Ma dernière réflexion a trait à la régulation des changements climatiques. L'Accord de Paris est une nouvelle manière de faire du droit international. Il y a là un mélange de droit dur et de droit mou. Les normes s'adressent aux États ainsi qu'à tous les autres acteurs de la communauté internationale, à la fois aux niveaux national, régional et universel. C'est aussi un accord qui a mis en place une stratégie de transparence aux fins de persuasion et de confiance. Les premières communications de réduction en 2020 constitueront un test important. Il s'agit d'un exemple à explorer, peut-être à affiner mais qui pourrait nous permettre de nous engager plus facilement à l'échelon universel.

FRANCIS MAUPAIN – Je voudrais commencer à apporter une réponse en citant trois articles récents, qui ont été publiés spécifiquement au sujet de la pérennité des pratiques de l'OIT, en particulier en matière de supervision. Je citerai d'abord le professeur Klabbers, qui a écrit récemment un article s'intitulant 'Marginalized International Organizations: Three Hypotheses concerning the ILO'. Le deuxième article tout à fait récent est 'The ILO Stumbling towards its Centenary Anniversary', qui a été écrit par un ancien président du Comité de la liberté syndicale. Et le troisième à prétention scientifique, qui a été écrit par un groupe d'auteurs, s'intitule 'The impact of ILO conventions on worker rights: Are empty promises worse than no promises?' C'est un article qui s'efforce de démontrer que la ratification n'est pas nécessairement une bonne chose parce qu'elle sert souvent des buts de relations publiques et qu'elle peut cacher des réalités tout à fait différentes.

Toutes ces réactions marquent, à mon avis, une désillusion excessive qui est la rançon de l'excès d'expectatives que l'on a placées dans le système de l'OIT auparavant. Ces expectatives ont été entretenues, d'une part, par une certaine vision fonctionnaliste de «*task expansion*» et de «*spillover*» et, d'autre part, un alignement de planètes qui était absolument exceptionnel, c'est-à-dire d'un côté la guerre froide à l'Est et de l'autre, à l'Ouest, le modèle fordiste.

Si toutes ces critiques sont exagérées – et des efforts sont en cours pour adapter certains aspects de ces procédures – elles n'en invitent pas moins

de manière très utile à repenser le système de façon plus approfondie pour le centenaire. Cet effort de réflexion approfondie doit tourner autour de trois aspects: premièrement, retrouver au-delà des pratiques qui se sont développées de manière un peu hémiplegique les deux fonctions que l'action normative est censée remplir et qui sont d'une importance absolument fondamentale; deuxièmement, redécouvrir la richesse du potentiel de l'OIT pour remplir ces deux fonctions de manière plus intégrée; et troisièmement, réveiller les volontés tripartites pour procéder aux ajustements nécessaires.

En ce qui concerne la première question, il convient de souligner que l'action normative s'est attachée principalement à ce que j'appelle la fonction magistérielle, c'est-à-dire à traduire les objectifs de l'Organisation en normes concrètes. C'est quelque chose d'extrêmement important et cela le deviendra de plus en plus sans doute, avec les mutations qu'on nous annonce dans le monde telles que décrites tant dans le rapport de la Banque mondiale, dont on a parlé, que dans le rapport de la Commission mondiale l'OIT. Mais, à côté de cette fonction extrêmement importante, il y en a une deuxième qui est restée dans l'ombre et qui est celle que j'appelle la fonction de régulation. C'est la fonction qui résulte du préambule de la Constitution selon lequel la non-adoption par une nation quelconque d'un régime de travail réellement humain fait obstacle aux efforts des autres. Cette fonction de régulation signifie donc que l'OIT est censée s'assurer que l'interdépendance globale ne s'exerce pas aux dépens du progrès social mais au contraire qu'elle le serve. Et cette fonction est, à mon avis, devenue d'une importance plus que jamais cruciale en raison précisément du développement de l'interdépendance globale dans tous les domaines, y compris le domaine environnemental. Cette importance est illustrée en particulier par les mécontentements que l'on observe maintenant dans les urnes et dans les rues au sujet de la distribution inégale des bénéfices et des contraintes de cette interdépendance globale, y compris sur le plan environnemental. Et il s'avère que l'OIT est l'Organisation la mieux placée au niveau universel pour traiter de cette question si on considère, d'une part, l'échec des tentatives pour inscrire des clauses sociales dans les accords de l'OMC et, d'autre part, le fait que si le Programme 2030 des ODD dont il a été beaucoup question parle effectivement de la réduction des inégalités, il fait l'impasse sur le concept de justice sociale. Or, ce concept, contrairement à ce que disait le professeur Alston hier, me semble particulièrement pertinent pour l'avenir.

La question est alors de savoir justement que faire? Il s'agit d'une part de poursuivre le travail de mise à jour de son corpus normatif pour répondre aux mutations du monde du travail et d'autre part de réactiver cette fonction de régulation, c'est-à-dire répondre aux aspirations pour une meilleure redistribution des bénéfices et des contraintes de l'interdépendance globale pour répondre au malaise qui peut être constaté dans beaucoup de pays.

Cela paraît être une équation impossible. Il y a pourtant trois pistes concrètes à explorer. La première est de revoir les pratiques actuelles pour rétablir – conformément à la lettre et à l'esprit de la Constitution – l'équilibre entre l'attention qui est portée à la supervision des Etats qui ont ratifié et, d'autre part, l'attention qui devrait être portée à l'impact général des instruments sur les législations et les réalités des Membres. Nous avons discuté de cela hier, ou avant-hier, de la nécessité de mesurer l'impact des instruments sur l'ensemble des pays, qu'ils aient été ratifiés ou qu'ils n'aient pas été ratifiés pour essayer d'en augmenter l'impact universel.

Une deuxième piste serait de décloisonner la mise en œuvre des objectifs de l'OIT. La fonction normative de l'OIT a procédé jusqu'ici par silo, par juxtaposition de normes individuelles pour promouvoir des objectifs individuels. Cela ne donne pas de cadre satisfaisant aux Etats, d'une part, pour combiner d'une manière optimale la poursuite de ces objectifs et, d'autre part, essayer de répondre au malaise lié à la redistribution inéquitable des bienfaits et des contraintes de la mondialisation entre tous les travailleurs, comme le prévoit d'ailleurs la Déclaration de Philadelphie de manière très spécifique. Et cela pourrait faire l'objet d'un instrument normatif, un instrument de politique sociale pour l'interdépendance économique globale, qui pourrait être un instrument promotionnel.

Une troisième piste, qui est aussi une piste extrêmement concrète et dont il a été beaucoup question ce matin, est à nouveau celle du décloisonnement. Après le décloisonnement des objectifs spécifiques de l'OIT, il faut s'intéresser au décloisonnement des objectifs de l'OIT par rapport aux objectifs des autres organisations. La question s'est déjà posée dans le passé sous le titre «cohérence». Mais il s'agit maintenant de voir concrètement de quelle manière l'OIT pourrait aider à la promouvoir. La Déclaration de Philadelphie lui donne un mandat qui est conçu en termes impératifs et dont Jenks avait dit à l'époque qu'il était «binding upon the ILO, binding on its members and binding on the UN as a statement of its mandate».

Mais, évidemment, ce n'est pas de cette façon-là qu'il est possible de le mettre en œuvre dans le contexte actuel. C'est plutôt par la persuasion, et l'OIT a à cet égard de quoi exercer une telle persuasion. Elle dispose en particulier de ce que Juan Somavia avait appelé le parlement universel de l'économie réelle. Une des réponses possibles à ce problème de cohérence serait donc tout simplement d'utiliser de façon un peu plus efficace ce parlement universel pour discuter de questions d'intérêt commun, non pas pour imposer quoi que ce soit, mais pour échanger de manière ouverte. Les questions ne manquent pas. On en a cité ici. Mais je voudrais pour terminer donner deux exemples très évidents. Le premier concerne les rapports qui ont été produits presque simultanément sur l'avenir du travail par la Banque mondiale et l'OIT. Il est pessimiste de se demander pourquoi ils ne pourraient pas faire l'objet d'un débat simultané entre les mandants tripartites de l'OIT. Un autre exemple, ce sont les travaux du FMI, qui ont traité récemment d'un sujet extrêmement pertinent pour l'OIT, celui du déclin relatif de la rétribution du travail par rapport à la rétribution du capital. Il pourrait évidemment aussi faire l'objet d'une discussion tripartite au sein de la Conférence internationale du Travail.

Donc le potentiel existe. La dernière question est évidemment celle de la volonté de le mettre en œuvre. Le tripartisme est un avantage comparatif immense du point de vue de la légitimité, mais il n'est pas sans poser quelques petits problèmes pratiques du point de vue de la prise de décision. A cet égard, il y a une espèce de loi d'airain à l'OIT. Dans toute l'expérience récente, on peut trouver de multiples exemples montrant que, finalement, la volonté tripartite ne peut se réaliser que sous la pression extérieure. Je crois que même Janice Bellace a rappelé un exemple à propos de la convention n° 87, mais il y en a beaucoup d'autres. D'où l'importance de cette réunion parce que l'une des clés de l'avenir c'est justement la pression qui peut s'exercer de l'extérieur à l'intérieur, peut-être pour aider les mandants tripartites à progresser là où ils n'arrivent pas à le faire volontairement. Sinon, l'autre solution qui apparaîtra, c'est ce qui a toujours été le cas pour l'OIT, c'est qu'il faudra une crise pour que tout d'un coup on se dise: «Heureusement, l'OIT est là, on va se tourner vers elle». Ce n'est pas nécessairement la solution que l'on souhaite.

STEVE CHARNOVITZ – There is a gentlemen here, I guess he is middle-aged but he is young at heart, who has not said anything today and that is the bust of Albert Thomas by the door, and he was a man of action. He was tireless in communicating to the people around the world the mission of the ILO and what the ILO has accomplished. There are a couple of surprising things to me about this conference. One was Professor Alston who told us that, despite our title of law for social justice, social justice was not a great motto, that it did not resonate in the street, and Professor Pellet has told us today that the ILO is not popular. And Professor Jenks has told us – quite rightly I think – that multilateralism is being tested. Professor Boisson de Chazournes has talked about the need for re-enchantment with international organizations. I am thus wondering if the panel has some concrete suggestions for how the ILO can better communicate. If it is really true that the ILO is not popular, how can the ILO better communicate to the public around the world on what it has accomplished? I would specifically ask Professor Alvarez to reflect on the American Society of International Law ‘100 Ways’ project. You have had some various thoughts on that project but this was a project where the American Society tried to communicate 100 ways in which international law has shaped our lives, and they were all sort of positive ways in which it has shaped our lives. Can the ILO do better to explain to people 100 ways in which the ILO has improved our lives?

ANNE TREBILCOCK – I was very pleased that Mr de Serpa Soares had mentioned the meetings of the UN legal advisers. It is an extremely valuable safe space in which to have an exchange, a frank exchange around a lot of operational issues, occasionally a hot-button political issue. One of the specialized agencies that participates in that round is, of course, the IMF and in light of the discussion that took place particularly this morning, if there were to be a cooperation agreement between the ILO and the IMF, what do you think it should contain, keeping in mind, obviously, the two different but often intersecting mandates?

JOSÉ E. ALVAREZ – One does not spit into the birthday cake, especially in the birthday room, so I have refrained. But the ‘100 Ways’ if you recall, happened during my presidency and my presidential speech included a distribution of the ‘50 Ways International Law Hurts Our Lives’ because I think one has to be self-critical in order to advance the ball. Of course you have to change, that’s what my doctor says every day, you have to move

otherwise you get every malady and you die. We may have to invent new international organizations but they do not have to be reinvented in the same exact way. If we are talking about advancing what the ILO has accomplished – not just for its 100th anniversary but simply to educate a populous public – it would help to have new generations revise the ILO website. That is, do videos, do tweeting, do social media, all the things I cannot do because I am too old. It is not a viewer-friendly website. Much could be done to ensure that the ILO's propaganda is better than what currently exists. I looked up, I believe, the Committee on Freedom of Association's webpage. The first thing you hit is a 1994 success story about the release of an Indonesian labour organizer – 1994, really?

BRUCE JENKS – I would just like to stress again the importance of communication. The moment that we are in and the need for a much more imaginative messaging, much more aggressive, much more confident must be taken seriously. The messaging at the entity level and the messaging with the UN as a whole is delicate but very important. For example, when all the legal advisers meet together, to what extent is this the right forum where there could be a discussion about what could be a system response to the current crisis of multilateralism? There must be ways of showing the UN as a whole without in any way detracting from the specificities of each organization and the contribution of each organization and the independent nature of each organization.

ALAIN PELLET – Je vais finir par une note un peu pessimiste. On a dit que les valeurs n'étaient pas les normes. C'est possible. Mais elles sont derrière les normes. A l'heure actuelle, nous sommes dans une période de grande crise pas seulement des organisations internationales mais de tout le droit international tel qu'on le connaissait, pas seulement entre les Etats, mais au départ toujours entre les Etats. Cette crise tient au fait qu'il n'y a pas vraiment de valeurs communes. Entre les valeurs de M. Trump, de M. Xi et les miennes, il y a un monde. Je partage sans doute à peu près les valeurs de tout le monde ici, mais ce sont des valeurs qui sont extraordinairement contestées et qui sont probablement minoritaires, en tout cas dont on ne sait pas si elles sont majoritaires. Ce n'est pas à la mode d'être marxisant ou marxiste mais le droit est décidément une superstructure. Si on n'a pas derrière des rapports de force qui permettraient de revenir à du bon vieux droit tel qu'on le rêve ou à un nouveau «bon droit», on entretient la crise.

Ceci dit, la situation est grave mais n'est pas complètement désespérée. Monsieur Jenks nous a parlé des trois étapes:

- 1919: On a inventé un nouveau droit international, mais il a fallu une guerre mondiale pour cela;
- 1945: On a inventé un nouveau droit international, mais il a fallu une autre guerre mondiale pour cela;
- 1990: La chute du mur. On a cru à un nouveau droit international, au bénéfice d'une très grave crise du système.

Je n'espère bien sûr pas qu'on s'achemine vers une troisième guerre mondiale ni même vers un bouleversement radical. Mais, à l'heure actuelle, les juristes doivent être modestes et c'est pour cela que je suis un absolu partisan du droit souple, parce que c'est ce qu'il y a de moins irréaliste, c'est ce qu'il y a de plus possible.

Il a été dit qu'il n'y avait pas eu beaucoup de bouleversements en ce qui concerne le contrôle. Ce n'est pas mon avis. Je pense que, justement, après 1990, l'OIT – qui a été un grand précurseur – a fait des petits, et que le contrôle du droit souple a fait des progrès. Et on peut se dire: «Qu'est-ce qui est le plus efficace? Une résolution ou une recommandation d'organisation internationale qui est suivie par un organe de contrôle ou un traité qu'on ratifie, qu'on signe et qui est obligatoire et que personne ne respecte?» Le droit mou n'est pas une mauvaise chose. Il faut être modeste dans le monde actuel. Il n'y a plus de mystique du droit international. Je pense que cela rend les choses plus difficiles. Peut-être qu'il faut réenchanter mais, comme je l'ai dit tout à l'heure, le réenchancement passe par l'interne avant et plus efficacement que par l'international.

LAURENCE BOISSON DE CHAZOURNES – En guise de conclusion, je voudrais souligner un aspect qui m'a beaucoup frappée au cours de la conférence et qui permet d'être optimiste. Le droit national est devenu récepteur de nombre de valeurs et normes internationales. Il y a des procédures nationales et transnationales en grand nombre qui permettent une internationalisation de la protection des relations de travail, de l'équilibre entre travail et commerce, etc. En ce sens, je pense que nous, les internationalistes, devrions plus prendre en compte la valeur «aimant» du droit national qui permet de régir les rapports internationaux. Cela devrait être un objet de focalisation plus prononcé.

MIGUEL DE SERPA SOARES – I have never heard States saying they do not like international law. They have their interpretation of international law, but I have never seen an international actor rejecting international law. In fact, I just want to reinforce something that José Alvarez said – something that we all said in a way – this is the need for constant critical self-analysis of what we are doing, how we are doing it and what should be improved. And for us international lawyers to keep a certain modesty which is also important. It is not observed all the time. I am still an optimist but it is an optimism based on real facts. It is true that we live a little bit apart from the World Bank Group. We talk only occasionally, we had this chance with the *Jam case* of the United States Supreme Court, there was some more visible context and cooperation.

Scripta manent

Delving into the ILO archives

Organized in the margins of the international conference ‘ILO100 – Law for Social Justice’, the document and photo exhibition brought back to light a selection of documents from the ILO archives that contain the institutional memory of the ILO – some 400 thousand files totalling 12 kilometres of stacks.

Verba volant, scripta manent – spoken words may easily be forgotten, written words remain.

The exhibition offered a series of snapshots, mainly from the ILO’s early days – from the drafting of the Constitution to negotiating the status of the Organization in Switzerland and the relationship with the League of Nations; from the construction of the lakeside building to the adoption of the first international labour standards; and from the advisory proceedings before the Permanent Court of International Justice to the temporary move to Canada during the Second World War.

The entirety of the documents and photos of the exhibition ‘*Scripta manent*’ – Delving into the ILO archives may be accessed by scanning the QR code below.



THE ILO AND INTERNATIONAL GENEVA

After the ILO's secretariat had operated in several temporary premises in Paris and London, the Governing Body decided to establish the secretariat permanently in Geneva.

In July 1920, the Office moved into the building that is today the headquarters of the International Committee of the Red Cross (ICRC). Continuously growing, the Office moved again in 1926 to a new building constructed on a lakeside plot donated by the Swiss Federal Government, now the headquarters of the World Trade Organization. The five-storey neoclassical building was designed by Georges Épitaux and was the first building in Geneva purpose-built to house an international organization. It was built between 1923 and 1926 and cost 3 million Swiss francs. It offered a stunning view of the Mont Blanc, and it was decorated with sculptures, murals and furniture donated by member States.

In 1974 the Office moved to its current location at Grand-Saconnex. The move was based on an exchange between the ILO and the Canton of Geneva of the 3.3-hectare site next to the lake for 11.5 hectares in Grand Morillon. The construction of the new building, with its facade of glass and cast aluminium, crowning a hill between the Jura mountains and Lake Geneva, took from May 1970 to the end of 1974. It was designed by a team of great architects, Eugène Beaudouin (France), Alberto Camenzind (Switzerland) and Pier Luigi Nervi (Italy). When it was inaugurated, the new ILO building was the largest administrative building in Switzerland. Of a total constructed surface of 16,500 m², it was designed to accommodate 2,000 people. It has 12 meeting rooms totalling 1,400 seats and four floors of underground garages of a total area of 38,600 m². The building is composed of three parts, symbolizing the tripartite structure of the Organization: the south wing, with the meeting rooms and library; the north wing, which includes general services; and, between the two, the central office building.



THE ILO AND THE HOST STATE

As soon as it decided to move its head office to Geneva, the ILO undertook discussions with the Government of Switzerland with a view to defining the legal status of the Organization and its officials in the country, as well as the practical modalities of their interaction. Among the matters addressed were the applicability of diplomatic privileges to ILO staff, the extraterritoriality of ILO premises, tax immunity, customs exemption, conditions for the presence of staff members' families, and identity documents (*cartes de légitimation*) for staff.

A first agreement, known as a *modus vivendi*, was concluded in 1921 through an exchange of letters between the Chief of the Federal Political Department and the Secretary-General of the League of Nations. In 1926, a second *modus vivendi* between the Federal Political Department, the League of Nations and the ILO supplemented the earlier agreement.

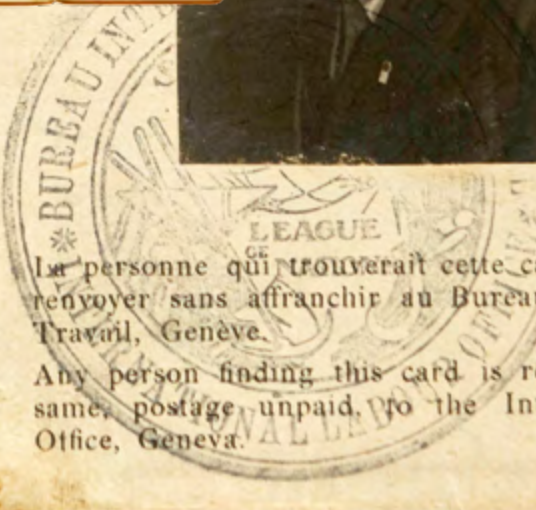
In 1946, the Swiss Federal Council and the ILO concluded an agreement concerning the legal status of the ILO in Switzerland, accompanied by an agreement of execution. To the extent that they were not modified by the 1946 agreement, the *modus vivendi* of 1921 and 1926 continue to apply to the ILO. The three agreements together set out the terms and conditions regulating the ILO's operations in Switzerland.

The ILO and the authorities of the host State – at the city, cantonal and federal levels – interact regularly on matters of mutual interest, such as accreditation of delegates to ILO meetings, staff compliance with domestic laws, security, maintenance or renovation of ILO premises and real estate issues, to ensure the proper application of the legal framework governing the presence of the ILO and its staff in Switzerland.

Signature du Directeur } *Albert Thomas*
 Signature of Director }
 Signature du Titulaire } *J. C. Kase*
 Signature of Holder }
 No. *P. 1598* Date *11.3.25.*



Mrs. L. E. Matthaei
 dont la signature et la photographie se trouvent ci-dessous appartient au personnel du BUREAU INTERNATIONAL DU TRAVAIL, qui fait partie de l'ensemble des institutions de la SOCIÉTÉ DES NATIONS Article 392 du Traité de Versailles.
 Elle jouit en cette qualité des PRIVILEGES ET IMMUNITÉS DIPLOMATIQUES Article 7 du Traité de Versailles.
 whose signature and photograph appear below, is a Member of the STAFF OF THE INTERNATIONAL LABOUR OFFICE, which is part of the organisation of the LEAGUE OF NATIONS Article 392 of the Treaty of Versailles.
 In this capacity she enjoys DIPLOMATIC PRIVILEGES AND IMMUNITIES Article 7 of the Treaty of Versailles.



Signature du Directeur } *Albert Thomas*
 Signature of Director }
 Signature du Titulaire } *Louise E. Matthaei*
 Signature of Holder } *Louise E. Howard*
 No. *P 748* Date *14.9.21.*

THE ILO CONSTITUTION

At the time of its adoption in 1919, the ILO Constitution formed one of the parts of each of the peace treaties – notably Part XIII of the Treaty of Versailles – entitled “Labour”. The Constitution took the form of a self-standing document of 41 articles in the 1930s.

The structure and the provisions on standards-related procedures have remained practically unchanged since 1919. This is probably due to the visionary Commission on International Labour Legislation which was appointed by the Paris Peace Conference to draft the ILO Constitution, and which was composed of 15 eminent personalities (ministers, civil servants, academics and trade unionists) all adhering to social reformism. The Commission conceived and gave shape to the idea of a tripartite international organization where representatives of governments, employers and workers would sit and decide on an equal footing.

The founders of the ILO recognized the importance of social justice in securing peace, against a background of workers’ exploitation in the industrializing nations of that time. There was also an increasing understanding of the world’s economic interdependence and the need for cooperation to obtain similarity of working conditions in countries competing for markets. The ILO’s aims were set forth in the 1919 Constitution’s preamble, supplemented by a programme of work condensed in one article entitled “General principles” based on the stated conviction that “labour should not be regarded merely as a commodity or article of commerce”.

The original text of the Constitution has been modified nine times. The constitutional amendment of 1946 incorporated the Declaration of Philadelphia concerning the aims and purposes of the Organization as an annex to the Constitution. The 1997 amendment, which entered into force in October 2015, provided the legal basis and set out the procedure for the abrogation of obsolete Conventions. An amendment of 1986, which has not yet received the required number of ratifications, aims at rendering the ILO governance structure more representative of the various geographic, economic and social interests of its constituent groups.

THE ILO'S WARTIME TRANSFER OVERSEAS

The outbreak of the Second World War did not find the ILO unprepared. The Governing Body had made the necessary arrangements to ensure that activities continued during the war. In May 1940, the Office transferred a large part of its key personnel to Montreal. At the invitation of the Canadian government and McGill University, the ILO established its wartime headquarters at the Presbyterian College of McGill University, where it remained until 1948. In the words of ILO Director John Winant, it was essential that the activities of the Office be carried on in a place where communications were assured and where the staff could direct their entire energies to the problems which laid ahead. Forty staff members from 18 countries made the transatlantic crossing to Canada. Another group remained in Geneva to continue making the necessary arrangements, while the rest returned to their countries as national correspondents or were posted to branch offices.

A commemorative plaque unveiled at McGill University in September 1950 as a sign of the ILO's gratitude reads: *"To this campus the International Labour Organisation transferred its wartime headquarters in 1940 on the generous invitations of the Government of Canada and McGill University. From here the I.L.O. directed its work of furthering world peace through social justice until 1948. This tablet records the lasting gratitude of the I.L.O. to McGill University"*.

In October 1941, in an effort to demonstrate the Organization's vitality at a time of great uncertainty, an extraordinary session of the Conference was hosted in New York. The Conference had no standard-setting item on its agenda but offered an opportunity to reflect on the future role and responsibilities of the Organization. It adopted a series of resolutions, including one proclaiming that "the victory of the free peoples in the war against totalitarian aggression is an indispensable condition of the attainment of the ideals of the International Labour Organisation".



THE DECLARATION OF PHILADELPHIA

As the Second World War was drawing to a close, it was considered imperative to redefine the ILO's mission and mandate in the post-war global institutional landscape. The swift action taken by the ILO to that end was remarkable. At the same time, it built on a process of institutional maturation which had begun before the war and was furthered in the report submitted by the Acting Director, Edward Phelan, to the 1941 extraordinary session of the Conference and key resolutions adopted by that Conference.

The Declaration of Philadelphia was adopted on 10 May 1944, at the Conference's 26th Session held in Philadelphia. The Declaration gave the ILO's social mandate a powerful new impetus by affirming that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".

As recalled by Wilfred Jenks, the Declaration "was essentially the work of two minds as one, Edward Phelan contributing the wisdom and restraint of experience and myself the bold enthusiasm of youth. We worked together so closely in the matter that, save for a few phrases, neither of us could in later years distinguish his handiwork from that of the other".

In 1946, the Declaration of Philadelphia was annexed to the ILO Constitution and since then has served to inspire other international instruments, from the Charter of the United Nations and the social provisions of the 1948 Universal Declaration of Human Rights through to the 1998 Declaration on Fundamental Principles and Rights at Work.

The Declaration of Philadelphia deepened the social justice mandate enshrined in the original 1919 Constitution and established a clear linkage between social rights and human rights. Foundational principles such as "labour is not a commodity" and "poverty anywhere constitutes a danger to prosperity everywhere" remain ever relevant and continue to guide the ILO's action at the dawn of its second century.

THE DECLARATION OF PHILADELPHIA

"I've just been meeting in Philadelphia where, for many ages, the Fathers of this Republic offered certain truths to be self-evident. They declared that among other things all men are endowed by their Creator with certain inalienable rights, among them Life, Liberty, and the Pursuit of Happiness. To these truths we are engaged in the noblest purpose of all, struggle against the abuse of freedom and democracy. The Declaration which you have just adopted in Philadelphia may well require a similar explanation. . . . I emphatically believe that future generations will look back upon it as a landmark in world thinking."

President Roosevelt, in an address to the delegates attending the 26th Session of the International Labour Conference, White House, Washington, D.C., 17 May 1944.

DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION

adopted by the 26th Session of the International Labour Conference, 10 May 1944

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular, that:

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

- (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
- (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;
- (d) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;
- (e) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and recruitment;
- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
- (e) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- (g) adequate protection for the life and health of workers in all occupations;
- (h) provision for child welfare and maternity protection;
- (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
- (j) the assurance of equality of educational and vocational opportunity.


IV

Confident that the fuller and broader utilization of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full co-operation of the International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.



 100 Avenue, 1086 University Street, Montreal, Canada



STANDARD-SETTING

The system of international labour standards is the backbone of the work of the Organization for the promotion of social justice and decent work globally. International labour standards are legal instruments that are adopted by the Conference to set minimum universal social standards. They take the form of Conventions and Protocols, which upon ratification are legally binding international treaties, or Recommendations, which serve as non-binding guidelines. They address a broad range of labour matters, including fundamental workers' rights (freedom of association and collective bargaining, equality of treatment and non-discrimination, abolition of child labour and elimination of forced labour), labour inspection, occupational safety and health, hours of work, wages, social security, maternity protection, and protection of seafarers, migrant workers, indigenous and tribal peoples.

Since 1919, the ILO has adopted 190 Conventions, 6 Protocols and 206 Recommendations – often described collectively as the International Labour Code – through a unique legislative process. In most cases, this involves a Conference discussion at two successive annual sessions, facilitated by a series of preparatory reports based on thorough consultations with ILO constituents and other interested stakeholders. As of October 2019, ILO Conventions had received a total of 8,180 ratifications.

Since the ILO aspires to universal application of standards, they need to take into account the diverse cultural and historical backgrounds, legal systems and levels of economic development among member States. They are therefore formulated in a manner that ensures the necessary flexibility in their practical application. Governments are not permitted to ratify ILO Conventions subject to reservations, due to the fact that the negotiation and adoption of these Conventions also involves the participation of non-governmental actors.

A number of standards have become outdated through time and no longer reflect the realities and needs of the world of work. Since 2015, the Conference is empowered to abrogate obsolete Conventions. Nine outdated instruments have so far been removed from the body of standards, while another 32 instruments have been identified for possible abrogation or withdrawal by 2024.



SUPERVISION OF STANDARDS

Pioneering in its inception, the system of monitoring the application of ratified Conventions comprises two complementary procedures: a standard examination of periodic reports communicated by governments – known as *regular supervision* – and *special procedures* or ad hoc supervision triggered by the submission of complaints. Based on an “ILO tradition of bold and cautious innovation”, as Wilfred Jenks put it, the system is designed to assist member States with the implementation of ratified Conventions mainly through persuasion and dialogue, and occasionally through pressure from peers and public opinion.

The periodic reports submitted by ratifying States are first examined by the Committee of Experts on the Application of Conventions and Recommendations, composed of 20 eminent jurists, which assesses the legislative conformity of the implementing legislation and makes observations and comments, as appropriate. The Experts’ report is then communicated to the Committee on the Application of Standards, a standing tripartite committee of the International Labour Conference, which examines each year a limited number of cases and draws up conclusions and recommendations.

Allegations of violations of international labour standards may take the form of either *complaints*, which may be filed by any member State, the Governing Body of its own motion or by a delegate to the Conference, or *representations*, which may be made by an employers’ or workers’ organization on the grounds that a member State contravenes the requirements of a Convention to which it is a party.

Under the complaints procedure, the Governing Body may appoint a Commission of Inquiry to establish the facts and draw up recommendations. As for representations, if found receivable, they are examined by an ad hoc tripartite committee of the Governing Body that submits its conclusions and recommendations to the plenary for its adoption.

Since 1950, a special machinery empowers governments and employers’ and workers’ organizations to file complaints concerning freedom of association with a dedicated tripartite committee. In nearly 70 years, the Committee on Freedom of Association has examined more than 3,200 complaints.



ILO MEMBERSHIP

At the time of its creation, the membership of the Organization included 29 States signatories of the Treaty of Versailles and 13 States which were invited to accede to the Covenant of the League of Nations. The first States non-members of the League to be admitted to the ILO were the United States (1934) and Egypt (1937). At present, the ILO has 187 member States.

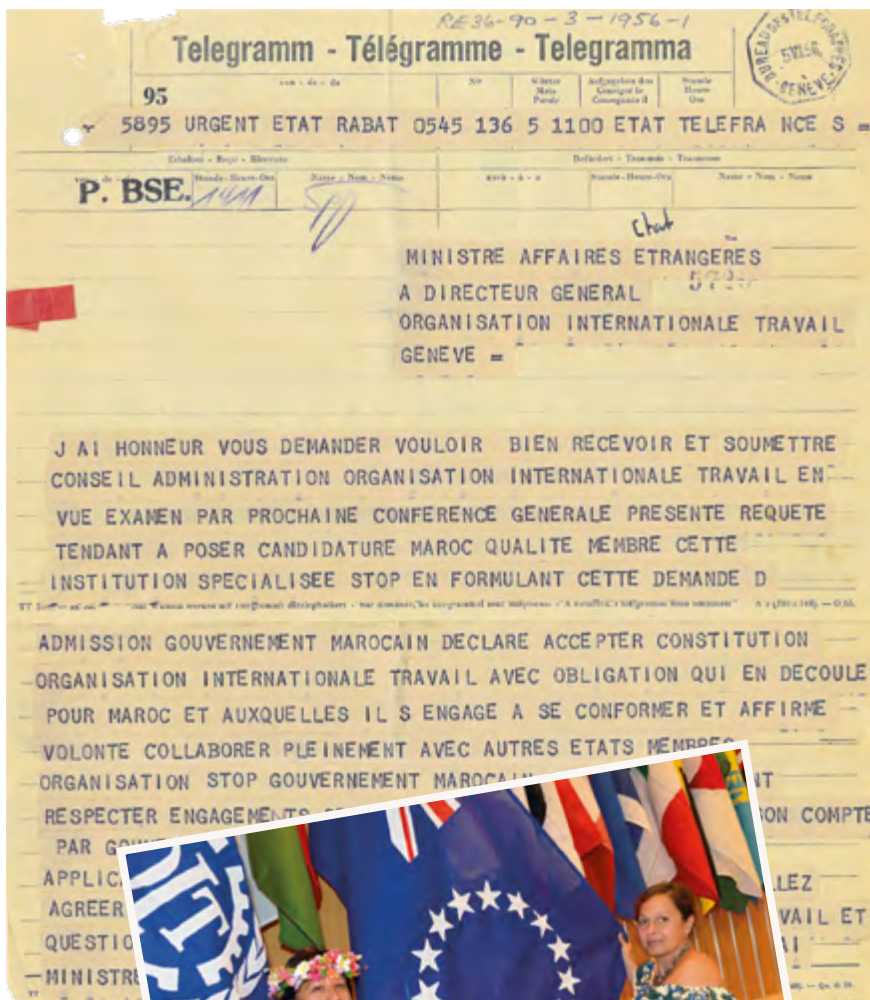
Nowadays, UN member States may join the ILO by communicating their formal and unconditional acceptance of the ILO Constitution. The latest UN member State to be admitted was the Kingdom of Tonga, in 2016.

For a non-UN member State, admission to the ILO requires a vote of the International Labour Conference and a double majority: two thirds of the delegates attending the session, including two thirds of the Government delegates present and voting. Such a Conference vote was last held in 2015 for the admission of the Cook Islands.

The practice of the Organization has always been to require that countries applying for admission, in addition to meeting the criteria of statehood established under international law, should have full capacity to exercise the rights and discharge the obligations arising from the ILO Constitution.

When applying for ILO membership during the period of decolonization, newly independent States have recognized the continued application of international labour Conventions that were applied to their territory by the State formerly responsible for their international relations. Based on this “doctrine of continuity”, approximately 1,000 ratifications of ILO Conventions were registered by 63 States. In recent years, however, the assumption has been that newly independent States start with a “clean slate”.

Withdrawal of a member State requires advance notice to be given to the Director-General and takes effect two years after the date of receipt. Over the past 50 years, five member States withdrew from the Organization but were later readmitted.



THE ILO EMBLEM

The first ILO emblem was created in 1921 and reflected the Organization's close relationship with the League of Nations. In 1938, it was replaced by a black triangle surrounding the letters "ILO" in white, symbolizing the tripartite nature of the Organization. In 1943, the triangle was maintained but the colours were reversed, with black letters on a white background and the letters slightly overlapping the triangle.

In the period from 1939 to 1967, many efforts were made to conceive a new ILO emblem reflecting the Organization's core elements of tripartism and universality and combining technological progress, peace and humanity in a simple design.

In 1967, a new emblem was designed to commemorate the ILO's 50th anniversary and was used as from 1 January 1968. The cogwheel symbolizes the world of work and the UN wreath of olive leaves reaffirms the ILO's membership in the UN family. As from July 1969, the same emblem without the dates (1919–1969) became the official ILO logo and is still in use today.

In 1994, a new logo was adopted for the 75th anniversary of the ILO and was used throughout that year.

The last attempt to redesign the ILO emblem was made in 2002. The UN wreath of olive leaves was to surround a sun-like symbol. However, the proposed emblem was not adopted as it lacked support.

The name and emblem of the Organization are protected by article 6ter of the Paris Convention for the Protection of Industrial Property, as revised.



ILO EXTERNAL OFFICES

In its early days, the Organization sought to establish a structure to support its field operations. The first external offices were opened in the 1920s to accommodate national correspondents, including in Washington, Berlin and Tokyo.

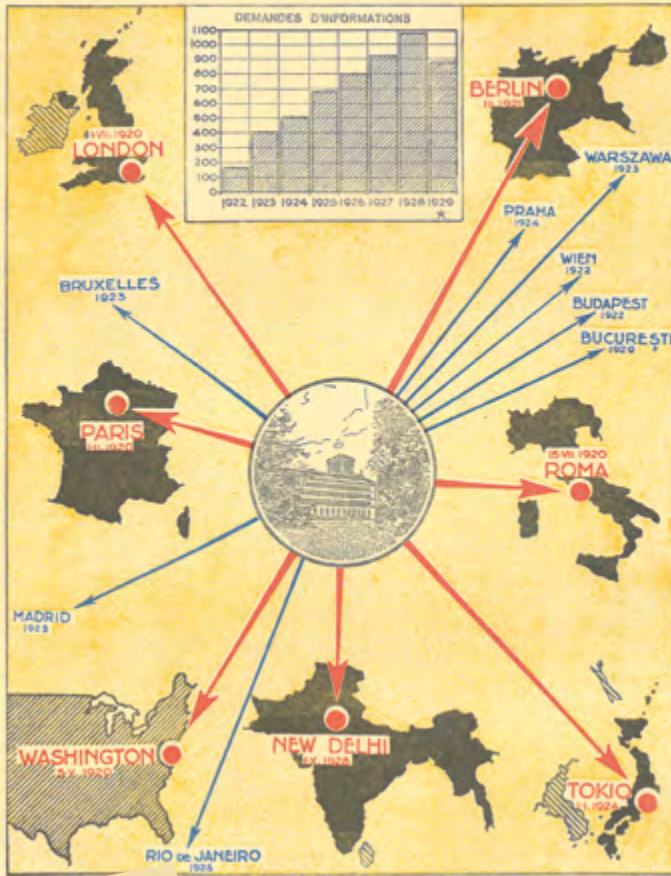
During the 1950s, the ILO established field offices, including an office in Mexico covering Central America and the Caribbean, and in Istanbul covering the Near and Middle East, in order to better support its expanding technical assistance programmes and activities. As a result, the first “host country agreements” were concluded to protect the privileges and immunities of the Organization and its officials. In the late 1960s, various field offices became “area offices”; meanwhile “regional offices” were created, including the regional offices for the Andean Programme in Lima and for Asia in Bangkok.

Due to the increased focus on technical cooperation activities, the ILO continued to adapt its field structure to evolving needs. In the 1990s, to ensure that the interests of the ILO’s tripartite constituency were fully taken into account in the design and delivery of field activities, “multidisciplinary advisory teams” were established. In 2003, “sub-regional offices” replaced merged area offices and multidisciplinary teams. In 2009, the ILO adopted its current field structure, including “decent work technical support teams”.

Today, the ILO operates 5 regional offices, 33 country offices, 13 decent work technical support teams, and more than 200 project offices. More than 60 per cent of the ILO’s 3,000 staff members serve in field duty stations. This field structure supports more than 760 development cooperation programmes and projects in 118 countries, with an overall budget of approximately US\$600 million.

The ILO’s main training institution has been established in Turin following a proposal of the Government of Italy. It operates under a statute and governance structure of its own. It employs 170 officials and runs 450 programmes for approximately 11,000 people each year.

BUREAUX ET CORRESPONDANTS NATIONAUX



PRIVILEGES AND IMMUNITIES

The early practice of the ILO and the League of Nations based on article 7(4) of the Covenant laid down the foundations of the modern system of privileges and immunities of international organizations and their staff. The privileges and immunities the ILO enjoys in Switzerland were first defined in agreements concluded with the host State as of 1921.

In 1946, the ILO Constitution was amended to provide, for the first time, that the Organization would enjoy in the territory of each member State such privileges and immunities as are necessary for the fulfilment of its purpose, and that the representatives of its tripartite constituency, such as Conference delegates and Governing Body members, would enjoy similar coverage to ensure the independent exercise of their functions.

In 1947, the rules concerning the status of the UN specialized agencies and their staff were systematized in a comprehensive Convention on the Privileges and Immunities of the Specialized Agencies. The Convention consists of standard clauses and one annex for each of the 17 specialized agencies that adapts the provisions of the Convention to the specificities of each organization. Annex I, which relates to the ILO, seeks to protect the Organization's unique tripartite structure through the immunities granted to the employer and worker members of the Governing Body. To date, 126 States have ratified the Convention and Annex I.

Privileges and immunities seek to ensure that the Organization is capable of pursuing its mandate in conditions of full independence. They principally include:

- immunity from legal process for the Organization and its staff members for acts performed in their official capacity;
- inviolability of ILO premises and archives, and immunity of ILO property and assets from any form of interference;
- exemption of ILO assets and property from direct taxes and custom duties;
- exemption of staff members from taxation in respect of their salaries and immunity from immigration restrictions.

IMMUNITIES OF MEMBERS OF THE STAFF OF THE
INTERNATIONAL LABOUR OFFICE

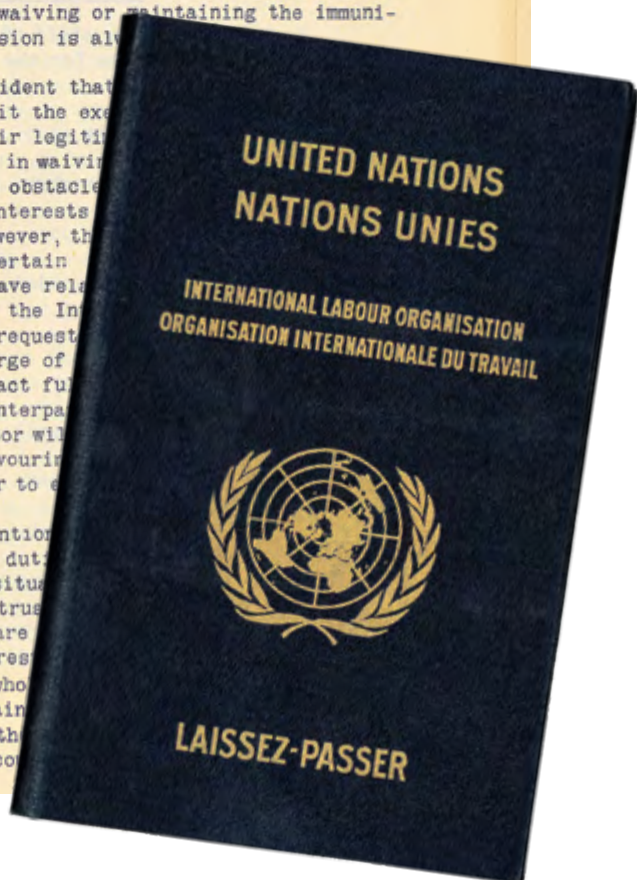
I.

General Provisions.

1) The immunities conferred on officials of the International Labour Office have not been instituted for the furtherance of the personal interests and convenience of these officials. They are intended only to secure, in all circumstances, the free working of the international organisations and the complete independence of their agents. The immunities attach to the function, and not to the person, of those who hold them; officials invested with these immunities cannot, therefore, relinquish them at will. The Director alone has power to determine in each particular case whether the interests of the function would be best served by waiving or maintaining the immunities, and his decision is al

2) It is evident that in circumstances permit the exercise of these immunities for other than their legitimate purposes. The Director has no hesitation in waiving them where they constitute an obstacle to the proper functioning of the Office. Since, however, these immunities are conferred on officials who exist may have a certain independence of action, they may have occasion to have relations with the agents of the International Labour Office. Every official is requested to exercise the greatest care in the discharge of his duties and to consider the exact fulfilment of these duties as a necessary counterpart of the immunities he enjoys. The Director will waive any official endeavouring to abuse his immunities in order to e

3) The attention of officials is also called to the duties which their particular situation in the Office have been entrusted with in the discharge of their function and they are requested to be guided in the discharge of their function by the principles enshrined in the interests of the International Labour Organisation as a whole. It is the duty of all officials to maintain towards the population of the co



THE ILO AND THE WORLD COURT

According to article 37(1) of the Constitution, the ICJ is the only entity empowered to render an authoritative interpretation of the Constitution or an ILO Convention. At that time of the PCIJ, requests for advisory opinions had to be channelled through the League of Nations' Council, pursuant to article 14 of the League's Covenant.

The ILO has sought an advisory opinion on six occasions. The first was rendered by the PCIJ in July 1922 and concerned the validity of the nomination of the Dutch Worker delegate to a session of the International Labour Conference in light of article 389 of the Treaty of Versailles, which required that nominations of non-governmental delegates be made in agreement with the most representative employers' or workers' organizations. To date, this advisory opinion remains the most authoritative guidance for the Conference Credentials Committee.

In two advisory opinions in 1922, the PCIJ considered that the ILO was competent to deal with the conditions of work of persons employed in agriculture but not with issues related to agricultural production.

Following the adoption of the Night Work (Bakeries) Convention, 1925 (No. 20), the Court was requested to make a determination on the competence of the Organization to adopt standards which would incidentally regulate the work performed by the employer.

In 1930, the Court considered that the Free City of Danzig could not become a member of the ILO as Poland had the right to conduct the foreign relations of Danzig and therefore certain ILO activities, such as the ratification of Conventions, could not be undertaken by the Danzig authorities without Poland's consent.

In 1932, the PCIJ ruled on the applicability of the Night Work (Women) Convention, 1919 (No. 4) to women who held supervisory or management positions and were not ordinarily engaged in manual work. To date, this remains the only time that a question relating to the interpretation of an ILO Convention has been referred to the World Court for decision.



PAR CES MOTIFS :

La Cour est d'avis que le délégué ouvrier des Pays-Bas à la troisième session de la Conférence internationale du Travail a été désigné en conformité des dispositions du paragraphe 3 de l'article 389 du Traité de Versailles, et donne, par conséquent, à la question qui lui a été posée, une réponse affirmative.

Le présent avis ayant été rédigé en français et en anglais, c'est le texte français qui fera foi.

Fait au Palais de la Paix, à la Haye, le trente et un juillet mil neuf cent vingt deux, en deux exemplaires, dont l'un restera déposé aux archives de la Cour et dont l'autre sera transmis au Conseil de la Société des Nations.

Le Président :

Le Greffier :



THE ILO ADMINISTRATIVE TRIBUNAL

The Administrative Tribunal of the International Labour Organization finds its origins in the Administrative Tribunal of the League of Nations, which was created in 1919 to serve both the League itself and the ILO. At the League's dissolution, the Tribunal was transferred to the ILO, which had become the first specialized agency of the newly created United Nations. By the time of its transfer to the ILO, the Tribunal had dealt with 37 cases.

The Tribunal is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the provisions of the Staff Regulations of member organizations.

In 1949, the Statute of the Tribunal was amended so as to allow other international organizations to recognize its jurisdiction. That same year, the World Health Organization (WHO) accepted the Tribunal's Statute, prompting other UN specialized agencies, such as the Food and Agriculture Organization of the United Nations (FAO), the International Telecommunication Union (ITU) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as other international organizations to follow. To date, as many as 57 international organizations have recognized the jurisdiction of the Tribunal, which is thus competent to hear complaints of approximately 60,000 serving and former officials.

The Tribunal is composed of seven judges, all of different nationality, who hold or have held the highest judicial functions in their respective countries, and who are appointed by the International Labour Conference for a renewable period of three years. At present, the Tribunal meets twice a year and delivers at each session approximately 90 judgments. The Tribunal's case law consists of over 4,000 judgments and is widely acclaimed as a landmark contribution to the development of international civil service law





PART TWO



Quelques observations sur l'utilisation des normes de l'OIT par les tribunaux nationaux

Xavier Beaudonnet

I. Introduction

Alors que l'OIT célèbre son premier centenaire, son activité normative, aspect central de son identité aux côtés du tripartisme, reste aujourd'hui encore son plus puissant moyen d'action. Si depuis 1919, les nombreuses conventions et recommandations internationales du travail, adoptées de manière tripartite par l'OIT, ont joué un rôle fondamental dans le développement des droits du travail nationaux, elles ont essentiellement rempli cette tâche en orientant le contenu des lois et règlements adoptés par les pouvoirs législatif et exécutif nationaux. Jusqu'au début des années 1990¹, rares étaient en revanche les décisions de justice nationales se fondant, du moins explicitement, sur les normes internationales du travail (NIT) adoptées par l'OIT. De fait, l'attention portée par l'Organisation elle-même sur les apports possibles des pouvoirs judiciaires nationaux à la mise en œuvre de ses normes est longtemps restée limitée².

¹ A cet égard, il est intéressant de constater que dans un ouvrage pionnier de Virginia Leary publié en 1982 et consacré à l'incorporation directe des conventions internationales du travail en droit interne, l'auteure n'avait recensé qu'un nombre limité de décisions judiciaires nationales s'appuyant sur les normes de l'OIT; voir Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982).

² On notera à cet égard que c'est à partir de 1984 que le BIT commence l'organisation des rencontres annuelles des juges européens du travail et que c'est à partir de 1999 que le Centre international de formation de l'OIT lance un programme régulier de formation sur les normes internationales du travail pour les juges, juristes et professeurs de droit.

Depuis environ trois décennies cependant, s'est progressivement mise en marche une évolution souvent discrète mais non moins significative de prise en compte par de nombreux organes judiciaires nationaux de ces sources internationales³. Les arrêts s'appuyant explicitement sur les NIT sont toujours quantitativement peu nombreux et le resteront du fait de la nature de ces instruments, composés de dispositions au contenu souvent général et n'ayant pas la finalité de se substituer aux droits nationaux mais, au contraire, de contribuer à leur développement.

Les recherches menées par le Centre international de formation de l'OIT⁴ permettent toutefois de recenser aujourd'hui des exemples d'utilisation judiciaire explicite des NIT dans plus de 60 pays aux caractéristiques juridiques très variées et incluant à la fois des pays s'inscrivant dans les catégories moniste et dualiste de réception du droit international en droit interne⁵. Au-delà des chiffres, c'est surtout l'aspect qualitatif de cette évolution qui retient l'attention dans la mesure où la prise en compte par certaines cours suprêmes ou constitutionnelles des NIT et des travaux des organes de contrôle de l'OIT qui les accompagnent contribue à la fois à un plus grand respect des conventions internationales du travail ainsi qu'à des évolutions importantes dans les droits nationaux du travail.

La tendance décrite n'est pas spécifique au droit international du travail et s'inscrit dans un mouvement plus vaste de prise en compte judiciaire du droit international des droits humains en général, encouragé explicitement

³ Voir, par exemple, Constance Thomas, Martin Oelz et Xavier Beaudonnet, «The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications» in Jean-Claude Javillier et Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir – Mélanges en l'honneur de Nicolas Valticos* (BIT 2004) 249.

⁴ Voir à cet égard le très intéressant recueil électronique de décisions de justice faisant usage du droit international du travail développé par le Centre international de formation de l'OIT <<http://compendium.ilo.org/fr>>.

⁵ Même si, dans la pratique, cette distinction binaire est souvent loin d'être absolue, on rappellera que, schématiquement, sont considérés comme monistes les pays dans lesquels droit interne et droit international sont perçus comme appartenant à un même ordre juridique et où, de ce fait, les traités ratifiés font directement partie du droit interne. Sont en revanche considérés comme dualistes les pays dans lesquels droit interne et droit international étant conçus comme deux ordres distincts, la ratification et la publication des traités internationaux ne suffisent pas à les intégrer au droit interne, l'applicabilité de leurs dispositions sur le plan national dépendant en effet de leur incorporation dans l'ordonnement juridique du pays par le biais, par exemple, d'une loi postérieure à la ratification.

par les organes chargés de la supervision des deux Pactes des Nations Unies en matière de droits civils et politiques d'une part et de droits économiques, sociaux et culturels d'autre part⁶.

Tout en étant conscient que la pratique de l'utilisation judiciaire des NIT s'exprime également devant les juridictions internationales, en particulier devant les cours régionales compétentes en matière de droits humains⁷, cet article se concentrera sur ce phénomène du point de vue des tribunaux nationaux. Sans prétendre à l'exhaustivité, il s'attachera en premier lieu à illustrer l'impact de la prise en compte judiciaire des NIT sur les évolutions de certains droits du travail nationaux. Il s'efforcera ensuite de mieux comprendre les techniques juridiques qui sous-tendent et accompagnent la référence judiciaire plus fréquente aux NIT avant de souligner finalement que l'utilisation de ces sources par les tribunaux nationaux est encore loin de constituer une pratique universelle et pérenne⁸.

II. Quelques illustrations de l'impact de la prise en compte judiciaire des NIT sur l'évolution des droits nationaux du travail

S'il n'est pas rare que la référence aux normes de l'OIT dans des décisions de justice nationales soit essentiellement symbolique voire décorative, il est également vrai que dans beaucoup de pays, l'utilisation judiciaire de ces sources contribue de manière importante non seulement à la mise en conformité des droits internes avec les engagements internationaux des pays concernés mais aussi à des évolutions substantielles des droits du travail nationaux. Alors qu'il est impossible d'être exhaustif en la matière et qu'il

⁶ Voir, en particulier, l'observation générale n° 9 du Comité des droits économiques, sociaux et culturels sur l'application du Pacte au niveau national, publiée en 1998, et qui évoque à plusieurs reprises les possibilités de prise en compte judiciaire des différentes dispositions du Pacte.

⁷ A ce sujet, voir Franz Ebert et Martin Oelz, *Bridging the Gap Between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts* (International Institute for Labour Studies 2012) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192786.pdf>.

⁸ Le présent article développe le contenu d'une note publiée par l'auteur en 2016 dans la Revue de droit comparé du travail et de la sécurité sociale. Voir Xavier Beaudonnet, «Quelques observations sur l'utilisation des normes de l'Organisation internationale du Travail par les tribunaux nationaux» (2016) Revue de droit comparé du travail et de la sécurité sociale 116.

ne s'agit pas de mettre en exergue tel exemple national spécifique plutôt que tel autre, nous citerons ici, à titre d'illustration, une série de thèmes vis-à-vis desquels le recours aux normes de l'OIT par les pouvoirs judiciaires nationaux a produit un impact notable sur le droit positif de plusieurs pays.

En matière de liberté syndicale et négociation collective, thématique particulièrement importante dans le système normatif de l'OIT, un nombre significatif de cours suprêmes ou constitutionnelles s'appuient sur les sources de l'OIT afin d'assurer que leur ordonnancement juridique accorde une reconnaissance à la fois complète, effective et équilibrée de ces droits fondamentaux. C'est ainsi que, vis-à-vis du champ d'application personnel de la liberté syndicale, l'utilisation judiciaire de la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 a permis dans certains pays de conforter la reconnaissance du caractère universel de la liberté syndicale en déclarant l'inconstitutionnalité d'exclusions législatives frappant certaines catégories de travailleurs vulnérables telles que les travailleurs agricoles⁹.

Nombreux sont également les exemples de différentes cours suprêmes et constitutionnelles qui interprètent leur constitution nationale à la lumière des normes de l'OIT et des travaux des organes de contrôle correspondants afin d'évaluer la validité de dispositions législatives ou réglementaires fixant les contours et les limites du droit de grève, les instruments internationaux contribuant dans certains cas à la mise à l'écart ou à la minimisation de certaines restrictions apportées à l'exercice de ce droit¹⁰ et, dans d'autres cas au contraire, à la confirmation de leur validité¹¹.

La question complexe de l'exercice du droit de négociation collective dans le secteur public qui rend nécessaire la conciliation d'objectifs et intérêts souvent contradictoires constitue un autre exemple où les apports

⁹ Voir, par exemple, Cour suprême du Canada, *Dunmore c. Ontario (Procureur général)* (2001) CSC 94; 2001 3 R.C.S. 1016.

¹⁰ Voir, par exemple, concernant l'invalidation de l'interdiction faite aux pilotes et aux travailleurs d'une compagnie aérienne de faire grève, Tribunal national du travail du Nigeria, *Aero Contractors Co. of Nigeria Limited c. National Association of Aircrafts Pilots and Engineers, Air Transport Senior Staff Association of Nigeria et National Union of Air Transport Employees* (2014) n° NICN/LA/120/2013.

¹¹ Voir, par exemple, concernant la confirmation du caractère constitutionnel de l'interdiction du droit de grève aux membres des forces armées, Cour constitutionnelle d'Afrique du Sud, *South African National Defence Union v. Minister of Defence* (1999) n° CCT 27/98.

nuancés des sources de l'OIT¹² peuvent constituer un appui fort utile pour les tribunaux chargés de garantir tout à la fois le bon fonctionnement de l'Etat, l'équilibre des comptes publics ainsi que le respect de la démocratie sociale et des droits syndicaux des fonctionnaires publics¹³.

Dans d'autres hypothèses enfin, la référence judiciaire aux normes internationales contribue à accroître l'effectivité de la protection accordée par la loi aux victimes de discriminations antisyndicales en étendant par exemple le champ d'application personnel de ladite protection au-delà des seuls représentants syndicaux ou encore en soulignant dans d'autres cas le caractère insuffisant d'une compensation pécuniaire et en reconnaissant la nécessité de l'élimination de la situation discriminatoire¹⁴.

En matière d'égalité dans l'emploi et la profession, le recours judiciaire au droit international du travail a permis dans plusieurs pays d'incorporer des concepts nouveaux par le biais d'une interprétation extensive de la législation nationale à la lumière des normes de l'OIT, assurant par ce biais la conformité du droit interne avec le droit international. Des notions importantes telles que la discrimination indirecte¹⁵ ou le harcèlement sexuel¹⁶ ont été reconnues dans différents pays par les tribunaux qui, en l'espèce, se sont souvent appuyés à la fois sur la Convention (n° 111) concernant la discrimination (emploi et profession), 1958 et les travaux correspondants des organes de contrôle de l'OIT ainsi que sur la Convention des Nations Unies pour l'élimination de toutes les formes de discrimination contre les femmes.

Une autre illustration de cette tendance concerne l'égalité de rémunération entre hommes et femmes. Alors que, dans certains pays, la législation nationale n'envisageait initialement l'application de ce principe qu'à des cas d'emplois identiques (à travail égal, salaire égal), plusieurs juridictions

¹² Conférence internationale du Travail, 102^{ème} session (2013), Etude d'ensemble de la Commission d'experts pour l'application des conventions et recommandations, *La négociation collective dans la fonction publique, un chemin à suivre* (OIT 2013).

¹³ Voir, par exemple, Tribunal constitutionnel du Pérou, *Ciudadanos, Colegio de Abogados de Tacna y Colegio de Abogados de Junín c. Congreso de la República* (2016).

¹⁴ Voir, par exemple, Cour suprême de justice d'Argentine, *Varela C/Disco* (2018) (CSJ 528/2011) ou encore Tribunal constitutionnel d'Espagne, n° 38/1981 (1981).

¹⁵ Voir, par exemple, Cour fédérale d'Australie, *The Commonwealth of Australia v. Human Rights & Equal Opportunity Commission* (2000) FCA 1854.

¹⁶ Voir, par exemple, Chambre du travail de la Haute Cour de Tanzanie, *Nicodemu Mwita v. Bulyanhulu Gold Mine* (2013) Review No. 12 of 2013.

nationales ont choisi d'interpréter leur droit interne à la lumière de la Convention (n° 100) sur l'égalité de rémunération, 1951, et d'étendre ainsi l'application du principe d'égalité de rémunération entre hommes et femmes aux situations où les travailleurs et travailleuses occupent des emplois différents¹⁷.

Finalement, tel que cela a déjà été relevé vis-à-vis de la discrimination antisyndicale, la référence judiciaire aux sources de l'OIT concernant l'égalité dans l'emploi et la profession a, dans d'autres hypothèses, contribué à accroître l'effectivité de la protection accordée par la loi aux victimes de discriminations professionnelles. Dans ce sens, plusieurs arrêts de juridictions constitutionnelles ont conclu que, conformément aux orientations conjuguées de leur constitution et du droit international du travail, l'élimination effective des pratiques discriminatoires au travail supposait d'aller au-delà de l'attribution d'une simple compensation pécuniaire au profit des salariés qui en étaient victimes et de leur accorder une réparation intégrale de leur préjudice professionnel¹⁸.

Dans plusieurs pays de *common law*, l'affirmation d'un régime juridique du licenciement distinct de celui du droit commun de la rupture du contrat a été le fait des tribunaux sur le fondement des conventions et recommandations de l'OIT en la matière¹⁹. Dans ces différents pays, les législations du travail n'imposaient explicitement ni l'obligation générale de fonder le licenciement sur un motif légitime ni la nécessité de faire précéder la rupture du contrat par l'employeur d'un entretien préalable avec le salarié. En Afrique du Sud²⁰, au Botswana²¹ ou encore à Trinité et

¹⁷ Voir, par exemple, Cour suprême de l'Inde, *Mackinnon Mackenzie v. Audrey D'Costa and another* (1987) 2 SCC 469, 153.

¹⁸ Pour un cas de discrimination antisyndicale lors de la rupture du contrat de travail conduisant à la réintégration des salariés, voir l'arrêt précité du Tribunal constitutionnel espagnol. Pour un cas de discrimination à l'embauche fondé sur le VIH/SIDA et conduisant à l'embauche du candidat précédemment écarté, voir Cour constitutionnelle d'Afrique du Sud, *Jacques Charl Hoffman/South African Airways* (2000) n° CCT 17/00.

¹⁹ Il s'agit en particulier de la Convention (n° 158) et de la Recommandation (n° 166) sur le licenciement, 1982.

²⁰ André Van Niekerk, 'The International Labour Organisation (ILO) and South African Labour Law' (1996) 5 *Contemporary Labour Law* 111.

²¹ Voir, par exemple, concernant la nécessité de fonder le licenciement sur un motif légitime, Tribunal industriel du Botswana, *Joel Sebonego c. News Paper Editorial and Management Services ltd* (1999) n° IC 64/98.

Tobago²², les tribunaux du travail ont contribué de manière décisive au développement de ces notions en droit interne en considérant que leur reconnaissance par les conventions et recommandations de l'OIT adoptées de manière tripartite démontrait leur nature de principes fondamentaux des relations de travail.

Pour ce qui concerne les droits des peuples autochtones, l'utilisation interprétative de la Convention (n° 169) relative aux peuples indigènes et tribaux, 1989 et des travaux correspondants des organes de contrôle de l'OIT a permis à de nombreuses hautes cours d'Amérique latine, accompagnées en cela par la jurisprudence de la Cour interaméricaine des droits de l'homme, d'appliquer et interpréter leurs constitutions et législations nationales de manière à concilier les droits des peuples autochtones sur leurs propres territoires avec les besoins de développement économique des pays en question²³. Les jurisprudences, parfois fort sophistiquées, élaborées par certaines cours vis-à-vis des mécanismes de consultation préalable des peuples autochtones et de leurs effets juridiques illustrent la manière dont le droit international du travail (ou en l'occurrence le droit international des droits humains) peut contribuer à poser les bases permettant de développer des réponses juridiques nationales solides et équilibrées à des questions très complexes. La question des droits des peuples autochtones étant caractérisée par la pluralité des sources de droit international applicables, on notera particulièrement à cet égard combien la jurisprudence de certaines cours contribue, par le biais d'une application systémique et intégrée du droit international, à une mise en œuvre harmonisée des différentes conventions, pactes et déclarations pertinents en la matière.²⁴

La liste de thèmes illustrant les apports de l'utilisation judiciaire des NIT pourrait encore être longue vis-à-vis de questions telles que l'existence de la relation de travail, le travail des enfants, le travail forcé, la santé et sécurité

²² Concernant toujours la nécessité de fonder le licenciement sur un motif légitime, voir, par exemple, Cour industrielle de Trinité et Tobago, *Bank and General Workers' Union v. Home Mortgage Bank* (1998) No. 140.

²³ Voir, à cet égard, le très intéressant recueil de cas préparé par le BIT, *Aplicación del Convenio Núm. 169 de la OIT por tribunales nacionales e internacionales en América Latina* (BIT 2009).

²⁴ Concernant par exemple la question très discutée des effets juridiques du droit des peuples autochtones à la consultation préalable, voir le très intéressant arrêt de la Cour constitutionnelle de Colombie *Awa la Cabaña* (2018) SU/123/18.

au travail, la sécurité sociale ou encore les congés payés²⁵. Fréquemment, les évolutions jurisprudentielles décrites sont suivies de réformes législatives consacrant dans le droit écrit les solutions acquises devant les tribunaux²⁶. Dans quelques autres hypothèses en revanche, les pouvoirs législatifs restent parfois en retrait par rapport aux avancées de la jurisprudence. C'est par exemple le cas lorsque l'invalidation judiciaire des dispositions d'une loi du fait de leur contrariété avec les NIT n'est pas suivie par l'adoption d'une nouvelle législation qui permettrait de mettre en œuvre de manière cohérente les nouvelles orientations inspirées du droit international du travail²⁷. Il en va également ainsi lorsque des juridictions constitutionnelles exhortent leur parlement national à adopter une législation conforme aux orientations des normes de l'OIT, sans que les pouvoirs législatifs ne donnent toujours rapidement effet aux décisions de leur Cour constitutionnelle²⁸.

Les différents exemples qui viennent d'être décrits dans cette première partie soulignent donc que, dans un nombre substantiel de cas, la prise en compte des NIT par les tribunaux nationaux constitue un vecteur important d'influence du droit international du travail sur les droits nationaux. Il convient de maintenant de s'intéresser à l'évolution des techniques juridiques de prise en compte du droit international par les tribunaux nationaux qui accompagnent les tendances jurisprudentielles précitées.

²⁵ Recueil (n 4).

²⁶ Voir, par exemple, le cas de l'Afrique du Sud en matière d'encadrement du licenciement, celui de l'Espagne et du Costa Rica en matière de protection contre la discrimination antisyndicale, celui du Pérou quant à la consultation préalable des peuples autochtones ou encore les évolutions de la législation dans plusieurs pays d'Europe en matière d'égalité de rémunération entre hommes et femmes pour un travail de valeur égale.

²⁷ Voir, à cet égard, la législation argentine en matière syndicale.

²⁸ Voir, à cet égard, l'arrêt *C-796-14* de la Cour constitutionnelle de Colombie demandant au pouvoir législatif d'adopter une loi délimitant et régulant l'exercice du droit de grève dans le secteur des hydrocarbures sur la base des orientations des organes de contrôle de l'OIT en matière de définition des services essentiels. Voir également la décision du Tribunal constitutionnel du Pérou du 3 septembre 2015 (dossiers nos 0003-2013-PUTC, 0004-2013-PI/FC et 0023-2013-PUTC) déclarant inconstitutionnelle, sur la base de la Convention n° 98 et de la Convention (n° 151) sur les relations de travail dans la fonction publique, 1978, la prohibition complète de la négociation collective des rémunérations dans le secteur public et demandant au Congrès de la République de légiférer sur la question de manière à concilier le droit de négociation collective avec les impératifs d'équilibre des comptes publics.

III. Un phénomène qui s'appuie sur un élargissement des sources du droit international du travail considérées comme judiciairement pertinentes

Si l'on se penche maintenant sur les techniques juridiques qui sous-tendent l'utilisation des NIT par les tribunaux nationaux, il est possible de constater que l'utilisation judiciaire plus fréquente des instruments internationaux en matière de travail, notée dans un nombre conséquent de pays, s'appuie sur un double mouvement conjoint de connaissance plus fine de ces derniers par les tribunaux et d'élargissement des sources internationales considérées comme judiciairement pertinentes. Tout en restant réaliste sur l'ampleur du potentiel d'utilisation judiciaire des NIT et tout en soulignant l'hétérogénéité des approches selon les différents ordonnancements juridiques nationaux (et, en leur sein, selon les compétences respectives de leurs différents tribunaux), il résulte de la tendance précitée que les situations dans lesquelles le droit international du travail est susceptible d'être mobilisé judiciairement sont moins rares que ce qu'il résulterait d'une compréhension classique des liens entre droit international et droit interne.

Nous rappellerons ici de manière schématique qu'une approche doctrinale traditionnelle²⁹ de la détermination des aspects des instruments internationaux susceptibles d'être appliqués par les tribunaux nationaux consiste à distinguer d'une part les dispositions internationales reconnaissant aux sujets de droit des droits suffisamment clairs et précis pour être directement exigibles devant les tribunaux, même en l'absence de législation nationale en développant le contenu (dispositions considérées comme directement applicables ou *self-executing*) de celles requérant des Etats l'adoption d'une législation ou l'élaboration de politiques publiques (dispositions considérées comme programmatiques), ces dernières n'étant pas considérées comme applicables judiciairement.

Une relativisation et un dépassement de cette distinction est aujourd'hui visible dans la pratique d'un nombre significatif de tribunaux nationaux et s'exprime, d'une part, par la reconnaissance que de nombreuses dispositions internationales contiennent à la fois des aspects directement applicables et des

²⁹ Pour une telle approche, voir, par exemple, Nicolas Valticos et Geraldo von Potobsky, *International Labour Law* (Kluwer 1995) pars. 644-646 ou encore Carlos Ernesto Molina, *Las normas internacionales del trabajo y su efectividad en el derecho colombiano* (Temis 2005).

aspects programmatiques³⁰ et, d'autre part, par la considération que l'applicabilité judiciaire d'une disposition peut difficilement être définie de manière abstraite et absolue mais qu'il semble au contraire plus approprié de la déterminer *in concreto*, en fonction des éléments spécifiques de chaque litige et du rôle que le tribunal attribue à la source internationale dans sa résolution.

En ce qui concerne le contenu des instruments internationaux, Victor Abramovitch et Christian Courtis expliquent de manière convaincante que les dispositions des traités internationaux en matière de droits humains contiennent généralement à la fois des aspects directement applicables (et donc judiciairement exigibles), dans la mesure où ces instruments ont pour objet de créer des obligations à l'égard des Etats, et des aspects programmatiques, dans la mesure où leur mise en œuvre requiert généralement des développements législatifs et institutionnels afin que les traités puissent produire leurs pleins effets. Selon cette compréhension nuancée du contenu des instruments internationaux, c'est l'importance respective des aspects directement applicables et programmatiques qui varie selon chaque disposition.

Une illustration de cette analyse peut être trouvée dans les dispositions des conventions internationales du travail qui se «limitent» à requérir des Etats la mise en œuvre d'une politique générale permettant d'atteindre les objectifs fixés par la convention. Si ces dispositions présentent un indéniable caractère programmatique, elles requièrent également la prise d'actions immédiates, en particulier pour abroger les dispositions internes contraires aux objectifs posés par la convention³¹, ce qui pourrait les doter d'un effet direct dans le cadre de litiges mettant en jeu la validité desdites dispositions nationales.

L'examen de ce même type de dispositions permet également de comprendre que l'applicabilité judiciaire d'une disposition internationale peut difficilement être déterminée de manière abstraite, sans que son contenu ne soit confronté aux caractéristiques propres à chaque litige, en prenant en compte en particulier le type de problème juridique à résoudre et la fonction attribuée au droit international par le tribunal dans la résolution du litige (résolution directe du litige ou fonction interprétative du droit

³⁰ Voir, à cet égard, Abramovitch Victor et Courtis Christian, *Los derechos sociales como derechos exigibles* (Editorial Trotta 2002).

³¹ On notera que l'article 2 de la Convention n° 111 de l'OIT illustre explicitement cette approche.

interne?)³². C'est ainsi qu'une disposition internationale fixant des objectifs programmatiques et qui pourrait s'avérer insuffisamment précise pour résoudre directement un premier litige consistant par exemple à déterminer avec précision les droits d'un justiciable pourra néanmoins se révéler utile, dans le cadre d'un autre litige ayant pour objet d'examiner la validité d'une disposition de droit interne.

Si l'on examine maintenant quelques illustrations concrètes de cette approche assouplie de l'applicabilité judiciaire du droit international du travail, il est en premier lieu possible de relever une série de décisions de justice en provenance de pays monistes où les tribunaux n'hésitent pas à résoudre directement un litige sur la base de dispositions de conventions internationales ratifiées qui, certes, reconnaissent des droits ou posent des règles mais qui n'en fixent toutefois pas avec précision le contenu ou la portée et dont la pleine mise en œuvre requiert donc l'adoption de mesures additionnelles de la part de l'Etat.

C'est ainsi que la Cour de cassation française fait usage de l'article 2(b) de la Convention (n° 158) sur le licenciement, 1982, qui permet d'exclure du champ de la protection contre le licenciement injustifié, les personnes soumises à une période d'essai dès lors que la durée de celle-ci est fixée d'avance et qu'elle est raisonnable, sans que cette disposition ne précise toutefois ce que constitue un délai raisonnable. Cette indétermination n'empêche pas la Cour de considérer cette disposition comme directement applicable tout en se réservant le soin d'interpréter ce qui, selon elle, constitue au regard des exigences de la convention une durée de période d'essai déraisonnable³³.

³² Sur les différentes typologies d'utilisation judiciaire du droit international du travail, voir Recueil (n 4). Voir également Xavier Beaudonnet, «L'utilisation des sources universelles du droit international du travail par les juridictions internes» (2005) Bulletin de droit comparé du travail et de la sécurité sociale 43.

³³ Dans un arrêt du 26 mars 2013 (pourvoi n° 11-25580), la chambre sociale de la Cour de cassation française a par exemple considéré qu'est déraisonnable, au regard des exigences de la Convention n° 158, une période d'essai dont la durée, renouvellement inclus, atteint un an. On notera également l'avis n° 15012 de la Chambre sociale de la Cour de cassation du 17 juillet 2019 dans lequel la Cour considère comme directement applicable l'article 10 de la Convention n° 158 qui prévoit que les organes chargés de se prononcer sur la validité des licenciements «devront être habilités à ordonner le versement d'une indemnité adéquate ou toute autre forme de réparation considérée comme appropriée». De nouveau, le caractère indéterminé de différentes notions utilisées par la disposition internationale n'est plus considéré comme un obstacle à son applicabilité judiciaire.

De même, face à certaines limitations de leur législation nationale, le Tribunal supérieur du Travail du Brésil et la Cour suprême du Costa Rica ont eu recours, afin de sanctionner plus efficacement les licenciements antisyndicaux, à l'article 1 de la Convention (n° 98) sur le droit d'organisation et de négociation collective, 1949, qui reconnaît aux travailleurs le droit à une protection adéquate contre la discrimination antisyndicale sans que cette disposition ne définisse toutefois le caractère adéquat de ladite protection³⁴. Dans un arrêt de 2014³⁵ concernant les conséquences d'une faillite d'entreprise, la Cour suprême d'Argentine a, afin d'assurer la prééminence des créances d'un salarié sur celles de l'administration fédérale des recettes, écarté les dispositions législatives en vigueur et a résolu directement le litige sur le fondement de l'article 8(1) de la Convention (n° 173) sur la protection des créances des travailleurs en cas d'insolvabilité de leur employeur, 1992 qui stipule que la législation nationale doit placer les créances des travailleurs à un rang de privilège plus élevé que la plupart des autres créances privilégiées, et en particulier celles de l'Etat et de la sécurité sociale, quand bien même les dispositions législatives requises pour donner effet à cet article de la convention n'avaient pas été adoptées.

Ces quelques exemples traduisent une plus grande appropriation des conventions internationales du travail ratifiées de la part des tribunaux en question dans la mesure où le fait que les dispositions internationales appliquées requièrent l'adoption de mesures nationales pour garantir leur pleine mise en œuvre n'a pas empêché que soient considérées comme pleinement applicables les règles posées par celles-ci.

On relèvera également plusieurs cas où l'utilisation de dispositions principalement programmatiques contenues dans des conventions de l'OIT auront permis à des tribunaux soit d'évaluer la validité de certaines dispositions ou décisions nationales soit d'interpréter le contenu de leur constitution ou législation nationale. A cet égard, il est intéressant de voir comment la Cour constitutionnelle d'Afrique du Sud, dans le cadre d'un recours en protection des droits fondamentaux, a utilisé l'article 2 de la Convention (n° 111) concernant

³⁴ Tribunal supérieur du travail du Brésil, *Zavascki Roberto Antonio c. Companhia Minuano de Alimentos, Brasília* (2012) n° TST-RR-77200-27.2007.5.12.0019 et Cour suprême de Justice du Costa Rica, chambre constitutionnelle, décision n° 5000-93 (1993).

³⁵ Cour suprême de justice d'Argentine, *Recurso de hecho, pinturas y revestimientos aplicados SA c. Quiebra* (2014).

la discrimination (emploi et profession), 1958 qui impose aux États parties l'obligation de mettre en œuvre une politique nationale visant à éliminer toute discrimination dans l'emploi et la profession, pour consolider son interprétation de sa Constitution nationale et considérer que la discrimination à l'embauche subie par une personne séropositive devrait impliquer l'élimination de cette situation et, par conséquent, l'embauche de la personne en question.

On soulignera enfin les cas où des tribunaux nationaux s'appuient sur des sources non contraignantes de l'OIT, telles que des conventions internationales du travail non ratifiées, des recommandations internationales du travail ou encore des commentaires d'organes de contrôle, soit pour interpréter des dispositions de leur droit interne, soit pour reconnaître l'existence de principes généraux du droit du travail. Le fait que la source internationale ne constitue alors pas le fondement juridique direct de la résolution du litige mais seulement un fondement du raisonnement du juge rend inopérante la distinction entre dispositions directement exécutoires et programmatiques ainsi que celle entre sources contraignantes et non-contraignantes.

Au-delà des exemples déjà mentionnés de tribunaux de pays de *common law* se référant à la Convention n° 158, non ratifiée par leur pays, pour dégager des principes généraux applicables au licenciement³⁶ nous citerons ici une déjà ancienne mais très intéressante décision du Tribunal constitutionnel espagnol où la haute juridiction a interprété les dispositions de sa Constitution en matière de liberté syndicale à la lumière de la Recommandation (n° 143) concernant les représentants des travailleurs, 1971 et a, sur ce fondement, attribué aux candidats au poste de représentant syndical une protection renforcée contre la discrimination antisyndicale³⁷.

Tel que judicieusement relevé dans un commentaire du professeur Dunand³⁸, un arrêt du Tribunal fédéral suisse du 6 septembre 2017³⁹ constitue un excellent condensé des différentes évolutions précédemment

³⁶ Recueil (n 4).

³⁷ Tribunal constitutionnel d'Espagne (n 14).

³⁸ Voir l'excellent commentaire de Jean-Philippe Dunand, «Liberté syndicale et droit de l'Organisation internationale du travail (OIT): un cadeau avant l'anniversaire!: commentaire de l'arrêt du Tribunal fédéral 2C_499/2015 du 6 septembre 2017» (2018) Université de Neuchâtel, Faculté de droit, 1 <<http://droitdutravail.ch>>.

³⁹ Tribunal fédéral suisse, *Sindacato svizzero dei servizi pubblici, SSP/VPOD Zurigo/Lugano contro Consiglio di Stato del Cantone Ticino* (2017).

décrites et de l'assouplissement de la position adoptée par de nombreux tribunaux vis-à-vis de l'applicabilité judiciaire du droit international des droits de l'homme en général et du droit international du travail en particulier. Dans un arrêt de 2012⁴⁰, le tribunal fédéral avait écarté la possibilité de se référer aux conventions de l'OIT pour interpréter les dispositions de la Constitution suisse en matière de liberté syndicale, du fait de la supposée absence d'«applicabilité directe» de ces instruments. En 2017, la juridiction suprême a substantiellement modifié sa position dans un arrêt qui a déclaré inconstitutionnelle une réglementation cantonale posant comme principe l'interdiction de l'accès des représentants syndicaux aux bâtiments de l'administration publique et ne prévoyant que d'étroites exceptions à cette prohibition.

Pour considérer que la reconnaissance constitutionnelle de la liberté syndicale requiert que les représentants syndicaux disposent, dans le respect du fonctionnement de l'administration, d'un droit d'accès aux bâtiments de l'administration publique afin d'entretenir des contacts avec leurs membres ou de recruter de nouveaux membres, le Tribunal s'est amplement fondé sur les sources de l'OIT (en particulier sur l'article 3 de la Convention (n° 87) sur la liberté syndicale et la protection du droit syndical, 1948 ratifiée par la Suisse, la Convention (n° 135) concernant les représentants des travailleurs, 1971, non ratifiée par la Suisse, ainsi que sur les travaux correspondants des organes de contrôle de l'OIT.

Pour justifier une telle utilisation, et après avoir rappelé que l'ordonnement juridique suisse ne reconnaissait généralement pas aux conventions de l'OIT un caractère *self-executing*, le Tribunal fédéral a d'abord indiqué que l'éventuelle absence de caractère formellement contraignant des conventions de l'OIT ne l'empêche pas de s'y référer volontairement pour interpréter la Constitution nationale. Le haut tribunal a ensuite expliqué que les dispositions de la Convention n° 87 se superposent partiellement au contenu de l'article 11 de la Convention européenne des droits de l'homme et de l'article 22 du Pacte international relatif aux droits civils et politiques, dispositions qui, elles, ont été reconnues comme *self-executing* par la jurisprudence du Tribunal fédéral bien que leur contenu ne soit pas, selon les propres mots de la haute juridiction, plus précis que ceux de la convention de l'OIT en question.

⁴⁰ Tribunal fédéral suisse, TF 6B_758/2011 (2012).

Le Tribunal fédéral poursuit en soulignant que des dispositions de traités internationaux, telles que l'article 3 de la Convention n° 87, imposant à l'Etat une obligation d'abstention doivent être considérées comme directement applicables en droit interne dans la mesure où elles ne requièrent pas d'action législative ou autre pour produire leurs effets. Le Tribunal a enfin souligné l'importance de la pratique consolidée des organes de contrôle de l'OIT pour interpréter les conventions internationales du travail. A cet égard, le tribunal fédéral s'est appuyé tant sur les commentaires de caractère général des organes de contrôle de l'OIT qui précisent le sens et la portée des dispositions des conventions en matière de liberté syndicale que sur ceux spécifiquement adressés à la Suisse et soulignant la nécessité de reconnaître aux représentants syndicaux un droit d'accéder aux lieux de travail.

