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Trade, investment and labour: interactions in international law

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2 Economic Competition and the Development of International Labour Law

2.1 INTRODUCTION

The rhetoric on the relationship between economic globalization and labour has not changed significantly during the last century. United States Trade Representative Ron Kirk proclaimed in in 2009 that: "American workers should not be expected to compete against substandard labor practices."[1] This closely resembles a statement from the American Federation of Organized Trades and Labor Unions in 1881, which demanded from the US Congress that industry be provided with "full protection from the cheap labour of foreign countries."[2] Both statements reflect the idea that low labour standards give countries an 'unfair advantage' over high-standard ones. Implicit herein is the equally normative premise that it is possible to define what 'substandard' labour conditions are, and the argument that there should be means available for redress. The purpose of this chapter is to examine both elements, namely how a branch of international law developed that lays down obligations concerning the regulation of states' domestic labour markets, and how these norms are formulated, interpreted and enforced.

This chapter lays the groundwork for the evaluation of trade-labour and investment-labour linkages in the subsequent chapters. It consists of three parts. Part 2.2 examines the origins of international labour law. Before the First World War many states expanded their international economic relations while concomitantly improving domestic labour legislation. This period is instructive with regard to the purpose that states assigned to international labour law, and also explains why it preceded both international human rights and international economic law. Furthermore, states applied different means to induce their trading partners to raise labour standards collectively. This included both unilateral trade measures, which are nowadays disciplined by the World Trade Organization, as well as bilateral labour treaties, which were a precursor to the foundation of the International Labour Organization.

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1 United States Trade Representative Ron Kirk, 'Remarks at Mon Valley Works – Edgar Thomson Plant' (16 July 2009).

2 Proceedings of the American Federation of Labor, 1881, Platform, point 11, cited in Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 568.

The remainder of this chapter is devoted to the ILO. Part 2.3 considers the purpose of international labour law at the time the ILO was founded, and introduces the ILO's institutional and legal framework. Part 2.4 then looks at two aspects of the implementation of ILO standards: the role of the organisation's supervisory bodies in the interpretation and development of international labour law, and the way in which the perceived ineffectiveness of the ILO influences the debate on trade-labour linkage.

2.2 THE ORIGINS OF INTERNATIONAL LABOUR LAW

2.2.1 Introduction

The purpose of this part is to provide an overview of the development of international labour law before the founding of the ILO in 1919. Section 2.2.2 sets out how labour law emerged as an international concern. Section 2.2.3 explores the methods that states applied during the initial phases of international cooperation. Section 2.2.4 then looks at the emergence of multilateral cooperation and discusses the work of the International Association of Labour Legislation.

2.2.2 Economic competition and the need for international cooperation

Across jurisdictions and throughout history, many different grounds have been advanced to justify the regulation of labour.[3] Generally, the purpose of labour law is to address the asymmetric relationship between employers and workers. It does so by offering procedural as well as substantive guarantees. Procedural labour rights safeguard the right of workers to organise in trade unions, to bargain collectively on wages and employment conditions, and recognizes industrial action as a legitimate means to pressure employers.[4] Substantive guarantees, on the other hand, can be divided into labour market conditions, including statutory minimum wages and hours of work, and working condi-

3 See Harry Arthurs, 'Labour Law After Labour' in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press 2011) 13-14. This variety also exists at a descriptive level. In the United States 'labour law' refers to collective labour relations, while the term 'employment law' covers individual contracts and legislative interventions on working conditions. Restrictions on access to the workforce, such as statutory age limits, or laws governing unemployment insurance and pensions may also not be labelled 'labour law'. In Europe, the label 'social law' is often used to describe this broader scope. Importantly, even the most inclusive definitions do not intend to cover all redistributive policies that influence the supply of labour, such as taxation or childcare.

4 The term 'industrial action' is not synonymous to strikes, but refers to all measures taken by trade unions that reduce productivity with the aim of putting pressure on employers.

tions, such as health and safety standards.[5] Both procedural and substantive norms are interventions in the labour market, i.e. the market where the supply of labour (workers) meets the demand for labour (employers) and wages and employment conditions are set.

From the 18th century, it was recognized that domestic regulation could have ramifications for a country's comparative advantage.[6] At a meeting in 1831, the wool manufacturers from Scotland and the north of England passed a resolution that conveyed their concerns about a proposal to limit the hours of work to eleven hours per day, prohibit night work for children and establish a minimum age of nine years. It stated that:

> [The measures] will raise the price of goods to the consumers, which will affect the home trade considerably, and will produce the most serious effects upon the prosperity of this district, by tending to foster the manufacturers of foreign nations, our trade with whom depends upon the cheap and advantageous terms on which we now supply them with goods, and whose manufacturers would be enabled by an advance of price successfully to compete with the British Merchant.[7]

Charles Hindley (1796-1857), a British Member of Parliament who had advocated the legislation, was later questioned by a Royal Commission that investigated conditions in factories. Here he made his first plea for international cooperation, stating that labour conditions "would be as proper a subject of treaty with foreign nations as the annihilation of the slave trade."[8] The idea of international labour legislation also gained support in continental Europe. Daniel Legrand, a Swiss national who lived from 1783 to 1859, wrote a in a plea to political leaders:

> In modern industrial Europe there are certain matters that individual nations cannot regulate except in the form of an agreement between the interested powers .... An international labour law is the only possible solution to the great social problem of granting moral and material well-being to the working class without working a hardship upon the manufacturers or upsetting the competitive balance between the industries of these countries... . An international factory law has an immense advantage over national laws. It can afford moral and material benefits to the

5 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 10.

6 See e.g. Adam Smith, *An inquiry into the nature and causes of the Wealth of Nations* (first published 1776, Thomas Nelson 1843) 358 who makes this point, although not specifically in relation to the regulation of labour.

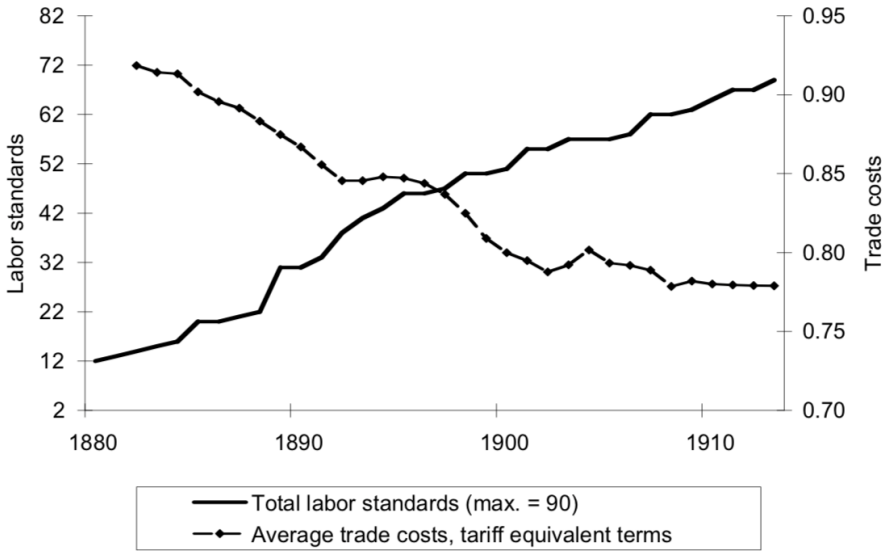
7 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 11-13.

8 Ibid 15.

working class without prejudice to the manufacturers and without the least shock to international competition.[9]

The social reformers' fear of "the tyranny of competition" was not theoretical.[10] In the 19th century the economies in Western Europe became increasingly integrated. With regard to the free movement of people the 'first globalization' even exceeded the current integration of the world economy. During this period states also developed national labour legislation. This encompassed the introduction of factory inspections, minimum age legislation, regulation of hours of work and insurance systems to protect against accidents, unemployment and sickness.[11]

Figure 2.1: The rise of trade integration and labour standards, 1880-1913



Source: Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No 15374, 2009) 44.

9 Daniel Legrand, *Appel respectueux adressé aux gouvernements des Pays Industriels dans le but de provoquer une Loi Internationale sur le travail industriel dont les dispositions seraient à arrêter par leurs délégués en un congrès lors de l'Exposition Universelle à Paris* (Paris or Strassbourg, 1855), translated and quoted in: John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 40.

10 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 47.

11 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 14.

Figure 2.1 shows the cumulative of the adoption of labour legislation on five different issues in eighteen states.[12] This is juxtaposed against the fall in trade costs, a proxy to determine the level of economic integration.

The simultaneous expansion of domestic labour legislation and the decrease in trade costs appears to contradict Legrand's assertion that "an international labour law is the only possible solution." Indeed, international coordination was not a precondition to the adoption of domestic labour law. The first steps in the improvement of labour conditions were inspired by humanitarian reasons. Legislation responded to problems that were so grave "that the public conscience would not tolerate the postponement of national legislation to abolish them to await international action."[13] Moreover, these improvements were not seen as harmful to the competitive position of national industries. However, when legislative effort began to focus on "less serious abuses" the need for harmonization became more important.[14]

2.2.3 The quid pro quo between improving labour standards and tariff reductions

In the absence of an institutional mechanism for the regulation of labour, however, states applied a wide range of trade measures (or threats to invoke them) to support the introduction of domestic social legislation. Huberman, an economic historian, argues that:

> Even in the absence of international oversight, states had options to harmonize the regulatory environment. Until 1900 or so, coercion prevailed over persuasion and negotiation. States threatened import restrictions on selected products of trading partners; failed to renew or abrogated commercial treaties and most-favored-nation clauses; or, in extreme cases, initiated trade wars to cut of competitors' entry into their markets.[15]

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12 The five standards that are included in the analysis are: 1) the introduction of factory inspection, (2) minimum work age 12 years, (3) night work by women prohibited, (4) 11-hour working day for women, and (5) accident compensation.

13 Arthur Fontaine, 'A Review of International Labour Legislation' in E. John Solano (ed) *Labour as an International Problem* (MacMillan and Co 1920) 172

14 Ibid 172; Banks points to the fact that 19th century labour legislation was not fully developed, and argues that: "the argument that no jurisdiction could improve its labour laws without risking its industrial competitiveness appears to have exerted a profound restraining influence on labour policy in Europe during much of the nineteenth century, and was the most important reason for the founding of the International Labour Organization." Kevin Banks, 'The impact of globalization on labour standards: A second look at the evidence' in John Craig and Michael Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge University Press 2006) 107.

15 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 41 (internal reference omitted).

Unilateral trade measures were also used to offset the domestic impact of foreign unfree labour. When in 1833 slavery was abolished within the British Empire, its colonies faced significant competition from countries like Cuba and Brazil. During the 1830s and 1840s, the British Parliament therefore discussed several proposals to differentiate its sugar tariffs for sugar produced by slave labour and free labour.[16] While the abolition was inspired by humanitarian concerns, the slave-trade treaties and the imposition of tariffs were necessary 'flanking' policies to reduce its economic burden. With other forms of unfree labour a different logic applied. During the 19th century many countries banned the importation of goods produced by prison labour.[17] Here, the aim was not to create the conditions necessary to abolish such labour domestically, but rather to prevent 'unfair' competition between foreign state-sponsored prison labour on the one hand, and domestic private enterprises and free workers on the other.[18]

From the 1870s onwards attempts were made to replace the protection of workers through tariff measures by reciprocal labour treaties, although the use of tariff measures and quotas extended well into the 20th century.[19] German academic socialists who advocated a treaty between Prussia and Austria presented their proposals as "[p]rotection without a tariff" and anticipated an important role for existing commercial treaties to be expanded and to also cover labour standards.[20] Whereas domestic labour legislation was inspired by humanitarian considerations, the need for international cooperation was an economic issue. As one contemporary author argued that: "Factory legislation, particularly the stabilization of the normal workday, must be international; its place is in commercial treaties".[21] Initially, treaties focused on labour migration, covering both the freedom of establishment as well as some material aspects of working abroad. This was done through separate agreements or in broader treaties of friendship, commerce and navigation. Later, states began to conclude bilateral treaties that were specifically concerned with

16 See William Green, *British Slave Emancipation: The Sugar Colonies and the Great Experiment* (Clarendon Press 1976) 191-260; and Howard Temperley, *British Antislavery, 1833-1870* (University of South Carolina Press 1972) 137-67 on this episode.

17 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 31; and Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 570.

18 In the US, it was expressly provided that restrictions only applied regarding products that were not produces (sufficiently) in the US, see Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 570.

19 Ibid 568 and 571.

20 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 83.

