Fundamental labour standards and the shift from international to transnational labour law: countervailing power in the globalised world of work

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2 The ILO 1998 Declaration and its Follow-Up

2.1 INTRODUCTION

Founded in 1919 as part of the Versailles Peace Treaty, the International Labour Organisation (ILO) is the oldest specialized agency of the United Nations (UN). The preamble to the ILO's constitution states that 'universal and lasting peace can be established only if it is based upon social justice'.[1] The ILO has, however, evolved over the years.[2] Starting with 42 member states, it now comprises of 187 member states, while keeping its unique tripartite character; bringing together governments, employers, and workers. Together, these constituents have established a legal framework aimed at *inter alia* promoting rights at work, encouraging decent work, and enhancing social protection, by setting a system of labour standards, developing policies and monitoring their implementation.[3] The international legal framework of the ILO and its labour standards can be divided into a constitution, conventions, protocols, recommendations and declarations. So far the ILO has adopted 191 Conventions, 208 Recommendations, six Protocols, and seven Declarations.[4] The ILO has developed a supervisory system to promote the adherence to these standards, including the 1998 Declaration and its Follow-Up.

This chapter explains the context and content of the fundamental labour conventions and the ILO supervisory mechanism. The second paragraph discusses the foundation of the ILO, the ILO Constitution, and describes the structure of the ILO and the discussions that took place in the formative years of the ILO. These discussions focused on a dilemma that is still relevant to this day, i.e. whether the ILO should be a system with hard enforcement mechanisms, which would be less attractive for states to join, since this would limit the exercise of states' sovereignty and their leeway to use labour standards as a comparative economic advantage, or an organization with a softer enforcement mechanism, which would thus have a lower threshold for states to join, attracting power of influence by the mass of its members. Although in the early days of the ILO, its supervisory system contained hard

1 Rombouts 2019, p. 86.
2 For in depth discussions on the history and evolution of the ILO, see e.g. Alcock 1971, Barnes 1926, Shortwell 1934 or Blanchard 2004.
3 https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (accessed on 24 May 2024).
4 https://www.ilo.org/dyn/normlex/en/f?p=1000:10005:::NO::: (accessed on 24 May 2024).

sanctions, nowadays it is explicitly not based on hard sanctions and binding decisions but rather on dialogue, recommendation, persuasion and technical assistance.[5] The third paragraph discusses the ILO's legal instruments in more detail, describing what they entail, how they are adopted and what their legal status is. Paragraph 4 examines the fundamental labour standards and their fundamental conventions in more depth. The fifth paragraph studies the different procedures of the ILO Supervisory System. The regular supervisory system, which is based on regular reporting by ILO member states, and the three different special procedures (representations, complaints, and on freedom of association and collective bargaining) will be discussed. Attention will also be given to the different roles of the various ILO bodies in these procedures. Subsequently, in paragraph 6 and 7, these procedures will be applied in practice. Paragraph 6 applies the regular supervisory procedure system to a child labour case in Guatemala, showing what effects the ILO supervisory system can have in practice. Paragraph 7 applies the special procedure on freedom of association to a case in Indonesia. This paragraph highlights the functioning of the Committee on Freedom of Association and the results it booked in that case. Paragraph 8 explains the background to the crisis in the ILO that has been on-going since 2012 to showcase the influence the ILO Supervisory bodies and report can have on (hard law) judgments outside of the ILO. The concluding paragraph summarizes the chapter by listing the strengths and weaknesses of the ILO supervisory system, finishing with the argument that the ILO continues to play an important role in international labour law, but is insufficient on its own in the modern market and globalized society.

2.2 The Foundations of the ILO

The constitution of the ILO was drafted at the beginning of 1919 by the Commission of International Labour Legislation, which was appointed by the Paris Peace Conference. The commission comprised of representatives from Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States. Against the background of World War I and the exploitation of workers, these nine founding members of the ILO created a tripartite organization. At that time, there was already an interdependence (or globalization) of economies with the social, legislative and economic societal challenges that go hand in hand with international competition for markets.[6] As soon as the dust of the first World War would settle, and the free market would operate again, it was understood that it would be inescapable to not only raise labour standards in national industries that were dependent on foreign mar-

5 ILO Governing Body 2016 p. 13.
6 https://www.ilo.org/about-ilo/history-ilo (accessed on 24 May 2024).

kets, but to apply a similar level of standards in these foreign markets.[7] The ILO's constitution was a first attempt to address these social and economic problems and to provide an instrument to set and enforce a range of international labour standards: 'by establishing a framework for economic exchange, it set out to provide the foundation of an equitable world trading system.'[8] The third paragraph of the preamble of the constitution reflects these challenges, linking social justice, trade and peace: 'Whereas also 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'[9]

According to the scholarly literature this paragraph reflects firstly the tension that countries will use labour standards, or costs, to gain a competitive advantage over other countries, resulting in a 'race to the bottom' so as to become as attractive hosts as possible to companies.[10] Secondly, this paragraph could refer to the danger of contamination or copycat behaviour by poor example.[11] The preamble furthermore lists areas of improvement, which remain relevant to this day, e.g. the protection of children, freedom of association, equal remuneration for work of equal value, an adequate living wage, and protection of the interests of workers when employed in countries other than their own.[12] Hence, over a century ago, the potential limits and harmful effects of globalization on labour conditions were already known. But how to design a system which addresses these issues, bearing in mind the equilibrium between enforcement, and considering the economic and legislative sovereignty of its potential members as well?

Various proposals were drafted on the architectural structures of the ILO to ensure the implementation of the agreed norms. For instance, economic sanctions against non-compliant members were discussed. One of the options was a product-targeted sanction, i.e. that products from an adhering member that did not comply with a convention would be subject to countervailing measures. Another proposal was that the executive organ, i.e. the Governing Body, could recommend an economic sanction that had to be automatically applied by all members, unless a (national) court excused the member state. Although often forgotten, the ILO was originally endowed with trade sanctions.[13] The original ILO Constitution entailed a two-step implementation system. First, the ILO Constitution relied on the power of persuasion to ensure a state's consent to an ILO convention. Secondly, the ILO Constitution provided sanctions to enforce a state's compliance with a ratified ILO convention.

7 Tyc 2021, p. 12 and Alcock 1971, p. 18-19.
8 Rodgers et al. 2009, p. 6.
9 ILO Constitution, Preamble.
10 See e.g. Tyc 2021, p. 14 and De Schutter 2015, p. 7.
11 Tyc 2021, p. 14 and Servais 2015, p. 24-25.
12 ILO Constitution, Preamble.
13 Charnovitz 2019, p. 218, and Charnovitz 2015.

However, the second option was left unused, and was in the early 1930's eventually rejected and completely sidelined.[14] One of the reasons was that at the time it was unclear what the scale of these sanctions would be. Members would fear for instance an economic blockade or a general economic boycott.[15] In the years after the adoption of the ILO Constitution, the ILO supervision system was reconceptualised, reflecting the system as we know it today in which compliance with ILO conventions is better promoted through reason and persuasion than hard sanctions.[16] Other authors were not aware of any sanctions that the ILO Constitution provided, and held that the proposals for sanctions never made it into the ILO Constitution. According to these scholars this occured for two reasons. Firstly, it was feared that product-targeted sanctions would stagnate the adoption of conventions or lower their ambition. Less conventions, or with a lower ambition, would lead to less risk of non-compliance and thus product-targeted sanctions. Secondly, it was feared that the obligation to automatically apply sanctions would hold states back to become a member of the ILO.[17]

The material content of the ILO was subject to similar debates. During the negotiations, the British proposed a system in which only Conventions could be adopted, and, once ratified, would be binding. Thus endowing the ILO with a real legislative power.[18] The United States, however, was of the opinion that it could not be bound by instruments adopted by the Conference, thus advocating for Recommendations.[19] Eventually, the negotiating parties reached an agreement. It was agreed that the ILO would have a tripartite structure,[20] where workers and employers have equal weight as governments in the decision making process.[21] The organs of the ILO would consist of a General Conference (nowadays called the International Labour Conference or ILC) of representatives of the members, a Governing Body, and an International Labour Office, which is controlled by the Governing Body.[22] A compromise between the United Kingdom and United States was reached on the procedures of the organization, including on how standards are adopted: the International Labour Conference decides whether proposals should take the form of an international convention or of a recommendation.[23]

14 Charnovitz 2019, p. 239-253.
15 Charnovitz 2019, p. 251.
16 Charnovitz 2019, p. 252.
17 Alcock 1971, p. 18-22 and Tyc 2021, p. 11-13.
18 Maupain 1999, p. 274.
19 Rodgers et al. 2009, p. 19.
20 ILO Constitution, article 3.1.
21 ILO Constitution, article 4.1.
22 ILO Constitution, article 2.1.
23 ILO Constitution, article 19.1.