L'arrêt en question est donc particulièrement riche vis-à-vis de l'évolution de la place attribuée au droit de l'OIT en matière judiciaire. En une seule décision, le Tribunal fédéral a souligné que l'applicabilité judiciaire des sources internationales est un concept plus large que celui d'applicabilité directe dans la mesure où un rôle interprétatif peut par exemple être attribué à des sources internationales non contraignantes. Dans le même temps, il a assoupli son approche de la détermination du caractère directement applicable des dispositions des conventions de l'OIT en relevant que même des articles rédigés en termes généraux peuvent recevoir une telle qualification, par exemple lorsqu'ils font peser sur l'Etat une obligation d'abstention. Il a enfin considéré que les travaux des organes de contrôle de l'OIT sont une référence importante afin de pouvoir interpréter les instruments internationaux en matière de travail. Ce dernier point constitue justement notre prochain élément d'attention.

IV. Un phénomène qui s'accompagne d'une référence plus fréquente aux commentaires des organes de contrôle internationaux

L'activité normative de l'OIT ne se limite pas à l'adoption de conventions et recommandations internationales du travail mais s'étend également à la supervision de leur application par les Etats membres par le biais de différents mécanismes de contrôle. Sans entrer ici dans une description détaillée, on signalera que l'OIT dispose à la fois d'un mécanisme régulier de contrôle fondé sur l'examen des rapports présentés périodiquement par les gouvernements des Etats membres sur la mise en œuvre des conventions

qu'ils ont ratifiées ainsi que de mécanismes spéciaux basés sur la présentation de réclamations ou de plaintes. Ces mécanismes, qui concernent principalement le contrôle des conventions internationales du travail ratifiées⁴¹, font intervenir à la fois des organes tripartites et des organes composés de juristes indépendants⁴².

Les différents organes de contrôle de l'OIT ne sont pas des tribunaux et leurs décisions ne sont pas juridiquement contraignantes, même si les instruments dont elles examinent le respect le sont. Cela étant, il n'en demeure pas moins que les observations et recommandations de ces organes constituent des repères de première importance permettant de préciser le sens et la portée des dispositions contenues dans les NIT et de déterminer le degré de conformité existant entre les législations nationales et les NIT. A cet égard, il est intéressant de remarquer qu'une proportion significative de décisions judiciaires nationales récentes faisant usage des NIT se réfèrent non seulement aux dispositions de certaines conventions ou recommandations internationales du travail mais également aux travaux correspondants des organes de contrôle de l'OIT.

Dans la majorité des cas, ce sont les commentaires généraux des organes de contrôle de l'OIT relatifs au sens et à la portée des dispositions des NIT qui sont utilisés par les tribunaux nationaux à des fins interprétatives. C'est ainsi que le Tribunal industriel du Botswana s'est référé à l'article 3 de la Convention n° 158 et aux paragraphes correspondants de l'étude d'ensemble de la Commission d'experts pour l'application des conventions et recommandations (CEACR) concernant ladite convention pour accueillir en droit national le concept de licenciement implicite dans les situations où l'employeur impose à son salarié des conditions de travail telles qu'il est forcé de démissionner⁴³. Dans une décision de 2015 précitée, la Cour suprême du

⁴¹ Voir, à cet égard, l'exception notable que représente le mécanisme spécial de plainte en matière de liberté syndicale qui peut être utilisé vis-à-vis de tout Etat membre de l'OIT, qu'il ait ratifié ou non les conventions pertinentes en matière de liberté syndicale et négociation collective.

⁴² Pour une description de ces différents organes de contrôle et une réflexion sur leur fonctionnement et efficacité, voir Rapport conjoint des présidents de la Commission d'experts pour l'application des conventions et recommandations et du Comité de la liberté syndicale GB.326/LILS/3/1.

⁴³ Tribunal industriel du Botswana, *Mpho C. Ganelang c. Tyre World Ltd.* (2013) case n° IC 169/13.

Canada s'est référée à la Convention n° 87 et aux travaux du Comité de la liberté syndicale (CLS) et de la CEACR pour considérer que l'article 2(d) de la Charte canadienne des droits et libertés relatif à la liberté d'association incluait la protection du droit de grève⁴⁴.

Dans d'autres hypothèses, les travaux des organes de contrôle servent à étayer l'analyse par les tribunaux de la constitutionnalité d'une disposition législative par le biais de l'examen de sa compatibilité avec une convention internationale ratifiée. Dans ce sens, sur le fondement d'observations individuelles de la CEACR relatives à l'application de la Convention n° 87, la Cour suprême d'Argentine a rendu une série d'arrêts⁴⁵ déclarant l'inconstitutionnalité de plusieurs articles de la loi n° 23.551 de 1988. Ces articles accordaient aux associations syndicales dotées du statut syndical (*personería gremial*) une série de prérogatives exclusives en matière de représentation des intérêts collectifs des travailleurs allant au-delà du seul droit de négociation collective, ce qui, selon la CEACR n'est pas conforme aux articles 2 et 3 de la Convention n° 87 de l'OIT qui reconnaissent le droit des travailleurs de choisir librement une organisation syndicale et le droit de ces organisations de pouvoir défendre les intérêts économiques et sociaux de leurs membres.

Dans le même sens, la Cour constitutionnelle de Colombie a, dans deux décisions de 2008⁴⁶, utilisé la Convention n° 87 et les travaux correspondants de la CEACR et du CLS pour déclarer la «constitutionnalité conditionnelle» des dispositions du Code du travail relatives à l'enregistrement des syndicats. Sur les fondements mentionnés, la Cour a indiqué que la procédure d'enregistrement des organisations syndicales devant le Ministère du Travail devait uniquement servir des fins de publicité, le contrôle de la légalité des statuts des syndicats devant en revanche relever du pouvoir judiciaire.

De la même manière, le Tribunal constitutionnel du Pérou s'est fondé, dans plusieurs décisions récentes, à la fois sur la Convention n° 98 et la

⁴⁴ Cour suprême du Canada, *Saskatchewan Federation of Labour c. Saskatchewan* (2015) CSC 4, 2015 1 R.C.S. 245.

⁴⁵ Voir, à cet égard, Cour suprême d'Argentine, *Asociación de Trabajadores del Estado (A.T.E.)/recurso en inconstitucionalidad* (2013) caso n° A.598.XLIII; *Adriana María Rossi c. Estado Nacional – Armada argentina* (2009) R. 1717. XLI; *Asociación de Trabajadores del Estado (A.T.E.) c. Ministerio de Trabajo* (2008) A. 201. XL.

⁴⁶ Cour constitutionnelle de Colombie, décision C-465/08 (2008) et décision C-695/08 (2008).

Convention (n° 154) sur la négociation collective, 1981 de et sur les travaux correspondants de la CEACR et du CLS pour considérer inconstitutionnelles plusieurs dispositions législatives excluant entièrement la rémunération du champ de la négociation collective dans le secteur public⁴⁷.

Alors que les débats récents sur les organes de contrôle au sein de l'OIT ont conduit la CEACR à souligner de manière expresse le caractère non-contraignant de ses commentaires⁴⁸, il est intéressant de noter qu'aucun des tribunaux cités dans cette section n'a justifié son recours aux travaux des organes de contrôle par une éventuelle reconnaissance de leur caractère contraignant. Au contraire, de nombreuses juridictions tiennent à préciser le caractère non-contraignant de ces commentaires⁴⁹ tout en soulignant l'autorité qui leur est généralement reconnue et l'importance qui est leur accordée par de nombreuses instances nationales et internationales. L'arrêt du Tribunal fédéral suisse de 2017 cité plus haut en matière d'accès des organisations syndicales aux lieux de travail de l'administration publique constitue à cet égard une illustration intéressante supplémentaire, le haut tribunal justifiant sa référence aux commentaires et décisions de la CEACR et du CLS par le fait qu'ils sont fréquemment utilisés par la Cour européenne des droits de l'homme comme «matériel non conventionnel» dans l'interprétation de l'article 11 de la Convention européenne des droits de l'homme relatif à la liberté d'association.

Cette référence à la Cour européenne des droits de l'homme rappelle que la prise en compte croissante des commentaires des organes de contrôle de l'OIT s'inscrit dans une tendance plus vaste d'utilisation judiciaire des travaux des organes chargés du contrôle de l'application des instruments

⁴⁷ Tribunal constitutionnel du Pérou, *Ciudadanos, Colegio de Abogados de Tacna y Colegio de Abogados de Junín c. Congreso de la República* (2016).

⁴⁸ Conférence internationale du Travail, 108^{ème} session (2019), Rapport de la CEACR (partie 1) par. 32.

⁴⁹ Voir, par exemple, Cour suprême du Canada (n 44) par. 69: «Même si, à strictement parler, elles n'ont pas d'effet obligatoire, les décisions du Comité de la liberté syndicale ont une force persuasive considérable et elles ont été citées avec approbation et largement reprises à l'échelle mondiale par les cours de justice, les tribunaux administratifs et d'autres décideurs, y compris notre Cour (Lynk, par. 9; *Health Services*, par. 76; *Renvoi relatif à l'Alberta*, p. 354-355, le juge en chef Dickson). Le Comité de la liberté syndicale a vu s'accroître avec le temps la pertinence et le caractère persuasif de ses décisions dans l'usage et dans la pratique et, au sein de l'OIT, c'est à lui principalement qu'il a incombé de délimiter le droit de grève».

internationaux en matière de droits humains en général. Est à cet égard très illustrative l'utilisation par de nombreux tribunaux de la recommandation générale n° 19 du Comité pour l'élimination de toutes formes de discrimination contre les femmes, relative au harcèlement sexuel⁵⁰. Le sont également différents arrêts de la Cour constitutionnelle de Turquie se référant de manière conjointe à la fois aux commentaires des organes de contrôle de l'OIT, à ceux du Comité européen des droits sociaux ainsi qu'à la jurisprudence de la Cour européenne des droits de l'homme⁵¹.

Ce recours plus fréquent des tribunaux aux commentaires des organes de contrôle de l'OIT revêt dans tous les cas une grande importance dans la mesure où une bonne connaissance des travaux de ces organes constitue le meilleur antidote pour éviter une lecture erronée du sens et de la portée des NIT et contribue ainsi, dans le respect de l'indépendance du pouvoir judiciaire, à une application cohérente des NIT au niveau national et donc, au final, à plus de sécurité juridique.

Ces troisième et quatrième parties ont donc permis de souligner que l'utilisation plus fréquente des NIT par certains tribunaux nationaux s'accompagne souvent d'une plus grande familiarité de ces instances judiciaires avec les sources de l'OIT ainsi que d'un affaiblissement de la présomption de non-applicabilité judiciaire qui avait souvent été attribuée à ces dernières. Cela étant, les évolutions décrites ne signifient pas pour autant que la tendance relevée d'une plus grande utilisation judiciaire des NIT ne soit pas confrontée à un certain nombre de limites et de défis.

V. L'utilisation judiciaire des NIT, une pratique universelle?

Il convient en premier lieu de relever que l'extension de l'utilisation judiciaire des NIT décrite dans les paragraphes précédents reste loin d'être universelle. S'il est nécessaire de rappeler que l'utilisation des NIT par les tribunaux ne constitue pas une fin en soi et que le besoin objectif des juridictions nationales de se référer à des sources externes pour pallier les effets

⁵⁰ Recueil (n 4).

⁵¹ Voir, à cet égard, la contribution de Melda Sur relative à la Turquie dans le dossier de jurisprudence sociale comparée de la Revue de droit comparé du travail et de la sécurité sociale consacré à «la jurisprudence sociale et le droit international, complémentarité ou hostilité» (2016) Revue de droit comparé du travail et de la sécurité sociale 93.

d'une législation trop réduite ou insuffisamment protectrice peut varier sensiblement selon les pays, il convient également de relever que l'utilisation judiciaire des NIT ne s'est toutefois pas encore épanouie dans certains espaces où son apport serait sûrement significatif.

A cet égard, à l'exception de décisions provenant de quelques pays, l'Asie semble constituer la région du monde où l'impact judiciaire des NIT parait, pour l'instant, le moins visible⁵², plusieurs facteurs pouvant expliquer cette situation (disponibilité limitée des NIT et des travaux des organes de contrôle dans les langues nationales, faible nombre de conventions internationales ratifiées, absence d'un système régional de protection de droits humains pouvant servir de vecteur de pénétration des normes internationales du travail en droit interne, etc.).

Cela étant, dans un contexte où la croissance des économies de la région se traduit également par un développement des législations du travail et, dans certains pays, par une augmentation significative du nombre de conventions internationales du travail ratifiées⁵³, il serait probablement judicieux de poursuivre et accroître les initiatives déjà prises par le Bureau international du Travail et son centre de formation pour familiariser les juridictions des pays asiatiques ainsi que les avocats plaidants de ces pays avec les NIT⁵⁴.

⁵² Voir en particulier les décisions judiciaires de l'Inde et des Philippines disponibles dans le recueil de décisions de justice du Centre international de formation de l'OIT. On relèvera toutefois que l'impact judiciaire des NIT peut parfois se manifester de manière implicite. On notera à cet égard la décision de la Cour suprême de la République de Corée reconnaissant aux travailleurs migrants en situation irrégulière le droit de se syndiquer. Même si cet arrêt ne mentionne pas les sources internationales, il se produit après de nombreuses années de recommandations récurrentes du Comité de la liberté syndicale à ce sujet dans le cadre du cas n° 2620 (Jugement du 18 septembre 2015).

⁵³ Voir, par exemple, les 29 conventions internationales du travail ratifiées par la République de Corée entre son adhésion à l'OIT en 1992 et le mois d'octobre 2019 ou encore les 24 conventions ratifiées par le Vietnam entre 1994 et octobre 2019.

⁵⁴ Même si cette deuxième observation est d'une portée bien plus limitée que la première, on relèvera également qu'assez peu de décisions judiciaires faisant usage des NIT proviennent de juridictions administratives. On soulignera à cet égard qu'un nombre non négligeable de pays, en particulier ceux de tradition juridique française, disposent de juridictions administratives compétentes pour résoudre les litiges du travail de leurs fonctionnaires et que de nombreuses conventions et recommandations internationales du travail ont vocation à s'appliquer tant aux secteurs public que privé.

VI. Une pratique toujours cohérente et durable?

Pour de nombreux juges nationaux, les NIT restent une source de droit relativement méconnue, ce qui devrait justifier la plus grande rigueur et prudence dans leur utilisation. Certains exemples semblent cependant indiquer que cela n'est pas toujours le cas. A titre d'illustration, on notera la décision d'une juridiction constitutionnelle se prononçant sur l'exclusion des fonctionnaires des douanes du droit de se syndiquer⁵⁵. Pour justifier la validité de cette exclusion, la juridiction s'était référée à plusieurs décisions du Comité de la liberté syndicale qui, d'une part, ont reconnu sur la base de la Convention n° 87, le droit des Etats d'exclure les forces armées et la police du champ de la liberté syndicale et qui, d'autre part, considèrent qu'il n'est pas contraire aux principes de la liberté syndicale de ne pas reconnaître le droit de grève aux fonctionnaires des douanes. L'arrêt n'a en revanche pas fait référence aux décisions spécifiques dans lesquelles le Comité de la liberté syndicale a souligné que, en vertu de l'article 2 de la Convention n° 87, les fonctionnaires des douanes doivent se voir reconnaître le droit de se syndiquer.

L'autorité attribuée aux NIT et aux travaux des organes de contrôle de l'OIT par les juridictions de certains pays peut parfois s'avérer moins solide que prévu et fluctuer en fonction du contexte économique, social ou politique. L'examen par certains tribunaux constitutionnels de réformes législatives adoptées pour faire face aux conséquences de la crise économique qui a sévi en Europe à partir de 2008 souligne qu'il peut s'avérer plus aisé pour les tribunaux d'utiliser les sources de l'OIT pour accompagner ou amplifier les évolutions juridiques déjà en cours tendant à une plus ample reconnaissance de certains droits plutôt que pour s'opposer à la mise en œuvre de lois nouvelles restrictives dictées dans le cadre de fortes contraintes économiques⁵⁶.

⁵⁵ Conseil constitutionnel du Sénégal, affaire n° 2/C/2013 (2013).

⁵⁶ Voir, à cet égard, Tribunal constitutionnel d'Espagne, *Parlamento de Navarra c. Ley 3/2012* (2014) caso núm. 5603-2012.

VII. Conclusion

Même si l'adoption de mesures législatives et réglementaires ainsi que de politiques publiques continuent et continueront de constituer le mode principal de mise en œuvre des NIT, cette note a voulu souligner que l'utilisation judiciaire de ces instruments constitue aujourd'hui un vecteur non négligeable d'application du droit international du travail dans un nombre important de pays où les tribunaux font preuve d'une familiarité croissante avec ces sources.

Cela étant, l'extension et la consolidation de cette pratique qui contribue de manière significative au renforcement de l'Etat de droit est, comme l'on a également vu, loin d'être acquise, ce qui justifie de poursuivre et d'intensifier, avec la plus grande rigueur juridique, les efforts de formation des juges et juristes des différents Etats membres de l'Organisation vis-à-vis de ces sources⁵⁷.

Une dernière réflexion s'impose avant de clore ces propos. L'attention qu'il convient de prêter à la prise en compte judiciaire des sources de l'OIT apparaît d'autant plus importante que le panorama juridique et politique au sein duquel les NIT sont amenées à s'appliquer a beaucoup changé depuis la création de l'OIT il y a cent ans. Dans un contexte juridique marqué par la pluralité croissante des sources de droit, l'espace judiciaire, tant national qu'international, constitue non seulement le lieu de résolution des litiges entre particuliers mais aussi le forum où se dénouent et s'arbitrent les points de friction et les possibles contradictions entre le droit du travail et d'autres branches du droit⁵⁸.

⁵⁷ Voir, à cet égard, les programmes et matériels de formation du Centre international de formation de l'OIT, et en particulier, Xavier Beaudonnet et Tzehainesh Tekle (eds), *Droit international du travail et droit interne: manuel de formation pour juges, juristes et professeurs de droit* (Centre international de formation de l'OIT 2015).

⁵⁸ On pensera particulièrement ici à l'articulation entre, d'une part, le droit de l'Union européenne, principalement centré sur les libertés économiques et d'autre part, les différentes sources du droit du travail, nationales ou internationales, applicables au sein des pays de l'Union européenne. Voir, à cet égard, Alain Supiot (dir), «Les gardiens des droits sociaux en Europe – Les recours nationaux et internationaux en cas de remise en cause des droits sociaux par l'Union européenne» (2016) supplément au n° 1746 Semaine sociale Lamy.

Dans ce cadre, la présence des NIT dans le débat judiciaire national et international⁵⁹ est essentielle pour assurer la pérennité de leur influence, et au travers d'elles, du droit du travail en général au cours des décennies à venir. Pour cela, au-delà de la formation régulière des juges et juristes aux NIT qui a déjà été mentionnée, les tribunaux devront pouvoir continuer à compter sur un corpus normatif de l'OIT solide et actualisé, accompagné et éclairé par des mécanismes de contrôle qui continuent de faire autorité⁶⁰. Ce sont autant d'éléments que l'initiative du centenaire sur les normes s'efforce justement de mettre en œuvre⁶¹.

⁵⁹ Sur la prise en compte jusqu'ici fort réduite des sources de l'OIT par la Cour de Justice de l'Union européenne, voir Tzehainesh Tekle, «Labour Rights and the Case Law of the European Court of Justice: Which Role for International Labour Standards?» (2018) 9 *European Labour Law Journal* 236.

⁶⁰ La prise en compte judiciaire des NIT bénéficierait également sans aucun doute des arrêts du tribunal qui pourrait être créé en vertu de l'article 37(2) de la Constitution de l'OIT afin de résoudre les questions d'interprétation soulevées par les conventions internationales du travail.

⁶¹ Pour une description de l'initiative du centenaire sur les normes <https://www.ilo.org/global/about-the-ilo/history/centenary/WCMS_502351/lang-fr/index.htm>.

La Convention du travail maritime, 2006: renouveau et source d'inspiration du droit international du travail

Alexandre Charbonneau et Beatriz Vacotto

I. Introduction

Le centenaire de l'OIT est l'occasion de mettre en lumière une expérience normative unique au niveau international, à laquelle Nicolas Valticos faisait allusion en ces termes au début des années 80: «il est tout d'abord remarquable de constater à quel point, après plus de soixante ans, les conventions internationales du travail constituent – et de plus en plus – malgré les diversités et les oppositions entre les pays et les idéologies, “un des principaux éléments à la fois d'ordre économique et d'ordre éthique de la civilisation, commune aux nations d'aujourd'hui”, “un ciment d'unité” ou une possibilité de dialogue au-delà des divergences entre nations ou systèmes, un moyen pour les pays en voie de développement d'accéder à un niveau de développement supérieur»¹. Certes, les remises en question sont profondes², les besoins de réformes insistants³. Il n'en demeure pas moins qu'au quotidien, les normes internationales du travail inspirent les législateurs nationaux, sont invoquées dans le cadre de demandes en justice et sont mobilisées par les partenaires sociaux à l'appui de leurs revendications.

¹ Nicolas Valticos, «Droit international du travail» in Guillaume H. Camerlynck (dir.), *Traité de droit du travail* (Dalloz 1982) préface.

² Voir, notamment, Alain Supiot, *L'esprit de Philadelphie – La justice sociale face au marché global* (Editions du Seuil 2010); Francis Maupain, *L'OIT à l'épreuve de la mondialisation financière – Peut-on réguler sans contraindre?* (Institut international d'études sociales 2012).

³ Des informations précieuses sur ce point peuvent être trouvées sur la page que le site de l'OIT consacre à la politique normative <<https://www.ilo.org/global/standards/international-labour-standards-policy/lang-fr/index.htm>>.

Les célébrations du centenaire ont rappelé à quel point, même une vingtaine d'années après sa création, «l'OIT était encore un rêve. Pour beaucoup de gens, c'était un rêve inaccessible»⁴. Pourtant, l'ambition était bien présente et, dès 1919, certains s'étaient permis, s'agissant des normes internationales du travail, de rêver à un statut international du marin (*International Seamen's Code*), question d'ailleurs inscrite à l'ordre du jour de la deuxième session de la Conférence internationale du Travail qui s'est tenue à Gênes, en 1920⁵.

L'adoption de la Convention du travail maritime (MLC, 2006), instrument aussi désigné comme le «*Seafarers' Bill of Rights*», représente certainement l'aboutissement et la concrétisation de ce rêve. Cette nouvelle convention avait notamment pour objet de répondre aux graves préoccupations exprimées par les armateurs et les marins, soutenues ensuite par les gouvernements, concernant la perte de pertinence des normes maritimes existantes. Comme l'expliquent très bien des auteurs avertis: «their substance was of good quality, but they were unevenly applied and enforced and often were not widely ratified. Moreover, the existing procedures for the revision of international labour Conventions have not allowed the technical aspects to be rapidly updated so as to meet modern conditions in the industry. From a broader systemic perspective the underlying concern was that, with the increasing level of regulation in other aspects of shipping operations and increased international competition, labour would be the one remaining area for cutting costs»⁶.

⁴ Allocution de Franklin D. Roosevelt, Président des États-Unis d'Amérique, à l'occasion de la Conférence internationale du Travail, tenue à Washington D.C. en 1941 <https://www.ilo.org/global/about-the-ilo/multimedia/video/video-interviews/WCMS_650711/lang-en/index.htm>.

⁵ La Commission de la législation internationale du travail, instituée par la Conférence de la Paix le 25 janvier 1919, avait adopté une proposition présentée par la délégation française et aux termes duquel «les questions très spéciales relatives au minimum d'avantages à assurer aux marins doivent éventuellement faire l'objet d'une session spéciale de la Conférence internationale du Travail réservée au travail des marins»; Conférence internationale du Travail, 2^{ème} session (1920), comptes rendus XI <[https://www.ilo.org/public/libdoc/ilo/P/09624/09624\(1920-2\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09624/09624(1920-2).pdf)>.

⁶ Cleopatra Doumbia-Henry, Dominick Devlin and Moira L. McConnell, «The Maritime Labour Convention, 2006 Consolidates Seafarers' Labour Instruments» (2006) 10(23) ASIL Insight.

En ce qu'elle visait avant tout à consolider la plupart des 70 conventions et recommandations maritimes antérieures, la démarche engagée aurait pu laisser penser à une simple logique de compilation. Toutefois, les cinq années qui furent nécessaires à son adoption permirent un effort d'actualisation et de clarification des droits reconnus aux gens de mer. En outre, afin de répondre aux préoccupations sectorielles, ses négociateurs ont fait appel à un nombre considérable de figures juridiques et de mécanismes innovants. Pour certains d'entre eux, il est possible de parler de «jamais vu» dans l'histoire des normes internationales du travail. Si le but de cette contribution n'est pas de passer en revue ces éléments novateurs, sur lesquels beaucoup a été écrit⁷, il est cependant essentiel de rappeler les traits les plus saillants de la convention.

La MLC, 2006 est un instrument complet qui couvre l'ensemble des aspects de la relation de travail, qu'il s'agisse des conditions d'accès à l'emploi (Titre 1), des conditions de travail à bord (Titre 2), des conditions de vie à bord (Titre 3), ainsi que des questions de santé, de bien-être et de sécurité sociale (Titre 4).

La convention tire sa force de son Titre 5, qui détaille les responsabilités incombant à l'Etat du pavillon, à l'Etat du port et au fournisseur de main-d'œuvre pour assurer le respect effectif, à bord, des conditions minimales de vie et de travail prescrites. En ce sens, elle est la seule convention de l'OIT à contenir, en elle-même, un mécanisme abouti de mise en application de ses dispositions. Tous les «navires» doivent être régulièrement inspectés sous

⁷ Voir, notamment, Olga Fotinopoulos Basurko, *Aspectos generales del Convenio refundido sobre el trabajo marítimo* (Gobierno Vasco, Departamento de Transportes y Obras Publicas 2006); Moira L. McConnell, Dominick. Devlin et Cleopatra Doumbia-Henry, *The Maritime Labour Convention. A Legal Primer to an Emerging International Regime* (Martinus Nijhoff Publishers 2011); Jennifer Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined* (Routledge 2014); Alexandre Charbonneau (dir.), «La mise en œuvre de la convention du travail maritime de l'OIT: espoirs et défis» (2013) *Revue de droit comparé du travail et de la sécurité sociale*; Patrick Chaumette (dir.), *Gens de mer: un marché international du travail en perspective*, (Gomylex Ed 2016); George P. Politakis, «The International Labour Organization and Ocean Governance» in David Joseph Attard, Malgosia Fitzmaurice and Alexandros Ntovas (eds), *The IMLI Treatise on Global Ocean Governance, Volume II: UN Specialized Agencies and Global Ocean Governance* (Oxford UP 2018) 102, 107-112.

l'autorité de l'Etat du pavillon. La MLC, 2006 met également à leur charge une obligation de «certification sociale»⁸ des navires.

Les Etats membres sont, par ailleurs, admis à exercer un contrôle sur les navires étrangers qui font escale dans leurs ports. Ce mécanisme consiste, au stade initial, en un «contrôle papier» réalisé sur la base des documents de certification sociale. En ce sens, la certification sociale joue comme une présomption de conformité et constitue un puissant argument en faveur de la ratification de la convention, du point de vue des armateurs et des Etats soucieux de développer leur flotte. Dans certaines hypothèses⁹, cette inspection initiale peut déboucher sur une inspection plus détaillée, voire sur l'immobilisation du navire en cas de non-conformité grave¹⁰. Le contrôle par l'Etat du port est étendu aux navires battant pavillon d'un Etat qui n'a pas ratifié la MLC, 2006, en raison d'une clause de traitement pas plus favorable¹¹. D'après celle-ci: «Tout Membre s'acquitte des responsabilités contractées aux termes de la présente convention en faisant en sorte que les navires battant le pavillon de tout Etat ne l'ayant pas ratifiée ne bénéficient pas d'un traitement plus favorable que ceux battant le pavillon de tout Etat l'ayant ratifiée». Cette clause donne à l'instrument une portée universelle et contribue à prévenir les risques de concurrence déloyale qui pèseraient négativement sur les Etats et acteurs économiques du secteur acceptant de le mettre en œuvre.

Des procédures organisent, en outre, l'examen et le traitement des plaintes des gens de mer à bord et à terre¹². Le Titre 5 vient donc définir un ensemble de mécanismes destinés à assurer l'application de la convention et qui complètent et se combinent avec le contrôle régulier de l'application des normes, auquel les Etats membres de l'OIT sont astreints¹³.

⁸ MLC, 2006, règle 5.1.3. Voir Amandine Lefrançois, *L'usage de la certification, nouvelle approche de la sécurité dans les transports maritimes* (PUAM 2011); Olga Fotinopoulos Basurko, «El Control y Certificación del Cumplimiento del Convenio de Trabajo Marítimo 2006 de la OIT: Aspectos críticos del RD 357/2015» (2015) 41 *Revista de Derecho del Trabajo y de la Seguridad Social*.

⁹ MLC, 2006, norme A5.2.1(1).

¹⁰ *ibid* norme A5.2.1(6).

¹¹ *ibid* article V(7).

¹² *ibid* règles 5.1.5 et 5.2.2.

¹³ L'article 22 de la Constitution de l'OIT impose un contrôle de l'application des conventions ratifiées sur la base de l'examen, par une commission d'experts indépendants,

Les dispositions de la MLC, 2006 incarnent le principe «*firmness in rights and flexibility in implementation*». Il s'agit, tout en garantissant un socle de droits, de s'adapter aux besoins des acteurs du transport maritime qui opèrent dans un environnement juridique, économique et social très hétérogène. En ce sens, l'instrument ne se conforme à la distinction habituelle entre conventions et recommandations internationales du travail et distingue, en son sein, des dispositions obligatoires (articles, règles, normes)¹⁴, qui sont ensuite détaillées par des principes directeurs non obligatoires. Ceux-ci sont alors destinés à guider les Etats dans la mise en œuvre de la MLC, 2006 en leur aménageant une marge de manœuvre. Leur valeur juridique dépasse cependant celle des autres recommandations de l'OIT puisque les Etats membres doivent «dûment envisager de s'acquitter de ses obligations de la manière prescrite dans la partie B du code (principes directeurs)¹⁵ et cette obligation fait l'objet d'un contrôle de la part des organes de supervision de l'OIT. La flexibilité de l'instrument se retrouve aussi dans la détermination du champ d'application des mesures adoptées au plan national pour lui donner effet et dans la possibilité d'avoir recours à une série de dérogations, exemptions et autres applications souples après consultation des organisations d'armateurs et de gens de mer¹⁶.

la Commission d'experts pour l'application des conventions et recommandations (CEACR), d'un rapport que les Etats doivent adresser au BIT, selon une fréquence qui diffère en fonction de la convention internationale. Voir, notamment, M. Rodriguez-Piñero, «Le système de contrôle des conventions internationales du travail de l'OIT et le rôle de la Commission d'experts» in Nikitas Aliprantis (dir), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008) 159; Eric Gravel, «Les mécanismes de contrôle de l'OIT: bilan de leur efficacité et perspectives d'avenir» in Jean-Claude Javillier et Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir – Mélanges en l'honneur de Nicolas Valticos* (BIT 2004) 3; Loïc Picard, «Le contrôle de la mise en œuvre des instruments adoptés par l'organisation internationale du travail» in Jean-Marc Thouvenin et Anne Trebilcock, *Droit social international* (Bruylant/CEDIN 2013) 702.

¹⁴ Les normes, en principe obligatoires quant à l'objectif de protection et aux moyens d'atteindre cet objectif qu'elles prescrivent, peuvent faire l'objet d'une mise œuvre par des dispositions dites «équivalentes dans l'ensemble» (MLC, 2006, article VI (3) et (4)). Sur la notion d'équivalence d'ensemble, voir Conférence internationale du Travail, 77^{ème} session (1990), *Etude d'ensemble des rapports concernant la convention (n° 147) sur la marine marchande (normes minima) et la recommandation (n° 155) sur la marine marchande (amélioration des normes) de 1976*, 41.

¹⁵ MLC, 2006, article VI(2).

¹⁶ Si la convention retient une définition étendue des notions de «gens de mer» (ou marins) et de «navire», elle donne toutefois aux Etats la possibilité d'adapter, en cas de doute,

Cent quatre-vingt-sixième convention adoptée par l'OIT, la MLC, 2006 est toutefois dépourvue du numéro qui identifie habituellement les conventions et recommandations internationales du travail. Cette absence reflète la volonté des négociateurs de créer un instrument durable, qui pourrait être amendé au gré des besoins du secteur, selon des procédures simplifiées. Ces procédures, inconnues jusqu'alors des normes internationales du travail, ont été empruntées à des conventions de l'Organisation maritime internationale (OMI) et se fondent sur les notions d'acceptation tacite et d'«*opting out*». Ainsi, une fois approuvés par la Conférence internationale du Travail et notifiés aux Etats Membres, les amendements sont réputés acceptés et entreront en vigueur, si certaines conditions sont remplies, pour tous ceux n'ayant pas exprimé formellement leur désaccord dans le délai imparti¹⁷.

Consolidation, *enforcement* et flexibilité sont les caractéristiques d'un instrument qui, au moment de son adoption, était un pari loin d'être gagné. Cette contribution se propose d'illustrer comment la MLC, 2006, qui aurait pu rester lettre morte, a progressivement acquis une portée universelle et transforme à présent en profondeur les conditions de travail et de vie des gens de mer. Elle est en effet devenu un outil concret de travail pour les administrations maritimes, les armateurs, les inspecteurs, les agences de recrutement et, bien évidemment, les marins et leurs organisations. Au passage, le droit international du travail s'est doté d'un instrument moderne, dynamique et innovant, qui vient enrichir les réflexions que l'OIT développe, à l'occasion de son centenaire, sur l'avenir de ses activités normatives.

Si les données qui seront présentées permettent aujourd'hui de considérer que cette expérience est une réussite (II), cela ne signifie toutefois pas qu'elle soit transposable, à l'identique, dans n'importe quel autre secteur. La convention peut bien entendu servir de modèle d'inspiration¹⁸, mais sous réserve de bien identifier les conditions particulières dans lesquelles elle a été adoptée (III) et de prendre la mesure des efforts et ressources que mobilise le suivi de son application. La MLC, 2006 tire ainsi sa légitimité

cette définition à l'échelle nationale en excluant certaines catégories de «gens de mer» ou de «navires». Voir l'article II de la MLC, 2006 qui précise que cette détermination nationale doit se faire après consultation des organisations d'armateurs et de gens de mer intéressées.

¹⁷ MLC, 2006, article XV.

¹⁸ Commission mondiale sur l'avenir du travail, *Travailler pour bâtir un avenir meilleur* (BIT 2019).

d'un dialogue tripartite et multilatéral permanent (IV), ainsi que d'un investissement fort du Bureau afin de répondre aux attentes des mandants, y compris pour faire face à des situations d'urgence (V).

II. L'impact de la MLC, 2006: des rives du lac Léman aux océans du monde

La MLC, 2006 exigeait pour son entrée en vigueur la ratification d'au moins 30 Membres représentant 33 pour cent de la jauge brute de la flotte marchande mondiale¹⁹. Cet objectif, plus qu'ambitieux, visait clairement à établir un «*level playing field*» entre les pays d'importance maritime, et ceci dès l'entrée en vigueur de la convention. Un premier constat de réussite est donc le fait que celle-ci a enregistré, en moins de 15 ans, 94 ratifications couvrant plus de 91 pour cent de la jauge brute de la flotte marchande mondiale²⁰. Parmi ces pays figurent cinq des six principaux Etats fournisseurs de main d'œuvre de marins dans le monde: la Chine, les Philippines, la Russie, l'Indonésie et l'Inde²¹.

La Commission d'experts pour l'application des conventions et recommandations (CEACR) a examiné à ce jour 70 premiers rapports sur l'application de la MLC, 2006, présentés par les pays l'ayant ratifiée. De ce fait, les législations, réglementations, circulaires, conventions collectives et autres pratiques des principales puissances maritimes du monde ont fait l'objet d'une étude minutieuse. La CEACR a observé que, dans l'ensemble, des efforts remarquables ont été entrepris pour donner effet à la convention. Elle a

¹⁹ MLC, 2006, article VIII.

²⁰ Parallèlement à la campagne de ratification du Centenaire de l'OIT, intitulée «Une pour tous», une campagne de ratifications sectorielle a été lancée: «Un objectif pour l'année du centenaire: atteindre les 100 ratifications de la MLC, 2006». Bien qu'il soit peu probable que cet objectif soit atteint d'ici la fin 2019, le seuil des 100 ratifications devrait très prochainement être franchi. Pour plus d'informations <<https://www.ilo.org/global/standards/lang-fr/index.htm>>.

²¹ Le sixième étant l'Ukraine, pays qui est très avancé dans le processus de ratification; Manpower Report, *The global supply and demand for seafarers in 2015* (BIMCO/ICC 2015). Selon une étude récente du secteur maritime, plus de 1,6 million de gens de mer travaillent sur divers types de navire. La Fédération internationale des ouvriers du transport (ITF) estime que 300 000 à 350 000 gens de mer travaillent dans le seul secteur des croisières; il est possible qu'ils ne soient pas inclus dans ce chiffre; *Recrutement et maintien dans l'emploi des gens de mer et amélioration des possibilités offertes aux femmes marins* (SMSWS/2019/9) <https://www.ilo.org/sector/activities/sectoral-meetings/WCMS_647755/lang-fr/index.htm>.

toutefois relevé un certain nombre de problèmes qui restent à régler, dont certains, comme la question de la sécurité sociale, sont d'une grande complexité.

Depuis 2013, trois séries d'amendements au Code de la MLC, 2006 ont été adoptées pour répondre aux besoins exprimés par le secteur. Deux d'entre elles sont déjà en vigueur. Ces amendements traitent notamment de l'abandon des gens de mer, de la prévention en matière d'harcèlement et d'intimidation à bord, ainsi que de la protection des salaires des marins en cas de piraterie. Un nombre infime d'Etats a utilisé le droit d'exprimer un désaccord formel (*opting out*)²². La procédure simplifiée d'amendement a donc rapidement fait ses preuves et s'impose comme une nouvelle ressource du droit international du travail qui permet de réviser les éléments plus techniques d'une convention d'une manière opportune et efficace sans passer par l'exigence d'une nouvelle ratification²³.

III. Entre volontarisme et coopération multilatérale: une approche pragmatique du droit international du travail maritime

Pour comprendre les raisons du succès de la MLC, 2006, il n'est pas inutile de revenir sur le contexte dans lequel elle a été adoptée. Il est courant de citer le mois de janvier 2001 comme un moment clé²⁴. Réunie pour sa 29^{ème} session, la Commission paritaire maritime va adopter à l'unanimité une Résolution concernant l'examen des instruments maritimes pertinents,

²² Pour les amendements de 2014: le Japon et les Pays Bas. Tous deux ont par la suite accepté les amendements (*opting in*). Pour les amendements de 2016: la Finlande, mais elle les a acceptés par la suite. Pour les amendements de 2018: aucun pays jusqu'au moment de la finalisation de cette contribution.

²³ Le Groupe de travail tripartite du mécanisme d'examen des normes de l'OIT s'est penché récemment sur les procédures de révision des normes et a examiné la possibilité de s'inspirer des mécanismes de la MLC, 2006 pour de futurs instruments. Voir, notamment, le document de référence 2: *Révision des normes internationales du travail* et le document de travail 1: *Assurer la cohérence et la rigueur du suivi normatif des recommandations*, en matière de sécurité et santé au travail, cinquième réunion du Groupe de travail tripartite du MEN (2019) <https://www.ilo.org/global/standards/international-labour-standards-policy/WCM_715804/lang-fr/index.htm> et <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/genericdocument/wcms_715739.pdf>.

²⁴ McConnell (n 7) 46; Cleopatra Doumbia-Henry, «The Consolidated Maritime Labour Convention: A Marriage of the Traditional and the New» in Javillier (n 13) 319.

bientôt connue sous le nom d'Accord de Genève²⁵. Celle-ci souligne que «l'élaboration d'un instrument qui rassemblerait, le plus largement possible, les instruments existants de l'OIT dans un texte unifié devrait être une priorité pour le secteur maritime, afin que les normes répondent mieux aux besoins de tous les acteurs de ce secteur». Même si les travaux préparatoires mettent en évidence l'importance des défis que ce projet allait obliger à relever, le même esprit de consensus se manifesterait au moment de l'adoption de l'instrument par la Conférence internationale du Travail, en 2006, à la quasi-unanimité des délégués présents. Tripartisme et volontarisme sont donc des traits marquant de cette histoire et la convention doit beaucoup à la qualité du dialogue social entre les organisations d'armateurs et de gens de mer qui sont appelées à régulièrement siéger à l'OIT.

D'autres manifestations de cette volonté partagée de renouveler par le dialogue le cadre juridique international applicable au travail maritime sont identifiables. Ainsi, le processus de reprise des conventions internationales du travail maritime en droit de l'Union européenne par le biais de la négociation collective est devenue une pratique courante depuis 1999²⁶. Par ailleurs, un accord cadre international (*International Bargaining Forum*) a été conclu le 13 novembre 2003²⁷ et est régulièrement révisé depuis à travers

²⁵ Commission paritaire maritime, 29^{ème} session (2001) Rapport final, annexe 2.

²⁶ Voir, notamment, la directive 1999/63/CE du Conseil concernant l'accord relatif à l'organisation du temps de travail des gens de mer, conclu par l'Association des armateurs de la Communauté européenne et la Fédération des syndicats des transports dans l'Union européenne; la directive 2009/13/CE du 16 février 2009 portant mise en œuvre de l'accord conclu par les Associations des armateurs de la Communauté européenne (ECSA) et la Fédération européenne des travailleurs des transports (ETF) concernant la convention du travail maritime, 2006, et modifiant la directive 1999/63/CE; la directive (UE) 2017/159 du Conseil du 19 décembre 2016 portant mise en œuvre de l'accord relatif à la mise en œuvre de la convention sur le travail dans la pêche, 2007, de l'Organisation internationale du Travail, conclu le 21 mai 2012 entre la Confédération générale des coopératives agricoles de l'Union européenne (COGECA), l'ETF et l'Association des organisations nationales d'entreprises de pêche de l'Union européenne (Europêche); la directive (UE) 2018/131 du Conseil du 23 janvier 2018 portant mise en œuvre de l'accord conclu par les ECSA et l'ETF en vue de modifier la directive 2009/13/CE conformément aux amendements de 2014 à la convention du travail maritime, 2006, tels qu'approuvés par la Conférence internationale du Travail le 11 juin 2014.

²⁷ Reynald Bourque, *Les accords-cadres internationaux et la négociation collective internationale à l'ère de la mondialisation* (Institut international d'études sociales 2005); Nathan Lillie, *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping* (Routledge 2006).

un Joint Negotiating Group qui réunit des représentants d'armateurs²⁸ et la Fédération internationale des ouvriers du transport (ITF).

Une autre influence a joué un grand rôle pour expliquer le succès que rencontre la MLC, 2006. Il s'agit du dialogue et du rapprochement qui s'est progressivement opéré avec l'OMI. Dès 1976, la Convention (n° 147) sur la marine marchande (normes minima) témoignait d'une volonté d'inscrire les instruments maritimes de l'OIT dans des mécanismes d'*enforcement* ayant fait leur preuve dans le domaine de la sécurité maritime et de la prévention de la pollution. Il s'agit principalement du mécanisme dit du «contrôle par l'Etat du port» ou PSC. Selon l'article 4 de la Convention n°147, «si un Membre, qui a ratifié la présente convention et dans le port duquel un navire fait escale dans le cours normal de son activité ou pour une raison inhérente à son exploitation, reçoit une plainte ou acquiert la preuve que ce navire n'est pas conforme aux normes figurant dans la présente convention, après que celle-ci sera entrée en vigueur, il peut adresser un rapport au gouvernement du pays dans lequel est immatriculé le navire, avec copie au Directeur général du Bureau international du Travail, et prendre les mesures nécessaires pour redresser toute situation à bord qui constitue clairement un danger pour la sécurité ou la santé».

En pratique, la Convention n°147 n'a pas permis la mise en place d'un contrôle social effectif par l'Etat du port, pour des raisons à la fois juridiques et culturelles. En effet, les inspecteurs chargés de ce contrôle, issus du monde de la navigation maritime, sont longtemps demeurés peu familiers des questions de droit du travail et n'avaient pas de formation comparable à celle apportée aux inspecteurs du travail. Par ailleurs, les obligations qui découlent de la Convention n°147 ont souvent été considérées par eux comme trop générales ou vagues, en comparaison des autres normes de l'OMI dont ils devaient assurer le contrôle²⁹. Néanmoins, ce début de rapprochement opéré par la Convention n°147 s'est poursuivi et un lent processus d'acculturation a été engagé, dont la MLC, 2006 est l'aboutissement.

²⁸ Il s'agit de représentants de l'International Maritime Employers' Council (IMEC), de l'International Shipping Employers' Group (ISEG), qui comprend l'International Maritime Managers' Association of Japan (IMMAJ), et la Taiwanese Company Evergreen, et la Korean Shipowners' Association.

²⁹ La Convention n°147 reste néanmoins un outil d'actualité pour des pays comme les Etats Unis ou la Turquie qui n'ont pas ratifié la MLC, 2006.

Une étape décisive de ce processus a été la mise en place, dans les années 90, d'un groupe de travail *ad hoc* mixte OMI/OIT d'experts sur la responsabilité et l'indemnisation à l'égard des créances en cas de décès, de lésions corporelles et d'abandon des gens de mer. Ce n'est pas un hasard si Jean-Marc Schindler, qui a présidé les sessions de ce groupe de travail, a également présidé aux travaux préparatoires de la MLC, 2006. Bien qu'il ne fut pas possible de s'accorder dès 2006 sur un mécanisme obligatoire de garantie financière en cas de décès, d'incapacité de longue durée et d'abandon des gens de mer, celui-ci a été introduit dans la MLC, 2006 à l'occasion des premiers amendements adoptés en 2014³⁰.

A travers l'expérience même balbutiante du contrôle social par l'Etat du port et les rencontres régulières avec l'OMI, c'est une approche multilatérale qui s'est concrétisée. Les négociateurs de la MLC, 2006 ont ainsi acquis la conviction qu'il fallait penser ce nouvel instrument social sur le modèle des grandes conventions adoptées sous l'égide de l'OMI (SOLAS sur la sécurité maritime, MARPOL sur la pollution et STCW sur la formation). Il fallait également que la MLC, 2006 puisse s'encadrer dans le mécanisme de contrôle par l'Etat du port, via des procédures détaillées (certification sociale et inspection) et l'énoncé de droits clairs en matière de conditions de travail et de vie à bord.

Le rapport de la Commission mondiale de l'OIT sur l'avenir du travail évoque l'opportunité de prendre en compte l'expérience de la MLC, 2006, pour répondre aux besoins des travailleurs des plateformes, de la façon suivante: «Comme cette forme de travail devrait prendre de l'ampleur à l'avenir, nous recommandons l'élaboration d'un système de gouvernance internationale pour les plateformes de travail numériques qui établisse un socle de droits et protections et impose aux plateformes (et à leurs clients) de les respecter. La convention du travail maritime (MLC, 2006), qui est en pratique un code mondial du travail pour les gens de mer, est une source d'inspiration pour régler les problèmes des travailleurs, des employeurs, des plateformes et des clients opérant dans différentes juridictions»³¹.

³⁰ Alexandre Charbonneau et Patrick Chaumette, «Premiers amendements à la Convention du travail maritime de l'OIT de 2006: Garanties financières en matière d'abandon des gens de mer et de responsabilité des armateurs en cas de décès ou de lésions corporelles» (2014) Droit social 802.

³¹ Commission (n 18) 46.

Certes, la MLC, 2006 peut être considérée comme une source d'inspiration, mais il semblerait aventureux de vouloir transposer à un autre secteur les mécanismes originaux d'*enforcement* qu'elle énonce, sans avoir pris pleinement en considération le fait que ces mécanismes préexistaient à la convention et reposaient sur l'acquis d'une autre organisation internationale, l'OMI, développé dans d'autres domaines que celui du travail³². Si la MLC, 2006 est regardée aujourd'hui comme le 4^{ème} pilier du droit international du transport maritime, avec les trois autres conventions que sont SOLAS, MARPOL et STCW, elle le doit certainement à ce rapprochement fructueux.

La MLC, 2006 nous semble donc constituer un exemple d'instrument pensé dans le contexte du système multilatéral et qui y puise des ressources pour sa réussite³³. En ce sens, elle s'inscrit en cohérence avec l'approche promue par la Déclaration du centenaire de l'OIT pour l'avenir du travail qui affirme que «sur la base de son mandat constitutionnel, l'OIT doit jouer un rôle important au sein du système multilatéral, en renforçant sa coopération avec d'autres organisations et en mettant en place avec elles des dispositifs institutionnels en vue de promouvoir la cohérence des politiques en faveur de son approche de l'avenir du travail centrée sur l'humain, en tenant compte des liens solides, complexes et déterminants qui existent entre les politiques sociales, commerciales, financières, économiques et environnementales»³⁴.

IV. Un suivi tripartite et multilatéral permanent

1. Renforcer la MLC, 2006 en tant qu'instrument de référence au niveau mondial

Le suivi de l'application de la MLC, 2006 conduit l'OIT à maintenir et à développer la coopération avec les autres organisations internationales intéressées, comme l'OMI ou l'Organisation mondiale de la Santé. Cela s'est traduit, concrètement, par l'adoption de plusieurs directives ou

³² Voir, sur ce point, l'ouvrage daté mais passionnant de Philippe Boisson, *Politiques et droit de la sécurité maritime* (Bureau Veritas 1998).

³³ Voir, en ce sens, Maupain (n 2).

³⁴ Déclaration du centenaire de l'OIT pour l'avenir du travail, 2019, partie IV(f).

guides qui viennent appuyer les Etats membres dans la mise en œuvre de la convention³⁵.

En parallèle, un dialogue tripartite est institué dans le cadre de rencontres régulières, accueillies au siège de l'OIT. Il s'agit, d'une part, de réunions organisées par le Département des politiques sectorielles traitant de sujets d'actualité, qui intéressent les acteurs du transport maritime. Ce fut le cas par exemple, en mars 2019, pour la question de l'amélioration des possibilités d'emploi offertes aux femmes³⁶. Ces rencontres peuvent préfigurer des initiatives futures, de nature normative, comme l'adoption d'amendements à la MLC, 2006.

La convention prévoit, d'autre part, la mise en place d'une Commission tripartite spéciale (STC) rattachée au Conseil d'administration du BIT et dotée d'une compétence spéciale dans le domaine des normes du travail maritime³⁷. Cette commission a déjà été réunie à trois reprises et ses réalisations sont notables. Elle a été le lieu où les trois séries d'amendements à la MLC, 2006 ont été finalisées et adoptées avant d'être approuvées par la Conférence internationale du Travail. Elle s'est également vue confier le travail d'examen des normes maritimes dans le cadre de l'initiative sur les normes. Il s'agit d'identifier, dans le corpus des instruments adoptés par l'OIT, ceux qui sont à jour, ceux qui doivent être révisés, ceux qui sont dépassés. L'objectif est «de s'assurer que l'OIT dispose d'un corpus de normes internationales du travail solide, clairement défini et à jour lui permettant de répondre aux mutations du monde du travail, aux fins de la protection des travailleurs et compte tenu des besoins des entreprises

³⁵ Une réunion conjointe OIT/OMI a ainsi permis, en 2011, la révision des Directives relatives aux examens médicaux des gens de mer. Cette question fait l'objet de prescriptions à la fois inscrites dans la MLC, 2006 et dans la convention STCW, telle que modifiée à la suite de l'adoption des amendements de Manille, en 2010 <<https://www.ilo.org/global/standards/maritime-labour-convention/lang-fr/index.htm>>. La MLC, 2006 fait également référence à plusieurs guides adoptés sous l'égide de l'OMS, comme le guide médical international de bord (principe directeur B4.1.1(2)). La coopération internationale est également encouragée en matière de sécurité et de santé au travail (Principe directeur B 4.3.11).

³⁶ Voir les conclusions adoptées par cette réunion sur le recrutement et le maintien dans l'emploi des gens de mer et sur l'amélioration des possibilités offertes aux femmes marins (document SMSWS/2019/9) <https://www.ilo.org/sector/activities/sectoral-meetings/WCMS_647755/lang-fr/index.htm>.

³⁷ MLC, 2006, article XIII.

durables»³⁸. La STC a passé en revue la moitié des instruments maritimes qui ont précédé la MLC, 2006 et recommandé l'abrogation ou le retrait de nombre d'entre eux³⁹. L'approche retenue par la STC vise ainsi à renforcer la place symbolique de la MLC, 2006 dans le secteur du transport maritime, en tant qu'instrument social de référence à portée universelle. L'autre moitié des normes maritimes devrait être examinée lors de la prochaine réunion de la STC, en avril 2021.

La réussite de la MLC, 2006 découle aussi de la très forte implication d'acteurs privés, qui sont indispensables à la mise en œuvre de certaines de ses prescriptions. Il s'agit, tout d'abord, des organismes reconnus auxquels l'Etat du pavillon peut confier tout ou partie des fonctions d'inspection et de certification des navires. En pratique, à l'échelle mondiale, l'essentiel des inspections et des certifications est opéré par des sociétés de classification qui réalisaient déjà depuis longtemps des prestations en lien avec des instruments de l'OMI. Très peu d'Etats du pavillon ont décidé de conserver et d'exercer directement les missions d'inspection et de certification, principalement par manque de ressources (nombre d'inspecteurs).

Le réseau des *Protection and Indemnity clubs* (P&I clubs), qui intervient sur les questions d'assurance, est également fortement impliqué dans la mise en œuvre des amendements de 2014, puisqu'il fournit des produits de garantie financière pour couvrir les risques décès, incapacité de longue durée et abandon des gens de mer. Enfin, les services privés opérant du recrutement et du placement de gens de mer ont concouru activement à la ratification de la MLC, 2006 par les Etats depuis lesquels ils opèrent. En effet, la MLC, 2006 a permis d'opérer un tri parmi ces agences, les armateurs étant fortement incités à se tourner vers des opérateurs qui leur fournisse une main-d'œuvre dans des conditions certifiées conformes aux exigences de la convention⁴⁰. Les agences opérant dans des Etats qui n'ont pas ratifié la MLC, 2006 ont réagi et défendu la mise en place d'une certification dite «volontaire», afin de ne pas être écartées du marché international du travail maritime.

³⁸ Voir le mandat donné au MEN par le Conseil d'administration <https://www.ilo.org/global/standards/WCMS_449688/lang-fr/index.htm>.

³⁹ Conférence internationale du Travail, 109^{ème} session (2020), Rapport VII(1), *Abrogation de huit conventions internationales du travail et retrait de neuf conventions et onze recommandations internationales du travail* <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/---relconf/documents/meetingdocument/wcms_650876.pdf>.

⁴⁰ MLC, 2006, norme A1.4 (9).

APPLICATION FOR CERTIFICATION OF SEAFARER RECRUITMENT & PLACEMENT SERVICE PROVIDERS

I, the undersigned applicant, request the NIPPON KAIJI KYOKAI, to provide the certification services as described below in accordance with the "Rules for the certification of seafarer recruitment and placement service providers".

| | |
|-----------------------------|--|
| Kind of Audit | <input type="checkbox"/> : Initial <input type="checkbox"/> : Annual <input type="checkbox"/> : Renewal <input type="checkbox"/> : Occasional (due to: _____) |
| Kind of Certificate | <input type="checkbox"/> : Certification of MLC2006 Regulation 1.4 <input type="checkbox"/> : Statement of Compliance with the MLC |
| Name and Address | Reg. 1.4 Certification No.: - _____ (No entry for Initial Audit) |
| | QMS Certification No.: _____ |
| | Organization Name: _____ |
| | Address: _____ |
| | Top Management: Name _____ Position _____ |
| | Management Representative for Quality Management System: Name _____ Position _____ |
| | Person in Charge: Name _____ Position _____ Tel. _____ Fax. _____ E-Mail _____ <small>(Please fill in an appropriate organization or departmental e-mail address.)</small> |
| No. of Employees | 1) Number of people _____ (_____) Persons in total 2) Additional site(s) <input type="checkbox"/> : No <input type="checkbox"/> : Yes (_____) site(s) <small>(Please specify each number of site(s) separately.)</small> |
| Expected Audit Date | _____ |
| Applicant & Billing address | <input type="checkbox"/> : as stated below <input type="checkbox"/> : as stated above - Organization _____ - Tel. No. _____ Fax. No. _____ - Name & Position _____ - Signature _____ |

Fig. 1: Formulaire d'une société de classification japonaise, destiné aux agences privées basées dans des pays qui n'ont pas ratifié la MLC, 2006 et qui souhaitent obtenir un certificat «volontaire» de conformité

2. Assister les Etats membres dans la mise en œuvre de la MLC, 2006

Le Bureau développe une politique d'assistance aux mandants dans la mise en œuvre de la MLC, 2006, qui adopte plusieurs formes. En premier lieu, plusieurs cours sont délivrés au sein du Centre international de formation de Turin. Une académie du travail maritime⁴¹ annuelle est organisée autour de deux parcours de formation: «*Training of trainers and maritime inspectors in the application of the ILO Maritime Labour Convention, 2006*» et «*Workshop on national legal implementation of the ILO Maritime Labour Convention, 2006*». De nombreux inspecteurs et fonctionnaires nationaux ont assisté à ces cours et ont ainsi grandement contribué, d'une part, à construire et à diffuser de par le monde une connaissance experte sur la convention et, d'autre part, à assurer une certaine cohérence dans son application. Ils constituent un réseau très actif, susceptible de faire remonter au Bureau des bonnes pratiques et des difficultés concrètes.

En deuxième lieu, des ateliers tripartites nationaux ou régionaux sont organisés à la demande des mandants. Initialement centrés sur la sensibilisation des acteurs en vue d'obtenir la ratification de la convention par le plus grand nombre d'Etats, ces ateliers voient leur contenu évoluer et s'intéresser de plus en plus à des questions techniques, portant sur la mise en œuvre de la convention.

En troisième lieu, en réponse à des demandes de clarification émanant des gouvernements, le Bureau a été amené à fournir plusieurs opinions informelles portant sur des points de droit particuliers. C'est ainsi que, par exemple, la question du recours à des documents sous format électronique, qu'il s'agisse de la certification sociale du navire ou bien des contrats d'engagement maritime a été soulevée en réponse à des demandes provenant des Pays Bas, de l'Allemagne et du Japon. Les opinions informelles du Bureau sont assorties d'une formule qui en précise la portée juridique relative: «ces informations sont fournies sous la réserve habituelle que la Constitution de l'Organisation internationale du Travail ne confère au Bureau aucune compétence particulière pour donner une interprétation authentique des dispositions des conventions adoptées par la Conférence internationale du Travail. Par ailleurs, cet avis ne préjuge pas des commentaires que les organes

⁴¹ <<https://www.ilo.org/global/standards/maritime-labour-convention/maritime-labour-academy/lang-fr/index.htm>>.

de contrôle de l'OIT pourraient vouloir formuler sur cette question dans le cadre de leur examen de cette convention». Cependant, ces opinions informelles ont en pratique une réelle influence dans l'industrie maritime. La plupart d'entre elles ont en effet été reprises dans *Les Questions fréquentes sur la MLC, 2006*, publication qui se trouve parmi les *bestsellers* du Bureau⁴².

3. *Assurer la complémentarité entre les différents mécanismes qui concourent au respect de la MLC, 2006*

Dans une observation adoptée en 2014, la CEACR avait pris note avec intérêt du rapport publié par le secrétariat chargé du suivi d'un mémorandum d'entente régional sur le contrôle par l'Etat du port. Celui-ci portait sur le nombre d'inspections de navires effectuées par les inspecteurs de l'Etat du port concernant le respect des dispositions de la MLC, 2006. Ce rapport faisait état «de déficiences qui avaient été identifiées à bord, ainsi que d'un nombre considérable d'immobilisations de navires pour des motifs relevant de la MLC, 2006, au cours de la première année qui a suivi l'entrée en vigueur de la convention». La Commission avait souligné que «ce système de contrôle à bord des navires, qui comprend à la fois les inspections de l'Etat du pavillon et les inspections des navires étrangers entrant dans les ports des Etats ayant ratifié la MLC, 2006, est important et, d'une manière concrète, contribue constamment à l'examen cyclique à l'échelle nationale de l'application des conventions, dans le cadre du système de contrôle de l'OIT».

En instaurant un contrôle par l'Etat du port assorti d'une clause de traitement pas plus favorable, la MLC, 2006 s'est dotée d'un moyen très efficace pour assurer le respect de son application, à une échelle universelle⁴³. Chaque année, des navires sont immobilisés en raison de déficiences portant sur le respect des prescriptions de la convention. Les contrôles sont exercés sous la responsabilité individuelle des Etats du port mais ceux-ci coordonnent leurs efforts au travers d'accords régionaux d'entente (MoU),

⁴² <https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/faq/WCMS_238041/lang--fr/index.htm>.

⁴³ Voir l'entretien de Luigi Giardino, de la Garde côtière italienne, «Inspecter les navires pour protéger les gens de mer: la convention du travail maritime à l'œuvre» (2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_696352/lang--fr/index.htm>.

comme le Mémorandum de Paris et son rapport de 2016 auquel la CEACR fait référence⁴⁴.

Lorsque les inspecteurs réalisent un contrôle sur un navire étranger, leur attention se porte d'abord sur les certificats MLC, 2006 que le navire conserve à bord. Il s'agit notamment de la Déclaration de conformité du travail maritime (DCTM) qui est établie par l'autorité compétente de l'Etat du pavillon. Dans sa partie I, doivent être mentionnées plusieurs informations, comme «les prescriptions nationales donnant effet aux dispositions pertinentes de la convention»⁴⁵. Les inspecteurs peuvent alors s'assurer que les conditions de travail et de vie à bord du navire sont conformes à ces mentions. Encore faut-il que le contenu de la déclaration soit exact, suffisamment précis et qu'il reflète l'état du droit en vigueur, ce que les inspecteurs n'ont pas la possibilité de vérifier (par manque de temps). Il s'agit là d'un exemple du rôle complémentaire que peuvent jouer le contrôle par l'Etat du port et le contrôle régulier opéré par la CEACR, puisque c'est à cette dernière qu'il revient d'examiner le contenu et la fiabilité des informations inscrites dans la DCTM.

Cela ressort dans certains commentaires adoptés par la Commission, auxquels les inspecteurs peuvent utilement se reporter. Par exemple, dans le cadre de la demande directe adoptée en 2018 concernant l'Argentine, la Commission a noté que la partie I de la DCTM fournie par ce gouvernement contenait seulement, «pour chaque règle, les références à la législation nationale applicable, sans indiquer le contenu de ces dispositions». Devant le caractère insuffisant des informations mentionnées, la Commission a noté que «la partie I de la DCTM, élaborée par le gouvernement de l'Argentine, ne semble pas atteindre le but fixé dans la MLC, 2006, qui est d'aider toutes les personnes concernées, telles que les inspecteurs de l'Etat du pavillon, les fonctionnaires autorisés de l'Etat du port et les gens de mer, à s'assurer que les prescriptions nationales [...] sont dûment mises en œuvre à bord du navire».

⁴⁴ <<https://www.parismou.org/results-first-year-maritime-labour-convention>>. Voir aussi Paris MoU, Rapport annuel (2014) 48.

⁴⁵ MLC, 2006, norme A5.1.3(10).

| 1. Name of Ship: ORMI | | 2. IMO Number: 9397200 | | 3. Date of report: 18/01/2018 | | 4. Place of inspection: Taranto | | | |
|-----------------------|---|--------------------------------|--|-------------------------------|---------------------------------------|--|-------------------------------------|--------------------------|---------------------------------|
| Nr. | Code/Defective Item | Nature of defect ¹⁾ | Convention ref. | Ground for detention | Action taken | Additional Comments | ISM Related | RO resp. | Accidental Damage ²⁾ |
| 3 | 18318 Food temperature | Not as required | MLC 2006 Title 3 - MLC 2006, Title 3/ Reg. 3.2 - Stand. A3.2 | <input type="checkbox"/> | 17 - To be rectified before departure | nr. 2 refrigerators in the food store found without thermometers and another one frozen | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 4 | 18416 Ropes and wires | Not as required | MLC 2006 Title 4 - MLC 2006 Title 4/reg. 4.3 - Stand. A.4.3 | <input type="checkbox"/> | 17 - To be rectified before departure | nr. 2 mooring ropes aft and nr. 1 fwd, worn | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 5 | 18202 Legal documentation on work and rest hours | Not as required | MLC 2006 Title 2 - MLC 2006 Title 2 Reg. 2.3 - stand. A.2.3 | <input type="checkbox"/> | 17 - To be rectified before departure | during the drills some crew members recorded in the record book, as in rest (on 16 december 2017 from 11:00 am to 12:00 am, ch. off., motormen, 2nd off, 2 nd. motormen. on 23 december 2017 from 11:00 am to 12:00 am, O/S, 2nd off, 2 nd. Eng., nr. 1 & 2 motormen). More of two rest period recorded in some cases. | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 6 | 18304 Lighting (Accommodation) | Inoperative | MLC 2006 Title 3 - MLC 2006 Title 3 Reg. 3.1 - stand A.3.1 | <input type="checkbox"/> | 17 - To be rectified before departure | lights in the tunnel in the deck nr. 1 and in the Eng. locker found inoperative | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 7 | 18399 Other (Accommodation, recreational facilities) | Other | MLC 2006 Title 3 - MLC 2006 Title 3 Reg. 3.1 - stand A.3.1 | <input type="checkbox"/> | 17 - To be rectified before departure | some doors of locker in the accommodation without handles and found blocked | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

Fig. 2: Extrait d'un rapport d'inspection réalisée dans le cadre du Paris MoU, qui conclut à la détention du navire en raison des déficiences constatées

Le rapport annuel du MoU de Paris montre, ces trois dernières années, une légère baisse dans le pourcentage de déficiences constatées en rapport avec les conditions de travail et de vie à bord des navires. De 16,1 pour cent en 2016, le taux est passé à 15,5 pour cent en 2017 et à 14,9 pour cent en 2018. Luigi Giardino, de la Garde côtière italienne⁴⁶ explique ce mouvement par la prise de conscience de l'industrie maritime «que la ratification de la MLC, 2006, bénéficie à la fois aux gens de mer, aux armateurs, aux Etats du pavillon, aux Etats du port et aux Etats fournisseurs de main-d'œuvre. C'est dans l'intérêt économique de l'armateur de ne pas présenter de défaillances ou d'y remédier rapidement et efficacement lorsqu'elles surgissent. L'immobilisation d'un navire, ne serait-ce que pour quelques heures, a un coût élevé et peut entacher la réputation du navire».

V. Les interventions d'urgence et la protection des droits fondamentaux des gens de mer

La procédure dite «d'intervention d'urgence» n'a pas de base juridique textuelle mais elle s'appuie sur une pratique développée par le Bureau dans le domaine de la liberté syndicale. Elle consiste, à la demande d'une organisation d'employeurs ou de travailleurs, à interpellier un gouvernement sur un cas de violation grave d'un droit reconnu en vertu d'une convention internationale du travail. L'intervention d'urgence prend la forme de l'envoi d'une lettre émanant du Directeur général de l'OIT ou bien d'un haut fonctionnaire du Bureau. Dans le domaine de la liberté syndicale, elle est principalement actionnée en cas de privation de liberté ou d'atteinte à la personne d'un syndicaliste (travailleur ou employeur). Il s'agit donc d'une action de nature diplomatique dont la force réside essentiellement dans la possible publicité que l'Organisation pourrait vouloir donner à la situation concernée.

Dans le secteur maritime, les interventions d'urgence ont surtout été employées en matière d'abandon d'équipages. Les amendements de 2014 à la MLC, 2006 proposent une définition de ce phénomène: «un marin est considéré comme ayant été abandonné lorsque, en violation des prescriptions de la présente convention ou des termes du contrat d'engagement maritime, l'armateur: a) ne prend pas en charge les frais de rapatriement du marin; ou b) a laissé le marin sans l'entretien et le soutien nécessaires; ou c) a par ailleurs

⁴⁶ Giardino (n 43).

provoqué une rupture unilatérale des liens avec le marin et notamment n'a pas versé les salaires contractuels durant une période d'au moins deux mois».

Les cas d'abandon d'équipages ont été nombreux depuis le début des années 90 et sont à l'origine de situations humanitaires et sociales particulièrement douloureuses, avec des équipages bloqués parfois plusieurs années dans les ports⁴⁷. Ils peuvent se traduire par des violations des droits humains des gens de mer mais également de certains droits sociaux fondamentaux, comme la liberté du travail. En effet, les gens de mer qui engagent des procédures visant à faire saisir le navire sur lequel ils travaillent afin de recouvrer leurs salaires impayés s'exposent ensuite à des pratiques de *blacklisting*. Ils peuvent se voir refuser tout nouvel embarquement parce qu'ils ont fait usage de leur droit d'agir en justice. Face à cela, la communauté internationale a réagi en essayant de mettre en place une obligation de garantie financière pour assurer le rapatriement des marins et le paiement au moins partiel de leurs salaires impayés⁴⁸. Ces réflexions ont abouti à l'adoption des amendements de 2014 à la MLC, 2006, qui concrétisent ce mécanisme de garantie financière⁴⁹.

La nouvelle norme A2.5.2, paragraphe 9, précise que «eu égard aux règles 2.2 et 2.5, l'assistance fournie au titre du dispositif de garantie financière doit être suffisante pour couvrir: a) les salaires en suspens et autres prestations que l'armateur doit verser au marin comme prévu dans le contrat de travail, la convention collective pertinente ou la législation de l'Etat du pavillon, le montant dû ne devant excéder quatre mois de salaire et quatre mois pour les autres prestations en suspens; b) toutes les dépenses raisonnables engagées par le marin, y compris les frais de rapatriement visés au paragraphe 10; c) les besoins essentiels du marin comprennent: une nourriture convenable, des vêtements lorsque nécessaire, un logement, l'approvisionnement en eau potable, le carburant nécessaire à la survie à bord du navire, les soins médicaux nécessaires et la prise en charge de tous autres frais ou dépenses raisonnables à partir de l'acte ou de l'omission constitutif de l'abandon jusqu'à l'arrivée du marin à son domicile».

⁴⁷ Voir l'étude sociologique d'Erol Kahveci, «Neither at sea nor ashore: The abandoned crew of the Obo Basak» (2006) *Annuaire de Droit Maritime et Océanique* 281.

⁴⁸ Patrick Chaumette, «De l'abandon de marins – Vers une garantie internationale de paiement des créances salariales?» (1999) *Droit Social* 872.

⁴⁹ MLC, 2006, normes A2.5.1 et A2.5.2.

CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF SEAFARER REPATRIATION COSTS AND LIABILITIES AS REQUIRED UNDER REGULATION 2.5.2, STANDARD A2.5.2 OF THE MARITIME LABOUR CONVENTION 2006, AS AMENDED

Name of ship:
Distinctive number of letters:
IMO Ship Identification Number:
Port of Registry:
Name and Principal Place of Business
of the Registered owner:

Contact details of the persons or entity responsible for handling seafarers' request for relief:

Hydor AS, telephone: +47 2240 3250, email: claims@hydor.no

Period of validity of the financial security: 20.08.2018 to 20.08.2019

THIS IS TO CERTIFY that there is in force a policy of insurance or other financial security in respect of the above-named ship while in the above ownership which meets the financial security requirements of Regulation 2.5.2, Standard A2.5.2 of the Maritime Labour Convention 2006 as Amended, where it is in force and applicable.

Provided always that the insurer or provider of financial security may cancel this Certificate in accordance with Standard A2.5.2.11 by giving at least 30 days' written notice to the competent authority of the flag State whereupon the liability of the insurer hereunder shall cease as from the date of expiry of the said period of notice but only as regards events arising thereafter.

Date: 20.08.2018

Fig. 3: Exemple de preuve documentaire qu'une garantie financière a bien été conclue pour couvrir l'équipage d'un navire en cas d'abandon

En parallèle, l'OIT et l'OMI ont mis en place une base de données sur les cas d'abandon, qui permet à des organisations d'armateurs ou de gens de mer, mais également à des gouvernements de signaler des cas et de les documenter⁵⁰. La quantité d'abandons recensés chaque année est encore importante et témoigne que ce problème est toujours actuel⁵¹. Si les amendements de 2014 ont permis de faciliter le règlement de bon nombre d'abandons d'équipage, il n'en demeure pas moins certaines difficultés qui ont conduit des organisations d'armateurs ou de gens de mer à solliciter des interventions d'urgence pour les cas les plus graves (cinq depuis le début de l'utilisation de cette procédure en 2017). Voici un exemple qui concerne la situation d'un équipage abandonné sur un navire battant pavillon du Panama «dépavillonné» par la suite.

⁵⁰ La base de données recense des cas depuis 2004 <https://www.ilo.org/dyn/seafarers/seafarersbrowse.home?p_lang=fre>.

⁵¹ Les cas notifiés sont de 55 en 2017, 36 en 2018 et 27 pour 2019 (année en cours).

Le signalement dans la base de données indique:

| | |
|---------------------------------|--|
| Abandonment ID: | 00386 |
| Ship name: | Shang Yuan Bao |
| 7-digit IMO no.: | 8126070 |
| Port of abandonment: | Luoyuan, China |
| Abandonment date: | 21 February 2019 |
| Notification date: | 4 March 2019 |
| Reporting Member Govt. or Org.: | ITF |
| No. of Seafarers: | 12 |
| Nationalities: | Myanmar(12) |
| Circumstances: | This abandonment presents particularly difficult problems as the vessel was deflagged on 1 September 2018 for engaging in ship to ship transfer with a DPRK registered vessel, thus violating a UN sanction. The ship engaged in a ship-to-ship transfer, likely of oil, with UN-designated DPRK vessel M/V PAEK MA on May 18, 2018. The ship was de-flagged in Sept 2018. |
| | The crew have not been paid since September 2018 and it is not currently clear whether any P&I cover exists and whether the former flag (Panama) will take any responsibility. The owner is unresponsive. |
| <hr/> | |
| Actions taken: | 25 April 2019: Other The ITF and the ICS have formally requested the ILO and the IMO to intervene. The IMO and ILO are requested to use any diplomatic channels available to resolve the situation in the interests of the crew. |
| <hr/> | |
| Repatriation status: | 5 June 2019: Repatriation pending Chinese MSA has visited the vessel again today. The crew was informed that, if they want to go home, they will have to pay for repatriation themselves. To date the crew have resisted requests to leave Chinese waters on the basis that the vessel is not capable of a long sea voyage. There are problems with the engines and navigation equipment. They were also told today that they will need to fix the equipment and leave Chinese waters immediately. The crew are now worried that they will be arrested by Chinese authorities. The crew now face the prospect of arrest for a problem that is not their fault, or a sea journey on a vessel that is not safe. I would ask that both IMO and ILO again contact Chinese authorities to advise them of safety concerns on the vessel and of their obligations under MLC to provide repatriation for the crew. -ITF 18 July 2019: Repatriated The manning agent in Myanmar has paid for the repatriation and the MSA made the arrangements and seized the vessel. |
| <hr/> | |
| Payment status: | 18 July 2019: Payment Pending The crew have not been paid any outstanding wages |
| <hr/> | |

Fig. 4: Extrait de la base de données sur les cas d'abandon, navire Shang Yuan Bao

Alors que les marins ne sont plus payés depuis septembre 2018 et que la situation du navire devient de plus en plus difficile, tant au regard de son statut juridique que des conditions de sécurité à bord, l'ITF et l'*International Chamber of Shipping* (ICS) sollicitent conjointement l'intervention du Bureau. Le 3 mai 2019, la Directrice du Département des Normes, au nom du Directeur général, adresse une lettre aux différentes autorités nationales concernées (Panama, Chine, Myanmar).

Subject: Urgent Intervention

Dear Sir,

I wish to inform you that I have received a communication dated 25 April 2019 from the International Transport Workers' Federation (ITF) and the International Chamber of Shipping (ICS) requesting the intervention of the ILO Director General concerning the abandonment of 12 Myanmar seafarers aboard the vessel *Shang Yuan Bo* (IMO: 8126070), located at Luoyuan, China. As indicated in the attached communication, the ICS and the ITF have raised concerns regarding the situation of the seafarers on board as none of them have been paid since September 2018 and two of them are in need of medical attention.

In this context, allow me to remind you that according to Standard 2.5, paragraph 5 of the Maritime Labour Convention, 2006, as amended (MLC, 2006) ratified by Myanmar, if a shipowner fails to make arrangements for or meet the cost of repatriation of seafarers who are entitled to be repatriated: (a) the competent authority of the Member whose flag the ship flies shall arrange for the repatriation of the seafarers concerned; if it fails to do so, the State from which the seafarers are to be repatriated or the State of which they are national may arrange for the repatriation and recover the cost from the Member whose flag the ship flies: (...).

In light of the above, I would be grateful for any measures your Government could consider adopting without delay to arrange the repatriation of the crew, taking particularly into account that the ship concerned has currently no flag.

I would appreciate if your Government could transmit as soon as possible to the ILO any information it may wish to make on the matters raised in the attached communication. In accordance with the regular procedure concerning informal interventions, the content of your communication will be duly transmitted to the organizations concerned.

[...]

Fig. 5: Intervention d'urgence, lettre adressée le 3 mai 2019 par la Directrice du Département des Normes du Bureau

Le rapatriement sera finalement opéré 18 juillet 2019, grâce aux efforts conjugués des différentes parties prenantes, le rôle déterminant ayant été joué par l'agence de recrutement basée au Mynamar. Avec l'entrée en vigueur des amendements de 2014 et le recours à des produits de garantie financière proposés par des assureurs privés, comme les P&I clubs, les situations de blocages concernant le rapatriement des gens de mer sont plus rares. Ces assureurs se montrent d'ailleurs très attentifs à la manière dont leur intervention est reportée dans la base de données abandon. Celle-ci est devenue, en quelque sorte, une vitrine des bonnes pratiques. Cependant, peu de cas notifiés y sont qualifiés de «résolus». En effet, pour qu'un cas soit considéré comme «résolu», il faut que les marins aient été rapatriés et qu'ils aient recouvré l'intégralité de leurs créances salariales et non uniquement les quatre mois de salaire qui sont pris en charge au titre de la garantie financière, conformément à la norme A2.5.2, paragraphe 9, rappelée ci-dessus. Dans l'affaire du navire Shang Yuan Bo, la base de données indique qu'au 18 juillet 2019 la question du paiement n'a pas été réglée, même partiellement, puisqu'aucun prestataire en charge de couvrir le navire au titre de cette garantie financière n'a été identifié.

Un autre exemple concernant un navire abandonné en 2017, qui illustre l'intervention du P&I club dans le paiement des créances salariales est à la figure 6 (page suivante).

Les chiffres disponibles montrent que 15 mois après l'entrée en vigueur des amendements de 2014, les P&I clubs affiliés à l'International Group of P&I Clubs sont intervenus sur 19 cas, rapatriant 198 marins et versant 1.9 millions de dollars américains pour couvrir les salaires impayés⁵².

La question des marins capturés dans le cadre d'actes de piraterie ou de vols à main armée à l'encontre des navires pourra aussi être une source de demande d'interventions d'urgence⁵³. L'un des enjeux est le maintien du contrat de travail et de la rémunération pendant la période de captivité, afin de permettre à la famille de subsister. C'est ce que les amendements de

⁵² Ces chiffres ont été donnés par l'International Group of P&I Clubs lors d'une présentation à l'occasion de la troisième réunion de la Commission Tripartite Spéciale de la MLC, 2006.

⁵³ D'après le rapport le plus récent du ICC International Maritime Bureau on Piracy and Armed Robbery, 119 incidents de piraterie et vol à main armée contre des navires ont été rapportés au IMB Piracy Reporting Centre (IMB PRC) en 2019, comparé à 156 incidents pour la même période (janvier-septembre) en 2018.

| |
|---|
| Abandonment ID: 00343 |
| Ship name: Indian Empress [disputed] |
| Flag: Isle of Man |
| 7-digit IMO no.: 1006245 |
| Port of abandonment: Grand Harbour Marina, Valletta, Malta |
| Notification date: 2017 |
| Reporting Member Govt. or ITF |
| Org.: |
| No. of Seafarers: 40 |
| Nationalities: Bulgaria; United Kingdom; Croatia; India; Malta; Netherlands; Portugal; Russian Federation |
| Circumstances: Crew not paid since September 2017 |
| Actions taken: 3 May 2018: Vessel arrested by the Port State Triggering of financial security mechanism, arrest of vessel |
| Repatriation status: 3 May 2018: Repatriation pending Varied. Skeleton crew remains onboard. |
| Payment status: 3 May 2018: Other Outstanding remuneration status: USD350000 |
| Comments and Observations: ITF (2 May 2018) Flag state contacted Nautilus in late 2017 and the case is being handled by Nautilus International |
| ITF (3 May 2018) SKULD financial security paid out USD600k and Nautilus members have arrested the vessel via the Union for the further USD400k owed to them. The first court date the Maltese lawyer has is on 8 May 2018 and members are being kept up to date via internal Nautilus bulletins. There is apparently a buyer lined up for the vessel who has requested sea trials. Other arresting parties are content with arrangements for sea trials but we are likely to seek further assurances before agreeing to these taking place. |
| Other (25 May 2018) From: David Bolomini Sent: 25 May 2018 17:02 To: Jan de Boer ; RE: New Abandonment case: Super Yacht Indian Empress |
| By way of an update on this listed case, the P&I insurance provider, Skuld, has paid outstanding wages which, after applying the MLC four month cap, amounted to USD 851,567.49. The liability for wages claimed under the MLC financial security has therefore been met in full. Skuld worked in cooperation with Nautilus who paid wages accrued in excess of the four month cap. We are not sure about the accuracy of the figure of approx. USD 350,000 outstanding as noted in the report. |

Fig. 6: Extrait de la base de données sur les cas d'abandon, navire Indian Empress

2018 prévoient. Outre cette protection, ils apporteront, une fois entrés en vigueur, un fondement juridique qui permettra aux partenaires sociaux de saisir le Bureau de demandes d'intervention d'urgence lorsque des cas de violation grave des droits des gens de mer seront constatés.