21 Ibid 86-87 (emphasis omitted).

labour issues. It started with agreements on saving funds that guaranteed access to certain financial services for foreign workers, and later shifted to a comprehensive extension of accident insurance coverage.[22]

These bilateral accident insurance treaties were seen as a prelude to labour agreements with a broader scope.[23] The agreement between Germany and Austria-Hungary of 1905, for example, provided that broader harmonization of labour standards would follow. The only comprehensive agreement that entered into force before World War One, however, was concluded in 1904 between France and Italy.[24] Both countries had been engaged in a trade war between 1886 and the early 1890s, which had been especially harmful to Italian wine makers.[25] Eventually a deal was reached in which France agreed on non-discrimination provisions in respect to Italian migrant workers, and lowered tariffs on Italian imports, while Italy would enforce a comprehensive set of labour standards that would benefit their own workers. The broader purpose of the labour agreements, however narrow in scope, was to strengthen commercial relations between states.[26] Ten of the eighteen bilateral partnerships on labour standards after 1900 also had trade agreement that guaranteed most favoured nation (MFN) treatment. It was thus tacitly understood that improvements of labour laws would prevent retaliation through tariff measures and form a precondition for the conclusion of MFN treaties that would deepen economic integration.[27]

2.2.4 The International Association of Labour Legislation and the emergence of multilateralism

After 1890, unilateral trade measures and bilateral accords were complemented by multilateral initiatives. In March 1890, fifteen states gathered during the Berlin Conference, the first multilateral inter-governmental meeting to solely discuss labour standards. There was no intention to conclude a binding agree-

22 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 77-79

23 Boutelle Ellsworth Lowe, *The International Protection of Labor: International Labor Organization, history and law* (Macmillan 1935) 171 and 194-95; Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No. 15374, 2009) 13-14.

24 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 80 fn 27.

25 Ibid 80.

26 Ibid 14, also: Boutelle Ellsworth Lowe, *The International Protection of Labor: International Labor Organization, history and law* (Macmillan 1935) 143-144.

27 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 67; and Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No. 15374, 2009) 14.

ment or to establish some kind of permanent institution. Eventually five resolutions were adopted, regarding work in mines, Sunday labour, child labour (up to 14 years), 'labour of the young' (14-18 years) and female labour. Compliance with the Berlin resolutions was voluntary, but it called upon states to periodically publish statistics and information about legislative and administrative measures. In 1891, a British inquiry concluded that the conference had set in motion some concrete improvements in the domestic legislation of the participating states.[28]

States showed little inclination to hold additional meetings in the years following the Berlin Conference. However, a diverse range of actors continued to carry the cause of social reform through non-governmental, transnational initiatives. On one side, there was the Second International, which consisted of Marxists, trade unionists and anarchists whose goal it was to gain full political control and socialise the means of production. On the other side were their political opponents who embraced social reform to provide a reformist alternative to communism. For many this coincided with their religious conviction. Pope Leo XIII for example, who "praised social reform with almost as much ardour as he had denounced Marxian socialism," discussed its importance in his 1891 encyclical *Rerum Novarum*.[29]

In 1897, a non-governmental conference was organized in Brussels. The delegates, mostly academics, parliamentarians and economists, decided to establish the International Association of Labour Legislation (IALL).[30] The IALL officially commenced its work in 1901. Although private in form, it was financed by states and is often regarded as the predecessor of the ILO. The purpose of the IALL was to conduct comparative studies of domestic labour laws and to organise intergovernmental conferences.[31] It focused on night work for women and occupational health, especially in the production of products containing lead colours and white phosphorus.[32] By concentrating on a few subjects and on the basis of years of study and preparation, the IALL had a different mode of operation than the Berlin Conference, which was a

28 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 143.

29 Ibid 146-147.

30 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 150-151. The French name of the IALL was *L'Association internationale pour la protection légale des travailleurs.* This explains the use of the English translation 'International Association for the Legal Protection of Workers' in some literature and on the website of the ILO.

31 Victor-Yves Ghebali, *The International Labour Organisation: A case Study on the Evolution of U.N. Specialised Agencies* (Martinus Nijhoff Publishers 1989) 4-5; Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 30 contains extracts of the IALL statute.

32 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 32.

one-time diplomatic conference and reached political, non-binding conclusions on a broader range of issues.

In 1905, after four years of work by the IALL, representatives of fourteen states assembled in Berne for a 'technical' conference to negotiate the first two multilateral conventions on labour standards: one concerning the production of matches containing white phosphorus, and the other prohibiting night work for women. Although relatively uncontroversial from a humanitarian point of view – many states had already adopted domestic legislation on both issues – states deemed it necessary to "equalize the conditions of industrial competition."[33] White phosphorus was a leading cause of necrosis among workers in the match industry.[34] Some countries had already banned the substance, while others had managed to eradicate necrosis through hygienic measures.[35] For these reasons, states were less concerned with the content of a possible treaty than with the question whether their competitors would participate.[36] Notably, the main obligation under the 1906 White Phosphorus Convention is the prohibition of "the manufacture, importation and sale of matches which contain white (yellow) phosphorus."[37]

States had also introduced domestic legislation concerning night work by women. However, the various laws contained differences on age limits, hours of rest, coverage of specific industries and exemptions.[38] The convention that was concluded harmonized some of these issues, but contained a compromise to exempt manufacturers with less than ten employees. This exemption also attests to the fact that the purpose of international agreement was not to

33 Ibid 33.

34 Necrosis is the irreversible death of body tissue.

35 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 163.

36 The negotiations in Berne on White Phosphorus were particularly concerned with the question whether Japan and British India, both important manufacturing countries, would also accede to the treaty. Unlike Britain, India did not take part in the conference. See John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 163.

37 Art 1 International Convention Prohibiting the use of White (Yellow) Phosphorus in the Manufacture of Matches (1906). After the establishment of the ILO, it adopted a non-binding instrument recommending its members to adhere to this convention.
To this day, it remains the only ILO instrument to explicitly call for trade measures in order to effectuate the purpose of banning a practice or substance that is harmful to workers. Art 1 ILO Recommendation R006: White Phosphorus Recommendation (Recommendation concerning the Application of the Berne Convention of 1906, on the Prohibition of the Use of White Phosphorus in the Manufacture of Matches) (1st Conference Session, Washington 28 November 1919).

38 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 164; Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 33-34.

guarantee healthy employment conditions for all women but a more pragmatic project to mitigate the competitive advantage of low labour standards.[39]

The multilateral treaties were not accompanied by an institutionalized monitoring mechanism. Proposals by Switzerland and Great Britain to include provisions on international enforcement and interpretation were not accepted.[40] Signatories to both conventions were only bound to "communicate with one another upon the measures that they had taken to execute the conventions and the manner in which the measures were enforced."[41] Some states diligently carried out their treaty obligations by changing their domestic labour laws, but others either refused to ratify the conventions out of competitiveness concerns,[42] or because they already adhered to the standards contained therein before the Berne meetings.[43]

39 It did not appear in the 1919 Convention. One year later, a second, diplomatic conference convened in Berne 1906 with the purpose of transforming the understandings into treaties. The white phosphorus convention was signed by 7 out of 14 states represented. Japan was not represented, and signalled that it had no intention to ratify. In response five other states also refused to sign. Despite a provision that the convention would not apply automatically to colonies and dependencies, Britain only wanted to sign the phosphorus agreement if all other states would do so. See John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 165-6. In contrast, the Night Work Convention was signed by all participating states. They entered into force in 1912 and 1913, respectively, see Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) at 47. Also in this text, some amendments were agreed upon to provide more flexibility for states that had no previous regulation on night work, and for non-European countries where climatic condition required work during cooler night hours.

40 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 39-40 on the Swiss proposal to that "any differences arising between any of the Parties in regard to the interpretation or the enforcement of conventions should be settled by arbitration." This proposal was not discussed according to Delevingne, and 44-45 on the British proposal to establish a commission that would supervise compliance with the convention and deal with matters of interpretation and complaints, and a proposal to submit disputes to arbitration. Germany fiercely opposed the proposals as they would infringe upon its sovereignty. Delevingne also notes, however, that there was a fear of undue socialist influence in the commission.

41 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 165.

42 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 73.

43 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 37; and John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 167.

2.3 The International Labour Organization

2.3.1 Introduction

This part introduces the institutional and legal framework of the International Labour Organization, which was established in 1919 pursuant to the Versailles Peace Treaty. Section 2.3.2 discusses the establishment of the ILO as well as its institutional framework. Section 2.3.3 examines the purpose of international labour law, and how this purpose has developed over time. Section 2.3.4 turns to the legal framework and the sources of international labour law.

2.3.2 The establishment of the ILO and its institutional framework

The October Revolution of 1917 made clear that improving working conditions was not only necessary to sustain an open trading system, but also to preserve political stability within, and peace between states. A liberal economic system could only be maintained when states would embrace a social and credible alternative to Bolshevism.[44] Soon after its assembly in January 1919, the Paris Peace Conference established the Commission on International Labour Legislation, which was tasked with the design of the labour arrangements that would eventually become part of the Treaty of Versailles. Chapter XIII famously declared that "labour should not be regarded *merely* as a commodity or article of commerce," which illustrates the *sui generis* nature of labour as an economic construct with inherent social importance.[45]

The first annual meeting of the newly established organization was held in Washington, from 29 October to 29 November 1919. Thirty-nine states attended. The United States hosted the initial meeting, but did not join the ILO until 1934. Over the years, its membership grew to 187 states. Already at the first conference, six treaties were adopted, dealing with hours of work, unemployment, and the protection of women and children. Since then, the

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44 See Paul O'Higgins, 'The interaction of the ILO, the Council of Europe and European Union labour standards' in Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 55. Morse, the Director-General of the ILO between 1948 and 1970, argued however that the inclusion of a labour chapter in the Treaty of Versailles was simply the consequence of the fact that the attention for "the hardships which nineteenth-century industrialization and economic competition inflicted upon workers" had become part of mainstream politics, and the peace conference provided a window of opportunity to address these issues on a multilateral level. See David Morse, *The origin and evolution of the I.L.O. and its role in the world community* (W.F. Humphrey Press 1969) 7.

45 Emphasis added. The word 'merely' was deleted at the 1944 Philadelphia Declaration. Most contemporary literature uses the 1944 wording. See e.g. Christine Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 51.

'international labour code' – as the body of international labour law is occasionally referred to – has expanded enormously. With 189 binding conventions, six protocols and 205 non-binding 'recommendations', no issue in international law is covered by so many instruments that are intended to have a universal scope.

The ILO has three organs: the General Conference (the Conference, or International Labour Conference),[46] the Governing Body (GB) and the International Labour Office (the Office).[47] The Conference is the organization's plenary and convenes once a year. It decides on the adoption of new conventions and recommendations, the organisation's work programme and budget and the composition of the Governing Body. It is also involved in the supervision of member states' compliance with their treaty obligations. The main institutional feature of the Conference is its tripartite composition. Article 3.1 of the ILO Constitution provides that once a state becomes a member of the ILO, it is required to comprise a delegation to the Conference of two government delegates,[48] one employer delegate and one worker delegate.[49] These latter delegates are independent from their governments and, according to Article 5, should be nominated "in agreement with the industrial organizations … which are most representative of employers and workpeople … in their respective countries."[50] The Governing Body is the ILO's executive organ. It consists of fifty-six members and has the same tripartite composition as the Conference. The members of "chief industrial importance" may appoint ten of the twenty-eight government representatives while the others are elected by the Conference.[51] The Governing Body takes decisions on ILO policy, prepares the Conference, elects the Director-General. The International Labour Office is the organisation's permanent secretariat, which is headed by the Director-General and responsible for the general affairs of the organisation.[52]

The importance of tripartism for the ILO can hardly be underestimated. Maupain defines the term as "the free confrontation and reconciliation of the respective interests of genuine worker and employer representatives with the

46 The ILO Constitution uses the term 'General Conference'. The more common name is 'International Labour Conference'.

47 Art 2 ILO Constitution.

48 Both government delegates have a vote. This division was agreed upon to prevent the possibility that states could be outvoted, see: Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 21-2.

49 Art 3.1 ILO Constitution.

50 Art 5 ILO Constitution.

51 Art 7.2, ILO Constitution, these are: Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States. Article 7.3 provides that "The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body."

52 Art 10 ILO Constitution.

active involvement of governments."[53] Through their role in the Conference and the Governing Body, trade unions and employer organisations (together referred to as the 'social partners') are involved in the adoption of normative instruments and their supervision, as well as almost all matters regarding the organisation's internal affairs and policy decisions. Although this is a corollary of the way in which employment relations are nowadays governed at the domestic level in many states, institutionalized forms of cooperation between social partners were uncommon before the ILO was founded.