2.3 ILO Instruments: Conventions, Protocols, Recommendations and Declarations

Today, the ILO legal framework entails conventions, protocols, recommendations and declarations. Conventions are legally binding international agreements creating obligations for member states once ratified. They are drafted by representatives of governments, employers and workers and are adopted at the annual International Labour Conference.[24] Ratified ILO conventions may be directly applied in individual disputes in monistic systems, while in dualistic systems they require further implementation into national law. In case of the latter, the ILO member state must bring the convention before the authority in whose competence the matter lies for the enactment of legislation or other action within one year and inform the ILO Director-General of its formal ratification.[25] Once ratified, a convention generally comes into force for that country one year after the date of ratification. Ratifying countries undertake to apply the convention in national law and practice and to report on its application at regular intervals, see also paragraph 2.4 for more information on reporting obligations.[26] Not all conventions have equal weight. The ILO Governing Body has identified 11 fundamental conventions; four governance or priority conventions and seven conventions that set basic labour standards.[27]

Protocols are adopted to add flexibility to a convention or for extending a convention's obligations, allowing the convention to be more relevant and up to date. Protocols do not exist independently since they are always linked to a convention, and they must also be ratified by states.[28]

Recommendations do not bind member states and are mainly used to supplement conventions to explain in further detail the provisions of a convention and how they may be applied. Recommendations are not subject to ratification.[29] Nonetheless, ILO member states are expected to bring the recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action within 12 to 18

24 https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 24 May 2024).
25 ILO Constitution, article 19.5.
26 https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 24 May 2024).
27 https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 24 May 2024).
28 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:71:0 (accessed on 24 May 2024).
29 https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 24 May 2024).

months.[30] The ILO constitution is clear that conventions and recommendations set a floor of standards, not a ceiling.[31]

Besides conventions and recommendations, the ILO has also adopted seven declarations.[32] ILO declarations are resolutions of the International Labour Conference. It is important to note that declarations are not subject to ratification and are not binding. They thus do not set or create new standards. Declarations, however, reaffirm the importance that the constituents attach to certain principles and values and are intended to have a wide application.[33] They clarify existing rights or standards in such a way that they remain applicable to political or societal changes.[34] Declarations make a formal and authoritative statement, (re)emphasising the importance that the ILO and its constituents attach to certain principles and values.[35]

For instance, the ILO Philadelphia Declaration reasserted the key values that guide ILO actions, namely that (a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; and, (d) the war against want requires an unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.[36] The ILO Philadelphia Declaration was incorporated into the ILO Constitution in 1946, because it reflected not only the political concerns of the time but it was considered to also have lasting constitutional significance, i.e. recognizing the treatment of workers' rights as human rights.[37]

The most important declaration for this research is, however, the Declaration on Fundamental Principles and Rights at Work, which was adopted in 1998 and its Follow Up. In the introductory chapter of this thesis the background and the context of the ILO 1998 Declaration have already been discussed. In summary, with social standards falling behind in increasing globalizing markets, a call for better international protection of labour standards became stronger. The WTO objected to include any social clauses in its frame-

30 ILO Constitution, article 19.6.
31 ILO Constitution, article 19.8.
32 (i) The Declaration of Philadelphia (1944), (ii) the Apartheid Declaration (1964), (iii) the Declaration on Equality of Opportunity and Treatment of Women Workers (1975), (iv) the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (adopted in 1977 and revised in 2000 and 2006), (v) the Declaration on Fundamental Principles and Rights at Work (1998), (vi) the Declaration on Social Justice for a Fair Globalization (2008), (vii) the ILO Centenary Declaration on the Future of Work (2019).
33 https://www.ilo.org/resource/ilo-declarations (accessed on 24 May 2024)
34 Tapiola 2018, p.1.
35 https://www.ilo.org/resource/ilo-declarations (accessed on 24 May 2024)
36 ILO Philadelphia Declaration.
37 Novitz 2022, p. 12-14.

work, leaving it to the ILO to take up the challenges of social progress in a globalized world. The ILO 1998 Declaration aims 'to reconcile the desire to stimulate national efforts to ensure that social progress goes hand in hand with economic progress and the need to respect the diversity of circumstances, possibilities and preferences of individual countries'.[38] The ILO 1998 Declaration proclaimed four labour rights as fundamental, namely (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.[39] In 2022 the International Labour Conference adopted a resolution on the inclusion of a safe and healthy working environment in the ILO's framework on fundamental principles and rights at work.[40] Consequently, the ILO 1998 Declaration was amended and the conventions on a safe and healthy working environment were added as fifth fundamental labour standard.[41] This was the result of a debate that was on-going since the early days of the constitution, in which the preamble already states the requirement to protect the worker against sickness, disease, and injury arising out of conditions of employment.

The existing supervisory framework which was set up in the ILO constitution (see paragraph 2.5 for more information on the ILO supervisory mechanism) already stipulated rules that sought to enforce compliance of conventions in the states that have ratified them. The novelty of the ILO 1998 Declaration, however, was that it obliges all members of the ILO, arising from the very fact of membership, even if they have not ratified the core convention, to respect, to promote and to realize, in good faith and in accordance with the ILO constitution, the principles concerning the fundamental labour rights.[42] Furthermore, in the Follow Up annexed to the ILO 1998 Declaration it is held that states that have not ratified the fundamental conventions, are asked to annually submit reports on progress made in implementing the principles enshrined in them.[43] The ILO 1998 Declaration also reiterated that the ILO itself has an obligation to assist its members to attain these objectives by making full use of its resources, including by offering technical cooperation and advisory services.[44] To assess the effectiveness of these actions and decide on future priorities, the 1998 Follow Up also asks for a Global Report, which should provide a dynamic global picture of the progress, made in the pre-

38 ILO 1998 Declaration, Preface by Michel Hansenne.
39 ILO 1998 Declaration, p. 9.
40 ILO 2022.
41 https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations (accessed on 28 May 2024)
42 ILO 1998 Declaration, p. 9.
43 ILO 1998 Declaration, Annex II.
44 ILO 1998 Declaration, p. 9.

ceding four-year period on the compliance with the five fundamental labour rights.[45]

ILO Declarations that succeeded the ILO 1998 Declaration further strengthened the latter. The ILO Social Justice Declaration (adopted in 2008 and updated in 2022) reiterated the importance of the fundamental labour standards and held that the respect, promotion, and realization of the fundamental labour standards is one of the four equally important strategic objectives for the ILO.[46] What is more, the follow-up to the Social Justice Declaration requires the ILC to hold a recurrent discussion to ensure that the ILO better understands the realities and needs of the ILO member states vis-a-vis *inter alia* the fundamental labour standards.[47] Lastly, the ILO Centenary Declaration held that it was time to recognize safety and health as fundamental principle, which it did in 2022.[48]

2.4 Fundamental Labour Standards and the Fundamental Conventions

The ILO 1998 Declaration and the 2022 amendment proclaimed five labour standards and eleven conventions as fundamental. This paragraph discusses each fundamental labour standard in more detail. The content of the fundamental ILO conventions of each fundamental labour standard will be analysed, and the most recent numbers of violations of the fundamental labour standard. As far as the latter is concerned, a common trend of stalled progress – and in some cases regression – in advancing the respect for fundamental labour standards is noticeable at a global level. Although national experiences vary, the challenges of globalization for international labour standards as discussed in the introductory chapter are not the only reasons for this common global trend. In the last few years the COVID-19 pandemic, armed conflicts, digitalization, the climate crisis, and a general deterioration in the rule of law in respect for human rights have contributed to a complex and challenging environment to advance the respect of fundamental labour standards.[49] What is more, high ratification rates of the fundamental conventions did not necessarily lead to fewer violations of fundamental labour standards. Finally, a caveat should be noted on the registered number of violations. Although these numbers give a general picture, in reality these numbers can be higher (since violations are not always registered) or in some circumstances lower (as reported violations might not always be actual violations in practice).

45 ILO 1998 Declaration, Annex III.
46 ILO Social Justice Declaration, para. I.A.iv.
47 ILO 2016, para. 15.2.
48 ILO Centenary Declaration, p. 6-7.
49 ILO 2024 A, para. 5-22.

2.4.1 Freedom of Association and the Effective Recognition to the Right to Collective Bargaining

Freedom of association and the right to collective bargaining are among one of the oldest and most important values of the ILO. The importance of freedom of association and the right to collective bargaining was already recognized by the ILO constitution. The ILO Philadelphia Declaration reiterated their importance and freedom of association and the right to collective bargaining have also been proclaimed in the Universal Declaration of Human Rights in 1948.[50] The right to organize and form employers' and workers' organizations (C87) is essential for solid collective bargaining and social dialogue between workers, employers and society (C98).[51] Collective bargaining is an important mechanism to ensure positive social developments in a market economy,[52] because freedom of association ensures that workers and employers can associate to negotiate work relations effectively. Research has shown that countries with highly coordinated collective bargaining are prone to have less inequality in wages, lower unemployment, and fewer strikes than countries where collective bargaining is absent or less coordinated.[53] However, freedom of association and the right to collective bargaining are still violated across the globe. Although exact numbers are difficult to gather, estimates reveal persistent deficits in many countries and insignificant improvements at global level since 2017. Since that same year, trade union density rates continue to decline, and many vulnerable groups of workers are not represented. According to the available data, only around third of formal economy employees are covered by a collective agreement. In recent years slow progress has been made in improving the ratification rates of both C87 and C98. What is more, the ILO Supervisory Bodies have noticed an increasing restriction of the full exercise of freedom of association, resulting in serious cases of violence against trade union officials in several countries, and restrictive laws that continue the effective exercise of freedom of association and collective bargaining rights in many countries.[54]

– *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*

C87 stipulates the right of workers and employers to establish and join organizations of their own choosing without previous authorization.[55] These organ-

50 Universal Declaration of Human Rights, article 20.
51 International Labour Office 2019, p. 33.
52 ILO Social Dialogue Report 2022
53 International Labour Office 2019, p. 36.
54 ILO 2024 A, para. 23-31.
55 C87, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), article 2.

izations should be able to organize in full freedom, drawing up their constitutions and rules, to elect their representatives and to organize their administration, activities and their programs.[56] Public authorities have to refrain from any interference which would restrict this right, and these organizations shall not be liable to be dissolved or suspended by administrative authorities.[57] By September 2024, C87 has been ratified by 158 states. In the last decades, C87 has been the subject of controversy within and outside the ILO, because ILO constituents differ on whether C87 includes the right to strike. Although not explicitly mentioned in C87, most experts, including the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA), believe that the right to strike is protected by C87.[58] Because of geopolitical tensions (between mainly the U.S. and the USSR), the ILO was under time pressure to draft and negotiate C87 swiftly. Within four months the tripartite members produced a statement on freedom of association, although all agreed it did not meet their notion of a perfect statement. Moreover, the *travaux preperatoires* have shown that parties agreed that the right to strike should have been considered in C87. The short deadline to conclude C87, however, did not leave room to discuss the exceptions on the rights to strike, thus leaving out an explicit reference to the right to strike altogether.[59] Paragraph 2.8 discusses the debate between the ILO constituents on the right to strike and the crisis this has sparked within the ILO in more depth.