Les interventions d'urgence apportent une démonstration immédiate et visible de la manière dont une convention internationale du travail peut avoir un impact positif sur la situation de travailleurs en grandes difficultés. Cantonnées à des circonstances exceptionnelles, elles participent néanmoins du processus de dialogue multi-acteurs qui est au cœur de la démarche de mise en œuvre de la MLC, 2006, et donc de sa réussite sur le long terme.

VI. Conclusion

Les négociateurs de la MLC, 2006, ont décidé de prendre des risques en marchant en dehors des sentiers battus. Les développements qui ont suivi ont montré que ça valait la peine. Si des progrès considérables vers l'amélioration des conditions de travail et de vie des marins ont été faits, des défis subsistent pour assurer le plein respect de leurs droits et garantir des règles de jeu équitables aux armateurs de toutes les régions en éliminant les navires sous-normes.

Les nouveaux mécanismes mis en place par la MLC, 2006 utilisés de façon complémentaire avec les mécanismes de contrôle de l'OIT déjà existants, représentent une base solide pour faire face aux besoins du secteur maritime dans les années à venir, à la condition de maintenir et d'entretenir la relation de confiance qui s'est progressivement construite entre tous les acteurs impliqués.

Le droit international du travail est une matière vivante et l'expérience de la MLC, 2006 apportera très certainement sa pierre à un édifice toujours en construction, en réinvention, cent ans après la pose des premières fondations.

The International Labour Organization as an Autopoietic System

Carlos García Guzmán

I. Introduction

Autopoiesis or ‘self-(re)production’, from the Greek words *αυτό* meaning ‘self’ and *ποίησις* meaning production, denotes the ability of systems to reproduce themselves from within themselves. The pseudo Greek word was firstly coined by the Chilean biologists Humberto R. Maturana and Francisco J. Varela when seeking to respond to the question ‘what is the organization of the living?’¹

The notion of autopoiesis, first elaborated in the context of a theory of biological systems, was later adopted by the German sociologist Niklas Luhmann as the central concept of his theory of social systems. Luhmann argues that autopoiesis is not a characteristic exclusive of the living organisms. Biological and non-biological systems are also autopoietic whenever their elements are reproduced by their own elements.² Apart from organisms, Luhmann identifies two other types of autopoietic systems: psychic

¹ Humberto R. Maturana and Francisco J. Varela, *Autopoiesis and Cognition: The Realization of the Living* (D. Reidel Publishing Company 1980) 12-13. Maturana and Varela contend that regardless of their components, all living systems share a common organization. They are *autopoietic machines* that ‘continuously generate and specify their own organization through [their] operation as a system of production of [their] own components under conditions of continuous perturbations and compensation of perturbations’; *ibid* 79. A cell, for example, internally self-regenerates its components (its proteins, lipids, etc.) without importing them from the outside and within a boundary, which is itself a product from within; see Pier Luigi Luisi, ‘The Minimal Autopoietic Unit’ (2015) 44 *Origins of life and Evolution of Biospheres* 335.

² David Seidl, ‘Luhmann’s theory of autopoietic social systems’ (2004) Technical Report 2004-2, Ludwig-Maximilians-Universität München, Munich Business Research paper <https://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf>.

systems and social systems;³ within psychic systems operations adopt the form of consciousness and experiences, whereas within social systems they take the form of communications ‘recursively produced and reproduced by a network of communications and which cannot exist outside of such a network.’⁴ Luhmann’s account of modern society devotes most of its attention to the study of the latter.⁵

For Luhmann, social systems are self-referential systems whose very creation is the result of their differentiation with the environment. They are systems simultaneously open and closed: *open* ‘in the sense that [the system] transforms inputs into outputs and has the ability to change to environmental conditions’, and at the same time *normatively closed* when their functions and elements ‘are reproduced in accordance with specific norms, norms which translate and define all information, influences and demands from the environment to [their] own terms’.

Social systems exist in different types, from the all-encompassing social system of society (the *world society*), to its functionally differentiated social subsystems and to their corresponding own social subsystems. The *world society* is the ultimate autopoietic system, it is the totality of all social systems and includes all possible communications which are produced by its own communications, ‘if something social emerges, if new kinds of communicative partners or themes appear, society grows along with them’. The world society is organized by a principle of *functional differentiation*, leading to

³ Martin Gren and Wolfgang Zierhofer, ‘The unity of difference: a critical appraisal of Niklas Luhmann’s theory of social systems in the context of corporeality and spatiality’ (2003) 35 *Environment and Planning A: Economy and Space* 616.

⁴ Niklas Luhmann, ‘The Autopoiesis of Social Systems’ in F. Geyer and J. Van d. Zeuwen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage 1986) 172.

⁵ Harro Müller and Larson Powell, ‘Luhmann’s Systems Theory as a Theory of Modernity’ (1994) 61 *New German Critique* 39. See also Niklas Luhmann, *A Sociological Theory of Law* (2nd edn, Routledge & Kegan Paul 1985); Niklas Luhmann, *Social Systems* (Stanford UP 1995); Niklas Luhmann, ‘The world society as a social system’ (1982) 8 *International Journal of General Systems*; Niklas Luhmann, ‘Organization’ in T. Bakken and T. Hernes (eds), *Autopoietic organization theory* (Copenhagen Business School Press 2003) 235; Michael King and Chris Thornhill, *Niklas Luhmann’s theory of politics and law* (Palgrave Macmillan 2003); Dimitris Michailakis, ‘Law as an Autopoietic System’ (1995) 38 *Acta Sociologica*.

it being differentiated into several functional subsystems, each ‘in charge of a peculiar function of modern society’⁶ (e.g. politics, economy, law). Respectively, every subsystem has its own autopoiesis and system-specific code; it constitutes its own society.

This paper seeks to approach the ILO from a systems theoretical perspective. Admittedly, Luhmann’s theory is mainly a theory of society and not a theory of organizations in the narrow sense. Yet, if one is to understand the role of the ILO within the world society, its relations with other social systems and the elements that have allowed it to self-(re)reproduce and to maintain its identity throughout its existence, it seems necessary not to restrict the analysis of this organization to a narrow approach.⁷ Consequently, this paper will recall some of the cornerstones of Luhmann’s system theory in order to provide an analytical framework for the ILO as an autopoietic system and its positioning within the world society.

II. On the autopoiesis of social systems

The question of whether a system is autopoietic (or not) depends on whether everything which is used as a unit by the system is produced as a unit by the system itself. This includes all its processes, boundaries and elements. Therefore, the recognition of a system as autopoietic requires the identification of its basic component. In the case of social systems, Luhmann observes that communications are their particular mode of autopoietic reproduction.⁸ Only communications ‘are necessarily and inherently social’,⁹ other candidates, such as actions, could not be considered. Only communication is the basic element of society, everything else is in reality the environment of social systems but not a part of them.

⁶ Julien Broquet, ‘Taking full advantage of Niklas Luhmann’s conceptual apparatus? Governance at the stake of a three-way differentiation’ (Niklas Luhmann’s theory of self-referential systems: Theoretical and empirical research conference, Dubrovnik, International University Centre (IUC) September 2009).

⁷ See Velibor Jakovleski, Scott Jerbi and Thomas Biersteker, ‘The ILO’s Role in Global Governance: Limits and Potential’ (2019) 11 *International Development Policy* 82.

⁸ Luhmann 1986 (n 5) 174.

⁹ *ibid* 177-178.

1. *Communications*

Luhmann reasons that communications are the synthesis of three components: information, utterance and understanding. Information ‘is the *what* of the communication [...] the difference between what is actually uttered and other possible meanings’;¹⁰ utterance is the *how* and *why* of communication, the form of and reason for it; and understanding is the distinction between information and utterance, it is how the addressed person understands the communication.¹¹ Only the amalgamation of information, utterance and understanding constitutes a social phenomenon. ‘Participation in this occurrence – whether as a source of information, as an utterer, or as someone who understands the utterance in relation to information – is the basis of all socialization’. Communications, although requiring the existence of people (someone that utters a message and someone that understands it), once produced, they ‘take on life of their own’. They originate on the basis of previous communications and give rise to new ones, in a process that occurs with relative independence from the persons communicating.¹²

Luhmann argues that two different types of communications exist: face-to-face communications and decision communications.¹³ Each of these types serves as the basis for the reproduction of a different type of social system; face-to-face communications are the communications on the basis of which interactions are reproduced whereas decisions are the basic element for the reproduction of organizations.¹⁴ Interactions are social systems of a

¹⁰ Jesper Taekke and Michael Paulsen, ‘Luhmann and the media’ (2010) 49 *MedieKultur Journal of media and communication research* 2.

¹¹ David Seidl and Hannah Mormann ‘Niklas Luhmann as organization theorist’ in Paul Adler, Paul du Gay, Glenn Morgan and Mike Reed (eds), *Oxford Handbook of Sociology, Social Theory and Organization Studies: Contemporary Currents* (Oxford UP 2015) 1.

¹² Marcus van Twist and Linze Schaap, ‘Introduction to autopoiesis theory and autopoietic steering’ in R. Veld, L. Schaap, C. Termeer and M. J. Twist (eds), *Autopoiesis and configuration theory: New approaches to societal steering* (Kluwer Academic Publishers 1991) 36.

¹³ Roberto Poli, ‘The Complexity of Self-reference. A Critical Evaluation of Luhmann’s Theory of Social Systems’ (2010) 50 *Quaderni del Dipartimento di Sociologia e Ricerca Sociale Università degli Studi di Trento* 20.

¹⁴ David Seidl, ‘Productive misunderstandings between organisation science and organisation practice: The science-practice relation from the perspective of Niklas Luhmann’s theory of autopoietic systems’ in Rodrigo Magalhães and Ron Sanchez (eds), *Autopoiesis in Organization Theory and Practice* (Emerald Group Publishing Limited 2009) 133.

temporary nature,¹⁵ their (face-to-face) communications are characterized by two specific restrictions, they require the effective presence of the interacting partners and are limited to focusing on one single subject at a time.¹⁶ As such, interactions are discontinuous and can be categorized as ‘episodes’ in the processes of society.¹⁷ For example, an informal discussion between two members of a city council is a social system in which face-to-face communications take place. However, its existence is merely ‘episodic’. It takes place only while the condition of presence is fulfilled. Yet, even though the interaction between the two council members may be short-lived and, therefore, limited in its capabilities, the lifespan of the city council to which they belong is significantly higher. The reason for this is that a city council, as other organizations, does not reproduce itself on the basis of interactions, it does so on the basis of decisions.

2. *Decisions*

According to Luhmann, decisions are ‘compact communications’ that differ from ordinary communications in the sense that they transmit simultaneously their content and that the selection of a specific alternative has been made.¹⁸ As the basic element of organizational systems, decisions are necessary because they enable organizations to handle high levels of complexity. When a decision is made (e.g. hire A), the selection is fixed and all the alternatives (e.g. hire B or C) are dismissed. Thus, complexity is reduced and the organization can take action.¹⁹

According to Luhmann, decisions fulfill a function of uncertainty absorption.²⁰ Every selection between different alternatives carries with it the inherent uncertainty of the unselected alternatives (e.g. what could be if B is selected instead of A). However, when a selection is made, the

¹⁵ Ansgar Thiel and Jan Ove Tangen, ‘Niklas Luhmann, System Theory and Sport’ in Richard Giulianotti (ed), *Routledge Handbook of the Sociology of Sport* (Routledge Handbooks 2015) 76.

¹⁶ Poli (n 13) 20.

¹⁷ Thiel and Tangen (n 15) 76.

¹⁸ Taekke and Paulsen (n 10).

¹⁹ Seidl (n 2) 13. See also Caspar Hirschi, ‘Regulation and Transparency as Rituals of Distrust: Reading Niklas Luhmann Against the Grain’ in E. Alloa and D. Thomä (eds), *Transparency, Society and Subjectivity. Critical Perspectives* (Palgrave MacMillan 2018).

²⁰ Niklas Luhmann, *Organization and Decision* (Cambridge UP 2018).

uncertainty is absorbed, the resulting decision communicates only *what* was decided and not *why* it was decided. Decisions are paradoxical communications for three reasons. First, the expression that an alternative is selected communicates simultaneously that other alternatives existed. At the same time, 'the more the decision communicates that there are real alternatives to the selected one, the more the chosen alternative will be challenged'. On the other hand, 'the less the non-selected alternatives are communicated as real alternatives, the less the decision will be understood as such'. Without alternatives, there is no decision to be made; if a decision can be reached through absolute objective analysis, it is not a decision, but a deduction or a calculation. If a decision cannot be reached through absolute objective analysis then it can be challenged. Second, decisions are always reached retrospectively. They can only be considered decided through the next prospective decision. 'A decision cannot decide whether it is decided. Future decisions need to ascribe to it the characteristics of decision'. And finally, only a decision can define what is a decision. 'Organisations do not just make decisions, they also continually decide what makes a decision a decision'.²¹

Let's imagine, for the sake of example, a decision by the ILO's Governing Body to elect candidate X as Director-General communicates not only that candidate X has been elected, it also communicates that an alternative (electing X) was selected instead of the other alternatives (electing candidate Y, Z, etc.). If the election of X is not the result of complete objective analysis (a calculation), then the decision could be challenged, but if the election of X was in fact absolutely objective, then there was no decision to be made in the first place, and consequently, a process of voting would be, from a structural point of view, completely unnecessary.

As such, if the decision 'invites its own deconstruction by ensuing communications',²² the communication may come up against its paradox. In an organizational system, this would mean that the decision may be paralyzed by the confrontation with its paradox, consequently, 'the organisation would be unable to decide'²³ and to take action.

²¹ Niels Åkerstrøm Andersen, 'The Undecidability of Decision' (2001) MPP Working Paper No. 12/2001, 12 <<https://openarchive.cbs.dk/bitstream/handle/10398/6324/wp122001.pdf?sequence=1>>.

²² Seidl and Mormann (n 11) 25.

²³ Åkerstrøm Andersen (n 21) 13.

As a result, Luhmann argues that there is a need to ‘de-paradoxify’ decisions.²⁴ This ‘deparadoxification’ provides decisions with stability by ‘concealing’²⁵ their paradoxical form but not by ‘confronting it’.²⁶ Organizations complete this ‘de-paradoxification’ in different ways. First, every communication is produced in the form of decision, thus, even the communication of challenging or rejecting a previous decision has to take the form of decision or it would be excluded from the organizational auto-poiesis²⁷ and each decision usually refers to a previous decision, which is connected to a succession of previous decisions, or to decisions prohibiting their rejection.²⁸ Secondly, organizations make use of structures (*decision premises*²⁹) ‘that regulate which decisions have to be accepted under what conditions’.³⁰

Hence, if we revisit the example of the Governing Body electing X as Director-General, we notice that such decision does not exist in a vacuum, it exists in connection to a number of other previous decisions that provide it with stability. The decision to elect X as the Director-General was preceded by another decision establishing the rules for the election of the Director-General; that decision, in turn, was preceded by a decision to include the discussion of the rules for the election of the Director-General as an item on the agenda of the Governing Body, and so forth.³¹

²⁴ Luhmann (n 20).

²⁵ *ibid* 108.

²⁶ Gunther Teubner, ‘Économie du don et positivité de la justice : la paranoïa réciproque de Jacques Derrida et Niklas Luhmann’ (2007) 65 *Droit et société* 105.

²⁷ David Seidl and Kai-Helge Becker (eds), *Niklas Luhmann and Organization Studies* (CBS Press 2005) 40.

²⁸ *ibid*.

²⁹ *ibid* 42.

³⁰ Seidl and Mormann (n 11) 26.

³¹ In the same manner, decisions require that other decisions attribute to them the characteristics of a decision. For example, the approval of the minutes of last meetings within organizations is the quintessential example of the realization of decisions by subsequent decisions. If a decision is not recognized as such by subsequent decisions, or if it is just ignored, then it is not a ‘real’ decision; see David Seidl and Kai-Helge Becker, ‘Organizations as distinction generating and processing systems: Niklas Luhmann’s contribution to organization studies’ in Stewart Clegg (ed), *SAGE Directions in Organization Studies* (SAGE 2010) vol 2, 223.

This process of ‘de-paradoxification’³² reveals the actual *autopoiesis* of the organization; ‘all decisions are always integrated into a network of connecting decisions.’³³ They are the result of previous decisions and give rise to new decisions.

III. Society, functional differentiation and organizations

Having defined communications as the constitutive elements of social systems, the questions of what these social systems are, and how they are produced or shaped, are central. One must, however, first refer to the definition of the social system that contains all other social systems, namely, society. Society is the system that contains all communications, its borders are the borders of communications and, as such, there are no communications outside of society.³⁴ It distinguishes itself from the environment on the basis of the code ‘communication/everything else.’³⁵ Luhmann contends, however, that modern society divides itself into different subsystems operating on the basis of function, he denominates this principle functional differentiation.³⁶

Functional differentiation arises with the emergence of ‘several societal subsystems specialized in serving specific societal functions’, for example, economy, politics, science and law. Each of these functionally differentiated systems is delegated with specialized functions in order to cope with specific societal problems,³⁷ and has a tendency to increasingly separate from the rest, becoming ‘more and more specialized, producing distinct roles and developing into autonomous subsystems.’³⁸ Through that dynamic, each social system distinguishes itself from its environment and reduces ‘environment complexity, e.g. by means of selective system/environment relations or by perceiving its environment in a pre-formed way’.³⁹

³² Seidl (n 2) 17.

³³ *ibid.*

³⁴ Seidl and Mormann (n 11) 18.

³⁵ Seidl and Becker (n 27) 225.

³⁶ Niklas Luhmann, *The Differentiation of Society* (Columbia UP 1982).

³⁷ Alexander Görke and Armin Scholl, ‘Niklas Luhmann’s theory of social systems and journalism research’ (2006) 7 *Journalism Studies* 644, 647.

³⁸ Michailakis (n 5) 326.

³⁹ Raf Vanderstraeten, ‘System and environment: Notes on the autopoiesis of modern society’ (2005) 22 *Systems Research and Behavioral Science* 471, 472.

Functionally differentiated systems are simultaneously, extremely inclusive and extremely exclusive. Each system includes all its function-specific communications while at the same time excluding all other communications.⁴⁰ As such, all functional systems operate on the basis of a system-specific *binary code* that makes them *operatively closed* in relation to other systems, e.g. the code of the law system is legal/illegal; the code of the economic system is payment/nonpayment; the code of the political system is power/nonpower, etc.

Consequently, each system develops according to its own particular and specific rationality until it becomes self-regulated and autonomous. For instance, the law system, through the binary code of the legal and the illegal, determines what is legal in accordance with the law. All legal decisions are made on the basis of the system specific elements, without appealing, for example, to religious or political authorities. From the system's point of view, its binary code is universally valid to all its objects and does not require any resort to elements outside of the system.

However, although systems are *operatively closed*, they are also *cognitively open*. They accept information from the environment and are sensible to changing environmental conditions,⁴¹ which they internally process on the basis of the system-based code.⁴² Luhmann describes the dichotomy of social systems as both open and closed, in the following way: 'the difference between closedness and openness does not indicate a contradiction, but a relation of relative degree. Openness presumes closed self-production; [...] In this sense, self-referential systems are exposed to evolutionary test in the combination of closeness and openness'.⁴³

For Luhmann, the interplay of operational closure and cognitive openness is necessary.⁴⁴ The differentiation of the social system and its consequent operational closure from the environment avoids its dissolution into it. At the same time, its openness allows the social system to change and to adapt itself to environmental conditions but only in accordance to the

⁴⁰ Seidl (n 2) 14.

⁴¹ Vanderstraeten (n 39) 473.

⁴² Inger-Johanne Sand, 'The Interaction of Society, Politics and Law: The Legal and Communicative Theories of Habermas, Luhmann and Teubner' (2008) 53 *Scandinavian Studies in Law* 45, 51.

⁴³ Luhmann 1985 (n 5) 282.

⁴⁴ Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4 *Goettingen Journal of International Law* 625, 635.

system-specific criteria and procedures. This relation between systems and their environment is referred in Luhmann's theory as *structural coupling*.⁴⁵

Luhmann's resorts to the concept of structural coupling to explain the co-evolution of social systems around particular issues. An autopoietic system does not receive any inputs from its environment, instead, it is irritated by it in a way that triggers internal operations. All systems are to some extent interlinked by structural coupling.⁴⁶ In Luhmann's theory, the relationship between structurally coupled systems is one of 'constant irritation with the one reacting to the other, but always on its own terms'. Under this notion, a structural coupling relates to the 'co-evolution of different systems [...] whereby each includes the other in its environment, interpreting the outputs of the other in its own terms on a continuous basis'.⁴⁷

The notion of structural coupling appears in different forms, and often occurs within the setting of formal institutions or frameworks. For example, the preeminent document in most domestic legal jurisdictions, the constitution, is an example of coupling between the social systems of the law and politics.⁴⁸ A constitution, although expressing a political agreement between different factions is undoubtedly a legal document that conforms to the binary code of the legal/non-illegal. By the same rate, as Luhmann explains: 'the economic and the legal systems are and remain separate, and both operate under the condition of operational closure; but this needs a specific mechanism of structural coupling, above all in the form of property and contract'.⁴⁹ Equally, all legal subsystems and their organizations cannot exist in isolation from the remaining bulk of law or other systems. There will always be some degree of interaction as, without such connection, a special subsystem may mutate 'into a "legal Frankenstein" that no longer partakes in the same basis of legitimacy and formals standards of pertinence'.⁵⁰

⁴⁵ Seidl (n 2).

⁴⁶ Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483, 492.

⁴⁷ King and Thornhill (n 5) 33.

⁴⁸ Mattheis (n 44).

⁴⁹ Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419, 1432.

⁵⁰ Simma and Pulkowski (n 46) citing Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University Journal of International Law and Politics* 919, 926.

IV. Organizations

Organizations are self-referential social systems constituted on the basis of their difference with the environment, they reproduce communications on the basis of their communications and their basic elements are decisions constantly reproduced through the autopoietic closure of the system.⁵¹ According to Luhmann, organizations are assigned to society on the basis of functional differentiation.⁵² Only the operation of the organization ‘within a function system provides organizations with a social “identity”’.⁵³ For example, churches are assigned to the religious system, schools to the educational system, courts to the legal system, etc. As a consequence of this assignment, organizations ‘adopt their functions system’s respective binary codes’ and express their decisions in that code.

However, although organizations’ decisions are always adopted on the basis of the binary code of their functional system, they may be ‘*polyphonic*’ in the sense that they are able to handle other functional codes and, as such, they may operate as instances of structural coupling between different functional systems, representing ‘the first link within a functionally differentiated society [...] they constraint functional systems to handle in parallel the specific information they produce from the same events’.⁵⁴

The above reveals the complementary character of functional systems and organizations. The latter are assigned to specific function systems because they are capable of taking the action that functional systems cannot, at the same time, the fact that organizations seek a reduction of complexity does not allow them to be complex enough to substitute their ‘parent’ functional system.⁵⁵

Although assigned to an specific functional system, organizations ‘actively demarcate themselves from the environment through explicit activities, such as deciding who belongs to the organization and who does

⁵¹ Broquet (n 6) 10.

⁵² Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp 1997) 840.

⁵³ Mathias Albert and Lena Hilkermeier, ‘Organizations in/and World Society: A Theoretical Prolegomenon’ in Mathias Albert and Lena Hilkermeier (eds), *Observing International Relations. Niklas Luhmann and World Politics* (Routledge 2004) 177, 192.

⁵⁴ Broquet (n 6) 11-12.

⁵⁵ *ibid.*

not,⁵⁶ their program and defined goals, all of which are established through decisions.⁵⁷ These organizational boundaries define what is supposed to happen within the organization in contrast to the outside, they establish expectations.⁵⁸ As such, the institution of membership means that organizations do not need to concern themselves with the motivations of their members, because membership implies consent with the organization's rules and non-compliance may involve the threat of loss of status, esteem etc., or in extremis, the loss of membership.⁵⁹

Given the precarious character of decisions, organizations resort to different methods of deparadoxification that 'invisibilize' the paradoxical form of the decision. Firstly, organizations are operatively closed on the basis of decisions; as such, the only form of communication ever accepted is decisions and, even the rejection or deconstruction of a previous decision, has to be presented in this form.⁶⁰ Secondly, organizations attribute decisions to 'decision makers' and to their motives, accordingly, the arbitrary character of the decision is concealed and redirected to the 'decision maker'.⁶¹ Finally, organizations rely on organizational structures that establish the conditions for the acceptance of decisions (decision premises), for example, procedural rules.⁶²

V. The ILO as an autopoietic system

The ILO was created in 1919 by the Treaty of Versailles. Born in the aftermath of World War I amidst the shadows of impending revolution, its foundation stone rests over the maxim '*si vis pacem, cole justitiam*' – if you desire peace, cultivate justice. The notion that 'universal and lasting peace can be established only if it is based upon social justice', which is set

⁵⁶ Seidl and Mormann (n 11) 25.

⁵⁷ Markus Mykkänen and Kaja Tampere, 'Organizational Decision Making: The Luhmannian Decision Communication Perspective' (2014) 5 *Journal of Business Studies Quarterly* 131.

⁵⁸ Seidl and Mormann (n 11).

⁵⁹ Samantha Ashenden, 'The problem of power in Luhmann's systems theory' in M. King and C. Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006).

⁶⁰ *ibid* 25.

⁶¹ *ibid*.

⁶² Seidl and Mormann (n 11) 25.

forth in the preamble of the ILO Constitution, has been the compass of the Organization for the last one hundred years. Set up on the basis of a tripartite structure, involving government, employers' and workers' representatives, the ILO has been hailed as unique. Tripartism is the source of its legitimacy. Its role as a standard-setting organization has had profound reverberations in the field of international law and the issues that led to its creation were as relevant back then as they are today. The affirmation of the ILO's role within the world society is, at this moment, more crucial than ever before.

Luhmann's theory contends that an autopoietic system defines itself through its differentiation from the environment. If it fails to affirm its identity, it dilutes into the environment and ceases to exist. In the case of the ILO, at its *poiesis*, the Organization assertively defined itself as a standard-setting institution with the abstract mandate of promoting social justice and exercising the concrete function of improving conditions of labour. This very clear-cut differentiation from the environment provided the system with social meaning and reduced environmental complexity. The Organization possess the dual character of extreme inclusiveness and exclusiveness. It includes all its system-specific communications relating to labour conditions, excluding, by the same token, all other communications.

However, all autopoietic systems need to maintain a duality. They must remain normatively closed through their differentiation with the environment, but also cognitively open to it. As such, all social systems, including organizations such as the ILO, have a systemic need to co-evolve with other systems through irritation from the environment; only in this way can organizations trigger internal processes of change. In the case of the ILO, the definition of its identity in relation to the environment has been subject to evolutionary test, through the constant irritation that occurs on a continuous basis in a double directional way, from the environment towards the system and vice versa.

VI. The ILO in a functionally differentiated social system

As already mentioned above, society is divided into several functional systems (law, economy, politics, etc.) In addition, in accordance with Luhmann's theory, each organization is assigned to a functional system from which it adopts its internal binary code. Consequently, when referring back to the ILO, the first question that needs to be answered is: to

what functionally differentiated system is this Organization assigned? *Ab initio*, it will be argued that the ILO is assigned to the system of law. This assertion, although not entirely evident, can be proven once the theoretical framework proposed by Luhmann is applied.

First, it should be accepted that expectations of different kinds, including economic and political expectations, are operating on a constant basis in the functioning of the ILO. The discussions inside the internal governance bodies of the Organization are a reflection of the global dynamics of power. Compromises and agreements are often reached on the basis of well-established political agendas. At the same time, economic considerations at all levels – whether globally, at the level of members States or within the organizational structure – are always present in most decisions taken. In those circumstances, it does not appear possible, at first, to affirm that the ILO is linked to only one functionally differentiated system. In fact, an accurate description of the ILO would categorize it as a ‘polyphonic’ organization, able to handle the communications from different functionally differentiated systems and their respective binary codes. This does not mean, however, that the Organization is normatively open, because its polyphonic character does not affect its autopoiesis. The Organization still translates all communications into the single binary code of the functional system to which is linked, namely the law.

The deliberative bodies of the ILO are a connecting point through which different systems, e.g. economy, politics, law, share information with each other. This is an instance of *structural coupling*. The autopoietic system of the ILO allows irritations from its environment through its organs (the International Labour Conference, the Governing Body, the International Labour Office) in a highly selected fashion, presented through its own binary code, and producing decisions on the basis of it. The communications of the system, its decisions, are created only on the basis of what is legal, they make reference to previous legal decisions (e.g. standing orders, internal directives, etc.) and produce subsequent legal decisions.

As a result, if one reverts to the *poiesis* of the Organization, its legal character is further clarified. The decision that gave birth to the ILO, is the Treaty of Versailles, a decision made and expressed through the code of the legal/illegal. This decision is the basis on which another legal decision, the ILO Constitution, is produced, which in turn reproduces in its preamble the

contents of the Treaty. The process of autopoiesis of the Organization then begins, the system is created on the basis of decisions expressed through the code of the legal, these decisions are, at the same time, the basis for new decisions which are recursively produced and which realize previous decisions.

At the same time, the Organization establishes different conditions for the legality for its decisions. Tripartism being one of them. As such, the decisions of the International Labour Conference and the Governing Body are considered legal only when they are produced on the basis of tripartism, which constitutes not only a condition of legality, but, from a systemic point of view, an organizational arrangement that fulfills a function of deparadoxification, it is a decision premise that conceals the paradox of decision-making and allows the ILO to complete decisions and fulfil its functions even when its decisions have an inherently paradoxical character.

VII. Decay and identity

As explained above, autopoiesis is the self-production of a system on the basis of its own particular elements. The basic living system, the cell, which through its own processes and elements achieves the self-production of its own elements, is the archetypal example of an autopoietic system. However, the capacity of cells to self-reproduce does not stop their demise, all biological systems experience the inevitability of decay, a process of entropy which autopoiesis can delay but not stop, at the end, all biological systems cease to exist.

The phenomenon of decay is not an exclusive reality of biological systems, for Luhmann, the existence of decay within social system is evident and desirable. Because 'while biological autopoiesis reproduces elements (e.g., molecules in cells) in order to stave off decay [...] social systems produce their own decay. If a social system maintained all its communications it would be victim of extreme complexity.'⁶³ In Luhmann's own words,

a conscious system does not consist of a collection of all of its past and present thoughts, nor does a social system pile up all of its communications. After a very short time the mass of elements would be intolerably

⁶³ Kenneth Bailey, *Sociology and the New Systems Theory: Toward a Theoretical Synthesis* (State University of New York 1994) 315.

large and its complexity would be so high that the system would be unable to select a pattern of coordination and would produce chaos. The solution is to renounce all stability at the operative level of elements and to use events only. Thereby, the continuing dissolution of the system becomes a necessary cause of its autopoietic reproduction. The system becomes dynamic in a very basic sense. It becomes inherently restless. The instability of its elements is a condition of its duration.⁶⁴

As such, decay in social systems is not a phenomenon that leads to the demise of the system, it is instead a condition of its reproduction.

The question is then, how could the ILO cause its own decay? The answer is that the Organization itself has prepared the structures to permit its own 'controlled' disappearance. Some basic examples of this phenomenon appears rather intuitively. For instance, the abrogation of obsolete conventions by the International Labour Conference is a clear illustration of the process of self-originated decay by the Organization. Through the abrogation of conventions in force, the Organization finds its own previous standards-setting decisions obsolete and removes them from its body of standards, thereby reducing complexity and facilitating its own operation.

Another significant example relates to the withdrawal of instruments, the decision by which an instrument which never entered into force or is no longer in force due to denunciations is found to be outdated and removed from the autopoiesis of the system. This example correlates to two concepts described by Luhmann. First, instruments that did not enter into force, are unrealized decisions. A decision needs to be recognized by subsequent decisions ascribing to it the character of a decision, thus, when a convention does not enter into force because of the lack of ensuing decisions (ratifications) it does not become 'real'. Second, the system causes its own decay by removing these decisions from its body of standards, consequently, changes take place within the system, that lead to the instability of its structures but also to the reproduction of the system.

However, the process of decay does not refer exclusively to the existence of established structures for the deconstruction of the elements of the system. It also refers to the capacity of the system to evolve in response to the evolutionary test created by the irritations from the environment.

⁶⁴ Luhmann (n 4) 179.

As argued before, at the moment of its creation, the ILO assertively differentiated itself from the environment. This allowed it to reduce complexity, which in turn permitted it to operate more effectively in the achievement of its objectives. However, in the process of mutual irritation with the environment, the ILO has been forced to adapt and to include information coming from other systems.

For instance, in the aftermath of World War II and the demise of the League of Nations, the ILO had to evolve its role within global society. As such, the ILO added to its identity the character of United Nations specialized agency, and through the Declaration of Philadelphia, it asserted its position in the post-war society, affirmed its social function and established its agenda.⁶⁵ In the same manner, economic factors have led to the evolution of the Organization as a system. For example, globalization led the ILO, in addition to the adoption of conventions and recommendations, to also rely 'on softer forms of exercising influence'.⁶⁶ This is exemplified by its 1999 Decent Work Agenda, which arguably permitted a compromise between the demands of the market economy and the ILO's goals of improving working conditions.

The above-mentioned examples describe two characteristics of the ILO that allow its reproduction as an autopoietic system: first, the system adapts to environmental conditions on the basis of its own internal code and through self-produced decisions (whether they are called international labour standards, declarations, agenda, amendments, etc.). These decisions need to be produced according to internal processes of the system, which, as means of deparadoxification, conceal the undecidable form of decisions. And second, the Organization although receiving information from the environment, it asserts itself as a differentiated social system within society in order not to dilute into the environment. As such, for example, most decisions that indicate a change of focus or a 'new goal-setting' agenda are usually accompanied by a reaffirmation of principles. This is a manner by which the system attempts to continue differentiating from the environment and maintaining its identity which is the condition for its existence.

⁶⁵ Jan Klabbers, 'Marginalized International Organizations: Three Hypotheses Concerning the ILO' in Ulla Liukkunen and Yifeng Chen (eds), *China and ILO Fundamental Principles and Rights at Work* (Kluwer 2014) 182.

⁶⁶ *ibid* 184.

VIII. Conclusion

Luhmann's systems theory offers an interesting framework to comprehend the ILO's functioning as an autopoietic organization assigned to the functionally differentiated system of law. Consistent with Luhmann's approach to observe systems as they are, and not as they ought to be, this paper has limited itself to a descriptive account based on a highly theoretical model.

The ILO has now reached one hundred years. It is a product, actor and survivor of the 20th century. Its contributions to the cause of social justice are undeniable. Yet, valuable as it is, its existence should not be taken for granted. Its self-reproduction has been successful to date. However, should it continue to exist for another hundred years, the ILO as a system has to maintain a delicate balance between adapting to the conditions of the environment and preserving the condition for its existence, its identity.

The International Labour Code – Myth or Reality?

*Tomih Kobiyama and Dražen Petrović**

I. Introduction

In order to make international law easily understandable, some lawyers use a Swiss cheese as a convenient metaphor. International law is a hole while the sovereignty of the State is the cheese itself. Of course, a Swiss cheese does not have just one big hole but rather several smaller holes. These are not of identical size – some are bigger and some smaller. Every hole reduces the density of the cheese, but without the cheese itself, nobody would be interested in the holes. International law thus opens holes in various domains of State sovereignty. Sometimes it opens a single hole – as when it regulates outer space or diplomatic relations – and sometimes several holes, as with humanitarian law or the law of the sea.

From this vantage point, the question is whether international labour standards – international labour Conventions and Recommendations – represent a series of small holes or one big hole. In other words, is the *corpus iuris* of international labour standards a random sequence of unconnected legal instruments or a coherent system of law which may be characterized as a legal code?

Two attempts to establish a code were carried by the International Labour Office ('the Office') in 1939 and 1951. In the preface to the 1951 volume, Wilfred Jenks remarked that the use of the expression 'the International Labour Code' preceded the first attempt in 1939 to present the provisions of Conventions and Recommendations in the form of a real code.¹ Jenks also recalled that the 1939 publication was an act of faith.

* The authors wish to thank Professor Laurence Boisson de Chazournes, Mr Francis Maupain and Mr Thomas Lieby for their useful comments on an initial draft.

¹ ILO, *The International Labour Code, 1951* (ILO 1952) Preface, lxvii.

It was hoped that it ‘might be serviceable to those who might be called upon to make detailed plans for post-war reconstruction, national and international [...] This codification was to be used according to circumstances either as the last will or testament of the Organisation or as an essential part of the title deeds to its future’.²

When the second attempt was undertaken in 1951, there had been an increase in the number of Conventions and Recommendations adopted, and regulatory gaps had been filled. Yet Jenks clarified that the Code ‘is simply an attempt to arrange in an orderly and convenient manner the provisions of the Conventions and Recommendations adopted by the International Labour Conference’, adding that ‘there has been no essential change in the legal nature of the Conventions and Recommendations adopted by the International Labour Conference which constitute *The International Labour Code*’.³

Since the 1951 publication, there has been no further attempt to pursue the codification exercise. What is more, the expression itself has fallen into desuetude.

The end of the Cold War brought new challenges to the ILO. In his report to the 1994 Session of the International Labour Conference (‘the Conference’) on the occasion of the ILO’s 75th anniversary, the Director-General noted that

the Organization itself has begun to experience some difficulties in proposing a common code to governments, workers and employers, who must deal with our changing world; these difficulties will increase unless the Organization comes to grips with what the concept of a common code really means.⁴

This paper aims to contribute to the answer to these difficulties, building on the ‘acquis’ of the earlier codification endeavours and using as a lever the major developments which have taken place over the last 25 years.

² *ibid* lxxv.

³ *ibid* lxxviii.

⁴ International Labour Conference, 81st Session (1994), Report of the Director General (Part I), *Defending values, promoting change – Social justice in a global economy: An ILO agenda*, 44.

Indeed, the ILO has embarked on an unprecedented consolidation process fostering the coherence and relevance of its body of standards, which in itself would justify more than ever before the designation ‘International Labour Code’. There have been four major stepping stones on the way to this consolidation, which is ongoing: the adoption in 1997 of an amendment to the Constitution empowering the Conference to abrogate Conventions in force; the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work (‘the 1998 Declaration’) outlining four categories of fundamental principles and rights at work; and the recognition of the importance of the ILO’s standards policy under the 2008 Declaration on Social Justice for a Fair Globalization (‘the 2008 Declaration’) as well as the 2019 Centenary Declaration on the Future of Work (‘the Centenary Declaration’).⁵

This is unfinished business. The fall of the Berlin Wall may well have taken place 25 years ago but the ILO’s back is against a new wall with a defining choice: either it garners its ‘spirit of businesslike courage’ which has played so large a part in the past development of its constitutional traditions⁶ and makes the International Labour Code its vindication in modern times or it decides to shy away from its constitutional responsibility and confine the Code to a myth.

This paper makes the case for the existence and need for further consolidation of an international labour code and its value as the ILO’s unique tool ‘to maintain a dynamic of progress by permanently encouraging and accompanying the efforts of all its Members with all the means at its disposal’.⁷

Indeed, in light of increasing challenges that the world of work is facing due to deregulation, globalization and impact of new technologies, the insistence on international labour standards seems to go against the main current of political debate. However, those standards cannot be simply ignored as they represent decades of human aspirations and rich, and intense

⁵ 2008 Declaration (Preamble) and the Centenary Declaration, Part IV, A.

⁶ The Future Development of the Constitution and Constitutional Practice of the International Labour Organisation: Memorandum by the Legal Adviser of the International Labour Office, Official Bulletin (1945) XXVII, para 16.

⁷ International Labour Conference, 96th Session (2007), *Strengthening the ILO’s capacity to assist its Members’ efforts to reach its objectives in the context of globalization*, Report V, 9.

debate of the ILO constituents. One way of diminishing their importance would be to consider each standard separately from all others and all standards together as a simple sequence of international instruments. To avoid this, the notion of a Code, guided by common considerations, composed of interrelated norms, and which can be modernized and updated so that it remains coherent and relevant, seems indispensable to guide decision makers not only within the ILO, but all those who will be called, internationally and nationally, to determine the role and value of work in profoundly changed human society.

II. The metaphysics of the International Labour Code

1. *What is a code of law?*

There is no clear legal definition for the word ‘code’ (*codex* in Latin). The Oxford Dictionary of Law⁸ defined it as ‘a complete written formulation of a body of law’. The idea of completeness is also present in *Black’s Law Dictionary*’s definition of code as ‘a systematic collection, compendium or revision of rules’.⁹ Gérard Cornu’s *Vocabulaire juridique* defines a code as a ‘corps cohérent de textes englobant selon un plan systématique l’ensemble des règles relatives à une matière et issu, soit de travaux législatifs [...] soit d’une élaboration réglementaire [...] soit d’une codification formelle (par décret) de textes préexistants et reclassé selon leur origine’.¹⁰ As historic examples show, a code can encompass either the codification or simple restatement of existing rules, including those created by custom or case law, or the elaboration of applicable rules, combining old and new rules, with the aim of creating a complete and unified system of law. In any case, in both common and civil law, it involves the creation of a comprehensive set of rules regulating a particular area of social relations. All the rules are linked and interrelated, based on common premises and principles.

Historically, there are several examples of codes with a lasting impact on humanity. For example, the Code of Hammurabi was one of the first codifications of the rules applicable in Babylonia, consisting of 282 laws. In the

⁸ 4th edition, 1997.

⁹ 10th edition 2014.

¹⁰ 8th edition, 1987.

Roman Empire, Justinian's *Corpus Iuris Civilis* had a decisive impact not only on legal relations within the Empire but also on Western legal tradition as a whole. In China, the Great Qing Legal Code comprised 1,907 statutes and was in force throughout the Qing Dynasty (1644–1912). A more recent remarkable example is the Napoleonic Code, also known as the Civil Code, which consolidated several hundred laws and inspired many national legal systems after its adoption.

The word 'code' is not used frequently in international law,¹¹ but the idea of codification is very much present since its objective is primarily the determination and identification of existing customary law. However, the written recording or declaration of existing rules in an effort to facilitate their understanding is not sufficient on its own, and codifications should aim rather at unifying international law,¹² including by enlarging its scope by creating new rules.¹³ Apart from the legislative efforts of various international organizations, the United Nations International Law Commission has specifically 'for its object the promotion of the progressive development of international law and its codification'.¹⁴ There are various areas where international law has been codified, like humanitarian law, the laws of armed conflict, the law of the sea, the law of diplomatic and consular relations and the law of treaties. However, efforts at codification have been limited to a few international treaties and were time-bound.

¹¹ It seems to be frequently used in the International Maritime Organization (IMO), but there are no other obvious examples elsewhere.

¹² Charles De Visscher, 'La codification du droit international' (1925) 6 *Recueil des cours*, 325, 380, 382.

¹³ 'Nous avons dit que la codification peut encore contribuer au progrès du droit international d'une autre façon: *quantitativement*, c'est-à-dire en élargissant le domaine d'application de la réglementation juridique, en l'étendant à des relations internationales qui jusqu'à présent y ont échappé à peu près complètement et qui sont restées dans le domaine de la politique', *ibid* 397. Yves Daudet also concludes that 'n'étant jamais un simple rassemblement de coutumes mais comportant toujours un élément plus ou moins marqué de développement progressif du droit international, la codification est aussi dans l'ordre international un moyen privilégié d'élaboration du droit'; see Yves Daudet, 'Actualités de la codification du droit international' (2003) 303 *Recueil des cours* 37.

¹⁴ Article 1, paragraph 1, of the Statute of the International Law Commission <<http://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>>.

2. Use of the expression 'International Labour Code'

The term 'International Labour Code' was used in the early stages of the ILO's existence¹⁵ but was later abandoned.¹⁶ Most authors outside the ILO use it to designate the set of Conventions and Recommendations, often using as reference the total number of these instruments adopted by the ILO throughout the history.¹⁷

The two volumes which resulted from the two attempts to issue a code in 1939 and 1951,¹⁸ went beyond a simple collection of adopted instruments and presented the ILO's normative activity according to subject matter. They included the ILO Conventions and Recommendations, while some other legal instruments were provided as annexes.¹⁹ The title of 'Code' was questionable since it gave the impression of a binding body of norms although many Conventions were not widely ratified at that time. As Jenks explained, his International Labour Code was not primarily a code of international obligations but a code of internationally approved standards, which may have become obligations by ratification.²⁰

¹⁵ Possibly influenced by the idea, mentioned several times before and during the Versailles Conference but finally not accepted, that the Conventions be applied directly by member States following their adoption by the Conference; see Sandrine Kott, 'Quelles normes pour quelle justice sociale? 100 ans d'histoire normative' in Stéphanie Dagnon, Anne-Sylvie Dupont and Karine Lempe (eds), *L'OIT et le droit social en Suisse: 100 ans et après?* (Pôle Berenstein 2019) 7, 12-13. This solution, which may seem appealing, would have caused other problems because the ratification of some Conventions was not met with enthusiasm, especially before the beginning of the Second World War. While the total number of ratifications on 1 September 1941 could have been 3,050 (61 Conventions multiplied by 50 member States), in fact it was only 882. See Custos, 'The International Labour Code' (1942) 13 *Political Quarterly*, 303, 305.

¹⁶ Nikita Lyutov, 'The ILO system of international labour standards and monitoring procedure: Too complicated to be effective?' (2014) 64 *Zbornik Pravnog fakulteta Zagreb (Collected Papers of Zagreb Law Faculty)* 255, 257.

¹⁷ Ernest Mahaim, 'International Labour Law' (1921) 1 *International Labour Review*, 283, 286; Steve Hughes and Nigel Haworth, *International Labour Organization (ILO): Coming in from the Cold* (Abingdon, Routledge 2011) 24, although they acknowledge the role of the supervisory mechanism in 'maintaining general adherence' to the Code; Ben Chigara, 'Latecomers to the ILO and the Authorship and Ownership of the International Labour Code' (2007) 29 *Human Rights Quarterly* 706.

¹⁸ ILO, *International Labour Code, 1939* (ILO 1941); ILO (n 1).

¹⁹ ILO (n 18) Explanatory Note, xxiv.

²⁰ *ibid.*, Preface, xiii.

The expression has vanished at the ILO due to hesitation in using it²¹ or objections by constituents. For example, in 2011, the Office presented to the Governing Body a paper entitled ‘ILO standards policy: An approach for a robust and effective international labour code’,²² advocating the creation of ‘a robust body of international labour standards’²³ or ‘a clear and up-to-date body of international labour standards that could be clearly identified as constituting a modern international labour code’.²⁴ In the documents that followed this discussion, the expression was omitted notably in view of the objections raised by some members of the Governing Body.²⁵

III. Constituent elements of the International Labour Code

The International Labour Code includes a comprehensive set of instruments based on common premises and principles deriving from the Constitution. Main among those instruments are the international labour Conventions and Recommendations which constitute an organized and structured body of standards.

1. *Constitutional foundation and principles*

It may be unusual to refer to the ILO Constitution as an element of the International Labour Code as its provisions deal mainly with the Organization’s functioning and various procedures. However, the preamble to the ILO Constitution in Section I of Part XIII of the Treaty of Versailles,

²¹ See, for instance, how Francis Blanchard, former ILO Director-General, refers to an international labour code ‘avec une certaine liberté de langage’; Francis Blanchard, *L’Organisation internationale du Travail* (Seuil 2004) 59.

²² GB.310/LILS/3/1 (Rev.).

²³ *ibid* para 2.

²⁴ *ibid* para 41. It is interesting to note that the Centenary Declaration, without referring to the Code, basically used a combination of these phrases, stating that the ILO should ‘have and promote a clear, robust, up-to-date body of international labour standards’.

²⁵ The Employer members indicated that the expression was ‘inaccurate and misleading’ as it implied an obligation to comply with international labour standards and the possibility of enforcing compliance, which did not apply to ILO Conventions and Recommendations. It should be replaced by the term ‘body of international labour standards’; GB.310/11/2 (rev.) para 13. In the past, governments have also hesitated due to the possible financial implications of preparing an edition of the Code; see Report of the Working Party on International Labour Standards, Appendix I, Official Bulletin (1987) LXX, 18, para 26.

1919, although relatively concise, was instrumental for asserting the broadening scope of the ILO mandate. The incorporation of the Philadelphia Declaration in 1946 made the Constitution much more ambitious and substantive. The Philadelphia Declaration reformulates the ILO's constitutional objectives beyond the protection of working conditions. It widens the scope of its action by taking into account the broader economic and social context, providing in particular for the ILO's responsibility to examine and consider all international economic and financial policies in the light of the fundamental objective of social justice.²⁶ This provided guidance for the ILO's normative activity and created a basis for identifying some principles and rights that were later spelled out in the 1998 Declaration.

The 1998 Declaration is one of the cornerstones of the International Labour Code. Instead of creating new rules, this Declaration creatively interpreted the ILO Constitution. The Declaration puts the ILO's entire normative work in a particular context.

The Declaration recalls that 'in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances'. In addition to stating that 'social justice is essential to universal and lasting peace', its preamble – which may have gone somehow unnoticed in practice – identifies other objectives such as 'the need for the ILO to promote strong social policies, justice and democratic institutions' and to ensure that 'in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing'. It recalls that to maintain the link between social progress and economic growth, 'the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential'. As these objectives arise from the Constitution, they should guide all ILO instruments, and in particular Conventions and Recommendations, which are to be drafted

²⁶ Eddy Lee, 'The Declaration of Philadelphia: Retrospect and Prospect' (1994) 133 *International Labour Review*, 467.

and later interpreted using the teleological method of interpretation so well enshrined in the methods of interpretation of international treaties, in the light of the objectives to be attained.

Against this background, the 1998 Declaration recalls that the principles and rights set out in the Constitution have been ‘expressed and developed’ in the form of specific rights and obligations in Conventions recognized as fundamental ‘both inside and outside the Organization’. The ‘principles concerning the fundamental rights’, the subject of those Conventions, are (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.

The approach taken by the 1998 Declaration was quite revolutionary.²⁷ There was no need to search for a customary law: all that was needed was for a commonly agreed interpretation to be given to an international treaty, namely the ILO Constitution. All member States – and in particular those who had not ratified the fundamental Convention – would be bound to respect those principles and rights, based on their acceptance of the ILO Constitution, and this obligation was accompanied by a reporting obligation.

To determine the content of those fundamental principles and rights at work, we have to look not only at ILO ‘fundamental Conventions’ and the comments made on them by the ILO supervisory bodies, but also at the broader context of international human rights instruments. Indeed, the choice of ‘fundamental’ rights is not really a surprise or detached from general international law. The fundamental principles of prohibition of slavery, discrimination and protection of children are covered by international customary law and by widely ratified human rights treaties.²⁸ As far as the freedom of association is concerned, this right is mentioned not only in

²⁷ For a general presentation see Claire La Hovary, *Les droits fondamentaux au travail: Origines, statut et impact en droit international* (PUF 2009).

²⁸ For slavery, including forced and compulsory labour, see article 8 of the International Covenant on Civil and Political Rights (1966) and the Slavery Convention (1926); for discrimination, the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of Persons with Disabilities that was adopted later (2006); and for child rights, the Convention on the Rights of the Child (1989).

the Universal Declaration of Human Rights but also in the two human rights Covenants, which both contain references to the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – in article 22 of the International Covenant on Civil and Political Rights, 1966, and in article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966. These norms have a legitimate place in the International Labour Code.

The adoption of the 1998 Declaration was criticized by scholars.²⁹ Some claimed that it risked undermining the importance of the Conventions. The ILO responded by arguing that the promotion of the Declaration and the ratification campaign went hand-in-hand. Subsequent events demonstrated that the Declaration's adoption in fact boosted the ratification of fundamental Conventions. For example, while there were 38 additional ratifications of fundamental Conventions in 1997 and 29 in 1998, the number of additional ratifications rose to 57 in 1999, 117 in 2000 and 96 in 2001. The Declaration actually increased States' willingness to be bound by the fundamental Conventions, thereby reinforcing the ILO's power to monitor the implementation of fundamental rights at work. That being said, even though the ratification rate of the fundamental Conventions is over 90 per cent, their coverage of the world population is much lower, as some countries that have not ratified the fundamental Conventions have very large populations. Significantly, over half of the world's population is in countries that have not ratified either of the freedom of association and collective bargaining Conventions.³⁰ Yet this does not undermine the importance of the constitutional obligation of the countries concerned to promote and realize the principles enounced in the Declaration.

The 1998 Declaration had a far-reaching impact on all aspects of the ILO's activities³¹ and, in particular, on standard-setting. It provided

²⁹ Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457.

³⁰ International Labour Conference, 101st Session (2012), *Fundamental principles and rights at Work: from commitment to action*, Report VI, para 34; International Labour Conference, 106th Session (2017), *Fundamental principles and rights at Work: from challenges to opportunities*, Report VI, para 82.

³¹ For an interesting account of its political and operational impact, see Kari Tapiola, *The teeth of the ILO – The impact of the 1998 ILO Declaration on Fundamentals Principles and Rights at Work* (ILO 2018).

an innovative global framework for new instruments and all but one Convention (Safety and Health in Agriculture Convention, 2001 (No. 184)) adopted after 1998 refer in their preamble to the 1998 Declaration or to the fundamental principles and rights at work to set out the legal context in which they are to be placed. The same approach was followed in the drafting of the ‘stand-alone’ Human Resources Development Recommendation, 2004 (No. 195), the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) and the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205).³² The most significant impact can be found in the Maritime Labour Convention, 2006 (MLC, 2006). So far, this Convention has gone furthest in integrating fundamental principles and rights at work in an instrument covering the most global of sectors. It articulates fundamental principles and rights at work not only as rights and principles, but also as the enabling conditions for all the other rights set out in the Convention. Article III of the MLC, 2006, concerning fundamental rights and principles, was introduced on the understanding that seafarers’ employment and social rights, as set out in the Convention, could only be meaningfully achieved in a context where fundamental principles and rights at work were respected, promoted and realized.³³

Building on the 1998 Declaration, the 2008 Declaration restates the ILO’s mandate, reaffirms the commitment of the ILO and its Members to its implementation and provides a contemporary vision of the ILO’s constitutional objectives regrouped under four strategic objectives. These objectives are spelled out in Part I of the 2008 Declaration.³⁴ The Declaration supplements this description with a statement regarding how the ILO and its Members should implement these objectives, placing emphasis on the fact that the ILO’s objectives ‘are inseparable, interrelated and mutually

³² Only the HIV and AIDS Recommendation, 2010 (No. 200), represented an exception from this approach.

³³ In a legal opinion concerning the reference to the fundamental principles and rights at work in Article III of the Convention, the ILO Legal Adviser indicated that each member State that ratifies the MLC, 2006, ‘will be obliged, in accordance with Article III, to satisfy itself that its legislation respects, in the context of this Convention, the four categories of fundamental rights’; see Conference (n 30) para 243.

³⁴ Francis Maupain, ‘New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization’ (2009) 20 *European Journal of International Law* 823.

supportive. The failure to promote any one of them would harm progress towards the others'.³⁵ In order 'to achieve real efficiency in promoting any of these objectives it is not enough to state what ought to be done with respect to each of them; it is necessary to take into account the fact that they interact and to understand better the way in which they do'.³⁶ This 'repackaging' of the ILO's constitutional objectives has had an important impact in terms of the updating of the body of standards and the advent of the ILO's standards policy. Yet while the 2008 Declaration to a certain extent seeks to extend the regulatory approach adopted by the 1998 Declaration to all the ILO objectives, its full potential is yet to be realized.³⁷

The adoption of the 1998 and 2008 Declarations raises the question as to whether the ILO can or is indeed willing to further build on these changes. There was an interesting development during the centenary session of the Conference. Based on the recognition in the ILO Centenary Declaration that safe and healthy working conditions are fundamental to decent work, the accompanying resolution requests 'the Governing Body to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work'.³⁸ During the discussion of the Centenary Declaration, there was a general recognition of the importance of occupational safety and health, but the legal implications (e.g. the identification of the corresponding Conventions, the revision of the 1998 Declaration) of this recognition gave rise to a number of questions,³⁹ starting with whether the rationale applied for the recognition of the four fundamental principles and rights at work could be followed for the recognition of a fundamental right relating to occupational safety and health. This debate is of central importance to the ILO which, in response to the needs of the world of

³⁵ 2008 Declaration, Part I B.

³⁶ Maupain (n 34) 837.

³⁷ International Labour Conference, 105th Session (2016), *Advancing social justice: reviewing the impact of the ILO Declaration on Social Justice for a Fair Globalization*, Report VI and Provisional Records 13-1.

³⁸ Centenary Declaration, Part II, D, and International Labour Conference, 108th Session (2019), *Resolution on the ILO Centenary Declaration for the Future of Work*, para 1; GB.337/INS/3/2.

³⁹ International Labour Conference, 108th Session (2019), *Provisional Record 6B (Rev.)* paras 986-1014.

work and in recognition of the significance of certain social rights in other fora, is further consolidating the impact of its standards beyond the act of ratification, based on the reciprocal obligations of the ILO and its Members under the Constitution.

2. *International labour standards and their hierarchy, grouping and classification*

In its first 100 years of existence, the ILO adopted 190 Conventions, six Protocols and 206 Recommendations. By all measures, the Organization was able to draft, adopt and promote an impressive number of international instruments. The Conventions have so far triggered 8,180 ratifications.⁴⁰

Some authors consider that the Code is composed of Conventions and Recommendations.⁴¹ However, simply listing them all may be misleading for the purposes of the International Labour Code.

Firstly, not all of these instruments are still valid. The ILO has gone through various stages of revision, consolidation and abrogation/ withdrawal of the instruments adopted, and this process is still ongoing. The ILO has eliminated obsolete standards and created a mechanism allowing the relevance of all instruments adopted in the past to be reviewed. It therefore maintains a code of up-to-date instruments.

Secondly, pursuant to article 19 of the ILO Constitution, Conventions and Recommendation produce different legal effects, and this difference is important. However, if viewed in the context of the International Labour Code, the difference between binding and non-binding standards is of secondary importance, since all of them represent valid standards and should be a part of the Code.

Thirdly, the limitation of the International Labour Code to ILO Conventions and Recommendations is also reductive since some other legal instruments form part of the Code, as explained below.

Fourthly, a list of standards ignores the fact that the body of standards is organized and structured by means of classifications and groupings of

⁴⁰ As of 14 October 2019.

⁴¹ See n 17 above.

standards. One example is the classification of Conventions as fundamental, governance/priority and technical.

The classification of some Conventions as fundamental is based on the function/role of a particular group of standards in advancing workers' rights. The 1998 Declaration did not indicate which Conventions were to be considered as fundamental. These were in fact identified by the Conference and the Governing Body before the Declaration was adopted on the grounds that they dealt with fundamental rights or basic social rights:

- (i) freedom of association and collective bargaining: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- (ii) forced or compulsory labour: the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105);
- (iii) child labour: the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182);⁴² and
- (iv) work-related discrimination: the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

The fundamental Conventions give rise to specific reporting obligations. Thus, Members which have ratified one or more fundamental Conventions must report every three years, and those who have not ratified them are subject to an annual follow-up under the 1998 Declaration.

There is no obvious basis either in the ILO Constitution or in general international law for introducing a hierarchy of norms with the same formal legal value. It would not be necessary for the purposes of a random set of conventions to classify some of them as 'fundamental', even if simply *primus inter pares*, as this classification would not have any legal value. In international law all treaties have the same value and there is no hierarchy among them, unless this is specifically provided for in the text of the treaties. Clearly, this categorization is not specifically provided in the text of the Conventions.

⁴² This Convention was adopted after the 1998 Declaration.

Later, the ILO introduced another category of Conventions ‘that are the most significant from the viewpoint of governance’ and which was identified in the 2008 Declaration (so-called ‘governance’ or ‘priority’ Conventions), based on their contribution to the effective implementation of workers’ rights. There are four of these at present: the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention, 1964 (No. 122), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Members having ratified one or more governance Conventions must report every three years. All other Conventions were classified as ‘technical Conventions’ and when ratified are subject to a reporting cycle of six years.

Classifying the Conventions makes sense only if they are understood as parts of a coherent and complete code of law. As this classification was performed by the Conference and the Governing Body and universally accepted by all members States as well as outside the ILO (for fundamental Conventions), it implies that the international labour Conventions are more than a random series of international treaties on different topics. Such an approach is more characteristic for the national legislative process, hence the idea of a coherent code encompassing a set of rules which are interrelated on the basis of common premises and principles.

In ILO practice, there is another method for classifying standards, which can be described as operational, placing emphasis on the follow-up action to be taken by the ILO and member States depending on the classification selected. Standards are in essence arranged in specific categories according to their relevance, obsolescence or need for revision to clarify the actions to be taken by the ILO and its member States. The structure of the classification and its actual operation are decided by the Governing Body upon the recommendation of a working group set up to review the body of standards. Three major classification exercises have been carried out and a fourth one is ongoing. Classification can thus be considered as an ‘acquis’ of the ILO body of standards.

The thematic grouping of standards by subject matter is a long-standing measure used to clarify the body of standards and enable its orderly presentation in a manner that places emphasis on its link with ILO objectives. Since the adoption of the 2008 Declaration, standards have been

distributed into four groups based on the ILO's four strategic objectives: (1) promoting employment; (2) developing and enhancing measures of social protection – social security and labour protection; (3) promoting social dialogue and tripartism; and (4) respecting, promoting and realizing the fundamental principles and rights at work.⁴³ There is a fifth group covering cross-cutting and sectoral instruments, with particular reference to the instruments relating to maritime/seafarers or migrant workers. Under each of the four broad headings, the standards are further allocated into thematic sets.⁴⁴ In addition to providing clarity, the grouping of standards highlights the completeness of the scope of the body of standards, makes it easier to grasp and facilitates its review.⁴⁵

These grouping and classification exercises have been successful overall in bringing clarity to the body of standards and in encouraging a systematic approach by the ILO and its member States. In that sense, they contribute to exemplifying the existence of the International Labour Code.

A clear identification of an international Labour Code would help in further clarifying and structuring the ILO's body of standards. There would be no imperative to classify or group Conventions separately from Recommendations or any other ILO or other instruments. If standards could be grouped by subject matter, Conventions and Recommendations would be considered together with ILO declarations, resolutions, codes of conduct and findings of supervisory bodies, and also in combination with other relevant standards of international law. Such an approach would help all those who are not necessarily familiar with ILO system – such as national judges or officials of other international organizations – to grasp better the content of the International Labour Code and make use of the standards and guidance set forth therein.

⁴³ See the terms of reference of the Standards Review Mechanisms Tripartite Working Group, para 11 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_420260.pdf>.

⁴⁴ GB. 326/LILS/1.

⁴⁵ Such groupings have also served to streamline the communication of reports on the application of ratified Conventions. A grouping of Conventions for reporting purposes was decided by the Governing Body in 2003 notably to facilitate the submission of reports on the application of ratified Conventions covering similar subjects, to contribute to greater consistency in the analysis of reports and to provide a more comprehensive overview of the application of Conventions in a particular subject area.

3. *Other ILO instruments*

Although formally non-binding, some resolutions adopted by the Conference form part of the International Labour Code.⁴⁶ Resolutions are usually of a technical and non-normative nature, but quite few of them, whether relating to an item on the Conference agenda or not, may be substantive and influence the understanding of the normative framework. Prominent examples are the 2000 resolution concerning HIV/AIDS and the world of work and the 2007 resolution concerning asbestos. Substantive resolutions arise frequently out of either the so-called ‘general discussion’⁴⁷ of an item on the agenda or within a recurrent discussion under the 2008 Declaration.⁴⁸

Some instruments which are formally resolutions have acquired specific status by their designation as ‘pact’ (for instance, the 2009 Global Jobs Pact). It is obvious that for the purposes of the International Labour Code, such instruments would have the value of providing an overall context to formally binding instruments.

A few other instruments adopted by the Governing Body have influenced significantly other international legal instruments and national policies and law. This is the case of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977). Such documents must find a place within the International Labour Code.

Wilfred Jenks included many other ILO instruments in his Codes such as conclusions of regional or sectoral meetings. However, while all of them may be politically relevant, their legal relevance has to be carefully assessed and a proper selection of such soft law instruments would identify only some of them as forming part of the International Labour Code.

4. *Beyond the ILO*

The ILO’s normative activities have been reflected in legal instruments adopted outside the ILO. An example already quoted above is the reference to Convention No. 87 in both human rights Covenants.

⁴⁶ GB.297/LILS/4/1; GB.298/LILS/1.

⁴⁷ See, for instance, the 2015 Resolution concerning small and medium-sized enterprises and decent and productive employment creation.

⁴⁸ See, for instance, the 2015 Resolution concerning the recurrent discussion on social protection (labour protection). This method goes beyond normative activity.

Other examples are the reference to Convention No. 111, in the preamble of the 1969 International Convention on the Elimination of All Forms of Racial Discrimination and to the protection of fundamental principles and rights at work incorporated in the United Nations Guiding Principles on Business and Human Rights. Non-ILO legally binding and non-binding international instruments dealing with labour matters should therefore also find an appropriate place in the International Labour Code.

The interaction between the ILO institutional framework and the wider framework of human rights protection is important for the labour rights protection. The ILO activities should stop being viewed as too specialized and too remote from a general international law context. At the international level, establishing close links between two systems would avoid fragmentation of international law and increase coherence of policies. It would also increase the ILO visibility and relevance for general human rights protection. At the national level, such a link would enable decision-makers and national judiciary to grasp easily the overall scope of international obligations of a State, without having to distinguish obligations on the basis of who created the norms under review.

IV. Coherence of the International Labour Code

The coherence of the ILO standards was not an obvious imperative in the past. Until the advent of a genuine standards policy, the coherence of the Code was primarily ensured through the increased cross-references to other ILO instruments in new standards, the mechanisms and practices relating to the interpretation of the ILO standards, the ILO supervisory mechanism and, to a lesser extent, the existence of clauses common to all Conventions. These specific measures aimed at maintaining and preserving the necessary degree of coherence for a body of standards developed to support action taken by the 187 Members to achieve the ILO's objectives.

1. Coherence in standards-setting: Cross-references and standard clauses

1.1 Cross-references

For a long period in the ILO's normative activity, newly elaborated Conventions made no reference to existing Conventions. The process of referring to other Convention in the preamble started in 1970 when the

Minimum Wage-Fixing Convention, 1970 (No. 131), cited the Minimum Wage-Fixing Machinery Convention, 1928, the Equal Remuneration Convention, 1951, and the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951. The purpose was clearly to indicate that this new instrument was supposed to complement those previous Conventions. Such cross-referencing was used in some other Conventions to indicate further improvements in accommodation aboard a ship⁴⁹ or the supplementary character of the new instrument with regard to previously adopted instruments.⁵⁰ In areas where the ILO has pursued rich legislative activity, such as in maritime matters,⁵¹ occupational safety and health⁵² and freedom of association,⁵³ such cross-references are quite frequent.

As indicated above, reference has frequently been made to the 1998 Declaration in subsequently adopted standards. References to other international standards that are relevant to human rights⁵⁴ or to the maritime sector⁵⁵ have recently been seen. This may indicate the willingness of the ILO constituents to affirm the existence of the International Labour Code within a wider context of international law.

1.2 Standard clauses

The ILO Constitution does not contain any provisions regarding the entry into force and denunciation of Conventions. To ensure uniformity in this respect as far as possible, the Conference adopted a set of standard final provisions to be inserted into all new proposed conventions by the Conference Drafting Committee before a final vote in the plenary session of the Conference (although the Conference standard-setting committee may propose changes to the 'model' clauses). Once included in a Convention, the final provisions, like any other provisions in a Convention, cannot be amended except by revision of the Convention of which they are an integral part.

⁴⁹ Convention No. 133.

⁵⁰ See, for instance, Convention No 135.

⁵¹ See, for instance, Conventions Nos 134, 147, 164, 179 and 180.

⁵² See, for instance, Conventions Nos 139, 148, 152, 161, 167, 170, 174, 176 and 184.

⁵³ See, for instance, Conventions Nos 141, 151 and 154.

⁵⁴ See the preambles of recently adopted Conventions Nos 189 and 190.

⁵⁵ In the MLC, 2006 and Convention No. 188, reference is made to the United Nations Convention on the Law of the Sea, 1982.

2. *Coherence in the implementation: Interpretation and supervision*

2.1 Interpretation

The uniform interpretation of norms is an essential requirement of any system of law. Its absence may be one of the main weaknesses of general international law, which allows a multitude of fora and actors for its interpretation. The ILO has attempted and so far succeeded in maintaining a coherent system for interpreting international labour standards at the international level. One should not underestimate the magnitude of this achievement. With the growth and diversification of its Members applying and interpreting international labour standards in varied national contexts and the overlapping mandates of other international organizations, there is a great risk of the same norms being interpreted differently by different international bodies, in addition to the different interpretations that can be reached by national courts.

This achievement may appear all the more remarkable in the light of the fact that neither of the two authoritative mechanisms provided for under article 37 of the Constitution have been used since 1946 when the reference was inserted to the International Court of Justice (ICJ) as the successor to the Permanent Court of International Justice (PCIJ) and when the possibility of creating a special tribunal was added.

Article 37(1) provides that ‘any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.’⁵⁶ In addition to

⁵⁶ Much has been written on article 37(1) of the Constitution. As pointed out in a 1993 Office document ‘one of the most vexing questions is whether it involves the jurisdiction of the International Court of Justice to decide disputes or its advisory jurisdiction. Only States may be parties in cases before the Court under article 34 of its Statute, and according to article 59 the decision it hands down is only binding on parties to the case in question. According to article 37, paragraph 1 of the ILO Constitution, at least in its English version, however, the intention is indeed to grant the Court competence to take a decision (English version), and not to give an advisory opinion (as might be suggested by the French version, which refers to *appréciation*)’; see GB.256/SC/2/2, para 34. In any event, the United Nations and the ILO concluded an agreement in 1946. Article IX (2) of this agreement authorises the ILO to request advisory opinions of the ICJ on legal questions arising within the scope of its activities. As pointed out in another 2014 Office document ‘it is probable that in the event of a request for an advisory opinion submitted by the Organization, the Court will base its

being authoritative, an interpretation rendered by the ICJ under article 37(1) could be of a crucial importance, as demonstrated by the impact of the advisory opinions rendered by the PCIJ in the ILO's early years. Among the five advisory opinions, three of these advisory opinions concerned the interpretation of the Constitution and more specifically the scope of the ILO's regulatory competence, which had been challenged by some powerful member States.⁵⁷ These advisory opinions, emanating from an uncontested legal authority and issued within the framework of what was at that time Part XIII of the Versailles Treaty, defined the ILO's institutional mandate and made it possible for the Organization to embark on standard-setting activities.

However, there has been only one advisory opinion on the interpretation of a Convention, which related to the Night Work (Women) Convention, 1919 (No. 4), and which was issued in 1932. The PCIJ was called upon to settle a divergence of views between governments on whether the Convention applied to women holding supervisory or managerial positions who were not ordinarily employed in manual work. This difference of views was brought to the attention of the Governing Body by the Committee of Experts on the Application of Conventions – later the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The PCIJ confirmed that the Convention was indeed applicable to such women and as a result, the Governing Body placed the revision of Convention No. 4 on the Conference's agenda. This interesting link between the work of the judge and the work of the legislature was later reflected in article 37(2).

jurisdiction primarily on article IX(2) of the 1946 Agreement between the United Nations and the ILO, which explicitly authorizes the ILO to request an advisory opinion, and UN General Assembly Resolution 50(I) of 14 December 1946 by which the General Assembly approved the UN–ILO Agreement'; GB.322/INS/5, para 13. That being said, article 37(1) would govern the legal effect of an advisory opinion for the ILO.

⁵⁷ *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ, Series B, No. 1 (1922); *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, PCIJ, Series B, No. 2 (1922); *Competence of the International Labour Organization to examine proposals for the Organization and Development of Methods of Agricultural Production*, PCIJ, Series B, No. 3 (1922); *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Series B, No. 13 (1926); *Free City of Danzig and the International Labour Organization*, PCIJ, Series B, No. 18 (1930); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, PCIJ, Series A/B, No. 50 (1932).

While reference to the ICJ remains an ultimate possibility, under article 37(2) – which has not been implemented so far and may be deemed a missing piece of the International Labour Code – the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the ICJ would be binding upon any tribunal established by virtue of this paragraph in order to ensure uniformity of interpretation, which was one of the paramount considerations in the elaboration of this provision. There are two aspects which are relevant for the purposes of the International Labour Code. First, the possibilities provided for in article 37(1) and (2) of the Constitution are complementary and not mutually exclusive. Nothing would prevent the same question submitted to such a tribunal from being subsequently submitted to the ICJ, thereby enabling a dispute or question of interpretation as regards a Convention to be unequivocally settled and contributing to consolidation of the integration of the ILO body of standards into broader international public law. Secondly, an explicit link is drawn between the authoritative interpretation made by the tribunal and the Conference as the legislative body: any award made by the tribunal must be circulated to the ILO's Members and any observations which they may make thereon must be brought to the Conference. This relationship between the judge's interpretation and the follow-up action that may be taken by the legislature reflects the institutional machinery supporting the development of a code and a classical distribution of functions familiar at the national level.

Beyond what is provided for in article 37 of the ILO Constitution, the supervisory bodies – particularly the CEACR – and the Office have in practice become the mechanisms through which issues relating to interpretation have been addressed. To date, they have been the main agents ensuring the normative coherence of the International Labour Code.

As the CEACR is competent for supervising the application of all Conventions in force by the member States which have ratified them, it naturally tends to ensure that it express views that are coherent across the Conventions. Within its remit 'to indicate the extent to which each member State's legislation and practice are in conformity with ratified Conventions

and the extent to which member States have fulfilled their obligations under the ILO Constitution in relation to standards', it must inevitably determine the meaning of the Conventions by interpreting them. Over the years and up to the major institutional crisis in 2012 concerning the interpretation of Convention No. 87 and the right to strike, the CEACR took on a more independent and broader role in matters of interpretation, including through the combined analysis of reports submitted by Members on the effect given to a set of Recommendations and unratified Conventions selected by the Governing Body and the reports submitted by member States which had ratified the Conventions comprised in the set of instruments. This analysis resulted in what came to be known as the CEACR General Surveys. In the framework of these, the CEACR has clarified and developed its views on the meaning of certain provisions.⁵⁸

Almost since the creation of the ILO, the Office has provided opinions in response to requests for clarifications made by constituents concerning the meaning of certain provisions. The role of the Office is governed by the ILO's internal rules, which highlight that the Constitution confers no special competence on the Office to give an authentic interpretation of the provisions of Conventions. However, its opinions are important, since, in determining the meaning of the provisions of Conventions, the Office takes into account all the relevant factors that may emerge from the ILO's preparatory work and the comments of its supervisory bodies⁵⁹ and plays also a role in ensuring the coherence of the body of standards and its coherence

⁵⁸ The CEACR currently presents its role in matters of interpretation as follows: 'The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise'; see International Labour Conference, 108th Session (2019) Report of the Committee of Experts on the Application of Conventions and Recommendations, para 32.

⁵⁹ See, for instance, Memoranda prepared by the International Labour Office in reply to requests for clarification concerning the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Safety and Health in Agriculture Convention, 2001 (No. 184), Official Bulletin (2002) LV 169.

with the broader international law.⁶⁰ In the past, a distinction was drawn between formal/official opinions which were published in the ILO official bulletin⁶¹ and informal opinions.

Reliance on the *travaux préparatoires* in seeking to identify the Conference's intention in order to arrive at an interpretation is particularly important in the ILO's tripartite structure. This aspect of normative activity is always well documented. The drafting process is transparent and always accessible to all those who are interested in determining the drafters' intentions.⁶² Combined with the reference to the comments of supervisory bodies and in particular the CEACR, this interpretative practice specific to the ILO has contributed significantly to the coherence of views on the meaning of the provisions of Conventions and Recommendations.

Interpretations by the CEACR and the Office have acquired importance over the years and can be said to have become indispensable in ensuring the integrity of the International Labour Code. Given that this development took place in an independent manner and has had some effect outside the ILO,⁶³ it may perhaps come as no surprise that it has been called into question. In particular, such was the case in 2012 with the views expressed by the CEACR as regards the existence of the right to strike under Convention No. 87. Although it concerned only one specific matter, the unprecedented crisis that this generated clearly demonstrated that the failure to use the mechanisms to reach an authoritative interpretation to settle disputes over the meaning of Conventions can have an impact on the integrity of the body of standards and indeed the whole standards system. Further, the use of ILO fundamental principles and rights at work and fundamental

⁶⁰ During the discussion of the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205), the Legal Adviser emphasized that 'international labour standards were mutually reinforcing and did not affect each other's normative value'. He also underlined the need to ensure that there was no conflict of obligations for ILO member States between the ILO standards and other rules of international law; International Labour Conference, 106th Session (June 2017), Provisional Record 13-2(Rev.), paras 2014, 2016.

⁶¹ The publication of Office's opinions was discontinued in 2002.

⁶² All questionnaires, preparatory reports and provisional record of the Conference are public and detailed.

⁶³ As seen by the use by national courts of the ILO supervisory bodies' comments, as well as their use at the international level.

Conventions in other frameworks such as free trade arrangements or private voluntary initiatives poses questions and challenges to the authority of their interpretation. This paper does not purport to review the initiatives taken outside the ILO to promote fundamental principles and rights at work.⁶⁴ While they exemplify the impact that the ILO and its values, principles and standards can have in spurring new regulatory approaches to the realization of human rights and the achievement of social justice, these ‘external’ uses of ILO instruments may, through the creation of other mechanisms for interpreting standards and resolving disputes, compromise the integrity of the International Labour Code. It may be preferable to make available by the ILO the mechanisms which under the ILO Constitution could provide a definitive settlement of controversies or questions concerning the meaning to be given to the provisions of a Convention.

2.2 Supervision

While the issue of how subjects of international law apply international law is traditionally left to their own discretion, the ILO has created a sophisticated supervisory system encompassing two broad sets of procedures: reporting-based supervisory procedures and complaint-based supervisory procedures. This is not the place to describe in detail the functioning of the system, but simply to note that its existence and the way it operates ensures the coherence of the International Labour Code, since all those involved have in mind the totality of the ILO’s normative activity.

V. Dynamic nature of the International Labour Code

The International Labour Code is not a static set of international norms. As the circumstances in the area of labour change constantly and often rapidly, the ILO has developed internal mechanisms enabling the revision of existing standards and elimination of obsolete standards. It has also recognized the importance of a standards policy, which is, however, yet to have its full potential impact on the choice of new topics for standard setting.

⁶⁴ Conference (n 30).

1. *Revision of existing standards*

Outdated treaties are like obsolete satellites that go around the Earth without a purpose. They may be obsolete either because they have not entered into force, they have gathered only few ratifications or their subject matter has become obsolete with the passage of time and the development of the international community.

The adoption of subsequent international treaties on the same or a similar subject is not unusual in international law. There are examples in the law of the sea and international humanitarian law. Article 30 of the Vienna Convention on the Law of Treaties, 1969 ('the Vienna Convention') provides some basic default rules on the application of successive treaties regarding the same subject matter.

It may be a paradox for an organization with a regulatory mission, but the ILO constitutional architecture lacks a fundamental mechanism of relevance to the Code: a revision procedure. This may be an indication that the ILO's creators did not have in mind the International Labour Code as such.⁶⁵ However, it soon became apparent that some Conventions would need to be revised. Starting with the Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27), the ILO introduced a standard clause into all Conventions which reads as follows:

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention [...] if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

⁶⁵ It may be of significance that when the 1919 Constitution was developed, the standards-related procedures focussed on their adoption and implementation. No mention was made of the revision or termination of standards, and interpretation by the then Permanent Court of International Justice was introduced in the course of the work of the Commission on Labour Legislation.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

This provision ensures that more recent instruments would, when ratified, *ipso iure* replace Conventions which were revised, thereby avoiding the need to denounce those Conventions.

As for Conventions adopted before 1929, they often had a denunciation ‘window’ of five⁶⁶ or ten⁶⁷ years after their entry into force, and any new revision would create either a duplication of standards or a delay in implementation of the revised standards. In order to get around that difficulty, the ILO adopted the Final Articles Revision Conventions, Nos 80 and 116, in 1946 and 1961 respectively, to harmonize both past and future Conventions through standard final clauses, including the consequence of the ratification of the new Convention on the revised Convention. Convention No. 116⁶⁸ addresses the impact of its entry into force on the final provision that had been present in all ILO Conventions adopted during the first 32 sessions of the Conference. Thus, it provides that, once it has entered into force, a Member’s formal ratification of any Convention adopted by the Conference in the course of its first 32 sessions would be deemed to have ratified that Convention as modified by this Convention.

In the absence of a constitutional procedure, three main tools have been developed for amending and updating standards: a specific revision procedure provided for in the Standing Orders of the Conference and the Governing Body; the general/standard procedure for adopting new standards through either a single or a double Conference discussion; and the amendment clauses (often relating to specific technical provisions) incorporated into the text of certain Conventions. In practice, the general

⁶⁶ For instance, Workmen’s Compensation (Accidents) Convention, 1925 (No. 17).

⁶⁷ For instance, Minimum Wage-Fixing Machinery Convention, 1928 (No. 26) and Hours of Work (Commerce and Offices) Convention, 1930 (No. 30).

⁶⁸ This unusual Convention triggered 77 ratifications. The reason for its adoption was that a standard final article appearing in all Conventions adopted before 1950 required the Governing Body to submit a report to the Conference on the working of each Convention and to consider the advisability of revising the Convention concerned in whole or in part, at five- or ten-yearly intervals after its entry into force. The new arrangement gave more flexibility to the Governing Body; see International Labour Conference, 46th Session (1961) Record of Proceedings, Appendix XII.

procedure for the adoption of new standards has become the ‘established’ method of revision.⁶⁹

A particular type of revision may be identified as ‘consolidation’. This is a process in which the ILO analyses the relevance of previously adopted instruments and creates a new Convention replacing in substance, if not formally, several other Conventions. Several such Conventions can be identified. One of them is the Minimum Age Convention, 1973 (No. 138). By accepting this Convention, member States *ipso iure* denounce ten Conventions.⁷⁰ The MLC, 2006 is a major consolidation of previous instruments, described by the current Director-General, Guy Ryder, as ‘the international labour code for the oceans’ and ‘the seafarers’ bill of rights’.⁷¹ Having noted that few previous Conventions achieved a high number of ratifications and that the maritime industry’s needs had evolved, the ILO decided to work on a comprehensive instrument. In the end, the MLC, 2006, which combined binding and non-binding provisions, revised 37 Conventions, which were closed to further ratification and expected to be gradually phased out, as well as 31 related Recommendations. A further example of consolidation is represented by the Work in Fishing Convention, 2007 (No. 188), which revised four previous Conventions.⁷²

2. *Elimination of obsolete standards*

A major step towards the creation of a Code was marked by the Conference’s adoption of the 1997 Amendment to the ILO Constitution. This demonstrated the ILO’s political will to declare some of its standards obsolete and rationalize the corpus of standards.⁷³ For the purposes of determining whether an international labour code exists, it was a major

⁶⁹ See fifth meeting of the Standards Review Mechanism Tripartite Working Group Reference document 2 Revision of international labour standards: <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_715398.pdf>.