In many states, there are multiple workers' and employers' organisations. Consequently, the requirement of Article 5 that non-governmental delegates should be "most representative" has been a ponderous issue. As early as 1922 the Council of the League of Nations requested the Permanent Court of International Justice (PCIJ) to issue an Advisory Opinion on the question whether the worker delegate from the Netherlands was nominated in accordance with the relevant provision. A dispute had arisen after the Dutch government had nominated a worker delegate that had been agreed upon by three trade union confederations. When combined, the membership of these three unions outnumbered the single largest union, which had provided the Conference delegate at the ILO's first two meetings. The Court concluded that the procedure followed by the Netherlands was in accordance with the Treaty of Versailles. Although the Court held that "other things being equal, the most numerous will be the most representative,"[54] governments should take all industrial organisations into account when appointing a delegate as this person "represents all workers belonging to a particular Member."[55]

Even more contentious than disputes that arise out of trade union pluralism is the accreditation of workers' and employers' representatives from states where these organizations are not independent from the government. This problem emerged in the 1930s, when several communist countries joined the ILO and a fascist regime had come to power in Italy. The Credentials Committee of the International Labour Conference separates the legal obligations on freedom of association from the appointment of delegates. It held that while freedom of association is an objective of the organisation, it is not a prerequisite for membership nor part of the "attributes to membership."[56] While this distinction relieves the pressure from the Credentials Committee to discuss member states' compliance with ILO standards on freedom of association, it

53 Francis Maupain, 'New Foundation of New Facade? The ILO and the 2008 Declaration on Social Justice in a Fair Globalization' (2009) 20 European Journal of International Law 823, 825.

54 *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference (Advisory Opinion)* PCIJ Rep Series B No 1 (31 July 1922) 19.

55 Ibid 23.

56 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 38.

shows the difficulty of maintaining the integrity of the tripartite governance system.

2.3.3 The purpose of the ILO

2.3.3.1 Early perspectives: social justice and the coordination problem

The alleged coordination problem that motivated the negotiation of labour standards before World War I is made explicit in the preamble to the ILO's Constitution. After an enumeration of some of the pressing issues of the time, such as regulation of hours of work and the protection of workers against sickness, it is 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." The Covenant of the League of Nations reiterates the presumed relationship between labour standards and comparative advantage where it is stated that its members: "will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and *in all countries to which their commercial and industrial relations extend*, and for that purpose will establish and maintain the necessary international organisations."[57] In other words: states with which no economic relations existed did not necessarily have to be involved. James Shotwell, who was part of the American delegation to the Paris Peace Conference, thus argued that the name 'International Labour Organization' was a misnomer as "[what] was created was an international economic organization to deal with labor problems."[58] This view is shared by political economist Karl Polanyi, who argued that: "The League of Nations itself had been supplemented by the International Labour Office partly in order to equalize conditions of competition among the nations so that trade might be liberated without danger to standards of living."[59]

The issue of economic competition was frequently raised in the International Labour Conference. Similar to the early days of domestic labour legislation, states did not await the conclusion of ILO conventions. They were nonetheless deemed important "in order to protect such countries as have

57 Art 23(a) Covenant of the League of Nations (emphasis added).

58 James Shotwell (ed), *The Origins of the International Labor Organization: Vol. I: History* (Columbia University Press 1934) xxi-xxii.

59 Karl Polanyi, *The Great Transformation* (first published 1944, Beacon Press 2001) 27-28. Also in more recent legal scholarship, this point is reiterated. According to Friedl Weiss, the ILO "was the first ever international economic organization" and "probably saved capitalism, at any rate in the west." Friedl Weiss, 'Elusive Coherence in International Law and Institutions: the Labour – Trade Debate' in Marise Cremona et al (eds) *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff 2014) 582.

already recognized these claims by progressive legislation," as a delegate from Czechoslovakia argued in the context of the eight-hour working day.[60] For the adoption of new conventions, economic necessity was assumed rather than something that required evidence. When in 1922 the PCIJ issued an advisory opinion on the competence of the ILO with regard to agricultural work, it noted *in dicta* that the economic dimension was self-evident with regard to any industry, including navigation, agriculture and fishing, in which:

> [the] adoption of humane conditions of labour ... might to some extent be retarded by the danger that such conditions would form a handicap against the nations which had adopted them and in favour of those which had not, in the competition of the markets of the world.[61]

The notion that the purpose of international labour law is to guarantee fair competition affects the conceptualization of labour treaties. These are to be seen as contractual arrangements, based on reciprocal inter-state exchanges of obligations, rather than instruments with a more normative – *ordre public* – character; the category to which human rights conventions belong.[62] This is one of the reasons why the ILO has never accepted reservations to its conventions.[63] As Director-General Thomas stated in a 1927 memorandum:

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60 International Labor Conference (1st Session) Record of Proceedings (Washington DC 1919) 54.

61 *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Rep Series B No 13 (12 August 1922) 25.

62 Although the distinction is not absolute, it played an important role in the work of the International Law Commission in the 1950s on the acceptability of reservations. Klabbers summarizes the underlying notion as follows: "Whereas with a contractual treaty, a reservation may disturb the balance of commitments between the parties, with normative treaties no such balance exists." Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations' in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Springer 2004) 161. On the non-reciprocal nature of human rights conventions and the conditions under which reservations are allowed, see: 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' (11 November 1994) CCPR/C/21/Rev.1/Add.6, esp para 17.

63 The other being the tripartite nature of decision-making within the International Labour Conference. This argument was also advanced in 1927, but contemporary works on international labour law perceive it as the sole objection against reservations. See e.g. Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 272. The International Labour Office itself submitted a comprehensive memorandum to the International Court of Justice on the subject in 1951 in the context of the ICJ's Advisory Opinion on 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide'. See: International Labour Office, 'Memorandum by the International Labour Office on the Practice of Reservations to Multilateral Conventions' (Official Bulletin Vol XXXIV, No 3, 31 December 1951) 274-288.

> The object of the [ILO] is to safeguard conditions of labour against the detrimental influence of international competition; and this is the reason why labour conventions must establish a network of mutual obligations among the various States. It is essential that exact reciprocity should be preserved in these obligations, and to that end the Peace Treaties establish an extremely detailed procedure for the enforcement of the conventions. It is perfectly obvious that the admission of reservations on the occasion of ratification would soon destroy the practical value of the international engagements in question and upset the balance which it is the object of the conventions to establish as regards industrial competition.[64]

Apart from the legislative agenda, the ILO was also engaged in the broader debate on economic policy.[65] Curbing international competition as a means to mitigate its 'detrimental influence' was not an option. The founding fathers of the ILOs were ardent free traders.[66] The exploitation of comparative advantage through trade was considered necessary to raise employment levels, while the quality of employment was to be safeguarded through the coordination of standards.[67] In 1931, for example, ILO Director-General Butler condemned the protectionist measures that states applied in the wake of the economic depression. His statement is striking considering the fact that today, international labour law and trade-labour linkages are sometimes regarded as 'disguised protectionism'. Butler wrote:

> Side by side with these effects of customs duties, the same disturbing effects result from the indirect and sometimes veiled protection which is practised by customs formalities, marks or certificates of origin, internal taxes, transport charges or

64 Director of the International Labour Office, 'Admissibility of Reservations to General Conventions' (15 June 1927), published as Annex 967a of 8 League of Nations Official Journal (1927) 883-884.

65 Economic policy was a concern of the League of Nations, but the ILO was closely involved with the League's activities in this field, including the 1933 World Economic Conference in London. Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations 1920-1946* (Oxford University Press 2013) 85 and 90.

66 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 72. Indeed, the ILO has never advocated the use of trade restrictive measures. In his 1994 report, Director-General Hansenne spoke out against unilateral trade restrictive measures, but suggested that a new ILO Convention could be concluded in which states would be obliged to "abstain from applying unilateral trade restrictions ... in exchange for a greater commitment by their trading partners to strive towards the social progress expected from Members of the [WTO]." International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 62-63

67 At the first ILC in 1919, the Italian Worker Delegate Baldesi submitted a proposal for a more equitable system of distribution of raw materials, which would help to alleviate poverty. The majority of delegates, however, concluded that these types of trade-restrictive proposals were not within the competence of the ILO. As Alcock puts it: "Unable to tackle the whole phenomenon of unemployment, including the economic causes, the ILO had soon learnt that it had to restrict itself to the limiting of its social effects." Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 45.

> facilities by land or sea, bonuses and all kinds of subsidies or encouragements to exports.[68]

In addition he dismissed the American Smooth-Hawley tariff of 1930, which "was intended to secure to the workers of the United States a certain stability of employment, and to defend them against the hardships of the depression" but "threatened simultaneously to create unemployment elsewhere."[69] Up to the last report before the outbreak of World War II, the ILO's successive Directors-General criticized protectionist policies and praised "successful efforts ... to counteract autarkic trends by constructive trade agreements."[70]

The Second World War marks a watershed in the history of the ILO. While its objective to realize social justice in the context of global economic competition remained valid, its role in international economic governance declined. New institutions and legal instruments in the area of trade, investment and finance were adopted. This body of international economic law took over the ILO's role as the 'enabler' of economic globalization. At the same time, however, new justifications for international labour law emerged.

2.3.3.2 Contemporary perspectives: fundamental rights and sustainable development

In May 1944 the International Labour Conference adopted the Declaration of Philadelphia, containing a comprehensive restatement of the organisation's aims and objectives.[71] It reflected Keynesian economic thought, which combines the objective of full employment, distributive policies and collective bargaining at the national level with a liberal international trade regime.[72] To effectuate this vision, the ILO saw a role for itself as a clearinghouse to examine "international economic and financial policies and measures" in light of the objective of social justice.[73] The concomitant establishment of other international organizations and agreements with an economic mandate diminished the role of the ILO in this area. However, since the Second World War it has significantly expanded its scope of work beyond standard-setting towards the promotion of employment, development cooperation and the promotion of social dialogue.

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68 International Labour Conference (15th Session) Report of the Director: First Part (Geneva 1931) 26.

69 Ibid 26.

70 International Labour Conference (25th Session) Report of the Director: The World of Industry and Labour' Geneva 1939) 13.

71 International Labour Conference (26th Session) Declaration concerning the aims and purposes of the International Labour Organization (Philadelphia 1944). Eddy Lee, 'The Declaration of Philadelphia: Retrospect and prospect' (1994) 133 International Labour Review (1994) 467.

72 Arts III and IV Declaration of Philadelphia.

73 Art II Declaration of Philadelphia.

Notably, the Declaration of Philadelphia does not refer to the coordination problem as the main reason for international cooperation in the field of labour. Instead it viewed social justice as a matter of human dignity, which in itself is enough to justify international action.[74] International human rights law emerged during this period. As such, "[the Declaration of Philadelphia] anticipated and set a pattern for the United Nations Charter and the Universal Declaration of Human Rights."[75] This is also reflected in some of the conventions that were adopted subsequent to the war, such as the 1957 Abolition of Forced Labour Convention that addressed *inter alia* forced labour as a means of political coercion.[76] The substantive provisions of these conventions classify individual workers as rights-holders.[77] This has implications for the interpretation of these conventions, as well as for their potentially self-executing nature in the domestic legal order of state parties.[78]

The reorientation towards a rights-based approach culminated in the adoption of the *1998 Declaration on Fundamental Principles and Rights at Work*. This declaration, which will be discussed in detail below, created a hierarchy in the ILO legal framework by designating four labour standards as 'fundamental rights', namely (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

This shift from protective labour law towards a rights-based paradigm has also been observed at the domestic level.[79] The fundamental labour rights are often portrayed as 'market-friendly': they would be consistent with the ideology of free trade, and are possibly even a source of comparative advant-

74 At the annual International Labour Conference, the discourse of universal human rights became increasingly important. In 1945, for example, a Canadian Government Delegate stated that "The rights of men and women and children, and of workers and all others the whole world over, are human rights. These rights are not given to us by Government or by industry; they come to us through creation itself... . The International Labour Organisation, therefore, and every nation of the world, must build upon that one solid, indestructible foundation: human rights." International Labour Conference (27th Session), Record of Proceedings (Paris 1945) 113.

75 Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 183.

76 Tonia Novitz, *International and European protection of the right to strike: a comparative study of standards set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press 2003) 99.