– *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*

This convention sets forth the rights of workers to be protected adequately against acts of anti-union discrimination.[60] Such protection should apply in particular when employment of a worker is subject to the condition that she or he will not join a union or relinquish trade union membership, or if the worker is dismissed because of union membership or participation in union activities.[61] Workers' and employers' organizations should furthermore be adequately protected against any interference by each other, in particular the establishment of workers' organizations under the domination of employers' organizations, or the (financial) support of workers' organizations which have

56 C87, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), article 3.1.
57 C87, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), article 3.2 and article 4.
58 See for instance Vogt et al. 2020.
59 Bellace 2014, p. 40-43.
60 C98, Right to organise and Collective Bargaining Convention, 1949 (No. 98), article 1.1.
61 C98, Right to organise and Collective Bargaining Convention, 1949 (No. 98), article 1.2 (a)(b).

as goal to place these organizations under the control of employers or their organization.[62] By September 2024, C98 has been ratified by 168 states.

2.4.2 The Elimination of All Forms of Forced or Compulsory Labour

The ILO fundamental conventions on forced or compulsory labour are among the most ratified, yet the number of people in forced labour shows that ratification does not necessarily lead to better protection. The number of people estimated in forced labour globally increased from 24.9 million in 2016 to 27.6 million people in 2021. This means a rise of 2.7 million people in absolute numbers, but also a relative increase was observed in the prevalence of forced labour from 3.4 to 3.5 per thousand people. These numbers do not take into account the effects of the Covid-19 pandemic.[63] Women and girls make up 11.8 million of all those in forced labour. A total of 86 per cent of forced labour cases occur in the private economy, which underscores the need to address forced labour not just at international and state level, but in the operations of private enterprises as well.[64] Rising with 1.5 million people between 2016 and 2021, 6.3 million people are now in forced commercial sexual exploitation. In absolute numbers, there were 200.000 people less that are in forced labour imposed by states in that same period (3.9 million in total).[65] Although forced labour is present in every region, it is clear that it is most pertinent in absolute numbers in Asia and the Pacific, hosting more than half of the global total (15.1 million). Relatively speaking, however, the situation in the Arab States is the most pressing, with 5.3 people in forced labour per thousand people.[66]

– *Forced Labour Convention, 1930 (No. 29) and its 2014 Protocol*[67]

C29 is the oldest fundamental ILO convention and prohibits the use of forced or compulsory labour in all its forms and within the shortest possible period.[68] The convention defines forced or compulsory labour as 'all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[69] Exceptions to this are *inter alia* military service or work that is exacted in the case of an

62 C98, Right to organise and Collective Bargaining Convention, 1949 (No. 98), article 2.
63 International Labour Office , Walk Free & IOM 2022, p. 22.
64 ILO 2024, para. 33.
65 International Labour Office , Walk Free & IOM 2022, p. 22-27.
66 International Labour Office , Walk Free & IOM 2022, p. 23.
67 In 2014 the Protocol of 2014 to the Forced Labour Convention was adopted as the 9th fundamental instrument.
68 C29, Forced Labour Convention, 1930 (No. 29), article 1.
69 C29, Forced Labour Convention, 1930 (No. 29), article 2.

emergency.[70] C29 explicitly states that the illegal exaction of forced or compulsory labour has to be punishable as a penal office and obliges ratifying states to impose penalties by law, which are really adequate and strictly enforced.[71] The 2014 Protocol entered into force in November 2016 and calls for additional measures to improve compliance with C29. It aims to improve prevention, protection and compensation measures, and increase efforts to eliminate contemporary forms of slavery.[72] By September 2024, 181 members have ratified this convention; the last states were Brunei and China in June 2023 and August 2022 respectively. The 2014 Protocol has only been ratified by 60 states so far.

– *Abolition of Forced Labour Convention, 1957 (No. 105)*

C105 supplements C29. It prohibits forced or compulsory labour as: a means of political coercion or as a punishment for holding or expressing political views or ideologies which are contrary to the established political, social or economic system; as a method of mobilizing and using labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; as a means of racial, social, national or religious discrimination.[73] By September 2024, C105 has been ratified by 178 states. The last ones were Japan in July 2022 and China in August 2022. The convention has been denounced by Malaysia in 1990 and Singapore in 1979 and is therefore the only fundamental convention that has been denounced by ILO member states.

2.4.3 The Effective Abolition of Child Labour

Child labour is a violation of a fundamental human right and has been shown to be detrimental to children's development, potentially leading to lifelong physical or psychological damage.[74] Currently, an estimated 160 million children worldwide are in child labour.[75] Although the percentage of children in child labour remained the same in the period 2016-2020, the absolute number of children in child labour has increased by more than 8 million globally. A similar trend is visible for children in hazardous work, which has risen by 6.5 million children in absolute numbers, but the percentage remained almost

70 C29, Forced Labour Convention, 1930 (No. 29), article 3.
71 C29, Forced Labour Convention, 1930 (No. 29), article 25.
72 P29, Protocol of 2014 to the Forced Labour Convention, 1930, preamble and articles 1-4.
73 C105, Abolition of Forced Labour Convention, 1957 (No. 105), article 1 a-e.
74 https://www.ilo.org/international-labour-standards/subjects-covered-international-labour-standards/international-labour-standards-child-labour (accessed on 10 June 2024)
75 ILO 2024 A, para. 36.

unchanged.[76] At a regional level, a steady reduction is visible in Asia and the Pacific and Latin America and the Caribbean since 2008. In Africa, on the other hand, there has been an increase, both in absolute numbers and in percentage. There are now more children in child labour in Africa than in the rest of the world combined.[77] Child labour has different root causes, including poverty, informality, social protection coverage for children, and access to quality education. C138 and C182 respectively define what child labour and its worst forms entail.

– *Minimum Age Convention, 1973 (No. 138)*

C138 requires ratifying members to pursue national policy to ensure the effective abolition of child labour and to raise progressively the minimum age of employment or work to a level consistent with the fullest physical and mental development of young persons.[78] The general minimum age of employment or work is set at 15 years (13 for light work) and at 18 for hazardous work (16 under certain strict conditions).[79] By September 2024, 176 states have ratified this convention.

– *Worst Forms of Child Labour Convention, 1999 (No. 182)*

The Worst Forms of Child Labour convention requires and urges ratifying members to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour.[80] A child is defined as any person under 18 years of age.[81] The worst forms of child labour are: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[82] It is also expected from ratifying members that they *inter alia* establish appropriate mechanisms to monitor the implementation of this convention, take action to prevent children from engaging in the worst forms of child labour,

76 International Labour Office & UN Children's Fund 2021, p.8
77 ILO 2024 A, para. 37.
78 C138, Minimum Age Convention, 1973 (No. 138), article 1.
79 C138, Minimum Age Convention, 1973 (No. 138), article 2.3-2.4, and article 3.1-3.3.
80 C182, Worst Forms of Child Labour Convention, 1999 (No. 182), article 1.
81 C182, Worst Forms of Child Labour Convention, 1999 (No. 182), article 2.
82 C182, Worst Forms of Child Labour Convention, 1999 (No. 182), article 3.

and provide necessary and appropriate direct assistance to remove them from these forms of child labour and for their rehabilitation and social integration. Furthermore, C182 requires states to ensure access to free basic education and, wherever possible, vocational training for children removed from the worst forms of child labour.[83] Despite C182 being the first and only fundamental convention that has been universally ratified by the 187 ILO member states (since 2020), it shows that ratification alone is not enough, for global progress against child labour has stagnated since 2016.

2.4.4 Equality of Opportunity and Treatment (Non-Discrimination)

Discrimination in employment and occupation is a violation that is omnipresent and permanently evolving. It is an important driver of inequality and an obstruction to decent work and social justice. Although exact figures are hard to gather, millions of women and men are being discriminated in the workplace or are denied access to jobs and training. Discrimination comes in many forms, e.g. wage or salary, and on the basis of different grounds, e.g. sex or skin colour.[84] It is estimated that the current global gender pay gap is 19 per cent, whereas the average pay is 18.5 per cent for people of African descent, indigenous and tribal peoples, ethnic minorities, migrant and refugees. Gender gaps in labour force participant and unemployment have remained unchanged globally since 2016. Nonetheless, significant differences are visible at a regional level. Notably in South Asia, North Africa, the Arab States, and across low-income countries more generally, larger gender gaps exist for these indicators.[85] In many national jurisdictions C100 and C111 are not (fully) implemented: discriminatory domestic laws remain in force, and gaps exist in non-discriminatory legislation.

– *Equal Remuneration Convention, 1951 (No. 100)*

C100 stipulates that ratifying members have to promote and ensure the application to all workers (men and women) equal remuneration for work of equal value, i.e. without discrimination based on sex.[86] The term remuneration is identified as the ordinary, basic or minimum wage or salary and any additional emoluments, whether in cash or in kind, payable by the employer to the

83 C182, Worst Forms of Child Labour Convention, 1999 (No. 182), article 5 and article 7(a)(b)(c).

84 https://www.ilo.org/international-labour-standards/subjects-covered-international-labour-standards/international-labour-standards-equality-opportunity-and-treatment (accessed on 10 June 2024).

85 ILO 2024 A, para. 42-44.

86 C100, Equal Remuneration Convention, 1951 (No. 100), article 1(b) and article 2.1.

worker and arising out of the worker's employment.[87] By September 2024, 174 states have ratified this fundamental convention.