⁷⁰ Conventions Nos 5, 7, 10, 15 and 33, as well as, if they accepted a minimum age of not less than 15 years, Conventions Nos 58, 59, 60, 112 and 123.

⁷¹ Speech by ILO Director-General Guy Ryder on ‘sustainable fisheries’ at ‘Our ocean’ conference – Malta, 6 October 2017 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/statement/wcms_580925.pdf>.

⁷² Conventions Nos 112, 113, 114 and 126.

⁷³ This step was preceded by discussions in 1929 about the possibility of the Conference abrogating Conventions; see International labour Conference, 12th Session (1929), Record

step in reversing the process of ongoing creation of norms by allowing some of them to be eliminated, thereby reinforcing the coherence of the Code.

The amendment was very simple. It added a new paragraph 9 to article 19 of the Constitution that reads:

Acting on a proposal of the Governing Body, the Conference may, by a majority of two-thirds of the votes cast by the delegates present, abrogate any Convention adopted in accordance with the provisions of this article if it appears that the Convention has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the Organisation.

However, it took 18 years from its adoption for the amendment to come into force on 8 October 2015. This is surprising given that on 19 June 1997 it was adopted by the Conference by 381 votes in favour, three against and five abstentions.

One of the reasons for the entry into force of the constitutional amendment 18 years after its adoption may be the somewhat unusual use of the word ‘abrogate’, and the ILO had to explain that:

The use of the term ‘abrogation’ in the context of the constitutional amendment of 1997 must not give rise to errors, in particular resulting from the different uses of the term within national legal systems. The effect of the abrogation of a Convention within the meaning of the 1997 amendment is to eliminate definitively all legal effects arising out of the Convention between the Organization and its Members. Thus, Members that have ratified the Convention are no longer obliged to submit reports under article 22 of the Constitution and can no longer be subject to representations (article 24) and complaints (article 26) for non-observance of the Convention. For its part, the Organization is no longer obliged to undertake any activities in respect of the abrogated Convention. In particular, its supervisory bodies are not required to examine the implementation of the Convention. The Office will also cease to publish the text of the Convention and the official information

of Proceedings, p. 743). The matter was also addressed in the Governing Body: Report of the Working Party (n 25) Appendices I and IV, Official Bulletin (1987) LXX 18, para. 26; GB.265/LILS/WP/PRS/2; GB.265/LILS/5, GB.265/8/2.

regarding its ratifications and denunciations. Electronic archiving will nevertheless be maintained for historical purposes.

While an abrogated Convention thus ceases to be an ILO Convention, nothing prevents those member States that have ratified it (and which might oppose its abrogation) from considering that they remain bound *inter se* by its provisions. But they may no longer call on the ILO to supervise observance and maintain the procedural obligations in respect of Conventions which no longer serve its objectives, and assume the resulting costs.

Furthermore, the abrogation of a Convention in no way implies that Members must revoke the legislative or other measures taken to give effect to the provisions of the Convention internally.⁷⁴

This approach is revolutionary for international law. Part V of the Vienna Convention does not provide for the abrogation of a treaty, because, in principle, treaties belong to their parties. They can be terminated either in accordance with the provisions of the treaty itself or by consent of all the parties. This traditional approach would not be suitable for the international labour Conventions for several reasons. The first and most obvious reason is that the ILO had to create a means of eliminating adopted Conventions which were silent on the possibility of their termination. The second is that the termination of a Convention should not be exclusively in the hands of one of the tripartite constituents, namely the Governments. As the relevance of Conventions is assessed during their adoption by the tripartite structure of the Conference, the relevance of each Convention for the world of work should be assessed in the same manner.

The decision to abrogate a Convention is, therefore, subject to a complex process. Several steps have to be followed. The first step is currently the review by the Standards Review Mechanism Tripartite Working Group (SRMTWG). After this, it is for the Governing Body to place the corresponding item on the agenda of a specific session of the Conference. The Office is then required to communicate to the governments, so that it

⁷⁴ The explanation was inserted in a brochure published by the Office in 2005 in the context of a campaign to encourage the ratification of the instrument of amendment; see GB.297/LILS/2, para 6.

reaches them at least 18 months before the session of the Conference at which the item is to be discussed, a short report and questionnaire inviting their views on the issue. Ultimately, it is for the Conference to decide the proposed abrogation by a two-thirds majority.

Obviously, the abrogation of Conventions by the Conference raises some questions in relation to their continuing validity in international law. One example arises from the standard clause providing that two ratifications are sufficient for a Convention to enter into force. There are situations in which the number of parties falls below this number, meaning that only one member State remains bound by it. If article 55 of the Vienna Convention ('A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force') applies, such a Convention remains in force with only one party. However, in the ILO's established practice, a Convention which has not received the minimum number of ratifications to enter into force or for which the number of effective ratifications has been reduced to zero or one, does not need to be abrogated by the Conference; it is withdrawn, as was the case, for example, for the Protection against Accidents (Dockers) Convention, 1929 (No. 28), which had four ratifications followed by three denunciations.⁷⁵

It has also been the case that some Conventions remained ratified by a number of States at the time of their abrogation by the Conference. For example, the Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67), was still ratified by three member States; Convention No. 4 by 25 member States; the Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15) by eight member States; the Recruiting of Indigenous Workers Convention, 1936 (No. 50) by 30 member States, and so on. As explained above, while the member States may still be bound *inter se* by those Conventions, the ILO supervisory mechanism is not available for them.⁷⁶

Yet the unique process of eliminating obsolete norms started without waiting for the entry into force of the 1997 Amendment in 2015. In 2000,

⁷⁵ GB.328/LILS/2/1 (Rev.), Annex II.

⁷⁶ The application of the abrogated Conventions for these countries could on the other hand be enforced by the national courts to the extent that pending their denunciation, they could still be considered as forming part of the domestic legal framework.

at its 88th session, the Conference modified its Standing Orders by inserting Article 45bis, which made a distinction between the abrogation of a Convention already in force and the withdrawal of a Convention not yet in force. The first step in eliminating Conventions was therefore made possible on a non-controversial issue, the withdrawal of the five Conventions that had never entered into force.⁷⁷ This process prevented these Conventions from ever entering into force and put an end to their legal existence. As a French Government delegate stated during the debate, this was ‘a historic event, since it was the first recognition that international labour Conventions could cease to exist and that some instruments did not serve the purpose they were intended to fulfil’.⁷⁸ As of September 2019, the Conference has withdrawn seven Conventions. On the other hand, the ‘obsolete’ Conventions which were in force had to wait for the entry into force of the 1997 Amendment. As of September 2019, the Conference has abrogated ten Conventions. In 2020, the Conference will examine the proposed abrogation of eight Conventions and the withdrawal of nine Conventions mostly relating to seafarers.⁷⁹

The withdrawal process was also applied to Recommendations. States do not have an obligation of formal acceptance, but only an obligation, pursuant to article 19(6)(a) of the ILO Constitution, to consider each Recommendation ‘with a view to effect being given to it by national legislation or otherwise’. Although the idea of their withdrawal coincided with the idea of abrogation of Conventions, withdrawal of Recommendations did not require the entry into force of the 1997 Amendment and was undertaken under article 45bis of the Standing Orders applicable to the Conventions which had not entered into force. To date, 39 Recommendations have been withdrawn.

The Office takes the necessary steps to ensure that abrogated and withdrawn instruments are no longer reproduced in any collection of international labour standards or referred to in new instruments, codes of conduct or similar documents. Thus, ‘the introduction of the possibility of

⁷⁷ Conventions Nos 31, 46, 51, 61 and 66.

⁷⁸ International Labour Conference, 88th Session (2000), Second report of the Selection Committee, Provisional Record 6/2, 2.

⁷⁹ International Labour Conference, 109th Session (2020), Report VII(1).

abrogating or withdrawing obsolete Conventions constitutes an important step forward in symbolic terms in view of the efforts to strengthen the coherence and relevance of the ILO's standards system. It thereby constitutes a step towards the development of a real International Labour Code, going beyond the unofficial codification carried out by the ILO half a century ago'.⁸⁰ It enables the ILO to keep the Code relevant and, as the Centenary Declaration puts it, 'to have and promote a clear, robust, up-to-date body of international labour standards'.

3. *Evaluation of the impact of standards*

It is a well-known fact that rule-making international organizations do not have proper mechanisms to monitor the impact of their standards.⁸¹ Yet, here again, the ILO is different. In addition to any relevant information that it can gather through the submission of reports by Members, under article 22 of the ILO Constitution, on the measures taken to give effect to the provisions of ratified Conventions, it has a unique constitutional tool designed specifically to enable the ILO to evaluate the impact of its standards beyond the ratification.

This tool consists of the submission by Members, under article 19(5)(e) and (6)(d) of the ILO Constitution, at the request of the Governing Body, of reports on the effect given to unratified Conventions or Recommendations and the difficulties preventing the ratification of a Convention. These provisions were introduced into the Constitution in 1946 in the context of a discussion on whether it was appropriate or feasible to empower the Organization to take decisions that would be binding on its Members.⁸² In 1919, a proposal on these lines, although not accepted, had led to the introduction in article 19 of the obligation for all Members, whether or not they had ratified an instrument, to submit it to their legislative authorities within a period of one year, or no later than 18 months, from its adoption

⁸⁰ M. Humblert and M. Zarka-Martres, 'ILO standards policy' in *International labour standards: A global approach* (ILO 2001) 13.

⁸¹ International Regulatory Co-operation, the role of international organisations in fostering better rules of globalization (OECD 2016) 73-83.

⁸² In October 2017, the Office prepared a working paper for the Governing Body explaining the genesis of the provisions and making an inventory of their use; see GB.335/INS/5/REF.

‘for the enactment of legislation or other action’. In 1946, the same concern led to the extension of the follow-up obligation to all instruments. The provisions were thus conceived as a tool to obtain information on the impact and relevance of standards: (i) through the submission of reports, the provisions encourage Members to give effect to the standards adopted by the Conference and share information on causes that might prevent ratification as well as actions to give effect to standards even in the absence of ratification; (ii) through the examination of the information, guidance may be derived for ILO activities, in particular as regards technical assistance for the ratification of standards, future standards-setting action and recognition of the efforts made by countries to give effect to standards even in the absence of ratification.⁸³

Currently, these reports are mainly used to gather information for the General Surveys prepared by the CEACR and discussed in the Committee on the Application of Standards. These surveys are an invaluable tool for gathering objective information about national law and practice and for evaluating emerging trends relating to the solutions advocated by the relevant instruments but do not permit an effective evaluation by the Conference of the impact of the instruments with a view to determining future standard-setting activities.

It is not a pure coincidence that the expansion and strengthening of this tool’s use have been part and parcel of ILO actions to enhance the Organization’s impact in the globalized world.⁸⁴ There are ongoing discussions in the Governing Body to enhance use of these reports.⁸⁵ As noted in the framework of the ongoing discussions before the Governing Body, ‘the submission of reports under article 19(5)(e) and (6)(d) and its use through appropriate modalities can provide a unique source of information on the state of national legislation and practice on a universal basis. Supplemented by tripartite guidance, it can strengthen the ILO’s position as a rule-making Organization in the multilateral system.’⁸⁶ Although the ILO is addressing

⁸³ *ibid*, para 4.

⁸⁴ The use of this provision currently also encompasses the annual follow-up to the 1998 Declaration under which reports are requested from governments which have not ratified one or more fundamental Conventions.

⁸⁵ GB.335/INS/5, paras 61-70.

⁸⁶ *ibid*, para 14.

the question for the first time from the wider perspective of effectively evaluating standards, returning to the objectives of the constitutional provision, discussions so far have centred on enhancing existing use.

4. *The ILO's standards policy*

The ILO has continuously strived to improve the relevance and impact of its standards. Traditionally, the ILO's general approach to its standard-setting activities was to tackle problems in succession, framing general aspirations in its sphere of activity in broad terms and breaking them down into a series of precise and definable problems in order to address each of these in the light of its particular characteristics.⁸⁷ The list of ILO standards reflects a proliferation of subjects and many variations on the same theme. This has not, of course, prevented evolutions in regulatory approaches, which in a number of areas have consisted in addressing the subject matter from a broader perspective and fostering linkages with social policies at the national level.

This method of proceeding presented the advantage of enabling a close examination of the various technical aspects of a given matter. The diversity of standards was also considered as allowing member States to choose from among the Conventions those corresponding closest to their needs and possibilities or to take a 'cafeteria approach' as some would designate the attitude of certain countries to the ratification of Conventions.⁸⁸

A gradual shift took place when the Conference and the Governing Body periodically discussed, starting in the 1960s, the evolution of the standard-setting system and measures to correct its shortcomings. In 1977, 1984 and 1995 the Governing Body established three working parties to review the body of standards.⁸⁹ These working groups contributed to further

⁸⁷ International Labour Conference, 52nd Session (1968), *The ILO and Human Rights*, Report of the Director-General (Part 1) 11-12.

⁸⁸ Francis Maupain, 'Revitalization not retreat: The real potential of the 1998 ILO Declaration for the universal protection of workers' rights' (2005) 16 *European Journal of International Law* 444.

⁸⁹ There were three working groups (commonly designated using the name of their chairpersons) which were tasked with reviewing the ILO body of standards and which, on this basis, proposed a classification of standards: (i) the first working party on international labour standards – the first Ventejøl Working Party – operated between 1974 and 1977;

building a systemic approach to the body of standards. Yet, none of them resulted in the adoption by the Governing Body of a standards policy.

This process of institutional maturation culminated with the acknowledgement in the 2008 Declaration of the importance of a standards policy to ensure the role of standards as an effective means to achieve the ILO's objectives and the Organization's responsibility to ensure the relevance of its policy to the needs of the world of work.⁹⁰ The stated purpose of the standards policy is to ensure the role of standards as a useful means to achieve the ILO's objectives. The corresponding responsibility of the ILO is to enhance the relevance of the standards policy to the world of work.⁹¹

Under the 2008 Declaration, the actions taken at the global level should lead to the corresponding actions being taken by Members at the national level to review their situation regarding the ratification or implementation of standards.⁹² Through the Decent Work Agenda as set forth in the 2008 Declaration, including the formulation of the ILO's four strategic objectives and the related holistic and integrated ways of working, standards must support a balanced approach to the promotion of the four strategic objectives by Members. Thus, the Declaration invites member States to review their situation as regards the ratification and the implementation of ILO instruments with a view to achieving progressively increasing coverage of each of the strategic objectives, with special emphasis on the instruments classified as core labour standards and governance standards. In line with the 1998 Declaration, the 2008 Declaration underlines the actions to be taken by reason of ILO membership as regards standards. Significantly for the purposes of the Code, it expresses policy guidance by spelling out the implications of the integrated approach to decent work for the ratification and implementation of standards. The act of ratification can no longer be considered an isolated act serving the national needs only; it is an act that

Official Bulletin (1979) LXII Series A, special issue; (ii) the second working party on international labour standards – the second Ventejol Working Party – operated between 1984 and 1987; Report of the Working Party on International Labour Standards (n 25); (iii) the third working party on policy concerning the revision of international labour standards – the Cartier Working Party – operated between 1995 and 2002; see GB.283/LILS/WP/PRS/1/2.

⁹⁰ 2008 Declaration, preamble.

⁹¹ *ibid.*

⁹² *ibid.*, Part II B(iii).

must make a contribution to the realization of the ILO's constitutional objectives. This holistic approach further underlines the ILO's responsibility to maintain and develop a body of up-to-date standards so that member States can develop and implement their standards policy at the national level in terms of their actions in relation to ILO standards.

The 2008 Declaration also provides for a mechanism which was intended to steer the ILO's standards policy. Thus, the ILO introduced annual Conference discussions – which came to be designated as recurrent discussions – to analyse the realities and needs of Members in relation to each of the ILO objectives and to better address these needs through the coordinated use of all of its means of action, allowing for an evaluation *ex ante* of the need for standards-related action validated by the tripartite membership. This has led to the adoption of recent standards, including the Social Protection Floors Recommendation, 2012 (No. 202), and the 2014 Protocol to the Forced Labour Convention, 1930 (No. 29).⁹³

Yet the turning point in the promotion of the standards policy as the cornerstone of ILO activities was the establishment of the Standards Review Mechanism in 2011 and subsequently of its Tripartite Working Group in 2015 in charge of reviewing the body of standards. After 95 years of standard-setting action, the ILO had come to terms with the integration of a standing review mechanism into its institutional architecture.

The SRM TWG – composed of 32 members and a chairperson – has detailed terms of reference adopted by the Governing Body in October 2015. Thus it is to 'contribute to the overall objective of the Standards Review Mechanism to ensure that the ILO has a clear, robust and up-to-date body of international labour standards that respond to the changing patterns of the world of work, for the purpose of the protection of workers and taking into account the needs of sustainable enterprises'.⁹⁴ This overall objective is set forth in the ILO Centenary Declaration (Part IV A) and has thus been endorsed unanimously by the Conference.

The mandate of the SRM TWG is to review the international labour standards with a view to making recommendations to the Governing Body

⁹³ International Labour Conference (n 37) para 114.

⁹⁴ Terms of reference (n 43) para 8.

on three elements: (a) the status of the standards examined, including up-to-date standards, standards in need of revision, outdated standards, and possible other classifications; (b) the identification of gaps in coverage, including those requiring new standards; and (c) practical and time-bound follow-up action, as appropriate.⁹⁵

An initial evaluation and review of the outcomes of the SRM TWG was presented to the Governing Body in March 2017 and March 2019.⁹⁶ Out of the 235 international labour standards included in the initial programme of work, 75 instruments remain to be reviewed, eight of which have been the subject of its fifth meeting in 2019. The SRM TWG has also identified five gaps in coverage requiring standard-setting action, as regards apprenticeships and occupational safety and health. It is currently holding key yet complex discussions on how to ensure coherence and consistency in the follow-up to its standard-setting recommendations concerning occupational safety and health and the impact of these recommendations on the standard-setting work of the Conference, including the setting of its agenda.⁹⁷ This discussion can legitimately be considered as the laboratory for the next phases of the ILO's standards policy.

Building on the recognition of the standards policy under the 2008 Declaration, the SRM and its Tripartite Working Group are anchored in the authoritative policy framework offered by the 2008 Declaration. The overall objective of the SRM and the ILO's responsibility in that regard are set forth in the Centenary Declaration. The process of standards review is now institutionally integrated. It must be undertaken in full coordination

⁹⁵ *ibid* para. 9.

⁹⁶ GB.329/LILS/2; Governing Body (n 85) paras 6-21.

⁹⁷ 'Ensuring coherence and consistency in the standard-setting follow-up to SRM TWG recommendations on OSH' fifth meeting of the SRM Tripartite Working Group (2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_715395.pdf>. The Governing Body approved standard-setting action to be taken on four sub-topics: biological hazards – revision of the Anthrax Prevention Recommendation, 1919 (No. 3) through the development of an instrument addressing all biological hazards; chemical hazards – consolidation of the chemicals instruments; machine safety – revision of the Guarding of Machinery Convention, 1963 (No. 119) and the Guarding of Machinery Recommendation, 1963 (No. 118); and ergonomics and manual handling – revision of the Maximum Weight Convention, 1967 (No. 127) and Maximum Weight Recommendation, 1967 (No. 128) to take into account the need to regulate ergonomics and update the regulatory approach to manual handling.

with the other processes, the functioning of the Governing Body and the ILO's broader programme of work. There are difficulties and challenges, most of which are inherent to any such complex institutional exercise. Some fundamental and structural challenges are linked to the requirement that new or revising Conventions must be ratified by ILO Member to create legal obligations. One paramount consideration guiding the work of the SRM TWG is that 'its work should not result in gaps in coverage for workers, while ensuring a clear, robust and up-to-date body of international labour standards that responds to the changing patterns of the world of work, for the purpose of the protection of workers and taking into account the needs of sustainable enterprises'.⁹⁸ There is a delicate balance to be achieved between the recommendations on the abrogation and withdrawal of obsolete instruments and recommendations concerning concrete and time-bound follow-up action by the Office and member States, including that concerning the ratification and implementation of up-to-date standards. As indicated in the 2019 review, '(t)he SRM TWG has acknowledged that integrated and balanced packages of follow-up action are the optimal way in which to ensure that its recommendations are impactful and fulfil the mandate given to it by the Governing Body'.⁹⁹

We can only hope that those efforts will result in the consolidation of an effective standards policy. For the purposes of the International Labour Code, the affirmation of the ILO's standards policy and the ongoing review within the SRM TWG proves that the international labour standards cannot be reduced to a collection of instruments.

5. *Choice of topics for future instruments*

This critical choice is to be made through a cardinal institutional process: the setting of the Conference agenda. The constitutional framework for setting the Conference agenda has remained basically unchanged

⁹⁸ Governing Body (n 85) para 21. The Workers' group sent a strong signal as early as March 2019 indicating that 'in the absence of mechanisms to ensure that up-to-date Conventions would be ratified in the near future, the Workers would closely monitor the follow-up to recommendations and would want to see effective action to improve the ratification rate of up-to-date instruments in order to prevent gaps in protection. Until the group saw that activities to promote ratification bore fruit, it would not agree to abrogate outdated instruments without ensuring that new instruments were first ratified'; see GB.335. INS/PV, para 215.

⁹⁹ Governing Body (n 85) para 21.

since 1919. The Governing Body is responsible for setting the agenda, giving consideration to any suggestion made by a government, a recognized representative employers' or workers' organization or a public international organization. It has the authority to determine the number and nature of the items on the agenda. The Conference itself can also decide to include a subject on the agenda of the following session. The Office is responsible for collecting and distributing information on subjects proposed for inclusion on the agenda with a view to the adoption of international Conventions. It undertakes the required research on the issues identified by the constituents or at its own initiative. Past discussions on the setting of the Conference agenda show that it is fundamental to have a sound common understanding of the distribution of the respective responsibilities.

Each major development in the setting of the Conference agenda corresponds to an important stage of the history of the ILO's standards policy. One of the main objectives of that policy – and on the realization of which its success and sustainability ultimately hinge – is to enable the ILO to determine the choice of topics of future instruments in manner that will enhance the relevance of the Code and further cement its coherence. Thus, recurrent discussions have one fundamental purpose: to streamline the process for the setting the Conference agenda. In addition to constituting one of the items placed on the agenda by the Governing Body for the entire duration of the cycle adopted for the holding of these discussions by the Conference, they are intended to enable all ILO Members to express their views on priorities and agree on the action to be taken.¹⁰⁰ As already explained, the setting of the Conference agenda is key in the follow-up to the recommendations of the SRM TWG, and they are now one of the sources for identifying future standard-setting items based on a tripartite examination.

The full impact of the recurrent discussions and the work of the SRM TWG on the placement of standards-setting items on the Conference agenda is yet to be seen. For example, the regulatory gap identified by the SRM TWG in relation to apprenticeships, mentioned above, resulted in the placement by the Governing Body in October 2018 of a corresponding item

¹⁰⁰ One recent example was the reference to the conclusions arising out of the recurrent discussion in the preamble of the Social Protection Floors Recommendation, 2012 (No. 202).

on the agenda of the 110th session of the Conference in 2021. However, no decision has yet been taken by the Governing Body in relation to the proposals for standard-setting items in the area of occupational safety and health concerning biological hazards, ergonomics, chemical hazards and guarding of machinery. Furthermore, members of the Governing Body are apparently still keen on retaining their discretion to select new standards-setting topics on an ad hoc basis. In this context, the ongoing discussions in the SRM TWG concerning the impact of its recommendations as regards standard-setting on the Conference agenda are crucial.¹⁰¹

The impact of ILO standards policy on determining standard-setting agenda of the Conference albeit limited shows that the ILO constituents have forged some understanding that the addition of new standards should be guided by their added value to the coherence of the existing body of standards. The full deployment of the effects of the policy would consolidate the existence of the Code and contribute significantly to its modernization.

VI. Conclusion

International labour standards do not usually codify existing international customary law but formulate new rules. Although it does not have as a starting point international customary law and the practice of States, the gradual adoption of international labour standards represents a magnificent example of international cooperation and one of the most successful examples of the creation of a comprehensive set of international norms in the history of humanity.

In light of the impressive number of international standards that it has established, the ILO was obliged to resort to mechanisms enabling their consolidation and coordination. While before introduction of these mechanisms, the International Labour Code might have been a myth, it has now become a reality. This international legal code is based on several constituting objectives and fundamental principles and rights at work. It comprises a remarkable number of legal instruments having diverse legal

¹⁰¹ 'Addressing the impact of the SRM TWG on the Conference agenda and the Office', fifth meeting of the SRM Tripartite Working Group (2019) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_715396.pdf>.

effects – from traditional international treaties and constitutionally-recognized soft law instruments to various forms of less formal legal commitments – but all are well-accepted and understood by those to whom they are addressed. There is sophisticated, unified machinery for supervising and interpreting norms. The system is rendered dynamic through a comprehensive standards policy and legally clear procedures for revision and elimination of obsolete standards. It is indeed a modern code of law.

The purpose of this contribution was not to write the International Labour Code. That is a long-term ambitious project requiring time and a great deal of effort. Considering all relevant Conventions, Recommendations, resolutions, declarations, codes of conduct and other, not necessarily ILO, instruments together and as a whole and systematizing them by subject matter would be very laborious, although this work could rely on the work already done under the ILO's standards policy. However, we believe that the International Labour Code already exists and can be easily identified.

Why does it matter? If understood as a code, international labour standards can be made more relevant and easily adaptable to the new conditions of labour relations. The idea of the completeness of the Code means that gaps can be easily identified, guiding the work of the Governing Body and the Conference. The creation of new standards is easier because they closely relate to existing norms and there is added value to an extant *acquis social*.

If understood as a coherent set of norms, in other words a code of law, the constituent elements cannot be neglected or simply removed. They have to be improved and modernized in relation to all other elements of the Code and therefore the objective of establishing universal and lasting peace based upon social justice becomes easier to attain.

The main purpose of any legal norm is to define clearly the rights and obligations of those to whom it is addressed. In international law, the situation is more complex because the acceptance of obligations goes mainly through the filter of State acceptance. But ultimately in international labour law, everything comes down to establishing global rules of the game and creating rights for workers and taking into account the employers' needs which actually means going beyond legal effects of individual legal instruments and insisting on their relevance. The International Labour Code would assist national authorities in ascertaining those rights and protecting them.

In supporting ILO Members' actions to achieve the universal objective of social justice in the current integrated world, the International Labour Code should constitute a resource for the broader international community in its search for guidance on the meaning of social justice and as well as its principles and methods.

Although the International Labour Code goes beyond the framework of the ILO, it has particular meaning for the Organization. In today's world where there is a demand for effective realization of rights at work and social justice, the ILO is the only organization established to promote social justice on a universal basis through the reconciliation of the interests of governments, employers and workers. To that end, it uses a comprehensive set of mechanisms to give, through standards, a concrete meaning to the concept of social justice based on the needs of its Members, ensuring its effectiveness through the constitutional procedures of supervision, interpretation and evaluation. Inherent to this constitutional mandate is the ILO's responsibility to maintain a body of standards fit to realize its constitutional objectives and to make the fullest use of all its constitutional procedures, including those ensuring that its standards remain effective and relevant at all times.

In this context, the affirmation of the existence of the International Labour Code is critical to enabling and cementing a common vision and actions. Through the ILO's procedures and their continuous monitoring by its governance organs, such common vision and actions ensure the flexibility and pragmatism inherent to a tripartite organization with a universal membership.

One hundred years of cumulated experience lends credibility to visions that are as ambitious as those leading to the revolutionary ideas culminating in the creation of the ILO. It is to be hoped that one of the next historic landmarks in the ILO's future will be the publication of the International Labour Code, with many future editions reflecting its development.

The words of Jenks that the International Labour Code is an act of faith resonate more than ever as the Organization ushers in its second centenary.

The Internal Law of International Organizations and the Quest for Accountability

Riikka Koskenmäki

I. Introduction

Like most legal persons, corporate or public, intergovernmental organizations have rules governing their internal affairs. Unlike other entities, however, they are usually not subject to the municipal laws of States. Therefore, intergovernmental organizations, with the International Labour Organization in the forefront, needed to develop comprehensive rules governing their internal organization and functioning. The existence of such laws became gradually accepted in the 20th century as intergovernmental organizations started to establish their position as a permanent part of the structure of the international community. The scope and complexity of internal laws grew in line with the size, activities and ever-transforming role of the organizations in inter-State relations. In addition to employment relations, internal laws cover today constitutional, procedural, and other primarily administrative matters. The evolution of these bodies of law is a core aspect of the law concerning intergovernmental organizations. Yet, as noted by Christopher Joyner with regard to the United Nations, while ‘the body of law administering the internal UN affairs is sophisticated and complex’, it remains ‘little appreciated outside the United Nations’.¹

¹ Christopher C. Joyner, ‘Conclusion: The United Nations as International Law-Giver’ in Christopher C. Joyner (ed), *The United Nations and International Law* (ASIL and Cambridge UP 1997) 432, 434.

It is sometimes said that an intergovernmental organization functions in two spheres, the internal and the external.² The former has been said to cover the core activities and mechanisms needed for the existence and efficient functioning of an international organization.³ The latter is described to cover ‘activities which aim at exerting a direct influence by an international organization on its environment, that is, in the first place, on Member-States and their conduct in mutual relations’.⁴ This internal/external distinction is however far from unproblematic because the borderline between the two tends to blur as will be further discussed below. Nonetheless, the distinction provides a helpful starting point for discussing the spheres of functioning of intergovernmental organizations.

This paper explores the law governing intergovernmental organization activities in the ‘internal sphere’ and attaches, accordingly, the descriptive label ‘internal law’ to such rules. It describes the nature and characteristics of the internal laws of intergovernmental organizations. By nature and characteristics, the paper refers to a number of dimensions of internal law such as (i) its origins; (ii) its relationship to external law and general public international law; (iii) its legal nature; (iv) its sources; (v) its legal effects; and (vi) remedies for its breach. The approach outlined above does not postulate the existence of a body of internal law that is common to all intergovernmental organizations.⁵ It goes without saying that the dizzying variety of institutional setups encountered in the hundreds of different or-

² See, for instance, Wojciech Morawiecki, ‘Legal Regime of the International Organization’ (1986) 15 *Polish Yearbook of International Law* 71, 74-80; Henry G. Schermers and Niels M. Blokker, *International Institutional Law. Unity within Diversity* (4th edn Martinus Nijhoff 2003) paras 1196, 1216; Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn Cambridge UP 2005) 272-273.

³ Cf. Morawiescki who adopted a narrow definition of the internal sphere of functioning and considered that it covers ‘activities which aim at ensuring indispensable, in a way “a minimum” of, conditions of survival and the very existence of the system and the efficient functioning of the mechanism of an international organization’; (n 2) 75. In light of the increase in intergovernmental organizations’ activities it could be argued that the scope of the internal sphere has expanded accordingly.

⁴ *ibid.*

⁵ See, however, Finn Seyersted who argues that there would exist a ‘common law of international organizations’, i.e. ‘an important body of customary law which in fact is common to all intergovernmental organizations, including even supranational intergovernmental organizations’; Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff 2008) 3.

gанизations has created a diversity of legal solutions that defies classification into a uniform body of rules – rather the opposite holds true. At the same time, internal law is part of the life of all intergovernmental organizations. In that sense, many questions concerning its nature and characteristics can be discussed on a generic level without the risk of over-simplification. An additional caveat is due here. In accepting some specificity to the internal law of intergovernmental organizations as opposed to external law and general public international law, this paper does not intend to depart from the mainstream approach according to which the law of international organizations (internal and external) is part of public international law. Nonetheless, the functional specificity of internal law, as will be explained below, offers adequate grounds for a study of its nature and characteristics on its own right.

Internal laws of intergovernmental organizations are sometimes referred to as ‘international administrative law’.⁶ This may not however be helpful since that term may be understood to imply that there would be one internal law common to all intergovernmental organizations. Furthermore, that term is sometimes used exclusively with reference to international civil service law. A distinction needs also to be made with the term ‘global administrative law’ which concerns the nascent administrative law of global governance.⁷

Needless to say, a comprehensive study of the hundreds and varied internal laws is not possible within the limits of this paper; instead, the following discussion provides an overview of the emergence, development and selected core aspects of the laws governing the internal organization and functioning of intergovernmental organizations that can be said to be common to all of them. This paper focuses on the internal laws of ‘classical’ intergovernmental organizations, such as those in the UN system.

⁶ For the use of the term ‘international administrative law’ see, for instance, Joyner (n 1) 434.

⁷ As its name implies, global administrative law covers a broad range of governmental, non-governmental and hybrid actors involved in transgovernmental regulation and administration; see Benedict Kingsbury, Nico Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Administrative Law and Global Market Regulation in the International Legal Order’ (2006) 17 *European Journal of International Law* 1.

The special features of regional economic integration organizations have been analyzed in detail elsewhere⁸ and are excluded from the scope of this paper.

Following the early scholarly interest in the emergence and consolidation of internal laws of intergovernmental organizations,⁹ studies have mainly focused on certain specific sub-areas of internal laws such as the law governing employment relations¹⁰ and management practices¹¹ in addition to the regular presentations of the topic in international institutional law manuals.¹² This may reflect the prevalent functionalist approach to intergovernmental organizations that seems to sometimes consider internal law as a management tool of organizations.¹³ The increase in activities and of their visibility since the early 1990s has given rise to calls for the accountability

⁸ See, for instance, Paul Joan George Kapteyn and Pieter VerLoren van Themaat, *The Law of the European Union and the European Communities: with reference to changes to be made by the Lisbon Treaty* (4th rev edn Kluwer 2008).

⁹ Lazar Focsaneanu, 'Le droit interne de l'Organisation des Nations Unies' (1957) 3 *Annuaire français de droit international* 315; Matteo Decleva, *Il diritto interno delle unioni internazionali* (Cedam 1962); Philippe Cahier, 'Le droit interne des organisations internationales' (1963) 67 *Revue Générale de Droit International Public* 563; Francesco Durante, *L'ordinamento internazionale delle Nazioni Unite* (Giuffrè 1964); Jan Kolasa, 'La notion de droit interne des organisations internationales' (1970) 3 *Polish Yearbook of International Law* 95. For more recent discussions see Philippe Cahier, 'L'ordre juridique interne des organisations internationales' in René-Jean Dupuy (ed), *Manuel sur les organisations internationales* (2nd edn Martinus Nijhoff 1998) 377.

¹⁰ See, most notably, Georges Langrod, *La fonction publique internationale. Sa genèse, son essence, son évolution* (A.W. Sythoff 1963); Michael B. Akehurst, *The Law Governing Employment in International Organizations* (CUP 1967); Chittharanjan F. Amerasinghe, *The Law of the International Civil Service. As Applied by International Administrative Tribunals* (2nd rev edn Clarendon Oxford 1994); Alain Plantey and François Lorient, *Fonction publique internationale. Organisations mondiales et européennes* (CNRS éditions 2015) 66-67.

¹¹ Michael D. V. Davies, *The Administration of International Organizations: Top down and bottom up* (Aldershot 2002); Chris de Cooker (ed), *International Administration. Law and Management Practices in International Organisations* (Brill 2005).

¹² Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (5th edn Sweet & Maxwell 2001) 442-459; Schermers and Blokker (n 2) para 1196; Amerasinghe (n 2). While not a manual, one should mention the excellent concise presentation by Pierre Klein, 'Organizations or Institutions, Internal Law and Rules' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford UP 2019) <<http://www.mpepil.com/>>.

¹³ For discussion on the managerial concept of international organizations see Jan Klabbbers, 'Two Concepts of International Organizations' (2005) 2 *International Organizations Law Review* 277.

of intergovernmental organizations. The constitutionalist approach to the study of international organizations has requested frameworks for the scrutiny of the organizations' action and drawn new attention to the questions related to the different layers of applicable law, including those governing internal organization and functioning.¹⁴ Hence the particular relevance of the topic today. The internal laws of intergovernmental organizations have been adapted to respond to the perceived accountability gap, which will be discussed below by way of examples.

II. The origins and development of internal law

The origins of the internal law of intergovernmental organizations can be found in the early 20th century when independent secretariats were established for the first international organizations to guarantee their independence and impartiality.¹⁵ Since the international staff of such secretariats needed to be independent from member States' control and influence, it appeared inappropriate to subject them to municipal laws which could have endangered their independence and impartiality. The question then arose as to which law should be applied to the employment relationship between the intergovernmental organization and its staff.¹⁶ Domestic courts declined however to pronounce themselves on such disputes and it was not until the establishment of the League of Nations Administrative Tribunal that further clarity was obtained on this question. In its first judgment in 1929 concerning a dispute between the International Labour Office and its staff, the Tribunal found that it was bound to apply 'internal law', including general statutes, decisions and texts concerning specific cases of the Organization, as well as contractual provisions between officials and

¹⁴ For the constitutionalist approach see, for instance, August Reinisch, 'Securing the Accountability of International Organizations', reprinted in Jan Klabbers (ed), *International Organizations* (Ashgate/Dartmouth 2005) 535 and Karel Wellens, *Remedies against international organizations* (Cambridge UP 2002).

¹⁵ The secretariats of the first intergovernmental organizations were provided by the host States. The International Institute of Agriculture established the first independent secretariat in 1905. It was followed by those of the International Labour Organization and the League of Nations; see, for instance, Langrod (n 10); Akehurst (n 10) 4.

¹⁶ For an early analysis, see Umberto Borsi, 'Il rapporto d'impiego nella Società delle Nazioni' (1923) 15 *Rivista di diritto internazionale* 261 and, in general, Akehurst (n 10).

the administration.¹⁷ In other words, since the domestic law of any member State was not applicable and no applicable rules of general international law existed, intergovernmental organizations were to develop and apply their internal laws.

After the Second World War, the establishment of the UN and the advisory opinions of the International Court of Justice (ICJ) rapidly shed further light on these issues. After the ICJ had found that the UN is endowed with a legal personality distinct from that of its members,¹⁸ the Court recognized the existence of an 'organized legal system of the United Nations, and dealing exclusively with *internal* disputes between the members of the staff and the United Nations represented by the Secretary-General' (emphasis added).¹⁹ Furthermore, in the *Certain Expenses* advisory opinion, the Court recognized the existence of the 'internal structure' of the UN, its 'internal plane'.²⁰ In parallel, scholars started showing interest in the emergence and consolidation of this new branch of law. The autonomous status of the internal legal orders of intergovernmental organizations thus became consolidated in legal practice and doctrine.²¹

The development of internal law initially grew out of the need to fill the legal void in the regulation of the status and conduct of international civil servants. Other core areas of internal law include financing and facilities, also essential to the functioning of an intergovernmental organization. Today, virtually all intergovernmental organizations have rules in these areas that constitute their 'proper law', to use the term coined by the ILO's former Legal Adviser, C. Wilfred Jenks.²² With the development and

¹⁷ See Administrative Tribunal of the League of Nations, Judgments Nos 1, 2 and 3 (1929). Judgments by other international administrative tribunals to this effect include ILOAT Judgment No. 28 (1957); see also Suzanne Basdevant, *Les fonctionnaires internationaux* (Sirey 1931) 283.

¹⁸ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, 174, 179.

¹⁹ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, 47, 56.

²⁰ *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, 151, 168.

²¹ See the article 5 of the Vienna Convention of the Law of Treaties (1969). For legal doctrine, see Focsaneanu (n 9); Decleva (n 9); Cahier (n 9); Kolasa (n 9).

²² The term 'proper law' was first used by C. Wilfred Jenks in his monograph *The Proper Law of International Organisations* (Stevens & Sons Limited 1962).

increase of activities undertaken by international organizations, internal laws now cover, depending on the competences of the organization in question, a number of additional areas such as creation of subsidiary organs, procedural rules, enactment of general conditions applicable to contracts concluded with private persons and entities, peacekeeping, administration of refugee camps, and development cooperation activities. Also the continuously increasing scope of municipal laws is mirrored in internal laws that now also address occupational safety and health, environmental impact and protection of personal data, for example. In addition to international civil servants – who amounted in 2007 to approximately 200,000²³ – internal laws may affect member States, intergovernmental organization organs and bodies and potentially third parties, including beneficiaries, contractors, businesses and non-member States.

III. Internal vs. external law and general public international law

The internal law of an intergovernmental organization is sometimes compared with the municipal law of a State.²⁴ While they have some similarities and a number of important differences, their comparison is a helpful starting point for presenting the main characteristics of internal law.

The first similarity between the two is that both States and intergovernmental organizations dispose of autonomous internal legal orders that are hierarchically structured and usually founded in a constitution. In the case of intergovernmental organizations, the term ‘constitution’ stands for their constitutive treaties or other instruments founding the organization. Second, just as the material content of the legal orders of States differs from one State to another, so do those of intergovernmental organizations. And third, the internal law is the internal dimension of a larger legal order that also includes rules arising outside of the entity. For intergovernmental organizations, such ‘external law’ includes, under general international law, rules of customary international law and general

²³ Yves Beigbeder, ‘Civil Service, International’ in Wolfrum (n 12).

²⁴ Internal law of an intergovernmental organization has also been referred to as ‘domestic law’. See Jenks (n 22) xxxi; Felice Morgenstern, ‘The law applicable to international officials’ (1969) 18 *International and Comparative Law Quarterly* 739. For comparison see, for instance, Seyersted (n 5) 72-77; Focsaneanu (n 9) 330-347.

principles of law, to the extent binding on international organizations, as well as treaties and rules of national law, to which the intergovernmental organization has consented.²⁵

On the other hand, there are a number of important differences between the internal legal orders of States and intergovernmental organizations. First, the constituent instruments of intergovernmental organizations differ from State constitutions because of their Janus-faced character: on the one hand, the constituent instruments are multilateral treaties and, on the other hand, these instruments establish a new legal entity with distinct legal personality.²⁶ Another major difference concerns the scope of internal law: while States possess plenary competence and their legal orders claim completeness as exclusive domains, the competence of intergovernmental organizations is partial as it is limited to that attributed to them (either expressly or implicitly) by their creators.²⁷ In addition, internal laws have sometimes been characterized as of 'functional' nature since they are adopted in view of the functional objectives of the organization.²⁸ The common understanding of internal law, that is, law governing the internal organization, structure and functioning of an intergovernmental organization,²⁹ which is also underlying this paper, reflects this functional character. Furthermore, the material content of internal law varies according to the functions of the

²⁵ The ICJ has found that 'international organizations are subject of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, 73, 89-90, para 37. It should be noted that general international law, with the exception of *jus cogens*, may be derogated from in treaties, including in the constitutive instruments of intergovernmental organizations.

²⁶ Cf. *Certain Expenses* (n 20) 157; *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts, Advisory Opinion, I.C.J. Reports 1996*, 66, 75. See also Schermers and Blokker (n 2) paras 1142, 1148.

²⁷ The ICJ has noted that 'whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'; *Reparation* (n 18) 180. See also Hermann Mosler, 'International Society as a Legal Community' (1974) 140 *Recueil des cours* 1, 191; Klein (n 12) 3.

²⁸ Michel Virally, 'L'O.N.U. devant le droit' (1972) 99 *Journal du droit international* 501.

²⁹ See, for instance, Amerasinghe (n 2) 273.

intergovernmental organization in question, which, in turn, are determined by the particular institutional setup.

Another major feature of internal law is the blurred borderline between the ‘internal’ and ‘external’ spheres of action. As was noted above, the former is commonly said to cover the internal organization, structure and functioning of an intergovernmental organization, and the latter activities which seek to influence State actions in the pursuit of the objectives of the intergovernmental organization in its external environment. While the core areas of internal rules are relatively similar in all intergovernmental organizations, they sometimes dispose of powers to adopt ‘external’ rules. The latter may include – depending on the institutional setup and practice of the organization – recommendations, conventions, declarations, or other acts addressed to States. Such rules vary greatly between organizations, from binding UN Security Council decisions to a recommendation to ratify a convention and beyond. This diversity of institutional setups and acts poses the challenge of distinguishing ‘external’ rules from the internal. In addition, as noted by Professor José Alvarez, the very definition of ‘internal’ law is circular because, in his view, we can identify actions as ‘internal’ only after we have defined that actions concerning certain subject matters are to be considered ‘internal’.³⁰ Furthermore, the internal/external distinction tends to blur in practice since many internal rules have external effects and vice-versa.³¹ They encompass those governing operational activities, including development cooperation and peacekeeping. Furthermore, when approaching the internal/external distinction from the point of view of a State, while the State is part of the internal sphere of an intergovernmental organization in its quality of a member, it may be, at the same time, the addressee of, or being impacted by, internal law in the ‘external sphere’.

As already noted above, the constitution of an intergovernmental organization is the basis for the development of its internal legal order and each intergovernmental organization has an internal legal order separate from those of other organizations. Internal laws have developed independently in line with the functions and specificities in their respective constitutive instruments. Despite the separate legal bases and development, internal

³⁰ José E. Alvarez, *International Organizations as Law-makers* (Oxford UP 2005) 144.

³¹ Schermers and Blokker (n 2) para 1216.

laws share a number of features. There are multiple reasons for this: first, a number of intergovernmental organizations share similar institutional structures, established in their constituent instruments, or legal arrangements, which constitute the basis for similar internal rules. Second, many intergovernmental organizations belong to more or less formal groups of organizations, such as the UN system and the European co-ordinated organizations, which have coordination structures or other mechanisms affecting the development of internal law.³² Third, intergovernmental organizations have had similar reactions to the changes in their operating environment and thus developed similarly in certain respects. For example, the demands for technical assistance activities in the 1970s by newly independent States led to the adoption of rules concerning financing, staffing and other arrangements for technical cooperation activities across intergovernmental organizations. More recent examples include how several organizations have amended their internal laws in response to demands to enhance transparency and accountability by introducing new rules concerning the disclosure of information and enhanced accountability frameworks for staff members, as will be discussed below. Another example is how the increased cooperation with non-governmental entities and the establishment of public-private partnerships has led to the adoption of policies and guidelines on these matters.³³ In the field of international civil service law, the case law of international administrative tribunals has had some standardizing effect on internal laws concerning employment relations. This is because the tribunals have distinguished general principles of international administrative law applicable to all international civil servants; they cross-reference case law and exercise jurisdiction over an increasing

³² See the UN system organizations which collaborate through the Chief Executives Board for Coordination (CEB) among other things and the six European co-ordinated organizations (OECD, NATO, WEU, ESA and CEU and the European Centre for Medium-Range Weather Forecasts) which have agreed to co-ordinate their remuneration policies and conditions. See Plantey and Loriot (n 10) 40-51.

³³ See, for instance, UN, *Guidelines on a Principle-based Approach to the Cooperation between the United Nations and the Business Sector* (2009) <<https://business.un.org/en/documents/5292>>; ILO, *Public-private partnerships*, GB.301/TC/1 (2008); WHO, *Partnerships*, EB124/23 (2009). For discussion see Stephen Tully, 'The Opportunities and Challenges of Private Sector Engagement by UN Secretariats' (2006) 3 *International Organizations Law Review* 225.

number of organizations.³⁴ Finally, Alvarez argues that, even in the absence of formal institutional ties between institutions, international bureaucrats would simply tend to behave in similar fashion or the learning effects among overlapping and interacting epistemic communities would result in similar development of internal law.³⁵

IV. The nature of internal law

The question of whether the internal law of intergovernmental organizations constitutes an autonomous legal order, distinct from both international and national laws, or whether it is part of international law, has been the object of intense scholarly debate.³⁶

According to one view, once an intergovernmental organization comes into existence, its internal law forms a distinct and autonomous legal regime, similar to national legal systems. Internal law exists thus separately from both international and national laws.³⁷ Some of the proponents of this position consider that internal law is in some way connected with, or subordinate to, international law (while not part thereof).³⁸

The second, and probably prevailing position, claims that the internal laws of intergovernmental organizations created by treaties are part of international law.³⁹ This is so because internal law is derived from the constituent instrument, which is created in accordance with and governed by international law. Some proponents of this view emphasize in addition that internal law is made by States acting through the organs of an intergovern-

³⁴ For discussion on the development of the international civil service law see, for instance, Akehurst (n 10) 261-263.

³⁵ Alvarez (n 30) 145.

³⁶ For an overview of scholarly work until 1970, see Kolasa (n 9).

³⁷ Focsaneanu (n 9) 317; Cahier, 'Droit interne' (n 9) 574; Schermers and Blokker (n 2) para 1196.

³⁸ See, for instance, International Law Association, *Report of the Seventy-First Conference, Final Report of the Committee on Accountability of International Organizations*, Part Three, section one (2004).

³⁹ In support of this position see, for instance, Decleva (n 9); Patrick Daillier and Alain Pellet, *Droit international public* (7th edn LGDJ 2002) 576-577; Rudolf Bernhardt, 'International Organizations, Internal Law and Rules' in 5 *Encyclopedia of Public International Law* (North-Holland 1983) 142, 144; Amerasinghe (n 2) 274.

mental organization.⁴⁰ Consequently, internal law is State-made law and, as such, part of international law.

Other scholars argue that the nature of internal law depends on its source or subject matter. Thus, while considering internal law in general as part of international law, some would exclude hierarchically lower level internal law⁴¹ or the rules that govern employment relations, from the sphere of international law.⁴² According to yet another view, only norms that govern relations between States and the international organization may be considered norms of international law.⁴³ Furthermore, it has been argued that international organizations that have achieved a high degree of integration constitute a special case or that their rules would be endowed with 'dual legality'.⁴⁴ Finally, there is the view that denies that internal law is really law at all.⁴⁵ This view does not, however, answer the question of what its nature would be, in particular as its proponents admit that internal law has legal effects.

The opposing views of whether internal law is part of international law reflect what was earlier described as the Janus-faced character of the treaties constituting intergovernmental organizations: on the one hand, the constituent instruments are international treaties and, on the other hand, these instruments establish new legal entities with their own internal legal orders. Furthermore, the positions distinguishing internal law according to its level in the norm hierarchy, source or subject, reflect the difficulties arising from the layered structure of intergovernmental organizations.⁴⁶

Some have doubted whether the preceding considerations have any practical relevance.⁴⁷ Indeed, the question of the nature of internal law has been

⁴⁰ *ibid.*

⁴¹ Seyersted (n 5) 25.

⁴² Grigory Tunkin, 'International Law in the International System' (1975) 147 *Recueil des cours* 167-168.

⁴³ W. Morawski cited in *ibid.*, 164.

⁴⁴ See, for instance, *Flaminio Costa v. ENEL* Case 6/64, 1964 ECR 585, 1158-1159; Lorenzo Gasbarri, 'The Dual Legality of the Rules of International Organizations' (2017) 14 *International Organizations Law Review* 87.

⁴⁵ Giorgio Balladore Pallieri, 'Le droit interne des organisations internationales' (1969) 127 *Recueil des cours* 1, 27.

⁴⁶ See Catherine Brölmann, 'A Flat Earth? International Organizations in the System of International Law' (2001) 70 *Nordic Journal of International Law* 319.

⁴⁷ Akehurst (n 10) 263; Schermers and Blokker (n 2) para 1196.

of little interest during the last decades to those endorsing the prevailing functionalist approach to international organizations. However, the calls for and projects to establish frameworks for the international scrutiny of intergovernmental organizations' action have drawn new attention to these questions. The need to clarify the identity of the different layers of law applicable to their action, including internal law, has been considered 'a necessary preliminary to any determination of accountability problems'.⁴⁸ Furthermore, determining the nature of internal law appears essential for establishing whether a breach of an obligation arising from internal law could constitute a breach of an international obligation giving rise to international responsibility.

The International Law Commission reviewed these issues in the context of its work on responsibility of international organizations.⁴⁹ While the Commission considered that the question of the legal nature of internal law was 'far from theoretical' for the purposes of its work, it acknowledged, after a review of the different positions on the nature of internal law, that rules of an intergovernmental organization have both internal and international aspects. Furthermore, the Commission found that it was not necessary to express a clear-cut view on the issue for the purpose of the draft Articles.⁵⁰ Consequently, the provision on the existence of a breach of an international obligation follows the corresponding article of the Articles on Responsibility of States for Internationally Wrongful Acts,⁵¹ except for the replacement of the term 'State' with 'international organization'. The draft Article provides first that 'there is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned'. In the commentary, the Commission notes that, for an international organization, 'many obligations are likely to arise from the rules of the organization', which are defined in

⁴⁸ International Law Association (n 38); see also International Law Association, *Report of the Sixty-eighth Conference. First Report of the Committee on Accountability of International Organizations* (1998) 593-594.

⁴⁹ Previous discussions of the International Law Commission on this issue include those in the context of drafting of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; Yearbook of the International Law Commission (1982) vol II part two 21, para 25.

⁵⁰ *Report of the International Law Commission* (2005) UN Doc A/60/10, 63.

⁵¹ *Report of the International Law Commission* (2001) UN Doc A/56/10, 46-47.

the draft Articles to cover the full range of internal law, including the established practice of the organization.⁵² Nonetheless, to avoid any ambiguity that the draft Article covers breaches of obligations arising from the rules of the organization, the Commission adopted a specific provision to that effect. According to the Commission, 'to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply'.⁵³ The Commission thus proposed a compromise that left the door open to accommodate contending views. While this approach gained some support from intergovernmental organizations,⁵⁴ it did not put to rest their principal concern, namely that the internal legal orders of intergovernmental organizations constitute special law (*lex specialis*), breaches of which would not normally give rise to international responsibility under the general law (*lex generalis*) codified in the draft Articles. This would be the case in particular with regard to obligations between an organization and its officials under the staff regulations and rules.⁵⁵ In reaction, the Commission recognized in the general

⁵² 'Rules of the organization' are defined in draft article 2(2) as meaning 'in particular, the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization'.

⁵³ *Report of the International Law Commission* (2005) UN Doc A/60/10, 64, para 7.

⁵⁴ While the WHO, for example, considers obligations arising directly under the constituent instrument of an organization vis-à-vis its member States to be of an international nature, it is not the same with regard to obligations arising between an organization and its officials under the staff regulations and rules. WHO, therefore, considered the solution adopted by the Commission to be 'an acceptable compromise on this point'; UN Doc A/CN.4/568, 4.

⁵⁵ For example, the International Monetary Fund (IMF) argued that the rules of intergovernmental organizations are a *sui generis* body of law, as they 'are both internal in scope and international in nature'. Since intergovernmental organization rules are *lex specialis*, IMF suggested, among other things, that the draft articles should clearly state that relations between an international organization and its members and agents that are covered under the organization's charter were outside their scope; see *Responsibility of international organizations: Comments and observations received from international organizations*, UN Doc A/CN.4/556 (2005) 38-39; *Responsibility of international organizations: Comments and observations received from international organizations*, A/CN.4/582 (2007) 7-8. See also the ILO who considered, in particular, that the majority of possible breaches of its internal rules would not entail international responsibility since the relevant obligations are created, fulfilled and sometimes enforced exclusively within its special internal legal order. Specifically, claims concerning ILO staff regulations could be brought before the ILOAT and consequently there would remain no room for invoking international responsibility on those grounds; see *Responsibility of international organizations: Comments and observations received from international organizations*, UN Doc A/CN.4/568/Add.1 (2006) 17-18.

commentary the principle of speciality and the fundamental importance of *lex specialis* (draft Article 64). It also noted that the rules of an organization may prescribe specific treatment of breaches of international obligations, also with regard to the question of the existence of a breach. However, the Commission considered that these special rules do not necessarily prevail over the principles set out in the draft Articles. Notwithstanding these clarifications, many intergovernmental organizations have urged great caution with respect to any future action concerning the Articles because many of them remain controversial and largely unsupported by practice.⁵⁶

V. Sources of internal law

The constitutive instrument of an intergovernmental organization establishes the organization and constitutes the basis for the development of internal law. Since the constituent instruments are usually multilateral treaties, the foundations of internal laws are laid in public international law.⁵⁷ The constitutions establish the main organs of the organization and lay out, in general terms, their functions and competences. A number of constitutions expressly authorize the adoption of certain internal law, in particular staff regulations and rules of procedure. For example, the UN Charter provides that ‘the staff shall be appointed by the Secretary-General under regulations established by the General Assembly’ and that ‘the General Assembly shall adopt its own rules of procedure’.⁵⁸ Furthermore, some constitutions provide for the enactment of financial regulations⁵⁹ but only few contain general authorizations for adopting internal law.⁶⁰ The authority explicitly provided in many constituent instruments in this

⁵⁶ *Responsibility of international organizations. Comments and information received from Governments and international organizations*, UN Doc A/72/80 (2017) part B.

⁵⁷ For discussion on intergovernmental organizations that have not been created by a treaty see, for instance, Schermers & Blokker (n 2) para 34 et seq.

⁵⁸ Articles 101(1) and 21 of the UN Charter respectively.

⁵⁹ Article IV(2) of the FAO Constitution provides that ‘the Conference shall adopt General Rules and Financial Regulations for the Organization’.

⁶⁰ See, however, article V(2)(f) of the International Bank for Reconstruction and Development (IBRD) Articles of Agreement that provides that ‘(f) the Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank’. See also IMF, Articles of Agreement, article XII(2)(g) and Statute of the Council of Europe, articles 14-16.

regard seems in fact quite limited and are sometimes even absent.⁶¹ This has not, however, prevented international organizations from adopting acts necessary for their internal functioning on the basis of implied powers.⁶² States have rarely objected to such practice on the grounds that an intergovernmental organization would not have the power to adopt such rules. Consequently, it has been argued that there is a rule of customary international law granting a general power to organizations to establish rules necessary for their internal functioning.⁶³ As concerns subsidiary organs created by the main organs, they, too, may have the competence to adopt internal rules. Such authority may be based either on the act which created the organ or on implied powers, that is, if adoption of internal rules is necessary for the exercise of the functions of the subsidiary organ.⁶⁴ For example, the UN General Assembly established in 1972 the Governing Council of the United Nations Environment Programme and authorized the Council, among other things, to 'formulate such general procedures as are necessary to govern the operations of the Environment Fund'.⁶⁵

Other legal instruments may provide for a specific legal basis for establishing internal rules in certain situations. For example, the UNESCO and UN Headquarters Agreements concluded with France and the United States respectively vest the organizations with authority to regulate activities in the headquarters and in the latter case also in the headquarter district. In case of conflict with national legislation, such regulations would prevail.⁶⁶ Another example is the WHO International Health Regulations (2005) which request the organization, among other things, to develop and publish certification guidelines for airports and ports.⁶⁷

⁶¹ For example, the Covenant of the League of Nations did not provide for the adoption of staff regulations and the Convention on the Organisation for Economic Co-operation and Development does not provide for the adoption of rules of procedure.

⁶² Cahier, 'L'ordre juridique' (n 9).

⁶³ *ibid* 390; Kolasa (n 9) 105; Seyersted (n 5) 109-112.

⁶⁴ Cahier, 'L'ordre juridique' (n 9) 390.

⁶⁵ UN General Assembly Resolution 2997 (XXVII) (1972) *Institutional and financial arrangements for international environmental co-operation*, I(1) and III(7).

⁶⁶ See UNESCO-France Headquarters Agreement, article 5; Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, section 21. For discussion see Sam Müller, *International Organizations and their Host States. Aspects of their Legal relationship* (Kluwer 1995) 136.

⁶⁷ WHO, International Health Regulations (2005), article 20(5).

Internal law may include, in addition to the primary source of constitutional instruments discussed above, rules adopted by the organs, and established practice of the organization.⁶⁸ The sources depend on the institutional framework and decisions of the organization in question.⁶⁹

Rules adopted by the organs complement the constitutional provisions and are sometimes called ‘secondary law’ or ‘secondary legislation’. Depending on the constitutional framework, intergovernmental organizations attach different labels to such rules, including resolutions, regulations, decisions, directives, bulletins, administrative instructions and circulars. Their form is generally not regulated. Secondary rules are organized hierarchically under the constitution on which their validity depends. The superior status of the constitution may be explicitly or implicitly provided for in the constitutive instrument or the rules at the lower levels. They may, for example, include so-called ‘priority rules’ providing that the constitution prevails in case of conflict with other rules,⁷⁰ or that the validity of the lower level rules depends on their consistency with the constitutive instrument.⁷¹ These rules seek to ensure the coherence of the internal legal order.

⁶⁸ See Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975), article 1(1)(34); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), article 2(1)(j) which provides that “rules of the organisation” means, in particular, the constituent instruments, decisions and resolutions, and established practice of the organization’. See also (n 52).

⁶⁹ See the intervention by Paul Reuter in Yearbook of the International Law Commission (1971) vol I, 212-213, para 18 and Yearbook of the International Law Commission (1971) vol II part one, 288, commentary to draft article 3, para 6.

⁷⁰ For example, the General Regulations of the World Meteorological Organization (WMO) provide that ‘in the event of any conflict between any provision of these Regulations and any provisions of the Convention [establishing the organization], the Convention shall prevail’. Similar provisions are included in the Financial Regulations of the WMO (article 1) and the Rules of Procedure of the World Health Assembly (preamble), among others. As concerns the relevant provisions in the constitutive instruments, the Constitution of the International Telecommunication Union, for example, provides that ‘in the case of inconsistency between a provision of this Constitution and a provision of the Convention or of the Administrative Regulations, the Constitution shall prevail’ (article 4.4., no. 32) See also article 103 of the UN Charter and article XVI.3 of the Agreement establishing the World Trade Organization (WTO).

⁷¹ See Treaty on the European Union, article 263 (ex article 230 of the Treaty Establishing the European Community) concerning the review of legality of community acts.

The relationship between rules may also be determined by the rank of the organs adopting them. The organs may be of equal rank or there may be a hierarchy between them. For example, a subsidiary organ may adopt rules only within its competence; such rules are subordinate to those adopted by organs of higher rank. Furthermore, the procedures to adopt rules may differ between rules of different rank: the 'fundamental' and other important rules are often enacted by majority decisions by the plenary or another decision-making organ. The more detailed rules at the lower levels of the hierarchy of internal law are often issued by the secretariat, pursuant to an authorization of the decision-making organ(s) of the intergovernmental organization or to the relevant provisions in the constitutive instrument. For example, the staff regulations of the UN are adopted by the General Assembly.⁷² Their implementation is carried out at the lower level by the Secretariat, which promulgates under the UN system of administrative issuances Secretary-General's bulletins and administrative instructions required for establishing 'rules, policies or procedures intended for general application'.⁷³ The Secretary-General's bulletins promulgate rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly and the Security Council, the organization of the Secretariat, and the establishment of specially funded programmes. Bulletins may also be issued in connection with 'any other important decision of policy, as decided by the Secretary-General' who also signs them.⁷⁴ Administrative instructions 'prescribe instructions and procedures for the implementation of the Financial Regulations and Rules, Staff Regulation and Rules or Secretary General's bulletins'. They are 'promulgated and signed by the Under Secretary-General for Management or by other officials to whom the Secretary-General has delegated specific authority'.⁷⁵

It is generally accepted that established practice of an intergovernmental organization not codified in the form of an institutional act may also be a source of internal law.⁷⁶ This was first confirmed by the ICJ in the

⁷² UN Charter, article 101(1).

⁷³ UN Secretary-General's Bulletin, *Procedures for the promulgation of administrative issuances*, UN Doc ST/SGB/2009/4 (2009) 1.1.

⁷⁴ *ibid* 3.1-3.3.

⁷⁵ *ibid* 4.1-4.2.

⁷⁶ See article 2 (1) (j) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) and, in

Reparation advisory opinion when it found that the rights and duties of the organization ‘must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’.⁷⁷ The Court has invoked the institutional practice a number of times thereafter, including to clarify the meaning of certain terms in the UN Charter,⁷⁸ to establish the legality of certain institutional practice,⁷⁹ as confirming the competence of the General Assembly⁸⁰ and as law-creating for international civil servants.⁸¹ In addition to the established practice of the organs of the UN, the ICJ has also taken into account the established practice by its agents.⁸²

The question then arises as to what is required for a given practice to be considered as internal law. This has been discussed by the ICJ in the well-known *South West Africa* advisory opinion that touched upon the decision-making procedure of the Security Council. Article 27(3) of the UN Charter provides that the decisions of the Security Council on all matters other than procedural ‘shall be made by an affirmative vote of nine members including the concurring votes of the permanent members’. In the course of the years, however, a consistent practice had been established to the extent that the voluntary abstention of one permanent member would not bar the adoption of resolutions. The ICJ found that ‘this procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice

general, Gérard Cahin, *La coutume internationale et les organisations internationales: l’incidence de la dimension institutionnelle sur le processus coutumier* (Pedone 2001).

⁷⁷ *Reparation* (n 18) 180. For an analysis of the ICJ practice, see Pierre-Marie Dupuy, ‘Le droit des Nations Unies et sa pratique dans la jurisprudence de la Cour internationale de Justice’ in Société française pour le droit international, *La pratique et le droit international* (Pedone 2004) 139.

⁷⁸ For the terms ‘budget’ and ‘action’, see *Certain Expenses* (n 20) 160.

⁷⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, 22, 22.*

⁸⁰ *Legality of the Threat and Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226, 233, para 12.*

⁸¹ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956, 77, 91.*

⁸² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999, 62, 85, para 53.*

of that Organization'.⁸³ Here the Court referred to the two elements of custom – general practice and *opinio iuris*,⁸⁴ which also apply to the formation of customary law in the context of internal law of international organizations.⁸⁵ Consequently, disputed, inconsistent, or otherwise uncertain practice could not normally be considered 'established'.⁸⁶ The question of what amounts to 'established practice' depends also on the institutional framework of the intergovernmental organization in question and the specific circumstances. For example, the European Commission has suggested that the term "established practice of the organization" must be understood broadly as encompassing the case law of the courts of an organization'.⁸⁷ This would not obviously be the case for all intergovernmental organizations.

What are then the limits (if any) to creating internal law through established practice? As a main rule, organs cannot derogate from the rules laid down in the constituent instrument.⁸⁸ Established practice can however transcend⁸⁹ or complement written law, among other things.⁹⁰ The question of the limits to intergovernmental organizations' practice juxtaposes those considering constituent instruments as multilateral treaties to those adopting the functional approach: while rigid adherence to the former approach overlooks the fact that constituent instruments establish new legal

⁸³ *Legal Consequences* (n 79) 22. See also the *Wall* advisory opinion in which the ICJ noted that the interpretation given to article 12 of the UN Charter had evolved, and that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. The ICJ found that this accepted practice was consistent with article 12 (1) of the UN Charter. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, 136, 150, para 28.

⁸⁴ Cf. article 38(1)(b) of the ICJ Statute refers to 'international custom, as evidence of a general practice accepted as law'.

⁸⁵ See also *Judgments of the Administrative Tribunal of the ILO, Advisory Opinion, I.C.J. Reports 1956*, 91 and World Bank Administrative Tribunal (WBAT) Decision No. 1, WBAT Reports (1981) 11-12.

⁸⁶ Sands and Klein (n 12) 14-33.

⁸⁷ *Responsibility of international organizations. Comments and observations received from international organizations*, UN Doc A/CN.4/545 (2004) 5.

⁸⁸ See, for instance, ECJ Case No. 131/186 *United Kingdom v Council* (1988) 905 para 29.

⁸⁹ *Effect of Awards* (n 19) 91.

⁹⁰ For case law of international administrative tribunals see, for instance, Plantey and Lorient (n 10) 66-67.

entities which need to respond to their changing environments through practice, the functionalist approach may result, and has resulted, in de facto amendments of constituent instruments. The situation might be different where the requirements for the adoption and entry into force of constitutional amendments are less rigid.⁹¹

In practice, how do we recognize rules adopted through established practice that have not been codified? At times, reliance on such rules is explicitly made: for example, at the 109th session of the Executive Board of the World Health Organization a State non-member of the Board requested to speak under Rule 3 of the Board's Rules of Procedure. While the Rules are silent as to the specific procedure for asking the floor in this case, the chairperson explained that the 'established practice' permits non-member States to take the floor under certain conditions.⁹² However, according to former Legal Adviser of the ILO Loïc Picard, the term 'established practice' is used quite rarely in the ILO practice, except when marking the establishment of new practice. Once a practice is established there is no need to expressly recall its origins. Thus, most of the time, '*la pratique s'avance masquée*',⁹³ which makes the identification of rules adopted through established practice challenging.

All the rules, decisions and established practices from the above sources form the internal law of an intergovernmental organization. In addition, general principles of law are a specifically recognized source of international civil service law.⁹⁴ They include principles such as equality, good faith and proportionality.⁹⁵ Furthermore, individual decisions by organs, administrations and international administrative tribunals may also be included in the list of sources of internal law.

The multiple categories of sources and the increase in the number of rules have given rise to criticism. Professor Theodor Meron noted as early as 1977, with regard to the UN's internal law governing staff relations, that

⁹¹ Agata Fijalkowski (ed), *International Institutional Reform* (TMC Asser Press 2007).

⁹² WHO Executive Board, Record of Proceedings, EB109/2002/REC/2 (2002) 26.

⁹³ Loïc Picard, 'La pratique comme fondement de l'action du Bureau international du Travail?' in Société française pour le droit international, *La pratique et le droit international* (Pedone 2004).

⁹⁴ WBAT (n 85) 12.

⁹⁵ For discussion see, for instance, Amerasinghe (n 10) 151-158.

‘although the Charter, staff regulations, and staff rules are easily available and generally known, upon these principal sources there has been superimposed a labyrinthic structure of additional provisions that govern the lives of members of the Secretariat. Yet these provisions are so dispersed that few persons, even those on the staff of the Personnel Department, master them fully and easily’.⁹⁶ In 2001 the UN Secretariat acknowledged that ‘for many years, policies, rules and procedures were issued by various officials in a variety of instruments [...] without [any] systematic review of these instruments, which proliferated and remained in place regardless of whether they were still needed, or had become inconsistent with subsequent documents. As a result, it was often difficult for staff, administrators and managers to know what the rules were and for the Organization to hold anyone accountable for the proper application of these rules’.⁹⁷ In 1997, as part of the UN reform efforts, the UN Secretary-General launched a reform of the internal system of administrative issuances, to contribute ‘to clarity and transparency within the Secretariat’ on the one hand, and to ensure that ‘the rules of the Organization are succinct, accessible and made available in a consolidated way’ to staff, on the other.⁹⁸ The new framework, described briefly above, streamlined the system and established procedures for the promulgation of administrative issuances, including obligation to review periodically the content of issuances to ensure that their content is up to date and to abolish obsolete issuances. The system also introduced mechanisms to ensure, among other things, that the position in the hierarchy of rules of any new issuance and the authority for its issuance are identified in advance; that proposed issuances are consistent with rules at higher levels; and that they specify issuances that will be superseded or amended.⁹⁹ Other intergovernmental organizations that have conducted similar reviews of their internal administrative document systems include

⁹⁶ Theodor Meron, *The United Nations Secretariat. The Rules and the Practice* (Lexington Books 1977) 61.

⁹⁷ UN, *Streamlining of rules. Note by the Secretariat*, UN Doc A/C.5/56/3 (2001) 3.

⁹⁸ UN, *New System for the Promulgation of Administrative Issuances*, UN Doc ST/IC/1997/43 (1997) para 7. See also *Renewing the United Nations: A Programme for Reform*, UN Doc A/51/950 (1997) para 54.

⁹⁹ See (n 97) 3-4; UN Secretary-General’s Bulletin, *Procedures for the Promulgation of Administrative Issuances*, UN Doc ST/SGB/2009/4 (2009).

the ILO where the International Labour Office put a fully revised system in place in 2008.¹⁰⁰

The quest for more accountable and transparent governance systems has also led to the adoption of policies concerning disclosure of information. A number of intergovernmental organizations have adopted policies that declare a presumption in favour of public disclosure. Some policies spell out what documents they disclose (so-called 'positive list' approach) while others disclose any information that is not deemed confidential in accordance with pre-established criteria.¹⁰¹ The UN, for example, provides access to a large number of its internal documents, including through the internet.¹⁰² As of 2007, the UN's overall approach to classifying information is based on the understanding that its work 'should be open and transparent, except insofar as the nature of information concerned is deemed confidential in accordance with the [pre-set] guidelines'.¹⁰³ These policies are designed to ensure that the expanding bodies of internal law are available to the widest possible audience, including those managing and applying such rules, members, partners and stakeholders, as well as any entity or person affected by internal law. This paper turns now to discuss the legal effects of internal law.

VI. Legal effects of internal law

Because of the different sources and types of internal law, the legal effects of a particular rule or decision may not always be easily identifiable. The legal effects should first be determined in light of the instrument establishing the organ that issued the rule in question and the constituent instrument of the organization. Legal effects also depend upon the intentions of the organ as well as its authority which must be clearly established for the rule to produce the intended legal effects.

¹⁰⁰ ILO Governing Body, *Preview of the Programme and Budget proposals for 2008-09 and related questions. Strategy for continued improvement of results-based management in the ILO*, GB.297/PFA/1/1 (2006) para 85.

¹⁰¹ See, for instance, ILO, *Office Directive Classification of ILO Information Assets*, IGDS Number 456 (Version 1) (2016).

¹⁰² See Official Document System of the United Nations (ODS) <<http://documents.un.org/>>.

¹⁰³ UN Secretary-General's bulletin, *Information sensitivity, classification and handling*, UN Doc ST/SGB/2007/6 (2007).

A distinction must be made between legally binding rules and decisions and non-binding guidelines or instructions.¹⁰⁴ As was seen above, the current UN system of administrative issuances describes to a certain extent the effects of the administrative issuances. Such descriptions are not, however, generally available for all types of internal law. The legal effects of particular rules may become even less clear when binding and non-binding rules and policies are collected together into user-friendly staff, procurement and other manuals. A further distinction is found between decisions in individual cases and those intended for general application: while the legal effects in the former case are limited to the specific case, they may have wider legal implications as part of the practice of the organization discussed above.

As concerns the hierarchy of norms of internal law, the constituent instruments are binding not only on the member States as parties to a treaty, but also on the organs and agents of the organization, as applicable, as part of internal law. This does not, however, hold true with regard to rules adopted at lower levels of the norm hierarchy the effects of which are generally more limited. As concerns organs at levels lower than the one that adopted the rule, they are bound by the rule if it was duly adopted.¹⁰⁵ The organ that adopted the rule is also bound to apply it as long as it is not amended in accordance with the relevant procedure.

A rule can also be binding on an organ of a level higher than the one that adopted the rule in question. This was the case in the *Effect of Awards* advisory opinion where the ICJ found that the UN General Assembly could not refuse to give effect to an award of compensation made by the UN Administrative Tribunal which the General Assembly had established. This was so because the Tribunal's decisions were binding on the parties to the dispute in question, i.e. the staff member concerned and the organization itself.¹⁰⁶ Finally, it appears that institutional acts adopted in breach of the rules of the organization will be devoid of legal effects in the internal legal order.¹⁰⁷

¹⁰⁴ Amerasinghe (n 2) 271-272.

¹⁰⁵ Schermers and Blokker (n 2) para 1203.

¹⁰⁶ *Effect of Awards* (n 19) 53.

¹⁰⁷ Cf. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, 150.

States are bound by internal law in their role as member States. For example, decisions concerning financial contributions and rules of procedure bind member States by virtue of their constitutional obligations.¹⁰⁸ Internal law may also affect States, not in their role as a member of the intergovernmental organization but, for example, in their capacity as donor or beneficiary of technical assistance. Finally, internal laws may affect in a number of ways, and through a multitude of mechanisms, non-member States and a range of non-State actors. They include contractors, suppliers and other businesses through contractual ties or in the context of collaborative arrangements, including public-private partnerships. Individuals affected by internal laws include staff members, experts, volunteers, visitors, prisoners in UN ran prisons and refugees in UN administered refugee camps.

VII. Remedies for breaches

The wide range of entities and persons potentially affected by internal laws gives rise to the question of what remedies they may have at their disposal in case of an alleged breach. A breach of internal law may generally occur in two different situations: first, when an act or rule is not adopted in accordance with the relevant rules of the legal order; and, second, when the material action of an organ or a staff member is in breach with the rules governing such conduct.

With regard to the first situation, the invalidity of an act or rule not adopted in conformity with the relevant rules of internal law flows from the hierarchical structure of the internal legal order of an international organization. As was discussed above, the validity of each rule depends on its conformity with the relevant rules on the higher level(s) and ultimately the constitution and general international law, to the extent that the latter is binding over the intergovernmental organization in question. This is reflected for example in the definition of ‘rules of the organization’ in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) which refers to ‘the constituent instruments, decisions and resolutions adopted

¹⁰⁸ Both the financial responsibility of member States as well as the adoption of rules of procedure are generally foreseen in the constituent instruments.

in accordance with them, and established practice of the organization' (emphasis added).¹⁰⁹ Thus, if acts adopted by lower or subsidiary organs are inconsistent with those enacted by organs at higher levels, the latter prevail over the inconsistent acts. For example, if an administrative act issued by the executive head of the organization concerning staff relations is in contradiction with the staff regulations adopted by the plenary body of the organization, the latter would prevail. It also follows from the hierarchical structure that decisions of lower or subsidiary organs can normally be overruled by organs at higher levels except when the lower level organ is endowed with an independent function.¹¹⁰ A more difficult question arises if organs at the same level of the hierarchy have different views of the validity of an act. Organs interpret, as a general rule, the constituent instrument autonomously without binding force on the other organs and the acts of organs are presumed to be *intra vires*.¹¹¹ However, no organ can take valid decisions clearly outside its field of competence.

With regard to the second situation, a breach may also occur when the actions of an organ or a staff member are inconsistent with the rules governing such conduct. Examples of this situation include an organ disregarding its rules of procedure or a staff member acting in breach of the rules, procedures and codes of conduct relating to the administration of a refugee camp.¹¹²

The availability of remedies for a breach of internal law depends, to a great extent, on the subset of internal law in question as well as the organization. Intergovernmental organizations provide remedies for matters relating to employment relations: a staff member alleging the non-observance of his/her employment contract or the terms of appointment, including all pertinent principles of law, staff regulations, and rules of the organization concerned, normally has access to informal (administrative) dispute

¹⁰⁹ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), article 2(1)(j).

¹¹⁰ *Effect of Awards* (n 19). See also Schermers and Blokker (n 2) para 1145.

¹¹¹ *Certain Expenses* (n 20) 168; Eberé Osieke, 'Ultra vires acts in international organizations – The experience of the International Labour Organization' (1976-77) 48 *British Yearbook of International Law* 259.

¹¹² For discussion see Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 *New York University Journal of International Law and Politics* 869.

settlement procedures within the organization concerned and thereafter to a judicial body to review whether the impugned act was in conformity with the organization's internal law. The first international administrative tribunal, the League of Nations Administrative Tribunal already mentioned above, was established in 1927 with jurisdiction over staff of the League of Nations and of the ILO. It was continued after the dissolution of the League as the International Labour Organization Administrative Tribunal (ILOAT) whose competence covers at the time of writing close to 60 organizations.¹¹³ In 1947, the UN established the United Nations Administrative Tribunal (UNAT)¹¹⁴ with jurisdiction over personnel of the UN and its funds and programmes, as well as some intergovernmental organizations which have recognized its jurisdiction. In addition, the World Bank, the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the Commonwealth Secretariat, as well as a number of regional organizations, including the Asian and Inter-American Development Banks, the Council of Europe, the European Union (EU)¹¹⁵, the League of Arab States, the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS), among others, have their administrative tribunals or appeals boards.

Internal justice systems have been increasingly criticized since the early 1990s by staff associations, academics and practitioners.¹¹⁶ On the national level, courts have not always given effect to the immunities enjoyed by intergovernmental organizations, which has even led to inconsistent judicial decisions concerning the same matter by an international administrative

¹¹³ <<http://www.ilo.org/public/english/tribunal/membership/index.htm>>.

¹¹⁴ UN General Assembly Resolution 351 (IV) *Establishment of a United Nations Administrative Tribunal* (1949).

¹¹⁵ The European Union Civil Service Tribunal (EUCST) was established by Council Decision 2004/752/EC. Disputes concerning staff relations were previously heard by the Court of First Instance. For discussion see Hazel Cameron, 'Establishment of the European Union Civil Service Tribunal' (2006) 5 *The Law and Practice of International Courts and Tribunals* 273.

¹¹⁶ See, for instance, August Reinisch and Ulf Andreas Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 *International Organizations Law Review* 59; Nassib G. Ziadé (ed), *Problems of international administrative law. On the occasion of the twentieth anniversary of the World Bank Administrative Tribunal* (Nijhoff 2008).

tribunal on the one hand and a national court on the other.¹¹⁷ In the case of the UN, the reform proposals of the so-called Redesign Panel in 2006¹¹⁸ led the UN General Assembly to recognize ‘that the current system of administration of justice at the United Nations is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed’. In response, the General Assembly decided to establish ‘a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike’.¹¹⁹ The new system covers both the informal and formal system, the cornerstone of which is the two-tier judicial system. The first tier is the United Nations Dispute Tribunal (which replaced the peer review mechanism of internal appeal boards as from 1 July 2009 and the UNAT as from 31 December 2009) and the second tier the United Nations Appeals Tribunal which is open to both parties to a dispute.¹²⁰ In addition to the possibility to appeal tribunal decisions, the system include expanded jurisdiction *ratione personae* and strengthened staff legal assistance, making it the most important reform of international administrative justice to date.¹²¹

Legal remedies for the breach of a rule of internal law concerning matters other than staff relations are generally less developed and available, as has been studied in detail elsewhere.¹²² Regional economic integration organizations often provide legal remedies to member States to challenge

¹¹⁷ ILOAT Judgment No. 2729 (2009).

¹¹⁸ UN, *Report of the Redesign Panel on the United Nations System of Administration of Justice*, UN Doc A/61/205 (2006).

¹¹⁹ UN General Assembly Resolution, *Administration of Justice at the United Nations*, A/RES/61/261 (2007) preamble and para 4.

¹²⁰ UN General Assembly Resolution, *Administration of Justice at the United Nations*, A/RES/63/253 (2009) paras 38 and 39.