77 The main example can be found in Art 2 of ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

78 Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982)

79 Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004* (Hart Publishing 2009) 15.

age. Notably, the critics of economic globalization also embrace the fundamental rights paradigm, as it "forecloses the discussion of efficiency and welfare by an appeal to an overriding value that justifies labour law."[80] The relationship between economic law and human rights may not necessarily be antagonistic, but if conflicts occur the moral foundations of human rights give it a higher degree of legitimacy than economic law. In other words: using the deontological language of human rights to describe the negative impact of utilitarian economic law leaves little room for trade-offs in policy decisions, but requires the conflict to be resolved in favour of human rights. According to Collins: "Once a fundamental right is at stake, it tends to exclude from consideration or at least override any other policies or principles, except, probably, appeals to other rights."[81]

Conceptualizing labour law as an enabler of economic development has also allowed alignment with the notion of sustainable development. The World Commission on Environment and Development – commonly known as the Brundtland Commission – defined sustainable development as development "that meets the need of the present without compromising the ability of future generations to meet their needs."[82] At the time it was not discussed whether 'needs' also encompassed human or labour rights. Later, consensus emerged that sustainable developments consists of three "interdependent and mutually reinforcing pillars": economic development, social development and environmental protection.[83]

From the mid-1990s the ILO and other international organisations began to link labour standards and sustainable development. The final report of the 1995 World Summit for Sustainable Development explicitly linked implementation of – what would later be qualified as – fundamental labour rights to the achievement of sustainable development.[84] This was reaffirmed in the 1998 Declaration,[85] and the 2008 Declaration on Social Justice for a Fair Globalization.[86] The latter proclaims that the ILO aims to "facilitate meaningful and coherent social policy and sustainable development."[87] Notably, the ILO not

80 Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 139.

81 Ibid.

82 World Commission on Environment and Development, 'Our Common Future' (Oxford University Press 1987) at 37.

83 United Nations, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20, 1.

84 United Nations, 'Report of the World Summit for Social Development' (19 April 1995) A/CONF.166/9, 12.

85 International Labour Conference (86th Session) ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva 18 June 1998, annex revised 15 June 2010) emphasis added.

86 International Labour Conference (97th Session) ILO Declaration on Social Justice for a Fair Globalization (Geneva 10 June 2008).

87 Art II(A), 2008 Declaration.

only uses the concept as a means to justify its normative instruments but has also developed a 'Green Jobs Initiative' with the United Nations Environmental Program.[88] Vice versa, the outcome documents of multilateral conferences on sustainable development contain ample references to labour, including child labour, occupational health issues, youth unemployment and decent work.[89] The most recent development in this respect is the inclusion of 'decent work' and employment in the 2015 Sustainable Development Goals.[90]

2.3.4 The legal framework

2.3.4.1 Conventions

International labour law is mainly based on treaty obligations. Since 1919 the International Labour Conference has adopted 189 Conventions, including six protocols. The subjects covered are diverse, ranging from freedom of association to social security and from forced labour to maternity protection. Over the last years, attempts have been made to streamline ILO instruments. Of the 189 Conventions, only 77 are considered up-to-date. The other instruments are to be revised or are considered redundant. Since 2015, the International Labour Conference may decide to abrogate these conventions.[91]

Conventions are treaties within the meaning of Article 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT). Article 9.2 of the VCLT holds that for the adoption of treaties in legislative conferences, "two-thirds of the States present and voting" decide on the adoption of treaties.[92] Due to its tripartite composition, however, new ILO conventions are adopted by a two-third majority in the International Labour Conference.[93] If a normal majority of the votes would have sufficed, it would be possible to adopt a convention with only 35% of the government delegates voting in favour. Likewise, if all non-governmental delegates oppose adoption of a proposal, even unanimous consent

88 UNEP, 'Green Jobs: Towards decent work in a sustainable, low-carbon world' (2008).
89 UNGA Res 66/288 (11 September 2012) 'The future we want' UN Doc A/RES/66/288.
90 UNGA Res 70/1 (21 October 2015) 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1.
91 Art 19.9 ILO Constitution.
92 Art 9.2 VCLT.
93 The same procedure applies to ILO Recommendations, which are discussed in the subsequent section. Article 5 VCLT allows *lex specialis* of international organizations. The ILO, together with other specialized agencies of the UN, was heavily involved in the drafting of the VCLT, see: Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 16.

amongst states cannot prevent that it is voted down.[94] Support from the social partners is thus necessary for every convention.

The second main difference relates to the obligations of ILO members prior to the ratification of a new convention. When the Conference adopts a convention, it is signed by the President of the Conference and the ILO Director-General. This deviates from the procedure foreseen in Articles 7 to 12 of the VCLT, which provides for the consent of states. The difference influences the obligations of states prior to ratification of an ILO convention. Article 18 VCLT, provides that states are "obliged to refrain from acts which would defeat the object and purpose of a treaty" when it signs a treaty or otherwise indicates its intention to become a party. After the adoption of an ILO Convention by the Conference, however, the member states incur procedural rather than substantive obligations. Article 19 of the ILO Constitution requires that adopted conventions be "communicated to all Members for ratification."[95] If a state decided not to ratify the convention "no further obligation shall rest upon the member except that it shall report to the Director-General ... at appropriate intervals ... the position of its law and practice in regard to the matters dealt with in the Convention".[96] The proposition that Article 18 VCLT does not apply to ILO Conventions has been confirmed in a case before the highest administrative court of the Netherlands.[97]

When the ILO was founded, the obligation to submit new conventions to the domestic ratification procedure was regarded one of the innovative features of the new system.[98] A British proposal to let conventions become binding on all ILO members upon adoption by the Conference was defeated. Such a procedure would be diametrically opposed to the law of treaties, both at the time of the ILO's founding as well as the VCLT regime. However, it does illustrate that the ILO was perceived as a new form of cooperation that challenged international legal doctrine at the time. In 1937, Jenks wrote:

> It will be clear ... that the Organisation is essentially a practical compromise between two contrasted theories of world organisation. Its present Constitution appears to correspond to a transitional phase in a process of evolution beyond the sovereign State. Its Constitution represents a bolder innovation in political thinking than the Covenant of the League of Nations but still falls far short of the framework of the super-State.[99]

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94 In practice however, employer delegates are reluctant to support new standards and majorities depend on coalitions between workers and governments.

95 Art 19.5(a) ILO Constitution.

96 Art 19.5(e) ILO Constitution.

97 Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 517-518.

98 Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 22.

99 Wilfred Jenks, 'The Significance for International Law of the Tripartite Character of The International Labour Organisation' (1937) 22 Transactions of the Grotius Society (The Eastern Press 1937) 45, 57.

Revolutionary ideas such as the automatic binding force of new conventions can be explained by the fear of free-rider behaviour: ratification by a state may create a disincentive for its competitors to ratify the same convention. But despite early attempts to portray ILO conventions as "projects of municipal legislation" they are normal treaties that only become binding upon their ratification.[100]

Low ratification levels have been a continuous concern for the ILO.[101] Some conventions have attained almost universal recognition; the 1999 Worst Forms of Child Labour Convention is ratified by 182 states, while other conventions are ratified by only a few. This provoked a debate about the drivers behind ratification. Empirical studies of ILO ratifications show that states have a variety of motives, such as peer-group ratifications, the dominant political orientation, or to what extent domestic constituencies (such as labour unions) press for ratification.[102] Consequently, many states ratify conventions that they do not (yet) comply with. Landy, in his study on the ILO, coined the term "empty ratifications" to describe this practice.[103] The pejorative indicates that he does not consider the ratification of treaties that are already complied with to be symbolic, as is sometimes suggested.[104] To the contrary, he is wary of the opposite scenario, in which a state first ratifies a treaty and subsequently takes steps towards its implementation. As early as 1937, Arnold McNair, in his role as Rapporteur of the ILO Committee of Experts, warned against the ratification of conventions prior to their implementation. This practice, according to McNair, constitutes an "infringement of the principle of scrupulous

100 Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 11-12.

101 Efrén Córdova, 'Some Reflections on the Overproduction of International Labor Standards' (1993) 14 Comparative Labor Law Journal 138.

102 Bernhard Boockmann, 'The Ratification of ILO Conventions: A Hazard Rate Analysis' (2001) 13 Economics and Politics 281; and Bernard Boockmann, 'Mixed Motives: An Empirical Analysis of ILO Roll-Call Voting' (2003) 14 Constitutional Political Economy 263.

103 Ernest Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (Stevens & Sons 1966) 83-90, discussing "empty ratifications," where countries decide to ratify conventions even though they lack the economic conditions enabling them to comply with the obligations assumed. This conclusion aligns with Hathaway's study on a number of human rights treaties, that often ratification "[offers] rewards for positions rather than for effects." Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Journal of International Law 1935, 2007 (see internal quotation).

104 According to Flanagan, an economist, the main motive to become a party to ILO conventions is pre-existing compliance. If a state does not yet comply, it would mean that costly domestic legislation would have to be adopted that may compromise its competitive position. This, he argues, is not how states act. Ratification is the result of improvements of domestic labour conditions instead of the other way around, which makes the act of ratification "largely symbolic." Robert Flanagan, *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford University Press 2006) 169.

respect for the mutual international undertakings implied by the ratification of a Convention ... ."[105]

Under the view held by Landy and McNair, states are thus supposed to implement conventions before ratification. But even if it has complied with the terms of a newly drafted convention for a significant period of time, perhaps even before the issue was even considered by the ILO, ratification is still meaningful as it could prevent backsliding. In this sense, the role of the convention is not to alter certain policies, but to prevent states from doing so by 'locking-in' existing labour standards in international agreements.[106]

2.3.4.2 Recommendations

Recommendations adopted by the International Labour Conference constitute the second prong of the international labour code. Since 1919, 205 recommendations have been adopted. Article 19.1 of the ILO Constitution provides that they may (1) complement conventions containing additional or more detailed rules, or (2) deal with subjects that are not (yet) "suitable or appropriate ... for a Convention."[107] The fact that recommendations are not subject to ratification as multilateral treaties does not mean that they have no relevance for member states' domestic labour law. The ILO Constitution obliges member states to "bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation of other action"[108] and, more importantly, to report whether they are complied with in domestic law and practice.[109]

Recommendations do not only contain additional norms, but may also have an interpretative function as they "indicate to members of the underlying Convention their minimum obligations if they are seeking to comply with treaty obligations that are otherwise extremely vague."[110] However, ILO Recommendations appear to fall outside the scope of Article 31 of the Vienna

105 International Labour Conference (23rd Session) Summary of Annual Reports under Article 22 of the International Labour Organisation, Appendix, Report of the Committee of Experts on the Application of Conventions (Geneva 1937) 4.

106 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 29. This is especially important in relation to the ILO's economic purpose. Indeed, to lock in existing labour standards is the main function of labour provisions in preferential trade and investment agreements. Art 4.3 of the labour chapter in the EU-Canada Comprehensive Trade and Economic Agreement (CAFTA), for example, provides that: "A Party shall not fail to effectively enforce its labour law ... as an encouragement for trade or investment." Unlike ILO conventions, these non-derogation provisions do not contain material norms but merely require the effective enforcement or non-amendment of existing domestic labour legislation.

107 Art 19.1 ILO Constitution.

108 Art 19.6(b) ILO Constitution.

109 Art 19.6(d) ILO Constitution.

110 José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 229.

Convention on the Law of Treaties. This article, which lays down the general rule of interpretation of treaties, provides in paragraph 3 that account shall be taken of: "(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." In addition, paragraph 4 stipulates that: "A special meaning shall be given to a term if it is established that the parties so intended." Both provisions thus give precedence to the right of 'the parties' to agree on the interpretations of treaties that apply between them. Allowing this practice at the ILO would encounter the same problem as reservations, namely the deposition of the social partners. Importantly, the VCLT does refer to the possibility of *lex specialis* by international organisations in relation to the interpretation of treaties drafted under their auspices. The interpretative role of recommendations is not explicitly foreseen in the ILO Constitution, but it is an important tool for the Conference to provide more detailed guidance in relation to conventions. The 2010 HIV and AIDS Recommendation (No 200), for example, influences the scope of the 1958 Convention concerning Discrimination in Respect of Employment and Occupation (No 111) and has even had an effect on generic non-discrimination provisions in human rights law.[111]

2.3.4.3 Flexibility of international labour standards

Whereas the debate on the appropriate mechanism for the ratification of ILO conventions emanates from the fear that some states may be unwilling to participate, other states may be unable to do so because of resource constraints. This poses a dilemma. As former ILO Director-General Hansenne has noted: "either the provisions [the Conventions] contain are made more flexible so as to make them more accessible to the majority, in which case the Conventions would lose some of their character; or else they include a minimum number of strict obligations, and the Conventions run the risk of being ratified by disappointingly few countries."[112]

This dilemma also exists outside the ILO. In general international law, reservations are the main instrument to modify otherwise more stringent treaty obligations. At the ILO, however, reservations are not allowed.[113] The International Covenant on Economic, Social and Cultural Rights (ICESCR) takes a different approach. Upon ratification, state parties commit themselves to the

111 The European Court of Human Rights has refered to ILO Recommendation No 200 in multiple cases concerning occupational discrimination. See *Case of Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011) para 67; *I.B. v Grèce* App no 552/10 (ECtHR, 3 October 2013) paras 32, 60, 84.

112 International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 48.

113 George Politakis, 'Deconstructing Flexibility in International Labour' in George Politkis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 467.