– *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*

The term discrimination in the field of employment and occupation is identified by C111 as follows: 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.[88] At national level, these grounds can be extended after consultation with representative employers' and workers' organizations, and relevant bodies.[89] Employment and occupation include access to vocational training, to employment and to particular occupations, and the terms and conditions of employment.[90] Ratifying members are expected to declare and pursue a national policy to promote equality of opportunity and treatment and to eliminate any discrimination.[91] By September 2024, C111 has been ratified by 175 states.

2.4.5 Occupational Safety and Health

A safe and healthy working environment has been a fundamental labour standard since July 2022. Everyday, workers are exposed to unsafe and unhealthy working environments, leading to 2.93 million deaths and over 395 million non-fatal work injuries in 2019. Between 2000 and 2019 there has been an increase of 330.000 work-related deaths, although, due to an increase of 26 per cent of the global labour force, the work-related mortality rate decreased with 10 per cent in that same period.[92] One of the key challenges to realize safe and healthy working environments is the quality or lack of national policies and regulations. Many of the Occupational Safety and Health (OSH) policies and regulations are out-dated or non-existent at a national level. This is especially alarming in high-risk sectors such as agriculture, mining or construction.[93] The amendment of the 1998 Declaration, promoting C155 and

87 C100, Equal Remuneration Convention, 1951 (No. 100), article 1(a).
88 C111, Discrimination (Employment and Occupation) Convention, 1958, (No. 111), article 1.1(a).
89 C111, Discrimination (Employment and Occupation) Convention, 1958, (No. 111), article 1.1(b).
90 C111, Discrimination (Employment and Occupation) Convention, 1958, (No. 111), article 1.3.
91 C111, Discrimination (Employment and Occupation) Convention, 1958, (No. 111), article 2.
92 ILO 2024 A, para. 29-50.
93 ILO 2024 A, para. 53.

C187 to fundamental, is seen as a necessary step to improve the working environment of workers all across the globe.

– *Occupational Safety and Health Convention, 1981 (No. 155)*

C155 is divided in several provisions, which have to be translated into measures at the national level (part III), and at the level of the undertaking (part IV). Part III holds that ratifying members implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment, so as to prevent accidents and injury to health in the context of work by minimizing the causes of hazards which are inherent in the working environment.[94] This policy should indicate the different responsibilities of public authorities, employers, workers and others in achieving occupational safety and health and to improve working conditions.[95] Part IV requires employers to ensure that the working environment is safe and without risk to health.[96] By September 2024, 82 states have ratified C155.

– *Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)*

C187 provides that ratifying states have to develop a framework and national safety and health culture to promote continuous improvement of OSH and prevent occupational injuries, diseases and deaths. Through dialogue between government and the most representative organizations of employers and workers, they have to formulate a national policy, national system and national program to promote these matters.[97] A national policy refers to the policy set out in article 4 of C155.[98] The national system refers to the infrastructure, which provides the main framework for implementing the national policy and programs.[99] National program refers to any national program that includes objectives to be achieved to improve OSH.[100] By September 2024, C187 has been ratified 67 times.

94 C155, Occupational Safety and Health Convention, 1981 (No. 155), article 4.
95 C155, Occupational Safety and Health Convention, 1981 (No. 155), article 6.
96 C155, Occupational Safety and Health Convention, 1981 (No. 155), article 16.
97 C187, Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), article 2.
98 C187, Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), article 1(a).
99 C187, Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), article 1(b).
100 C187, Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), article 1(c).

2.4.6 The ILO 1998 Declaration and the Fundamental Conventions

As already stated in the introductory chapter, the numbers on ratifications show that the ILO 1998 Declaration and its Follow-Up had a positive effect on the ratification of the fundamental conventions. Although other factors pushed the ratification rates of conventions as well, such as the ratification campaign of the ILO that started already after the UN World Summit for Social Development in 1995, the ILO 1998 Declaration further captured the attention of the international community and put the fundamental conventions in the spotlight.[101] In 1998 the fundamental conventions had 862 ratifications. In 2010, the number had risen to 1319 ratifications, which meant that only 145 ratifications were 'left'.[102] One of the reasons that drove these ratifications in the beginning was the uncertainty that existed among the new follow-up procedures for non-ratifiers. Originally it required reporting every year, but at the time no one was aware of how these reports would be presented and used. This uncertainty made it tempting to fall under the general framework of supervision of ratified conventions.[103] Nevertheless, even when these procedures were clear, the rise of ratifications of fundamental conventions continued as by September 2024, the current eleven fundamental conventions had 1606 ratifications.[104] What is more, as mentioned above, in 2020 the fundamental convention No 182 became the first ILO instrument to reach universal ratification,[105] and in general data suggests that the fundamental conventions tend to have higher ratification rates than non-fundamental conventions.[106] The attention that is given to the ratification of fundamental conventions, by virtue of the ILO 1998 Declaration (see paragraph 2.3), is likely to be an important reason for this.[107]

The following general conclusions can thus be drawn from the statistics mentioned before: (i) promoting conventions to fundamental, leads to high(er) ratification rates. Although C155 and C187 have a lower ratification rate, these have only recently been promoted to fundamental and it cannot be excluded that these fundamental conventions will reach higher rates in the future. (ii) Ratification rates say little about compliance with the fundamental conventions in practice. For instance, the violations on child labour have increased in the latest years in absolute figures, even though its fundamental conventions have one of the highest ratification rates.

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101 Tapiola 2018, p. 57-60.
102 Tapiola 2018, p. 59.
103 Tapiola 2018, p. 59.
104 https://normlex.ilo.org/dyn/normlex/en/f?p=1000:10001:::::: (accessed on 26 September 2024).
105 ILO 2024 B, p. 3.
106 https://normlex.ilo.org/dyn/normlex/en/f?p=1000:10015::::10015:P10015_DISPLAY_BY,P10015_CONVENTION_TYPE_CODE:3,U (accessed on 26 September 2024).
107 Bellace 2022, p. 188-189.

2.5 ILO Supervisory System

The ILO supervisory system monitors the correct implementation of the ILO fundamental conventions. As mentioned in paragraph 2.3, the novelty of the ILO 1998 Declaration was that it obliges all members of the ILO, arising from the very fact of membership, even if they have not ratified the fundamental convention, to respect, to promote and to realize, in good faith and in accordance with the ILO constitution, the principles concerning the fundamental labour rights.[108] Nonetheless, its compliance is monitored by the 'general' ILO supervisory system (as a new or additional supervisory mechanism was explicitly rejected by the Governing Body during the negotiations on the ILO 1998 Declaration).[109] The ILO has developed different methods to monitor and promote the application of (fundamental) conventions and recommendations in national law and practice.[110] Although already set up in the ILO constitution, the ILO supervisory system has evolved substantially throughout the years.[111] The ILO supervisory system contains two types of methods of supervision: the regular system of supervision and three special procedures. The tripartite element of the procedures makes it a unique system.[112] Several specific bodies and systems have been developed to assist the ILC in its supervisory task: the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Conference Committee on the Application of Standards (CAS), Committee on Freedom of Association (CFA), International Labour Conference (ILC), International Labour Office, and the Governing Body. The International Court of Justice (ICJ) can be asked to provide authoritative, binding interpretations of conventions.

The CEACR, CAS and CFA (discussed in more depth in paragraph 2.5.3) are arguably the most important committees. The CEACR is an independent body of 20 members, who are outstanding legal experts at the national and international levels. The Governing Body appoints the experts for renewable periods of three years, with a maximum of 15 years. They are appointed in a personal capacity, from among impartial persons of competence and independent standing drawn from all regions of the world, in order to enable the CEACR to have at its disposal first-hand experience of different legal, economic and social systems. The chairperson of the CEACR is elected for a period of three years, which is renewable once for a further three years. The CEACR meets annually in November–December. In accordance with the mandate given by the Governing Body, the CEACR examines (i) the periodic reports under

108 ILO 1998 Declaration, p. 9.
109 Tapiola 2018, p. 27.
110 McConnell, Devlin & Doumbia-Henry 2011, p. 93.
111 See for an historical overview for instance McConnell, Devlin & Doumbia-Henry 2011 and Samson 1979.
112 Maupain 1999, p. 274.

article 22 ILO constitution on the measures taken by member states to give effect to the provisions of the conventions to which they are parties, (ii) the information and reports concerning Conventions and Recommendations communicated by member states in accordance with article 19 ILO Constitution, and (iii) information and reports on the measures taken by member states in accordance with article 35 ILO constitution (see paragraph 2.5.1 for further information what this entails). The task of the CEACR is 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. In carrying out this task, the CEACR adheres to its principles of independence, objectivity and impartiality.[113]

The CAS is a permanent tripartite body of the International Labour Conference (ILC) composed of government, employer and worker delegates. It is an essential component of the ILO supervisory system, since it has the overall responsibility for considering the application of *inter alia* fundamental labour standards in national jurisdiction and report reports thereon in the ILC.[114] It examines each year the report published by the CEACR, and selects from it a number of observations for discussion to which the relevant governments can respond to and provide information on the situation. The CAS then can recommend those governments to take specific steps to remedy a problem or to invite ILO missions or technical assistance.[115] Hence, the CAS is granted the authority to exert pressure on countries that persistently fail to comply with their obligations under ratified conventions.[116] Within the regular supervisory system the CEACR thus conducts an objective technical review and the CAS assesses the political dimensions of the situation. This way the regular system combines two complementary types of review and assessment of the action members have taken to meet their obligations under ratified Conventions.[117] No hierarchal arrangement or set inter-relationship exists between the CEACR and the CAS.[118]