¹²¹ For discussion see August Reinisch and Christina Knahr, ‘From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations’ (2008) 12 *Max Planck Yearbook of United Nations Law* 447-483; Phyllis Hwang, ‘Reform of the Administration of Justice System at the United Nations’ (2009) 8 *The Law and Practice of International Courts and Tribunals* 181.

¹²² Wellens (n 14).

rules of internal law.¹²³ In more ‘classical’ intergovernmental organizations, on which this paper focuses, examples of procedural remedies can be found in the World Bank Group where States can have recourse to arbitration, for example, in case of termination of membership.¹²⁴ Questions of review of rules of internal law have also been addressed in passing in the context of ICJ advisory or contentious proceedings.¹²⁵ For example, in the *Wall* advisory opinion, the ICJ found, in response to claims submitted by Israel, that the UN General Assembly did not contravene the relevant provisions of the UN Charter when seeking an advisory opinion from the Court and that the Assembly, hence, did not exceed its competence.¹²⁶

Agreements concluded by intergovernmental organizations concerning different subsets of internal law frequently provide remedies to the parties to the agreement. For example, headquarters and other host country agreements,¹²⁷ agreements on privileges and immunities,¹²⁸ loan and technical cooperation agreements,¹²⁹ contracts,¹³⁰ and status of force agreements¹³¹ often provide for arbitration for any disputes arising out of or in connection with the agreement in question. Such proceedings may involve the review

¹²³ See, for instance, the Treaty Establishing the European Community, article 230.

¹²⁴ See, for instance, the Articles of Agreement of the International Monetary Fund (IMF), article XXIV (c).

¹²⁵ See, for instance, *Constitution of the Maritime Safety Committee* (n 107).

¹²⁶ *Wall* (n 83).

¹²⁷ See the Headquarters Agreement between the United Nations and the United States, section 21; the Agreement Between the ILO and the Government of the Socialist Republic of Viet Nam on the Establishment of an ILO Office in Ha Noi, Viet Nam, article VII, Official Bulletin of the ILO (2002) LXXXV.

¹²⁸ The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies provide a specific procedural remedy in contentious cases. On request, the ICJ renders an advisory opinion accepted as decisive by the disputing parties. See Convention on Privileges and Immunities of the United Nations, section 30; Convention on Privileges and Immunities of the Specialized Agencies, section 32.

¹²⁹ See, for instance, International Bank for Reconstruction and Development (IBRD) Articles of Agreement, article VIII sec. 8.04; Standard Basic Assistance Agreement (SBAA) between the recipient Government and the UNDP, article XII, 2326 UNTS I-41688 (2005) 61.

¹³⁰ See, for instance, UN General Conditions of Contract for Contracts for the Provision of Goods and Services (rev. April 2012) <<https://www.un.org/Depts/ptd/about-us/conditions-contract>>.

¹³¹ See Model Status-of-Forces Agreement for Peace-keeping Operations, UN Doc A/45/594 (1990) paras 51 and 53.

of the conformity of an institutional act with the terms of the agreement or contract.

Legal remedies for individuals and other private parties (for matters other than employment relations) are generally less available than those intended for States. However, the remedies provided by regional economic integration organizations are often also available for individuals. Other examples include review boards established to process claims by private parties affected by peacekeeping operations.¹³² In response to external pressures, a number of permanent quasi-judicial or hybrid mechanisms allowing access to individuals and other private parties adversely affected by an act of an international organization have been established during recent years. These developments were prompted by severe criticism concerning the so-called Narmada development project in India, as a result of which the World Bank established in 1993 an inspection procedure with regard to Bank-financed development projects.¹³³ The model was followed by several regional development banks. It allows a panel to investigate claims made by groups of private persons adversely affected by an alleged disregard by the Bank of its own operational policies and procedures during the design, appraisal and/or implementation of a Bank-financed project.¹³⁴ In recent years, a number of UN agencies, including the Food and Agriculture Organization (FAO), the United Nations Development Programme (UNDP) and the United Nations Industrial Development Organization (UNIDO), have established mechanisms accessible to third parties adversely affected by project implementation. Their make-up is dependent on the nature of the work, scale of

¹³² For discussion see Marten Zwanenburg, 'UN Peace Operations Between Independence and Accountability' (2008) 5 *International Organizations Law Review* 23.

¹³³ The Inspection Panel procedure was established by the Executive Directors of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) by IBRD Resolution No. 93-10 and the identical IDA Resolution No. 93-6 both adopted by the Executive Directors of the respective institutions on 22 September 1993.

¹³⁴ The World Bank Inspection Panel, *Operating Procedures* (1994) I.1. For mechanisms adopted by other regional development banks see, for instance, Compliance Review Panel and Special Project Facilitator at the Asian Development Bank (ADB), Independent Investigation Mechanism at the Inter-American Development Bank (IADB), Independent Recourse Mechanism at the European Bank for Reconstruction and Development (EBRD), Compliance Advisor Ombudsman at the World Bank's International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).

the projects and risks involved, as well as the available resources. Frequently, such channels are established to complement local mechanisms, in particular, those established by host governments.

Other mechanisms open to private parties include the UNDP Information Disclosure Oversight Panel which examines denied requests to disclose a document or portion of a document¹³⁵ and vendor review or sanctions committees to which vendors can appeal decisions suspending them from procurement processes.¹³⁶ These mechanisms are intended to be independent – yet, they remain internal to the organizations and their determinations are sometimes subject to the final decisions of the executive heads of the organization in question. Despite these qualifications, these mechanisms constitute important examples of efforts to enhance intergovernmental organization accountability vis-à-vis external private parties.¹³⁷

Finally, one should not overlook the importance of non-legal – institutional, political and administrative – means in addressing and preventing breaches of internal laws within the internal sphere of an intergovernmental organization.¹³⁸ First, the main organs supervise and control the acts of lower level and subsidiary organs by means of periodic reporting. Following a series of scandals as of 2004, including those concerning the UN oil-for-food programme, peacekeeping procurement and sexual abuses, a number of intergovernmental organizations have carried out studies of their existing internal accountability frameworks and have taken significant measures in response to mounting pressures. Adopted measures include strengthening accountability frameworks for officials and management, including financial disclosure, denouncing conflicts of interest, corrupt, fraudulent and other

¹³⁵ UNDP, *Information Disclosure Policy*, <<https://www.undp.org/content/undp/en/home/accountability/transparency/information-disclosure-policy.html>>.

¹³⁶ See, for instance, IADB *Corporate Procurement Policy* GN-2303-20 (2011) <<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=948065>>; UNOPS *Vendor Sanctions*, Operational Instruction (2017) <https://content.unops.org/publications/Policies/OI.PG.2017.02-Vendor-Sanctions_EN.pdf?mtime=20180406125300>.

¹³⁷ For discussion, see Andrés Rigo Sureda, 'Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank' in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002) 165.

¹³⁸ International Law Association (n 38) 32.

unethical behaviour and practices, as well as sexual harassment and abuse through the institution of ethics officers, improved investigative processes and whistleblower-protection policies.¹³⁹ These policies include an increasing number of channels for reporting concerns and inappropriate conduct by officials, contractors and partners. As concerns more novel, performance based approaches to accountability, a number of intergovernmental organizations have moved to results-based management which, according to the UN General Assembly, is 'an essential element of accountability'.¹⁴⁰ It involves, among other things, results-based budgeting, planning of work and identification of expected results at all levels of the organization – from top down all the way to the individual official. As a result, the organizations are 'seen as being [...] more transparent and accountable'.¹⁴¹

As concerns the role of member States, they have the competence and, according to Karel Wellens, an obligation to supervise and monitor the activities of intergovernmental organizations.¹⁴² To this end, States have a number of political or administrative means at their disposal, including voting behaviour, challenging an institutional act before the body concerned,¹⁴³ terminating the appointment of an executive head,¹⁴⁴ as well as threatening with the refusal to pay the assessed contribution under the regular budget and the temporary or permanent withdrawal from membership.¹⁴⁵ If the latter were actually carried out, they would also give rise to legal problems. Finally, in the external sphere at the national level, parliaments dispose often of powerful means of control, in particular through the use of budgetary powers.

¹³⁹ See, in general, Chris de Cooker (ed), *Accountability, Investigation and Due Process in International Organizations* (Nijhoff 2005).

¹⁴⁰ UN General Assembly Resolution 67/226 (2012), *Quadrennial comprehensive policy review of operational activities for development of the United Nations system*, para 164.

¹⁴¹ WHO, *Programme budget 2002-2003. Performance assessment report: summary of initial findings. Note by the Secretariat*, A57/25 (2004) para 4.

¹⁴² Wellens (n 14) 175.

¹⁴³ For discussion, see Benedetto Conforti, *The Law and Practice of the United Nations* (3rd rev edn Martinus Nijhoff 2005) 305-311.

¹⁴⁴ ILOAT Judgment No. 2232 (2003).

¹⁴⁵ For the United States policy, see, for instance, Michael J. Matheson, 'The United States and International Organizations: A US Perspective' in Fijalkowski (n 91) 114; Jack Martin, 'The United States and the ILO' in Fijalkowski (n 91) 135.

VIII. Conclusion

Internal laws of international organizations have evolved into elaborate and often extensive bodies of law. Their well-established position reflects the recognition of intergovernmental organizations as separate subjects of international law. Yet, ambiguities persist with regard to certain central features of internal laws and, in particular, the often blurred borderline between the internal and external spheres of action and the specific legal nature of internal laws. The underlying reason for these issues is the transparent and multilayered structure of intergovernmental organizations, which seems to bar clear-cut answers to these questions.

The emergence and development of internal laws has been essentially driven by the functional needs of intergovernmental organizations. On the other hand, intergovernmental organizations have established, from the very beginning, institutional checks as part of their hierarchically structured internal legal orders. The gradual evolution and expansion of intergovernmental organization activities together with changes in their external environments have constantly brought about new needs for internal laws, including control mechanisms. The recent intensification of these developments has posed significant challenges to intergovernmental organizations. As was seen above, international organizations have reformed internal laws in response, including through the introduction of novel accountability mechanisms, although much remains to be done. They reflect the commitment of international organizations to accountability vis-à-vis their members, partners, beneficiaries and the wider public. The tension between the functional needs on the one hand and the needs to establish accountability procedures and mechanisms on the other is at the heart of the development of internal laws, which constitute the first yardstick for measuring intergovernmental organization accountability in the internal sphere.

What is Work? A Malleable Notion in the ILO's Legal Pursuit of Social Justice

Claire La Hovary and Jordi Agustí Panareda

I. Work: A flexible concept

The notion of 'work' has many associations. Etymologically, the word derives from the old English 'weorc' which roughly translates as 'action', but the word 'travail' in French or 'trabajo' in Spanish derive from the latin 'tripalium' – a Roman instrument of torture.¹ Similarly, the notion of work can also have varying significance in different societies across the world.² Seen from this perspective, the concept of 'work' is clearly difficult to pin down, to the extent that it can be said that it 'now bears an oppressive overload of semantic significance and conceptual implications'.³

One might assume that after almost a hundred years of history the ILO, the international organization devoted since 1919 to the world of work and furthering social justice through the improvement of conditions of labour, would have pinned down a precise legal definition of its centre-piece. However, despite 190 conventions, six protocols and 206 recommendations, as well as volumes of comments by its supervisory bodies, the

¹ Jeremy Seabrook, 'The language of labouring reveals its tortured roots' (The Guardian 2013) <<http://www.theguardian.com/commentisfree/2013/jan/14/language-labouring-reveals-tortured-roots1>>.

² Alain Supiot, 'Perspectives on work: Introduction' (1996) 135 *International Labour Review* 607. This article does not get into discussion of whether legal categories are universal or correspond to a particular political context – and whether the very notion of universal standards is culturally insensitive. Acknowledging that work may have different meanings, including in different disciplines and cultural contexts, it rather explores its adaptive potential.

³ G.M. Kelly, 'Employment and the Concept of Work in the New Global Economy' (2000) 139 *International Labour Review* 9.

Organization has not produced a unique universal legal definition of 'work'. It was moreover not until 2013 that the International Conference of Labour Statisticians (ICLS), held under the auspices of the ILO, adopted a formal definition of what constituted 'work' for statistical purposes, through its Resolution concerning statistics of work, employment and labour underutilization adopted on 11 October 2013 (the 2013 ICLS Resolution).

The lack of a clear definition of 'work' has obviously not been a problem for the ILO's ability to generate a vast corpus of international labour law and, arguably, a worldwide 'magisterium'⁴ over the world of work. Yet, some scholars have argued that the ILO has 'drifted into the margins of international influence', precisely because it has not been able to 'offer a model of work suitable for the twenty-first century'.⁵ On the one hand, such critique relates to changes in the way work is performed. Since the 1970s, scholars have highlighted that the nature of work has evolved,⁶ with a rise of, inter alia, self-employment, part-time work, homework, telework, casual work, as well as the emergence of new working arrangements such as crowd sourcing,⁷ that national labour law does not necessarily cover fully or adequately.

On the other hand, the 'contour' of the notion of work itself has always been an issue (i.e. what is considered work and what is not, and what is

⁴ Francis Maupain, *The Future of the International Labour Organization in the Global Economy* 6 (Hart Publishing 2013).

⁵ Guy Standing, 'The International Labour Organization' (2010) 15 *New Political Economy* 307.

⁶ Gerry Rodgers and Janine Rodgers (eds), *Precarious Jobs in Labour Market Regulation* (ILO 1989); Alain Supiot, *Au-delà de l'emploi: transformations du travail et devenir du droit du travail en Europe* (Flammarion 1999). In developing countries, 'non-standard' forms of employment have always been the norm, although labour law is also structured around the standard employment relationship; see for instance, Tzehainesh Teklè, 'Labour Law and Worker Protection in the South' in Tzehainesh Teklè (ed), *Labour Law and Worker Protection in Developing Countries* (ILO 2010) 12-13. As Stone and Arthurs state, 'workers today move from job to job, in and out of different nonstandard employment relationship, in and out of training, in and out of self-employment and indeed, in and out of the labour market'; Katherine V.W. Stone and Harry Arthurs, 'The Transformation of Employment Regimes: A Worldwide Challenge' in Katherine V.W. Stone and Harry Arthurs (eds), *Rethinking Workplace regulation* (Russel Safe Foundation 2013) 6-7.

⁷ Further potential challenges such as the increased robotization of work also lie ahead, although the extent to which such developments will result in a huge change in the need for human labour is disputed; Thereza Balliester and Adam Elsheikhi, 'The Future of Work: A Literature Review' (2018) ILO Working Paper No. 29.

considered within the scope of what should be regulated). Questions related to, for example, the nature of housework and unpaid care work,⁸ are a case in point. Moore for example has highlighted how the rigid division between family and work, and the fact that housework is not considered ‘work’, is very much ‘the product of a specific historical moment in Europe.’⁹ More generally, the fact that the prevalent notion of ‘work’ is highly gendered has been discussed across disciplines. In the context of labour law, Conaghan and Rittich have argued forcefully that the very concept of work ‘presupposes a (gendered) division of labour in which “reproductive” work is sharply distinguished from “productive” work, and is largely consigned to the “private” realm of non-market relations.’¹⁰

Reflection concerning the question of what constitutes ‘work’ is not novel at the ILO, as exemplified by the intervention by the Employers’ delegate of the British Empire in 1929 during the discussion on the report of the Conference Committee on hours of work.¹¹ The ambiguity of the term has in fact explicitly been mentioned over the years,¹² despite the Organization also producing extensive material on the evolving forms of work worldwide. However, there has been little consideration of the way that the ambiguities surrounding the concept of work impact on the ILO’s legal toolbox, whether in terms of what it has produced or can produce.

⁸ The term ‘housework’ covers unpaid care work in this article. It is assimilated to ‘domestic work’ as defined in article 1(1) of the Domestic Workers Convention, 2011 (No. 189). This Convention, however, applies only to domestic workers in an employment relationship; see Adelle Blackett, ‘The Decent Work for Domestic Workers Convention and Recommendation, 2011’ (2012) 106 *American Journal of International Law* 778.

⁹ Henrietta Moore, ‘The Future of Work’ (1995) 33 *British Journal of Industrial Relations* 657, 666.

¹⁰ Joanne Conaghan and Kerry Rittich, ‘Introduction. Interrogating the Work/Family Divide’ in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family – Critical and Comparative Perspectives* (Oxford UP 2005) 2.

¹¹ ‘This regulation is going to follow us from the midwives that bring us into the world to the undertakers that see us to our last rest, and it all turns on this: what is the definition of work?’; see International Labour Conference, 12th Session (1929) *Records of Proceedings*, vol I 573.

¹² In 1972, the United Kingdom Government member suggested to remove the word ‘work’ from the text of the draft convention on minimum age discussed by the Conference because of the ‘ambiguity’ arising from its ‘very wide meaning’; see International Labour Conference, 57th Session (1972), *Report of the Committee on Minimum Age* 537, para 21.

This article addresses, therefore, how the lack of a precise legal definition of work has impacted on the execution of the ILO's mandate, in particular through the scope of its legal instruments. It begins by exploring the general mandate of the ILO and how it has been executed, highlighting how work has been conceived both widely and narrowly within its international labour standards. It then considers the 2013 ICLS Resolution on the statistical notion of work, and how – at the Organization's centenary – it offers an opportunity to reflect on the scope of existing and future international labour standards and to assess their coverage with regards to evolving forms of work. Although empirical approaches are on the radar of labour law scholars,¹³ statistics which feed into indicators for example have largely been ignored. One innovative element of the ICLS' definition of work is that it includes activities previously not associated with the so-called 'economically active' population such as own use production (including – importantly – housework and care work), unpaid trainee work and volunteer work. Focusing specifically on the latter forms of previously neglected work, the article then explores how these are tackled in international labour standards and how their explicit recognition as a form of work by the ICLS might open up new avenues for reflecting on standard-setting and review, highlighting the advantage of having a broad, malleable notion of work. Finally, while centred on international labour standards, the paper also aims at informing both international and national law debates on the matter.

II. The ILO's mandate: Hardly more comprehensive

As set out in the preamble of the ILO Constitution, the Organization's mandate can be deemed to be concerned, at its most basic, with the amelioration of conditions of labour as these relate to the overall aim of achieving social justice. Although the preamble does refer to a number of measures to be taken, these are listed in a very general and non-exhaustive manner, and, rather than focusing on a specific category of work or worker, they regard 'people'.

It has often been pointed out that beyond the general objective of establishing 'universal and lasting peace [...] based upon social justice', the

¹³ Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators – Global Power through Quantification and Rankings* (Oxford UP 2012).

mandate of the ILO is rather undefined. This may however have been purposeful, since it has, inter alia, allowed for a changing understanding of the term 'work' over time. As observed in a 1931 ILO publication, for example, 'definitions always imply to some extent limitation', and the authors of the ILO Constitution may have 'wished to avoid any formula which, being inspired by the circumstances of the moment, might impede the future progress of the Organisation by preventing it from taking such action as later circumstances might require'.¹⁴ In fact, in the words of the Permanent Court of International Justice (PCIJ), in its advisory opinion in 1922 as to whether the ILO's competence extended to agricultural workers, the competence of the ILO is expressed in the preamble of its constitutional text in a language that 'could hardly be more comprehensive'.¹⁵

Similarly, in a 1926 advisory opinion, the PCIJ responded positively to whether it was 'within the competence of the [ILO] to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer'.¹⁶ Employers had argued that the term 'work' should be understood as not extending to all human activities, but only to the work done for the benefit of someone else.¹⁷ However, Albert Thomas, the Director of the ILO at the time, seized the opportunity to present arguments in favour of a broad understanding of the competence of the ILO and argued that the determination of the categories of workers under the scope of the ILO could not be based solely on the existence of wages.¹⁸

¹⁴ *The International Labour Organization – The First Decade* (ILO 1931) 96-97. See also Georges Scelle, *L'Organisation internationale du travail et le B.I.T.* (M Rivière 1930) 72; Ilia Ianouloff, 'Législation internationale du travail' (1935) 51 *Recueil des cours* 554-555.

¹⁵ *Competence of the International Labour Organization in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, PCIJ, Series B, No. 2 (1922).

¹⁶ *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Series B, No. 13 (1926). The question, raised by Employers, was very narrow – it concerned the draft text of the Night Work (Bakeries) Convention, 1925 (No. 20), which stated that, subject to some exceptions, the prohibition of making bread during the night 'applies to the work of all persons, including proprietors as well as workers'.

¹⁷ Nicolas Valticos, *Droit international du travail* (Daloz 1983) 187-188.

¹⁸ *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Series C: Acts and documents relating to Judgments and Advisory Opinions given by the Court/Pleadings, Oral Arguments and Documents 137, 141.

This broad understanding of the competence of the ILO over 'work' was complemented by the Declaration of Philadelphia, adopted in 1944 and annexed to the Constitution in 1946, which confirms an even broader competence of the ILO, beyond conditions of work and beyond workers. In Valticos and Von Potobsky's words, this competence is thus recognized as 'no longer limited strictly to conditions of work, but extend(s) more generally to conditions of life'.¹⁹ International labour law produced by the ILO has therefore never been limited by the existence of a (standard) employment relationship (which tends to frame the application of domestic labour law²⁰) to exercise its influence.²¹

Despite the PCIJ's clarifications and the adoption of the Declaration of Philadelphia, there has always been a tension between those who believe that the ILO's mandate is limited and those who believe that the ILO operates within a broad framework.²² Some argue that this tension is exacerbated by the tripartite structure of the ILO,²³ contending that the representatives of the workers and employers' groups in the ILO may be overly concerned with issues that are closer to their constituencies. Others have pointed out that the all-encompassing vague formulation of the Constitution gives the impression that 'with good will, all working men, women, and children could, in one way or another, feel protected by the ILO', which they feel has not been the

¹⁹ Nicolas Valticos and Gerardo Von Potobsky, *International Labour Law* (2nd edn, Kluwer Law and Taxation Publishers 1995) para 67. See also Francis Maupain, 'L'OIT, la justice sociale et la mondialisation' (1999) 278 *Recueil des cours* 320-321 and section II(a) of the Declaration.

²⁰ 'The Scope of Labor Law and the Notion of Employees' 2004 JILPT Comparative Labor Law Seminar, 2004, The Japan Institute for Labour Policy and Training <<http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf>>.

²¹ The Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), which applies to all workers engaged in dock work (i.e. employees and self-employed); the Safety and Health in Construction Convention, 1988 (No. 167), which applies to all workers engaged in construction; the Medical Examination of Young Persons (Industry) Convention, 1946, (No. 77) which applies to children and young persons 'employed or working'; the Indigenous and Tribal Peoples Convention, 1989 (No. 169) which applies widely to 'tribal people'. More generally, see the Forced Labour Convention, 1930 (No. 29) and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) examined below.

²² Lee Swepston, *The Foundations of Modern International Law on Indigenous and Tribal Peoples* (Brill Nijhoff 2015) 41-42.

²³ Maupain (n 19) 324.

case in practice.²⁴ From an operational perspective, however, the ILO has tended to focus its activities and its standards on either all or specific types of work. In the latter case, the focus of international labour standards has often been on paid work, and even more specifically on dependent wage work.²⁵

To a certain extent it could be argued that this is due to the fact that the ILO operates within a broader external framework where the notion of work is widely understood in a narrow way, as paid participation in the production of goods and services, and is often assimilated to employment or 'jobs',²⁶ or self-employment. It is in this way (whether self or independent) that work is understood in the 'right to work' in international human rights instruments (e.g. the 'right to work' in article 11(a) of the Convention on the Elimination on Discrimination against Women and in article 6 of the International Covenant on Economic, Social and Cultural Rights).²⁷ Furthermore, it is in this sense that work seems *a priori* to be understood in the Sustainable Development Goals where decent work is mentioned alongside economic growth.²⁸ Understood as a paid occupation, work may certainly be a *de facto* springboard for the enjoyment of other rights;²⁹ certainly,

²⁴ Magaly Rodríguez García, 'Conclusion: The ILO's Impact on the World' in Jasmien Van Daele and others (eds), *ILO histories: Essays on the International Labour Organization and its Impact on the World During the Twentieth Century* (Peter Lang 2010) 471.

²⁵ International Labour Standards are not, however, the only manifestation of this. The World Employment Programme, led by ILO economists and launched in 1969, also initially focussed its activities on dependant wage work before expanding them to self-employment.

²⁶ World Bank, *World Development Report 2013* 66 ('jobs are activities that generate actual income, monetary or in kind, and do not violate fundamental rights and principles at work'). For an earlier example of this, see the ICLS which associated being 'at work' with having a paid job; see *The eighth international conference of labour statisticians* (ILO 1954) 43.

²⁷ According to the UN Committee on Economic, Social and Cultural Rights, the right to work 'encompasses all forms of work, whether independent work or dependent wage-paid work'; CESCR, General Comment No. 18, E/C.12/GC/18 (2006) para 6 <<https://www.refworld.org/docid/4415453b4.html>>. This concept of work is therefore not really all encompassing, as it is limited to so-called 'productive work'; see Mathew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford UP 1995) 219. For a different opinion, see Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford UP 2014) 281. However, other forms of unpaid work are not excluded from international human rights.

²⁸ See Goal 8: 'Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'.

²⁹ Craven (n 27) 194; Saul, Kinley and Mowbray (n 27) 273.

employment – whether self- or dependent employment – is considered key to reducing poverty and promoting development.

However, other forms of work, beyond paid employment, could also be taken into account and the reach and purpose of the ILO accommodates this. In particular, the ILO has raised awareness as to the difficulties to quantify this type of work (e.g. unpaid work in the family and in the community), the fact that it is ‘essential to the welfare not just of the young or elderly or sick but also to those in paid work’, and the fact that it is often ignored by current thinking.³⁰ There is a growing understanding within the ILO that this type of work needs to be taken into consideration because ‘economic productivity is in fact indirectly subsidized by the social productivity of unpaid work’.³¹

A broad understanding of work (i.e. both ‘employment and self-employment’, and ‘paid and unpaid’ work) has arguably been reflected in the Organization’s Decent Work agenda, which covers ‘the living conditions of workers and their families, not just with paid productive work and the workplace’.³² Decent ‘work’ targets everyone, workers and employers, and all type of work, reflecting ‘a broader notion of participation in the economy and the community’.³³ Perhaps not surprisingly, the notion of ‘decent’ work has never been defined with precision however and is contextual. To this extent, it could be said that it is a notion that is – just as the concept of ‘work’ in the mandate of the ILO – largely undefined, and therefore also malleable.³⁴

³⁰ International Labour Conference 95th Session (2006) Report of the Director-General, *Changing patterns in the world of work* iv.

³¹ *ibid.* There is an extremely vast economic literature on the status of such work, in particular housework and care work, on whether it should be captured in the notion of ‘economic activity’, as well as on the so-called practical difficulties of capturing it with statistics.

³² *Measurement of Decent Work: Discussion paper for the Tripartite Meeting of Experts on the Measurement of Decent Work* (ILO 2008) para 26. See also Gerry Rodgers, *Decent Work as a Development Objective* (2001) 44 *Indian Journal of Labour Economics* 15, 17. The notion of decent work is however simply a repackaging of existing ideas and as such does not reflect a new interpretation of the ILO’s mandate; see Anne Trebilcock, ‘From Social Justice to Decent Work: Is the Shift in the ILO Significant for International Law?’ in Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin (eds), *Select Proceedings of the European Society of International Law, volume 2 2008* (Hart Publishing 2010).

³³ Rodgers (n 32) 17.

³⁴ Although once again, the operationalization of decent work is said to have focussed on wage employment; see Standing (n 5) 314.

III. International labour standards: A malleable scope

International labour law has, among many other particularities, a very different scope than that of national labour legislation as the latter often revolves around the notion of employment. International labour law has as a purpose to improve the conditions of work (and life) of all human beings, and this in the context of its overall aim of achieving social justice. As such, international labour law developed in the ILO overlaps with international human rights law and it is considered by many public international lawyers to be its precursor at the international level.³⁵ For these reasons, issues on the scope of labour law discussed at the national level – for instance, whether unpaid care work should be the object of family law rather than labour law³⁶ – are not conceptually posed at the international level. In short, the scope of international labour law as a whole, closely linked to the mandate of the ILO, is very broad.

It is within the context of the ILO's broad constitutional framework and the general pursuit of social justice that international labour standards are adopted and interpreted. This does not mean, of course, that all standards apply to all workers and all types of work. Over the years, and reflecting the times in which they were adopted, international labour standards have dealt with many different types or dimensions of work, together or separately. Indeed, depending on the standard, 'work' can be, for example, all-encompassing, agricultural, industrial, commercial, artistic, maritime, home-based, family, domestic, part-time, seasonal, temporary, dependent, independent, light, forced, worst, dangerous, unhealthy, tenant farming, in cooperatives, or child (labour).

³⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell UP 2013) 182 ('the first international human rights regime of any sort was the functional regime of the International Labour Organization'); James Crawford, *Brownlie's Principles of Public International Law* (Oxford UP 2012) 636 (noting that the ILO 'has done a great deal towards giving practical expression to some important human rights and towards establishing standards of treatment'); Nicolas Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 *International Labour Review* 136, 137 ('it should be clearly understood that international labour standards, as a body, constitute a special category of human rights'). Domestic labour lawyers, however, do not tend to see the same linkages between domestic labour law and domestic human rights law.

³⁶ As confirmed by Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford UP 2011) for example, and as questioned by Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' (2014) 22 *Feminist Legal Studies* 1.

The term ‘work’ is rarely defined in international labour standards, however, with the reach of an instrument often determined by the definition of the individuals or the ‘worker’ it covers instead.³⁷ When the exact scope of an instrument is not clearly stated, the subject-matter of the instrument can exclude certain workers or type of work from its scope (for instance, the benefits of the Termination of Employment Convention, 1982 (No. 158) do not apply to independent workers, or the Protection of Wages Convention, 1949 (No. 95) does not apply to volunteer work). Work can cover dependent wage work and/or self-employment, or be broader. Similarly, the use of the expression ‘all workers’ means different things depending on the convention; the expression does not have the same coverage in the Equal Remuneration Convention, 1951 (No. 100) than in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). In other cases, the supervisory bodies have added clarification as to the scope of an instrument. Some instruments apply to employer’s work – this may be the case when they concern the work of dependent workers (e.g. the Night Work (Bakeries) Convention, 1925 (No. 20) which was the subject of the 1926 PCIJ advisory opinion), or when it is the object of broad conventions (e.g. Convention No. 87 and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) discussed below). Other conventions allow ratifying states to exclude, after tripartite consultations, some type of work or some workers from their application.³⁸

³⁷ In this regard the *Manual for drafting ILO instruments* (paras 124-125) acknowledges that it is ‘difficult to define the word “worker” in ILO instruments in terms of one single meaning. Some Conventions propose a definition that is intended to meet their specific requirements [...] The practice of the ILC has been to give the broadest possible meaning to the term “workers”. On many occasions, it has been emphasized that, if the subject matter of a given instrument is not limited only to employed workers, or the instrument does not provide for any specific exclusion in respect of one or more categories of workers, then ‘worker’ is understood to cover all workers’. <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/publication/wcms_426015.pdf>. For a recent overview of the meaning of worker in international labour standards – exploring in particular to what extent international labour standards should apply to individuals who are engaged under some form of dependent relationship, but who are not, in a technical sense, ‘employees’; see Breen Creighton and Shae McCrystal, ‘Who Is a Worker in International Law?’ (2016) 37 *Comparative Labor Law and Policy Journal* 691.

³⁸ George P. Politakis, ‘Deconstructing Flexibility in International Labour Conventions’ in Jean-Claude Javillier and Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l’avenir – Mélanges en l’honneur de Nicolas Valticos* (ILO 2004) 463 (noting how flexibility devices are also used to ‘soften international labour standards’).

Observing that the scope of international labour law can be (theoretically) very broad does not deny that the scope of specific international labour standards may reveal scope for improvement. Neither does it mean that international labour standards currently in force cover all forms of work and all the challenges or injustices these may entail. Rather, it is a reminder – which is after all in the ILO’s Constitution – of the need to permanently ensure that standards are adequately applied, updated and supplemented to address any gaps or needs that may arise. The broad mandate of the ILO has been relied upon to cover evolving forms of work and it can also be relied upon to include future forms and notions of work. In this endeavour, the latest statistical efforts to chart comprehensively the world of work may provide some inspiration.

IV. Work (re)viewed by statistics: An invitation for reflection?

Statistics are widely considered to add immediate visibility to an issue and are today the dominant means of informing, designing and monitoring international and national policies, as well as establishing rankings and goals. Statistics concerned with the world of work are used to measure such notions as access to employment, working conditions, quality of employment and even the broader concept of decent work, as well as to measure progress towards established goals, such as the Sustainable Development Goals (SDGs).³⁹ Regardless of our opinion of the value of such rankings or goals, there is little doubt that statistics, or the indicators they feed into, can have an impact on the implementation of rights, beyond their use in the elaboration of national or international policies, for example, by highlighting gaps in the application or coverage of the law, and by helping develop targeted responses to these gaps. Statistics may also have an influence on the perception of the existence of a problem that might be addressed by legal

³⁹ For the use of statistics linked to the SDGs, see 20th ICLS (October 2018), General Report, Report I. Furthermore, it may be singled out that the 2018 ICLS adopted a Resolution concerning the methodology of the SDG indicator 8.8.2 concerning the measurement of the level of national compliance with labour rights (freedom of association and collective bargaining) based on ILO textual sources and national legislation.

instruments. It is therefore crucial to have accurate statistics at the national levels in order not to have flawed analysis.⁴⁰

The ICLS has a key role in this regard and offers a framework to labour statistics. It has been meeting about every five years since 1923 under the auspices of the ILO and makes recommendations in the form of resolutions and guidelines which are submitted to the ILO Governing Body for approval. These recommendations are important as they reflect the dominant take on a topic at the time of adoption, having been agreed to after many regional and international consultations and meetings have been held amongst statisticians and economists. They are also important as their aim is to provide concepts, definitions, or classifications that will be adopted at country level – aiming to have statistics which can be compared between countries as well as compared across time within a country.⁴¹ The framework offered by the ICLS influences the way statistics are collected at national level; it also has an important influence beyond this however, and is used as an international point of reference (e.g. by the World Bank). It is for all these reasons that the definition of work offered by the ICLS is of interest.

The 2013 ICLS Resolution offers the first international definition of the statistical concept of work.⁴² ‘Work’ in this resolution is understood, for statistical purposes, as ‘any activity performed by persons of any sex and age to produce goods or to provide services for use by others or for own use’

⁴⁰ Abi Adams and Jeremias Adams-Prassl, ‘Labour Legislation and Evidence-Based Public Policy’ in Alysia Blackham and Amy Ludlow (eds), *New frontiers in empirical labour law research* (Hart Bloomsbury 2015) 161.

⁴¹ See <<http://www.ilo.org/global/statistics-and-databases/meetings-and-events/international-conference-of-labour-statisticians/lang--en/index.htm>>. Article 2 of the Labour Statistics Convention, 1985 (No. 160) makes direct reference to the ICLS when it asks ratifying States that ‘in designing or revising the concepts, definitions and methodology used in the collection, compilation and publication of the statistics required under this Convention, Members shall take into consideration the latest standards and guidelines established under the auspices of the [ILO]’. See also the Social Protection Floors Recommendation, 2012 (No. 202) para 22.

⁴² Resolution concerning statistics of work, employment and labour underutilization <https://www.ilo.org/wcmsp5/groups/public/--dgreports/--stat/documents/normativeinstrument/wcms_230304.pdf>. On this new resolution, see Grant Belchamber and Sylvain Schetagne, ‘What Counts as a Job?’ (2013) 146 *Global Labour Column* and Grant Belchamber and Sylvain Schetagne, ‘Outcomes of the 19th ICLS on Work Statistics: What Counts as a Job?’ (2013) 156 *Global Labour Column* <http://www.global-labour-university.org/fileadmin/GLU_Column/papers/no_156_Belchamber_Schetagne.pdf>.

(para 6). This comprises five different ‘forms of work’: own use production work, employment work,⁴³ unpaid trainee work, volunteer work, and other (unpaid) work activities (para 7).⁴⁴ This Resolution understands ‘jobs’ in relation to employment and ‘work activity’ in relation to volunteer, own use production (i.e. housework/care work), and unpaid trainee work (para 12 (b)(ii)). It follows that this Resolution importantly recognizes that unpaid care work or housework are ‘work activities’.

The importance of this wide-ranging definition lies in the fact that it explicitly takes into account unpaid work in the family and in the community that is all too often ignored despite being ‘essential to the welfare not just of the young or elderly or sick but also to those in paid work’.⁴⁵ As such, this new notion of work aims at replacing the framework that has been predominant since the 1920s which was built around a broader notion of ‘employment’ and which defined who was to be counted as employed (and unemployed) as those considered (or not) economically active. As noted in the report prepared by the International Labour Office in view of the 19th ICLS discussions,⁴⁶ it was widely acknowledged that these concepts were inadequate to capture the complexities of measuring social progress, living standards, economic progress and job creation and that there was a need to include all forms of work, including care work and volunteer work (considered non-economically active)⁴⁷, in order to formulate fully informed economic and social policies. Moreover, the previous broad definition of employment not only favoured a focus on paid occupations but also put a very heterogeneous group of people into a single category with no ways of distinguishing between employment for pay, own-use production or vol-

⁴³ Under the Resolution, employment is ‘work performed for others in exchange for pay or profit’ (para 7).

⁴⁴ The resolution explains that ‘work is defined irrespective of its formal or informal character or the legality of the activity’ and that ‘work excludes activities that do not involve producing goods or services (e.g. begging and stealing), self-care (e.g. personal grooming and hygiene) and activities that cannot be performed by another person on one’s own behalf (e.g. sleeping, learning and activities for own recreation)’ (para 6).

⁴⁵ International Labour Conference (n 30) vi. Indeed, the same report also notes that ‘economic productivity is in fact indirectly subsidized by the social productivity of unpaid work’.

⁴⁶ 19th ICLS (October 2013), Report II, *Statistics of Work, Employment and Labour Underutilization* para 3.

⁴⁷ *ibid* paras 15-16.

unteer work,⁴⁸ and ignored the key contributions of care work, volunteer work and trainee work to the economy, which were typically ‘invisible in national statistic systems’.⁴⁹

The 2013 ICLS Resolution offers a more narrow understanding of ‘employment’ within a broader notion of ‘work’. This shift is in line with some of the critiques of the approach of mainstream economics towards ‘non-market activities’, which have been developed in particular since the 1930s by feminist economists, and have since concerned all unpaid work performed by men, women and children.⁵⁰ The narrower understanding of employment offered by the 2013 ICLS Resolution is also in line with the general perception that ‘employment’ is work done for pay or profit, and that the broad notion of ‘work’ – in accordance with the mandate of the ILO – is not only concerned with employment, but with work in the widest sense.⁵¹

While statistical concepts are not always synchronized with legal concepts, whether at the national or international levels,⁵² they can cer-

⁴⁸ *ibid* para 43; the 1982 definition included in ‘employment’ everyone working for pay or profit as well as those in own-use production work – this included ‘subsistence farmers and fishers, persons collecting firewood and fetching water, persons manufacturing durable goods or constructing their own dwelling’.

⁴⁹ Indira Hirway, ‘Unpaid Work and the Economy: Linkages and Their Implications’ (2015) Levy Economics Institute of Bard College Working Paper No. 838.

⁵⁰ Lourdes Benería, ‘The Enduring Debate over Unpaid Labor’ (1999) 183 *International Labour Review* 287, 292 (these critiques started to be addressed substantively in the 1970s).

⁵¹ Another dimension, beyond the scope of this paper, concerns the frequent connections between paid and unpaid work, and the intersection with the employment contractual framework – e.g. unpaid work either as linked to an employment contract (e.g. unpaid overtime), as means of obtaining such contract (unpaid training, time spent searching and trying to secure a remunerated engagement, or as a result of the restructuring or cutting back of paid work (e.g. when the choice is offered between using care services or receiving cash benefits for undertaking care work in the home). This fluid permeability adds a normative ground to the malleable approach to the notion of work explored herein.

⁵² For example, a resolution adopted by the 20th ICLS in 2018 adopted a more general statistical definition of domestic work and domestic workers for use in statistics on employment. Indeed, domestic work has been defined as work ‘performed with payment made to employees of the household, to agencies that provide domestic services to households and to self-employed domestic service providers. Domestic work is performed unpaid by household members or by persons not residing in the household, such as family members, neighbours and volunteers’; see Resolution concerning statistics on work relationships, para 103 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648693.pdf>. This has been explained by the fact ‘the definitions in Convention

tainly influence each other.⁵³ The 2013 ICLS Resolution is important as national statistics may become more attentive to other types of work beyond employment, if they were not already, and this might bring some issues that have been in existence for a very long time even more to the attention of policymakers and lawmakers. It is hoped that the fact that the 2013 ICLS Resolution includes forms of unpaid work in its definition of work will have an impact on the way such work is perceived. It is clear that while adding such types of unpaid work in the ICLS' definitions highlights the value that this work provides, it does not alone provide a solution to the injustices that such work can entail.

V. Does law match statistics? A selection of international labour standards reviewed

The new ICLS definition of work invites us to enquire about the notion of work covered by international labour standards. Having noted already that there is no single approach, the following paragraphs examine the scope of international labour standards by concentrating on a few conventions only, chosen as illustrations, because of their relevance either in general or as linked to the areas of work highlighted by the ICLS definition, used in this article as reference to assess the coverage of some international labour standards: (i) Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) are examined because of their centrality for the ILO and because they are applicable, and may be adaptable, to broader types of work than is currently the norm; (ii) Convention No. 29 as an example of broad coverage, and (iii) Convention No. 111— because housework, in particular, is an obstacle to employment and, more generally, a source of discrimination. Specific attention will be given to housework and care work, volunteer work and traineeships. Indeed, although reference to these types of work is not explicitly made in these

No. 189 are not sufficiently precise and have various limitations if used directly for statistical purposes [...] and to 'allow the provision of comprehensive statistics on the various circumstances in which domestic work is performed, including when it is mediated through agencies or Internet applications, and through independent domestic services providers'; see 20th ICLS (October 2018), Report II, *Statistics on work relationships* para 171.

⁵³ See below the example of the influence of the ICLS on the understanding of the scope of Convention No. 111.

conventions, the supervisory bodies may have clarified their application. The aim is not to suggest that all international labour standards should cover all forms of work, but to draw insights that highlight the potential of international labour standards and assist in assessing the pertinence of their scope to improve conditions of labour and living and address challenges to social justice.

1. *Freedom of Association and collective bargaining*
(Conventions Nos. 87 and 98)

The right to establish and join organizations is enshrined in Convention No. 87 for all workers and employers ‘without distinction whatsoever’ (article 2). As only possible exclusions, national law can determine ‘the extent to which the guarantees provided in the Convention shall apply to the armed forces and the police’ (article 9). As recalled by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), ‘these guarantees apply to all employers and workers in the private and public sectors’, including non-exhaustively ‘seafarers, agricultural workers, migrant workers, domestic workers, apprentices, subcontracted workers, dependent workers, workers employed in export processing zones and in the informal economy, and self-employed workers’.⁵⁴

A less evident yet equally interesting example, illustrating how ILO fundamental conventions cover forms of work not traditionally associated to them, is provided by Convention No. 98. The promotion of the right to collective bargaining set out in article 4 of the convention has traditionally been related to one particular type of work – salaried unionized work. However, the text of the convention does not warrant such a limited reading, as it is applicable to all workers and employers covered by the

⁵⁴ Report of the CEACR, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (ILO 2012) para 53 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf>. This broad understanding has also been stressed by the ILO’s Committee on Freedom of Association (CFA); see ILO, *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee* (2006) paras 209-271. Recently, for example, rather than focusing on the notion of worker, the CFA noted that ‘the activities carried out by the West Bengal civic police volunteers constitute work and as such are covered by the principles of freedom of association’; see 377th Report of the CFA, para 370.

convention, and the its scope may only be limited in relation to the armed forces and the police, as well as public servants engaged in the administration of the State (articles 5 and 6). Similarly, while the convention promotes collective bargaining by workers' organizations, the latter is, yet again, a very broad concept that the convention does not curtail with a definition. The ILO has thus encouraged different forms of collective action and collective bargaining. In this regard, in its 2012 General Survey, the CEACR recalled that the right to collective bargaining covers organizations representing diverse categories of workers, including, among others, temporary workers, outsourced or contract workers, apprentices, domestic workers or the self-employed.⁵⁵ Scholars have echoed this broad understanding.⁵⁶ Furthermore, the CEACR has acknowledged the need to adapt national mechanisms for collective bargaining to the circumstances of these other forms of work.⁵⁷

Indeed, salaried workers may have relied more than other kinds of workers on the guarantees provided by these conventions, as well as on the ILO machinery, to supervise their application. This should not come as a surprise – whereas all workers may face hurdles to enjoy the realization of the right to organize, difficulties may be particularly trying for those considered to be in an 'atypical' or a 'precarious' situation – both because of practical difficulties and because of deficient national laws. As Servais notes, while there are some examples of good practice with regards to non-traditional categories of workers, these are 'few and far between'.⁵⁸ From an ILO perspective, action is needed to promote the right to organize in a larger variety of ever changing forms of work, and to assess measures to address any challenges in this respect. In this endeavour, the standards in place are broad enough to promote and realize the right to organize in the many different kinds of work covered by the ICLS definition – e.g. those self-employed or

⁵⁵ CEACR (n 54) para 209.

⁵⁶ For example, in relation to specific categories such as the self-employed; see, Shae McCrystal, 'Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 217.

⁵⁷ See, for instance, CEACR 2016 and 2017 Observations and 2018 Direct Request on the application by Ireland of Convention No. 98 <https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3962776>.

⁵⁸ Jean-Michel Servais, *International Labour Law* (4th edn Wolters Kluwer 2014) 212.

engaged in own production work, volunteers, and any unpaid workers, all enjoy the guarantees in these conventions in law.⁵⁹ Thus, in examining their application, the ILO supervisory bodies have stressed the need to ensure the enjoyment of freedom of association and collective bargaining by these different categories of workers, making explicit reference to those not covered by an employment relationship.⁶⁰

2. *Forced labour: The broadest understanding of work (Convention No. 29)?*

Convention No. 29 illustrates most strikingly the success of how relying on a broad notion of work in international labour standards can positively address evolving practices and challenges in the world of work and retain its relevance in the pursuit of social justice. The convention seeks the suppression of all forms of ‘forced or compulsory labour’ and to this end its article 2(1) defines these terms very broadly as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. The CEACR has stressed over the years that the convention ‘applies to all types of work, service and employment, regardless of the industry or sector within which it is found, including the informal sector’ and to all human beings, ‘adults and children, nationals and non-nationals, including migrants in irregular situations’.⁶¹ The protection set out in the convention covers all the forms of work identified by the ICLS definition, including unpaid work, services carried out outside of any contractual relationship, or activities not legally recognized as work under certain national laws, such as sexual labour. While certain types of work or service are expressly excluded from the scope of the instrument,⁶² these are subject to the observance of specific conditions which define their limits,⁶³ and would otherwise have been covered by the convention’s broad definition of ‘forced or compulsory labour’. It may be argued, therefore, that

⁵⁹ Such remark being made without ignoring the exclusions in the scope of such conventions, nor dismissing the potential contributions of standard-setting, as exemplified by instruments on freedom of association adopted after Convention No. 87.

⁶⁰ CEACR (n 54) paras 53 and 209.

⁶¹ *ibid* para 162.

⁶² Including compulsory military service, normal civic obligations, compulsory labour of convicted persons, cases of emergency and minor communal services (article 2(2) of the convention).

⁶³ CEACR (n 54) paras 273-281.

even these exclusions confirm the extremely broad nature of the notion of work relied upon by Convention No. 29. The capacity that such a conception of work has shown over more than 80 years to respond to forced labour in its myriad forms further highlights this. While the convention was first adopted to chiefly address forced or compulsory labour imposed by the State,⁶⁴ its reliance on a broad notion has enabled it to fight all types of forced labour into the contemporary epoch, including new forms linked to trafficking, for example.⁶⁵ Thus, when in 2014 the Conference adopted a Protocol to complement Convention No. 29, ‘recognizing that the context and forms of forced or compulsory labour have changed’, it did not need to change a single comma in the definition of forced or compulsory labour, and merely recalled that it covered ‘all its forms and manifestations’.⁶⁶

3. *Discrimination protection for all workers concerned* (*Conventions Nos. 100 and 111*)

Convention No. 100, calling for equal pay for men and women workers for work of equal value, applies to ‘all workers’ (article 2(1)); an enumeration of the branches of activities concerned was rejected at the time of drafting as it was thought that it could lead to omissions. As the CEACR has recalled in 2012, there are ‘no exclusions permitted under C. 100: it applies to all workers, both nationals and non-nationals, in all sectors of activity, in the public and the private sectors, and in the formal and informal economy’.⁶⁷ It may, however, be slightly misleading to affirm without further

⁶⁴ Most of the text of the original convention was made up of transitional provisions regulating how ‘recourse to forced or compulsory labour may be had, during the transitional period for public purposes only and as an exceptional measure, and subject to the conditions and guarantees’ provided in the convention (article 1(2) and (3) and articles 3 to 24 of Convention No. 29 – provisions long deemed not applicable and formally deleted by the Protocol of 2014).

⁶⁵ CEACR (n 54) and International Labour Conference, 103rd (2014) Report IV (1), *Strengthening action to end forced labour*.

⁶⁶ Also noting that ‘trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination’. See Preamble to the Protocol of 2014 to the Forced Labour Convention, 1930.

⁶⁷ CEACR (n 54) para 658. See also Anne Trebilcock, ‘International Labour Standards and the Informal Economy’ in Jean-Claude Javillier and Bernard Gernigon (eds) (n 38) 590 (noting that there can be formal employment relationships within an informal enterprise).

qualification that Convention No. 100 applies to ‘all workers’ in the same way as Convention No. 111 does⁶⁸ – this expression has of course to be interpreted within the aim of the convention which focuses only on paid work in the context of an employment relationship⁶⁹ while Convention No. 111 covers additional situations.

Convention No. 111 on discrimination has a broad scope, and applies to both ‘wage-employment’ and ‘non-wage work’.⁷⁰ It concerns all individuals, whether nationals or not, dependents or independents, in the public or private sector (as well as in the ‘informal economy’⁷¹) and deals with discrimination in employment and occupation, including access to employment and occupation, based on specific grounds. Employment and occupation are understood extremely widely: they include all those who work and ‘work’ includes ‘not only persons whose status is that of employee’ but also persons whose status is that of ‘worker on own account’, ‘employer’ or ‘unpaid family worker’⁷² working in a family business. Occupation, on the other hand, means ‘the trade, profession or type of work performed by the individual, irrespective of the branch of economic activity to which he or she belongs or of his or her professional status’.⁷³ It is interesting to note that it is exactly these words that were used to describe the meaning of ‘in employment’ and ‘at work’ in 1958 and they have been reproduced ever since.⁷⁴

Assessing the scope of Conventions Nos. 111 and 100 in relation to the ICLS definition highlights two relevant insights. First, it reflects how

⁶⁸ CEACR (n 54) para 658.

⁶⁹ Remuneration is payable ‘by the employer to the worker and arises out of the worker’s employment’ (article 1(a)); see also CEACR, *General Survey of the Reports on the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951* (ILO 1986) para 16.

⁷⁰ CEACR (n 54) para 752. See also CEACR, *Special Survey on Equality in Employment and Occupation in respect of Convention No. 111* (ILO 1996).

⁷¹ CEACR (n 54) para 733.

⁷² *ibid* para 752.

⁷³ *ibid*.

⁷⁴ General surveys often refer to previous general surveys stating the same concepts. In this case, the 2012 General Survey (n 54) refers to the 1996 General Survey (n 70) which refers to the 1988 General Survey. The 1988 General Survey refers to the significance of the words ‘employment and occupation’ reproduced in the report prepared by the Office for the second debate on Convention No. 111; see CEACR, *General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958* (ILO 1988) para 86.

the ICLS definitions may inform the application of international labour standards – the 1958 report specified that the meaning of ‘occupation’ was taken from the 7th ICLS,⁷⁵ and the meaning of ‘persons in employment’ included all persons who were ‘at work’, as the 8th ICLS defined them,⁷⁶ stressing at the same time the importance of staying up-to-date with ICLS developments and vice versa as these notions have evolved since the 1950s.⁷⁷ Second, it reveals the importance of assessing the impact between forms of work, and, consequently, of the need to apply international labour standards in a manner that is mindful of such impact. The 2012 General Survey does mention in relation to Convention No. 100 ‘household’ duties, and lower training levels, as causes of pay inequality,⁷⁸ and it does address ‘family responsibilities’ (i.e. housework) in the context of Convention No. 111⁷⁹ – it is well acknowledged that housework is highly gendered and prevents access to paid employment and traineeships.⁸⁰ However, Convention No. 111 does not address housework as work (this is not the purpose of this convention) but rather as an obstacle to access work. Certainly, the CEACR has not had the opportunity to address the effect of unpaid family work for example, which it includes in its understanding of work to which one must have access without discrimination, as the Committee on the Elimination of Discrimination against Women Committee did.⁸¹

⁷⁵ See 7th ICLS, Resolution concerning the International Standard Classification of Occupations (1949) para 3(a).

⁷⁶ See 8th ICLS, Resolution concerning Statistics of the Labour Force, Employment and Unemployment (1954) para 6.

⁷⁷ In other instances, law supersedes statistics; such is the case for housework under the Minimum Age Convention, 1973 (No. 138) which has been included by the CEACR, when excessive, in prohibited work while it is limited to ‘economic activities’; see International Labour Conference, 58th Session (1973), Report IV(1) para 21 and CEACR (n 54) para 332. Housework, however, has only been considered an ‘economic activity’ under the 2013 ICLS Resolution.

⁷⁸ CEACR (n 54) para 712.

⁷⁹ The CEACR mentions this very rarely, and only when it is mentioned in the Government’s report.

⁸⁰ CEACR (n 54) paras 785-786; CEACR (n 71) para 53; CEACR, *General Survey of the Reports relating to the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123)* (ILO 1978) para 3.

⁸¹ In its General Recommendation No. 16 on Unpaid Women Workers in Rural and Urban Family Enterprises of 1991, the CEDAW Committee noted that ‘unpaid work constitutes a form of women’s exploitation that is contrary to the Convention’.

4. *Avenues for further exploration*

Some argue that the ILO is not rising to the challenge of the changing world of work.⁸² While it is true that, for example, care work – ‘the work done by more people than any other’⁸³ – is not the exclusive subject of any international labour standards, and that volunteer work and traineeships are not dealt with in a straightforward manner, these forms of work are not completely ignored either. Forms of work highlighted in the ICLS definition, other than paid employment, are taken, sometimes explicitly, or may be taken into account by certain conventions (e.g. Conventions Nos. 87 and 29, as well as conventions dealing with health and safety at work or with social protection)⁸⁴ or have implications for others. At the same time, possibilities can be envisioned to bring these forms of work more fully within the ILO legal landscape. Some examples are noted with a view of encouraging further reflection on these and other fields.

4.1 Volunteer and unpaid trainee work

Owens and Stewart, for instance, note that, concerning (paid or unpaid) trainees, the real question is whether international labour standards are specific enough to deal with issues raised by this type of work.⁸⁵ This seems to be the case with regards to international labour standards dealing with minimum wage, for example. The CEACR, recalling the ‘overarching principle of equal pay for work of equal value’, has considered that ‘persons covered by [...] traineeship contracts should only be paid at a differentiated rate where they receive actual training during working hours at the workplace’.⁸⁶ This statement might mean that every trainee undergoing training must at least be paid something as the eventuality that the trainee is not

⁸² Standing (n 5) 311-314.

⁸³ *ibid* 316.

⁸⁴ Recommendation No. 202 provides guidance to ‘implement social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible’ (article 1(b)).

⁸⁵ Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’, unpublished paper presented at the 4th Conference on Regulating Decent Work: Developing and Implementing Policies for a Better Future at Work (July 2015).

⁸⁶ CEACR, *General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)* (ILO 2014) para 188.

paid at all does not seem to have been brought before the CEACR. This example illustrates that further precisions may be needed on the application of international labour standards to trainees.

Volunteer work (i.e. work done without remuneration) and traineeships/internships (i.e. work done without remuneration or with little remuneration in order to acquire work experience and skills in view of obtaining paid work) are said to be on the increase since the 2008 economic crisis, especially in the developed world. These forms of work open the possibility of various forms of discrimination and exploitation.⁸⁷ As concerns trainees, abuses may include their use beyond the stipulated periods, the replacement of existing workers and/or their utilization as cheap labour.⁸⁸ Traineeships also pose problems of discrimination, as they may require trainees to find means to subsidize their traineeships, therefore *de facto* excluding those with less resources. Conversely, traineeships are considered to be one of the ways to reduce youth unemployment and their provision is encouraged by the ILO, as is their regulation and monitoring.⁸⁹

This could open the possibility for the ILO to consider the adoption of new standards, on the topic of traineeships, offering a clearer framework for regulation.⁹⁰ More clarity, for example, may be found in the Employment Injury Benefits Convention, 1964 (No. 121) and the Employment Injury Benefits Recommendation (No. 121). The convention applies (article 4) to all employees. It specifies possible exclusions with regard to, *inter alia*, casual workers, out-workers and family workers – these workers are covered by the convention unless ratifying States decide to exclude them. Moreover, Recommendation No. 121 states in paragraph 3 that ILO members should grant benefits to ‘certain categories of persons working without pay’ including trainees and volunteers. Generally, however, the CEACR does not provide comments on ‘volunteer work’ or ‘unpaid trainees’ for example (apart from some rare case when mentioned in governments’ reports).

⁸⁷ See Owens and Stewart (n 85).

⁸⁸ International Labour Conference, 101st Session (2012), Report V para 188 and ‘Resolution and conclusions – The youth employment crisis: A call for action’ para 24.

⁸⁹ *ibid.*

⁹⁰ Currently the topic of ‘apprenticeships’ is on the agenda of the ILC for standard setting (2021 and 2022) and the exact scope of the new standard remains to be seen. This has been decided following the recommendation of the Tripartite Working Group of the Standards Review Mechanism.

4.2 Housework and unpaid care work

Housework is not fully captured by statistics, is generally not recognized as work, and is undervalued by policy makers.⁹¹ Furthermore, it is mostly unregulated (these activities are usually outside the scope of national labour, social and security law and, for example, social benefits such as pensions are non-existent, or minimal) and is typically not considered to be 'work'. Moreover, undertaking housework very often prevents access to training, education, paid work and decent work, and has a considerable impact on levels of discrimination and poverty. Housework, and the gendered attribution of housework, is a root cause of many international labour standards and human rights violations. However, it is well established that society could simply not function without housework and care work.⁹² The new ICLS definition should contribute to highlight and better measure its relevance. Housework poses some additional regulatory issues as, contrary to traineeship and most volunteering, it takes place within the household, and contrary to domestic work under Convention No. 189, there is no employment relationship.

Efforts to regulate housework are certainly by no means new and the matter of minimum wages for housework is said to have been raised at the Peace Conference of 1919 that led to the creation of the ILO.⁹³ Such attempts have, however, not been very successful within the Organization. Convention No. 20 (an outdated convention) included employers' work within its scope. Conversely, it explicitly excluded from its scope persons making bread for their household or for own consumption (article 1(2)). Such work did not seem appropriate for regulation at the time. Similarly, family responsibilities (i.e. housework) are explicitly considered to be outside 'work' and not an 'economic activity' in some international labour

⁹¹ For instance, Magdalena Sepúlveda Carmona and Kate Donald, 'What does care have to do with human rights? Analysing the impact on women's rights and gender equality' (2014) 22 *Gender and Development*, 442; Supiot (n 2).

⁹² For a definition of housework, see *ABC of women workers' rights and gender equality* (ILO 2007) 107 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf>. For a general account from an economic perspective, see Hirway (n 49). For a labour law perspective, see Conaghan and Rittich (n 10) and Fudge (n 36). For an international human rights perspective, see Sepúlveda Carmona and Donald (n 91).

⁹³ ILO, *Women's Empowerment: 90 years of action*, undated brochure <http://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_105088.pdf>.

standards. Indeed, the Workers with Family Responsibilities Convention, 1981 (No. 156) is concerned by the limitations housework and care work pose with regards to entering the labour market. It does recognize the limitations that housework and care work pose, but not intrinsically, and does not consider these types of work as in need of more attention.⁹⁴

Despite women's unpaid work being on the post-Beijing agenda, for example, it has remained neglected by government policies, mainstream development and human rights debates.⁹⁵ However, the fact that it has been recognized as work by the ICLS and the fact that it has been recognized in the SDGs⁹⁶ are steps in the right direction. There is certainly space within the ILO's mandate to deal further with such work, especially since the perception that housework and care work is work is slowly getting more widespread. A wider legal approach to the concept of work is precisely what Trebilcock, Beneria, Conaghan and Rittich are arguing is necessary in order to tackle the structural causes of gender inequality.⁹⁷

VI. By way of conclusion: Undefined at work

Fundamental notions are often left undefined. The absence of a legal definition of work in international labour law is maybe not that surprising considering that, for example, notions such as peace, security, and justice, describing the basic objectives of international law, are also (purposefully) left undefined.⁹⁸ The key to their success lies, well beyond the abstract

⁹⁴ International labour Conference, 78th Session (1991), Resolution concerning ILO action for women workers, 1991. In this resolution, the Conference stressed 'that the unequal sharing of family responsibilities and the lack of adequate child-care facilities and other measures to enable women to fully participate in the labour force are major barriers to full equality for women at Work'.

⁹⁵ Sepúlveda Carmona and Donald (n 91) 442.

⁹⁶ '5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate'.

⁹⁷ Conaghan and Rittich (n 10) 15 and Anne Trebilcock, 'Labour issues and the Convention on the Elimination of All Forms of Discrimination against Women' in Adriana Di Stefano (ed), *Gender issues and international legal standards. Contemporary Perspectives* (Ed.it 2010) 140.

⁹⁸ Martti Koskenniemi, 'What is international law for?' in Malcom D. Evans (ed), *International Law* (Oxford UP 2010).

plane, in their adaptive application to address the challenges of the realities they need to confront. Similarly, other key notions of the ILO such as ‘social justice’ or ‘fundamental principles and rights at work’ are also undefined. The broad notion of work underpinning the ILO comes in fact as a blessing, as it offers the possibility to adapt its work and its international labour standards to both the changing world of work and the changing perceptions of what work is. The ILO framework is broad enough to include all types of work, covering not only paid, but also unpaid work, not only dependent, but also independent work, and importantly, is malleable to include new understandings of work. This is a key trait reflected in international labour standards and a comparative structural advantage of international labour law – differing in that regard from national labour law, which is often tied to precise legal constructs, such as the employment relationship.⁹⁹

It is not enough to have an adaptable notion of work and a broad framework however – it is of course necessary for the ILO to put it at work within its mandate. This brings to the forefront the need (or, rather, the constitutional obligation) for the ILO’s constituents to constantly assess through the different institutional processes available,¹⁰⁰ and within the political constraints that tripartism brings,¹⁰¹ whether existing legal instruments respond to the challenges to achieve the equally broad axiological notion of social justice and, in that regard, be mindful of the different forms that work may take. This is not new – the ILO is constantly facing the need to adapt, to create new or revise existing standards, or more simply to ensure that their guarantees are, in law and in practice, covering all those concerned.

⁹⁹ Attempts to recast national labour law under broader paradigms should be acknowledged in this regard. See, in particular, Langille, arguing for a liberation from ‘a slavish devotion to the concepts that were essential to labor law under the old narrative -the concepts of employee, employer, and the contract of employment’; Brian Langille, ‘Take these chains from my heart and set me free: How labor law theory drives segmentation of workers’ rights’ (2015) 36 *Comparative Labour Law and Policy Journal* 278.

¹⁰⁰ In particular, the Tripartite Working Group of the Standards Review Mechanism provides a valuable contribution as it reviews international labour standards with a view to making recommendations to the Governing Body on ‘the status of the standards examined, including up-to-date standards, standards in need of revision, outdated standards, and possible other classifications’; GB.325/LILS/3 para 9.

¹⁰¹ Claire La Hovary, ‘A Challenging Ménage à Trois: Tripartism in the International Labour Organization’ (2015) 12 *International Organization Law Review* 204.

Yet, the fast pace of change in today's labour landscape only emphasizes its importance; certainly, it should not come as a surprise that one of the main themes of the ILO's centenary is 'the future of work'. In relation to such an enterprise, this paper questions the views of those who all too easily dismiss the body of labour standards as tied to old paradigms, and highlights not only the broad but also the flexible nature of the ILO's focus, noting that the conceptual foundation of international labour standards can respond to both old and new realities.

Linking law to statistics, this article argues that sound statistics are essential not only to provide factual evidence on the impact of and compliance with labour standards, but also to critically assess whether the law responds adequately to evolving challenges of the reality it seeks to address. The comprehensive definition of work offered by the ICLS can thus inspire further reflection on the scope of international labour standards as well as, importantly, the scope of national laws. This definition, which includes five different forms of work activities – own use production work, employment work, unpaid trainee work, volunteer work, and other (unpaid) work activities – is taken by this article as an opportunity to reflect both on the ILO's comprehensive conceptual net, well beyond employment, and on the opportunity to broaden its regulation through international labour standards to different notions of work.

In some areas (e.g. forced labour or freedom of association) the paper has shown how the broad approach to work reflected in relevant legal instruments enables them to adapt and cover the widest variety of its forms and thus respond to emerging needs and new practices. At the same time the paper has acknowledged that ensuring their effective application remains key: the often general norms contained in international labour standards need to be given effect at the national level in a way that reflects the particularities of the forms of work concerned, as noted above in relation to collective bargaining by the self-employed.

In other areas the paper has relied on the new ICLS definition to shed light on forms of work that may have received less attention from international labour standards, with a view to encouraging reflection on the suitability of their coverage. A step was taken when adopting a convention on domestic work – the Domestic Workers Convention, 2011 (No. 189) – carried out within an employment relationship; another much larger step could

be taken to consider the need for standards on housework and unpaid care work, including taking into account the impact they have on access to other forms of work. Of course, this issue should also be addressed in a broader human rights framework,¹⁰² but this does not mean that action should not be taken within the ILO. Similarly, the need to address traineeships, whether paid or unpaid, or volunteer work has also been raised in this paper. All of these forms of work are increasing in times of economic crisis, which confirms the need to increase attention to them.

Within this broad notion of work, the importance of paid work in general, and of the employment relationship and the protections it can afford in particular, should of course not be minimized. Most people need paid work to survive. The assessment of whether standards provide an adequate coverage to the different forms of work of course also pertains to paid work in its different forms and shifting developments.¹⁰³ The challenges faced by traditional forms of paid work confirm this paper's central thesis: at a time when standard dependant form of work are stated to be under pressure, or in the process of disappearing,¹⁰⁴ it is vital to ensure that mechanisms to protect and empower workers are grounded in a broad notion of work that can account for its changing forms.

Conceptually, work should be viewed as a complex phenomenon, beyond any particular form or contractual arrangement, to more widely encompass the human dimension of economic activities in its varied ramifications. Coupling the ICLS activity-based definition with such understanding of work – as the human dimension or conscience of the economy (the human in the *oikos*) – falls squarely within the constitutional purposes of the ILO, as set out in its Declaration of Philadelphia.¹⁰⁵ Going back to our initial quote¹⁰⁶ – speculating whether international labour standards would or should follow us from birth to death – the broad approach and malleability identified in this paper does not entail that international

¹⁰² Sepúlveda Carmona and Donald (n 91) 445.

¹⁰³ See, for instance, the Conclusions of the ILO Meeting of Experts on Non-standard forms of Employment, in particular para 8 <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_354090.pdf>.

¹⁰⁴ Stone and Arthurs (n 6) 1.

¹⁰⁵ Declaration of Philadelphia, section II (a).

¹⁰⁶ International Labour Conference (n 11).

labour standards should regulate every single aspect of human life affected by economic activity. The feasibility of regulation and the choice of focus are in the end, political matters, subject to many variables, including the make-up and agendas of the ILO's constituency. From a legal conceptual perspective, however, the ILO is endowed with an ambitious mandate and a flexible toolbox that do not only allow but call for international labour standards to continuously critically assess social and economic realities – with the assistance of statistics and other disciplines – and devise instruments equipped with notions capable to adaptively and creatively strive for social justice.

The Interpretation of International Labour Conventions and the Principle of ‘Systemic Integration’ – The Way Forward for an ILO Tribunal

Thomas Lieby

I. Introduction

In a 2018 report, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) asserted that ‘the interpretation of the ILO Convention [No. 169] could be aligned with the emerging consensus of human rights bodies on free, prior and informed consent, as imposing both procedural and substantive requirements, including the emerging consensus in international law that large-scale development projects affecting indigenous peoples will often trigger free, prior and informed consent requirements’.¹ In other words, the EMRIP called upon the ILO and its member States to take into account the evolution of general international law on indigenous peoples, notably the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP), to interpret a treaty adopted by the International Labour Conference (ILC) in 1989, the Indigenous and Tribal Peoples Convention, 1989 (No. 169).²

¹ EMRIP, *Free, prior and informed consent: a human rights-based approach* (2018) A/HRC/39/62 para 48.

² See also Advice No. 11, para 19, annexed to the report (n 1) which reads as follows: ‘States that have ratified Indigenous and Tribal Peoples Convention, 1989 (No. 169) should interpret and apply its provisions on consultation and free, prior and informed consent in accordance with other relevant standards, notably the United Nations Declaration on the Rights of Indigenous Peoples and emerging jurisprudence, including by regional human rights mechanisms’.

In EMRIP's view, the UNDRIP and Convention No. 169 are complementary and mutually supportive.³ The latter cannot be interpreted in isolation from the former and other international instruments.⁴ Relying on the Human Rights Committee's stance on the evolving nature of the International Covenant on Civil and Political Rights, whereby an instrument should be interpreted in context and in the light of present-day conditions, EMRIP advocated for a similar approach to be applied to Convention No. 169 in order to broaden an interpretation that some may regard as overly narrow.⁵

The divergence of interpretation between the two entities relates to the exact scope and meaning of the duty to consult indigenous peoples when considering legislative or administrative measures which may affect them directly. Within the ILO, article 6 of Convention No. 169 conceptualizes consent as the objective of consultations.⁶ For the EMRIP, indigenous peoples' consent is the required outcome of consultations.

Beyond the specific disagreement, the position taken by another entity of the UN system raises the essential question of the coherence of interpretations of the same rule given by different bodies and the systemic integration of ILO norms within public international law – or, in the absence thereof, of a risk of fragmentation – as enshrined in article 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT).

Despite the evident stakes at hand, this question may have sometimes been left out of the ILO normative discourse and activities, at least from the angle of interpretation. Article 31.3(c) of the VCLT which requires, in interpreting a treaty, to take into account any relevant rules of international law applicable in the relations between the parties, has never been explicitly or clearly relied upon by the Organization. Its status in the interpretative methods applied within the ILO remains unclear. This may be due to the fact that, arguably, none of the bodies called to interpret ILO conventions on a regular basis have the mandate to look beyond a specific instrument

³ Report (n 1) para 46.

⁴ *ibid* para 48.

⁵ *ibid* para 47.

⁶ Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), International Labour Conference 110th Session (2011), Report III (Part 1A) 783.

and its travaux préparatoires and adopt a systemic approach of interpretation. At least none of the bodies established thus far. The possible institution of a new tribunal – an ILO in-house tribunal under article 37(2) of the ILO Constitution – could change the situation. At the very least, it would put the question on the table.

Before looking into this matter, and without delving in details into the ILO interpretative framework, including the role and competency of each of those actors called to interpret ILO standards and the controversies that arose in their respect,⁷ it may be useful to recall some of its features. From the very beginning, the ILO has been faced with the complex and multifaceted issue of treaty interpretation. The founders of the Organization at the Peace Conference, the Office (the ILO secretariat), and the constituents have set up over the years a sophisticated machinery for the interpretation of the treaties adopted by the ILC, i.e. international labour conventions. While it is ‘an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it’,⁸ such principle does not entail that parties to a treaty ultimately control its interpretation.⁹ In practice, and especially in the ILO, many actors had to become fluent in the art of hermeneutics.

Initially, the only interpretation procedure was provided for in article 423 of the Treaty of Versailles according to which any question or dispute relating to the interpretation of conventions adopted by the ILO was to be referred for decision to the Permanent Court of International Justice (PCIJ). This procedure¹⁰ was used only once – albeit considered

⁷ These have already been the subject of a considerable literature. For recent publications, see for instance, Francis Maupain, ‘L’interprétation des conventions internationales du travail’ in *Mélanges en l’honneur de Nicolas Valticos: droit et justice* (Pédone 1999); Francis Maupain, ‘The ILO Regular Supervisory System: A Model in Crisis?’ (2013) 10 *International Organizations Law Review* 117; Anne Trebilcock, ‘The International Labour Organization’ in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and contextual perspectives on the modern law of treaties* (Cambridge UP 2018) 848.

⁸ *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ, Series B, No. 8, 37.

⁹ Richard Gardiner, *Treaty interpretation* (Oxford UP 2008) 109.

¹⁰ The Governing Body of the International Labour Office had to request the Council of the League of Nations to ask the PCIJ for an advisory opinion relating to the interpretation of a convention. Following transmission of the request by the ILO Director-General to

on several occasions – with respect to the interpretation of a convention,¹¹ when the PCIJ was asked to determine whether the Night Work (Women) Convention, 1919 (No. 4) applied to women who held positions of supervision or management and were not ordinarily engaged in manual work.¹²

In parallel, a dense practice has developed. The first in line was the Office on the basis of article 10 of the ILO Constitution which bestows upon it the function of collecting and distributing information on all subjects relating to the international adjustment of conditions of industrial life and labour. Faced with the difficulties conveyed by the constituents in interpreting certain provisions of ILO standards, the Office has issued an important number of opinions subject to the customary reservation that the ILO Constitution confers no special competence upon it to provide an authoritative interpretation of international labour conventions and that its informal opinions are without prejudice to any position that the ILO's supervisory bodies might take with respect to the subjects at hand. Due to its technical capacity to provide interpretations and settle most difficulties,¹³ the Office has developed what Jenks described, as early as 1939, as a considerable 'jurisprudence' of Office opinions upon disputed points of interpretation.¹⁴ Undeniably, these interpretations had greater weight when they were published in the Official Bulletin and submitted to the Governing Body, practices that were both discontinued,¹⁵ with the exception of Office opinions concerning the interpretation of the Maritime Labour Convention, 2006 (MLC, 2006), in the form of anonymized

the League of Nations' Secretary-General, the matter was placed on the agenda of the next session of the Council which could, through a resolution, authorize the Secretary-General to submit a request to the PCIJ for an advisory opinion.

¹¹ The ILO had recourse to the PCIJ's advisory function on six occasions, five of them for questions relating to the interpretation of the ILO Constitution.

¹² *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, PCIJ, Series A/B, No. 50, 366.

¹³ ILO, Article 37, paragraph 2 of the Constitution and the Interpretation of International Labour Conventions (1993) GB.256/SC/2/2 para 17.

¹⁴ C. Wilfred Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office' (1939) 20 *British Yearbook of International Law* 133.

¹⁵ No Office interpretation has been published in the Official Bulletin since 2002. Their submission to the Governing Body was discontinued in the 1980s.

frequently asked questions.¹⁶ Yet, they still represent an important function for the Organization and its constituents.

This brings us to the various bodies of the supervisory system which are also called to take positions on the interpretation of international labour conventions. In a nutshell, none of them has the formal mandate of interpreting conventions. However, it is generally admitted that supervision entails some measure of interpretation.¹⁷ In considering and expressing their views on the content and meaning of the provisions of conventions and in determining their legal scope, these bodies have sometimes no choice but to interpret a particular provision. This position was taken by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which also considered that if States did not avail themselves of the opportunity to contest their interpretation of a provision through the available mechanisms, that interpretation was 'to be considered as valid and generally recognized'.¹⁸ As this did not come without contestation, the CEACR defended its position on several occasions, explaining that this approach was indispensable to the principles of legality and legal certainty required for the proper functioning of the ILO.¹⁹ As a result of a major institutional crisis on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), evoked below, the CEACR has recently softened its position. In its recent reports, it states that in undertaking an impartial and technical analysis of how the conventions are applied in law and practice by member States, it must determine the legal scope, content and meaning of the provisions of the conventions.²⁰ While reaffirming its interpretative function, the CEACR

¹⁶ Maritime Labour Convention (MLC, 2006), Frequently Asked Questions (4th edn ILO 2015) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_238010.pdf>.

¹⁷ Report of the CEACR, International Labour Conference 54th Session (1970), Report III (Part 4A) 11. More recently, see the Workers' and Employers' recognition of the CEACR's latest description of its mandate, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, outcome document, 2.

¹⁸ Report of the CEACR, International Labour Conference 77th Session (1990), Report III (Part 4A) 8.

¹⁹ *ibid.*

²⁰ Report of the CEACR, International Labour Conference 107th Session (2018), Report III (Part A) 10.

presently makes it explicit that its recommendations are non-binding, being intended to guide the actions of national authorities.²¹

Without going into more details in this paper on all the other bodies of the supervisory system, such as the Conference Committee on the Application of Standards, the Committee on Freedom of Association, tripartite committees set up to examine representations made under article 24 of the Constitution and Commissions of Inquiry appointed to consider complaints lodged under article 26, it may be safely argued that some degree of interpretation is also inherent to the fulfilment of their respective mandates.

These practices have emerged without a formal amendment to the Constitution, or ILC decision formally conferring an interpretative mandate, and have all been contested to varying degrees. The institution of an additional formal procedure for the interpretation of conventions was for the first time considered in 1930. Discussions were, however, inconclusive. At the time, the Committee set up by the ILC to examine reports submitted under article 408 of the Treaty of Versailles – what would become the CEACR – drew attention to a certain number of divergences in the interpretation of conventions from different States.²² The Office noted that diverging or arbitrary interpretations would menace the attainment of the general standards of legislation which the conventions are intended to promote in the States which ratify them.²³ While the Office expressed regrets that recourse to the PCIJ had not been more frequent, it acknowledged the fact that requests could only be made in cases of major importance.²⁴ It appeared appropriate to establish an intermediate mechanism to handle cases requiring an authoritative interpretation without them being so important so as to warrant referral to the Court.

The institution of an in-house tribunal, an additional constitutional procedure,²⁵ was only made possible fifteen years later with a constitutional

²¹ *ibid.*

²² Office Note on the possibility of instituting a special procedure for the interpretation of conventions, submitted to the Standing Orders Committee on 15 October 1931, 1.

²³ *ibid.* 2.

²⁴ *ibid.* 3.

²⁵ The first procedure is established in the ILO Constitution, article 37(1), which reads as follows: 'Any question or dispute relating to the interpretation of this Constitution or of

amendment adopted by the ILC²⁶ following a proposal of the Committee on Constitutional Questions.²⁷ As a result, a second paragraph was added to article 37. It reads as follows:

Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.

The views on the function and benefits of the 1946 constitutional reform have changed over time. The adoption of article 37(2) first occurred in a context where the process of referral of interpretation issues to the ICJ was not settled and hence uncertain.²⁸ The idea was to ensure that the Governing Body could set up a tribunal for the expeditious settlement of questions relating to the interpretations of an ILO convention²⁹ irrespective of the modalities of access to the future World Court, or whether the ILO would have access to it altogether. Since then, as access to the ICJ was secured,³⁰ the tribunal has been and continues to be seen by its proponents as a means to complete the judicial interpretative framework of the ILO with a view to improving the ability of the Organization to face future difficulties of interpretation.³¹

any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice’.

²⁶ International Labour Conference, 29th Session (1946), Records of Proceedings 378.

²⁷ *ibid*, Report of the Committee on Constitutional questions, Appendix VI, 355.

²⁸ Minutes of the 21st Sitting of the Conference Delegation on Constitutional Questions, 5 February 1946, Official Bulletin (1946) vol XXVII, No. 3, 729.

²⁹ International Labour Conference 27th Session (1945), Report IV Part 1, Relationship of the ILO to other international bodies, 107.

³⁰ Article IX of the Agreement between the United Nations and the International Labour Organization authorizes the ILO to request advisory opinions to the ICJ on legal questions arising within the scope of its activities.

³¹ Maupain (n 7) 568.

If some concerns were raised by the constituents on the impact of a new in-house tribunal on the supervisory system, and particularly the risk of weakening the CEACR,³² the tribunal has been viewed as a means to increase legal certainty, relieve the workload of the supervisory bodies, create an 'in-between solution' offering an easier access to constituents than what is offered by the ICJ while still permitting the delivery of authoritative interpretations and to increase the visibility of ILO standards outside of the Organization.³³

Since 1946, the modalities of the institution of the tribunal have been extensively discussed, both institutionally and academically. A number of issues have already been considered, and in particular the number and selection of judges, permanent or ad hoc character, right to bring cases, right to intervene, procedure, effects of decisions, relationship with the supervisory system or even the possibility of instituting an interlocutory appeal system with other jurisdictions either national or international.³⁴ A draft statute has even been proposed by the Office in 2014.³⁵ The Governing Body decided to defer further consideration of the matter³⁶ until recently, when it requested a new study on the elements and conditions for the operation of an independent body under article 37(2), in considering further steps to ensure legal certainty.³⁷

The purpose of the present article is not to come back on the debates that already took place on the institution of a tribunal, and the potential risks and advantages associated with it, especially when one considers that the protracted discussions on the matter have had no outcome so far. These debates may take place again in the governance organs of the ILO. This

³² *ibid* 582.

³³ The implementation of article 37(2) was discussed in particular between 2009 and 2011 through informal means such as informal consultations, non-papers, informal reports and explanatory papers. For the most recent view on the matter, with a focus on the interpretation of ILO standards in the framework of trade, Justin Fraterman, 'Article 37(2) of the ILO Constitution: Can an ILO Interpretive Tribunal End the Hegemony of International Trade Law?' (2011) 42 *Georgetown Journal of International Law* 879.

³⁴ For the most recent discussion, see ILO, Standards initiative: follow-up to the 2012 ILC Committee on the Application of Standards (2014) GB.322/INS/5 and the Minutes of the related discussion, GB.322/PV 17-45.

³⁵ *ibid* GB.322/INS/5 appendix 2.

³⁶ GB.322/PV (n 34) para 209.

³⁷ GB.335/INS/PV para 304.

being said, the Governing Body's request begs a new question, in light of evolving circumstances, that of the impact and role of a possible tribunal on the place of international labour standards in public international law. As mentioned above, this has somewhat been absent of normative discussions.