ICESCR's "minimum core obligations" that become more demanding as the state's resources increase.[114] This is known as "progressive realization" and is a core difference with obligations under civil and political rights treaties.[115]

Unlike the ICESCR, the legal framework of the ILO is not unitary. It consists of nearly two-hundred conventions with diverging subject-matters and legal character. To adopt a general notion of progressive implementation would, for example, be incompatible with the object and purpose of the conventions on forced labour. Instead, differentiation of obligations is determined on a treaty-by-treaty basis. Article 19.3 of the ILO Constitution provides that:

> In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

This provision has had a great impact on ILO treaty-making.[116] Many conventions contain flexibility devices in order to accommodate states at different levels of economic development.[117] Some contain language that is similar to the ICESCR. Article 2.3 of the 1990 Night Work Convention (No 171) provides that protective measures "may be applied progressively." Other conventions contain qualified or unspecified language, providing that states should comply with certain norms "as far as possible"[118] or that incomes should enable "a suitable standard of living."[119] In general, flexibility devices have in common that they allow states to adapt the scope of obligations *ratione materiae* or *ratione*

114 Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 10.

115 Ibid, para 1.

116 J.F. McMahon, 'The Legislative Techniques of the International Labour Organization' 1967) 41 British Yearbook of International Law 1965-1966 1, 31-41; George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 463 stating that "flexibility is today omnipresent in the Organization's standards work."

117 Whereas the provision is intended to accommodate developing countries in the ILO system, arguments for more flexibility have also been advanced by developed economies. This started in the 1970s when states increasingly rejected "the ILO's Keynesian labour market policies." Ignacio Donoso Rubio, 'Economic Limits on International Regulation: A Case Study of ILO Standard-Setting' (1998) 24 Queens Law Journal 189, 214. Duplessis uses the term 'softness' rather than 'flexibility'. She notices a clear trend towards softness in the area of precarious work, on which the ILO adopted three conventions between 1994 and 1997. Isabelle Duplessis, 'Soft international labour law: The preferred method of regulation in a decentralized society' International Institute for Labour Studies (ed), *Governance, International Law & Corporate Social Responsibility* (ILC Research Series 106, 2008) 28-29.

118 See e.g. Art 4.1 ILO Convention 177.

119 Art 7.3(b) ILO Convention 177.

personae in order to account for "the evolution of national socio-economic conditions."[120]

The use of flexibility devices in order to allow for progressive implementation of ILO conventions invokes the question whether states are allowed to take retrogressive steps in times of economic decline. The Committee on Economic, Social and Cultural Rights (CESCR) accepts economic justifications for weakened protection, but such measures "require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[121] The ILO has not made general statements on how to deal with this issue. In practice, its supervisory bodies do not accept retrogressive measures that affect tripartite governance. During economic crises governments often involve themselves more actively in wage policy, and sometimes annul collective agreements between social partners, or forces them to renegotiate.[122] The Committee on Freedom of Association (CFA) has consistently held that such measures are not allowed. In a complaint brought against Greece in 2010, it urged for "full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified ILO Conventions" even though it was:

> ... [deeply] aware that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis, and while recognizing the efforts made by the Government and the social partners to tackle these daunting times.[123]

Although it has been argued that "there was no scope for flexibility in Conventions on fundamental human rights and basic freedoms,"[124] many of the obligations under the conventions that are said to embody 'fundamental rights' leave some degree of discretion to the state parties. Under the 1999 Worst Forms of Child Labour Convention (No 182), for example, states have to

120 For different classifications see Jean-Michel Servais, 'Flexibility and Rigidity in International Labour Standards' (1986) 125 International Labour Review 193, 197; George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 469.

121 Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 9.

122 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 1021.

123 *Greece (Case No 2820)* (21 October 2010) Report of the Committee on Freedom of Association No 365 (Vol XCV 2012 Series B No 3) para 1003.

124 International Labour Office, 'Report of the Working Party on International Labour Standards' (Official Bulletin – Special Issue, Vol LXX, Series A, 1987) para 7.

establish "appropriate mechanisms"[125] and "take effective and time-bound measures"[126] in order to eliminate child labour. The Convention concerning Minimum Age for Admission to Employment (No 138) is even more flexible, where it provides that: "Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work ...."[127] The ILO supervisory bodies can further substantiate "vague and accommodating terms"[128] and verify whether states indeed take on more demanding obligations when economic conditions allow this.

2.3.4.4 The 1998 Declaration on Fundamental Principles and Rights at Work

The almost 400 conventions and recommendations are not equally important. Since 1998, when the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work, much scholarship is focusses on the so-called 'fundamental' or 'core' labour rights: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.[129]According to the 1998 Declaration ILO mem-

125 Art 5 ILO Convention 182.

126 Art 7.1 ILO Convention 182.

127 Art 1 ILO Convention 138.

128 George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 483.

129 The idea of a hierarchy within international labour law was not new. According to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), all ILO members "by virtue of their membership of the Organization, are bound to respect the fundamental principles contained in its Constitution, particularly those concerning freedom of association (...) ." International Labour Conference (81st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Freedom of Association and Collective Bargaining (Geneva 1994) para 19. The special status of freedom of association is attested to by the Committee on Freedom of Association (CFA), which together with the CEACR are the main pillars of the ILO's supervisory mechanism. The CFA has jurisdiction to hear complaints against ILO member states irrespective of whether they have ratified Conventions Nos 87 and 98. The 1998 Declaration has not extended the scope of institutional obligations to three other areas of international labour law. In his 1994 report, ILO Director-General Hansenne had put forward the idea to introduce a CFA-like supervisory procedure for discrimination, child labour and forced labour. See: International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 52-53, and: Francis Maupain, 'International Labor Organization: Recommendations and Similar Instruments' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2000) 387-388 pointing out that this proposal failed due to strong opposition from governments and the employers' representat-

ber states have, irrespective of ratification of the eight 'underlying' conventions in these four areas, "an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions."[130]

But as the instrument itself is non-binding under international law, the question arises what 'the principles' are that the Declaration refers to, and how they relate to existing treaties that do contain legally binding norms in the four areas that are covered. Two views can be distinguished. The first is that the 'principles' under the 1998 Declaration are less demanding than the norms contained in the underlying conventions. Alston points to the various ways in which the word 'principles' is used in international relations, and concludes that: "the Declaration legitimates the use of a regressive terminology."[131] In other words: the 1998 Declaration is a step back from the detailed and legally binding conventions on freedom of association, non-discrimination, forced labour and child labour. The related political concern is that states will thus opt for this less demanding version at the expense of the "legalism" of the conventions.[132]

The second view is that the 1998 Declaration contains obligations that exceed the ILO conventions. According to Maupain: "The Declaration's admittedly ambiguous reference to 'principles' was designed to leave the door open to progressive evolution of the scope of these principles without having to wait for the cumbersome amendment of the relevant Conventions."[133] It is unclear, however, where this 'progressive evolution' takes place. New rules or interpretations of rules may emerge from the 'regular' system of ILO conventions. But during the negotiations on the 1998 Declaration, attempts to explicitly link it to treaty-based international labour law were rejected.[134] The 'follow-up mechanism' of the 1998 Declaration merely requires states to report on the extent to which they comply with non-ratified fundamental conventions. The practical application of the follow-up mechanism confirms that states tend to provide rather general information, and do not consider themselves legally

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ives. But although the 1998 Declaration elevated these issues to the same normative plane as freedom of association, it neither extends the jurisdiction *ratione materiae* of the CFA nor create a similar adversarial mechanism.

130 Art 2 1998 Declaration.

131 Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 483.

132 Ibid 460.

133 Francis Maupain, 'ILO Normative Action in its Second Century: Escaping the Double Bind? in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 308, fn 31.

134 Isabelle Duplessis, 'Soft international labour law: The preferred method of regulation in a decentralized society' International Institute for Labour Studies (ed), *Governance, International Law & Corporate Social Responsibility* (ILC Research Series 106, 2008) 30.

bound through treaty, custom, or their ILO membership.[135] The review of the submitted reports by the Governing Body also explicitly states that it has no legal implications.[136] The follow-up mechanism therefore has little relevance for a better understanding of the content of the fundamental principles. There are no legal parameters to construct a distinction between full implementation of conventions and adherence to the principles contained therein. Even if the fear that the 1998 Declaration is less demanding that the underlying conventions is overstated, Alston is correct to point out that there remains a degree of "uncertainty as to the precise content to be accorded to the principles."[137]

The 1998 Declaration also raises a conceptual issue. The prioritization of four norms and their designation as 'fundamental rights' appears to deviate from the economic purpose of the ILO. The 1998 Declaration is not perceived as an instrument to overcome the coordination problem that is caused by international trade and investment. Instead, it is premised upon a purely normative, rights-based approach. The 1994 report by Director-General Hansenne was primarily motivated by the end of the Cold War and the perceived triumph of liberal democracy.[138] These events challenged the legitimacy of the organisation that was *inter alia* created to provide a social market-based alternative to communism.[139] During the 1980s neoliberalism had become the dominant political ideology in much of the Western world and Latin America. It has thus been argued that the selection of the four norms that were

135 In 2013 the United States, for example, reported that it "pursues the elimination of discrimination in respect of employment and occupation through a combination of law enforcement, administrative action and public outreach." Governing Body (317th Session) Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, GB.317/INS/3 (Geneva, March 2013) para 121.

136 Governing Body (325th Session) Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, GB.325/INS/4 (Geneva, October-November 2015) GB.325/INS/4, 1.

137 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 17.

138 Francis Maupain, 'New Foundation of New Facade? The ILO and the 2008 Declaration on Social Justice in a Fair Globalization' (2009) 20 European Journal of International Law 823, 826.

139 Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 464; and Francis Maupain, 'The Liberalization of International Trade and the Universal Recognition of Workers' Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up' in Linos Alexander Sicilianos and Maria Gavouneli (eds), *Scientific and Technological Developments and Human Rights* (Ant. N. Sakkoulas Publishers 2001) 35, at 44 and 47, respectively.

included aligns with a neoliberal conception of the labour market.[140] According to Plant, neoliberalism values a legal framework that enables the free market to function effectively, and dismisses rules that pursue "some overall end, goal or purpose" such as social justice.[141] Commenting on the 1998 Declaration, Alston argues that:

> probably the most convincing way of explaining the standards that were chosen is that those contained in the 'core' are process, rather than result-oriented, rights. This approach is supported by Hansenne's claim in his 1994 report that 'the essential obligation [under the ILO Constitution] is not to achieve results but rather to pursue certain means or lines of conduct'.[142]

The conceptual harmony between the free market and fundamental labour rights is not necessarily reflected in the substantive obligations of the eight underlying conventions. The United States, for example, has indicated that ratification of the 1930 Forced Labour Convention (No 29) "runs counter to the current trend towards privatization of prison management."[143] Similarly, trade unions and collective bargaining have a troublesome relationship with neoliberal labour market policies.[144]

However, the view that the fundamental norms are, or are intended to be, benign to the market is shared by scholars like Kaufmann,[145] Hepple,[146] and McCrudden and Davies. According to the latter: "Confining our list of labor rights to those that serve to increase freedom of choice, and freedom of contract, means that such labor rights would seem not only theoretically consistent with the ideology of free trade, but also required by it."[147]

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140 Brian Langille, 'Core Labour Rights – The True Story' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 118 noting that "core labour rights are treated with suspicion by human rights promotors precisely because they are seen to rest upon the neoliberal terrain."

141 Raymond Plant, *The Neo-liberal State* (Oxford University Press 2010) 6.

142 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 41 (internal reference omitted).

143 Governing Body (268th Session), Committee on Legal Issues and International Labour Standards, GB.268/LILS/7 (Gevena, March 1997) para 8.

144 For example, Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 British Journal of Industrial Relations 532. Historically, even the prohibition of child labour has been perceived as an unnecessary intervention in the freedom of contract.

145 Christine Kaufmann, *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 70.

146 Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 15.

147 Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labour Rights' (2000) 21 Journal of International Economic Law 43, 51-52; Drusilla Brown, 'International

Consequently, civil and political freedoms of workers are prioritized over the economic and social rights elements of the international labour code.[148]

2.3.4.5 Labour standards as part of customary international law

The recognition that (a subset of) international labour standards amount to customary international law would significantly expand the number of states that are bound by those norms. There are no studies that have systematically investigated the customary status of international labour law norms. Nonetheless, two arguments have been advanced in order to demonstrate that the four 'fundamental labour rights' have attained this status. The first is related to the near universal acceptance of the 1998 Declaration. Addo argues that the nineteen ILO members that abstained from voting when the declaration was adopted have since then complied with the follow-up mechanism, which "could be considered as state practice."[149] However, the follow up mechanism merely requires states to report to what extent they have implemented non-ratified fundamental conventions. It does not assess the validity of these statements or provide for an external assessment. It is therefore impossible to infer that because states participate in this process, there is state practice, let alone *opinio juris*, in support of customary status of the substantive norms.