It is important to note that within the ILO's supervisory system, only the ICJ or a tribunal appointed by the Governing Body and approved by the International Labour Conference can provide authoritative, binding interpretations of conventions.[119] Although the International Labour Office, CFA and CEACR have provided interpretations of Conventions from very early on, these

113 ILO 2024 C, p. 38-39.
114 McConnell, Devlin & Doumbia-Henry 2011, p. 101.
115 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/conference-committee-application-standards (accessed on 10 June 2024)
116 McConnell, Devlin & Doumbia-Henry 2011, p. 101.
117 Maupain 2013, p. 117.
118 Bellace 2019, p. 167.
119 ILO Constitution, article 37.

are not deemed binding. Nevertheless, it is considered that the CEACR and CFA cannot not interpret Conventions when supervising the application of the conventions by states.[120] The links and interactions between the different ILO bodies and elements play a key role in ensuring the balance and coherence of the different procedures and the functioning of the supervisory system as a whole.[121]

2.5.1 Regular System of Supervision

The regular system of supervision is based on reports sent on a regular basis by member states on the application of fundamental labour standards. For the core conventions, member states are expected to report to the CEACR once every three years. An ILO member state has to report on measures it has taken to give effect to the provisions of any of the eleven fundamental Conventions that it has ratified.[122] Employers' and workers' organizations receive copies of these reports and can comment upon these.[123]

Once the ILO receives the report, the CEACR examines the report and can make two kinds of comments on the application report: (i) observations, which are comments on the application of the convention by a State and are published in part II of the annual report of the CEACR. The annual report is published and accessible for all, and (ii) direct requests, which are technical questions or requests for further information. Direct requests will not be published but are communicated directly with the State concerned.[124]

The next step of the regular system is the adoption of the annual report of the CEACR and submission to the ILC. At the ILC, the CAS examines the annual report in a tripartite setting and selects several observations to discuss. The member states concerned are invited to respond and to provide further information on the situation in question. The CAS publishes the discussions and conclusions in its report, which is public. Conclusions can consists of recommendations on further action in law and practice by the member state or the need for ILO missions or technical assistance (see paragraphs 2.5.4-2.5.5 below for further information).[125]

120 La Hovary 2015, p. 317-318.
121 ILO Governing Body 2016, para. 92.
122 ILO Constitution, article 22.
123 ILO Constitution, article 23.
124 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/committee-experts-application-conventions-and-recommendations-ceacr (accessed on 12 June 2024)
125 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/conference-committee-application-standards (accessed on 12 June 2024)

Data shows that compliance with the regular system is in decline. Member states have been submitting fewer reports. Whereas in 1957 95% of the reports requested were received, in 2009 this was only 70.24%. In 2019, the number of submitted reports under article 22 ILO Constitution fell below 70% for the second time in history (the other time was during the second World War in 1944). A number of reasons are given for this downward trend of formal compliance. One is the increase of members and ratifications of ILO Conventions. Many members struggle with the administrative problems following from the reporting obligations. Other members, on the other hand, want to avoid the CEACR's scrutiny.[126] Paradoxically, the high ratification rates of the fundamental conventions thus lead to less compliance with the reporting obligations of the ILO.

2.5.2 Special Procedures: Representation and Complaints

There are three different special procedures: (i) procedure for representation, (ii) procedure for complaints, and (iii) procedure for complaints regarding freedom of association. The special procedures can only be invoked by a submission of a representation or a complaint by an ILO body or a member state.

According to article 24 of the ILO Constitution, a (inter)national industrial association of employers or of workers can make a representation to the ILO Governing Body that an ILO member state did not effectively observe a (ratified) convention within its jurisdiction. The Governing Body can forward the representation to the concerned government and invite the government to reply.[127] The Governing Body can then set up a tripartite committee to examine the representation, the government's response and the legal and practical aspects. The committee concludes with recommendations.[128] If, within a reasonable time, no or an unsatisfactory statement by the concerned government is received, the Governing Body can publish the representation and the statement.[129] However, in recent years the reports of the tripartite committees have been made public in any case. Furthermore, the reports can be followed-up by the Committee of Experts or the case can lead to an official complaint.[130]

126 Tyc 2021, p. 58-59.
127 ILO Constitution, article 24.
128 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/representation-procedure-art24 (accessed on 12 June 2024).
129 ILO Constitution, article 25.
130 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/representation-procedure-art24 (accessed on 12 June 2024).

The procedure for complaints over the application of ratified conventions is explained in articles 26-34 of the ILO constitution. Article 26 states that a complaint can be filed against a member state for not securing the effective observance of a ratified Convention, by: (i) another member state that has ratified the concerned convention itself;[131] (ii) a delegate to the International Labour Conference;[132] or (iii) the Governing Body on its own motion.[133] When the Governing Body receives a complaint, it can first invite the concerned member state to reply, in the same manner as described above in article 24 ILO constitution.[134] If, within a reasonable time, no or an unsatisfactory statement by the concerned government is received, or when the Governing Body did not believe an invitation to reply seemed appropriate in the first place, the Governing Body can appoint a Commission of Inquiry (CoI).[135]

A CoI consists of three independent members. It is the ILO's highest-level investigative procedure and the General Body only appoints one in rare cases when a complaint relates to notorious and grave violations and a member state refuses to address it.[136] A CoI have been appointed only 15 times.[137] The CoI carries out a full investigation of the complaint. It prepares a report and concludes with recommendations on the steps that should be taken within a certain period of time to meet the complaint.[138] The Director-General of the ILO publishes the report and forwards it to the Governing Body and to the member state concerned. The latter should within three months either accept the recommendations or, if not accepting, inform the DG whether it proposes to refer the complaint to the International Court of Justice (ICJ).[139] A decision of the ICJ is final.[140]

When a member state fails to comply with the recommendations contained in the report of the CoI or with the decision of the ICJ, article 33 of the ILO Constitution provides a last resort: 'the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.'

131 ILO Constitution, article 26.1.
132 ILO Constitution, article 26.4.
133 ILO Constitution, article 26.4.
134 ILO Constitution, article 26.2.
135 ILO Constitution, article 26.3.
136 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/complaint-procedure-art26 (accessed on 12 June 2024).
137 https://normlex.ilo.org/dyn/normlex/en/f?p=1000:50011:::NO:50011:P50011_ARTICLE_NO:26 (accessed on 28 September 2024).
138 ILO Constitution, article 28.
139 ILO Constitution, article 29.
140 ILO Constitution, article 31.

2.5.3 Special Procedure on Freedom of Association and Collective Bargaining

Conventions Nos 87 and 98 have a special supervisory procedure through the Committee on Freedom of Association (CFA). This Committee was set up in 1951, shortly after the adoption of C87. The CFA is a tripartite Governing Body committee; it is composed of nine regular members representing in equal proportion the Government, Employer and Worker groups of the Governing Body. Each member participates in a personal capacity. Nine deputy members, also appointed by the Governing Body and representing in equal proportion the Government, Employer and Worker groups, have since 2002 the right to participate in the work of the CFA as well, whether or not all the regular members are present.[141] The CFA always endeavours to reach unanimous decisions.[142] Complaints may be brought against a member state by employers' and workers' organizations, also when the concerned member state has not ratified Conventions Nos 87 and 98.[143] If the CFA decides to declare the case admissible, it will consider evidence and, if it finds that a violation of C87 or C98 has occurred, it can either report recommendations to the Governing Body on how to remediate the situation or conduct a 'direct contact' mission to address the problem directly with the concerned government. The objective of this procedure is not to criticize governments, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice. Whereas the CEACR assesses in general terms compliance of national legislation or practice with conventions, the CFA examines specific cases regarding Conventions Nos 87 and 98, determining whether any given legislation or practice complies with the principles laid down in these conventions.[144] The CEACR can also refer decisions to the CFA. Nevertheless, this overlap of assessing Conventions Nos 87 and 98 could result in a conflict of views within the ILO Supervisory system, which would damage the impact of the system. In practice, however, this has not yet occurred.[145]

Between 1951 and 2021, 3417 complaints were presented before the CFA. Half of these complainants were located in Latin America, 20 per cent in Europe, 12 per cent in both Africa, and Asia and the Pacific, and only six per cent in North America. Globally, a decreasing trend is visible on the amount of complaints that are being presented before the CFA. This is mainly due to a decrease in cases in the last two decades in all regions except Latin

141 International Labour Office 2018, Annex I, para. 7-8.
142 International Labour Office 2018, Annex I, para. 11.
143 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/committee-freedom-association-cfa (accessed on 12 June 2024).
144 Bellace 2019, p. 163-168.
145 ILO Governing Body 2016, para. 89.

America. Numbers on complaints do not necessarily say anything about violations of C87 and 98 on the ground.[146]

2.5.4 General Surveys

On the basis of article 19.5 of the ILO Constitution, the CEACR publishes an in-depth annual General Survey on the national law and practice of member states on a specific theme or subject chosen by the Governing Body. These surveys are established mainly on the basis of reports received from all non-ratifying and ratifying members and information transmitted by employers' and workers' organizations (under articles 19 and 22 of the ILO Constitution). They allow the CEACR to examine the impact of conventions and recommendations, analyse the difficulties reported by governments in their application and identify means of overcoming these obstacles. It should be noted that these reports are often limited to a legal analysis and are not an assessment of the practical situation on the ground.[147]

2.5.5 Technical Assistance and Training

According to the 1998 Declaration and its Follow-Up, the ILO supervisory system does not consist solely of a legal framework for supervising the application of standards. The ILO also provides technical assistance. ILO officials or experts support states to implement the ratified (fundamental) conventions both in law and in practice. The form of such technical assistance can vary, e.g. direct contacts missions, during which ILO officials meet officials of a state to address problems in legislation and practice. Other activities can include national workshops, seminars, capacity building and assistance to draft national legislation in line with *inter alia* fundamental conventions. The ILO has regional offices located in different parts of the world. Standards specialists in these offices meet local government officials and employers' and workers' organizations to discuss and provide assistance with regional problems arising from for instance new ratifications of (fundamental) conventions and reporting obligations. They also discuss solutions to problems raised by the supervisory bodies and can review national or regional draft legislation to ensure that it is in conformity with international labour standards.[148] Such technical assistance exists already since the 1930s and should go hand in hand with the

146 ILO Governing Body 2022 A, p. 4-8.
147 Thomann 2011, p. 179.
148 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/technical-assistance-and-training (accessed on 12 June 2024).

extensive portfolio of different donor funded actions of the ILO. Lastly, the ILO has its own international training centre in Turin, Italy, where it offers training on international labour standards to government officials, employers, workers and their organizations, and other national and international partners.[149] Although such technical assistance is less relevant from a purely legal perspective, it can make a significant contribution to situations on the ground.