It is well-accepted that interpretation has a key role to play for the coherence, integration and efficacy of the ILO supervisory system. Internal normative coherence is indisputably essential. External or systemic coherence is as crucial. To come back on the recent debates on the interpretation of Convention No. 169, clarity as regards the scope and meaning of the convention's provisions is fundamental for member States to ensure their effective application. A legislation adopted by a member State in implementation of Convention No. 169 could be very well be declared consistent with its obligations by the ILO and unlawful or at least insufficient under international law by other human rights bodies. When one considers the Governing Body's intention to further legal certainty within the Organization as well as to improve system-wide coherence and the visibility of ILO positions,³⁸ the relationship between international labour standards and public international law cannot be ignored.

What would the role and impact of a new in-house tribunal in this regard? The first question that comes to mind concerns the implications of a new tribunal on the international legal system. The second, undeniably more sensitive in the ILO context, is the extent to which that tribunal will take into account rules of international law shaped outside the ILO's 'world parliament of labour'.

II. A new judicial institution in the system, further fragmentation or prospect of coherence?

Unquestionably, a tribunal mandated to render authoritative decisions on the interpretation of ILO conventions would strengthen internal normative coherence. Could it weaken systemic coherence? The institution of an ILO in-house tribunal would also mean an additional tribunal for the

³⁸ ILO, Strategic plan for engagement with United Nations system bodies and relevant regional organizations regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), GB.335/POL/2.

international legal order.³⁹ From a systemic point of view, the creation of specialized tribunals should be welcomed. The complexification of international law creates a need for specialized tribunals to accommodate normative diversification and specialization.⁴⁰ Additionally, their establishment improves efficiency by helping in the implementation of obligations and by generating a more refined and precise system of interpretation of norms.⁴¹ By broadening the justiciability of international disputes, the creation of courts and tribunals further reduces and eliminates areas outside any control by independent entities.⁴²

At the same time, the multiplication of courts and tribunals may create a risk of fragmentation of the interpretation of norms,⁴³ that is the emergence of diverging interpretations of the same rule depending on which body interprets it, in which context it is interpreted, and according to which methods. A recent case in point is offered by the conflicting views on the scope and meaning of the duty to consult under Convention No. 169.

Consequently, this phenomenon also generates a need for a common interpretation of the overarching principles by those tribunals in order to preserve systemic unity.⁴⁴ In this regard, the ICJ, which to some extent fulfils a constitutional role within the UN system,⁴⁵ has a central role to play in the new structure of international law. Its advisory function is crucial.⁴⁶

In the case of the ILO, the ICJ may even have a greater role to play. Its guardianship of systemic unity is magnified by article 37(1) of the

³⁹ For an overview of the international judicial system, see Project on International Courts and Tribunals, 'The International Judiciary in Context: A Synoptic Chart', Version 3.0 (2004) <http://cesarero.com/wp-content/uploads/2015/06/synop_c4.pdf>.

⁴⁰ Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' in *Symposium The proliferation of International Tribunals: Piecing Together the Puzzle* (1999) 31 NYU Journal of International Law and Politics 926.

⁴¹ Pierre-Marie Dupuy, 'The Danger of fragmentation or unification of the international legal system and the International Court of Justice' in *Symposium*, *ibid* 795-96.

⁴² *ibid*.

⁴³ *ibid* 792.

⁴⁴ Abi-Saab (n 40) 926.

⁴⁵ Report on the conclusions, Outcome of the celebrations of the Centennial of the First International Peace Conference (1999), A/54/381, para 113.

⁴⁶ Laurence Boisson de Chazournes, 'Advisory Opinions and Common Interests of Humankind' in Laurence Boisson de Chazournes et al (eds), *International Organizations and International Dispute Settlement, Trends and Prospects* (Martinus Nijhoff Publishers 2002) 112.

Constitution which not only permits the Court to pronounce itself on overarching principles but also on virtually every detailed provision of an international labour convention.

In 1919, the Commission on International Labour Legislation was concerned by the possible links between the nascent ILO and World Court.⁴⁷ The question of coherence was already in the minds of the drafters of the ILO Constitution for whom it seemed apposite to establish links between general international law and international social law – links which materialized among others in article 26 of the PCIJ Statute. At its origin was a British proposal to set up a special Chamber of the Court for labour-related cases, consisting of judges appointed for three years. This was to ensure that judges would acquire special competences in the questions concerned. The Court could moreover maintain continuity in its jurisprudence.⁴⁸ A parallel can be drawn with a *Cour de cassation* which permits unity through an integrated judicial system and specialization owing to special chambers, such as a social chamber. Article 26 is still in existence in the ICJ Statute, and allows for the formation of a chamber composed of three or more judges for dealing with labour cases.

With the introduction of article 37(2), the ILO Constitution instituted a second level of jurisdiction over interpretation disputes or questions. Any applicable judgment or advisory opinion of the International Court of Justice shall indeed be binding upon an in-house tribunal, thereby establishing a hierarchy between the two judicial mechanisms and a clear prospect for systemic unity. Paragraph 2 leaves open the possibility to appeal to the ICJ to challenge the decisions of the tribunal.⁴⁹ Perhaps, the institution of a tribunal and the cases that would come with it could lead the ICJ to be seized from time to time by the Governing Body on the request of constituents dissatisfied with an interpretation rendered by the tribunal.⁵⁰

⁴⁷ Anne-Marie La Rosa, 'Links between the ILO and the ICJ: A Less than Perfect Match' in Laurence Boisson de Chazournes, *ibid* 120.

⁴⁸ ILO Official Bulletin (1920) II, No. 17, 2.

⁴⁹ That said, it should be noted that nothing would compel the Governing Body to seize the tribunal instead of going to the ICJ in the first place.

⁵⁰ The lack of interpretation requests to the ICJ is all the more striking when one considers the impressive development of the body of norms. Maupain (n 7) 568.

In the case of Convention No. 169, a ruling of the ICJ would settle the divergences once and for all between the EMRIP and the ILO.

This system is not entirely foreign to the international legal system. In his 1939 course at The Hague, Jenks relied on article 13 of the 1921 Statute on Freedom of Transit⁵¹ and on articles 35 and 36 of the Convention on the International Regime of Railways,⁵² which established the jurisdiction of both technical bodies and the PCIJ over disputes relating to those instruments, without however establishing a hierarchy. Technical questions would in principle be resolved by a technical body when more general questions of interpretation would be left to the World Court. Jenks called for reserving the last word on all questions of which may have an impact on the *droit des gens* to be left to the PCIJ as this would contribute to maintain the unity of the international jurisprudence with regards to the interpretation of multilateral agreements.⁵³

The proper integration of an international tribunal within the international legal order is influenced by the behaviour of the relevant legal actors and in particular organs of international organizations when creating tribunals in the exercise of their constitutional powers. They must be cognizant of the objective and seize all opportunities to inch the process in the direction of unity.⁵⁴ Jenks' stance on systemic unity may very well explain why article 37(2) was drafted as is. While there is usually no hierarchy between specialized tribunals and the ICJ for the interpretation of conventions, the ILO tribunal would on its part be bound by the jurisprudence of the ICJ.

In light of the foregoing, it appears that implementing article 37(2) would not in itself create a risk of fragmentation. It may on the contrary provide an opportunity for coherence. Beyond possible appeals to the ICJ which, in all likelihood, will not be mushrooming, a lot will depend on the mandate given to the tribunal and the means of interpretation it will be able to rely upon, especially article 31.3(c) of the VCLT.

⁵¹ Convention and Statute on Freedom of Transit, Barcelona (1921) LNTS vol 7, 11.

⁵² Convention on the International Regime of Railways (1923) LNTS vol 47, 55.

⁵³ C. Wilfred Jenks, 'Les instruments internationaux à caractère collectif' (1939) *Recueil des cours* 509.

⁵⁴ *Abi-Saab* (n 40) 927.

III. Coherence through interpretation, will the tribunal have recourse to article 31.3(c)?

1. *What is article 31.3(c)?*

Before looking into its application in the context of the ILO, a brief overview of article 31.3(c) may be useful. This article provides that a treaty shall be interpreted taking into account any relevant rules of international law applicable in the relations between the parties.

It embodies the principle of systemic integration of law which rests upon the premise that a treaty is not concluded nor does it produce its effects *in vacuo juris* but in an existing system.⁵⁵ A treaty is a living instrument interacting with the evolutions of a system composed of other living instruments.⁵⁶ Article 31.3(c) also signifies that no treaty-regime is self-contained in the sense that the application of general international law would be generally excluded.⁵⁷ The International Law Commission, in its report on fragmentation, explained that the only – albeit essential – point was that ‘the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind’.⁵⁸ Article 31.3(c) requires ‘the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness’.⁵⁹ Some authors went further so as to qualify article 31.3(c)’s principle of systemic integration within the international legal system as having the status of a constitutional norm, a ‘master-key’ of the international legal system.⁶⁰ Others have envisaged article 31.3(c) as a tool for the defragmentation of international law.⁶¹

⁵⁵ Giovanni Distefano, ‘Les techniques interprétatives de la norme internationale’ (2011) 115 *Revue Générale du Droit International Public* 383.

⁵⁶ *ibid* 384.

⁵⁷ International Law Commission, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law* (2006) A/CN.4/L.682. See also Nicolas Valticos, ‘Pluralité des ordres juridiques internationaux et unité du droit international’ in Jerzy Makarczyk (ed), *Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 302.

⁵⁸ International Law Commission, *ibid* 211.

⁵⁹ *ibid*.

⁶⁰ Campbell MacLachlan, ‘The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 280–81.

⁶¹ Anne van Aaken, ‘Defragmentation of Public International Law through Interpretation: A Methodological Proposal’ (2009) 16 *Indiana Journal of Global Studies* 483.

In practice, this article covers all sources of international law. In addition to treaties applicable between the parties, account should also be taken of customary law and general principles. One must probably add the interpretations already given by third parties.⁶² Those rules must be both relevant and applicable in the relations between the parties. Article 31.3(c) is unfortunately silent on a number of issues. In particular, it does not specify to what extent the membership of a treaty must be similar to that of the treaty being interpreted in order to be taken into account. Nor does it state whether the applicable rules of international law are those in existence when the treaty in question was concluded or if rules arising at a later stage can also be taken into account. The International Law Commission has analyzed these two essential aspects of article 31.3(c) that will feed into the contemporary challenges faced by the ILO.

On the first point, the Commission has highlighted the unlikelihood of a precise congruence in the membership of multilateral conventions. Requiring that all parties to a convention being interpreted have also ratified another convention to take the latter into account would defeat the purpose of the article, at least with regards to conventional norms, as they would almost never be taken into account. The most successful instruments, paradoxically, would be entirely isolated from the rest of international law.⁶³ On the contrary, it is more sensible to assess the implicit acceptance or tolerance by the other parties of a treaty upon which an interpreter considers relying.⁶⁴ As the Commission pointed out, it would allow to determine how treaty notions or concepts are the object of a wide enough common understanding, irrespective of whether they are contained in instruments with an identical membership.⁶⁵

On the second point, an earlier draft of the articles on the law of treaties, then draft article 56, presented by H. Waldock, provided that only the rules in existence at the time of the adoption of a treaty could be

⁶² Denis Alland, 'L'interprétation du droit international public' (2014) 362 *Recueil des cours* 172.

⁶³ International Law Commission (n 57) 236.

⁶⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge UP 2003) 257-263.

⁶⁵ International Law Commission (n 57) 239.

taken into account for the purpose of interpretation.⁶⁶ This mention has in the end been left out of the VCLT. Two conclusions follow from this decision. The first is a practical one. It can reasonably be argued that subsequent rules can now be taken into account. Otherwise the drafters of the VCLT would have left an explicit reference to ensure the static character of interpretation. The second concerns legal theory. As pointed out by the Commission, views about the meaning and application of a rule develop in accordance with the passing of time, the accumulation of experience and new information and novel circumstances. In sum, 'no legal relationship can remain unaffected by time'.⁶⁷ The evolution of international law and international organizations constitute a phenomenon which may call for a systemic, evolving, outlook of international rules.⁶⁸

This principle was put almost a century ago by Max Huber as follows:

the same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.⁶⁹

Now, this does not mean that subsequent norms should systematically be taken into account. There cannot be any hard and fast rule about which rule should and should not be included in the interpretative process. In the end, this question should be left to the interpreter who can, for instance, look at the intention of the drafters who may have wished to establish a static or evolving norm.⁷⁰ In the context of the ILO, the Constitution's wording is broad enough in this regard. 'Any dispute or question relating to the interpretation of a Convention' constitutes a rather large subject-matter which could include a question on the intention of the ILC regarding the evolutionary character of a convention. It is not unusual in this regard to hear delegates opposing the inclusion of a time-bound instrument in a standard, to allow for subsequent developments to be taken into account.

⁶⁶ Yearbook of the International Law Commission (1964) vol II, 8-9.

⁶⁷ International Law Commission (n 57) 241.

⁶⁸ Valticos (n 57) 203.

⁶⁹ *Island of Palmas Case (Netherlands/USA)*, arbitral award of 4 April 1928, RSA vol II, 845.

⁷⁰ Distefano (n 55) 388.

The scope of article 31.3(c) has been considered as one of the most important questions that international law will have to ask itself in the coming years.⁷¹ It will certainly be an important one for a future in-house tribunal.

2. *Can an ILO in-house tribunal have recourse to article 31.3(c)?*

In its hundred years of history, the ILO has developed a certain number peculiarities in its application of the general international law on treaties. The participation of social partners, non-State actors, to treaty-making has given birth to special rules with regards to, among others, reservations to conventions, subsequent agreements, the revision or abrogation of conventions and the means of interpretation.⁷²

On the latter, the most distinct feature of ILO interpretation is the place given to the *travaux préparatoires*. In doing so, the ILO deviates from the letter of the VCLT,⁷³ pursuant to which recourse to preparatory work can only be made when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. This is allowed by article 5 of the VCLT which provides that it applies to any treaty adopted within an international organization⁷⁴ without prejudice to any relevant rules of the organization.⁷⁵ A good illustration of this practice is offered by a Director-General's Instruction of 1952

⁷¹ Alland (n 62) 176.

⁷² See on this topic, Wilfred Jenks, 'The significance for International Law of the Tripartite Character of the International Labour Organisation' (1936) 22 *Transactions of the Grotius Society* 48-81. For a more recent study, Trebilcock (n 7).

⁷³ In practice, however, recourse to preparatory work is rather common, even when the circumstances laid out in article 32 are not met; see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge UP 2013) 218.

⁷⁴ For conventions adopted before the entry into force of the VCLT, articles 31 and 32 would apply in so far as they reflect customary law. The customary nature of these rules has been for the first time affirmed by the ICJ in 1991 (*Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, para 48) and reaffirmed on several occasions (for instance, *Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, para 94).

⁷⁵ There is no express rule in the ILO legal framework establishing express derogations from the VCLT, even on questions such as the admissibility of reservations. However, the records of the United Nations Conference on the Law of Treaties show that the term 'rules' is to be construed as covering established practices of international organizations. See summary records of the plenary meetings of the Committee of the Whole (1968), Statement made by Sir Humphrey Waldock, A/CONF.39/C.1/SR.10 para. 40.

listing the preparatory work as the first element which an Office ‘interpretation’ should take into account.⁷⁶ With a view to giving greater weight to the intention of the parties, the Office uses the preparatory work to interpret a convention alongside the ordinary meaning of a term.

The CEACR has also given an account of the methods it uses. In affirming that it bore in mind all the different methods of interpreting treaties recognized under international law, and in particular under the VCLT, the CEACR has explained paying due regard to the textual meaning of the words in light of a convention’s purpose and object. In application of VCLT articles 5 and 32, it also takes into account preparatory work which it highlighted as being of particular importance in view of the tripartite nature of the Organization and the role of tripartite constituents in treaty-making.⁷⁷

Aside from the more prominent weight given to the preparatory work, the status of other means of interpretation has never properly been asserted, neither excluded nor accepted. In the event of the creation of an in-house tribunal, such clarification should be made. As explained above, the institution of a tribunal was first made possible to replace a then uncertain access to the ICJ. Since then, it has been seen as a means to complement the ILO institutional framework for the interpretation of conventions, creating a hierarchy between an in-house tribunal and the ICJ, in favour of the latter. Should the ICJ be called to rule on a judgment of the tribunal, it would only be sensible for the purpose of coherence and legal certainty that the tribunal generally applies the same means of interpretation as the ICJ,⁷⁸ and in particular article 31.3(c).

While it is sometimes contended that international tribunals are not entitled to go beyond the rules and principles enshrined in a given treaty,⁷⁹ it is very common for them to do so. In a system, a tribunal can only interpret and apply the convention which gave it jurisdiction in its normative

⁷⁶ Director-General’s Instruction No. 45 (1952) para 5(a).

⁷⁷ CEACR (n 6) para 12.

⁷⁸ The ICJ stated on several occasions that it interprets a treaty in terms of customary international law on the subject, as reflected in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. See for instance, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, 237.

⁷⁹ International Law Commission (n 57) 213-214.

environment.⁸⁰ The jurisdiction of a tribunal may be limited to particular types of disputes or disputes arising under particular treaties without by the same token limiting the scope of the law applicable in an interpretation.⁸¹ In the *Oil Platforms case* the ICJ has ruled that the application of the relevant rules of international law relating to this question formed an integral part of the task of interpretation entrusted to the Court by a 1955 treaty.⁸²

Specialized or regional judicial bodies have taken a similar stance on interpretation. The European Court of Human Rights (ECtHR) applies sources of international law, which include both treaty-based law and customary international law.⁸³ The ECtHR emphasized that it never considered the European Convention on Human Rights (ECHR) and its Protocols as the sole framework of reference for interpreting the rights and freedom enshrined in its provisions,⁸⁴ which cannot be interpreted in a vacuum but in harmony with any international law of which they form part.⁸⁵ In discharging its functions under the ECHR, the ECtHR has for instance relied upon the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁸⁶ the Universal Declaration of Human Rights,⁸⁷ the International Covenant on Civil and Political Rights,⁸⁸ the Convention on the Rights of the Child,⁸⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁹⁰ It also referred to judgments of the ICJ⁹¹ or the Inter-American Court of Human Rights,⁹² to mention but a few examples.

The World Trade Organization (WTO) Appellate Body in a famous dictum also recognized that the covered agreements ‘should not be read

⁸⁰ *ibid.*

⁸¹ *ibid.* 28.

⁸² *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, para 41.

⁸³ *Marckx v. Belgium*, App. No. 6833/74 (1979), 31 ECtHR (ser. A), para 15.

⁸⁴ *Demir and Baykara v. Turkey*, App. No. 34503/97 (2008), ECtHR, para 67.

⁸⁵ *Marguš v. Croatia*, App. No. 4455/10 (2014), ECtHR, para 129.

⁸⁶ *Selmouni v. France*, App. No. 25803/94 (1999), ECtHR, para 97.

⁸⁷ *Al-Adsani v. the United Kingdom*, App. No. 35763/97 (2001), ECtHR, para 26.

⁸⁸ *Makaratzis v. Greece*, App. No. 50385/99 (2004), ECtHR, para 28.

⁸⁹ *Sommerfeld v. Germany*, App. No. 31871/96 (2003), ECtHR, paras 37-39.

⁹⁰ *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (2010), ECtHR, paras 147-148.

⁹¹ *Cyprus v. Turkey*, App. No. 25781/94 (2001-IV), ECtHR, para 86.

⁹² *Zolotukhin v. Russia*, App. No. 14939/03 (2009), ECtHR, para 40.

in clinical isolation from public international law'.⁹³ Other international agreements⁹⁴ and customary international law⁹⁵ have been utilized to interpret them.

Is an analogous reasoning suitable in the ILO context? Due to the particular nature of the ILO, and its tripartite treaty-making, recourse to instruments of the nature referred to as part of the context in article 31.2(b), and subsequent agreements between parties to a treaty may not appear to be permissible in respect of international labour conventions. What about article 31.3(c)?

The fate of paragraph 3(c) may in the end be tied to its impact on tripartism. After all, fragmentation could be the necessary result of the ILO's unique tripartite structure. Taking into account conventions or customary rules respectively adopted or shaped by States only to interpret a convention which is the product of vigorous negotiations between the social partners and governments may raise legitimate concerns. Outside of the ILO, social partners have little bearing on the creation of international rules, even when they touch upon the mandate of the ILO. There is a risk that these norms may evolve without them and weaken the normative production of the ILO. While one should not overlook these considerations, the application of article 31.3(c) should not be discarded on their basis.

This is not to say that an in-house tribunal would override the intention of the ILC or make a norm developed outside of the ILO prevail over the provisions of an ILO convention. A primary consideration for an interpreter is the strong presumption under international law against normative conflict.⁹⁶ Norms should be interpreted together to the extent possible and – sometimes – the rights and obligations contained in a treaty may evolve as a result of the development of international law. In case of an actual and unsolvable conflict between two norms, it would not be for the tribunal to rule, as it is only mandated with disputes or questions of interpretation,

⁹³ *United States–Standards for Reformulated and Conventional Gasoline*, Appellate Body Report (1996), WT/DS2/AB/R, para 17.

⁹⁴ *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (1998) WT/DS58/AB/R, para 130.

⁹⁵ *Korea–Measures affecting Government procurement*, Panel Report (2000) WT/DS/163/R, para 7.96.

⁹⁶ International Law Commission (n 57) 25.

and not of the application of conventions. Such a conflict would be left to the law of State responsibility and general principles such as *lex posterior* or *lex specialis* as a norm adopted within the ILO would still be valid, even if it was to conflict with another norm, at least within the context of the ILO.

In any event, the intention and interests of the parties, especially of social partners, can be protected through a proper access to the tribunal, the means of interpretation being secondary in this regard.⁹⁷ Recognizing the competence of a third party for interpretation is a means to put forth and emphasize one's own interpretation, not a renunciation to the power to interpret.⁹⁸ If social partners have strong views against the evolution of a specific norm, they would be able to defend their positions before the tribunal.

In short, paragraph 3(c) of article 31 does not seem proscribed by ILO's tripartite nature. It appears that the tribunal would be entitled to apply article 31.3(c) for the interpretation of ILO conventions. But should it do so?

3. *Should an ILO in-house tribunal have recourse to article 31.3(c)?*

3.1 A normative corpus extending beyond traditional international labour law

For a century, the ILO has been adopting conventions on rather specific areas. A superficial overview of ILO's normative corpus could lead to believe that any application of general international law to the interpretation of instruments on hours of work, wages, termination of employment, night work, occupational safety and health in mines, tripartite consultations or maternity protection, to cite only a few, would be rather theoretical and would not do much for the coherence of international law. The ILO normative system cannot however be viewed as a self-contained regime.

As early as 1953, Jenks noted that the then proposed Covenant on Social and Economic Rights dealt in general terms with equal pay, conditions of work, trade union rights, social security, and maternity protection, areas which were and are still all regulated by the ILO.⁹⁹ As a matter of

⁹⁷ ILO (n 13) para 48.

⁹⁸ Alland (n 62) 117.

⁹⁹ Wilfred Jenks, 'The Conflict of Law-Making Treaties (1953) 30 British Yearbook of International Law 409-410.

fact, the question of systemic integration is far from theoretical, even when it comes to the traditional bread and butter of the ILO. A case in point is the interpretation of Convention No. 87 which was the subject of a major institutional crisis in 2014 when a disagreement arose between constituents on whether the right to strike was protected by that instrument.¹⁰⁰ In short, the right to strike is not mentioned explicitly anywhere in the convention. For some, it is implied from its articles 3, 8 and 10, protecting freedom of association and the right to organize. For others, such reading goes beyond the text and the intention of the parties. Irrespective of the outcome of the debate on the strict content of Convention No. 87, applying article 31.3(c) may have consequences on the interpretation of that convention.

Article 8, para 1(d), of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that the Parties undertake to ensure the ‘right to strike, provided that it is exercised in conformity with the laws of the particular country’. Its paragraph 3 states that nothing in the article authorizes States to take measures which would prejudice the guarantees provided for in Convention No. 87. This article clearly calls for a systemic interpretation of both instruments, which led some authors to consider that the right to strike is necessarily protected by Convention No. 87, suggesting that it would otherwise not make sense to ‘tell States that it is not permissible to fall below ILO standards on the right to strike, if the right to strike is not protected by these ILO standards in the first place’.¹⁰¹ The ICESCR has been ratified by 170 States,¹⁰² forms part of what is known as the International Bill of Human Rights, and could certainly be taken into account as a relevant instrument to interpret Convention No. 87. This case was close to being referred to the ICJ in 2014,¹⁰³ and would likely be one of the first cases to be put before an in-house tribunal. The ongoing controversy on the right to strike could even be a determinant factor for its creation.

¹⁰⁰ In general, see Janice Bellace, ‘The ILO and the right to strike’ (2014) 153 *International Labour Review* 29.

¹⁰¹ Keith D. Ewing, ‘Myth and reality of the right to strike as a “fundamental labour right”’ (2013-2) 29 *International Journal of Comparative Labour Law and Industrial Relations* 146.

¹⁰² Status at 14 August 2019 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&cmdsg_no=IV-3&chapter=4&clang=_en>.

¹⁰³ See draft resolution of the ILO Governing Body, GB.322/INS/5.

One can also refer to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), an ILO fundamental convention, which lists grounds for discrimination in its article 1. It is unnecessary to recall here the numerous instruments and mechanisms touching upon discrimination under international law. Convention No. 111 cannot be read in complete isolation from the rest of international law.

Beyond the traditional domain of labour regulation, the ILO has progressively touched upon topics usually pertaining to other areas of international law. For instance, the recently adopted Violence and Harassment Convention, 2019 (No. 190) contains the expression ‘vulnerable groups or groups in situations of vulnerability’, concepts familiar to human rights bodies. Its interpretation can certainly not be isolated from general international law on this matter. A high risk of fragmentation would otherwise emerge. In this regard, the accompanying Violence and Harassment Recommendation, 2019 (No. 206) offers explicit guidance for the interpretation of the expression which should be interpreted in accordance with applicable international labour standards and international instruments on human rights.¹⁰⁴

Another example is given by the MLC, 2006. A 2018 amendment, to enter into force shortly,¹⁰⁵ provides for the protection of seafarers’ employment agreements when they are held captive as a result of acts of piracy. According to the future Standard A2.1, para 7(a), piracy will have the same meaning as in the United Nations Convention on the Law of the Sea.

Recently, the ILO adopted the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205). Although not a convention, this instrument encompasses several areas that are highly regulated under international law, in particular international humanitarian law, international refugee law and international human rights law.¹⁰⁶ It shows the propensity of the Organization – faced with ever-increasing

¹⁰⁴ Violence and Harassment Recommendation, 2019 (No. 206), para 13.

¹⁰⁵ Amendments of 2018 to the Code of the MLC, 2006, approved by the Conference at its 107th Session (June 2018).

¹⁰⁶ It is interesting to note that paragraph 6 of the recommendation expressly states that it is without prejudice to the rights and obligations of Members under international law, in particular international humanitarian law, international refugee law and international human rights law.

interdependence among global issues – to regulate new areas. Interpretative issues requiring the use of concepts which have a life outside of the ILO will likely come in growing numbers.

Finally, some norms contained in international labour conventions also have a customary nature.¹⁰⁷ This is the case of freedom of association¹⁰⁸ and the prohibition of forced labour.¹⁰⁹ They may also be crystallizing into one, for instance non-discrimination in employment,¹¹⁰ or the prohibition of child labour.¹¹¹ Could a tribunal ignore these developments without jeopardizing the integrity of international law on these issues? Probably not.

3.2 The extensive use of ILO conventions by international and domestic courts

The use of rules of international law alongside international labour conventions is also a common feature of domestic interpretation. Naturally, when a court examines the compliance of a State with its obligations arising from international law, either because they are directly applicable or as they have been implemented through domestic legislation, it will take into account all applicable international rules. Many courts and tribunals are called to rule on labour-related matters such as child labour, collective bargaining, dismissal, domestic workers, employment relationship, equal remuneration, forced labour, freedom of association, equality, holiday with pay, hours of work, indigenous and tribal peoples, maternity protection, migrant workers, minimum wages, occupational safety and health, protection against discrimination in employment and occupation, right to strike or social security.¹¹²

¹⁰⁷ For a broader discussion of the topic, see Véronique Marleau, 'Réflexion sur l'idée d'un droit international coutumier du travail' in George Politakis (ed), *Les normes internationales du travail: un patrimoine pour l'avenir Mélanges en l'honneur de Nicolas Valticos* (ILO 2004) 363.

¹⁰⁸ Supreme Court of Canada, *Dunmore c. Ontario (attorney general)*, 2001, 3 R.C.S. 1016.

¹⁰⁹ *Doe I v. Unocal Corp*, 2002, U.S. App. (9th Cir. 2002).

¹¹⁰ *Juridical Condition and Rights of Undocumented Migrants*, Advisory opinion OC-18/03, Inter-American Court of Human Rights, 17 September 2003.

¹¹¹ *Juridical Condition and Human Rights of the Child*, Advisory opinion OC-17/2002, Inter-American Court of Human Rights, 28 August 2002.

¹¹² For a compilation of recent cases, see the compendium on court decisions published by the ILO and its International Training Centre <<http://compendium.itcilo.org/en>>.

In assessing the legality of a behaviour or domestic legislation against international law, domestic courts often take into account all relevant legal instruments, not only ILO conventions. For instance, the Colombian Constitutional Court relied on both Convention No. 87 and article 8 of the ICESCR on a matter of freedom of association, collective bargaining and the right to strike.¹¹³ On a matter concerning the rights of indigenous and tribal peoples, the Supreme Court of Belize referred to Convention No. 169, but also on the UNDRIP, the 'general principles of international law on indigenous peoples and their lands and resources', as well as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Charter of the Organisation of African States and a pronouncement of the Inter-American Commission of Human rights.¹¹⁴ Similarly, the Constitutional Court of Guatemala invoked together Convention No. 169, the American Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the UNDRIP and indicated that they were standards in force within the Guatemalan legal system, which enshrined the right of indigenous people to consultation on state measures that might affect them.¹¹⁵ This is of particular relevance given the current controversy on the scope of the duty to consult.

International courts and tribunals seem to operate in a similar manner. The Special Court of Sierra Leone relied upon the Convention on the Rights of the Child as well as articles 2 and 3 of the Worst Forms of Child Labour Convention, 1999 (No. 182) to rule on the existence of a customary norm prohibiting the recruitment of children under the age of 15.¹¹⁶ To assess Paraguay's recruitment of minors into military service, the

¹¹³ Constitutional Court, *Juan José Gorriti and more than 5,000 citizens v. Congress of the Republic of Colombia*, 12 August 2005, Case No. 008-2005-PI/TC.

¹¹⁴ Supreme Court of Belize, *Aurelio Cal, in his own behalf and on behalf of the Maya village of Santa Cruz & Others v. the Attorney General of Belize & Others*, 18 October 2007, nos. 171 and 172/2007.

¹¹⁵ Constitutional Court, *Community Development Councils of the Community of El Pilar I and II and others v. Municipal Council of San Juan Sacatepéquez*, 21 December 2009, Case No. 3878-2007.

¹¹⁶ Special Court of Sierra Leone, *Prosecutor v. Sam Hinga Norman*, 31 May 2004, No. SCSL-2004-14-AR72.

Inter-American Court of Human Rights referred to Convention No. 182 alongside several other relevant instruments, such as Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000.¹¹⁷

More recently, an arbitral panel constituted under article 20.6.1 of the Dominican Republic-Central America Free Trade Agreement had to rule on the alleged violation of Guatemala's obligations to enforce its national labour laws relating to the right of association, the right to organize and bargain collectively, and acceptable conditions of work.¹¹⁸ Without making any specific pronouncement on the meaning of Conventions No. 87 or 98, the arbitral panel explicitly recognized a mandate to interpret ILO norms when it stated that

in accordance with Article 31.3(c) of the VCLT, the Panel should take into account, together with the context, 'any relevant rules of international law applicable in relations between the parties' to the CAFTA-DR in interpreting and applying its provisions. All CAFTA-DR Parties are members of the ILO. By virtue of their membership in that Organization, they are bound by an obligation enunciated in the ILO's Declaration on Fundamental Principles and Rights at Work and grounded in the ILO Constitution to 'respect, promote and realize [...] principles concerning [...] fundamental rights, namely [...] (a) freedom of association and the effective recognition of the right to collective bargaining.'¹¹⁹

Finally, reference must be made to the Working Group of the Business and Human Rights Arbitration project, headed by judge Simma, which is working on a set of rules for the arbitration of business and human rights disputes. The draft of The Hague Rules is based on the UNCITRAL Arbitration Rules and has been adapted to address certain issues likely to arise in the context of business and human rights disputes.¹²⁰ The draft rules

¹¹⁷ Inter-American Court of Human Rights, *Vargas Areco v. Paraguay*, 26 September 2006, Series C, Case No. 15.

¹¹⁸ *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, final report of the panel, 14 June 2017, 1.

¹¹⁹ *ibid* 427.

¹²⁰ Introductory note to the Hague Rules on business and human rights arbitration.

provide for a very large subject-matter jurisdiction.¹²¹ Virtually any rule can apply to the dispute.¹²² Should this project be successful, labour-related disputes could be settled under those rules by arbitral tribunals which could be called to interpret ILO conventions.

For the sake of coherence and legal certainty, an ILO in-house tribunal should consider other rules of international law relevant to the rights and obligations enshrined in any convention it will be called to interpret. Domestic courts will undoubtedly take into consideration the tribunal's ruling. Under the ILO Constitution, they could even have an obligation to do so, in so far as their ruling could engage their State's responsibility. They cannot be expected to do so if the ILO tribunal ignores other rules that they are meant to apply because their State is bound by them. For their part, international courts and tribunals will certainly give weight to interpretations rendered by an ILO in-house tribunal, which would limit the risk of seeing the exercise of attribution of meaning escaping the ILO – a risk that one could foresee with the potential multiplication of bodies called to rule on the meaning of ILO conventions.

3.3 Increasing incorporation of international labour standards in non-ILO international instruments

International labour standards are increasingly used outside of the ILO, especially in trade agreements containing labour clauses. Over the last two decades, trade-related labour provisions have become more common and comprehensive.¹²³ The large majority of current labour provisions refer to

¹²¹ Article 1(1) sets the scope of application of the rules as follows: 'Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under these Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may expressly agree upon in writing. The Rules include the Code of Conduct for Arbitrators (hereinafter called the "Code of Conduct"). The characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules'.

¹²² Article 41(1) of the draft rules provide that the 'arbitral tribunal shall apply the law, rules of law or standards designated by the parties as applicable to the substance of the dispute'. Pursuant to paragraph 2, 'failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate'.

¹²³ Handbook on assessment of labour provisions and investment arrangements (ILO 2017) 2.

internationally recognized core labour standards, notably through the 1998 ILO Declaration on Fundamental Principles and Rights at Work¹²⁴ but also to the fundamental conventions themselves or other ILO conventions.¹²⁵

Outside of the world of trade, a draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises makes numerous references to ILO conventions.¹²⁶ In particular, draft article 6(7) seeks to create an obligation for State Parties to ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for forced labour – as defined in article 2(1) of the Forced Labour Convention, 1930 (No. 29) and article 1 of the Abolition of Forced Labour Convention, 1957 (No. 105) – or the use of child soldiers as defined in article 3 of the Worst Forms of Child Labour Convention, 1999 (No. 182). It is also interesting to note that the preamble of the latest draft to this day (July 2019) incorporated the newly adopted Violence and Harassment Convention, 2019 (No. 190).

With the multiplication of bilateral and multilateral instruments outside the ILO, interpretation will be fragmented and the risk of diverging interpretations of labour standards is heightened. The creation of a tribunal could have a significant impact on the interpretation of international labour conventions by external bodies, both at the international and national levels, as it would arguably offer more visible authoritative pronouncements on certain controversial questions. In particular, the ruling of the ILO tribunal would provide a WTO panel with an authoritative determination of the meaning of and scope of obligations under ILO conventions.¹²⁷

For all the above reasons – number of rights and obligations under ILO conventions also incorporated in other instruments, ILO conventions expanding their scope of regulation to other areas of international law, systemic use of international law by domestic courts, increased use of

¹²⁴ *ibid* 1.

¹²⁵ *ibid* 12.

¹²⁶ Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

¹²⁷ Fraterman (n 33) 920.

international labour conventions in trade instruments or even the emergence of a customary norms on labour issues – one may reasonably contend that an in-house tribunal, integrated in an interpretative framework potentially leading up to the ICJ, could not ignore public international law when interpreting an ILO convention. Over-reliance on an ILO *lex specialis* could ‘turn the institution in on itself, possibly isolating it from the modern developments in international treaty law’.¹²⁸ As pointed out by Nicolas Valticos, the unity of international law is an objective that every jurist must contribute to.¹²⁹

IV. Conclusion

The times where Albert Thomas, the first ILO Director-General, was apologizing to the judges of the World Court for occupying a great deal of their time¹³⁰ may have long been gone. The creation of an international tribunal may not be *dans l’air du temps*. Whether implementing article 37(2) of the ILO Constitution is apposite will in the end be for the ILO constituents to decide. After all, as pointed out by the Office in 1993, the ILO has lived for a long time without a tribunal, now for more than 70 years, since its institution was made possible by a constitutional amendment and ‘it would be rash to conclude that it could not continue to do so in the future’.¹³¹ There may also be very good reasons to do so.

Should this tribunal be instituted, it would constitute an interesting opportunity to examine the issue of the systemic integration of international labour standards within international law. Surely, the composition of the tribunal may be a determining factor of the approach adopted by the institution. Internationalists would likely have a greater sensitivity to systemic considerations. Most fundamentally though, the Governing Body, under article 37(2), is responsible for drawing the rules for the establishment of a tribunal. It could take this opportunity to clarify the means

¹²⁸ Trebilcock (n 7) 880.

¹²⁹ Valticos (n 57) 322.

¹³⁰ Speech of Director-General Albert Thomas, 30 June 1922, Documents relating to advisory opinions Nos. 1, 2 and 3, Annex 21, 123.

¹³¹ ILO (n 13) 19.

of interpretation to be used by the tribunal or even the law applicable in discharging its functions.

Law is not only an instrument to attain regime-objectives. Without systemic integration, 'it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or regime'.¹³² In this sense, a rule or regime alone cannot determine what its international legal implications are.¹³³

As pointed out by Georges Abi-Saab, 'à chaque niveau de densité normative correspond un certain niveau de densité institutionnelle permettant aux normes d'être mises en œuvre de manière satisfaisante'.¹³⁴ Accordingly, if the ILO normative density increases over time, through the broadening of the scope of ILO norms and through their growing use in other contexts, a tribunal with a systemic approach could very well be the key for the ILO to sustaining it.

¹³² International Law Commission (n 57) 244.

¹³³ *ibid* 246.

¹³⁴ Georges Abi-Saab, 'Le droit international dans son environnement' (1987) 207 *Recueil des cours* 95.

Technologies, the Future of Work and the ILO's Normative Approach

Kroum Markov and María Marta Travieso

I. Introduction

Humanity has gone through many phases and ages. Over these various periods, quality of life has largely improved and men and women have progressed, including as a result of technological development. Humans living during the iron age indeed experienced better living conditions than their counterparts who lived during the stone age. Industrial development also vastly contributed to the bettering of living standards compared to previous periods. The technological revolution that humanity is facing today is often presented as the next big era in human history and development. With technological advancement, work is indeed already flying over borders, reaching potential workers abroad, including straight within the comfort of their homes.

And yet, instead of being seen as synonymous of shared prosperity, it is sparking fears about its potential impacts on one major component of each society's social contract – namely how human beings work and make a living. As ILO's Director-General Guy Ryder has rightly stressed, 'the challenges are many and, from many respects, humanity is at a crossroads where issues of the past, present and future of work come together. While technology is at the heart of that change, it alone will not determine the future. We must not fall into the trap of *technological determinism*. Governments, workers and employers, are the ones who must shape the future of work we want'.¹

In the same vein, the 2019 Global Commission for the Future of Work stressed the need to harness and manage technology for decent work by

¹ Guy Ryder, Opening speech of the 19 American Regional Meeting, Panama, 2-5 October 2018 <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_646171/lang-es/index.htm>.

adopting a 'human-in-command' approach to artificial intelligence that ensures that the final decisions affecting work are taken by human beings. The Commission envisioned the need for an international governance system for digital labour platforms to require platforms (and their clients) to respect certain minimum rights and protections, stressing that technological advances also demand regulation of data use and algorithmic accountability in the world of work. The Commission further recognized that governments, as well as workers' and employers' organizations, need to invest in incubating, testing and disseminating digital technologies in support of decent work and stressed the potential of new technologies such as the blockchain technology to provide transparency and security through mechanisms such as encryption applied to data blocks and decentralized databases, as well as to guarantee the payment of minimum wages and facilitate the portability of skills and social protection for migrant workers, or the payment of social security for those working on digital labour platforms.²

Taking the debate from there onwards, and based on ILO's central mandate to set global standards to ensure decent working conditions for all, including for workers in the new digital economy, this paper aims at exploring potential ways in which the ILO may use its main comparative advantage – the establishment of global labour standards – to guarantee that certain dimensions of the new economy do not free ride the benefits of globalization to the detriment of the overarching and foundational objective of social justice. Section II of this paper is devoted to exploring how tripartite standard-setting while remaining faithful to its traditional types of legal instruments could open up and partner with other international entities such as the International Telecommunications Union and the International Organization for Standardization in order to design the necessary technical processes and bridges to harness the activities of digital work platforms. In subsequent sections III to VI, the paper goes into exploring in more concrete terms how one of the currently available technologies – blockchain – could be used in order to strengthen legality and the effective implementation of labour-related rights and obligations in the digital sphere.

² Global Commission on the Future of Work, *Work for a brighter future* (ILO 2019) 44 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf>.

II. Standard-setting through standardization: Reaffirming ILO's mandate to secure decent work for all, including those in the digital economy

The digital economy is characterized by highly volatile, de-materialized and segmented work arrangements.³ As a new national but increasingly also transnational labour marketplace, the digital economy has managed to overcome the barriers of national borders. Digital crowdsourcing platforms are becoming a central component in the manner in which labour or services are supplied in (or rather through) the digital economy. Indeed, they make it possible for labour supply and demand to meet and agree instantly regardless of national borders on the terms under which labour is to be carried out. Crowdsourcing platforms already allow companies but also individuals from one country to hire other companies or individuals in another country to perform a given activity. They also secure the payment of labour or services prior to the extinction of contractual relationships. In the current state of most national legal practices, work performed under arrangements through digital platforms is diverse and subject to heterogeneous legal templates which often are not 'digital specific' but rather subjected to the usual (and sometimes ill adapted) labour law frameworks. Cross-border digital platform operations are also rarely subjected to prior validation by national authorities of the country in which the activity is performed certifying that each offer has passed the test of the national legal framework successfully and may hence be performed. More often than not, activities carried out through transnational digital platforms tend to be highly fragmented, micro tasks remunerated as piecework which once completed is de-materialized as it only exists in the 'borderless' and unregulated digital international space. Often these arrangements operate in a grey zone characterized by the lack of a formal work contract in line with the national labour law framework and presented as service rendition or task related contracts. Unless duly notified by the person or company performing such work, national labour, employment or tax authorities of the country where it is performed do not dispose of the means to know about the actual performance of work nor the conditions under which it has been performed.⁴

³ Valerio De Stefano and Antonio Aloisi, *European Legal framework for digital labour platforms* (European Commission 2018).

⁴ See also, Janine Berg, Marianne Furrer, Ellie Harmon, Uma Rani and M Six Silberman, *Digital labour platforms and the future of work: Towards decent work in the online world* (ILO 2018).

The digital sphere is thus sometimes presented as the new frontier where the global offer for 'tasks' (as opposed to employment) freely meets the 'global demand', thus creating 'perfect market and competition conditions' in the neo-classical sense of the term. Major advances in social justice achieved over the 20th century such as collective labour rights and risk-sharing are thus relegated to the old economy and considered as non-adapted to the possibilities and opportunities offered by the new economy. However, to consider a platform contracted click-worker who makes ends meet by performing piece-work from his or her home not as being a worker but a free-lance or a self-entrepreneur exempt from the protection of the labour law and social security frameworks of their country of residence obviously quickly reaches its limits. While most States are committed to make the most of the opportunities opened by the digital economy including in terms of employment generation, seizing these opportunities should not be synonymous of bypassing national labour laws and regulations or rolling back some major *acquis* of social justice as enshrined in the ILO's Constitution and national laws and practice.

And indeed, digital does not necessarily mean unregulated. The analogy with the conditions for accessing audio-visual contents over borders is quite revealing in this regard. From the start, a legal framework was established in order to regulate the manner in which digital audio and video contents could be seen over borders. Of course, the existence of this framework did not prevent fraudulent practices aimed at watching and listening contents outside of it and avoid paying the full cost of these contents. Nonetheless, the framework has the merit of outlawing these practices and all current efforts are rather aimed at improving how it operates and its efficiency than at dismantling it to guarantee greater freedom or a 'perfect market'. The case of labour performed in one country through or for digital platforms based abroad, while different, is analogous in many respects. Put very simply, labour offers entering a national space also logically need to comply with the legal framework applicable to work in that same space. The reason for this to be so are obvious. Since work involves, inter alia, human security and safety considerations, its performance deserves even more than audio visual property to be subjected to a dedicated legal framework avoiding it being performed outside the rule of law.

As the world's standard-setting organization, the ILO is well placed, strong of its tripartite constituency, to be at the forefront of thinking

the innovative ways in which the future of work, in general, and the digital economy, in particular, will guarantee decent work for all. Given the numerous challenges associated with the variety of the legal approaches to cover these new work arrangements, the classical approach by which ILO constituents adopt an international labour standard establishing a common (minimal) denominator harmonizing the legal regime applicable to platform workers in case of trans-border transactions may not seem the most suited. Instead, the efforts should be placed on creating the international legal and technical architecture (the pipelines) based on which platforms operate as well as the screening conditions based on which job/task offers may or may not access a country and be accessed from that country. In other words, this approach could result in a new type of ILO instrument which could be two-pronged: a first part would be dedicated to establishing the principle for the standardization of the international electronic protocols used by digital work platforms operating transnationally; and a second part which would establish an internationally agreed 'filter' comprised of a set of minimum parameters authorizing platforms to display work/tasks proposals in a given country (those would include, for example, minimum hourly wage, minimum social security provisions, work/rest periods, minimum age, respect of the principle of freedom of association and collective bargaining, etc). In order to pass the test of this filter, work/task offers would need to at least match the parameters set by each participating member State.

1. Standardize the 'digital pipelines' used by crowdsourcing platforms operating transnationally

As such, the first element of a possible new normative instrument would be a novelty with regard to how the ILO has carried out its standard-setting functions so far. Indeed, to come into being, it would necessitate to actively involve the specialized United Nations agency on telecommunications – the International Telecommunication Union (ITU) with a view to developing a standardized (and possibly secured) protocol exclusively dedicated to digital crowdsourcing platforms operating transnationally. Thus, in order to be compliant with the internationally established framework any work/task offer would need to be made using the dedicated electronic protocol and be certified as operating under the established international legal framework. Such mechanisms already exist, in the form of secured protocols

for example, allowing payments to be made through encrypted pathways guaranteeing the security of online transactions. As a result, all platforms offering work or tasks in a country without making use of the dedicated standardized protocol would automatically be presumed to operate outside the scope of legality and the rule of law. As for audio visual products currently, the use of dedicated portals for legally owning or using media products can always be bypassed in practice. Nonetheless, such behaviours would imply that platforms knowingly violate existing legal frameworks or that individuals or firms have recourse to illicit technical solutions to access work or task offers otherwise inaccessible in their national context for failure to meet the minimum conditions specified by national authorities. They would therefore most probably tend to decrease over time. From the point of view of formalization strategies, this type of mechanism would have important transitioning effects as this type of work arrangements currently predominantly escapes the realm of national legal frameworks altogether. It would allow to keep track, register and protect workers involved in these transactions as well as the members of their families. Crowdsourcing platforms could thus almost naturally become formalization portals thanks to 'one-stop-shop' type simplified mechanisms aimed at integrating the persons concerned into the formal economy.

2. *Establish a harmonized set of terms of reference to filter platforms' access to national labour markets*

Besides having a technical first part dedicated to standardizing the digital architectural network through which international crowdsourcing platforms could operate, a possible new normative instrument on such platforms should also establish an internationally agreed set of 'terms of reference' (ToRs) listing the core elements or requirements to be met in order to allow each work/task advertised on a platform to enter and be seen from a given country. In this scenario, the authorities of each country would be required to fill-in the 'terms of reference' with the minimum parameters that they require to be met so as to satisfy the requirements of their national legal framework. In order to advertise a certain work or task on a platform, the platform itself would automatically require the advertising entity to fill in these ToRs and would automatically validate or invalidate its viewing from a given country depending on the parameters each country has required to be met.

Deciding on the various parametrical elements to be included in the ToRs will not be without difficulty as they would need to be sufficiently encompassing to ensure that the main provisions of labour law frameworks are observed. They should not be excessively lengthy to fill-in by those advertising a work or task on a digital crowdsourcing platform. Amongst the first elements to be retained to figure on the ToRs is the legal nature of the relationship, i.e. whether the assignment takes the form of an employment relationship and the person is considered a dependent worker or as a service request, in which case the person would be considered as self-employed. Another major element of the ToRs could relate to the remuneration of the assignment (for example, the minimum hourly remuneration), coupled with an indication of the duration in hours, days or months over which the assignment is to be carried out. Minimum age requirements could also be easily included in the ToRs. Compliance with social security obligations also seems of paramount importance – in other words, both the advertiser and the person performing the assignment need to recognize that since work is being carried out, this generates social security rights and obligations and, depending on each national legal framework, may necessitate to deduct from the total amount of the transaction the amounts pertaining to providing social security and protection to the workers concerned in accordance with each national legislation. In many national contexts, measures exist to facilitate and incentivize affiliation to social security by persons in non-salaried employment operating in the informal economy and would most probably also be extended to small wage earners operating through digital platforms. If a deduction is to be made, this could be done automatically upon making the payment at the end of each assignment (especially in the scenario where specifically dedicated electronic protocols for digital platforms have been set up) and could be coupled to secured payment means to transfer the amounts of each transaction to a national authority which would then deduct the amounts required by the national legislation before making the final payment to the person concerned. Naturally, observance of ILO's fundamental principles and rights at work is core for all ILO member States and the ToRs could therefore also require, for example, that those providing work through digital platforms express formal recognition of the fundamental principles and rights ratified by the country in which the work is to be performed. Other specific elements could also be included in order to take into account the special nature of digital platform workers.

Once established, these ToRs could be subjected to certification by the International Organization for Standardization (ISO) thus conditioning and filtering the entrance of work/task offers into national labour markets based on the parameters indicated by national authorities.

3. *The legal nature of a possible normative instrument on digital crowdsourcing platforms*

Since 1919, the ILO has had a good record in adopting a comprehensive set of international labour conventions and international labour recommendations. In many cases, recommendations accompany conventions and provide further non-binding guidance as to how best to implement conventional provisions or suggest higher levels of protection. At times, they may be stand-alone, representing a first, almost exploratory, attempt to give a normative dimension to a new subject which may become the antechamber of a possible future convention on the same subject. In the context of digital crowdsourcing platforms, adopting an innovative recommendation bridging with interventions by other international organizations such as the ITU or ISO (in their respective fields of expertise) to set up the operational architecture for digital platforms observant of national labour law frameworks, appears as an adequate and effective tool to tackle the challenge of regulating the operations of digital work platforms operating transnationally. Following this approach, once the core elements of the architecture have been determined by the recommendation, the ITU could proceed with designing the electronic protocols which would act as the pipelines which would route the work or task proposals to the national labour markets. In parallel, based on the recommendation's ToRs, the ISO could establish an electronic certification mechanism the obtainment of which would allow the entrance of filtered work/tasks to enter a particular labour market.

III. Blockchain – A specific form of Distributed Ledger Technology

Distributed Ledger Technology (DLT) is a shared database that enables the transmission of data about goods, services and rights within a network of multiple users (nodes or computers). Blockchain is a form of distributed ledger where the information is encrypted and stored in an unlimited series of badges or blocks. Each block of information is encrypted and

time-stamped so that it is attached to the chain following a certain time sequence. At the same time, and in order to validate their incorporation to the chain, all blocks must comply with certain rules following a ‘consensus mechanism’. Each blockchain has a specific consensus mechanism which gives security to the system and prevents fraud, alteration of information or double use of assets. For example, Bitcoin blockchain uses the consensus mechanism known as ‘proof of work’.

In blockchain, each participant to the network has a copy of all the entries in his computer (node).⁵ Any change in one of the copies will make it incompatible with the others. This makes blockchain a ‘trust less’ technology, meaning that there is no need for a centralized certifying authority. All participants (or certain participants, according to the type of blockchain) are the trustees because once incorporated to the chain, they have access in real time to a copy of the same full version of the blockchain. A change or alteration would thus be observed immediately as the altered copy will not coincide with the rest.

Although originally linked to crypto-currencies, blockchain is now also used to ensure traceability compliance with obligations and the enforceability of rights in diverse types of contracts. It is important to specify from the outset that DLT and blockchain are not univocal as there are several forms of blockchain and DLT. Furthermore, both are evolving quickly and there, are at present, no common rules or terminology.

1. The elements of a blockchain

Once the information is on the blockchain, it is available in real time to all those that are in the system. Certifying intermediaries (e.g. notaries) are thus no longer required as there is constant monitoring by all participants. This is called ‘disintermediation’.⁶ Blockchain is thus a solution to registries that are not up to date, that differ among themselves, or that have conflicting information. It also avoids delays in the transfer of information from one registry to the other. As a matter of fact, control is redistributed

⁵ World Bank Group, *Distributed Ledger Technology (DLT) and Blockchain*, FinTech, Note (2017) 1, 5.

⁶ Michele Faioli, Emanuele Petrilli and Donato Faioli, ‘Blockchain, contratti e lavoro, la ri-rivoluzione del digitale nel mondo produttivo e nella PA’ (2016) 2 *Economia & lavoro*, Carocci editore, 40.

to users.⁷ By virtue of the elements described above, blockchain is a private transnational system that gives certainty and renders immutable, secure and transparent certain amount of information in real time to the participants without the intervention of any national certifying authority or law,⁸ making the mechanism speedier and reducing costs and inefficiencies. Blockchains can also enable the collection of large amounts of data on a given product while making this information available to all and everyone in the production chain, from the producer to the final consumer. As such, blockchain can provide increased governance to global supply chains and some forms of digital platform work such as crowdwork.

Concerning the participants, the system can be open to the public, as in the case of bitcoin, where access to the network is free ('permissionless'), and where all participants are allowed to have a copy of the database. Alternatively, it can be a 'permissioned' database where the number of participants authorized to access information is limited. In permissioned blockchains there are two sorts of participants, those that follow some operations in the system and those that have the competence to validate information.⁹ The latter have an updated copy of the database and participate to build consensus.¹⁰

2. *Challenges and opportunities*

While still at its initial stage, many institutions both private and public, are starting to implement blockchain in their operations, at least on a trial basis. Different applications have been identified for blockchain: monetary, registry of assets property, development of applications, exchange of digital representations of existing assets (values, metals, titles, bonds).¹¹ As a new technology, blockchain is in constant evolution and may be subject to considerable improvements and modifications.

⁷ Philip Boucher, *How blockchain technology could change our lives* (2017) European Parliamentary Research Services 4 <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/581948/EPRS_IDA\(2017\)581948_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/581948/EPRS_IDA(2017)581948_EN.pdf)>.

⁸ Faioli (n 6) 139.

⁹ Validation is done by means of public and private keys.

¹⁰ Faioli (n 6) 143. For an explanation of Bitcoin protocol, the risk of double spending and blockchain technology, see *ibid* 144. Bitcoin protocol was the first application of Blockchain technology with cryptography, digital firm and distributed consensus 'proof of work'. There are other protocols beyond Bitcoin, such as Ethereum.

¹¹ See Faioli (n 6) 146.

1.1 Need for common rules and interoperability mechanisms

For the moment, as stated above, there is not a single blockchain but a whole array of blockchains created with differing and specific objects. The variety of existing systems also makes it difficult to combine and harmonize them. Each blockchain allows the sharing of real time information for all those that are in the system. But the systems are technically diverse, have different objectives, have different kinds of information and concern different groups of participants. Moreover, they respond to different and unclear rules. This heterogeneity constitutes an obstacle to global governance.

In this regard, it would be necessary for example to establish common rules concerning the determination of jurisdiction in case of conflict or disagreement over to the consensus mechanism, non-fulfilment or problems with the implementation of smart contracts.¹² Moreover, the fact that blockchains cannot operate together or combine their information limits their potential. Interoperability rules would allow blockchains to interact with each other.¹³ For example, the information contained in a blockchain concerning the identity of persons or the registration of lands, together with a blockchained payment system could be useful for the implementation of a contract in the framework of a global supply chain. In fact, several blockchains could exist and combine in one supply chain. A web of blockchains could help in the operation of smart contracts that require information of different nature saved in different blockchains (for instance, identity of parties, land registration, property of assets, working conditions). Interblockchain communication and interoperability systems would favour the portability of rights, including transfer of reputation records.¹⁴ The combination of blockchains (which is very immature) could facilitate the

¹² See below the brief explanation on smart contracts.

¹³ See, for instance, the simple explanation and the research done in this regard by Ibrahim Ludwick, *The race for cross-chain communication: 11 Projects working on blockchain interoperability* (2018) <<https://www.investinblockchain.com/blockchain-interoperability-projects/>>; and Melanie Clay, *Interoperability Key in Blockchain roadmaps for 2019* (2019) coinsquare, <<https://news.coinsquare.com/blockchain/interoperability-key-in-blockchain-roadmaps-for-2019/>>.

¹⁴ Mary Tate, David Johnstone and Erwin Fieft, 'Ethical issues around crowdwork: how can blockchain technology help?' (2017) Australasian Conference on Information Systems, Hobart Australia 10 <https://www.acis2017.org/wp-content/uploads/2017/11/ACIS2017_paper_149_FULL.pdf>.

payment of taxes and of social protection obligations. Once a job has been done or a service has been provided and paid, the system could connect to the country of residence of the crowdworker and pay the corresponding taxes or make the social security deductions. To make this possible, cross-chain protocols will be needed in order to create bridges among blockchains. Several companies are currently delving to this.

1.2 Privacy and data

Another issue to consider is how to combine the immutability and even the public nature of the information characterizing the chain of blocks, with data protection rights provided by national and international regulation such as the right to be forgotten and the right to have personal data deleted or corrected.¹⁵ There is a policy decision to take, in this regard, concerning which information can be inserted into the blockchain and which information cannot be 'blockchained' to protect privacy. There are some suggestions below on how to overcome this issue.

1.3 Identity and location of participants

The identities and location of parties to a blockchain are among the most interesting legal aspects involved in blockchain. These issues give rise to crucial questions: Are there different jurisdictions? What are the applicable regulations? Or, how to monitor and enforce rules? The nature of the blockchain – permissionless or permissioned – may have an impact on this as well.

1.4 Access to information by the public authority

A positive aspect is that the labour inspection services, or the public administration, even the tax authorities could have access to some information on real time. The fact that there is no central authority in the blockchain to certify the veracity of the information does not mean that the public authority cannot take advantage of the blockchain. Many governments and other public institutions are already experimenting with blockchain as a manner to improve efficiency and governance and costs

¹⁵ For instance, the European General Data Protection Regulation (EU) 2016/679 (GDPR).

management.¹⁶ Because blockchain enables them to have access to real time information without fragmentation.¹⁷

The blockchain system permits to share partial information or enables some participants (through keys) to have access to certain information. Enterprise could thus allow, for instance, the labour administration to access certain real time information concerning workers and the fulfilment of certain obligations such as payment of wages and social security, working time, and respect for other working conditions. Employment services could also take advantage of blockchain, and more precisely ‘blockcerts’ to help workers and employers match their.¹⁸ Health and social protection systems are exploring the use of blockchain, particularly with respect to the certification of the identity of beneficiaries. Public administrations could participate to blockchain or have their own blockchains to enhance their services.

Measures are also being taken at the international level. In this regard, the Inter-American Development Bank, launched in 2018 through its innovation laboratory, an alliance with the main technological players in the field, to foster the development of a ‘blockchain ecosystem’. Its objective is to make the advantages of blockchain accessible to everyone in the region. This alliance recognizes the utility of blockchain for financial services, digital identity, property of personal data, and efficiency of health systems, among others. Furthermore, on 30 October 2018 a Global alliance was launched to promote the use of blockchain in Latin America and the Caribbean.¹⁹

IV. Blockchain as the basis for legal relationships in the future:

Smart contracts

Blockchains are usually combined with smart contracts, a digitalized protocol that automatically executes the terms of a contract through a computer. They are actually ‘computer programs whose execution is automated in accordance with the software and algorithmic instructions written in

¹⁶ For instance, Estonia. See also Faioli (n 6) 156.

¹⁷ Boucher (n 7).

¹⁸ See below and explanation of blockcerts.

¹⁹ See in this regard, Inter-American Development Bank, press release, October 2018 <<https://www.iadb.org/es/noticias/anuncian-alianza-global-para-impulsar-el-uso-de-blockchain-en-america-latina-y-el-caribe>>.

the block chain'.²⁰ Smart contracts transform contractual obligations into self-executing encrypted codes in the blockchain. The contract is executed automatically (for instance, payment to suppliers or payment of indemnities) once some of the codified conditions are met (e.g. release of the product). They follow the logical structure 'if this [...] then that [...]'.²¹ The smart contract will do what it was programmed to do.

Smart contracts are not indeed contracts. Rather, they are the codification of the implementation mechanism of a contract. As such, they intervene in the execution stage of the contract (even if there are currently studies concerning its implementation on the formulation of contracts). This implementation process takes place without human intervention. In fact, it ensures that the contract will be executed and that no human intervention, once the conditions are fulfilled, will have the capacity to refuse or obstruct this execution. It can also serve to sanction non-performance of her obligations by one party to the contract. This may take place, for example, when a service is automatically suspended in case of non-payment.

Smart contracts have existed for over twenty years. There are currently various forms of smart contracts that are implemented without blockchain. Vending machines as well as well as electronic commerce where the process is fully automatized are examples of smart contracts. Smart contracts provide parties the assurance that once the conditions are fulfilled the mechanism will work.²²

The blockchain system provides further security to the mechanism since the software and algorithms are encrypted in the blockchain in such a way that instructions cannot be altered.²³ Indeed, the distributed registry of information and the validation mechanism contribute to this. The blockchain permits to go a step forward and use smart contracts in a wider range of cases.

²⁰ Yves Poulet and Hervé Jacquemin, 'Blockchain: une revolution pour le droit?' (2018) 36 *Journal des Tribunaux* 815.

²¹ *ibid.*

²² Ming Li, Jian Weng, Anjia Yang, Wei Lu, Yue Zhang, Lin Hou, Jia-Nan Liu, Yang Xiang and Robert H. Deng, *CrowdBC: A Blockchain-based Decentralized Framework for Crowdsourcing*; *LACR Cryptology* (2017) 444 ePrint Archive 3.

²³ Poulet and Jacquemin (n 20) 816.

Smart contracts and blockchain together can facilitate the effective implementation of contracts and transactions. This is still in a developing stage and entails some risks. As this is an automated process, it lacks the flexibility that the fulfilment of contractual obligations require on many occasions. As such, it is not prepared to respond to unforeseen events. For example, execution will take place once conditions are fulfilled; but if one of the parties is not satisfied with the manner in which these conditions have been fulfilled, she will not be in a position to refuse payment or execution of the contract. In a case of crowdwork, for example, full payment will take place even if the client is not fully satisfied. Furthermore, minor material mistakes will inevitably launch the sanction process. The only possibility at hand will be to go to the tribunals to seek reparation. Moreover, this system is only applicable to contracts that are similar in their terms and conditions. It does not allow, in principle any adaptation to special cases or conditions. There are also many other aspects that still need to be dealt with such as the determination of liability and responsibilities in case of non-fulfilment of obligations or when some automated procedures have not worked. Finally, this will require a true change in legal thinking as legal clauses of a contract, for example, will need to be translated into programmable codes. It is necessary to combine legal and computing disciplines to succeed in the adoption of effective smart contracts.²⁴

V. What are the possible uses of blockchain at work?

1. *Towards an international digital identity in blockchain*

Governments are experimenting with blockchain in different areas, including in the development of identity registries, as indicated above. By the same token, blockchain could be similarly used to develop registries with the digital identity of workers. As is the case with goods, which do have a digital identity ensuring the traceability of ownership, the same could be applied to the digital identity of workers that participate throughout the production process. This would increase efficiency, facilitate supervision and ensure that the benefits derived from work are adequately linked to the worker that provided it: wage, social protection, skills development,

²⁴ See Faioli (n 6) 151.

experience, reputation (at a certain moment). In order to establish the identity of a person in the blockchain, the establishment of a 'BlockID' through biometric authentication and blockchain has been suggested.²⁵ This can be very useful when workers are mobile and different jurisdictions are involved.

At the same time, the use of blockchain to identify the source of a product enables the identification and enhances the visibility of the producer. This has repercussions not only on product traceability but also on the reputation of producers and production methods as well as the value of products.²⁶ This has already been implemented in the tea industry to formalize the sector. For example, the 'Tea Integrated Payment System' (TIPS) in Sri Lanka has established a 'Smart Tea Card' as a payment and procurement card for tea factories and green tea leaves suppliers. This enables the factory to keep track electronically of how much tea has been supplied by each collector and pay them via electronic remittances, which has in turn facilitated access to social protection coverage and financial inclusion.²⁷

Blockchain could help to confirm digital identities through securely-encoded devices – or even through mobile devices – which would allow citizens to receive benefits directly, at reduced transaction costs, thereby facilitating financial inclusion. Such a solution could also be linked to other systems with a view to reducing the level of fraud and official error in the delivery of benefits, as identities would be more difficult to forge.²⁸ Workers and their abilities and certifications are more visible with blockchain. The case of the Swiss railways system is a case in point. The Swiss railway enterprise has established a system of identification of railway workers through the blockchain with the objective of proving the identity as well as the enabling certificates of workers. Since railways are very extended geographically and

²⁵ Zhimin Gao, Lei Xu, Glenn Turner, Brijesh Patel, Nour Diallo, Lin Chen and Weidong Shi, *Blockchain-based Identity Management with Mobile Device* (University of Houston 2018).

²⁶ Marten van Gils, *Position Paper: Blockcains, Fairfood* (2017) <<https://fairfood.nl/wp-content/uploads/2018/01/Position-Paper-On-Blockchains-1.pdf>>.

²⁷ Sunimallee Madurawala, 'Farm Smart! Developing Sri Lanka's Agriculture Sector in the 4IR' IPS Blog 'Talking Economics' <<http://www.ips.lk/talkingeconomics/>>.

²⁸ United Kingdom Government Chief Scientific Adviser, *Distributed Ledger Technology: Beyond Block Chain*, United Kingdom, (2015) 67 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf>.

have very high maintenance requirements, a great number of workers intervene in the different sites. Blockchain has eased the work of the managers in the process of choosing the appropriate worker with the adequate training for each task.²⁹

2. *Portability of rights – remunerations (remittances), social protection, taxes*

The use of blockchain could be envisaged to implement blockchain in labour contracts to ensure payment once work has been provided.³⁰ Various applications can be foreseen. Indeed, a system that enables the identification of beneficiaries could facilitate the payment of wages or the services provided by platform workers (mainly crowdworkers), including where worker, client and platforms are in different jurisdictions. Similarly, farmers could benefit from blockchain and the combination with smart contracts and mobile phones to ensure their incomes. This could be implemented with systems like the already functioning BitPesa.³¹ These payments, contributions to social security as well as the number of contracts established between the parties could be registered in the blockchain.

The combination of smart contracts with blockchain would ensure increased transparency in the case of crowdwork, for example, where very similar contracts are established with the crowd. Any change made to the smart contract with respect to one crowdworker will immediately imply the change of all the smart contracts with all crowdworkers in that blockchain. Blockchain may further assist in keeping track of all the communications that have taken place between the requester and the crowdworker, including how many times the requester opened the work before accepting it. Blockchain would allow the work to be time stamped and could serve as a registry of payments received and of work done by a specific worker. Smart contracts could be used to provide payment for the work carried out that already exists in platforms but also a way of ensuring payment of

²⁹ SecureID news, Media Guide <<https://www.secureidnews.com/news-item/swiss-federal-railway-tests-blockchain-identity-system-for-rail-workers/>>.

³⁰ For a thorough reflection and explanation of smart contracts and blockchain in labour law, see Alicia Villalba, 'El principio de transparencia en la ejecución automatizada del contrato de trabajo: una aproximación jurídica a la tecnología 'blockchain' y a la inteligencia artificial' (2019) 224 *Revista española de derecho del trabajo*.

³¹ 'BITPESA' concerns payments using bitcoin and blockchain technology within Africa through mobile applications.

social security contributions. Blockchains and smart contracts could also ensure that social security contributions are made and that benefits are portable within and across jurisdictions.³² Furthermore, this combination of smart contracts and blockchain can also serve to prove the existence of an employment relationship between the client and the provider of work.

Blockchain permits to eliminate information gaps that may lead to fraud or errors, thus reducing implementation costs. Blockchain will enable government agencies to know whether potential beneficiaries of unemployment allowances have been looking for a job or are eligible for different benefits (e.g. housing benefit, if the country provides it).³³ For example, blockchain is already being used in some cases to enable migrants to receive some allocations or to send money in a safer and less costly way.

3. *Blockchain, the internet of things and traceability of working conditions*

The Internet of Things (IoT) is synonymous with the interconnectivity of everything (from the smart fridge that sends a message when there is no more milk to smart homes with remote control energy meters, to smart cities and traffic lights, through to smart pills that control medicine efficacy). IoT comprises devices that can be managed remotely and which can exchange data with other connected devices and applications. They can collect data and process it either locally or send the data to centralized servers or cloud-based application back-ends for processing.³⁴ It links the digital world with the physical world. The 'things' may consist of different objects or tools that are connected to a network and which collect and communicate data.³⁵ In fact, machines and persons can be connected to sensors that

³² See, for instance, the model envisaged by Paul Mizel, Fabian Raetz and Gamal Schmuck *Asure: First scalable blockchain network for decentralized social security systems* (Asure Foundation 2019) <<https://www.asure.network/asure.network.whitepaper.en.pdf>>. This is only an example, without making any evaluation of its compatibility with existing international and national systems.

³³ Richard Horne, 'Blockchain and the future of work' (2017) Medium magazine <<https://medium.com/@rhhkk/blockchain-and-the-future-of-work-93551ecf8920>>.

³⁴ Arshdeep Bahga and Vijay Madiseti, 'Blockchain Platform for Industrial Internet of Things' (2016) 9 *Journal of Software Engineering and Applications* 533.

³⁵ Deloitte, *Continuous interconnected supply chain, Using Blockchain and Internet-of-things in supply chain traceability*, (2017) <<https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/>>

will register external information such as environmental conditions, speed of work or behaviour. Enterprises are currently providing workers with all sorts of devices that incorporate advanced sensors as well as computer and electronic technology ('wearables') to gather different sorts of information. These devices help determine levels of stress, measure distances covered or weight lifted, and control online work, including how many computer keys workers have pressed per minute, as well as the duration of breaks. There are sensors to determine the speed at which work is carried out and to guide workers in the factory, as well as headphones to receive instructions without being distracted, or credentials that assess workers' mood and humour. All the information gathered can be combined, examined and processed in order to evaluate working conditions and take measures for improvement, avoid risks and determine responsibilities. This should not benefit solely the enterprise by way of excessive control over workers. Indeed, digital technologies such as apps and sensors can make it easier for companies and social partners to monitor working conditions and labour law compliance in supply chains or platform work.³⁶

The internet of things and blockchain enable all parties in the production process to have real time information concerning production, traceability of products, environmental aspects (air quality, humidity, temperature, winds) and risks. This may be of particular interest for example in global supply chains, to know the particular working conditions in the lowest tiers. The combination of these technologies would provide the final employers with this information thus enabling them to take the necessary corrective measures. At the same time, the national authorities will have the necessary information to launch increased on-site controls or to initiate compliance procedures.

4. Registry of information, property and transactions

Blockchains can also be used as a register of information (property, land, identity, etc.) and function in this case as a certification mechanism for documents. Keeping records and monitoring them is a difficult duty for governments. Demonstrating land property or tracing back ownership

lu-blockchain-internet-things-supply-chain-traceability.pdf>.

³⁶ Global Commission (n 1) 43-44.

through history can be difficult and costly. Loss or forgery of registry are not uncommon. In many countries, land records are poor and lack consistency. There are currently many governments throughout the world that are studying the feasibility of transforming their land registries by means of blockchain.³⁷ As any registry, blockchain provide the transaction history of any product enabling proof of ownership. The system allows tracing back ownership until the original owner in real time which facilitates transactions and the resolution of potential disputes. Besides, the whole transfer of property could be eased through smart contracts, with the act taking place automatically when certain conditions are fulfilled, for example, that the buyer deposits the money on the owner's bank account. The whole process of checking ownership and exchanging of property is more secure, efficient and cost effective. This is substantial in the rural economy where due to distance, poverty and the lack of resources property ownership is often difficult to demonstrate.

5. *Certification*

Globalization and increased communications have facilitated the movement of people within and among countries. Moreover, in the framework of the future of work individuals will be required to transition between jobs within and among countries while keeping up-to-date with the changes in the organization of work and technological evolutions. They will need to show their academic background, other acquired skills as well as past work experience. However, the system is currently atomized making it very difficult to track somebody's competencies down. Blockchain can help to certify competencies. In this regard, the Massachusetts Institute of Technology (MIT) has contributed to develop 'Blockcerts'. Countries such as Malta³⁸ and Bahamas, are already implementing these blockcerts for the certification of skills. For example, the Government of Malta is using them

³⁷ Alexandru Oprunenco, and Chami Akmeemana, 'Using blockchain to make land registry more reliable in India', (2018) London School of Economics Business Review, <https://blogs.lse.ac.uk/businessreview/2018/04/13/using-blockchain-to-make-land-registry-more-reliable-in-india/> See for example, United Nations Development Project in the city of Panchkula, India. Similar projects exist under the United Kingdom HM Land Registry's business strategy for 2017 to 2022.

³⁸ Following a Memorandum of Understanding signed in February 2019 between the Ministry of Education and Employment and Employment and Learning Machine Group

to certify apprenticeships and Bahamas has successfully completed a pilot project to implement blockcerts to certify apprenticeships and working experience.³⁹ People could register certificates of academic studies, courses, internships or work experience in the blockchain. They would be the owners of this information, which could be easily produced whenever and wherever needed.

These blockcerts will facilitate job matching by employment services and employers as they will have real time access to information concerning workers' skills. At the same time, workers will be able to easily demonstrate their skills and experience. This could be potentially more interesting for migrant workers and those workers coming from conflict or crisis zones where registries and public administrations have disappeared. Blockcerts are also interesting tools in the framework of a lifelong learning active society where people are constantly improving knowledge and skills through very heterogeneous channels.

Blockchains can also serve as a seal for products in the framework of corporate social responsibility when they have been produced with full respect for workers' rights.⁴⁰ This has already been implemented in the coconut industry, for example. In this case, the public at the end of the chain are informed of whether the producer received a living wage out of his or her production. In turn, public authorities, including labour inspectorates, may have access in real time to all this information. Similarly, in March 2018, the Coca-Cola company and the United States Department of State launched a pilot project to increase transparency and efficiency in the verification of labour policies in the combat against forced labour in the sugarcane sector worldwide. There are numerous similar attempts currently being launched throughout the world.

<<https://www.maltachamber.org.mt/en/employers-in-malta-will-soon-be-able-to-verify-skills-and-credentials-through-blockchain>>.

³⁹ Sponsored by the IDB, this project has enabled the Bahamas National Training Agency to issue some 78 certificates already in 2018 <<https://www.developmentaid.org/#!/news-stream/post/28782/the-bahamas-releases-national-platform-for-digital-certificates-using-blockchain-technology-with-idb-support>>.

⁴⁰ See, for instance, Fairfood, *A 100 per cent transparent coconut chain* (2018) <<https://fairfood.nl/en/blockchain-cases/a-100-transparent-coconut-chain/>>.

VI. Can Blockchain improve working conditions and enhance compliance?

Based on the elements shown above, we will see below how blockchain could serve to improve working conditions in global supply chains and platform work.

1. *Work in global supply chains*

Global supply chains are complex transnational structures set up for the production, assembly, transport, distribution and marketing of products throughout the world. They also involve a set of different procedures, as well as the exchange of information and documentation throughout different jurisdictions. Global supply chains are prone to disruptions and various types of risks. Mistakes and delays in the transfer of documents and information, as well as defective goods, are common throughout the chain. At the same time, on many occasions global supply chains are the object of complaints arising from serious decent work deficits. The complexity of this production setups makes it difficult to have a global view of the whole operation process and to track information and communication flows.⁴¹

Blockchain is being used in some procedures and sectors of the chain to overcome some of these challenges. As clearly explained in a European Union report 'the question is whether blockchain technology can really improve today's supply chains and logistics sector to respond to operational inefficiencies, fraud and perhaps even some grand challenges such as unethical labour practices and environmental degradation. [...] Blockchain-based applications have the potential to improve supply chains by providing infrastructure for registering, certifying and tracking at a low cost goods being transferred between often distant parties, who are connected via a supply chain but do not necessarily trust each other'.⁴²

Interestingly, blockchain has made it possible to track different products on a unit-by-unit basis as seen above.⁴³ It also facilitates certification of ownership and provides a history of transactions. It allows for real-time visibility of inventory levels and shipments. Urgent orders can also be expedited

⁴¹ Deloitte (n 35) 10.

⁴² Boucher (n 7) 16-17.

⁴³ Faioli (n 6) 149.

and rerouted, minimizing disruptions to production schedules and customer shipments.

The combination with other technologies increases blockchain's impact on global supply chains, making them more transparent. IoT, mobile phones and blockchain can be important allies to global supply chain management as they facilitate real-time access to information that is gathered by the machines and extracted from the wearables used by workers. All aspects of the global supply chain including working conditions, warehouse temperatures, speed of production, time of work and time of rest, risks or accidents occurred – to name a few – become more accessible to management thanks to IoT and blockchain. The combination of blockchain and IoT sensors are used to track freshness, quality, and safety of perishable foods.⁴⁴ It is possible to follow a whole process from beginning to end, monitoring production and transport in real time, and detecting breakdowns in a timely manner, thus providing more security to the consumer. This has even been organized among competing companies to increase customer confidence.⁴⁵ Blockchain is also used in maritime transport, allowing all enterprises involved to jointly track a transaction without affecting the privacy and confidentiality of sensible aspects of the transaction. Shippers, ship owners, port terminals, customs and land transport companies have real-time access to information and to the necessary documents at all stages of the transport, without bugs or document inconsistencies. Other entities that intervene in the commercialization process such as exporters and importers, as well as customs brokers, can also benefit from the encrypted documents and the security provided by the blockchain.

By the same token, these tools could also help improve working conditions. While this technology allows for the tracking of products, including the places of production, it also makes it possible to 'follow' a worker through all tiers of production, including the verification of working conditions and the respect for his or her rights. Certification of workers' identity

⁴⁴ Louis Columbus, 'Top 10 Ways Internet Of Things And Blockchain Strengthen Supply Chains', *Forbes Magazine*, 2019 <<https://www.forbes.com/sites/louiscolombus/2019/01/13/top-10-ways-internet-of-things-and-blockchain-strengthen-supply-chains/>>.

⁴⁵ For instance, the Food Trust blockchain established by Nestlé SA, Dole Food Co., Driscoll's Inc., Golden State Foods, Kroger Co., McCormick and Co., McLane Co., Tyson Foods Inc., Unilever NV, and Walmart and Carrefour with IBM.

and capacity as well as certification of products can also be made accessible to global supply chains thanks to the blockchain. Blockchain may also help certify workers age (to avoid child labour), the absence of forced labour, as well as the payment of wages and social benefits. Moreover, it may also provide a means of fairer compensation to different layers of the value chain. Small-scale farmers, or sweatshop factory workers may be entitled to a higher share of the final product price. The combination of these technologies would provide the final employers with information concerning working conditions enabling them to take the necessary corrective measures for the protection of workers. At the same time, the national authorities would have the necessary information to launch increased on-site controls or to initiate compliance procedures.

This increased transparency would make enterprises more accountable. The key question is whether the blockchain and 'smart contracts', in combination with other technologies, like IoT, could be widely implemented to track work in global supply chains and on digital platforms as well. The objective would be to have certainty about the identity of the parties to the contract, to monitor working conditions (payment of wages, working hours, safety and health, and social security), to guarantee effective payment once the work has been done, and to ensure respect for fundamental rights. To achieve this, it would be necessary to establish common rules among the different companies operating in different jurisdictions.

2. Blockchain, the employment relationship and transition to formality

Blockchain in combination with smart contracts can serve to determine the existence of an employment relationship (including short or fixed term employment relationships). The employer has capacity to hire and the worker has the skills to provide the work (this can also be certified by blockcerts, as seen above). With blockchain and smart contract some processes may be automatized, reducing time and costs. The employer may post in the internet some job offers and at the same time block or park the remuneration in the system. Once the work is provided, fulfilling all the conditions required, the money is unblocked and deposited in the worker's account. The repetition of this contract could serve to determine the existence of an employment relationship between the parties. The authority could have access in real time to information concerning the celebration

of the contract, or the realization of the conditions stipulated in the smart contract. The fact that in the great majority of cases the work involved is simple, repetitive and similar facilitates the quality control and the establishment of the smart contract to automatize the payment.

In this case, the blockchain in combination with the smart contract works as a public, unchangeable ledger, which contains all relevant information concerning the contract. At the same time, the blockchain serves in this case to manage, control and monitor the proper execution of the employment contract in order to protect workers, prevent abuses and facilitate supervision by the authority. This application is, of course, still very rudimentary and needs further evolution. Besides, it would greatly benefit from solving the uncertainties raised by certain issues like, for example, the difference of jurisdiction and liability in case of non-fulfilment by one of the parties, notably the employer.

Technology is without doubt a powerful instrument for the transition from the informal to the formal economy. Blockchains can, for example, facilitate companies' and workers' registration. They can facilitate, as we have seen, payment of wages, services and taxes. Moreover, providing workers with a digital identity can also contribute to their transition towards formality.