The second argument looks at the broader origins of the fundamental labour norms. Kaufmann and Heri note that:

> [t]he core labour rights of the ILO Declaration – with the exception of the abolition of child labour – can be traced back all the way to the Universal Declaration of Human Rights of 1948 .... [A]ccording to a majority of scholars the Declaration

Trade and Core Labour Standards: A Survey of the Recent Literature' (Discussion Paper 2000-05) 4; The European Commission also supported this idea, see: Commission of the European Communities, 'Communication from the Commission to the Council – The Trading System and Internationally Recognized Labour Standards' COM(96) 402 final (Brussels, 24 July 1996) 12, stating that: "[The core labour standards] could directly improve working conditions and therefore represent a framework within which other standards could become established. They could be regarded as prerequisites for social development."

148 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 42. See generally on the incompatibility of economic and social rights and neoliberalism: Joe Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights and Hegemony' (2014) 27 Leiden Journal of International Law 11.

149 Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015) 117. The 1998 Declaration has been praised in lofty language. The norms would serve as the ILO's "normative polestar", see Laurence R. Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59 Vanderbilt Law Review 649, 720, and are "constitutive of the essence of humanity," according to Brian Langille, 'Seeking Post-Seattle Clarity – and Inspiration' in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002) 152.

> further elaborates on human rights that are meanwhile recognized as customary international law.[150]

However, this general assertion is more controversial than the authors admit. In 1991, Schachter observed that: "Although only a few legal scholars have taken this position (that the UDHR amounts to customary law, RZ), they are often cited by human rights advocates in national tribunals and in publications."[151] Whereas the UDHR as such has not attained the status of customary international law, "some important human rights included" in the document have.[152] Also more recent commentaries on the customary status of the norms in the UDHR do not unequivocally support the proposition that the document as a whole reflects customary international law.[153]

A number of sources have commented upon the customary law status of specific labour norms. This provides a mixed picture. Humbert, in her study on child labour in international law, concludes that the prohibition of child labour is not part of customary international law.[154] This is different with regard to forced labour. The Commission of Inquiry that was established by the Governing Body to investigate the situation of forced labour in Myanmar held in 1998 that: "there exists now in international law a *peremptory norm* prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights."[155] Peremptory norms – or *ius cogens* – and customary international law are conceptually distinct, as the former is concerned with the character

150 Christine Kaufmann and Simone Heri, 'Globalisation and Core Labour Rights: What Role for the World Bank and the International Monetary Fund?' (NCCR Working Paper No. 2008/01, 2008) 5-6.

151 Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 337.

152 Ibid.

153 Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' in Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law (online ed, Oxford University Press 2008) reflects on the debate on the basis of ICJ materials, domestic case law and theory but does not make a claim; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2018) 217 notes that "certain human rights may now be regarded as having enterered into the category" but lists only a few examples and does not reflect upon the UDHR; James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 642-3 notes that "it is now generally accepted that the fundamental principles of human rights form part of customary international law, although not everyone would agree on the identity of the fundamental principles." In his section on the UDHR (636-637) he concludes that "many of its provisions reflect general principles of law or elementary considerations of humanity" while emphasising the "indirect legal effect of the UDHR.

154 Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press 2009).

155 International Labour Office, 'Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29)' (Official Bulletin – Special Edition, Vol LXXXI, Series B, 2 July 1998) para 203, emphasis added.

of a norm and the latter with the source of a norm. However, as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole" the possibility of non-customary *ius cogens* norms appears only to exist in theory.[156]

In addition, there is a handful of domestic court cases that have reflected upon the *ius cogens* and the customary status of the prohibition of forced labour. In *Doe v Unocal Corporation*, the United States Court of Appeals for the Ninth Circuit held that forced labour constitutes a *ius cogens* violation.[157] The decision has been criticized on two main grounds. Firstly, it fails to separate between slavery – which is accepted as a violation of *ius cogens* – and forced labour.[158] Secondly, it does not take into account the fact that the 1930 Forced Labour Convention contains a list of exceptions, which are by definition not allowed in relation to *ius cogens* norms.[159] In 2007 a US District Court accepted that forced labour is prohibited under customary international law, but noted that: "The critical question is whether that norm is sufficiently specific, universal and binding as applied to the circumstances alleged in this particular case."[160] Absent a systematic inquiry into state practice and *opinio juris*, however, the ILO Commission of Inquiry and the US court cases are insufficient authorities to conclude that the prohibition of forced labour is a customary norm of international law.

On the right to freedom of association and collective bargaining and the right to non-discrimination in occupation and employment there are few sources that explicitly confirm or deny customary status. Only the 1975 Fact-Finding and Conciliation Commission on Chile, which was chaired by former President of the ICJ Bustamante, noted that:

> Chile has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), which, accordingly has no binding effect for this country. However, by its membership of the International Labour Organisation, Chile is bound to respect a certain number of general rules which have been established for the common good of the peoples of the twentieth century. Among these principles, freedom of association has become a customary rule above the Conventions.[161]

156 Art 53 VCLT.

157 *John Doe I et al v UNOCAL Corp et al*, 395 F.3d 932 (9th Cir 2002) 946.

158 Tawny Aine Bridgeford, 'Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism' (2003) 18 American University International Law Review 1009, 1045.

159 Ibid.

160 *Roe v Bridgestone*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

161 Governing Body (196th Session) Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Case of Chile, GB.196/4/9 (Geneva, May 1975) para 466.

The Commission seems to conflate obligations deriving from ILO membership with the existence of a customary norm. Since 1975 none of the ILO organs or supervisory bodies have proclaimed the customary status of the right to freedom of association.[162]

An additional problem with regard to the status of labour standards in customary international law is the ascertainment of the precise legal norm. While the conventions on freedom of association and collective bargaining are rather succinct, the ILO supervisory bodies have developed a detailed jurisprudence. Does the lack of state practice or *opinio juris* on, the rights of minority unions or the prohibition of compulsory arbitration procedures – to take two elements from that jurisprudence – impair a finding that *the* right to freedom of association and collective bargaining can be considered custom? Providing answers to these questions does not fall within the scope of the present study. Given the persisting uncertainty about the customary status of international labour law, this study will only consider treaty-based norms.

2.4 Implementation of ILO standards

2.4.1 Introduction

After having considered the form and content of international labour law, we now turn to the supervisory function of the ILO. Section 2.4.2 provides an overview of the structure of the ILO supervisory procedures and the mandates of the respective bodies. Section 2.4.3 examines the interpretation of international labour conventions and the constraints imposed by the ILO Constitution. Section 2.4.4 examines the dichotomized perspectives on the question whether the ILO is 'effective' and the implications of this debate on the question whether labour standards should be included in trade and investment agreements.

2.4.2 The ILO supervisory procedures

2.4.2.1 Structure of ILO supervisory procedures

With the establishment of an international system of labour standards, the question arose how these standards were to be supervised and enforced. In the run-up to the Treaty of Versailles, it had been advocated that a "super-parliament of nations with the power to enforce its decrees on all peoples"

162 The one time it was raised in a complaint against Canada, the Committee on Freedom of Association ignored the issue. See: *Canada (Case No 2821)* (6 October 2010) Report of the Committee on Freedom of Association No 364 (Vol XCV 2012 Series B No 2) para 339.

should be established.[163] Eventually states embraced a compromise between the (perceived) trade-off between universal membership and coercive enforcement. George Barnes, himself a moderate socialist and Labour Party minister, wrote in 1920 that:

> In establishing an organisation for international labour legislation, it is therefore essential to secure the co-operation of as many nations as possible. To do this successfully it is important to eliminate from the scheme, as far as possible, coercive measures to enforce the observance of the conventions agreed upon by the representatives of the contracting states. National honour, public opinion, the moral obligations or 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.[164]

This comment reflects a similar dilemma as in the debate on the flexibility of ILO standards; namely how to involve as many states as possible while creating a legal framework that is both meaningful and recognizes differences in economic development between states?

The current supervisory mechanism of the ILO consists of five different procedures: two based on reports submitted by the member states, and three special procedures. Under the ILO Constitution, member states have to submit two types of information. First, there are requirements to report on the alignment of national law with unratified conventions and recommendations. Although recommendations cannot be ratified, states are obliged to inform the ILO on the actions that have been taken in pursuit of the recommendation's objectives and on "the position of the law and practice in their country in regard to the matters dealt with in the Recommendation ... ."[165] Second, Article 22 provides that members comprise "an annual report" which contains information on "the measures which it has taken to give effect to the provisions of Conventions to which it is a party." These reports are important as they provide the basis for the ILO to determine whether a state is compliant with its treaty obligations.

The Treaty of Versailles did not yet provide for a procedure to subject these reports to an external assessment. As reporting without a further factual and normative inquiry proved to be inadequate, the Conference of 1926 adopted a Resolution which led to the establishment the Committee of Experts on the Application of Conventions and Recommendations (CEARC).[166] The CEARC

163 George Barnes, 'The Scope and Purpose of International Labour Legislation' in E. John Solano (ed) *Labour as an International Problem* (MacMillan and Co. 1920) 5.

164 Ibid.

165 Art 19.6 ILO Constitution.

166 International Labour Conference (8th Session) Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles (Geneva 1926).

has the task "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."[167] Currently, the CEARC consists of nineteen eminent lawyers who are appointed by the Governing Body for three-year terms.

The CEARC conducts, in its own words, an "independent technical examination."[168] It publishes two annual reports: the 'General Report', which contains observations and direct requests concerning particular states, and a 'General Survey' which provides a broad overview of one specific theme. While the CEACR's primary task is to scrutinize state reports, it also examines to what extent states have implemented recommendations from *ad hoc* committees that have investigated representations and complaints. The CEARC may issue 'observations' when it identifies "more serious or long-standing cases of failure to fulfil obligations."[169] In subsequent reports the CEACR then assesses whether the situation has improved. Through 'direct requests' the CEARC may solicit more information, or "engage in a continuing dialogue with governments often when the questions raised are primarily of a technical nature."[170] The CEACR reports are submitted to the Conference Committee on the Application of Standards (CAS), which is a tripartite standing committee of the International Labour Conference. The main task of the CAS is to "examine a number of individual cases concerning the application of ratified Conventions which have been the subject of observations by the Committee of Experts."[171] Unlike at the CEARC, which only communicates with member states in writing, the CAS invites these states to appear at its session and comment upon the alleged failure to comply with their treaty obligations.

The 'follow-up' mechanism to the 1998 Declaration launched a second type of reporting obligation, which *de facto* modifies the obligation under Article 19.5 of the ILO Convention to provide for a stricter follow-up with respect to non-ratification of the fundamental conventions.[172] States' submissions regarding their intention to ratify as well as other relevant developments in their domestic legislation are summarized in an 'Annual Review Report'. The narrow focus of these reports allows a more comprehensive discussion. Whereas Article 19.5 requires the submission of information "at appropriate intervals" the 1998

167 International Labour Conference (104th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2015) 2.

168 International Labour Conference (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2011) 4.

169 International Labour Conference (104th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2015) 2.

170 Ibid, para 53.

171 Ibid 4.

172 This change has not led to the amendment of the ILO Constitution.

Declaration's follow-up mechanism is published annually. The more systematic approach enables the ILO to establish "country baseline tables" to monitor progress.[173] Unlike the CEARC's General Report, however, the Annual Reports are merely descriptive and do not contain factual or normative assessments. The 'Global Reports' constitute the second prong of the follow-up to the 1998 Declaration. The subject of these reports rotates annually between the four fundamental standards and provides a comprehensive overview of domestic legislation that subject. Unlike the Annual Reports, the Global Report also contains information on states that have ratified the relevant conventions.

In addition to these two report-based methods, the ILO has three grievance mechanisms: (1) a representations procedure, (2) a special procedure concerning freedom of association, and (3) a complaints procedure. The former two are open to worker and employer organisations. Article 24 of the ILO Constitution provides that representations may be submitted when "any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." After informing the member state, the Governing Body may appoint a tripartite committee to investigate the matter. The role of the tripartite committee is not laid-down in the ILO Constitution but has developed in practice. The findings and recommendations of the committee are sent to the Governing Body. When it adopts the report, the matter is passed on to the CEACR in order to monitor whether the recommendations are implemented. Alternatively, the Governing Body may establish a Commission of Inquiry under the (more stringent) complaints procedure.