2.6 ILO Regulatory Framework in Practice: the Guatemala Case

To demonstrate the workings of the ILO supervision system in practice, a case of child labour on coffee farms in Guatemala will be used. This is not an imaginary example, but has happened in reality. At the beginning of 2020, a journalist named Antony Barnett visited Guatemala for the investigative show *Dispatches*, which is aired on the British TV network Channel 4. Barnett discovered that children under 14 were working on coffee farms in Guatemala that supply companies such as Starbucks and Nespresso with its beans. The investigation revealed that children were working around eight hours a day, six days per week in poor conditions and earning below minimum wage (less than _5 a day at that time). The show visited seven farms that were linked to Starbucks and five to Nespresso. Child labour was found on all these farms.[150] In the following paragraphs I will describe how the ILO has dealt with similar issues in Guatemala in the past, and explain what could happen in case the special procedures would be invoked.

2.6.1 Applying the Regular System

The Minimum Age Convention, 1973 (C138) and the Worst Forms of Child Labour Convention, 1999 (C182) are the two main legal sources of the ILO to abolish child labour. Guatemala has ratified C138 in 1990 and C182 in 2001. The ILO's regulatory regime stipulates that Guatemala has to report every three years on the measures it has taken to give effect to fundamental conventions Nos 138 and 182.[151] Albeit sometimes too late, Guatemala has always complied with this provision and the last reports of Guatemala on both conventions were in 2022 and previously in 2018. Since the ratifications of C138 and

149 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/technical-assistance-and-training (accessed on 12 June 2024).

150 https://www.theguardian.com/business/2020/mar/01/children-work-for-pittance-to-pick-coffee-beans-used-by-starbucks-and-nespresso (accessed on 12 June 2024)

151 Although article 22 of the ILO constitution states that reports should be submitted annually, the Governing Body has decided in 2011 that the reporting cycle for fundamental conventions will become a three year cycle from 2012. See ILO Governing Body 2011.

C182 by Guatemala, the application reports of Guatemala were followed by observations and direct requests of the CEACR almost every time.[152] For this case it suffices to only discuss the comments of the CEACR on C138. The first time Guatemala reported on C138 was in 1994. Throughout the years the recurrent issues of the direct requests of the CEACR were related to article 2(1) and 3 of the Convention, i.e. minimum age for admission to employment, and article 7, age for admission to light work. The comments of the CEACR, both observations and direct requests, have two sides. On the one hand it is clear that Guatemala has improved its standards since the ratifying C138, including an important adoption of a new Labour Code and its reforms several years later. On the other hand, the CEACR has recurring questions on the progress of the implementation of the reforms and its application in practice to which it seems not to get clear answers on from Guatemala. Guatemala has initiated various roadmaps 'for a Guatemala free from child labour'. However, the figures mentioned in the ILO reports also show that the number of inspections in sectors in which there is proof of violations related to child labour went down from 6686, detecting 85 cases in 2015, to 1734, detecting 26 cases in 2017.[153] Over the course of two years, almost four times less inspections were made in Guatemala. In line with these statistics, the CEACR requests Guatemala in its last observation in 2022 to investigate the causes of the significant difference between the number of cases of child labour detected in enterprises during inspections and the high number of children under 14 years of age who are engaged in child labour, according to the National Survey of Employment and Income 2018.[154]

Another issue raised by the CEACR, and which is important for our case, is Government Decision No. 885. This stipulates that boys and girls aged over 13 years may be engaged in lifting, carrying or moving loads appropriate to their age, on the condition that such work is not prejudicial to their health. The CEACR asked Guatemala several times whether Government Decision No. 885 was still in force. In the direct request of 2018 the CEACR finally concluded that, based on the report of Guatemala, decision No. 886 is still in force and requests Guatemala to take the necessary actions to bring it in conformity with the national Labour Code, which, in line with C138, prohibits any work by young persons under the age of 15, including in the informal

152 The CEACR made observations on C138 in 2022, 2018, 2015, 2012, 2011, 2008, 2006, 2004, 2002 and 1997. It issued direct requests on C138 in 2022, 2018, 2015, 2012, 2008, 2006, 2004, 2002, 2000, 1997, 1995 and 1994. On C182 it made observations 2018, 2015, 2012, 2011, 2008, 2006 and 2004 and direct requests in 2018, 2015, 2012, 2011, 2008, 2006 and 2004.

153 Observation (CEACR) – adopted 2018, published 108th ILC session (2019) – Minimum Age Convention, 1973 (No. 138) – Guatemala

154 Observation (CEACR) – adopted 2022, published 111st ILC session (2023) – Minimum Age Convention, 1973 (No. 138) – Guatemala

economy.[155] However, in its last direct request of 2022, the CEACR welcomes Ministerial and tripartite decisions that have raised the minimum age of employment to 15 years, and encourages Guatemala to continue making improvements to raise the minimum age from 14 to 15 years.[156]

At the coffee farms, children under the age of 14 were found to be working. To improve the situation the CEACR invited Guatemala already in 2015 to examine the possibility of ILO technical assistance to help it bring the legislation into conformity with C138. Previous technical missions, albeit in on the subject of freedom of association and collective bargaining, were labelled a success, by both Guatemala and the ILO.[157] In its observation of 2016 the CEACR stated:

> 'While noting the measures adopted by the Government, the Committee notes with concern that a significant number of children under the minimum age for admission to employment are engaged in work in Guatemala. The Committee once again urges the Government to intensify its efforts to ensure the progressive elimination of child labour. It continues to request the Government to take practical measures to strengthen the capacity and expand the reach of the labour inspectorate in its action to prevent and combat child labour, taking into account its important role in enforcing the application of the minimum age for admission to employment'.[158]

The CEACR observed in 2018 that a positive amendment of the Labour Code allowed the labour inspectorate to impose penalties directly in cases of the violation of labour rights. This change reinforced their possible enforcement actions.[159]

It is clear that Guatemala complies with the ILO regular supervision system by submitting its reports on C138 and C182 once every three years. The direct requests and observations of the CEACR show that the situation has improved in Guatemala since it has ratified the convention. However, the numbers of violations show that Guatemala does not yet fully comply with C138 in practice. As discussed above, the ILO Constitution foresees in special procedures in case a member fails to (continuously) comply with a (fundamental) convention in practice.

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155 Direct Request (CEACR) – adopted 2018, published 108th ILC session (2019), Minimum Age Convention, 1973 (No. 138) – Guatemala.

156 Direct Request (CEACR) – adopted 2022, published 111st ILC session (2023) – Minimum Age Convention, 1973 (No. 138) – Guatemala.

157 Individual Case (CAS) – Discussion: 2007, published 96th ILC session (2007) – Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Guatemala.

158 Observation (CEACR) – adopted 2015, published 105th ILC session (2016) – Minimum Age convention, 1973 (No.138) – Guatemala

159 Observation (CEACR) – adopted 2018, published 108th ILC session (2019) – Minimum Age Convention, 1973 (No. 138) – Guatemala

2.6.2 Applying the Special Procedures

Looking at the track record of Guatemala on representation, it can be noted that in the past, four representations were made to the Governing Body on non-observance of Conventions. Three representations were made on non-fundamental conventions: in 2007 on C169 (Tribal Peoples Convention) and two in 2003 on non-observance of C144 (Tripartite Consultation Convention) of which one was deemed equal to the other pending representation in that year. One representation was made on the fundamental conventions No. 29 and No. 105 (Forced Labour Convention and Abolition of Forced Labour Conventions) in 1996. In all these representations the Government Body adopted the tripartite committee's report and consequently the recommendations to the government that were made in the report. In general the recommendations in these reports urged Guatemala to take various necessary measures to ensure that effect was given to the correct application of the Conventions in national law and in practice and to supply information on the adoption of the recommended measures to the CEACR. Analysing the observations of the CEACR on C29 in the years following the representation and report of the tripartite committee, it is clear that the representations resulted in (legal) improvements.

Although it was concluded that the first report of Guatemala's following the tripartite committee's recommendations did not contain the information requested by the Governing Body,[160] much improvement was visible in Guatemala's second report a year later in 1999. The tripartite committee noted – with satisfaction – that this time most recommendations were followed up by Guatemala.[161] By analysing the observations and direct requests between 1999 and 2007, it can be concluded that these interventions led to considerable improvements both in national law and practice.[162]

Taking this case in consideration, it would not be unlikely that when the tripartite committee would make recommendations along the same lines, i.e.: to urge Guatemala to bring its national law in conformity with C138, both in theory and in practice; and to supply the CEACR with information on the taken measures. If such recommendations would again be followed up persistently via direct requests and observations, and considering the conclusions in the previous paragraph, similar progress could be witnessed in the field of child labour if a representation would be made on the basis of our case.