3. *Blockchain and the MLC, 2006 as an inspiring model: Establishing a labour certificate*

One of the issues to be examined is the interaction between personal data protection rules that tend to restrict the transmission of personal data between companies and between different jurisdictions, and the use of blockchains that involve making such information available to network parties (even in different countries). To overcome this obstacle, a worldwide requirement could be established for a certificate issued by a competent national authority showing, for example, that wages have been paid, that health and safety conditions are respected, that the workers of the company concerned are registered with the social security system and that the corresponding contributions have been made. The assessment of compliance with the conditions would be carried out at national level by the public authority (or whoever has the delegation to do so), who will have access to workers' personal data. Once the fulfilment of the obligations has been verified, the national authority will issue a certificate that will only

state that the required conditions have been fulfilled, without communicating any workers' personal data. This certificate could be recorded in the blockchain to enable access to this information to all the parties of the global supply chain. This certificate would then be accessible by other governmental agencies, as well as by all the parties involved in the production process throughout the supply chain. The registration of this certificate in the blockchain could be a requirement to participate in one or more of the processes in the production chain.

In order to achieve proper harmonization and consistency in the certificates, all parties should agree on what specific information should be included in the certificates. While it will require time and resources, in particular to be able to harmonize different practices between different countries (even at different levels of development), this could lead to the effective establishment of global standards for labour and social protection at least on a sectoral level. In this respect, ship certification procedures under the ILO Maritime Labour Convention, 2006 (i.e. Maritime Labour Certificate and Declaration of Maritime Labour Compliance) are an interesting example to emulate.⁴⁶

The question remains whether it would be possible to establish a certification process, similar to the one established in the framework of the MLC 2006, which in combination with blockchain, would serve to ensure that workers working in global supply chains or through platforms all over the world enjoy their labour rights, improve working conditions and have access to social security benefits. The registration of the different enterprises involved and a system of enterprises reputation could also assist in the process.

⁴⁶ According to regulation 5.1 of the MLC, 2006, each Member shall establish an effective system for the inspection and certification of maritime labour conditions ensuring that the working and living conditions for seafarers on ships that fly its flag meet, and continue to meet, the standards in this Convention. In establishing an effective system for the inspection and certification of maritime labour conditions, a Member may, where appropriate, authorize public institutions or other organizations (including those of another Member, if the latter agrees) which it recognizes as competent and independent to carry out inspections or to issue certificates or to do both. In all cases, the Member shall remain fully responsible for the inspection and certification of the working and living conditions of the seafarers concerned on ships that fly its flag. A maritime labour certificate, complemented by a declaration of maritime labour compliance, shall constitute prima facie evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention relating to working and living conditions of the seafarers have been met to the extent so certified.

VII. Concluding remarks

All over the world, concerns are voiced about what the future holds and about how work in the future will enable us to meet our needs. Sometimes, the new economy is exaggeratedly presented as requiring a complete overhaul, including in terms of how work is regulated. While this may be true with respect to certain occupations, it should not overshadow the need for enlightened human-in-command and centered policies breaking away from the currently omnipresent technological determinism. At some point, societies and policy makers will need to engage in discussions about how to secure decent work in the digital economy and how to take advantage of new technologies, such as blockchains for the protection of workers' rights. It is indeed essential to harness the technological potential so that it contributes to bettering the world of work, including platform work, and not making it more isolationist, insecure and unprotected. As the world's leading institution with a mandate to establish global labour standards, the ILO has a historic opportunity to take the normative lead in this area. Its traditional normative instruments can be adapted with a view to build partnerships with other international institutions so as to be better equipped with the tools necessary to grasp a phenomenon that has so far tended to be (probably excessively) dematerialized. This article has merely outlined some of the possible avenues for action on the normative front as well as the potential of new technologies such as the blockchain technology for the world of work.

The future is indeed yet to be written and, in 2019, the ILO Centenary Declaration for the Future of Work called the ILO to carry forward into its second century with unrelenting vigour its constitutional mandate for social justice by further developing its human-centred approach to the future of work, which puts workers' rights and the needs, aspirations and rights of all people at the heart of economic, social and environmental policies. Clairvoyant technology-specific policy orientations had already been given more than 30 years ago by ILO constituents in the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169). These remain as valid today, if not more, as they were back then – namely, that one of the major elements of national development policy should be to facilitate the development of technology as a means of increasing productive potential and achieving the major development objectives of creation of

employment opportunities and the satisfaction of basic needs. Technology policies should, taking into account the stage of economic development, contribute to the improvement of working conditions and reduction of working time, and include measures to prevent loss of jobs.⁴⁷ The time to implement policies and approaches conducive to these objectives is counted in view of the numerous current challenges and the commitment made under the Sustainable Development Agenda 2030 to leave no one behind.

⁴⁷ Recommendation No. 169, paragraphs 20 and 26.

Entre marginalisation et réinvention: l'OIT et son action normative face à la mondialisation et à la remise en cause du multilatéralisme

Francis Maupain

I. Introduction

La célébration d'un anniversaire n'est pas nécessairement le meilleur contexte pour anticiper l'avenir. L'expérience du cinquantenaire de l'OIT invite à cet égard à la prudence. Célébré avec faste et couronné par l'attribution du prix Nobel de la Paix, il fut suivi à quelques mois d'intervalle par une crise qui l'opposa si gravement à son principal contributeur que certains commentateurs s'interrogèrent sur sa survie¹.

On ne sait trop si ce précédent est pour quelque chose dans le choix qui a été fait dès 2015² de focaliser le centenaire non point tant sur l'avenir de l'OIT que sur l'avenir du travail, et d'établir à cet effet, en 2017, une Commission mondiale sur l'avenir du travail dont le rapport serait transmis par le Directeur général à la Conférence internationale du Travail lors de sa session du centenaire en 2019.

Cette thématique pouvait cependant difficilement éviter de déboucher tôt ou tard sur la question institutionnelle sous-jacente: celle de savoir si, et de quelle manière, l'OIT aura la capacité, au long de son deuxième siècle d'existence, de faire en sorte que l'avenir du travail, à travers les mutations

¹ N.M., «International labour in crisis» (1971) 49(3) Foreign Affairs.

² Conférence internationale du Travail, 104^{ème} session (2015), Rapport du Directeur général, *L'initiative du centenaire sur l'avenir du travail*.

évoquées par le rapport de la Commission mondiale sur l'avenir du travail³ puisse néanmoins s'inscrire dans le cadre des principes et objectifs énoncés dans sa Constitution.

A l'approche du centenaire cette question institutionnelle avait déjà suscité un certain nombre de commentaires, parfois dubitatifs⁴.

C'est le cas en particulier de l'article du professeur Jan Klabbers qui s'interroge sur les raisons de ce qu'il perçoit comme une «marginalisation» partielle dont l'OIT ferait, avec quelques autres organisations internationales, l'expérience. Malgré l'adoption de la Déclaration de 1998 relative aux principes et droits fondamentaux au travail, il suggère qu'elle aurait manqué «*the flotilla of globalization*» et que, contrairement à d'autres organisations telles que l'OCDE, elle n'aurait pas réussi à capter le «*Zeitgeist*».

Il n'est guère surprenant qu'au regard de l'extraordinaire tour de force que représentent l'œuvre de l'OIT et la capacité d'adaptation dont elle a su faire preuve à travers le siècle le plus sanglant de l'histoire humaine, ces commentaires n'aient pas retenu l'attention dans le contexte des festivités du centenaire. Et pourtant ils le méritent, venant de personnes éminentes et dont l'attachement à tout ce que représente l'OIT ne peut être mis en doute.

De ce point de vue, on ne peut donc que se féliciter du fait que la dimension institutionnelle de l'avenir post centenaire de l'OIT, que l'on avait congédiée par la porte de l'avenir du travail et du travail décent, ait fait son retour par la fenêtre d'une résolution qui est venue compléter la Déclaration

³ Ou, avant lui, par le rapport de la Banque mondiale: *Rapport sur le développement dans le monde 2019: Le travail en mutation* (2019) 138, ainsi que par les travaux de l'OCDE.

⁴ Voir, par exemple, Lucio Baccaro et Valentina Mele, «Pathology of path dependency? The ILO and the challenge of new governance» (2012) 65 *Industrial and Labor Relations Review* 195; Jan Klabbers, «Marginalized International Organizations: Three Hypotheses Concerning the ILO» in Ulla Liukkunen and Yifeng Chen (eds), *China and ILO Fundamental Principles and Rights at Work* (Kluwer 2014) 181; Marcel Van der Linden, «The International Labor Organization, 1919-2019: An Appraisal» (2019) 16 *Labour* 11; Paul Van der Heijden, «The ILO stumbling towards Its Centenary» (2018) 15 *International Organizations Law Review* 203. Voir aussi, Dursun Peksen et Robert G. Blanton «The impact of ILO conventions on workers rights: Are empty promises worse than no promises?» (2017) 12 *The Review of International Organizations* 75.

du centenaire de l'OIT pour l'avenir du travail⁵. Le dernier paragraphe du dispositif de cette résolution charge en effet le Conseil d'administration d'inviter le Directeur général à lui soumettre des propositions «en vue de promouvoir une meilleure cohérence au sein du système multilatéral».

Cela est d'autant plus significatif qu'à la différence de la Déclaration de 1998 et la Déclaration de 2008 sur la justice sociale pour une mondialisation équitable, il avait été délibérément prévu que la nouvelle Déclaration ne devrait pas comporter de dispositif de suivi, sans doute pour ne pas laisser les questions institutionnelles venir troubler les festivités ni perturber le cours des choses tel qu'il a été balisé depuis 2015 par le Programme de 2030 sur le développement durable et les objectifs de développement durable des Nations-Unies et la place qu'il fait à l'OIT, notamment dans le cadre de son objectif 8 «Promouvoir une croissance économique soutenue, partagée et durable, le plein emploi productif et un travail décent pour tous».

Il se peut que les menaces qui s'accumulent sur le multilatéralisme aient fait prendre conscience entretemps du fait que l'horizon ainsi fixé ne saurait être considéré tout à fait comme indépassable; ceci d'autant moins sans doute qu'il est maintenant tout proche, alors que celui du centenaire s'étend par hypothèse bien au-delà.

Quoi qu'il en soit, la fenêtre ainsi ouverte pose à nouveaux frais la question de la «marginalisation» possible de l'OIT ainsi que celle de la réinvention possible de son potentiel pour renforcer une cohérence indispensable à la consolidation du système multilatéral face aux menaces qui pèsent sur lui. Dans cet esprit, les réflexions qui suivent s'articuleront autour des deux dimensions complémentaires que l'on peut distinguer dans la problématique de la cohérence telle qu'elle résulte de la résolution susvisée: d'une part une dimension externe, qui concerne la cohérence dans la mise en œuvre des objectifs spécifiques de prospérité économique, de stabilité financière, de libéralisation des échanges et de progrès social au sein du système des Nations Unies; cette dimension apparaît de plus en plus comme une condition de soutenabilité du multilatéralisme dans son ensemble. Nous verrons que son renforcement semble appeler une réflexion nouvelle au sujet

⁵ Conférence internationale du travail, 108^{ème} Session (juin 2019), Résolution sur la Déclaration du centenaire de l'OIT pour l'avenir du travail <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711691.pdf>.

de formes de régulation appropriées pour que les bénéfices et contraintes inhérents à l'interdépendance économique et environnementale globale se trouvent répartis de manière acceptable entre tous ceux qui en sont les acteurs ou les victimes collatérales. D'autre part une dimension interne à l'OIT: les menaces qui pèsent sur le système multilatéral placent en effet l'OIT devant ses propres carences dans la mise en œuvre équilibrée de la double dimension magistérielle et régulatrice de sa raison d'être⁶.

II. La cohérence dans la mise en œuvre des objectifs économiques et de progrès social au sein du système des Nations Unies, condition de soutenabilité du multilatéralisme

Le problème de la cohérence dans la mise en œuvre simultanée des objectifs de développement économique et de progrès social s'inscrit dans un cadre institutionnel complexe marqué par une fragmentation des mandats entre organisations internationales universelles qui, selon certains, aurait été voulue et entretenue par les puissances dominantes⁷ pour perpétuer une forme de contrôle sur les pays émergents.

Si tel était le cas la situation actuelle n'en serait que plus paradoxale: c'est en effet «l'hégémon bienveillant» à l'origine de la création et de la consolidation du système multilatéral qui menace maintenant son avenir.

Des travaux récents sont venus apporter une lumière nouvelle et particulièrement utile pour aider à mieux comprendre le phénomène. On peut en déduire que c'est moins la fragmentation du système en tant que telle, que la volonté délibérée de «désencastrer» l'économie transfrontière des contraintes d'ordre politique ou social qui a fait obstacle à la poursuite

⁶ Il est indispensable en effet pour bien comprendre la nature des défis institutionnels qui se posent à l'OIT au seuil de son deuxième centenaire de bien distinguer les deux dimensions de sa raison d'être telles qu'elles résultent du préambule de sa Constitution. Il s'agit d'une part de sa fonction magistérielle qui consiste à traduire en termes concrets et adaptés aux réalités du moment les objectifs énoncés dans la Constitution; et il s'agit d'autre part de sa fonction de régulation qui consiste à faire en sorte que les Membres de l'OIT ne soient pas dissuadés de mettre en œuvre les normes par crainte de s'en trouver pénalisés face à la concurrence. Bien que ces deux dimensions soient indissociables dans la réalité, il est indispensable d'opérer cette distinction sur un plan heuristique.

⁷ Eyal Benvenisti et George W. Downs, «The Empire New Clothes: Political Economy and the Fragmentation of International Law» (2007) 60 *Stanford Law Review* 595.

cohérente des objectifs respectifs des différentes organisations; ce sont les conséquences sociales de ce «désencastrément» et en particulier la distribution très inégale des bénéfices et des contraintes de la mondialisation à travers le mécontentement qu'elle suscite parmi ceux qu'elle laisse de côté ou marginalise; à partir de là, la problématique de la cohérence ne se pose plus en termes de «*level playing field*» ou de clauses sociales comme ce fut le cas à l'orée de l'hyper mondialisation; elle se pose en termes de restauration des conditions et de l'espace institutionnel nécessaires à une redistribution équitable, dans un esprit de réciprocité, des bénéfices et contraintes de l'interdépendance économique et environnementale au sein de chaque Etat. Reprenons ces trois aspects.

1. *La cohérence victime collatérale du «désencastrément» de l'économie transfrontière?*

La recherche de la cohérence au niveau du système des Nations-Unies n'a rien d'un long fleuve tranquille. Elle s'inscrit dans une dialectique de forces opposées que l'on peut à traits grossiers regrouper autour de trois phases historiques principales.

La première phase est la tentative de l'OIT de proclamer, à travers la Déclaration de Philadelphie elle-même inspirée de la Charte de l'Atlantique⁸, que les objectifs de stabilité financière, de développement économique et de libération des échanges sont au service des objectifs de progrès social sur la base de son chiffre II d) selon lequel:

Il incombe à l'OIT d'examiner et de considérer à la lumière de cet objectif fondamental, dans le domaine international, tous les programmes d'action et mesures d'ordre économique et financier.

A cette ambition difficilement accessible qui aurait fait de l'OIT la «*master agency* du système» selon Ernst Haas⁹, a succédé une deuxième phase, pendant la guerre froide et une partie des «Trente Glorieuses», soit

⁸ «L'école de Genève» avait pu voir dans la Charte de l'Atlantique selon Slobodian la «faute inexcusable» par laquelle Roosevelt pour gagner la guerre avait laissé le génie de l'égalitarisme s'échapper hors de la bouteille en répandant parmi les combattants l'expectative qu'ils seraient dorénavant pris en charge par le «*welfare State*»; Quinn Slobodian, *Globalists – The End of Empire and the Birth of Neoliberalism* (Harvard UP 2018) 158.

⁹ Ernst B. Haas, *Beyond the Nation-State* (Stanford UP 1964) 164.

celle d'une période de coexistence, dont la politique ultérieure de l'ajustement structurel et le consensus de Washington ont fait oublier que, conformément aux conceptions keynésiennes qui avait partiellement inspiré la création du Fonds monétaire international (FMI), elle était censée être pacifique sinon harmonieuse.

Selon cette conception – dont l'article 1 des Statuts du FMI porte encore la trace¹⁰ – le FMI devait assurer la stabilité financière, et l'OIT se charger d'élaborer le cadre juridique du progrès social à travers sa production normative; et celle-ci s'est en effet étendue progressivement au cours des trois décennies de l'après-guerre pour couvrir peu à peu l'ensemble des objectifs constitutionnels de l'OIT et offrir ainsi des références aux Membres pour les différents chapitres de leurs législations du travail.

La troisième phase est la phase contemporaine d'émancipation de l'économie transfrontière depuis le consensus de Washington et la chute du mur de Berlin. C'est sur cette phase que les travaux de l'historien de Harvard, Quinn Slobodian¹¹, sont venus jeter un éclairage indispensable. Il montre que cette phase est le produit d'une stratégie mûrement réfléchie de quelques économistes et penseurs réunis au sein de ce que l'auteur appelle «l'école de Genève»¹².

Leur influence s'est manifestée très concrètement, d'abord à travers le torpillage de la Charte de La Havane censée établir l'Organisation internationale du Commerce au début des années 50. Elle s'est affirmée ensuite par une stratégie dont le but était de contrecarrer les efforts du groupe des 77 visant à établir un nouvel ordre économique international qui représentait tout ce qu'ils abhorraient. Cette contre-offensive s'est traduite en premier lieu à travers le consensus de Washington au début des années 80; et ensuite, surtout au milieu des années 90, par la création de l'Organisation

¹⁰ A travers ses références à «l'instauration et [au] maintien de niveaux élevés d'emploi et de revenu réel», lesquelles références pourraient avoir été influencées, selon ses propres dires, par Edward Phelan, qui pourtant n'a participé qu'à un stade tardif en tant qu'observateur à la Conférence de Dumbarton Oaks. Voir Antony Alcock, *History of the International Labour Organisation* (MacMillan 1971) 188.

¹¹ Slobodian (n 8) 381.

¹² Dont les membres avaient en commun la nostalgie d'un ordre économique transfrontière protégé des caprices et dérives nationalistes de l'opinion tel qu'il s'était établi dans l'empire des Habsbourg avant de s'effondrer avec lui.

mondiale du commerce (OMC) pour mettre la sphère du commerce transfrontière à l'abri d'interférences étatiques nuisibles à la sécurité et à la mobilité des capitaux.

Cette construction, et en particulier ce qui en est le joyau institutionnel, c'est-à-dire le mécanisme de règlement des différends, s'est largement inspirée de l'expérience de l'intégration européenne et plus spécifiquement du rôle qu'y a joué la Cour de justice des communautés européennes. La jurisprudence de la Cour au temps de la Communauté européenne illustre la capacité de dire «non» aux écarts des Etats sous la pression de mouvements d'opinion ou d'intérêts nationalistes ou de changements de majorité qui selon Hayek¹³ est la clé d'une économie transfrontière pérenne fondée sur la mobilité et la sûreté des mouvements de capitaux à travers les frontières.

Bien davantage que le commerce des biens et services, le fer de lance de l'hyper globalisation c'est, en effet, bel et bien la mobilité des investissements¹⁴. C'est à travers elle que s'opère la diffusion rapide des technologies et que se joue de bien d'autres manières l'avenir du travail et ses transformations.

Ainsi est-il possible de dire par exemple que la nomadisation du capital n'est pas étrangère au phénomène que certains ont appelé la «monadisation» qui affecte les individus tiraillés entre leurs intérêts divergents en tant que travailleurs et en tant que consommateurs, et par ailleurs guettés par la tentation du repli sur leurs préférences individuelles ou sur des solidarités communautaires de moins en moins contrebalancées par les influences des institutions créatrices de lien social telles les organisations syndicales¹⁵.

¹³ Friedrich Hayek, *The road to serfdom* (Routledge Press 1944) cité dans Slobodian (n 8) 122.

¹⁴ Sur ce point particulier, les travaux un peu antérieurs d'un professeur à la Harvard Business School, Rawi Abdelal, *Capital Rules: The Construction of Global Finance* (Harvard UP 2007), ont mis en lumière le rôle joué par l'équipe de Jacques Delors d'abord à Paris puis à Bruxelles avec l'appui de l'OCDE pour installer une liberté de mouvement des capitaux dont l'impact est de loin le plus significatif du point de vue du travail et de son avenir.

¹⁵ On a ainsi pu observer aux Etats-Unis une corrélation entre l'affaiblissement de ces organisations et l'exode des emplois peu qualifiés qui a suivi l'exode des capitaux, suite au feu vert donné à l'admission de la Chine en qualité de pays en développement par l'administration Clinton. En effet cet exode a d'abord affecté les emplois les moins qualifiés qui se trouvaient aussi être les plus syndicalisés. Et, au-delà du relâchement du lien social auquel il a pu participer, cet affaiblissement pourrait avoir contribué au fait que les travailleurs reçoivent une part décroissante du produit national sous forme de salaires et bénéfices sociaux dans un

2. *Au péril la soutenabilité du système multilatéral?*

Ce sont précisément ces phénomènes qui semblent être à l'origine du rejet populaire de cette «hyper mondialisation» qui s'est manifesté de manière brutale dans les rues et les urnes d'un certain nombre de pays qui avaient auparavant joué un rôle d'avant-garde dans la mise en place de cet ordre néo-libéral. Les analyses semblent converger sur le constat que ce phénomène de rejet touche essentiellement les travailleurs au seuil de la classe moyenne qui ont vu s'éroder leur pouvoir d'achat, s'amenuiser les perspectives de progrès de leur progéniture, et leur valeurs traditionnelles remises en cause, tandis que les solidarités collectives seraient en voie d'«archipellisation».

La question de savoir si cette réaction de rejet menace la soutenabilité du processus d'hyper globalisation lié au «désencastrement» de l'économie transfrontière est cependant sujette à davantage d'interrogations.

Pour les chantres de la mondialisation heureuse – dont Pascal Lamy fut l'un des représentants les plus articulés avant de faire plus récemment son *mea culpa* pour avoir mésestimé le rejet dont il faisait l'objet parmi ses laissés pour compte¹⁶ – ce phénomène ne concerne qu'une frange minoritaire de travailleurs des pays industrialisés dont la situation était artificiellement favorable du fait d'un certain nombre d'accidents de l'histoire, dont la colonisation. Il n'affecte en rien le soutien des multitudes de travailleurs à travers le monde que la mondialisation a tirés de la pauvreté et même pour beaucoup amenés au seuil de la classe moyenne.

A l'inverse d'autres n'ont pas hésité à évoquer le spectre de l'avant-guerre sous l'éclairage des travaux de Polanyi¹⁷ qui avaient déjà montré que le «désencastrement» de l'économie opéré par le capitalisme du XIX^{ème} siècle était l'un des phénomènes à l'origine du retour de bâton de la société sous la forme du fascisme au XX^{ème} siècle.

contexte plus général de croissance vertigineuse des inégalités. Un rapport tout récent de la Brookings Institution montre une corrélation entre le déclin de l'affiliation syndicale dans le secteur privé et la stagnation des salaires et la croissance des inégalités relayée par un éditorial: The Editorial Board, «Reviving the American Working Class» (The New York Times 2019).

¹⁶ Pascal Lamy, «Le protectionnisme serait porteur de guerres et de déclin» (Le Point 2017). Cet entretien a été donné à l'occasion de la sortie du livre de Pascal Lamy et Nicole Gnesotto, *Où va le monde?* (Odile Jacob 2017).

¹⁷ Joseph E. Stiglitz et Fred Block, qui ont écrit la préface et l'introduction à la réédition du livre de Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001).

Abstraction faite des failles axiologiques¹⁸ et juridiques¹⁹ que recèle par ailleurs la logique du «désencastrement» de l'économie transfrontière, il semble peu contestable en tout cas que l'onde de choc des réactions populaires qu'il a provoquée au sein des pays industrialisés se fait sentir bien au-delà des pays où elles se sont produites²⁰.

De manière plus générale cette situation consacre la faillite d'une vision «panglossienne» du lien entre la libéralisation des échanges et la marche vers le libéralisme à laquelle Dani Rodrik a opposé son «trilemma»²¹. Le bon côté de la situation est qu'elle a commencé à soulever de très vives alarmes quant à l'avenir de l'ordre mondial libéral. Elles se sont exprimées dans certaines publications de référence telles que *Foreign Affairs*²².

¹⁸ En ce qui concerne en particulier le hiatus entre le traitement accordé à la libre circulation des investissements et celui des travailleurs migrants.

¹⁹ En ce qui concerne la façon de considérer le rôle que l'organe d'appel est censé jouer pour combler les angles morts que l'absence d'accord politique a laissés dans les textes. Ce rôle paraît naturel à la plupart des juristes européens habitués à la place que la jurisprudence de la Cour de justice de l'Union européenne a prise dans la mise en œuvre des traités. Une attitude beaucoup plus stricte prévaut du côté des Etats-Unis qui y voient une dérive par laquelle les juges excèdent («*over reach*») leur mandat pour se substituer à ce qui relève des négociations politiques par une politique de «*self-aggrandizement*». Cette façon de voir explique les réactions que l'on sait à l'égard de l'Organe d'appel et qu'une auteure a appelé «*the other trade war*»; voir Kathleen Claussen, «The Other Trade War» (2018) 103 *Minnesota Law Review Headnotes* 1.

²⁰ Du fait notamment du Brexit, des hostilités commerciales entre les Etats-Unis et la Chine mais aussi de la contagion médiatique de ces phénomènes à travers les continents.

²¹ Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton UP 2017) 66. Selon l'auteur, la démocratie et la souveraineté ne peuvent se conjuguer que deux à deux: ainsi l'hyper globalisation et la démocratie se combinent au détriment de la souveraineté comme le montrerait l'exemple de l'intégration européenne; la souveraineté et la démocratie se conjuguent aux dépens de la mondialisation comme le montrent le Brexit et la guerre commerciale initiée par les Etats-Unis contre la Chine; et finalement la souveraineté et l'hyper globalisation se conjuguent, comme l'illustre la Chine de l'ère Xi qui est venue démentir les prophéties naïves ou intéressées qui avaient ouvert la voie à l'admission de la Chine à l'OMC en tant qu'économie en développement.

²² Voir, par exemple, Jeff D. Colgan et Robert O. Keohane, «The Liberal Order Is Rugged: Fix It Now Or Watch It Wither» *Foreign Affairs* (mai/juin 2017) dans lequel les auteurs soulignent que le principal problème de politique étrangère n'a pas sa source dans les relations entre Etats mais dans des problèmes domestiques de contestation au sein des Etats; ou encore l'article au titre quelque peu apocalyptique de Richard Haass, «How a World Order Ends and What Comes in its Wake» *Foreign Affairs* (janvier/février 2019). La livraison septembre/octobre 2019 porte pour sa part en couverture le titre «How a Global Trading System Dies».

Le contexte semblerait donc mûr pour relancer la réflexion au sujet des conditions institutionnelles d'une mise en œuvre plus cohérente des objectifs de développement économique de progrès social et de protection de l'environnement dans une situation d'interdépendance globale de plus en plus étroite.

3. *«Ré-encadrer» l'économie transfrontière en rétablissant les conditions d'une régulation équitable des bénéfices et contraintes de l'interdépendance globale par les Etats*

Les réactions de rejet de la mondialisation ont leur source, on l'a vu, dans le sentiment de marginalisation de certaines catégories c'est-à-dire la perception d'inégalités injustifiables dans la répartition des bénéfices d'une interdépendance globale économique et les contraintes d'une interdépendance environnementale qui pèsent bien souvent sur les plus faibles.

Cela explique peut-être que la lutte contre les inégalités soit devenue une espèce de leitmotiv au sein de la communauté internationale. Les déplorations des organisations qui furent naguère les artisans du consensus de Washington, ainsi que la place que vient de lui faire le G7 sous présidence française à Biarritz, confirment que cette lutte exprime le «*Zeitgeist*» des temps nouveaux et que l'OIT serait d'autant plus inexcusable de ne pas le saisir qu'il est plus proche de son mandat et de ses valeurs.

Cette nouvelle focalisation a le grand mérite en tout cas de poser la problématique de la cohérence autrement que sous l'angle du «*level playing field social*» ou de l'inclusion des clauses sociales dans les accords OMC qui a précipité les réflexions sur une régulation sociale appropriée de l'interdépendance globale dans l'impasse dès l'émergence du phénomène.

Il est à craindre en même temps que la recherche de solutions ne fasse guère de progrès aussi longtemps que l'on reste à ce niveau de généralité. Si l'on veut répondre aux menaces spécifiques qui pèsent sur le système multilatéral il est indispensable de poser le problème de manière plus spécifique, sous l'angle de la régulation équitable des bénéfices et contraintes de l'interdépendance économique et environnementale globale entre tous ceux qui en sont les acteurs ou les victimes collatérales. Et, à partir de là, la question est d'identifier les conditions institutionnelles requises pour qu'une telle régulation puisse se développer de manière effective.

Deux conditions paraissent essentielles à cet égard.

3.1 Première condition: une capacité institutionnelle de réguler adéquate au niveau des Etats

Dans son discours au Forum de Paris sur la Paix en 2018 le Secrétaire général des Nations-Unies António Guterres a affirmé sa ferme conviction «qu'un multilatéralisme fort exige des Etats forts». Ce sont là des paroles fortes; encore faut-il – une fois de plus – que l'on fasse preuve de cohérence dans leur mise en œuvre au plan multilatéral.

On ne peut manquer de relever une contradiction dans certaines conceptions «progressistes» qui déplorent la croissance des inégalités tout en ringardisant les Etats comme des reliques poussiéreuses d'un ordre westphalien définitivement dépassé par les réalités transfrontières de la technologie et de l'économie.

Bien sûr il n'est pas question d'hypostasier le rôle de l'Etat comme acteur et agent principal du progrès social. Il s'agit seulement de mettre en lumière un angle mort dans la réflexion quant à la manière d'éviter que la promotion indispensable de la responsabilité sociale des entreprises et du rôle de la société civile ne serve pas d'excuse sinon de cache misère à l'affaiblissement de la capacité institutionnelle des Etats de maintenir et promouvoir une cohésion sociale sans laquelle la soutenabilité du processus sera de plus en plus menacée.

Il s'agit en particulier d'éviter que la mise en œuvre au sein des chaînes de valeur des principes de responsabilité sociale des entreprises au profit des travailleurs qui en dépendent n'aboutisse à démobiliser les Etats en ce qui concerne la responsabilité qui leur incombe de promouvoir leur législation et leurs institutions au bénéfice de l'ensemble des travailleurs, y compris ceux censés bénéficier des engagements de responsabilité sociale. Le drame du Rana Plaza est en effet venu tragiquement démontrer que ces engagements n'offrent pas de substitut aux carences des législations et des administrations nationales dans les domaines vitaux pour les travailleurs²³.

²³ Il est à peine nécessaire de souligner le rôle accru que l'OIT pourrait jouer pour contribuer au renforcement de cette capacité institutionnelle tant il paraît évident.

3.2 Deuxième condition: un «espace incitatif» au plan multilatéral

Un article récent a bien résumé le lien nécessaire entre les deux niveaux en observant que le fait de libéraliser le commerce tout en limitant l'espace laissé aux Etats pour conduire de tels efforts risque de saper les liens de solidarité entre individus au niveau national et par voie de conséquence le système commercial international lui-même²⁴.

Deux conditions doivent se trouver réunies pour qu'il n'en soit pas ainsi: d'une part faire en sorte que les efforts des Etats visant à sauvegarder la cohésion et le progrès social par une redistribution équitable des bénéfices et contraintes inhérentes à l'interdépendance économique et environnementale globale soient reconnus comme légitimes au plan multilatéral. Cette légitimation est évidemment de première importance du point de vue de la régulation de la concurrence fiscale, telle qu'elle a été entreprise par l'OCDE²⁵; d'autre part, faire en sorte qu'ils ne s'en trouvent pas pénalisés sur le plan pratique et celui de leur compétitivité, ce qui suppose une réciprocité dans leurs efforts.

Si l'on considère les deux documents qui encadrent le phénomène de l'hyper mondialisation à ses deux extrémités, d'une part les Accords de Marrakech ayant débouché sur l'institution de l'OMC en 1994 et d'autre part le Programme de 2030 des Nations Unies sur le développement durable, force est de constater que ce qui manque au premier sur le plan des principes n'est pas corrigé par le second sur le plan de la réciprocité pour fournir un cadre incitatif cohérent et réellement efficace.

En effet, si le premier est emblématique d'une réciprocité dans les engagements des membres en ce qui concerne l'ouverture de leurs marchés au mouvement des biens des services et des capitaux, il ne couvre que de manière très sibylline la dimension sociale de cette réciprocité dans le préambule de l'Accord instituant l'OMC en vertu duquel les Membres reconnaissent «que leurs rapports dans le domaine commercial et économique devraient être orientés vers le relèvement de leurs niveaux de vie, la réalisation du plein

²⁴ Gregory Shaffer, «Retooling Trade Agreements for Social Inclusion» (2019) *Illinois Law Review* 43.

²⁵ La dimension fiscale de la redistribution des bénéfices et contraintes de l'interdépendance globale paraît évidente. Voir Reuven S. Avi-Yonah, «Globalization, Tax Competition and the Fiscal Crisis of the Welfare State» (2000) 113 *Harvard Law Review* 1573.

emploi et d'un revenu réel et de la demande effective». Si limité soit-il, le potentiel de développement de ce texte avait suscité un certain optimisme parmi les spécialistes. Les menaces qui pèsent maintenant sur l'organe d'appel risquent de ne pas lui laisser avant longtemps la possibilité de le développer comme cela paraissait encore envisageable il y a quelques années²⁶.

Quant au Programme de 2030, il fait de la lutte contre la pauvreté son premier objectif, et de la réduction des inégalités entre les Etats et en leur sein, son objectif 10. Cela ne peut sans aucun doute que contribuer à renforcer la légitimité des efforts des Etats pour concilier les réalités de l'interdépendance économique et environnementale globale avec les exigences d'un progrès social équitable²⁷. Toutefois le texte laisse dans l'ombre la question de la réciprocité nécessaire dans ces efforts de lutte contre les inégalités pour que ceux-ci se poursuivent. Or il est permis de douter que la satisfaction du devoir accompli soit une motivation suffisamment puissante, si elle reste à sens unique, pour surmonter la crainte de subir un désavantage compétitif²⁸.

Ce double déficit croisé au niveau universel est à l'origine de la prolifération de diverses formules visant à le compenser sur une base uni, bi, ou plurilatérale et en particulier bien sûr, par l'inclusion de dispositions de clauses de travail dans les accords de commerce dont l'examen déborderait largement le cadre des présentes réflexions²⁹.

Il semble bien au demeurant que la contestation populaire persistante des accords de commerce bi ou plurilatéraux dans les pays développés, ainsi

²⁶ Voir, par exemple, Gabrielle Marceau, «Trade and Labour» in Daniel Bethlehem, Isabelle Van Damme, Donald McRae et Rodney Neufeld (eds), *The Oxford Handbook of International Trade Law* (Oxford UP 2009) 542, ainsi que Gabrielle Marceau et Aline Doussin, «L'Organisation Mondiale du Commerce» in Jean-Marc Thouvenin et Anne Trebilcock (eds), *Droit international social* (Bruylant 2013) 345, par. 19.

²⁷ Bien qu'il manque de spécificité au sujet de la dimension «redistributive» de la lutte contre les inégalités en ce qui concerne en particulier les bénéfices et contraintes de l'interdépendance économique et environnementale globale et il s'abstient curieusement de toute référence à la justice sociale.

²⁸ Comme le suggère *a contrario* la position selon laquelle les accords de commerce devraient inclure une disposition relative à la redistribution des bénéfices résultant de l'ouverture des marchés. Voir Timothy Meyer, «Saving the Political Consensus in Favour of Free Trade» (2017) 70 *Vanderbilt Law Review* 985.

²⁹ Pour une vue d'ensemble récente des différentes formules visant à corriger les effets de la libéralisation des échanges sur l'inclusion sociale, y compris les dispositions sociales des accords de commerce, voir l'article de Shaffer (n 24) 17-30 ainsi que la thèse de Ruben Zandvliet, *Trade Investment and Labour: Interactions in International Law* (Leiden University 2019).

que l'onde de choc et les incertitudes engendrées par les mesures unilatérales prises dans le cadre du conflit commercial Chine/États-Unis aient fait prendre conscience du fait que ces solutions ne sauraient être un substitut durable aux carences du système commercial universel; ainsi par exemple, la «balkanisation» de l'espace commercial qui en résulte risque-t-elle de compliquer sérieusement le développement des chaînes de valeur.

On ne peut donc à cet égard que se féliciter du fait que la réforme de l'OMC soit maintenant officiellement au cœur des préoccupations, y compris celles du G7 depuis le Sommet de Biarritz en 2019. Elle pourrait représenter l'un des éléments essentiels d'une plus grande cohérence; et souhaiter bonne chance et plein succès à cette entreprise sans pour autant fermer les yeux sur les obstacles qu'elle devra surmonter c'est-à-dire: d'une part, la dimension sociale n'est pas vraiment au cœur des revendications de réforme, lesquelles sont axées principalement autour des griefs relatifs notamment au «vol» allégué de la propriété intellectuelle et des distorsions engendrées par les entreprises d'Etat; d'une manière plus fondamentale, la greffe sur le mandat de l'OMC d'une capacité de régulation des problèmes environnementaux et sociaux inhérents à l'interdépendance globale risquerait tout simplement d'en changer la vocation et la nature. D'autre part, le système de décision de cette organisation qui est indirectement à l'origine de la recherche de solutions uni, bi, ou plurilatérales reste un obstacle difficile à surmonter.

Au terme de cette analyse une question vient nécessairement à l'esprit: pourquoi aller chercher ailleurs ce qui existe déjà en germe dans la Constitution de l'OIT et ne demanderait qu'à être développé?

Si l'on considère le pénultième attendu du préambule de la Constitution – «la non-adoption par une nation quelconque d'un régime de travail réellement humain fait obstacle aux efforts des autres nations désireuses d'améliorer le sort des travailleurs dans leurs propres pays» – il est clair d'une part qu'en acceptant d'y adhérer les Membres s'engagent de bonne foi, et dans un esprit de réciprocité, à mettre les bénéfices qu'ils retirent de l'ouverture réciproque de leurs marchés et de la division internationale du travail qui en résulte au service de l'amélioration du sort de l'ensemble de leurs travailleurs³⁰ à la lumière des différents objectifs énoncés dans le préambule.

³⁰ Il est important de souligner à cet égard que la conception du «*level playing field*» qui sous-tend cet attendu n'est pas celui d'une uniformisation des législations respectives, mais

Il est clair, d'autre part, que l'OIT est à cet effet investie par ce préambule d'une mission régulatrice qui fait partie intégrante de sa raison d'être mais qui pour les raisons que l'on a eu l'occasion d'examiner ailleurs³¹ a eu tendance à passer à l'arrière-plan des pratiques normatives en vigueur.

La prise de conscience des risques qui pèsent sur le multilatéralisme tel qu'il s'exprime à travers la résolution du centenaire susvisée place donc l'OIT devant un défi en même temps que devant une immense opportunité à l'orée de son deuxième centenaire: celle de savoir si elle est capable, à la faveur de ladite résolution, de rétablir une plus grande cohérence dans la mise en œuvre de son propre mandat, c'est-à-dire un meilleur équilibre entre les deux dimensions, magistérielle et régulatrice, de sa raison d'être en «réinventant» le potentiel inexploité dont elle dispose à cet effet et dont il convient de faire maintenant l'inventaire.

III. La dimension interne: remédier à l'atrophie de la fonction de régulation de l'OIT pour renforcer la cohérence/soutenabilité du système multilatéral

Parmi les trois principaux facteurs qui, selon Klabbers, peuvent avoir contribué à la marginalisation de l'OIT face à la mondialisation figure en bonne place le déclin de l'action normative dans sa forme conventionnelle au profit de nouvelles formes d'action «*aimed at gently persuading*» telles que la stratégie du travail décent. Non seulement, selon l'auteur, cette tendance laisse sans réponse normative un certain nombre de problèmes spécifiques qui marquent le phénomène de mondialisation tel que celui de la flexibilisation du travail, mais le recours à la *soft law* sous ses diverses formes n'est pas le meilleur moyen d'être pris au sérieux.

Les développements qui vont suivre visent à mettre en lumière le fait que la marginalisation alléguée de l'OIT face au phénomène de la mondialisation ne saurait être attribuée à un quelconque désengagement vis-à-vis des formes et pratiques traditionnelles de l'action normatives telles qu'elles

celle d'une réciprocité d'efforts à mener pour traduire – selon les conditions et préférences qui leur sont propres ainsi que le souligne la Déclaration de 2008 – les bénéfices de leur ouverture réciproque en termes de progrès vers les objectifs de progrès social auxquels ils ont souscrit.

³¹ Francis Maupain, *L'OIT à l'épreuve de la mondialisation financière* (BIT 2012).

ont connu leur âge d'or grâce à la «bulle» la guerre froide. Ce sont bien plutôt ces formes et pratiques traditionnelles qui, en privilégiant pendant cette période la fonction magistérielle de l'action normative sous sa forme conventionnelle, en ont dévalué la crédibilité en tant qu'outil de régulation sociale du phénomène de mondialisation après la chute du mur de Berlin. C'est en effet pour répondre à une nouvelle demande de régulation face à l'émergence du phénomène de l'hyper mondialisation que l'OIT a été amenée à «inventer» des formes nouvelles d'action normative pour tenter de répondre à une demande de régulation qui resurgit aujourd'hui sous une autre forme mais avec autant de vigueur.

La difficulté est en effet que, dans le contexte très exceptionnel de la guerre froide, l'impact concret de l'action normative sur les législations et les réalités des Etats Membres comptait moins que sa portée symbolique. C'est l'une des raisons³² qui explique la préférence donnée, avec l'acquiescement tacite des employeurs, à la forme conventionnelle de l'action normative³³.

³² Outre la nécessité de maintenir un front commun avec les travailleurs face aux exigences soviétiques tout au long du long débat relatif à la réforme de la structure de l'OIT dans la décennie 75-85. Le fait que les employeurs n'aient pas fait obstacle à la tendance à faire des conventions l'instrument emblématique de l'action normative s'explique évidemment aussi par le fait que les perspectives de ratification sont inversement proportionnelles au niveau des exigences du contenu, et que la forme conventionnelle peut de ce fait être approuvée à moindres risques tout en permettant de donner des gages d'attachement au progrès social dans un contexte de concurrence des systèmes politiques.

³³ La préférence donnée à la valeur symbolique de la forme conventionnelle a entraîné un certain nombre de malentendus en ce qui concerne sa «valeur ajoutée» par rapport aux recommandations. Voir à ce sujet Francis Maupain, «ILO Recommendations and Similar Instruments» in Dinah Shelton (ed), *Commitment and Compliance* (Oxford UP 2003) 372. Cette valeur ajoutée tient en définitive à deux éléments: d'une part à son effet cliquet (*ratcheting*) lequel est à double tranchant dans le cas d'un instrument obsolète – d'où l'importance de l'instrument d'abrogation qui permet aux Etats de se libérer d'obligations obsolètes sans prêter le flanc au grief de faire marche arrière (comme ce serait le cas s'ils devaient pour ce faire avoir recours à la dénonciation); il tient d'autre part au fait que la ratification offre un degré de juridiction internationale objectif et fiable qui vient s'ajouter au contrôle judiciaire national et le cas échéant en corriger les carences. Ce qui est présenté comme un manque d'efficacité de la convention est en réalité un manque d'efficacité de la législation nationale; on ne saurait faire grief à l'OIT du fait que les mécanismes qu'elle offre aux intéressés pour y remédier ne sont pas utilisés. C'est cette confusion qui sous-tend l'analyse à prétention scientifique parue récemment; voir Peksen et Blanton (n 4) dont on peut s'étonner qu'elle n'ait pas suscité de la part du BIT la réfutation qu'elle appelle de toute évidence.

Cette façon de privilégier le surcroît de valeur symbolique que le choix de la forme conventionnelle est censé donner au contenu au détriment de l'évaluation et de la promotion de l'impact universel des instruments à travers les législations et les réalités des membres s'est cependant retournée contre elle dans le nouveau contexte introduit par la chute du mur de Berlin et l'émergence d'une nouvelle phase d'hyper mondialisation. Le faible niveau des ratifications de conventions a alors eu tendance à décrédibiliser les prétentions de l'action normative de servir d'outil efficace de régulation d'une concurrence exacerbée par la liberté de mouvements des capitaux.

C'est pourquoi les travailleurs qui avaient jusqu'alors été les soutiens les plus constants de l'action normative de l'OIT sous sa forme conventionnelle se sont tournés vers ce que l'on considérait alors comme la star émergente du système multilatéral en raison de son mécanisme de règlement des différends, l'OMC pour tenter d'y faire inclure des «clauses sociales» contraignantes.

C'est suite à l'échec de cette tentative que prit naissance l'initiative qui devait conduire à l'adoption de la Déclaration de 1998 sur les Droits et principes fondamentaux au travail dans laquelle Klabbers a raison de voir la réponse spécifique de l'OIT au défi de la mondialisation.

La contribution de Tomi Kohiyama et Dražen Petrović dans ce volume dispense de s'attarder sur les innovations introduites par ce texte. Avec le recul de deux décennies, il sera simplement permis de souligner qu'il n'a pas eu sur l'action normative traditionnelle l'effet délétère que certains croyaient pouvoir y déceler³⁴ et que son impact, malgré ses limites, s'est avéré relativement inespéré³⁵.

Il est clair cependant que la contestation de la mondialisation, telle qu'elle s'est développée depuis quelques années, du phénomène de l'hyper mondialisation et de son impact social, montre que l'on a franchi une

³⁴ Voir, notamment, Philippe Alston, «Core Labour Standards and the Transformation of the International Labour Regime» (2004) 15 *European Journal of International Law* 457.

³⁵ Notamment parce qu'elle a servi de catalyseur à l'inclusion de dispositions sociales dans les accords de commerce et d'investissements; Zandvliet (n 29) 283. L'auteur y évoque le point de vue de Erika De Wet selon laquelle la Déclaration représenterait «*a feasible substitute to a WTO social clause*».

nouvelle étape dans la demande de régulation sociale de l'interdépendance globale; cela doit amener l'OIT à examiner à nouveaux frais la contribution qu'elle peut apporter en réponse à cette demande.

En effet, compte-tenu du mandat que lui confère la Déclaration de Philadelphie et du fait que, bon gré mal gré, sa profondeur historique en fait un symbole d'un multilatéralisme aujourd'hui en crise, l'OIT ne saurait se dégager de la part de responsabilité qui lui revient dans cet état des choses.

Malgré leur grande importance³⁶, il n'est pas question ici d'entrer dans le détail des problèmes de cohérence que posent les pratiques de supervision des normes internationales du travail. Les réflexions qui suivent se focaliseront donc sur les trois chantiers qui apparaissent prioritaires pour permettre à l'OIT de contribuer, au long de son deuxième siècle d'existence, à rétablir à la fois son rôle en matière de régulation et la soutenabilité du système multilatéral. Ces trois fronts ont pour caractéristique commune de viser au décloisonnement de ses pratiques normatives et de renforcement de sa capacité de persuasion tripartite.

³⁶ Le rétablissement d'une plus grande cohérence entre ces pratiques qui résultent de l'accumulation de près d'un siècle de réformes et d'adaptations présente un problème de première importance en raison du fardeau que cela représente en termes d'efficacité et de coût tant pour les Membres que pour l'Organisation. Cela est vrai en particulier pour toutes celles qui résultent d'un chevauchement mal contrôlé des différentes formes de contrôle de l'application au niveau national par les juridictions, par le biais du contrôle dit «régulier» de la Commission d'experts sur l'application des conventions et recommandations et en vertu des procédures constitutionnelles prévues aux articles 24 et 26 de la Constitution, sans parler du problème du règlement des questions ou difficultés d'interprétation explicitement prévu par la Constitution mais toujours dans les limbes au détriment de la clarté et de la sécurité juridique. L'enchevêtrement de ces pratiques est tel qu'il est difficile de progresser rapidement vers un résultat d'ensemble cohérent par la voie de consultations tripartites discontinues comme c'est la pratique actuelle. Pour un état de ces travaux, <https://www.ilo.org/gb/GBSessions/GB335/ins/WCMS_681356/lang-en/index.htm>. La méthode suivie par la délégation aux questions constitutionnelles (voir Conférence internationale du Travail, 29^{ème} session (1946), Rapport II(1)) pour procéder à la refondation des pratiques de l'avant-guerre (en étroite coopération avec le Bureau et le Conseiller juridique d'alors, Wilfred Jenks, semblerait beaucoup plus adaptée. Elle suppose cependant un climat de confiance dans l'avenir et entre l'ensemble des protagonistes qu'il faudrait d'abord rétablir.

1. *Décloisonner le contrôle de l'application des conventions et la vérification de l'impact/pertinence des instruments, qu'ils soient ou non ratifiés*

Un des acquis les plus remarquables et novateurs de l'action normative de l'OIT a été la mise sur pied sur la base de l'article 22 de la Constitution du «contrôle régulier» de la manière dont les Etats qui ratifient s'acquittent de leurs obligations et de la place essentielle qu'un organe d'experts indépendants joue dans ce contrôle. Le problème est que les ressources et le temps consacrés à ce contrôle ont eu pour effet de réduire à peu de chose le contrôle de l'impact universel – et donc de la pertinence – des instruments en vigueur, ratifiés ou non, tel qu'il est envisagé par le dispositif très novateur prévu à l'art 19(5)(c) de la Constitution. Cela a entraîné un double déséquilibre: d'une part en donnant, de manière non réciproque aux pays qui s'abstiennent de ratifier, une possibilité de contrôle sur ceux qui l'acceptent et qui se trouvent de ce fait soumis à une forme de double peine dissuasive du point de vue de la ratification universelle; d'autre part en donnant aux travailleurs des pays qui ne ratifient pas l'impression que le système de contrôle de l'OIT profite surtout à ceux qui sont déjà les mieux lotis, autrement dit les «*insiders*».

Pour corriger cette double distorsion, il convient de revenir à la lettre et à l'esprit de la Constitution, et en particulier à la mise en œuvre effective de son article 19(5). En permettant d'exercer un contrôle sur la manière dont l'ensemble des Membres prend en compte les instruments de l'OIT dans sa législation et sa pratique, cette disposition permet d'une part d'exercer une forme de régulation universelle qui pour n'être pas contraignante n'en est pas moins persuasive; et d'autre part de restituer aux pays qui ratifient une forme de contrôle réciproque vis-à-vis de ceux qui s'en abstiennent.

Il est important de souligner que c'est exactement cette logique qui a été mise en œuvre pour les droits fondamentaux en vertu du suivi à la Déclaration de 1998.

Bien sûr, il n'est pas envisageable d'un point de vue pratique d'extrapoler ce régime – y compris le système de suivi – tel qu'il était conçu à l'origine pour les droits fondamentaux en vertu de l'annexe à la Déclaration de 1998 aux autres instruments se rapportant aux trois autres objectifs stratégiques. Cela ne serait possible par analogie que pour certains droits qui sans être «*enabling*» revêtent une importance particulière, voire littéralement vitale, comme c'est le cas de la sécurité et santé au travail. La Résolution du

centenaire a demandé au Conseil de formuler des propositions en vue de son inclusion dans le cadre des principes et droits fondamentaux au travail. Il est à espérer que cela soit fait de manière à ne pas affecter la logique spécifique qui sous-tend la Déclaration de 1998.

Pour les droits qui ne sont, ni directement, ni par analogie, considérés comme de caractère fondamental, la question est simplement de mettre en œuvre de manière plus réaliste le dispositif de l'article 19 en lui accordant une place qui corresponde mieux à son importance dans les travaux de la Commission de l'application des normes de la Conférence internationale du Travail ainsi que dans ceux du Conseil d'administration.

2. Décloisonner les normes spécifiques pour les intégrer dans un instrument global de politique sociale

L'édification du corpus normatif de l'OIT s'est faite de manière presque exclusive³⁷ par la juxtaposition d'instruments spécifiques pour promouvoir séparément chacun des objectifs visés dans le préambule de la Constitution.

Cette démarche est parfaitement adaptée à la fonction magistérielle. Il n'en va pas de même de la fonction de régulation.

En premier lieu parce que cette juxtaposition n'aide pas les membres à combiner la mise en œuvre des différents objectifs de manière à tirer le meilleur parti des opportunités qu'offre la division internationale du travail pour un progrès équitablement réparti.

Ensuite parce qu'elle ne permet pas, comme le voudrait le préambule de la Constitution, d'entretenir parmi l'ensemble des membres une dynamique globale d'efforts réciproques, en vue de traduire de manière idiosyncratique les avantages de la division internationale du travail en progrès social équitable. Telle était la logique que la Déclaration de 2008 s'est efforcée d'explicitier, mais à laquelle il a manqué d'être prolongée par un instrument normatif approprié, doté d'un mécanisme de suivi approprié pour permettre d'en évaluer l'impact sur les réalités.

³⁷ Avec quelques exceptions dont la Convention (n° 117) sur la politique sociale (objectifs et normes de base, 1962 et la Convention du travail maritime, 2006.

Il n'y a rien en effet dans l'outil normatif qui la voue à cette double infirmité. On peut à cet égard invoquer le précédent de la Convention (n° 117) sur la politique sociale (objectifs et normes de base), 1962, même si cet instrument reste très largement prisonnier d'une optique de juxtaposition. Rien ne s'opposerait ainsi à l'élaboration d'un nouvel instrument global de politique sociale visant de manière spécifique à guider/accompagner les Membres dans leurs efforts en vue de promouvoir de manière intégrée et, dans un esprit de réciprocité, les différents objectifs spécifiques dans une optique d'interdépendance économique environnementale et technologique globale. Il s'agissait d'assurer une répartition plus équitable des bénéfices et des contraintes y afférentes entre l'ensemble des travailleurs, à travers, entre autres, la promotion des capacités individuelles, le rééquilibrage de la relation de travail dans les différentes formes nouvelles qu'elle peut revêtir ainsi qu'en terme de protection contre les aléas de l'existence tout en tenant compte de la diversité des situations et préférences nationales. Pour assurer son application universelle cette action normative pourrait prendre la forme d'une recommandation internationale du travail dotée d'un système de suivi *sui generis*.

L'élaboration et la mise en œuvre d'un tel instrument supposerait, bien sûr, une coordination appropriée avec les autres organisations dont le mandat touche à des domaines adjacents. Cette coordination est avant tout affaire de volonté, mais elle pourrait aussi s'appuyer très solidement sur les «finalités» convergentes de leurs mandats respectifs telles qu'elles résultent du préambule de leurs chartes constitutives et en particulier celui de l'Accord de Marrakech instituant l'OMC évoqué ci-dessus, ainsi que celui des statuts du FMI. Ce qui conduit à aborder le troisième front, qui va au-delà de l'action normative *stricto sensu*.

3. *Décloisonner les objectifs de progrès social et les objectifs économiques, financiers et commerciaux relevant d'autres organisations*

La question qui sera évoquée ici est celle de savoir si, et de quelle manière, il est possible de stimuler une meilleure cohérence dans la mise en œuvre simultanée des objectifs économiques, financiers et commerciaux d'une part, et de progrès social et de protection de l'environnement de l'autre, sans sortir de la fragmentation actuelle des mandats.

L'OIT dispose d'un atout majeur: le mandat que lui donne de manière spécifique la Déclaration de Philadelphie dont il a été question plus haut.

Ce mandat donne en effet en principe à la Conférence un véritable droit de regard sur « tous les programmes d'action et mesures d'ordre économique et financier » pour apprécier s'ils sont « de nature à favoriser ou à entraver » l'accomplissement de l'objectif fondamental qu'elle énonce.

Sans doute selon son concepteur juridique et futur Directeur général Wilfred Jenks, ce texte est-il « a fundamental part of the fundamental Charter of the ILO, binding upon the Organisation, binding upon its member States, and binding upon the United Nations as a statement of the recognized competence of the Organisation »³⁸.

Il n'en paraît pas moins clair que l'OIT n'est pas ou plus en position d'imposer le respect littéral de ce mandat. Elle dispose en revanche d'un avantage comparatif institutionnel pour le mettre en œuvre par la persuasion qui est sans équivalent au niveau universel. Il s'agit de la Conférence que Juan Somavia avait décrite comme un véritable « Parlement universel de l'économie réelle »³⁹.

Bien que cette description puisse paraître quelque peu hyperbolique, il n'en est pas moins exact que l'existence d'un tel organe universel et tripartite parfaitement rodé représente *pour l'ensemble du système multilatéral* un potentiel d'échanges et de débats associant les forces de la société civile qui concernent l'activité humaine la plus centrale à la vie quotidienne de chacun qui est absolument sans équivalent. Et il serait tout à fait aisé de l'exploiter concrètement au service d'une meilleure cohérence dans la mise en œuvre des objectifs respectifs de manière très simple et tout à fait concrète. Ainsi, l'ordre du jour de la Conférence pourrait, à intervalles appropriés, être aménagé pour faire place à une question lui permettant, conformément au cadre constitutionnel et réglementaire en vigueur, d'engager une discussion générale tripartite sur des sujets d'intérêt commun (recoupant leurs mandats respectifs) avec la participation des organisations concernées.

Ces sujets sont d'autant moins difficiles à identifier qu'ils font, dans bien des cas, l'objet de travaux menés simultanément, bien qu'en presque complet « isolement clinique » de l'OIT alors même qu'ils relèvent de son

³⁸ Wilfred Jenks, *Social Policy in a Changing World: The ILO Response – Selected Speeches by Wilfred Jenks* (ILO 1976) 64 <https://www.ilo.org/public/libdoc/ilo/1976/76B09_212.pdf>.

³⁹ Dont le principe était déjà évoqué dans son rapport de 2008 à la Conférence: Conférence internationale du Travail, 97^{ème} session (2008), *Le travail décent. Défis stratégiques à venir*.

mandat ou l'intéressent directement. L'exemple le plus récent et le plus flagrant est évidemment celui du dernier rapport de la Banque mondiale⁴⁰ sur les mutations du travail qui a précédé de très peu celui de la Commission mondiale sur l'avenir du travail. Mais il y en a bien d'autres, notamment les études du FMI relatives à la dégradation de la rémunération du travail rapportées à celle du capital⁴¹.

Il semblerait évident que la possibilité pour les mandants tripartites d'en discuter directement au niveau universel – c'est-à-dire autrement qu'à travers l'écran des bureaucraties respectives – pourrait être d'un grand intérêt pour eux; mais tel serait aussi le cas pour les organisations concernées qui auraient ainsi l'occasion de s'expliquer et de dissiper les suspicions ou mauvais procès dont leurs travaux peuvent à l'occasion faire l'objet dans la société civile.

La mise en œuvre de ce riche potentiel soulève cependant de toute évidence une question qui n'est pas accessoire, celle de la volonté tripartite de puiser dans tous ces possibles. C'est cette question que je vous propose d'évoquer en conclusion.

IV. En guise de conclusion: quid de la volonté tripartite?

Il est clair que l'OIT ne détient pas la clé de tous les problèmes qui assaillent le système multilatéral et sa soutenabilité, du fait d'une interdépendance économique et environnementale qui, en se renforçant, rétrécit la planète et démultiplie les problèmes de régulation.

La contribution qu'elle peut apporter à la régulation des bénéfices et contraintes de l'interdépendance économique et sociale pour une mondialisation équitable à travers l'optimisation de son potentiel normatif et de persuasion ne peut que rester relativement modeste. Il convient cependant de souligner que la limitation inhérente au caractère volontaire de son action normative devient beaucoup moins rédhibitoire dès lors que l'on s'éloigne du terrain miné du «*level playing field*» et du dumping social, pour poser le problème sous l'angle d'une régulation équitable des bénéfices et contraintes

⁴⁰ Banque mondiale (n 3).

⁴¹ Valentin F. Lang et Marina Tendes Tavares, «The Distribution of Gains from Globalization» (2018) IMF Working Paper WP/18/54; Dilyana Dimova, «The Structural Determinants of the Labor Share in Europe» (2019) IMF Working Paper WP/19/67.

de cette interdépendance au sein de chaque Etat, en s'appuyant sur les dispositions convergentes des préambules des chartes constitutives auxquelles ils ont adhéré.

Dans un contexte où le système multilatéral peine tant à s'adapter à ces nouvelles réalités, le fait que l'OIT laisse en jachère ce potentiel représenterait donc un véritable gâchis institutionnel du point de vue de la soutenabilité du système dans son ensemble.

Cela est d'autant plus vrai que les mécanismes de décision de l'OIT ne souffrent pas des mêmes handicaps – liés à l'application stricte du principe «un Etat une voix» et à la règle du consensus – qui rendent si difficile l'adaptation de l'OMC aux nouvelles attentes. La composition du Conseil d'administration tient compte des réalités économiques et des rapports de force. A l'exception des questions qui requièrent une majorité des deux tiers à la Conférence, la plupart des décisions peuvent être prises, soit à la majorité simple qui peut être facilement atteinte par le vote conjugué des employeurs et des travailleurs lorsqu'ils parviennent à s'entendre, soit à la majorité qualifiée des deux-tiers pour les décisions d'ordre législatif, financier et constitutionnel.

La mise en valeur de ce potentiel suppose bien évidemment une convergence de volonté tripartite. Or – au risque de simplifier à l'extrême – l'histoire centenaire de l'OIT et du tripartisme fait apparaître une espèce de loi d'airain. En effet, les mandants tripartites ont beaucoup de mal à se mettre d'accord sur autre chose que leur plus petit commun dénominateur à moins que ne se produise un alignement favorable entre trois conditions: l'intervention active d'un hégémon bienveillant dont Klabbers et d'autres n'ont certainement pas tort de souligner le rôle dans le dynamisme et l'inventivité dont l'OIT a pu faire preuve dans les décennies d'après-guerre; un Bureau international du Travail et un Directeur général prêts à jouer un rôle proactif selon une tradition qui remonte à Albert Thomas et qui la distinguait des organisations dites «*constituents driven*» telles que l'OMC; et enfin la perception partagée d'une menace externe. Ce fut le cas par exemple lors de la menace soviétique – en premier lieu lorsque l'URSS insista pour que la question de la liberté syndicale soit suivie par l'ECOSOC en 1949; ce fut à nouveau le cas plus récemment lors de la tentative visant à l'insertion de clauses sociales dans l'Accord de Marrakech; c'est son échec qui a conduit à l'adoption de la Déclaration de 1998, alors même que la disparition de

la menace soviétique avait entraîné la rupture du front commun entre les employeurs et les travailleurs au sujet de la «politique» normative.

En l'absence de semblables menaces, la tentation sera forte pour l'OIT de limiter son horizon à celui maintenant tout proche du Programme de 2030 et de la place qu'il fait à l'objectif du travail décent pour tous au risque de marginaliser peu à peu ce qui fait son vrai cœur de métier.

Une nouvelle et sérieuse menace s'est cependant dessinée depuis. Elle concerne, on l'a vu, la soutenabilité du système multilatéral. La demande formulée par la résolution du centenaire au sujet de la cohérence du système multilatéral ouvre une fenêtre vers de nouvelles réflexions quant à la contribution que l'OIT pourrait apporter pour y remédier.

Le principal défi sera sans doute de convaincre les employeurs d'y voir une opportunité positive. A la lumière de l'expérience récente, on peut en effet se demander s'ils n'en sont pas venus à considérer la raison de leur participation à l'OIT de manière essentiellement défensive plutôt que sous l'angle de ce qu'elle peut leur apporter de positif au-delà du plan individuel, en termes d'approfondissement des connaissances, de stabilité des institutions et des législations de paix sociale, au profit de leur intérêt fondamental commun en ce qui concerne la prévisibilité et de la sécurité des affaires. Dans un contexte marqué par la remise en cause du système multilatéral qui fait peser de graves menaces sur l'économie transfrontière, y compris l'organisation des chaînes de valeur, il faut espérer qu'ils verront dans la thématique de la cohérence une double opportunité: d'abord celle de faire jouer à l'OIT un rôle positif pour rétablir l'équilibre du système multilatéral dans l'intérêt de la prévisibilité de l'économie mondiale et de la paix civile. Ensuite celle de concrétiser leur volonté d'exercer un rôle au sein du système des Nations Unies; la volonté de mettre, à travers l'OIT, le «pied dans la porte» du nouveau système des Nations Unies semble avoir joué un rôle non négligeable dans le soutien qu'ils choisirent d'apporter à la fin de la guerre à la renaissance de l'OIT en tant qu'organisation autonome au sein de ce système; l'initiative conjointe des employeurs et des travailleurs⁴² pour se

⁴² Conférence internationale du Travail, 107^{ème} session (2018), Résolution concernant une coopération efficace de l'OIT pour le développement à l'appui des objectifs de développement durable <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_633137.pdf>.

voir reconnaître un statut propre directement au sein du système montre que cette volonté n'a pas disparu mais que les pratiques actuelles ne leur permettent pas de l'exercer de manière optimale. Il n'en serait plus ainsi si certaines des pistes esquissées ci-dessus – en particulier celle qui concerne l'optimisation du rôle de la Conférence en tant que caisse de résonance de l'économie réelle au sein du système multilatéral – étaient explorées plus avant.

Le débat sur la cohérence leur offre de ce double point de vue une occasion – qui pourrait n'être pas moins historique que celle de l'après-guerre – d'y parvenir.

Si l'occasion n'est pas saisie par l'ensemble des mandants, il est à craindre que ce soient «les circonstances d'une crise financière ou de conflits plus graves encore» dont le Président français Emmanuel Macron a agité le spectre devant la Conférence du centenaire qui, en provoquant, selon la formule du préambule de la Constitution «un mécontentement tel que la paix et l'harmonie universelle se trouvent mises en danger», poussent à se tourner à nouveau vers l'OIT pour la tirer d'un sommeil régulateur que l'écho bien discret de son centenaire n'a pas réussi à interrompre.

Thinking Inside the Box: The Quest for Legal Certainty

George P. Politakis

I. Introduction

Legal certainty is a foundational principle and objective of every legal system.¹ The notion of legal certainty (*sécurité juridique* in French) is intimately linked to the primary function of law and justice, which is to regulate social interaction and protect against the unfair and the arbitrary.

Legal certainty is commonly understood as synonymous with predictability, reflecting the principle that those subject to the law must know what the law is so as to be able to plan their actions accordingly. Beyond predictability, however, the concept of legal certainty is also perceived to cover an array of other substantive elements, such as clarity and rigour in law-making, stability and security of legal relations, intelligibility and reliability of rules, accessibility of legal remedies, judicial continuity, jurisprudential consistency, and normative coherence. Even though tautological to some extent, these various attributes clearly demonstrate that legal certainty

¹ See, for instance, Patricia Popelier, 'Legal Certainty and Principles of Proper Law Making' (2000) 2 *European Journal of Law Reform* 321; Dominique Soulas de Russel and Philippe Raimbault, 'Nature et racines du principe de sécurité juridique: une mise au point' (2003) 55 *Revue internationale de droit comparé* 85; Thalia Kruger, 'The Quest for Legal Certainty in International Civil Cases' (2015) 380 *Recueil des cours* 281, 294-315; Marzena Kordela, 'The Principle of Legal Certainty as a Fundamental Element of the Formal Concept of the Rule of Law' (2008) 110 *Revue de notariat* 587. For a selection of definitions of legal certainty and a literature review, see Mark Fenwick, Mathias Siems and Stefan Wrzka, 'The State of the Art and Shifting Meaning of Legal Certainty' in M. Fenwick, M. Siems, S. Wrzka (eds), *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (2017) 1-26.

is a *sine qua non* of the ideal of the rule of law.² There seems to be general agreement that 'legal certainty is central to the creation of the legal methods by which law is made, interpreted and applied'.³

At the same time, common wisdom tells us that flexibility and adaptability are also essential for drawing up functional legal regimes. It is argued that uncertainty is inherent in law and it would, therefore, be illusory to conceive law as determinate.⁴ For some, vagueness and ambiguity – *a priori* direct opposites of certainty and precision – are seen not as an unfortunate obscurity to be avoided but rather as a solution, an opportunity especially in matters of interpretation.⁵ For others, vagueness is considered ineliminable

² In the words of the UN Secretary-General, 'the rule of law is a concept at the very heart of the Organization's missions. It refers to a principle of governance in which all persons, institutions, and entities [...] are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated [...] It requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness [...] *legal certainty*, avoidance of arbitrariness and *procedural and legal transparency*' (emphasis added); see Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616 (August 2004) para 6.

³ James R. Maxeiner, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31 *Houston Journal of International Law* 27, 38.

⁴ It is beyond the scope of this paper to discuss the principle of legal certainty as contrasted to the principle of legal indeterminacy – a point of contention between European and American legal systems; see James R. Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 *Tulane Journal of International and Comparative Law* 541. According to the 'legal indeterminacy' school of thought, legal certainty is no longer attainable or even desirable goal but rather a chimera, an infantile longing, whereas in its strongest version, indeterminacy means that law is always indefinite and never certain, and that any decision is legally justifiable in any case; see Maxeiner (n 3) 33-35. Cf Ken Kress, 'Legal Indeterminacy' (1989) 77 *California Law Review* 283.

⁵ See, for instance, Andreas Kulick, 'From Problem to Opportunity?: A Analytical Framework for Vagueness and Ambiguity in International Law' (2016) 59 *German Yearbook of International Law* 257. Based on Martii Koskienniemi's view that 'interpretation creates meaning rather than discovers it', Kulick argues that – paradoxically – vagueness and ambiguity 'enable interpreters to pretend that there is clarity while in fact there is multitude of constructed clarities and thus the opposite, i.e. vagueness and ambiguity'; *ibid* 264. Cf Andrea Bianchi who argues that 'language as such conveys no clear and objective meaning and that only by resorting to context and/or other extra-linguistic elements may "meaning" be considered clear'; see Andrea Bianchi, 'Textual Interpretation and (International) Law Reading : The Myth of (in)Determinacy and the Genealogy of Meaning' in Pieter Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts* (Cambridge UP 2010) 34, 36. For Bianchi, 'both textual determinacy and indeterminacy are but myths and the interpretive process far from

from a legal system and therefore the ideal of rule of law – in its essential quality of clarity – is unattainable.⁶

This paper looks into the certainty versus flexibility debate through an ILO lens. It argues that at the dawn of its second century of existence, the Organization has to continue its normative mission and mandate restoring the prominence of legal certainty among the values guiding its action. This paper proceeds on the basis of several assumptions: first, legal certainty in an international organization presupposes set(s) of clearly worded and orderly structured rules. Second, the legal stability and continuity of international institutions can suffer as much from unresponsive governance as from unprincipled experimentation. Third, normative vagueness and high levels of generality or discretion are sources of uncertainty rendering processes untrustworthy and organizations fragile. Fourth, normative organizations are by definition committed to standardization, regularity and benchmarking hence the primordial importance of legal certainty for the realization of their objectives. Fifth, the more leeway is left for ad hoc practices, indeterminacy and ‘creative’ or ‘out of the box’ solutions, the less predictable and reliable normative organizations can claim to be.

In this latter respect, the appealing metaphor of ‘thinking outside the box’ has often been presented as synonymous with legal creativity and capacity to generate fresh and agile ideas, which *a contrario* implies that ‘thinking inside the box’ should necessarily be assimilated with legal conservatism and uninspiring formalism. Yet, the virtues of out of the box thinking may have been overstated. Creativity and innovation, as this paper argues, operate within a framework (a ‘box’ for this matter) even when they seek to completely revamp it. Rules may be repealed, revised, superseded by custom, or evolve through dynamic interpretation but cannot be replaced by unregulated, self-proclaimed ‘flexible’ constructions.

being merely the produce of linguistic analysis, is deeply embedded in a societal context [...] to resist the sirens’ song of plain meaning is not necessarily conducive to subscribing to indeterminacy [...] To know that [interpretation] is no neutral exercise and that considerations of context and purpose by the actors concerned are always relevant to producing outcomes does not take anything away from the legitimate regulatory function of the law’; *ibid* 35, 54-55.

⁶ See Timothy A. O. Endicott, *Vagueness in Law* (Oxford UP 2000) 185-190.

II. Legal certainty and international law

Certain notions appear to attract little attention among scholars, probably because they are either uninterestingly obvious or patently elusive. Legal certainty is one of these blind spots as there are surprisingly few writings that address the significance of that principle in international law. The only aspect that seems to have stirred some debate, as discussed briefly below, is language determinacy in relation to the customary rules of treaty interpretation or the role of judges and international courts in this respect. The quest for legal certainty has, of course, been the main driver behind all major codification exercises of *jus gentium*. *Lex scripta*, wrote Oscar Schachter, ‘brings clarity and precision where there had been obscurity and doubt’⁷ while for Roberto Ago, ‘si l’on veut éviter que le droit international plonge dans un état d’incertitude croissante, dont le danger pour la stabilité de la société internationale n’a certes pas besoin d’être souligné, l’on dispose en réalité que d’un moyen: [...] la codification du droit international’.⁸

In one of the few scholarly analyses of the principle of legal certainty, Robert Kolb looks at legal certainty as one of what he calls eight ‘consubstantial with law’ principles, namely common good, justice, reciprocity, equality, proportionality, freedom, morality, reason and sanction.⁹ He considers that certainty translates in law the existential requirement for security, stability and predictability and distinguishes between ‘objective’ certainty that refers to the legal order as a whole (*erga omnes*) and ‘subjective’ certainty which concerns the legal relations between parties (*inter partes*). Objective certainty relates to the need for clarity and stability of the law (*certitudo*) on the one hand, and security of legal enforcement (*securitas*) on the other. As for subjective certainty, it requires consistency and continuity in bilateral relations and respect for commitment and promises (*fides*).¹⁰

⁷ Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 66.

⁸ Roberto Ago, ‘Nouvelles réflexions sur la codification du droit international’ in Yoram Dinstein (ed), *International Law at a Time of Perplexity – Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 1, 6. As Ago, then chairman of the International Law Commission, stated at the first reading of the draft articles of what later became the Vienna Convention on the Law of Treaties, the ‘main objective of the ILC’s work in treaty law and beyond is certainty of the law’; cited in Kulick (n 5) 1.

⁹ Robert Kolb, ‘La sécurité juridique en droit international : aspects théoriques’ (2002) 10 African Yearbook of International Law 103.

¹⁰ *ibid* 109-117.

III. The role of vagueness and ambiguity

It is widely shared that both ambiguity and vagueness indicate indeterminacy and lack of precision. Ambiguous words or expressions have multiple meanings (homonymy and homography are the most common cases) whereas vague terms are so indeterminate that their meaning can only be guessed.

Most commentators admit the important role vagueness and ambiguity can play in modern international law. Qualified language and imprecise terms often help to reach otherwise unattainable consensus or allow for a comfortable margin of interpretation. Ambiguity – is argued – helps to grasp contemporary complexities. Even though indeterminacy, polysemy, vagueness and ambiguity express distinct connotations, they all indicate different levels of lack of clarity that help to prevent negotiation deadlocks. In the case of a larger package deal, for instance, ‘rather than hold up the overall agreement, states can incorporate hortatory or imprecise provisions to deal with the difficult issues, allowing them to proceed with the rest of the bargain’.¹¹

The ‘constructive ambiguity’ technique, as the deliberate use of imprecise language in order to disguise the incapacity of reaching an agreement, is no longer limited to some exceptionally sensitive negotiations, such as a peace accord, but is being widely used in drafting all kinds of multilateral legal texts. It is often hailed as proof of pragmatism and legal creativity. What is less clear, however, is the long-term impact of techniques that favour generality and unspecification more than clarity and systemic coherence and put intrinsic uncertainty before stable and clear-cut responses to legal questions.

¹¹ Kenneth W. Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 445. Even though constructive ambiguity ‘pushes fundamental disagreement from the drafting stage to the implementation stage, reaching an agreement is often better than none at all, whatever its flaws’; see Kulick (n 5) 283.

IV. Legal certainty and the ILO's normative dilemmas

As already mentioned above, legal certainty is the underlying rationale for the *creation*, *interpretation* and *application* of the law. Current discussions around the Organization's normative function, and in particular the creation, interpretation and application of international labour standards, underscore the critical importance of legal certainty.

1. *Legal certainty and standard-setting*

Legal certainty is, of course, the *ultima ratio* of any law-making exercise; clear legal prescriptions remove doubt and provide security. Standard-setting, in particular, is about defining thresholds of labour protection, and holding accountable those who would fail to guarantee – in law or in practice – the minimum permissible coverage so fixed. It flows clearly that specific and unambiguous prescriptions are key to any standard-setting exercise (indicative as it is, the word 'definition' derives from the Latin *definitio* which means boundary). The more open-endedly or inconclusively permissible 'limits' are defined, the less convincingly they can fulfil their regulatory function.

With respect to standard-setting, the principle of legal certainty is relevant in two distinct respects – the drafting but also the content of standards.

Concerning drafting, the more voluminous the body of ILO standards becomes the greater the need for systematization and consistent drafting. Recent practice in negotiating international labour instruments shows that drafters do not enjoy unlimited discretion and that they should rather feel bound by well-established legislative methodology and time-sanctioned usages and specificities. Certainty in standard-setting is prominently valued through the attributes of rigour, clarity, simplicity, and consistency.

Imprecision or unspecification are sources of uncertainty, especially when they relate to the standards' scope, the nature of legal obligations, or the wording. Imperfections are also source of uncertainty and may vary from redundancies to lacunae.

In certain cases, key terms in a convention are left undefined or scope provisions remain deliberately vague. For instance, 'subsistence fishing', which is specifically excluded from the scope of the Work in Fishing Convention, 2007 (No. 188), is left undefined thus arguably permitting ratifying countries to exempt broad categories of fishers and/or fishing

vessels under an extended interpretation of subsistence fishing. All the more so as the Convention provides that cases of doubt as to whether specific categories of fishing vessels fall within its scope shall be determined by national competent authorities.¹² In other cases, definitions do not seem to be ‘synchronized’ with those adopted in other multilateral fora.¹³

In other cases, the obligations arising from a Convention are conditioned by its inherently programmatic or promotional nature. For instance, under article 2(1) of the Nursing Personnel Convention, 1977 (No. 149), ratifying countries commit to a policy on nursing services and nursing personnel ‘designed to provide the quantity and quality of nursing care necessary for attaining the highest level of health for the population’. Promotional instruments, in general, call for the adoption of policies and the formulation of programmes rather than precise legal obligations to be directly complied with by ratifying States. As it has been observed, ‘this lack of certainty about States’ obligations is bound to cause problems and it has often been asked whether greater use should not be made of Recommendations as the main instrument, reserving Conventions for matters that lend themselves to precise definition and action’.¹⁴

Writing in 1978, the then ILO Assistant Legal Adviser Felice Morgenstern, questioned the appropriateness of drafting conventions designed to obtain from States only a commitment to pursue stated policy objectives in the absence of ‘a clearly defined and meaningful legal obligation which could be enforced by the various procedures laid down in the ILO Constitution’.¹⁵ In the same vein, another scholar observed that ‘in a

¹² More generally, the discussions that led to the adoption of Convention No. 188 were dominated by flexibility concerns to the point that the relevant provisions have given rise to a specific Office publication; see *The flexibility clauses of the Work in Fishing Convention, 2007 (No. 188)*, Working paper No. 315 (ILO 2018).

¹³ This was the case, for instance, of the proposed definitions of the terms ‘disaster’ and ‘conflict’ that gave rise to considerable controversy during the Conference discussions that led to the adoption of the Peace and Resilience Recommendation (No. 205); see International Labour Conference 105th Session 2016, Provisional Record 15-2(Rev.2) paras 59-64, 74, 323-354; International Labour Conference 106th Session 2017, Provisional Record 13-2(Rev.) paras 34, 37, 169.

¹⁴ J. M. Servais, ‘Flexibility and Rigidity in International Labour Standards’ (1986) 125 *International Labour Review* 193, 198.

¹⁵ Felice Morgenstern, ‘International Legislation at the Crossroads’ (1978) 49 *British Yearbook of International Law* 101, 105. She cites a report submitted to the ILO Governing

few conventions, the obligation assumed is so minimal and amorphous as to be barely discernible'.¹⁶

Moreover, exemption possibilities are often worded in very general terms, for instance allowing ratifying countries to exclude from the application of the Convention 'limited categories' of workers, branches of economic activity or establishments where 'special problems of substantial nature arise'.¹⁷

It is also worth noting that many Conventions make reference to 'progressive implementation', admittedly in recognition of the fact that certain ratifying countries may only be able to implement specific obligations in a phased manner.¹⁸ Yet, making provision of open-ended progressive implementation without specifying any timeframe, or conditioning such phased implementation on close supervision, is significantly weakening the binding character of the provisions concerned.

Body in 1974 which saw value in promotional conventions only 'where the policy objective is defined with precision, and progress in realising that objective can be evaluated with a fair measure of certainty'; *ibid* 104. The same issue had been raised in the Director-General's report to the Conference in 1945, which warned that 'any attempt to enhance the authority of what is in substance a Recommendation by expressing it in Convention form [...] would seem to be calculated to undermine the authority of Conventions and Recommendations alike'; *ibid* 103.

¹⁶ J. F. McMahon, 'The Legislative Techniques of the International Labour Organization' (1965-66) 41 *British Yearbook of International Law* 1, 37-38.

¹⁷ See, for instance, article 1(2) of the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148); article 1(2) of the Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172); article 3(1) of the Work in Fishing Convention, 2007 (No. 188); article 2(2)(b) of the Domestic Workers Convention, 2011 (No. 189). It should be recalled that the good faith application of such exemption possibilities is subject to the control and supervision of the Committee of Experts. In practice, however, the Committee of Experts' comments on whether flexibility provisions have been implemented in accordance with the letter and spirit of the Convention concerned are rare. Generally speaking, the use of flexibility devices does not seem to be proportionate to the time and effort constituents often invest in negotiating those devices – this is certainly an area that calls for more careful study.

¹⁸ See, for instance, article 13(2) of the Domestic Workers Convention, 2011 (No. 189). In the case of the Work in Fishing Convention, 2007 (No. 188), article 4(1) provides for progressive implementation of several requirements 'in the light of insufficiently developed infrastructure or institutions' and in accordance with a plan drawn up in consultation with representative organizations of fishers and fishing vessels owners. During the negotiations that led to the adoption of Convention No. 188, a time limit of ten years had been proposed for the progressive implementation of the provisions concerned but it was finally not retained.