With regard to issues related to freedom of association, workers' and employers' organisations may submit cases to the Committee on Freedom of Association (CFA). The CFA is a standing body with a tripartite composition and an independent chair. It is unique in international law, as it has jurisdiction to receive complaints against ILO member states irrespective of whether they have ratified the ILO conventions on freedom of association and collective bargaining.[174] According to the CEACR, "the legal basis for this concept resides in the Constitution of the ILO and the Declaration of Philadelphia".[175] Consequently, the CFA uses the word 'principles' instead of 'obligations' when states have not ratified the relevant conventions. Since 1951, the CFA has examined over 3000 cases, which makes it by far the most productive of the three special procedures. Importantly, it publishes the 'Digest of Decisions

173 International Labour Conference (99th Session), Review of the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Report VII (Geneva 2010) para 8.

174 Arguably, the Human Rights Council comes closest to this procedure, as it also assesses state conduct irrespective of treaty obligations. But see Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 481.

175 International Labour Conference (81st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Freedom of Association and Collective Bargaining (Geneva 1994) para 19.

and Principles', which serves as the authoritative interpretation of the right to freedom of association and collective bargaining within the ILO.[176]

The complaints procedure, which completes the ILO's supervisory mechanism, may be initiated by individual delegates to the ILO, the Governing Body, or by a member state that has ratified the convention that the complaint is concerned with. The ILO Constitution describes the complaints procedure in detail.[177]Complaints are investigated by a Commission of Inquiry, which publishes a report containing its findings and possible recommendations. These reports contain much stronger language than the CEARC reports, and explicitly note whether a state has 'violated' a convention.[178] Under Article 29.2 of the ILO Constitution, the respondent government has to communicate "whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice." In practice, the latter option has never been used. If the member state fails to carry out the recommendations made by the Commission of Inquiry or the ICJ, the Governing Body may invoke Article 33 of the ILO Constitution and "recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

2.4.2.2 The Myanmar complaint and economic countermeasures

In 1996, twenty-five worker delegates filed a joint complaint against Myanmar regarding the country's non-observance of the Forced Labour Convention (1930, No 29).[179] After a Commission of Inquiry found that Myanmar violated its

176 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006). In 2018, the ILO published an updated version: International Labour Organization, 'Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association' (6th edn, International Labour Office 2018). This research refers solely to the 2006 edition.

177 Arts 26-33 ILO Constitution.

178 See for example the Report of the Commission of Inquiry report in the Zimbabwe complaint procedure in 2010, which reads: "The Commission of Inquiry concludes that there was systematic, and even systemic, violation of the Conventions in the country." International Labour Office, 'Truth, reconciliation and Justice in Zimbabwe: Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe 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)' (Official Bulletin – Special Supplement, Vol XCIII, Series B, 2010) x.

179 See generally, Francis Maupain, 'Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience' in Philip Alston (ed) *Labour Rights as Human Rights* (Oxford University Press 2005); and Richard Horsey, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime* (Routledge 2011).

treaty obligations in law and practice,[180] the Governing Body called upon the Conference to:

> recommend to the Organization's constituents as a whole – governments, employers and workers – that they ... review ... the relations [with Myanmar] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations.[181]

The Conference approved these recommendations in June 2000.[182] In response, the United States adopted the US Burmese Freedom and Democracy Act of 2003, which imposed a ban on all products from the country, included a specific reference to the ILO resolution. Furthermore, it held that the import ban could only be lifted after consultations with, *inter alia*, "the ILO Secretary General" [sic].[183]

Under the original ILO Constitution only states could file complaints. According to Maupain, the procedure was conceived to hear claims from "other States parties to a Convention whose competitive position might be affected by the failure of a ratifying country to comply."[184] The original text of Article 28.2 of the ILO Constitution – now Article 33 – held that when a Commission of Inquiry found a violation, "[i]t shall also indicate in this report the measures, if any, *of an economic character* against a defaulting Government which it considers to be appropriate, and which it considers other Governments would be justified in adopting" (emphasis added). It has been argued that this was directly influenced by a more concrete proposal by the British government in 1919,[185] which argued that:

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180 International Labour Office, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29) (Geneva, 2 July 1998) 536.

181 Governing Body (277th Session) Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), GB.277/6(Add.1) (Geneva, March 2000).

182 International Labour Conference (88th Session) Record of Proceedings: Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar (Geneva 2000) 37.

183 Burmese Freedom and Democracy Act of 2003, Public Law 108-61, 108th Congress (117 Stat 864). Whether these economic sanctions are permissible under WTO law will be discussed in Chapter 3.

184 Francis Maupain, 'ILO Normative Action in its Second Century: Escaping the Double Bind? in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 310.

185 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 575.

> The appropriate penalty ... appears to be that when a two-thirds majority of the Conference is satisfied that the terms of the Convention have not been carried out, the signatory States should discriminate against the articles produced under the conditions of unfair competition proved to exist unless those conditions were remedied within one year or such longer period as the Conference might decide.[186]

Eventually, the ILO Constitution only provided for a general framework with regard to the imposition of economic countermeasures.[187] States retained discretion to adopt sanctions, and to decide whether these should be targeted against certain products – as the British proposal suggested – or against the country as a whole.

The removal of the reference to 'economic' measures from Article 33 in 1946 was not intended as a rejection of such measures. Instead, the Conference envisaged a broader range of possibilities, including referral to the UN Security Council.[188] The sanctions pursuant to the Myanmar resolution are thus allowed under ILO law.[189] Notably, however, the United States had not suffered an economic injury due to Myanmar's violations of the Forced Labour Convention. The sanctions were not intended to offset a negative impact to the competitive position of the United States, but were merely as a lever to induce Myanmar to change its practices.

Arguably, the way Maupain portrays the rationale of the complaints procedure is too narrow. As early as 1963, the Commission of Inquiry that was established to examine a complaint filed by Portugal against Liberia qualified the possibility to submit complaints a "constitutional right."[190] It

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186 Memorandum on the Machinery and Procedure Required for the International Regulation of Industrial Conditions, Prepared in the British Delegation (15-20 January 1919) 125, reprinted in: James Shotwell (ed), *The Origins of the International Labor Organization: Vol. II* (Columbia University Press 1934) Document 25.

187 Suggestions by the United States to prohibit international trade in goods "in the production of which children under the age of 16 years have been employed or permitted to work" and "in the production of which convict labor has been employed or permitted" were not accepted, see James Shotwell (ed), *The Origins of the International Labor Organization: Vol. II* (Columbia University Press 1934) Document 37. This also applied to a US proposal to include a provision in the 1957 Abolition of Forced Labour Convention "prohibiting products of forced labour in international commerce" was not accepted. International Labour Conference (39th Session), Record of Proceedings (Geneva 1956) 724. Notably, however, this was due to the rather late introduction of the amendment by the United States, and other ILO Members demanded more time to study the proposal.

188 International Labour Conference (29th Session) Constitutional Questions – Part 1: Reports of the Conference Delegation on Constitutional Questions (Montreal 1946) para 64.

189 Their compatibility with WTO law is a different matter, which will be discussed in the subsequent chapter.

190 International Labour Office, 'Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No 29)' (Official Bulletin Vol XLVI No 2, April 1963) p 154.

sided with Judge Jessup, who commented in his concurring opinion to the ICJ's judgment in the *South-West Africa Cases* on an earlier Commission of Inquiry report in the case between Ghana and Portugal, concerning the latter's observance of the 1957 Abolition of Forced Labour Convention (No 105):

> The fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests.[191]

The right to invoke the responsibility of states for a breach of an ILO convention mirrors Article 48.1(a) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. It provides non-injured states with the right to invoke responsibility in case "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group." Notably, trade law and human rights law are both examples of regimes with obligations *erga omnes partes*.[192] The 'collective interest' which forms the rationale of the complaints procedure may thus well be economic, but not at the individual level.

2.4.3 Interpretation of ILO Conventions

When assessing whether states comply with the conventions they have ratified, it is inevitable that the supervisory bodies engage in some degree of interpretation.[193] But whereas under the international and regional human rights covenants the interpretative role of their respective supervisory bodies and courts is either implicitly or explicitly provided, Article 37(a) of the ILO Constitution 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."[194] Alternatively, paragraph (b) provides for the possibility to establish an *ad hoc* tribunal for this purpose.[195]

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191 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Separate Opinion Judge Jessup) [1962] ICJ Rep 319, 428.

192 Draft Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission, Vol II, Part Two (2011) 126. Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 126-7.

193 José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 453.

194 According to the rules of the ICJ itself such a request would lead to an Advisory Opinion instead of a binding judgment. However, through its Constitution the ILO indicates the outcome will be treated as a binding interpretation.

195 Art 37.2 ILO Constitution. This provision was added in 1946.

Since the PCIJ in 1932 confirmed the expansive interpretation of the 1919 ILO Convention concerning Employment of Women during the Night,[196] no similar question has been put before it or its successor.[197] This has not prevented the ILO's supervisory bodies from exercising an "interpretive function."[198] In its 2012 report, the Committee of Experts stated:

> the Committee has regularly made clear that, while its terms of reference do not authorize it to give definitive interpretations of Conventions – competence to do so being vested in the International Court of Justice (ICJ) under article 37 of the ILO Constitution – in order to carry out its mandate of evaluating and assessing the application and implementation of Conventions, it must consider and express its views on the legal scope and meaning of the provisions of these Conventions... . at least as far back as the 1950s, the Committee has expressed its views on the meaning of specific ILO instruments in terms that inevitably reflect an interpretive vocabulary.[199]

The extent to which the supervisory bodies have to interpret the conventions may depend on their level of specificity and flexibility.[200] Furthermore, the Conference could influence the interpretation of conventions through the subsequent adoption of a recommendation. The reference to 'definitive interpretations' should be understood as an acknowledgment that if the Inter-

196 *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion) PCIJ Rep Series A/B No 50 (15 November 1932).

197 Although the idea to request an advisory opinion or establish an *ad hoc* tribunal has been entertained several times, see: 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, 889-890.

198 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 68. The International Labour Office also issues interpretations of Conventions at the request of Member states, which are published in the organisation's Official Bulletin. These opinions cover general matters of international labour law, such as the question whether reservations to Conventions are allowed or to what extent labour standards apply during armed conflict. The Office carefully emphasises that it does not deal with questions of compliance by member states and that its statements have no official status. According to McMahon, however: "it is precisely because the International Labour Office has claimed so little that it has achieved so much. By making such modest claims for its opinions, the Labour Office deflects any possible challenges of its constitutional power to give them at all." J.F. McMahon, 'The Legislative Techniques of the International Labour Organization' 1967) 41 British Yearbook of International Law 1965-1966 1, 100; José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 225-226.

199 International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2013) para 34. It should be noted that the recommendations of the experts of the CEACR and the tripartite CFA are 'legitimized' by their subsequent adoption by the International Labour Conference and the Governing Body, respectively.

200 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 68-69.

national Court of Justice or an *ad hoc* tribunal established under Article 37.2 ILO Constitution would deviate from the conclusions of the CEACR or CFA, the former prevails.

The corollary of the absence of a mandate to interpret ILO conventions is the lack of constitutional guidance on the method of interpretation. Normally, this would mean that the Vienna Convention on the Law of Treaties (VCLT) applies, which rules on treaty interpretation are generally recognized as customary international law. The VCLT provides that the ordinary meaning, context and object and purpose are the primary means of interpretation.[201] Only when interpretation according to Article 31 remains "ambiguous or obscure" or when this "leads to a result which is manifestly absurd or unreasonable" can the *travaux préparatoires* or other subsidiary means of interpretation be invoked.[202] The CEARC, however, relies mostly on the *travaux préparatoires*, which reflects the discussions between the tripartite constituents of the ILO.[203] The lack of a constitutional mandate arguably requires closer adherence to the intentions of the drafters. This leads to the paradoxical conclusion that (perceived) legitimacy problems lead to more emphasis on means of interpretation that are nowadays regarded merely subsidiary by the general rules of international law.[204]

Within the ILO the employers group has been the most vocal opponent of an expansive interpretation of international labour law. Their concern is not that interpretation as such is unacceptable, but that the influence of the interpretative work of the CEARC "outside of the ILO" is problematic.[205] At

201 Art 31.1 VCLT.

202 Art 32 VCLT.

203 Wilfred Jenks, 'The Significance for International Law of the Tripartite Character of The International Labour Organisation' (1937) 22 Transactions of the Grotius Society (The Eastern Press 1937) 66-67. Thirty-one years later, Jenks participated in the United Nations Conference on the Law of Treaties as the observer for the ILO, where he reiterated this point, and commented more broadly on the draft of what would later become the VCLT and ILO *lex specialis*. United Nations Conference on the Law of Treaties, 'Official Records: First session – Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' (26 March-24 May 1968) 36-37.

204 The same is observed in relation to the GATT dispute settlement system before it was transformed by the WTO Agreement, see: Christoph Feddersen, 'Focusing on Substantive Law in International Economic Relations: The *Public Morals* of GATT's Article XX(a) and "Conventional" Rules of Interpretation' (1998) 7 Minnesota Journal of Global Trade 75, 87-88.