160 Observation (CEACR) – adopted 1998, published 87th ILC session (1999) – Forced Labour Convention, 1930 (No. 29) – Guatemala

161 Observation (CEACR) – adopted 1999, published 88th ILC session (2000) – Forced Labour Convention, 1930 (No. 29) – Guatemala

162 Observation (CEACR) – adopted 2007, published 97th ILC session (2008) – Forced Labour Convention, 1930 (No. 29) – Guatemala

This would thus result in better practical (or second level) compliance in Guatemala with C138.

However, if Guatemala would decide not to respond within a reasonable time, to respond with an unsatisfactory statement, or would not take the necessary measures, the case may lead to an official complaint.[163] The Governing Body received a complaint against Guatemala once before. In 2012 delegates made a complaint concerning non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organize (C87 and C98).[164] This activated a dialogue between Guatemala, the ILO, and the delegates. Six years later, in 2018, the Governing Body declared the procedure closed. After a tripartite mission to Guatemala, it was concluded that much progress was achieved: the mature and constructive dialogue, the tripartite agreement on legislative reforms and the social dialogue on a sustainable implementation of the roadmap should ensure conformity with C87 and C98.[165] In this case considerable improvement was noted and therefore it was not necessary to appoint a CoI.

Applying this information to the case, and given Guatemala's track record set out in the previous paragraphs, it would be unlikely that no improvements would be recorded following an official complaint and the subsequent dialogue (it should be noted, however, that in general other political or economic factors may play a role as well). Furthermore, a CoI is only established rarely. To date this has happened only 14 times. For these reasons, it would be improbable that such a commission would be appointed in this case.

To conclude, special procedures can be seen as a valuable addition to the regulatory system as far as enforcement is concerned. The procedures also contain an appeal procedure that can result in a final judgment and even a 'last resort' option. However, these mechanisms are all targeted at improving the first level of compliance, i.e. the behaviour of states vis-à-vis the international institutions charged with monitoring and enforcing the formal rules (such as periodic reporting system and peer review mechanisms and expert opinions to assess compliance in specific cases). In the case of Guatemala it is unclear whether the second level of compliance truly improved as well.

163 https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/representation-procedure-art24 (accessed on 12 June 2024)

164 Complaint (article 26) – Delegates to the 101st ILC Session (2012) – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Guatemala

165 ILO Governing Body 2018.

2.7 The Committee on Freedom of Association in Practice: the Case of Dita Sari and Indonesia

The supervision of freedom of association and collective bargaining has an additional special procedure. This procedure is broader in scope, because it can be invoked regardless of ratification of the core conventions C87 and C98. The CFA examines the cases via the lens of of the principle of freedom of association and collective bargaining. To assess the system in practice, the case of Dita Sari and Indonesia will be used. In 1996, when Indonesia was still under authoritarian rule, the freedom of association and the right to bargain collectively were systematically repressed both in law and in practice, even though C98 had already been ratified by Indonesia since 1956.[166] C87 was not yet ratified by Indonesia. Already in 1994, the International Confederation of Free Trade Unions (ICFTU) filed a complaint against the Indonesian government for *inter alia* government interference in trade union activities and harassment and detention of trade unionists.[167]

In a first interim report on Indonesia, published in 1995, the Committee on Freedom of Association published its recommendations, which were clear on the repressive system that existed in the country:

> 'The Committee considers that the Indonesian trade union registration system at the national level comprises requirements that are so stringent as to constitute a major impediment to collective bargaining and, indeed, negates the right of workers to establish organizations of their own choosing [...] The Committee urges the Government once again to take all the necessary measures, in law and in practice, to ensure that the rights of workers to organize are fully recognized and to keep it informed in this respect.'[168]

In November 1996, the CFA published another interim report where it recalled that the Indonesian legislation limits the Freedom of Association and again urged the government to eliminate these impediments.[169] That same year, Ms. Dita Sari, together with numerous other trade unionists, was arrested and sentenced to jail for building up trade unions and leading a mass strike. During this time, Dita Sari was a labour activist of the Democratic People Party and chairwoman of the Centre for Indonesian Workers Struggle.

After the arrest of Dita Sari, the CFA explicitly discussed her case in its interim report of November 1997. The ICFTU and other complainants described

166 Tjandra 2016, p. 75, 78, 98.

167 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994.

168 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 297, March 1995, para. 537 (a).

169 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 305, November 1996, para. 371 (a).

the circumstances under which Dita Sari was imprisoned for her role in a wave of workers' protests and initially sentenced to four years of prison for 'manipulating, undermining and deviating from state policy guidelines'.[170] The government did not react to these complaints, which was 'deeply regretted' by the CFA.[171] In its recommendations, the CFA urged the government to provide information on the situation of *inter alia* Dita Sari and to immediately release her if she was still imprisoned.[172] This call for action did not have an immediate effect. In its interim report of 1998 the CFA reported that the Indonesian government still did not react on the situation of Ms Sari, and the CFA again urged the government to immediately release her from prison.[173]

Meanwhile, there was a change of power in Indonesia. After the fall of President Suharto in May 1998, his successor President Habibie announced reforms to change the authoritarian regime of Indonesia, by *inter alia* releasing political prisoners. Only a month later, Habibie bypassed the Parliament to ratify C87, using his executive discretion.[174] Ms Dita Indah Sari was, however, not yet released from prison. In August 1998, at the invitation of the Indonesian Minister of Manpower, the ILO conducted a direct contact mission to the country. During the mission, ILO officials visited Dita Sari in prison and assessed how the ILO could help the Indonesian government bring its laws and practices in line with ILO standards.[175]

In the CFA's interim report of June 1999, the first results of the change of power in Indonesia and the mounting pressure by the CFA and others are visible. The government replied that Ms Sari was still in prison, but that the Indonesian Minister of Manpower sent letters to both the Minister of Justice as the president of Indonesia requesting her immediate release. The Minister of Manpower was informed that she had been offered conditional release, which she had refused.[176] The government concludes that:

> 'In the new era of reformasi in Indonesia, particular attention is being paid to the implementation of human rights and especially to the protection of workers' rights. All labour activists, with the sole exception of Ms. Dita Sari, have been released and charges against them dropped. Freedom of association and freedom of expression, as well as the right to hold meetings, are being fully guaranteed in line

170 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 308, November 1998, para. 371 para. 416 and 417.
171 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 308, November 1998, para. 446.
172 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 308, November 1998, para. 450 (j).
173 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 310, June 1998, para. 466 and 473 (i).
174 Tjandra 2016, p. 75.
175 Tjandra 2016, p. 77 and footnote 9.
176 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 316, June 1999, para. 591.

> with this spirit of reformasi. Finally, and as mentioned before, Manpower Act No. 25 of 1997 is being revised and a Trade Union Bill, as well as a Bill on Labour Disputes Settlement, are being drafted with ILO technical assistance'[177]

In the same report, the CFA welcomed the letters which were sent by the Minister of Manpower, nonetheless it noted with deep regret that Ms Sari remained imprisoned. It therefore expressed its hope that the competent Indonesian authorities would proceed to implement the recommendation to immediately and unconditionally release Ms Sari, and thus comply with the government's international obligations stemming from the ratification of C87.[178] On 5 July 1999, a month after the June report, Ms Sari was unconditionally released from prison pursuant to a Presidential decision, and was able to carry out her trade union activities without any restrictions since then.[179]

This case shows how the CFA and direct contact missions can be effective in practice and in specific cases. However, the effects of the political changes in Indonesia on the situation of Ms Sari cannot be ignored either. Furthermore, the positive effects of this case are not everlasting. Since the final report, 16 other complaints against Indonesia were discussed by the CFA up until September 2024, the last one in 2018. Whereas most of these complaints concerned violations by companies of the principles covered by C87 and C98 (which rights were not effectively protected by the Indonesian authorities), recent CFA reports discuss violence by state authorities, such as violence used by the police to break up strikes.

2.8 External Influence of ILO Supervisory Bodies

As stated in the introduction, ILO's labour standards, and more specifically the ILO 1998 declaration, have influenced multiple global, regional and national legal frameworks. It might therefore not come as a surprise that reports, conclusions and pronouncements of the ILO supervisory bodies have had similar effects, influencing 'hard law' judgments of national and regional courts. Being, however, a framework that is not based on hard sanctions and binding decision, this paragraph will show that such developments were not welcomed or anticipated by all constituents, most notably the employers' group.

177 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 316, June 1999, para. 599.

178 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Interim Report – Report No 316, June 1999, para. 609 and 617(c).

179 Committee on Freedom of Association, Case No 1773 (Indonesia) – Complaint Date 20 April 1994 – Report in which the committee requests to be kept informed of development – Report No 318, November 1999, para. 227 and 230.

This paragraph will discuss a side effect of the ILO supervisory mechanism, namely its influence on regional and national courts' 'hard law' decisions and the crisis it sparked within the ILO. The subject of this crisis has been the debate on whether C87 on Freedom of Association includes the right to strike, and whether the CEACR and CFA have the mandate to interpret conventions when exercising their supervisory tasks.