Another flexibility tool of noticeable elasticity is the notion of ‘substantial equivalence’, or the idea that a legal prescription may not be taken literally but implemented in a substantial equivalent manner provided that the level of protection is not negatively affected. For instance, article 2(2) of the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152) permits variations in the technical measures it prescribes on condition that they ‘provide corresponding advantages and that the overall protection afforded is not inferior to that which would result from the full application’ of the Convention. As it has been observed, in this regard, ‘it is not possible to make systematic use of this type of clause since the impreciseness of the concept of equivalence’ can lead to controversy and uncertainty’.¹⁹

In between redundancies and lacunae are found qualifying clauses, which instead of mitigating the rigidity of certain provisions, practically void them of meaningful normativity.²⁰ Expressions such as ‘reasonable hours of work’, or ‘sufficient advance notice’ are, in reality, escape clauses framed in semantic vagueness that detract from the object and purpose of the instruments concerned. In the words of a commentator, ‘there is a deliberate and frequent tendency to choose words for their qualities of imprecision rather than precision. Vague and accommodating terms are liberally deployed throughout successive conventions, as may be instanced by the abundant recourse to such adjectives as reasonable, appropriate, adequate, effective, fair, practicable, necessary, sufficient, suitable and proper’.²¹

Admittedly, standards often necessitate a careful balancing of technical detail and generality. For instance, the Maritime Labour Convention, 2006, on the one hand, sets very precise minimum standards, for instance with

¹⁹ Servais (n 14) 197. It is recalled that the question of establishing some procedure which would permit governments to ratify a convention on the basis of legislation not strictly compliant with the requirements of the convention but ‘substantially equivalent’ to those requirements, was considered in the context of the 1946 constitutional amendment but it was felt that such procedure ‘would only serve to perpetrate discrepancies and inequality in the obligations assumed by States and impair the uniformity of international standards’; see McMahon (n 16) 36.

²⁰ By way of example, in the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205), the clause ‘as appropriate’ is used on 17 occasions and the clause ‘where appropriate’ on three occasions, the clause ‘as applicable’ two times while the clauses ‘as necessary’ and ‘as appropriate and applicable’ appear once each.

²¹ McMahon (n 16) 39.

regard to cabin floor space and headroom, and on the other, uses very broad terms for certain requirements, such as ‘proper lighting’, ‘adequate heat and ventilation’, ‘suitable food in respect of quality and quantity’ and ‘adequate insulated sleeping rooms’.

Beyond clarity and precision in legal drafting, a certain degree of consistency in the convention’s design and structure is an additional factor of certainty. Repetitive affirmations and verbalistic constructions, arguably for reasons of emphasis, may affect the clarity and exactness of legal prescriptions. For instance, the use of practically identical provisions both as preambular paragraphs and operative provisions is legally unjustified and serves poorly the overall economy of the text.²² Likewise, the use of certain annexes, such as long lists of relevant ILO instruments, should be reconsidered.²³ Not only is their normative value unclear, but they may generate unwarranted legal uncertainty with respect to all other instruments which may not be accompanied by similar annexes. Likewise, the haphazard reference to the eight fundamental Conventions in certain instruments but not in others may be questioned.²⁴

These few observations, which would certainly warrant more expanded analysis, seem to argue in favour of an enhanced role of the Conference drafting committee beyond ensuring the linguistic concordance between the authentic English and French versions of the draft text. They also call for a serious reflection on ways to guarantee that at all times the negotiated text is thoroughly and diligently discussed and amended in Conference committees.

²² See, for instance, fourth preambular paragraph and article 4(1) of the Violence and Harassment Convention, 2019 (No. 190).

²³ By way of example, the Annex to the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) lists 45 ILO and UN instruments as being relevant to facilitating the transition from the informal to the formal economy. A similar annex appended to the draft Recommendation on Peace and Resilience gave rise to heated debate but was finally dropped; see International Labour Conference 105th Session 2016, Provisional Record 15-2(Rev.2) paras 541, 544, 548, 1235, 2167-2250; International Labour Conference 106th Session 2017, Provisional Record 13-2(Rev.) paras 285, 904, 1960 and 1998-2013.

²⁴ See, for instance, the preamble to Convention No. 190 which ‘reaffirms the relevance of the fundamental Conventions’.

As for the normative qualities of standards, legal certainty calls for a structured set of intelligible, binding rules. By implication, over-softening prescriptive standards may result in relativizing the very essence of legal obligation, blurring the distinction between binding and non-binding instruments and, in the long run, denaturing the ILO's identity and mission as a normative organization.

It is certainly a truism to say that flexibility is an essential precondition to drafting standards that may aspire to universal acceptance. This is all the more true in the ILO's institutional framework that privileges tripartite compromise, and which, understandably, tends to prioritize flexibility when faced with difficult choices between prescriptive clarity and constituents' alienation. At the same time, flexibility varies inversely as normativity, and therefore, needs to be kept within reasonable limits. As Wilfred Jenks has eloquently put it, 'flexibility is not an end in itself. The maximum of flexibility is secured by the absence of any international standard'.²⁵ Echoing the same concern, Nicolas Valticos cautioned: 'it all depends on what is meant by flexibility. It goes without saying that the provisions of standards must be flexible enough to be applied to a variety of countries and situations. However, if what is proposed is to make their wording so loose as to render them inoperative, it would then amount to betraying the Organization's mandate, which is to bring about a real improvement in working and living conditions'.²⁶

Therefore, particular attention is needed to avoid flexibility becoming a misnomer for vague and ambiguous drafting. Unclear, too general or over-qualified language, is a far cry from the 'modifications' for special local conditions foreseen in article 19(3) of the ILO Constitution. This is then the normative dilemma for the drafters of future ILO standards: What is the degree of flexibility that does not put in danger the imperatives of certainty, stability and clarity of binding rules?²⁷

²⁵ Wilfred Jenks, 'ILO Standards: Are They Obsolete, Premature, Marginal or Important?' in *Social Policy in a Changing World: The ILO Response* (ILO 1976) 92.

²⁶ Nicolas Valticos, 'The ILO: A Retrospective and Future View' (1996) 135 *International Labour Review* 477.

²⁷ As noted in an earlier study, 'flexibility should remain an exceptional technique designed to offer common sense solutions to specific problems of application, and not a stratagem for scrapping legal commitment altogether [...] Finally, the crux of the matter is

Some of the considerations outlined above seem to be shared concerns for multilateral treaty-making in general. José Alvarez, for instance, criticizes the ‘meaningless compromise formulations reached by consensus’ and ‘provisions framed in deliberate ambiguities’ and suggests that ‘part of the blame must surely lie with “treaty-machines” such as the ILO and the UN General Assembly’.²⁸ For Bruno Simma, deliberate ambiguity consists in ‘a choice of language for which the application of all established rules of interpretation must fail because there is no common intention of the parties to be discovered other than that of leaving the issue open for further debate or conflict’.²⁹ As for Laurence Helfer, he considers that flexibility mechanisms ‘function as insurance policies’ as States calculate the overall level of treaty risk. He acknowledges that although such mechanisms facilitate agreement among States *ex ante*, ‘overly capacious flexibility provisions may engender opportunistic behaviour with pernicious consequences [...] Flexibility tools that are too easy to invoke will encourage self-serving behaviour and lead to a breakdown in cooperation’.³⁰ Or, as Andrew Guzman writes, ‘states

whether and how it would be possible to draw a clear distinction between real flexibility devices and clauses of sweeping normative variability. The former are genuine tools of suppleness and adaptability which can facilitate the ratification and application of standards, while the latter give rise to legal uncertainty, loopholes and misinterpretations’; see George P. Politakis, ‘Deconstructing flexibility in international labour Conventions’ in Jean-Claude Javillier et Bernard Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l’avenir* (ILO 2004) 493, 496.

²⁸ José E. Alvarez, *International Organizations as Law-makers* (Oxford UP 2005) 370-371. And elsewhere he refers to ‘texts carefully calibrated to avoid giving offense to the opposing interests at stake [...] and therefore fatally vague’; *ibid* 372.

²⁹ Bruno Simma, ‘Consent: Strains in the Treaty System’ in R. St. J. Macdonald and D. M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff 1983) 491. His position is that expectations of behaviours should be reflected in non-legal agreements and that the treaty form should not be selected for the establishment of not yet matured consensus. Otherwise, as he foresees, ‘just as specific manifestations of soft law surreptitiously gain at least part of the significance and solemnity of traditional sources through their use of language, content and procedures, so, in reverse, will the form of the treaty lose in normative status and stability when it is continuously used to define a consensus which is still too imprecise, fluid or weak to be able to live up to the rigid demands of *pacta sunt servanda*’; *ibid* 490.

³⁰ Laurence R. Helfer, ‘Flexibility in International Agreements’ in Jeffrey Dunoff and Mark A. Pollack (eds), *International Law and International Relations: Taking Stock* (Cambridge UP 2012) 175-176. His overall conclusion is that ‘flexibility mechanisms are not superfluous, boilerplate, or symbolic provisions that appear in the final clauses of treaties out of habit or happenstance’ but rather that ‘States make tradeoffs among potentially available

have an incentive to set terms that maximize the expected payoff from that agreement. Granting each party the ability to unilaterally change those terms reduces this expected payoff. Though a state prefers that its own commitments be flexible in this way, it would prefer that its counter-party be held to its promise'.³¹

2. *Legal certainty and interpretation of standards*

A second aspect, which underscores the importance of legal certainty for a normative organization such as the ILO, is the mechanisms it has at its disposal for ensuring the authoritative interpretation of the norms it produces. Are these mechanisms fit for purpose, transparent and impartial? Are they cost-effective? Have they ever been tested, and if so, have they produced results to the satisfaction of the ILO constituency?

Article 37 of the ILO Constitution provides for two distinct methods of judicial settlement of disputes relating to the interpretation of international labour Conventions. Article 37(1) refers to the compulsory jurisdiction of the ICJ for deciding 'any question or dispute' relating to the interpretation of the Constitution or of any international labour Convention adopted by member States whereas article 37(2) provides for the establishment of an internal tribunal for the expeditious settlement of disputes relating to the interpretation of international labour Conventions based on the understanding that not all questions are complex to merit referral to the ICJ and that probably a more convenient method at a lower level might be preferable.³²

In its early years, the ILO had recourse to the advisory function of the Permanent Court of International Justice (PCIJ) on six occasions between 1922 and 1932. Five of the six cases concerned the interpretation of the

flexibility tools in an attempt to calculate an overall level of treaty risk'; *ibid* 190. In this regard, he refers to flexibility tools used in ILO Conventions 'to enable States to customize their legal obligations in much the same way as reservations'.

³¹ Andrew T. Guzman, 'The Design of International Agreements' (2005) 16 *European Journal of International Law* 592.

³² See generally, Francis Maupain, 'L'interprétation des conventions internationales du travail' in René-Jean Dupuy (ed), *Mélanges en l'honneur de Nicolas Valticos : droit et justice* (Pedone 1999) 567. For relevant Office documents, see GB.256/SC/2/2 (May 1993) and GB.322/INS/5 (Oct 2014).

Constitution and only one referred to the interpretation of an international labour Convention. No use of the advisory jurisdiction of the ICJ has been made thus far while the idea of setting up an in-house tribunal for the rapid settlement of interpretation disputes has never been followed up beyond the level of preliminary studies.³³

Considering that no further interpretation request has been transmitted to the PCIJ, or to its successor, since 1932, one might wonder whether the experience of the first six advisory opinions had been positive and whether these pronouncements have indeed provided authoritative guidance allowing the Organization to adapt its action accordingly. Suffice it to recall, in this respect, that the first advisory opinion on article 3(5) of the Constitution has shed – and continues to shed – light on the issue of the method of nomination of non-governmental delegates at the Conference. The advisory opinion on women’s night work led to the revision of Convention No. 4 while the three advisory opinions on ILO competence clarified once and for all that the scope of standard-setting could well extend to work in agriculture or regulate the employers’ activities. As for the advisory opinion on the Free city of Danzig, it confirmed that the capacity of an entity to freely participate in ILO activities, such as the ratification of international labour conventions, is a precondition for statehood, and by implication, a precondition for admission to ILO membership. Proceedings on all six instances were expeditious (between three and six months), and most notably, workers’ and employers’ organizations were allowed to make written submissions. All advisory opinions were well received and promptly followed up; no dissenting voices were raised among ILO constituents nor the mandatory character of the Court’s ‘rulings’ was ever doubted.³⁴

There is no doubt that the ILO’s frequent recourse to the Permanent Court of International Justice in its early years aimed at securing legal

³³ Possible action for the implementation of article 37(2) was considered between 1993 and 2002 and again in 2008-2009 but no decision was taken; see GB.256/SC/2/2.

³⁴ In 1932, in his oral statement before the Court, Edward Phelan had this to say: ‘the object of the present proceedings before the Court is to secure an authentic interpretation. Once such an interpretation is given in whatever sense, it will lead *ipso facto* to the disappearance of all divergences and inequalities, for States bound by the Convention will be under an obligation to take the necessary measures to give effect to the interpretation laid down by the Court’; see PCIJ, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Series C – No. 60, 209.

certainty for the Organization's future development. In June 1926, speaking in the context of the advisory proceedings concerning the regulation of the employer's personal work, Albert Thomas concluded in these words:

il est un vieux mythe grec que mon esprit se plaît souvent à évoquer, dans notre effort quotidien d'organisation internationale. A la porte du ciel, les Grecs avaient placé trois déesses sœurs: Dikè, Eiréné, Eunomia. Ne se retrouvent-elles pas au seuil du temps nouveau que nous devons préparer? C'est nous qui sommes les serviteurs fidèles de Diké, de la justice sociale; la Société des Nations se consacre au culte d'Eiréné; mais ces deux cultes seraient peut-être inefficaces et les deux déesses seraient *hésitantes et incertaines*, si elles étaient séparées de celle que vous servez si pieusement, Eunomia, déesse de l'ordre et de l'harmonie par la loi. C'est à ses décrets, rendus par vous, que nous nous soumettrons respectueusement (emphasis added).³⁵

Since then, the closest the Organization has come to bringing an interpretation question before the World Court was in 2014 amidst a heated debate around the international protection of the right to strike under the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Following a profound disagreement between the Employers' and the Workers' groups on this issue which threatened the ILO supervisory system with paralysis,³⁶ the ILO Governing Body considered taking action under article 37 either referring the matter to the ICJ or setting up a tribunal.

Although a strong body of opinion favoured a 'constitutional' solution under article 37, the Governing Body decided in March 2015 not to pursue the matter any further in view of perceived uncertainties around an ICJ

³⁵ PCIJ, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, Series C – No. 12, 79.

³⁶ See Francis Maupain, 'The ILO supervisory system: A model in crisis?' (2013) 10 *International Organizations Law Review* 117; Lee Swepston, 'Crisis in the ILO supervisory system: Dispute over the right to strike' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 199; Janice Bellace, 'The ILO and the right to strike' (2014) 153 *International Labour Review* 29; Keith Ewing, 'Myth and reality of the right to strike as a fundamental labour right' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 145; Paul Mackay, 'The right to strike' (2014) 38 *New Zealand Journal of Employment Relations* 58.

ruling on the one hand and the lengthiness of establishing an in-house tribunal on the other.³⁷ It is interesting to note that most of the members of the Governing Body who expressed support for the proposed referral to the ICJ alluded to the need for 'greater legal certainty'.³⁸

The reluctance to seek an advisory opinion from the ICJ seems to stem from the instinctive scepticism towards an external mechanism which ILO constituents cannot control but also from what is perceived as the relative inexperience of ICJ judges in labour law matters. However, the hesitation of making use of the sole methods of interpretation expressly provided for in the Constitution raises legitimate concerns as it maintains uncertainty and reinforces the sentiment that we may not always need legal answers to legal questions and that article 37 could be stored away in mothballs.

Such hesitation risks to aggravate what one might call legal certainty 'deficit'. For the law to 'rule', law must be trusted. Ignoring legal means for resolving legal questions creates the perception that law is inadequate or that legal solutions have failed or are unavailable. As former ILO Legal Adviser, Francis Maupain, has written in relation to the ILO's decision not to seek an authoritative ruling from the ICJ on the interpretation of Convention No. 87,

*il serait plus préoccupant pour le prestige de l'action normative de l'OIT, que cette attitude ne traduise en réalité, après l'engouement pour la nouveauté de l'avant-guerre, le sentiment que les problèmes d'interprétation ne méritent pas les aléas et les tracasseries d'une procédure juridictionnelle de règlement, et peuvent somme toute s'accommoder d'une espèce « d'incertitude négociée ». Il semblerait normal et sain, pour un système aussi avancé que celui des normes internationales du travail, que dans les cas les plus significatifs, l'incertitude puisse être levée de manière claire et définitive.*³⁹

³⁷ See GB.323/INS/5, para 25, as amended.

³⁸ GB.322/PV, paras 50, 74, 78, 120.

³⁹ Maupain (n 30) 583. Laurence Boisson de Chazournes writing in this volume on 'The ILO and International Judicial Mechanisms: A Story of Control and Trust' makes the point that various questions 'turn around the opposition between legal security and uncertainty. A judicial pronouncement presents the advantage of breaking the cycle of uncertainty but there is the risk that it may not be accepted by the ILO tripartite constituents [...] One might wonder if it is better to find an internal compromise at the price of uncertainty. Is constructive

Against this backdrop, it is encouraging to note that as part of its ongoing consideration of the so-called ‘Standards Initiative’ – a major review process of all aspects of the ILO supervisory system launched in 2013 – the Governing Body has decided to hold a tripartite exchange of views in early 2020 on the possible ‘operationalization’ of article 37(2) of the Constitution.⁴⁰ In this connection, it is revealing that the Governing Body has been debating possible future action with regard to article 37 under the heading ‘further steps to ensure legal certainty’.

At the 334th Session (October 2018), for instance, several representatives welcomed the discussion on enhancing legal certainty while also stressing the importance of the related principles of transparency, coherence, effectiveness and impartiality for the systems of ILO standards.⁴¹ The most vocal support for considering the prospects of setting up an in-house tribunal under article 37(2) came from the spokesperson of the Workers’ group who indicated that ensuring legal certainty should be a key aspect of any reflection on the ILO supervisory system and that an exchange of views on article 37(2) was indispensable as continued challenges to Committee of Experts’ interpretations of conventions undermined the authority of the ILO as a whole.⁴²

Equally supportive statements were made at the 335th Session (March 2019), with the Workers’ group reiterating that discussions should enable the ILO to improve legal certainty with regard to interpretation of Conventions and that it was necessary to fully explore options under articles 37(1) and (2) before considering other suggestions.⁴³

ambiguity better? Referring to the above-mentioned institutional issue in relation to the right to strike, it appears difficult to argue that ambiguity over this issue is proving constructive in practice; *supra* 207-208.

⁴⁰ GB.334/INS/5 para 21, as amended and GB.335/INS/5 para 84, as amended.

⁴¹ GB.334/PV, paras 194, 197, 199, 200-201.

⁴² *ibid* para 253. In contrast, the Employers’ group considered that it should be explained what legal certainty actually implied and why it would be required as well-known interpretations of ILO Conventions made by ILO supervisory bodies were never legally binding, and the ILO supervisory system had so far functioned without legal certainty; *ibid* para 254.

⁴³ GB.335/PV paras 240-241. In contrast, the Employers’ group considered discussion should not be limited to article 37(2) and that decisions should not be easily outsourced to a new body, as would be the case if the chosen option were article 37(2); *ibid* para 243.

It is hoped that the forthcoming consultations on the possible establishment of the tribunal long foreseen in article 37(2) of the Constitution will confirm that lasting solutions to divisive interpretation disputes may only be grounded on clear and stable rules procuring legal certainty and security. Authoritative interpretation of binding legal texts constitutes the quintessence of legal certainty; it presupposes fair and accessible procedures, and final decision by an independent and impartial authority. After all, to give effect to the letter and spirit of constitutional provisions is the best guarantee of legal certainty and the clearest evidence that the Constitution remains the *Magna Carta* of the Organization.⁴⁴

In re-evaluating the merits of resolving interpretation disputes – authoritatively and definitively – through judicial means, the Organization should draw inspiration from, and find comfort in, the experience of the constitutional amendment of 1997 that brought to a felicitous end the 90-year old debate about the power of the Conference to repeal obsolete conventions. Indeed, the constitutional amendment of 1997 – despite its unexpectedly long gestation – was motivated by the same wish to reinforce legal certainty through a legally-defined process for definitively removing obsolete conventions from the body of ILO standards. Contrary to ‘creative’ but transient measures, such as the ‘shelving’ of outdated instruments or considering them ‘dormant’, the option of a constitutional amendment was finally retained as the most legally sound and clear-cut solution. It should be recalled, in this respect, that the Governing Body’s decision to undertake a constitutional amendment was based on the firm view that ‘in cases when the Organization had truly reached the conclusion that the obligations deriving from a given Convention no longer had any real influence on social progress, it [was] preferable [to abrogate that Convention] from the standpoint of the *credibility and clarity* of the standard-setting system’ (emphasis added).⁴⁵

⁴⁴ It may even be argued that in view of the categorical wording of article 37(1) to the effect that ‘any question or dispute [...] shall be referred for decision to the ICJ’, the Organization has a real responsibility – directly flowing from its constituent instrument – to seek and obtain definitive responses to interpretation disputes. This, in and of itself, is a legal question that could theoretically be brought before the World Court for decision.

⁴⁵ GB.265/LILS/WP/PRS/2 para 15. Note also that when this item was first considered by the Governing Body in November 1995, abrogation of outdated conventions was proposed as one of the tools for ensuring simplicity and consistency of standards; see GB.264/LILS/WP/PRS/1 para 53.

3. *Legal certainty and supervision of application of standards*

The third facet of ILO's normative work which should be driven by the principle of legal certainty relates to the procedures put in place for the control of the effective application of ratified Conventions. As the purpose of those procedures is basically to hold accountable those States which would be in breach of their obligations arising from ratification, it is evident that legal certainty about the applicable procedural rules becomes of paramount importance.

The ongoing debate in the Governing Body with regard to the advisability of codifying the rules for the examination of article 26 complaints is a case in point.⁴⁶ Most constituents seem to realize the need for clarity and consistency in view of the interests at stake, especially insofar as the most 'powerful' procedure for ensuring compliance is concerned. For instance, at the 334th Session (October 2018), one government regional group indicated that codification of article 26 should not be delayed further since there was no good reason to leave the most serious measure of the Organization to erratic and inconsistent interpretation while another regional group stated that the codification of article 26 procedure was essential to ensure transparency and accountability.⁴⁷

Others seemed to value the flexibility afforded by the absence of codified rules. The Workers' group, for instance, was supportive of reforms to allow for the establishment of a commission of inquiry not through codification but through a common understanding of improved practices.⁴⁸ In the same vein, a government regional group, while indicating that clear, transparent and accessible information on article 26 procedure could improve predictability, considered that the flexibility of the system had encouraged improved application of standards in article 26 cases without the establishment of commissions of inquiry and therefore the possibility to use intermediate measures should be retained.⁴⁹

⁴⁶ It is recalled that Standing Orders concerning the procedure for the examination of representations filed under article 24 of the Constitution have been adopted in 1932 and have since been amended twice. As for the procedure for article 26 complaints, it should be noted that draft rules of procedure were drafted by the Office in March 1952 but were never submitted to the Governing Body Committee on Standing Orders.

⁴⁷ GB.334/PV paras 197, 255.

⁴⁸ *ibid* para 191.

⁴⁹ *ibid* para 257.

The discussions at the 335th Session (March 2018) seem to confirm the ambivalence of certain constituents between codification and the existing flexibility based on evolving practice. The Workers' group, for instance, doubted whether codifying the procedure would improve its efficiency while the Employers' group expressed the view that codification should be considered only if the clarification of rules and practices through an Office guide was insufficient and if it was guaranteed that codification would not restrict the existing flexibility of the procedure.⁵⁰ For a government regional group, however, article 26 was such a key provision of the Constitution that it should be formally regulated and rely on Standing Orders.⁵¹

Beyond the specific question of the possible codification of the article 26 complaint procedure, it might be relevant, in this connection, to offer some reflections about the need to preserve and further promote legal certainty in all Office internal rules. Rules of procedure are all about orderly and efficient business processes based on clear and uncontested principles regulating those processes.⁵² It is evident that the reassuring and stabilizing function of procedural rules depends on their textual clarity, their structural coherence, comprehensiveness and updatedness. The more gaps there are to be filled through interpretation or practice, the less certainty the rules inspire. And the more outdated clauses are left unrevised, the less trust and confidence the rules can command.

The ongoing efforts of the Office to review in a comprehensive manner the Standing Orders of the annual Conference, by modernizing, rationalizing and simplifying a voluminous but barely convenient set of procedural rules is a case in point. If the fact that the Spanish language is not listed as

⁵⁰ GB.335/PV paras 238, 242.

⁵¹ *ibid* para 244.

⁵² As it has been aptly noted, 'no international organization or international conference can carry out its functions without clearly defined rules. Procedural debates have been termed "time-consuming", "rather uninteresting and profitless"; nevertheless procedure, in any organisation is integrally linked to due process'; see Robbie Sabel, *Procedure at International Conferences – A study of the rules of procedure at the UN and at inter-governmental conferences* (2nd edn Cambridge UP 2006) 2-3. Sabel cites extensively Wilfred Jenks for whom 'due process requires regularity of procedure' and 'the despatch of business in an orderly manner and respect by international bodies for their own terms of reference and limits of constitutional power are not tedious technicalities [but] essential ingredients of substantial justice on which all members are entitled to rely as guarantees'; see C. Wilfred Jenks, *Law in the World Community* (1967) 114.

an official language of the Conference (although it is treated as an official language in practice since 1950) is the most flagrant example of the hiatus between 'black letter law' and institutional practice, there are numerous other aspects of the Standing Orders that would need to be revisited in the interest of promoting legal certainty.

Procedural rules, of course, no matter how well-crafted or detailed they may be, will never be able to cover all unanticipated or exceptional situations the life of an international organization reserves. There may well be cases where one needs to proceed by analogy, interpret contextually, look into the negotiating history and seek to establish the drafters' intention or draw upon precedents. Consequently, ad hoc practices or special arrangements may be developed when confronted with unforeseen and atypical circumstances. These deviations, however, should be regarded as the 'exceptions that prove the rule' (*exceptio probat regulam*) and should not be relied upon to challenge – or, even worse, undermine – the validity (and utility) of the procedural orthodoxy of written rules.⁵³

Some observations on the legal status of the so-called 'introductory notes' preceding several sets of formal rules of procedure of the Organization, including the Standing Orders of the Governing Body, the Rules for Regional Meetings and the Standing Orders of technical meetings and meetings of experts, may better illustrate this point.

Strictly speaking, these introductory notes should be seen as merely providing background information, for instance tracing the origins and evolution of the relevant rules. The Introductory note to the Governing Body Standing Orders, nonetheless, indicates that it 'contains not only texts, but also practical solutions that have either served to deal with situations not covered in specific written provisions and which have not occurred again since, or, through repetition, have become precedents that the Governing Body follows [...] A number of these practices, in particular those in regular use, are described in the introductory note. This also applies to points on which the Governing Body has not seen fit to adopt rules so as to maintain the necessary flexibility for it to adjust to new issues the Organization has

⁵³ See Loïc Picard, 'La pratique comme fondement de l'action du Bureau international du Travail?' in Société française pour le droit international, *Colloque de Genève – La pratique et le droit international* (2004) 209.

to address'.⁵⁴ It is also true that recent practice shows that the introductory notes are thoroughly examined and agreed upon at the same time the formal rules are adopted.⁵⁵

The legal value of the introductory notes is unclear. There seem to be intentionally designed to safeguard flexibility in the way governance or deliberative bodies conduct their business by limiting formal rules to a certain degree of generality while elaborating more amply on accepted practices. Yet, a clear line should be drawn between formal legal prescriptions and a 'practical guide'. The risk with this permissive approach is that ill-defined practices may under certain conditions antagonize and finally sideline written rules. The even greater risk perhaps is the subliminal message that written rules may finally not be as indispensable as they may initially appear to be and that time-sanctioned usages and 'tested' patterns of action (or reaction) may do the job just as well. Clearly, this is far from an ideal situation from the point of view of orderly process, clarity and legal certainty. Attributing to those introductory notes – directly or indirectly – some degree of formality, or elevating them for all practical purposes to 'para-Standing Orders', does not seem to be conducive to legal certainty.⁵⁶

⁵⁴ In addition, the Introductory note is structured in six sections and numbered paragraphs and reads more as a compilation of regulatory arrangements supplementary to the rules that follow than as contextual explanations around those rules. Judging from the wording and drafting style (e.g. 'each section determines its own time management procedure', 'side events not intrinsic to the business of the session should be an exception and kept to a minimum [...] and should be approved by the tripartite screening group', or 'the number of its representatives in [committees or working parties] should be eight or any other multiple of four'), one is tempted to assimilate the paragraphs of the Introductory note with binding rules. Besides, textual repetition of certain provisions of the Standing Orders in the Introductory note accentuates this perception. It is thus not infrequent Governing Body members to invoke specific paragraphs of the Introductory note as if they were mandatory prescriptions.

⁵⁵ It is indicative that the Introductory note to the new Rules for Regional Meetings adopted in November 2018 was the subject of separate discussions at three Governing Body sessions; see GB.331/WP/GBC/3(Rev.); GB.332/WP/GBC/4; GB.334/WP/GBC/3. As stated in the Office document submitted at the last of the three sessions, the Introductory Note 'offers guidelines on the practical application' of the Rules.

⁵⁶ The fact that the notion of consensus – the Organization's decision-making method *par excellence* – is only 'defined' (by reference to a relevant UN document) in the Introductory note to the Standing Orders of the Governing Body exemplifies those risks. It is also indicative that the inclusion of a 'definition' of consensus was resisted at the time of drafting the new Rules for Regional Meetings (article 12(3)) while it remains unclear whether such 'definition' will be included in the revised Standing Orders of the Conference currently under consideration.

There can be no doubt, of course, that institutional practice may ultimately crystallize into a binding rule. Yet, for as long as practice remains uncodified, the very existence of such rule remains doubtful and may be subject to controversy, hence not conducive to legal certainty and security. According to a recent judgment of the ILO Administrative Tribunal, the legal effect of ‘accepted and recognized practice’ must be considered through the lens of the ‘fundamental requirement of creating consistency and predictability in a legal system’ and when ‘the legal effect of practice is to invite instability, unpredictability and uncertainty’ it should be rejected.⁵⁷

The need for flexibility, adaptability and a certain margin of discretion is evident. But only formally agreed written rules may under certain conditions be interpreted in a flexible manner. Flexibility may not be obtained in a legal vacuum; the absence of any written rules, or the maintenance of lacunary rules or rules long fallen into desuetude, does not guarantee flexibility but cacophony. The recipe for flexibility is judicious and intelligent drafting, not absence of commitment.

V. Concluding remarks

Legal certainty is the sentiment of security and confidence that procures the existence of clear rules, transparently and consistently implemented. As such it lies at the heart of all legal systems, values and processes. It reflects what drives the legislator as much as the judge and the legal practitioner in the pursuit of the overarching ideal of the rule of law. Legal certainty is vital for the institutional governance of an international normative organization. It may at times appear elusive but it is an organizational value which neither permits nor forgives half-hearted commitment.⁵⁸ In contrast, legal

⁵⁷ See Judgment No. 4134, consid 38-39. Moreover, the Tribunal ruled that ‘whatever may have emerged systematically by actions of the [United Nations] General Assembly cannot, in the absence of an amendment to the Statute [of the International Civil Service Commission], found an interpretation of the Statute, adopted almost one and a half decades earlier, which is at odds with its terms’; *ibid*, consid 37 <https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=4134&p_language_code=EN>.

⁵⁸ Consider the following statement that best captures the elusiveness of legal certainty: ‘it has been said that in international law, legal certainty remain a “chimera” [Karl Zemanek, “The Legal Foundations of the International System (1997) 266 *Recueil des cours* 288] This

uncertainty may well offer a convenient way out of challenging situations, which is nonetheless both ephemeral and illusory.

There are some hopeful signs in recent ILO governance debates that the promotion of legal certainty is placed again at the forefront of the Organization's priorities. Fresh initiatives, such as the progressive removal of obsolete instruments from the ILO's *corpus juris*, the possible operationalization of article 37(2) of the Constitution or the codification of the rules of the article 26 complaints procedure, offer good reasons for optimism. However cautious or hesitant, these are steps in the right direction since they help reinvigorating – and here lies the true value – an organizational culture of legal certainty and security. 'Thinking inside the box' is an invitation to pursue and further strengthen such a culture.

description goes too far, in particular considering its generality and boldness; but it would be foolish to deny part of its truth'; see Robert Kolb, *Theory of International Law* (Hart 2016) 400.

What the New Convention on Violence and Harassment Tells Us about Human Rights and the ILO

*Anne Trebilcock**

I. Introduction

The Violence and Harassment Convention, 2019 (No. 190) and Recommendation, 2019 (No. 206), both adopted by the International Labour Conference (ILC) on 21 June 2019, mark the first comprehensive international instruments to call for the prevention and elimination of such unacceptable behaviour in relation to all workers across the world of work.¹ As noted by feminist legal scholars, investigating the silences of international law can serve to deconstruct it.² The end of this silence coincided with the decision of the Governing Body of the ILO, at its October-November session in 2015, to place violence and harassment on the agenda of the 107th Session of the Conference. The period of preparation and adoption of the new ILO

* With thanks to Professor Ursula Rust and Associate Professor Fatma Karakaş Doğan for the opportunity to participate in a workshop at the University of Bremen (29 July 2019), and to Shauna Olney of the ILO for comments on an earlier draft.

¹ Presentation by Shauna Olney in Professor Adelle Blackett's course, Transnational Futures of International Labour Law (McGill Law School 2019) <<https://www.mcgill.ca/lldrl/what-we-teach/tfill>>.

² 'Investigating the silences of international law is another way of discovering its gendered nature: for example, why is violence against women not regarded as an international human rights violation?' wrote Charlesworth in 1993; see Hilary Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law' in Dorinda G. Dallmeyer, *Reconceiving Reality: Women and International Law* (American Society of International Law 1993) 1, 12. Twelve years later, the first United Nations Special Rapporteur on violence against women could point to 'perhaps the greatest mobilization around a specific human rights issue, leading to the articulation of international norms and standards' (but not yet in the world of work); Statement of Radhika Coomaraswamy (2005) cited in United Nations, Report of the Secretary-General, *In-depth Study on all Forms of Violence against Women*, UN Doc A/61/122/Add.1 (2006), para 38 and footnote 22.

instruments serendipitously coincided with a social media groundswell condemning sexual harassment at work, in what has been called ‘a transformative moment’.³ When the ILO filled this gap in human rights law, it did so in a way that encompassed but went well beyond gender issues.

Adoption of the new instruments alongside the ILO Centenary Declaration for the Future of Work 2019 served as fitting tribute to the institution’s resilience over its 100 years of existence. The present contribution briefly traces the ILO’s indirect and direct engagement over time with the issues of violence and harassment at work. It then turns to some reflections on the embedding of the new instruments in human rights law, and on the contested vitality of the ILO’s international norm generation on a tripartite basis. The text ends on a personal note.

II. An ILO concern from the outset

From its inception in 1919, the International Labour Organization has focused on the centrality of improving conditions of labour.⁴ When the Organization renewed its constitutional aims and purposes in 1944, it stressed that ‘all human beings [...] have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity’.⁵ The continuum that spans violence and harassment severely undermines freedom and dignity, and such behavior is linked to denial of equal opportunity and perpetuation of economic insecurity. The ILO was thus right on target in celebrating its centenary year with the adoption of trailblazing instruments on the prevention and elimination of such intolerable conduct in the world of work. In the words of one international law commentator, ‘ILO Convention No. 190 places human dignity at the center of the global regulatory paradigm’.⁶

³ Keynote address by Catharine McKinnon to the Conference on ‘Global Resistance to Sexual Harassment and Violence: The Worldwide #MeToo Movement’ (Berkeley Law 2019) <<https://executive.law.berkeley.edu/academics/metoo-globalization/details-metoo-globalization-conference>>.

⁴ ILO Constitution, Preamble.

⁵ Declaration on the aims and purposes of the International Labour Organization (1944), known as the Declaration of Philadelphia, which became part of the ILO Constitution as from 1946.

⁶ Diane Desierto, ‘The ESCR Revolution Continues: ILO Convention No. 190 on the Elimination of Violence and Harassment in the World of Work’ (2019) EJIL: Talk!

1. *At first it was just about women*

Beginning at its first Conference in 1919, the ILO encountered issues involving violence and harassment related to work. One of the rationales given for limiting women's employment during nighttime hours was allegedly to protect them from negative health effects, as reflected in the pre-ILO Convention respecting the Prohibition of Night Work for Women in Industrial Employment (the Bern Convention of 1906).⁷ Although the focus was on women's reproductive health, considerations relating to possible abuse,⁸ such as affronts to moral sensibilities or attacks during hours of darkness, also played a role. With the protective approach winning the day early on, the ILO adopted a series of international labour conventions on night work that some saw even at the time as unfairly constraining women's ability to participate fully in the labour force.⁹

Fast forward to the First International Women's Year (1975), when the International Labour Conference adopted a Declaration and Plan of Action that called for a review of all protective legislation applying to women.¹⁰ The 'protection by exclusion' approach to night work was eventually – and rather belatedly – displaced by one aimed at protecting all workers from such occupational risks: the Night Work Convention, 1990 (No. 171) and

⁷ Earlier origins of the ban on night work for women are traced in the Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey of the reports concerning the Night Work (Women) Convention, 1919 (No. 4), the Night Work (Women) Convention (Revised), 1934 (No. 41), the Night Work (Women) Convention (Revised), 1948, and the Protocol of 1990 to the Night Work (Women) Convention (Revised) 1948, (ILO 2001) 23-27.

⁸ Eve C. Landau and Yves Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) 115.

⁹ ILO, *Women's empowerment: 90 years of ILO action* (ILO 2009) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_105088.pdf>; for a fascinating analysis of positions taken in relation to women at work in this period, see Susan Zimmermann, 'Globalizing Gendered Labour Policy: International Labour Standards and the Global South, 1919-1947' in Eileen Boris, Dorothea Hoehcker and Susan Zimmermann (eds), *Women's ILO: Transnational Networks, Global Labour Standards and Gender Equity, 1919 to Present* (ILO/Brill 2018) 227. See also Ulla Wikander, 'Some kept the flag of feminist demands waving – Debates at international congresses on protecting women workers' in Ulla Wikander, Alice Kessler-Harris and Jane Lewis (eds), *Protecting Women – Labor Legislation in Europe, the United States, and Australia, 1880-1920* (University of Illinois Press 1995) 29.

¹⁰ Landau and Beigbeder (n 8) 118-119.

Recommendation (No. 178). Recommendation No. 178 suggested measures to improve night workers' 'safety when travelling at night' (para 13), implying that the threat of violence was still seen as a problem, but for both men and women.

Only recently, the International Labour Conference abrogated as obsolete the two earliest conventions banning night work for women; the instruments had already been 'shelved' by the ILO Governing Body.¹¹ The Night Work (Women) Convention, 1948 (No. 89) was the object of a Protocol to it adopted at the same time as Convention No. 171; Convention No. 89 now has 'interim status', meaning that it is slated for further review.¹²

In the meantime, a resolution adopted by the International Labour Conference in 1985 recognized that 'sexual harassment at the workplace is detrimental to employees' working conditions and to employment and promotion prospects'.¹³ The resolution called rather timidly for policies on equality to combat and prevent such behaviour. At a regional level, an influential 1987 report on sexual harassment¹⁴ spurred adoption of a recommendation in 1991 and eventually a European Union Directive of 2002, recast

¹¹ Proceeding under the 1997 Amendment to the ILO Constitution, which entered into force on 8 October 2015, the International Labour Conference in 2017 abrogated as obsolete the Night Work (Women) Convention, 1919 (No. 4) and the Night Work (Women) Convention (Revised), 1948 (No. 41). As from 2001, the Governing Body had already instructed that these instruments be 'shelved', with no more reports requested from Governments under these conventions (GB.282/LILS/WP/PRS/2 and GB.282/8/2). 'Shelving' was a unique ILO legal invention. The Night Work (Women) Convention, 1948 (No. 89), remains in force for the parties to it, but is noted as no longer fully up-to-date, while remaining relevant in some respects (see report of Working Party on Policy regarding the Revision of Standards, known as Cartier Working Party) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_125644.pdf>. Work now being undertaken by the Standards Review Mechanism Tripartite Working Group established by the ILO Governing Body may lead to a fresh recommendation on Convention No. 89. For its terms of reference <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_450466.pdf>.

¹² <<https://www.ilo.org/dyn/normlex/en/f?p=1000:12030::NO:::>>.

¹³ ILO, Resolution on equal opportunity and equal treatment for men and women in employment (1985) <<https://www.ilo.org/public/libdoc/ilo/P/09734/09734%281985-71%29.pdf#page=12>>.

¹⁴ Michael Rubenstein, 'The Dignity of Women at Work: A Report on the Problem of Sexual Harassment in the Member States of the European Communities' (Commission of the European Communities 1987) Doc V/41.2/1/87-EN Part II, Appendix, cited in Landau and Beigbeder (n 8) 215.

in 2006, that defined harassment and sexual harassment and laid down measures for EU member States to take.¹⁵ In terms of treaty instruments, the Americas led the way in 1994 with the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Convention of Belém do Pará, and the African Union adopted the Protocol on the Rights of Women, added to the African Charter on Human Rights and Peoples' Rights in 2003. In 2011, the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention. It has been widely ratified.

Writings on comparative labour law evidenced some interest in sexual harassment in employment as from the early 1990s.¹⁶ Beginning in 2002, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) repeatedly called for effective measures to prevent and prohibit both quid pro quo and hostile environment sexual harassment at work. With the issue already being covered, no need was seen at the time for a new instrument.¹⁷ The first Global Report under the Follow-Up to the Declaration on Fundamental Principles and Rights at Work highlighted the issue in 2003,¹⁸ but the question failed to gain much traction in the ILO until later. In 2009, the CEACR pointed to sexual harassment as an important implementation gap when it marked the 50th anniversary

¹⁵ Commission Recommendation on the protection of the dignity of women and men at work (1991) 92/131/EEC; Directive of the European Parliament and the Council amending Council Directive 76/207/EEC on the implementation of the principle of equality of treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (2000) 334; Directive 2006/54/EC of the European Parliament and of the Council (2006), all as cited in Landau and Beigbeder (n 8) 219-223.

¹⁶ See, for instance, Robert Husbands, 'Sexual Harassment Law in Employment: An International Perspective' (1992) 131 *International Labour Review* 535; Nelien Haspels, Zaitun Mohamed Kasin, Constance Thomas and Deidre McCann, *Action against Sexual Harassment at Work in Asia and the Pacific* (ILO 2001).

¹⁷ Landau and Beigbeder (n 8) 224.

¹⁸ ILO, *Time for Equality at Work*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference (ILO 2003) 86-87. The main author of this report was Manuela Tomei, who later became Director, Conditions of Work and Equality, International Labour Office, which had overall responsibility, under Deputy Director for Policy, Deborah Greenfield, for the work done by the Gender, Equality and Diversity unit for the development of Convention No. 190 and Recommendation No. 206.

of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).¹⁹ It acknowledged, of course, that protection against sexual harassment was already guaranteed for indigenous peoples, through the provision of article 20(3)(d) of the Indigenous and Tribal Peoples Convention, 1989 (No. 169) – the only international instrument at that stage to contain such a provision.²⁰

Meanwhile, the issue of gender-based violence was gaining considerable attention outside the ILO, especially in the context of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The General Recommendations adopted by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) addressed the problem, beginning with General Recommendations No. 12 (1989) and No. 19 (1992), later updated by General Recommendation No. 35 on gender-based violence against women (2017). Many elements of the CEDAW Committee's earlier views became reflected in the United Nations Declaration on the Elimination of Violence against Women, adopted on 20 December 1993.²¹ The Declaration recalled that 'violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared to men', including through 'sexual harassment and intimidation at work'.²²

2. *Beyond gender*

The problem of violence at work more generally attracted ILO interest as from the late 1990s, principally through publication of the first edition of *Violence at Work*.²³ A non-binding Code of Practice on Workplace Violence in Services Sectors appeared in 2003.²⁴ The occupational safety and health perspective on the issue reflected in this work has broadened understanding

¹⁹ ILO, General Report of the CEACR (ILO 2009) 32, para 111.

²⁰ Article 20(3)(d) of Convention No. 169 provides that Governments shall do everything possible to prevent discrimination, in particular as regards 'protection from sexual harassment'.

²¹ UN Doc A/RES/48/104 (1994).

²² *ibid*, sixth preambular paragraph and article 2(b).

²³ Duncan Chappell and Vittorio Di Martino, *Violence at Work* (ILO 1998). The publication is now in its third edition (2006).

²⁴ ILO, *Code of Practice on Workplace Violence in Services Sectors and Measures to Combat this Phenomenon* (ILO 2003), adopted following a meeting of experts.

of the topic. Legal scholarship has also informed the knowledge base on gender aspects of workplace violence in important ways.²⁵ It was essential to bring these two tracks together, and the ILO's approach to the topic has been grounded in multidisciplinary research and analysis.²⁶ In relation to sexual harassment, the CEACR noted in 2002 that a victimized worker [of whatever gender] may be affected in terms of wages, promotion or dismissal (*quid pro quo* harassment) or through a hostile environment in which the worker is unable to fulfil his or her professional potential.²⁷

Finally, in 2011, the pathbreaking Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201) took up violence and harassment as a central issue.²⁸ Convention No. 189 stated plainly that 'each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence' (article 5). Recommendation No. 201 outlined how to handle complaints of such behavior (para 7). Yet until Convention No. 190 and Recommendation No. 206, there was no comprehensive international instrument embracing the issue for all categories of workers and in all types of work circumstances.

The ILO Governing Body decided at its October/November 2015 session to place violence and harassment in the world of work on the agenda of the Conference for purposes of standard-setting. The Governing Body foresaw a double discussion, the first to be held in 2018.²⁹ When taking this decision, the Governing Body also convened a tripartite Committee of Experts to provide guidance for the preparation of possible instruments.³⁰

²⁵ See, for instance, Patricia Hughes, 'The Evolving Conceptual Framework of Sexual Harassment' (1995) 3 Canadian Journal of Labour and Employment Law 1. See also Colleen Sheppard, 'Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment' (1995) 3 Canadian Journal of Labour and Employment Law 249.

²⁶ See, for instance, the bibliography of the background paper for discussion at the Meeting of Experts on Violence against Women and Men in the World of Work (ILO 2016).

²⁷ General Observation of the CEACR (ILO 2002) cited in Frances Raday, 'Article 11' in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford UP 2012) 279, 290.

²⁸ Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labour Law* (Cornell UP 2018).

²⁹ GB.325/PV 18.

³⁰ *ibid.*

The Office's background document for that meeting (3-6 October 2016) identified regulatory gaps on the issue, and an addendum noted points for discussion.³¹ The report of the three-day expert meeting reflected conclusions on understanding what violence entails in the context of work, risk factors at play, means of addressing violence in the world of work, and gaps to be addressed by a possible new ILO instrument or instruments.³² The steps that followed over the next 32 months involved preparation of documents by the Office, official consultation of member States, informal consultations, and deliberations of a standard-setting committee of the Conference at two sessions, finally culminating in the adoption of the Convention and the Recommendation in June 2019.³³

³¹ ILO, *Final Report*, Meeting of Experts on Violence against Women and Men in the World of Work (ILO 2016) 3-4.

³² *ibid.*, appendix, 39-42.

³³ The full legislative history of decisions taken and discussions at the Conference on the basis of documents prepared by the Office may be found in these sources, listed in chronological order: ILO, *Ending Violence and Harassment in the World of Work*, Report V(1) (ILO 2017) [known as the background report, including the questionnaire to Member States]; Report V(2) (ILO 2018) [the compilation of replies to the questionnaire] and Report V(2A) (ILO 2019) [compilation of supplementary replies]; *Reports of the Standard-Setting Committee on Violence and Harassment in the World of Work: Resolution and Proposed Conclusions for adoption by the Conference*, Provisional Record 8A International Labour Conference 107th Session (2018); *Reports of the Standard-Setting Committee on Violence and harassment in the World of Work: Summary of Proceedings*, International Labour Conference 107th Session (2018), Provisional Record 8B (Rev.1) [Committee reports of the first discussion]; Reports V(1), V(2A) and V(2A)(Add.) (ILO 2019) [reports of feedback from ILO constituents and draft instruments prepared by the Office]; *Reports of the Standard-Setting Committee on Violence and Harassment in the World of Work: Instruments submitted for adoption by the Conference*, International Labour Conference 108th Session (2019), Provisional Record 7A [containing the Convention, Recommendation and resolution put to vote in plenary]; *Reports of the Standard-Setting Committee on Violence and Harassment in the World of Work: Summary of Proceedings*, International Labour Conference 108th Session (2019), Provisional Record 7B (Rev.) [report of Committee deliberations in the second discussion]; *Outcomes of the Work of the Standard-Setting Committee on Violence and Harassment in the World of Work, Plenary Sitting*, Provisional Record 7C (2019) [statements in Conference plenary and final record votes on the instruments]. The informal consultations took place in March 2019, shortly after the Office document containing the proposed texts and explanations was published.

3. *A broad scope of application*

Given the different vocabularies and conceptual approaches taken to violence and harassment,³⁴ the ILO wisely chose to steer clear of trying to propose a fixed definition of ‘harassment’. Instead, Convention No. 190 focuses on the impact of the unwanted behavior on the workers (and indirectly, on employers) affected by violence and harassment. ILO constituents did not have a uniform view of whether violence and harassment should be treated as a single concept, separately, or not at all. In the end, the Conference decided that the instruments would cover ‘a range of unacceptable behaviours and practices, or threats thereof, whether in a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment’ (article 1(1)(a)). The convention calls for each country to adopt a national definition or definitions in its own context, but taking into account and ‘consistent with’ what the convention provides in relation to its scope of application (articles 1(2) and 7). This approach combines a universal notion with recognition that each country’s laws and legal traditions may call for using various expressions.

The personal scope of the new instruments is deliberately broad: ‘This Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer’ (article 2(1)). It thus encompasses categories of persons who may be particularly exposed to *quid pro quo* harassment, such as jobseekers and interns. The instruments extend protection to those in all sectors, whether private or public, in the formal or informal economy, and in rural or urban areas (article 2(2)). Neither a contract of employment nor compensation serves as a prerequisite to coverage.

³⁴ See, for instance, the analysis in Loic Lerouge and L. Camille Hébert, ‘The Law of Workplace Harassment of the United States, France and the European Union: Comparative Analysis after the Adoption of France’s New Sexual Harassment Law’ (2013) 35 *Comparative Labor Law and Policy Journal* 93.

The convention and recommendation are also capacious in relation to the situations in which violence and harassment may arise ‘in the course of, linked with or arising out of work’ (article 3). Specifically, this extends to situations ‘(a) in the workplace, including public and private spaces where they are a place of work; (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; (c) during work-related trips, travel, training, events or social activities; (d) through work-related communications, including those enabled by information and communication technologies; (e) in employer-provided accommodation; and (f) when commuting to and from work’ (article 3). Thus the instruments extend beyond the traditional workplace, since work may be performed, for example, in cyberspace – an arena for potential cyberbullying. The new provisions apply as well to third parties, such as clients and service providers, who may be either victims or authors of harassment or violent acts in the world of work. The focus is on protecting the individual. Legal entities, such as corporations, are therefore not the objects of protection,³⁵ but specific reference is made in article 2(1) to ‘individuals exercising the authority, duties or responsibilities of an employer’.

The substantive core of the convention appears in Parts IV (Protection and Prevention), V (Enforcement and Remedies), VI (Guidance, Training and Awareness-Raising) and VII (Methods of Application). Laws and regulations are to be adopted to define and prohibit violence and harassment in the world of work (article 7). Prevention measures include recognizing the important role of public authorities in the case of informal economy workers (article 8(1)), identifying particularly exposed sectors, occupations and work arrangements (article 8(2)) and measures to protect persons so exposed (article 8(3)). Article 9 sets out the specifics regarding workplace policies; inclusion in occupational health and safety management; hazard and risk assessment, prevention and control; and provision of related training.

Under article 10, States are to take appropriate measures, *inter alia*, to monitor and enforce relevant laws and regulations, ensure easy access to

³⁵ See explanation of the Office regarding draft article 1, Report V(2A) (ILO 2019) 22. This was important to clarify, since the scope of the impact of violence and harassment extends to ‘economic harm’; otherwise, the instruments might have been turned to unintended use in connection with an industrial dispute or a consumer boycott.

appropriate and effective dispute resolution procedures and remedies (with examples), provide for sanctions where appropriate, and ensure that labour inspectorates and other relevant authorities are empowered to deal with the targeted behavior. This includes the power to stop work in cases of ‘an imminent danger to life, health or safety, subject to any right of appeal to a judicial or administrative authority which may be provided by law’ (article 10(h)). The text thus backs up the need to ‘ensure that workers have the right to remove themselves from a work situation which they have reasonable justification to believe presents [such a danger] due to violence or harassment, without suffering retaliation or other undue consequence’ (article 10(g)). There is also a duty to inform management of such imminent danger.

The prevention and enforcement provisions are reinforced by each Member being obligated ‘to seek to ensure that violence and harassment in the world of work is addressed in relevant national policies, such as those concerning occupational safety and health, equality and non-discrimination, and migration’ (article 11(a)). Guidance, resources, training and tools, including on gender-based violence and harassment, are to be provided, and initiatives such as awareness-raising campaigns, to be undertaken (article 11(b) and (c)). The convention is to be applied ‘by means of national laws and regulations, as well as through collective agreements or other measures consistent with national practice, including by extending or adapting existing occupational safety and health measures to cover violence and harassment and developing specific measures where necessary’ (article 12). Recommendation No. 206 elaborates on each of the substantive parts of the convention. For instance, it lists possible remedies (para 14), types of support services (para 17) and examples of means of awareness-raising (para 23).

III. A reminder that ILO standards are firmly anchored in and create human rights law

As the preamble to the convention notes, violence and harassment in the world of work can constitute a human rights violation or abuse.³⁶ The new ILO instruments built on existing sources of international law, both within and outside the institution. The preamble to the convention recalled

³⁶ Preamble, para 6. This recalls the view taken earlier by the ILO CEACR.

the particular relevance of the Declaration of Philadelphia 1944 and the ILO's fundamental conventions.³⁷ The link was briefly explained in the preparatory document for the new instruments. The new convention directly anchors respect for fundamental principles and rights at work (consecrated in the 1998 Declaration bearing that title) as a means of preventing and eliminating violence and harassment in the world of work (convention, article 5). By its nature, much forced and compulsory labour is performed under the threat or actual use of violence. The same often applies to child labour, especially in its worst forms, including the sexual exploitation of children. On the other hand, exercise of freedom of association and the right to engage in collective bargaining empower people to call out abuses of power such as violence and harassment on the job. And the role of these phenomena as an obstacle to equality of opportunity and treatment is intuitive. Like the fundamental conventions, the new ILO convention brings the sometimes different streams of international labour law and international human rights law onto the same page.³⁸

The preamble to Convention No. 190 highlights other relevant international instruments such as the Universal Declaration of Human Rights, the international Covenants, and other global human rights conventions.³⁹ Going beyond these instruments, Convention No. 190 is the first ILO standard explicitly to reflect the now familiar UN human rights due diligence framework, i.e. the obligation on ratifying States to 'respect, promote and

³⁷ The fundamental conventions are the Freedom of Association and Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Forced Labour Convention, 1930 (No. 29) and its Protocol of 2014, the Abolition of Forced Labour Convention, 1957 (No. 105), the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182).

³⁸ On this point generally, see Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010) 1-38.

³⁹ The fourth preambular paragraph of Convention No. 190 cites the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, CEDAW, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities. The phrase 'such as' means that the list is not exhaustive, and future interpretation could thus take into account newly concluded human rights instruments.

realize' the right in question (article 4(1)).⁴⁰ It also displays ILO traditions of building flexibility into how the obligations laid down in the instrument may be met.⁴¹ The convention is to be applied by 'national laws and regulations, as well as through collective agreements or other measures consistent with national practice' (article 12). These explicitly include 'by extending or adapting occupational safety and health measures to cover violence and harassment and developing specific measures where necessary' (article 12).

In addition, the ILO texts echo the adaptation of the human rights due diligence framework in the context of enterprises, as reflected in the UN Guiding Principles on Business and Human Rights (UNGPs), although there is no direct reference to this non-binding source.⁴² While Convention No. 190 similarly does not use the term 'due diligence' in relation to employer accountability, its article 9 requires States to 'adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment'. This includes, so far as reasonably practicable, identification of hazards and assessment of risks of violence and harassment, with the participation of workers and their representatives, and taking measures to prevent and control them (article 9(c)). These form part of the due diligence method, familiar to firms, that runs like a thread through the UNGPs.⁴³ Thus one

⁴⁰ The term 'due diligence' did appear in the text of the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29); see article 2(e) which refers to supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.

⁴¹ For a full discussion of this feature, see George Politakis, 'Deconstructing Flexibility in International Labour Conventions' in Jean-Claude Javillier, Bernard Gernigon and Georges Politakis (eds), *Les normes internationales du travail: un patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos* (ILO 2004) 463-496. For other examples of flexibility clauses, see ILO, *Manual for Drafting ILO Instruments* (ILO 2006).

⁴² Among the recommendations made by a coalition of workers' organizations and non-governmental organizations to the ILO in the preparatory phase of the instruments was to build on existing due diligence provisions evolving under the UNGPs; see 'Violence Against Women and Men in the World of Work, Executive Summary of New Research on Asian Garment Supply Chains and Recommendations for an ILO Convention' (2018) <<https://asia.floor-wage.org/workersvoices/reports/violence-against-women-and-men-in-the-world-of-work>>.

⁴³ Anne Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 93.

knock-on effect of the new ILO convention and recommendation will be to update the guidance provided in relation to the UNGPs by the United Nations Office of the High Commissioner for Human Rights,⁴⁴ and the Guidance for Responsible Business Conduct issued by the Organisation for Economic Co-operation and Development under the OECD Guidelines for Multinational Enterprises.⁴⁵ The ILO Governing Body will also no doubt wish to include the new convention and recommendation in a revised annex to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,⁴⁶ last updated in 2017.

The link between the new ILO instruments and human rights law on gender equality is particularly strong, as already intimated. While the text of CEDAW does not mention harassment or violence, the treaty body supervising its implementation made the connection in its early comments.⁴⁷ Most recently, in General Recommendation No. 35 (2017), the CEDAW Committee updated its General Recommendation No. 19 (1992), which had identified gender-based violence as a major obstacle to equality.⁴⁸ In General Recommendation No. 35, the Committee went further: ‘The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law’.⁴⁹ The Committee drew attention to the work of the Special Rapporteur on violence against women, its causes and consequences, and of human rights treaty bodies and special procedure mandate holders, and noted the impact of activities of civil society groups that had prioritized the issue.⁵⁰ The Committee made it clear that ‘gender-based violence against women is [...] a critical obstacle to the achievement of substantive equality between women and men and to the enjoyment by women of their human

⁴⁴ See various resources produced by the UN Office of the High Commissioner of Human Rights <<https://www.ohchr.org/en/issues/business/pages/businessindex.aspx>>.

⁴⁵ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD 2018).

⁴⁶ <<https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>>.

⁴⁷ CEDAW, General Recommendation No. 19 on violence against women (1992).

⁴⁸ The Asian Garment Supply Chains recommendations (n 42) had urged the ILO to ‘draw upon and strengthen definitions and prohibitions addressing violence against women’ by the CEDAW Committee.

⁴⁹ CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para 2.

⁵⁰ *ibid* paras 3 and 4.

rights and fundamental freedoms, as enshrined in the Convention'.⁵¹ This view dovetails with recent writings on the need to address violence against women as part and parcel of achieving substantive equality.⁵²

ILO Convention No. 190 mentions gender-based violence and harassment three times in its preamble, and refers to 'underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations'.⁵³ Article 6 of the convention calls for laws, regulations and policies ensuring 'the right to ensuring equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other persons belong to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work'. Similarly, the laws and regulations requiring employers to take steps commensurate with their degree of control to prevent violence and harassment in the world of work refer specifically to that which is gender-based (article 9). In relation to enforcement and remedies, States are to 'provide that victims of gender-based violence and harassment in the world of work have effective access to gender-responsive, safe and effective complaint and dispute resolution mechanisms, support, services and remedies' (article 10(e)).

Domestic violence has long been a focus of women's rights advocates because it is at once so serious and so common.⁵⁴ While it was obvious that employers could not be held responsible for ending domestic violence, discussions at the 2018 Conference led to seeing that the world of work could serve as an important entry point to prevent or mitigate its effects.⁵⁵

⁵¹ *ibid* para 10.

⁵² See articles by Katherine Lippel and Ludo McFerran, Anne Lee Fos Tuvera and Jane Aeberhard-Hodges in Meghan Campbell, Sandra Fredman, Judy Fudge and Shauna Olney (eds), *A Better Future for Women at Work* (2018) 1 University of Oxford Human Rights Hub Journal.

⁵³ Preambular paragraph 12. See also preambular paragraphs 5 and 10.

⁵⁴ Diane Roman, 'Le Corps des femmes. Autonomie et intégrité corporelles dans la Convention' in Diane Roman (ed), *La Convention pour l'élimination des discriminations à l'égard des femmes* (Pedone 2014) 183, 203.

⁵⁵ The debate on this issue appears in the Report of the Standard-Setting Committee on Violence and Harassment in the World of Work: Summary of Proceedings, Provisional Record 8B (Rev.1) 67-70.

Thus Convention No. 190 foresees, so far as reasonably practicable, mitigation of the effects of domestic violence in the world of work (article 10(f)). Recommendation No. 206 lists specific actions aimed at doing so, including through workplace risk assessments among other measures (para 18). This cross-over of the public and private spheres in the new ILO convention also responds to the feminist critique of international law as using such distinctions so as to artificially disempower women.⁵⁶ The new instruments are on the same wavelength as CEDAW, acknowledging that to achieve substantive equality, socially and culturally constructed differences between women and men must be taken into account.⁵⁷ Echoes of this idea are evident in the preamble to Convention No. 190, and underpin several of its substantive provisions. The domestic violence issue has not been free from controversy, however, as evidenced in pockets of opposition to ratification.⁵⁸

CEDAW provides in article 23 that nothing in the instrument 'shall affect any provisions that are more conducive to the achievement of equality between men and women' in national legislation or other international treaties. The CEDAW Committee has read this to mean that more conducive instruments 'will prevail' over the obligations of CEDAW, and accordingly, the General Recommendations issued by its treaty body.⁵⁹ The CEDAW Committee has itself pointed this out in relation to violence against women.⁶⁰ While the Committee has noted that violence against women occurs 'in all spaces and spheres of human interaction, whether

⁵⁶ See, for instance, Frances E. Olson, 'International Law: Feminist Critiques of the Public/Private Distinction' in Dallmeyer (n 2) 157.

⁵⁷ On CEDAW and substantive equality, see, for instance, Anne Hellum and Henriette Sinding Aasen, 'Conclusions' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge UP 2013) 626. On how ILO conventions and CEDAW relate, see, for instance, Anne Trebilcock, 'Labour issues and the Convention on the Elimination of All Forms of Discrimination against Women' in Adriana De Stefano (ed), *Gender Issues and International Legal Standards – Contemporary Perspectives* (ed. it. 2010) 139.

⁵⁸ A few Latin American employers are for this reason urging their governments not to ratify the new ILO convention; see, for instance, 'Empresarios piden no ratificar convenio 190 de la OIT, normativa contra la violencia y el acoso laboral' (Prensa Libre 2019) <<https://www.prensalibre.com/economia/empresarios-piden-no-ratificar-convenio-190-de-la-oit-normativa-contra-la-violencia-y-el-acoso-laboral/>>.

⁵⁹ CEDAW (n 49) para 13.

⁶⁰ *ibid* para 13.

public or private',⁶¹ it has devoted most of its attention to violence in areas other than the world or work, such as in armed conflict. As for international cooperation, General Recommendation No. 35 calls on States parties to 'urge business actors whose conduct they are in a position to influence to assist the States in which they operate in their efforts to fully realize women's rights to freedom from violence'.⁶² Thus the mechanisms relating to business and human rights mentioned earlier would need to highlight the gender-relevant aspects of Convention No. 190 and Recommendation No. 206 in providing guidance in relation to working conditions for men and women. In addition, in line with the information exchange foreseen under article 22 of CEDAW with UN Specialized Agencies such as the ILO, the CEDAW Committee might also expand its body of general recommendations to take elements of the new ILO instruments on board.

The international community has been quick to pick-up the new ILO instruments. On 11 July 2019, the UN Human Rights Council invited ILO member States to ratify Convention No. 190.⁶³ The revised draft binding instrument on business and human rights made public on 17 July 2019 refers to Convention No. 190 in its preamble.⁶⁴ A blog on the website of the European Society of International Law posted a week after the adoption of the instruments enthusiastically heralded them as 'revolutionary'.⁶⁵ The convention has been proposed as a topic of discussion at a future annual meeting of the American Society of International Law.⁶⁶ In light of civil society's interest in the topic, the instruments are likely to gain attention beyond the ILO's traditional partners.⁶⁷ They are in any event to be submitted to the competent authorities (usually parliament), as required under

⁶¹ *ibid* para 20.

⁶² *ibid* para 35(a).

⁶³ UN Human Rights Council, UN Doc A/HRC/41/L.5/Rev.1 (2019).

⁶⁴ Revised draft of the possible instrument circulated by the Chair of the Open-Ended Inter-Governmental Working Group (2019). <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>.

⁶⁵ Desierto (n 6).

⁶⁶ Suggested by the author to the organizing committee for the 2020 conference, in July 2019.

⁶⁷ In early outreach to a wide range of actors, the ILO Office for the United Nations organized a high-level event to promote and celebrate the adoption of the new convention and recommendation on 25 September 2019, during the 74th Session of the UN General Assembly.

the ILO Constitution (article 19(5)(b)), within a maximum of 18 months from their adoption.

The ILO and UN Women have joined forces to produce a handbook that links the topic to realization of the Sustainable Development Goals, among other aspects.⁶⁸ In the context of the 25th anniversary (in 2020) of the Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women in 1995, the UN is contemplating preparation of the path for adoption of a new declaration on violence and harassment by the General Assembly.⁶⁹ This could be useful if it would promote the new ILO instruments, and make links between the world of work and other areas in which violence and harassment operate to deny the exercise of human rights. Or if it would explore more fully aspects of the phenomenon involving factors other than gender, such as race, religion and sexual identity, in addition to the intersectionality of various discriminatory grounds. Or if it reiterated the call of the 1992 UN Declaration on violence against women for States to collect and publish relevant data, perhaps through new indicators under the Sustainable Development Goals. UN action would be considerably less helpful if it attempted to supplant, through a new soft-law political declaration, the commitments made at the international level in the binding ILO convention.⁷⁰

IV. Reaffirmation of the (mostly) tripartite approach to international norm-setting

To a certain extent, adoption of the new instruments reaffirmed the role of tripartite dialogue in reaching consensus on matters of common interest in the world of work. Much of the text proposed by the Office remained unchanged, reflecting the solid preparation it had done on the basis of earlier work, involvement of the tripartite constituents throughout the process,

⁶⁸ UN Women/ILO, *Handbook on Violence against Women in the World of Work* (2019) 28-34 and 53-56. The publication also contains an extensive bibliography.

⁶⁹ Statement of Dr Purna Sen, Executive Coordinator and Spokesperson at UN Women, Berkeley Conference (n 3).

⁷⁰ This is not a hypothetical situation, if one looks at the extent of promotion given to the non-binding UN Declaration on the Rights of Indigenous Peoples, in comparison to the binding ILO Indigenous and Tribal Peoples' Convention, 1989 (No. 169).

and translation of the conclusions of the tripartite group of experts into normative language. The record votes taken on adoption of the convention and the recommendation produced results that well exceeded the required two-third majorities of the votes cast by the delegates present.⁷¹ At the same time, the discussions at the Conference over two years revealed a number of areas where representatives of employers, workers and governments shifted their positions to accommodate views strongly held by others or found middle ground. Several examples of compromise are explored below. The informal tripartite consultations of 14 and 15 March 2019 served to clarify positions on several issues in a constructive atmosphere,⁷² although such off-the-record interchanges inevitably favour delegations with a strong year-round presence in Geneva.

Yet the successful outcome of the deliberations was by no means guaranteed. As a Conference delegate recalled in the 2019 plenary, ‘after sitting in this room at the end of last year’s session of the Conference with no consensus around key issues – including definitions, the scope, and how to deal with groups disproportionately affected by violence and harassment – I do not think many of us were in an optimistic state of mind’.⁷³ The Committee’s Reporter pointed to discussions that were ‘sometimes difficult, sometimes tense and, a few times, very emotional’,⁷⁴ with compromises made by each of the tripartite groups. Non-governmental and intergovernmental organizations also played some part in shaping the instruments, albeit not in terms of decision-making, which remains in the purview of the tripartite actors alone.

⁷¹ On the convention, there were 439 votes cast for, 7 cast against (6 employer and 1 worker delegates), and 30 abstentions (11 government delegates from 6 countries and 19 employer delegates); the majority required was 298. On the recommendation, the vote was 397 votes in favor, 12 against (all employers), and 44 abstentions (30 employers and 14 government delegates from eight countries – Brazil, Colombia, El Salvador, Guatemala, Kyrgyzstan, Paraguay, Russia and the United States). The majority required was 273 and the quorum was 321. For more details, see *Provisional Record 7C* (n 33).

⁷² Statement of the Chairperson of the Committee, Reports of the Standard-Setting Committee on Violence and Harassment in the World of Work: Summary of Proceedings, *Provisional Record 7B* (Rev.) (n 33) 2.

⁷³ Statement of Mr Joyce, Worker delegate of Ireland, *ibid* 13.

⁷⁴ Statement of Mr Jordan, Reporter of the Standard-Setting Committee, *ibid* 2.

One of the most controversial aspects of the draft texts up for discussion in 2018 was the inclusion of a list of persons disproportionately affected by violence and harassment in the world of work, including, inter alia, lesbian, gay, bisexual, transgender, intersex (LGBTI) and gender-non-conforming persons.⁷⁵ The spokesperson for the group of African member States, supported by members States of the Gulf Cooperation Council, made it clear that the African group could not accept international instruments that contained such language.⁷⁶ Along with a number of other governments, the employers and workers initially supported the specific reference. However, when the African group walked out of the room near the end of the first discussion of the draft instruments, and the employers stated that they felt ‘profoundly offended’ by the course of the discussion, it became urgent to find a way out of the seeming impasse. This was done by the end of that session with text adopted by the Committee Drafting Committee that referred in the conclusions for a draft convention to ‘workers and other persons belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected’.⁷⁷

Thus the text that served as the basis for the second discussion contained this more subtle language in what became article 6 of the convention. But at that point, the draft recommendation still contained the list of specific groups.⁷⁸ Compromise was later reached to remove this list from it as well. As approved, the recommendation refers in paragraph 12 to ‘women and the groups referred to in Article 6’, and paragraph 13 notes that the reference to ‘vulnerable groups and groups in situations of vulnerability in Article 6 of the Convention should be interpreted in accordance with applicable international labour standards and international instruments on human rights’. In any event, without tripartite dialogue, formal and informal, during and between sessions of the Conference, it is unlikely that a consensus for adopting Convention No. 190 and Recommendation

⁷⁵ See, for instance, the text of points 10 and 13 of the draft conclusions submitted by the secretariat, which were later amended to include text that contained no specific list.

⁷⁶ For the discussion of this issue at the first session in 2018, see *Provisional Record* 8B (Rev.1) (n 33) 82-85.

⁷⁷ Proposed Conclusions, International Labour Conference 107th Session (2018) para 10.

⁷⁸ *ibid* para 26 (in brackets, meaning that this part of the text had not yet been discussed by the Conference Committee).

No. 206 would have emerged. As the Government member of Canada remarked, the Committee had ‘refined the language through a pragmatic approach, while retaining strong protections’.⁷⁹ However, walking away from explicit reference to LGBTI persons led a few delegates to abstain in the vote on the convention, and even to vote against the recommendation.⁸⁰

A few more specific aspects also drew out diverse views. The employers and some governments were reluctant to include ‘commuting to and from work’ within the encompassing notion of the ‘world of work’ as set out in article 3 of the convention. They argued that how workers travelled to and from their jobs often escaped an employer’s control. While the Committee decided to retain this provision of the convention, draft article 4 was then amended to provide for account to be taken of the varying nature and extent of the respective responsibilities of governments, employers, workers and their respective organizations (article 4(3)). Similarly, the phrase ‘appropriate steps commensurate with their [employers’] degree of control’ was added to the draft that became article 9, in relation to the laws and regulations that are to be adopted as regards employers.

In the section of the convention addressing protection and prevention, the employers had proposed language that would have protected persons subjected to violence and harassment in an industrial dispute, with remedies and sanctions.⁸¹ The workers saw this as undermining the right to take industrial action, and opposed the amendment. The employers’ proposal had touched a nerve that remains sensitive in the ILO: the continuing controversy over recognition of the right to strike.⁸² In response to a question, the Secretariat basically noted that article 4 already covered a wide range of circumstances in which violence and harassment could occur, and that

⁷⁹ *Provisional Record* 7B (Rev.) (n 33) 135.

⁸⁰ See, for instance, statement of Ms Beckwith (Employer, United Kingdom), in Plenary Sitting, *Provisional Record*, 7C (n 33) 17. She abstained on the recommendation, but voted for the convention.

⁸¹ For the discussion on this proposal, see *Provisional Record* 8B (n 33) 104-106.

⁸² See, for instance, Claire La Hovary, ‘Showdown at the ILO? A Historical Perspective on the Employers’ Group 2012 Challenge to the Right to Strike’ (2013) 42 *Industrial Law Journal* 338; Lee Swepston, ‘Crisis in the Supervisory Machinery: Dispute over the Right to Strike’ (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 199.

the text also recalled that freedom of association and effective recognition of the right to collective bargaining; the different points should be read together. The employers voiced concern over this statement, and pledged to pursue the issue in relation to various points in the draft conclusions. However, lacking sufficient support from governments, their amendment was rejected. By the time of the 2019 Conference, it appeared that the parties to the discussion on violence and harassment in the world of work had decided to focus on the task at hand without holding it hostage to another point of contention within the ILO.

The story of the development of these new ILO standards would not be complete without noting that the traditional tripartite actors, while under the rules the only ones with the right to vote, did not create these instruments on their own. Civil society has been campaigning for years against violence and harassment, particularly of women. On a range of issues, groups calling for greater voice and empowerment of actors in the informal economy have been pushing the ILO to open up more to them and to make all ILO standards more responsive to their needs.⁸³ The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) had already called for an integrated policy framework addressing ‘the elimination of all forms of discrimination and violence, including gender-based violence at the workplace’ (para 11(f)). A number of such groups were observers at the tripartite meeting of experts that preceded the formal standard-setting process on harassment and violence in the world of work, and then at the 2018 and 2019 sessions of the Conference Committee. Current provisions in the Standing Orders of the Conference permitted the Chair of the Committee, acting with the support of the vice-Chairs, to allow these observers to make opening statements once the tripartite representatives had provided their own. The recorded participation of the wide range of actors concerned with the issue is also important from the perspective of international law, since the preparatory works for an ILO instrument are given more weight for purposes of interpretation of ILO

⁸³ Many ILO standards already cover work in the informal economy; see ILO, *Extending the Scope of Application of Labour Laws to the Informal Economy: Digest of Comments of the ILO's Supervisory Bodies related to the Informal Economy* (ILO 2010). See also Anne Trebilcock, ‘International labour standards and the informal economy’ in Javillier (n 41) 585.

conventions than is normally the case under the Vienna Convention on the Law of Treaties.⁸⁴

The social partners' determination to tackle violence and harassment in the world of work produced an innovative approach to arriving at a final text. By the end of the first discussion, they had committed to adopting both a convention and a recommendation, and had tentatively agreed on the draft text of the convention, as well as on portions of the proposed recommendation. They locked in these results by submitting the text of the proposed conclusions to date to the plenary of the Conference at the 107th Session. Immediately after the first discussion, the Office circulated the texts for further review, noting in brackets what the Committee had not had the chance to discuss, and explaining any minor redrafting in the proposals. Member States again had the opportunity to review the texts and propose changes, in line with established ILO drafting procedures. The Office draft of the texts was circulated just prior to the informal consultations in March 2019. Thus, when the delegates convened for the second review of the texts in June, it was clear what the remaining major issues were, and there was hope for a resolution. The final reviews of both the proposed convention and the proposed recommendation by the Committee Drafting Committee completed the process.

During deliberations, the Committee had examined 327 amendments and scores of subamendments presented by a broad cross-section of delegates.⁸⁵ Within the short time-span, this presented a dizzying prospect. The Reporter of the Committee praised the Chair's openness to considering different, but related, parts of the text at the same time rather than proceeding in the traditional manner, in order to reach better results.⁸⁶ But other ideas for departing from tradition were not pursued. For instance,

⁸⁴ For why this is so, see Anne Trebilcock, 'The International Labour Organization' in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848.

⁸⁵ Statement (n 74) 2. This approach was not appreciated by all delegates, however, as indicated by statements of the Government representatives of Belarus and Russia, which had sponsored many amendments that failed to gain sufficient support for discussion. The Russian Government delegates were among those of four countries (also El Salvador, Kyrgyzstan and Paraguay) that abstained in the vote on both instruments.

⁸⁶ Statement (n 74).

a proposal to diverge from the typical threshold of two ratifications for entry into force for non-maritime instruments did not gain support in the Committee. It is anticipated that the first two ratifications will come fairly rapidly. This will trigger entry into force of the convention twelve months after the ILO Director-General's registration of the second ratification (article 14(2)).

Generally speaking, ILO standard-setting has not had an easy ride over the past two decades or so.⁸⁷ It has been difficult for the Governing Body to reach consensus even on fixing topics for the Conference agenda, particularly if a binding instrument is envisaged. One factor that facilitated this to happen in the case of Convention No. 190 was the simple recognition that the occurrence of violence and harassment is not in the interests of successful employers, motivated workers, or governments. On the contrary, such behavior acts as a drag on productivity that has economic as well as social costs. Where the tripartite actors see a mutual interest, they can and do come together to forge strong legal instruments. In the words of the Government member of France, speaking as well on behalf of others, 'the adoption of the first international instruments on this topic on the occasion of the ILO centenary demonstrated the vitality and relevance of the ILO, social dialogue, and tripartism'.⁸⁸ It would, however, be overly optimistic to extrapolate the success of the standard-setting exercise for Convention No. 190 to areas in the world of work that remain more contested.

At the same time, substantial momentum seems to exist for heralding this most recent successful standard-setting experience. This is the spirit behind the resolution that accompanied the adoption of the two new instruments.⁸⁹ Aside from calling for ratification and implementation, it asks the Governing Body to request the Director-General to develop a comprehensive strategy towards those ends, and to back it up with the necessary resources.

⁸⁷ See, for instance, Christophe Gironde and Gilles Carbonnier (eds), *The ILO@100: Addressing the Past and Future of Work and Social Protection* (Brill/Nijhoff 2019); Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart 2013).

⁸⁸ *Provisional Record* 7B (n 33) 134. The French delegate was also speaking on behalf of the European Union and its Member States, as well as Iceland and Norway.

⁸⁹ Resolution concerning the elimination of violence and harassment in the world of work (2019), *Provisional Record* 7A 16.

The strategy is envisaged as including measures to support ILO constituents through awareness-raising, promotion, research and technical assistance, with related resource mobilization. It extends to promoting partnerships and joint initiatives with relevant international and regional organizations to eliminate violence and harassment in the world of work. These would be concrete ways to make good on pledges to promote both decent work for all and gender equality, recently reaffirmed within the ILO in its Centenary Declaration and by the international community through the Sustainable Development Goals. The most pertinent are – briefly stated – Goal 5 on gender equality and Goal 8 on decent work for all, but others, such as Goal 16 that covers access to justice for all, may come into play as well in tackling violence and harassment at work.⁹⁰

V. Ending on a personal note

In my view, with these new instruments the ILO is by no means advocating an austere, humourless working environment. After all, many people meet their life partners through work. A bit of innocent banter among colleagues can make the hours seem to fly by faster. A line gets crossed, however, when jokes are at the expenses of the perceived ‘other’. A line is also crossed when a flirtatious overture from a peer is not welcome, or because a hierarchical or dependent relationship makes it simply inappropriate in the first place. At their core, Convention No. 190 and Recommendation No. 206 are targeting potential and actual abuses of power. The new ILO instruments affirm human dignity at work for all.

Which leads me to end on a personal note, because anyone may be subject to violence or harassment. Many years ago, in between terms at university, I had a summer job with a small home-based firm run by a young man who was most often away at his day job. My tasks included typing, running errands, and cleaning the apartment. When my employer was present one day, he asked me to rub his back, placed his hand on my hip, and started moving us toward the bedroom. I did not think that was a good idea, said so, grabbed my purse, and left. Luck was with me. He did

⁹⁰ For the full text of the goals and links to related documents <<https://www.un.org/development/desa/disabilities/envision2030.html>>.

not turn violent, I had already made enough money to be able to quit my job, and – while the incident certainly left me taken aback – I did not feel lasting emotional scars. But the incident, however relatively minor, should never have happened. I wish I had felt bold enough to call this predator out, although reporting the incident was unlikely to have accomplished much at the time.⁹¹

We now have international instruments denouncing violence and harassment in the world of work, insisting on prevention, and calling for effective remedies. They make ‘the invisible visible, acknowledging the pervasiveness and unacceptability of violence and harassment’.⁹² Convention No. 190 and Recommendation No. 206 contain seeds of deeper transformative change towards decent work for all. So I end this text with an expression of personal thanks for the hope that these new steps offer. Now it is time for ratification and translation of words into deeds.

⁹¹ Theoretically, the prohibitions on sex discrimination that were then already anchored in both federal and state law would have covered this behaviour, but neither provision extended to (nor do they today) such a small employer.

⁹² ILO, Q & A: ILO Convention on Violence and Harassment: Five key questions (ILO 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm>.

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ISBN 978-92-2-134086-7



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