205 International Labour Conference (101th Session) Report of the Committee on the Application of Standards, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2012) para 145. The concerns of the employers are antipodal to those of Philip Alston in his critique of the 1998 Declaration. Both recognize that the consensus on four core labour standards accelerated the appropriation of ILO norms by external instruments, both in the domain of soft and hard law. Alston was concerned that this would enable external actors to interpret and apply labour standards as they please. The employers, on the other hand, are concerned that external actors would unjustly follow the ILO Committees.

the 2012 International Labour Conference, the employers' spokesperson held that:

> The eight fundamental Conventions were important not only within the ILO, but also because other international institutions regularly used them in their activities. The fundamental Conventions were embedded in the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the UN Human Rights Council's "Protect, Respect and Remedy" framework. The ILO's supervisory machinery related to member States only, not to businesses, so it was vital that, when other international institutions used the fundamental Conventions, such use was correct.[206]

The employers' concerns are primarily related to non-binding instruments in the domain of corporate responsibility. The central question is whether references to particular conventions implies a recognition of the interpretative work of the various supervisory bodies. Substantively, the right to strike is the main bone of contention. Although not mentioned in Convention No 87, the CEARC and the CFA have consistently held that this right is essential to the effective exercise of freedom of association.[207] Both committees actively monitor compliance with this right in their examination of reports and complaints, and have developed parameters which can be found in the Digest on Freedom of Association.[208] As such, the right to strike is a product of the interpretation of Convention No 87 that has never been confirmed by the International Court of Justice or an *ad hoc* tribunal. Nonetheless, the work of the ILO supervisory bodies is relied upon outside the ILO. For example, in the Enerji v Turkey case before the European Court of Human Rights, the Court relied on the pronouncements of the ILO supervisory bodies when it held that Article 11 of the European Convention, which protects the right to freedom of association, without mentioning the right to strike, protects this right nonetheless.[209]

In 2016, the chairpersons of the CEARC and the CFA published a joint report in which they conducted a thorough review of the ILO supervisory mechanism. They conclude that "it is generally acknowledged that some degree of interpretation is necessary in order for the CEACR to conduct its examination

206 Ibid, para 146.

207 In fact, as early as 1927, twenty-one years before the first convention on the issue was adopted, an ILO report stated that is considered it impossible to draw a distinction between the right to strike and the right to organise as "limitations of the right to strike are also limitations of the right of combination for trade purposes ... ." International Labour Conference (10th Session) Freedom of Association: Report and Draft Questionnaire (Geneva 1927) 101.

208 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) paras 520-676.

209 *Affaire Enerji Yapi-Yol Sen c Turquie* App no 68959/01 (ECtHR, 21 April 2009) para 24.

of reports, and for the CFA to investigate and examine complaints."[210] Since the report, the debate over the mandate of the supervisory bodies has toned-down. Nonetheless, La Hovary observes that "the CEACR has changed its practice" as it "made more 'direct requests' in its 2014 report, which are less visible and less accessible than 'observations' and are not the object of discussions in the CAS, and it has at the same time reduced the length of its observations."[211] In this would continue, it could hamper the development of international labour law. This is not only a problem for the ILO, but also for the 'other international institutions' that may use the jurisprudence of the ILO supervisory bodies to achieve a coherent meaning between ILO norms and other sources of international labour law.

2.4.4 Perspectives on the effectiveness of the ILO in relation to the trade-labour debate

After more than ninety years of experience with legal instruments, monitoring and supervision, the efficacy of international labour law remains contested.[212] In one of the first empirical studies, Ernest Landy concluded that "I.L.O. supervision has proved its powers of persuasion in relation to a sizable proportion of the violations with which it had to deal.[213] Ernest Haas, writing in the same era, asserted that the ILO has "a record of which any international agency can be intensely proud."[214] Since 1964 the CEACR explicitly lists 'cases of progress' to express satisfaction with the way in which its observations led to concrete improvements in the implementation of labour standards. Although definitive statements on causality remain difficult,[215] several studies have used these cases of progress to assess the impact of the Committee of Experts. Gravel and Charbonneau-Jobin, for example, examined cases of progress on

210 Governing Body (326th Session) The Standards Initiative: Joint report of the Chairpersons of the Committee on the Application of Conventions and Recommendations and the Committee on Freedom of Association, GB.326/LILS/3/1 (Geneva, February 2016) para 132.

211 Claire La Hovary, 'The ILO's Mandate and Capacity: Creating, Proliferating and Supervising Labour Standards for a Globalized Economy,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 47.

212 Petersmann notes for example that "The 183 multilateral treaties on labour and social standards adopted in the ILO similarly suffer from inadequate enforcement mechanisms." Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of the Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621, 625.

213 Ernest Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O Experience* (Stevens & Sons 1966) 198.

214 Ernest Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford University Press 1964) 258.

215 Eric Gravel and Cloé Charbonneau-Jobin, 'The Committee of Experts on the Application of Conventions and Recommendations: its Dynamic and Impact' (ILO 2003) 26.

the implementation of the eight core Conventions from 1977 to 2003. The authors conclude that: "[the] supervisory machinery, of which the Committee of Experts is one of the central components, has shown considerable effectiveness over the years, as illustrated by the constantly increasing number of cases of progress."[216] A similar study from 2001 on the Committee on Freedom of Association found that it "demonstrated undoubted effectiveness."[217] In addition, many studies have looked at the general impact of certain conventions,[218] the impact of certain conventions in certain member states,[219] or the impact of the ILO in certain member states.[220]

In one of the few critical empirical studies, Weisband notes that "ILO member states routinely defy the influences of shame stemming from CEARC censure."[221] In his analysis of regional responsiveness, he finds that Asian members "are least amenable to pressures stemming from efforts to mobilize shame and, among the regions, most willing to reject the legitimacy of the ILO monitoring regime."[222] To a large extent, however, this can be contributed to a number of "global pariahs," while "the majority of ILO members remain in sound standing relative to global benchmarks of compliance and responsiveness."[223] He does not propose to abandon the non-coercive style of supervision but expects it to contribute, in the long run, to the erosion of the pariah regimes' legitimacy.

Generally, the notion that the ILO is capable of inducing states to (continue to) comply with their treaty obligations is contested. This has led to a situation in which some authors conclude that the ILO "is generally credited with having developed the most effective review methods among the global organizations,"[224] while others dismiss it "as a slow, cumbersome and low-profile institution [that] has not made the impact it should in the new political eco-

216 Ibid 75. Please note that the authors did not evaluate these cases of progress themselves.
217 Eric Gravel, Isabelle Duplessis, Bernard Gernigon, 'The Committee on Freedom of Association: Its Impact over 50 years' (International Labour Office 2001) 65.
218 For example, Geraldo von Potobsky, 'Freedom of association: The impact of Convention No. 87 and ILO action' (1998) 137 International Labour Review 195; Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press 2009) 192.
219 See e.g.: Edward Potter, 'Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 & No. 98' (Labour Policy Association, Inc. 1984).
220 See e.g.: Edward Potter, 'The Growing Importance of the International Labour Organization: the View from the United States' in John Craig and Michael Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge University Press 2006).
221 Edward Weisband, 'Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime' (2000) 44 International Studies Quarterly 643, 658.
222 Ibid 659.
223 Ibid 661.
224 Thomas van Dervort, *International law and organization: an introduction* (Sage 1998) 214.

nomy."[225] It is unlikely that this dichotomy will soon be resolved. There is no commonly accepted definition or methodology to determine when international law is effective.

A recurring argument in the debate about international labour law in particular is its perceived ineffectiveness *relative* to international trade and investment law.[226] The methods of 'moral persuasion' and the 'mobilization of shame' of the ILO do not provide for the same 'teeth' as the WTO which ultimately allows for economic retaliation. This juxtaposition influences the perceived need for labour provisions in trade and investment agreements. Addo summarizes this point as follows:

> Whilst the debate surrounding [the imposition of sanctions on countries with weak labour standards] is not new, it has recently been pushed to the top of the international trade agenda. This is because the ILO, as the custodian of the labour standards, appears to lack the enforcement powers necessary to achieve compliance, which is relevant to the debate as to whether labour standards should be left to the ILO or added to the WTO agenda since the WTO, through its dispute settlement mechanism, has *more effective* procedures for surveillance and suspension of concessions.[227]

The same argument is made in the context of preferential trade and investment agreements (PTIAs). According to Abel, their labour chapters "should compensate the lack of hard enforcement mechanisms in the ILO".[228]

The comparison between the ILO supervisory mechanism and dispute settlement in international economic law is problematic for various reasons, including the nature of the underlying obligations and the assumptions about the use of economic sanctions as a means to induce compliance. Providing a more nuanced evaluation of the ILO's supervisory mechanism, Manfred Weiss argues that although "the monitoring machinery of the ILO is not very efficient

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225 Financial Times (24 March 1999) 3, Quoted in: Sean Cooney, 'Testing Times for the ILO: Institutional Reform for the New International Political Economy' (1999) 20 Comparative Labour Law & Policy Journal 365, 399. Similar statements are made by Joseph and Thomas. Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 131; Chantal Thomas, 'The WTO and labor rights: strategies of linkage' in Sarah Joseph, David Kinley and Jeff Waincymer (eds) *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Edward Elgar Publishing 2009) 281.

226 Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 295: "The relative strengths of the respective global trade and social justice systems should be evened out."

227 Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015) 6 (emphasis added); See also Eddy Lee, 'Globalization and Labour Standards: A review of issues' (1997) 136 International Labour Review 173, 178.

228 Patrick Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 158.

... the impact of the monitoring bodies should not be underestimated."[229] This is the case because:

> The committee of experts and the committee on freedom of association have produced an impressive amount of case law. Even if the binding effect of this case law is problematic, it may be argued that in many jurisdictions it serves as a point of reference and hence may have an impact on shaping the legal structure in many countries.[230]

His argument can be extended to international legal structures. This primarily concerns the international and regional human rights instruments, but increasingly also the field of international economic law. As explained above in relation to the ECtHR's *Enerji v Turkey* case, the lack of a binding effect does not prevent the use of the work of the supervisory bodies by courts or other adjudicators outside the ILO. The following chapters will explore the relevance of the work of the ILO supervisory bodies in international trade and investment law in more depth.

2.5 Concluding remarks

According to the 19th century economist and politician George Campbell, "two great discoveries have been made in the science of government: the one is the immense advantage of abolishing restrictions on trade; the other is the absolute necessity of imposing restrictions upon labour."[231] At the time it was felt that only the latter warranted a form of institutionalized cooperation between states. International labour law was thus seen as an important mechanism to facilitate economic globalization. In fact, it was even contemplated whether international labour law was conceptually part of international economic law.[232] The establishment of the International Labour Organization in 1919 invoked similar comments. Although the ILO had no role in the development of international trade and investment law, it was nonetheless perceived as an international economic organization.

The debates on the features of international labour law during its formative years still resonate today. What is the purpose of this area of international law? How should treaties be monitored and enforced? And to what extent

229 Manfred Weiss, 'International Labour Standards: A Complex Public-Private Policy Mix' (2013) 29 The International Journal of Comparative Labour Law and Industrial Relations 7, 9-10.

230 Ibid.

231 George Campbell (Duke of Argyll), *The Reign of Law* (4rd American edn, George Routledge & Sons 1873) 334-335.

232 Georg Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 Recueil des Cours 1, 8.

should different levels of economic development be reckoned with?[233] These issues remain relevant for the ILO, which faces some important challenges in the wake of its 2019 centenary, but also for the body of international labour law that has developed outside the organization, including labour provisions in trade and investment agreements. In this regard, the question of monitoring and enforcement is of particular relevance, as trade-labour linkages are sometimes portrayed as 'more effective' than the ILO supervisory procedures. The latter are premised on "the sanction of publicity" instead of "the economic weapon".[234] This was a deliberate decision, as the ILO's founders had to find a balance between two objectives. On the one hand, there was a need for meaningful standards that did not reflect the lowest common denominator. On the other hand, differences in levels of economic development between members had to be taken into account.

Although the ILO's supervisory mechanism was not premised on the use of economic countermeasures, ILO member states that were – for whatever reason – displeased with the level of labour standards of another ILO member could unilaterally resort to such measures. The legality of labour-related trade measures is a matter for international trade law. With the establishment of the GATT, and later the WTO, a legal framework was established which constrains the ability of states to apply trade measures in order to induce other states to improve their labour standards. The extent of these constraints will be examined in the following chapter.

233 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) at 39.

234 B.H. Sumner, 'Review of International Labour Legislation by H.J.W. Hetherington' (1921) 31 The Economic Journal 84, 85.