Between 1952 and 1992 no challenge was made by the employer's group to ILO jurisprudence on the right to strike as developed by the CFA (which, as stated above, decide cases by tripartite consensus) and CEACR.[180] The fall of the Berlin wall, however, changed the political climate within the ILO, where a strategic alliance existed between employers and workers against the Soviet system, and the global economic situation, which – as explained in the introductory chapter – rapidly further developed into a global market.[181] From 1992 onwards the employer representatives started to systematically question conclusions made by the CEACR and CFA on the right to strike and other topics that they perceived to be contrary to their interests. The debates intensified when ILO texts were increasingly incorporated or referred to in other legal frameworks, e.g. Free Trade Agreements, the enlargement of the EU and the influence it had on the European Court of Justice's jurisprudence, and the potential accession of the EU to the European Convention on Human Rights.[182] However, the straw that ultimately broke the camel's back was the use by the European Court on Human Rights (ECtHR) of ILO standards and the CEACR's reasoning on Convention Nos 87 and 98 as stepping stones in their decisions on the right to strike in those cases.[183]

Two key examples are the Turkish cases of *Demir and Baykara v. Turkey* and *Enerji Yapi-Yol Sen v. Turkey*. In the former, the ECtHR explicitly referred to the interpretation of the CEACR and its Individual Observation to the Turkish government concerning Convention No. 98, when deciding the case at hand.[184] Furthermore, the ECtHR referred to the CEACR's General Survey of 1994 and its interpretation of article 6 of Convention No. 98.[185] In *Enerji Yapi-Yol Sen v. Turkey* the ECtHR held that the right to strike is recognized by the supervisory bodies of the ILO as '*le corollaire indissociable*' of the right of association protected by ILO Convention No. 87.[186] According to Maupain, however, the conclusions of the ECtHR were based on the validity of the

180 Vogt et al. 2020.
181 Maupain 2013, p. 123-124.
182 Maupain 2013, p. 125-126.
183 Bellace 2019, p. 157 and La Hovary 2015, p. 326 and Maupain 2013, p.140.
184 Demir and Baykara v. Turkey [GC], Application no. 34503/97, 12 November 2008, e.g. para. 37, 100 and 166.
185 Demir and Baykara v. Turkey [GC], Application no. 34503/97, 12 November 2008, para. 43.
186 Enerji Yapi-Yol Sen v. Turkey, Application no. 68959/01, 21 April 2009, paragraph 24

reasoning done by the CEACR, and less on the official legal authority of the CEACR.[187]

The interpretations of the ILO supervisory bodies were also used outside of Europe. In Canada, the Supreme Court recognized a constitutional right to collective bargaining under the Canadian Charter of Rights and Freedoms, relying among others on the interpretation by the CEACR and CFA of Convention No. 87: 'Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry [...] While not binding, they shed light on the scope of s. 2(d) of the Charter as it was intended to apply to collective bargaining'.[188] And the ILO standards and its interpretation were also taken into account by the Inter-American Court of Human rights. Allegedly to increase the legitimacy of the court itself, but also to establish accurate facts by using the factual assessment of the CFA.[189]

These developments were not well received by the employer's group. In June 2012 the CEACR submitted a General Survey on all Conventions concerning fundamental rights and work and their impact. Consequently, it also discussed Convention No 87, where it explicitly reaffirmed that the right to strike derives from this Convention.[190] Even though the report also highlights the disagreement with this opinion by the employers' group,[191] the latter decided to block the adoption of the proposed list of cases to be examined by the Conference Committee as retaliation, resulting in a full stop of the ILO supervisory system and one of the biggest 'systemic' crisis the ILO had ever faced.[192] This crisis is not yet resolved, although it has scaled down to ceasefire. The main argument of the employer's group remains that the CEACR and CFA cannot interpret conventions, i.e. stating that C87 includes the right to strike. Although the CEACR, CFA and employers agree that the former two cannot issue a binding interpretation on the meaning of a convention, it is believed that the CEACR by virtue of its supervisory tasks, must determine the legal scope, content and meaning of the provisions of the conventions.[193] In November 2023, the ILO requested the ICJ to provide an advisory opinion on the basis of article 37 of the ILO Constitution. The question put forward to the ICJ was the following: 'Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the

187 Maupain 2013, p. 140 and La Hovary 2015, p. 326.
188 Health Services and Support – facilities Subsector Bargaining Assn. v. British Columbia [2007] 2 SCR 391, para. 76.
189 Ebert & Oelz 2012, p. 212.
190 See ILO, 'Giving Globalization a Human Face', (2012) ILC 101st Session, Report III (1B), para. 119
191 Idem para. 117
192 Maupain 2013, p. 122.
193 La Hovary 2015, p. 317-318.

Right to Organise Convention, 1948 (No. 87)?'[194] This referral has come somewhat as a surprise, since for years the employers (and many governments) refused to refer the matter to the ICJ or a tribunal appointed by the Governing Body and approved by the International Labour Conference, fearing that the Committee's jurisprudence would transform into hard law, with all the associated consequences. Nonetheless, it should also be noted that the ICJ has only been asked an advisory opinion, which means that the ICJ's ruling does not necessarily mean the final word on this matter.

What it interesting about this crisis for this research specifically, is that it shows that even though the ILO supervisory system has no hard enforcement or sanctioning powers at its disposal, it can, by virtue of its expertise, influence frameworks that have such powers. This could thus indirectly result in better enforcement and compliance of fundamental labour standards in practice as well.

2.9 Conclusion

This chapter has shown that the ILO has a unique tripartite system of international labour standards, which includes an intelligent system of norms(-setting) and supervision. It is safe to say that the ILO is the most important player in the context of international labour standards to this day. In cooperation with governments, employers, and workers, a comprehensive legal framework has been built in over 100 years, compromising a constitution, declarations, conventions, protocols and recommendations.

Nevertheless, when conventions are adopted, they are often not ratified, which results in no or a poor degree of protection for workers in national jurisdictions. The ILO 1998 Declaration, however, has been one of the reasons that the ratification rate of core conventions is high. The proclamation of the fundamental labour standards can be seen as a success in this regard. Yet, the numbers of violations of these rights reveal that ratification of conventions does not inevitably lead to effective implementation and compliance, thus challenging the universal application of fundamental labour standards, even when many other ILO member states do effectively implement them.

To improve compliance with the fundamental labour standards, the ILO has set up a supervisory system, containing two different procedures. The regular supervisory procedure is based on the reports that are submitted at regular intervals by the ILO member states, assuring the continuous assessment of the application by the member states of the fundamental conventions. Even when member states have not ratified the core conventions, they have to report on the difficulties and progress of the implementation of the fundamental

194 https://www.icj-cij.org/sites/default/files/case-related/191/191-20231110-req-01-00-en.pdf (accessed on 12 June 2024)

labour standards in their national jurisdiction, both legally and in practice. The regular supervisory procedure combines the objective examination of the reports by the CEACR with the tripartite examination in the CAS. Moreover, employers' and workers' organizations actively participate through commenting the reports as well. A negative development is the downward trend on the submission of reports. Increasingly more members are submitting their reports too late or not at all. This is worrying, because the regular supervisory procedure depends on the reports of the member states and is key to ensure the correct functioning of the system as a whole.

The special supervisory procedures focus on resolving specific complex problems caused by non-observance of ratified conventions. In general these are mainly initiated by employers' and workers' organizations, and they have specific mandates. The representation procedure can offer a relatively speedy resolution by a tripartite commission. A complaint, on the other hand, takes more time but can result in more serious measures. Freedom of association has a special procedure, with a broader scope as it can be invoked regardless of ratification of the relevant core conventions. The CFA examines the cases in the light of the principle of freedom of association and collective bargaining.[195]

The ILO supervisory system lacks hard enforcement power, in the sense that it does not have (or no longer has) a mechanism to enforce its norms in case of non-compliance. Instead, the ILO supervisory system is based on guidance and persuasion. It is clear that this lack of hard enforcement power is a weaker characteristic of the system, in the context of ensuring compliance with the reporting obligations as well as concerning the respect of fundamental labour standards in national jurisdictions in practice. The ILO supervisory system, however, has proven to be able to overcome this lacuna in most cases, thanks to its strong system of persuasion and guidance. As we have seen in the case of Guatemala, the two supervisory mechanisms improved the situation of child labour by (technically) assisting and persuading Guatemala to draft road maps and bring their national laws in conformity with the relevant Convention. Even though this process took some time, and there is still a long way to go, there were results with regards to the second level of compliance. Nevertheless, the ILO's lack of hard enforcement powers becomes an issue in the more problematic cases. Furthermore, if member states have not ratified conventions, it is difficult for the supervisory system to actually supervise compliance at both levels, especially in the case of dualist systems.

Ratification is less of a problem for the CFA, since it can examine complaints on freedom of association whether a country has ratified Conventions Nos 87 and 98 or not. The Indonesia case shows that the CFA can improve both levels of compliance in specific cases, by persuading the Indonesian

195 McConnell, Devlin & Doumbia-Henry 2011, p. 102.

government to release the trade unionist from jail and by assisting it in revising its labour statute. However, as we have also seen, such results are no guarantee for future conduct, and heavily depend on the political situation in a country as well.

What is more, the rules of the ILO's supervisory system only apply to its member states. Although it is correct that the ILO member states are responsible for labour violations within their national jurisdictions, other states or private actors are not without some degree of responsibility. As discussed in the introductory chapter, multinationals have significant power and influence on the application of fundamental labour standards in national jurisdictions, yet they are not members of the ILO (members of the International Organization of Employers are national employer associations, and not corporations) nor subjects of the ILO supervisory system. The ILO supervisory system thus does not bridge the global governance gap.

Nonetheless, by virtue of the expertise of the ILO on *inter alia* fundamental labour standards, the ILO supervisory bodies and reports have influenced regional and national courts as well, resulting in hard law judgments. The ILO supervisory system can thus indirectly affect the rules in other jurisdictions, which may have effects for the practical compliance with fundamental labour standards by states, corporations, and other actors.

These conclusions were addressed at the ILC in June 2024 as well, which was dedicated to the recurrent discussion on fundamental labour standards. The ILC noted positive developments since 2017 at both the national and the international level, such as national legal reforms to guarantee respect for fundamental labour standards, increased ratifications of fundamental conventions and increased references to the fundamental conventions in international legal and policy frameworks. Nonetheless, the ILC concluded that we are far from achieving the universal ratification of fundamental conventions and that significant implementation gaps remain.[196]

In conclusion, in addition to its unique role as international labour standard setter, the ILO has developed a supervisory system that is strong in persuading and guiding its members (and beyond) to correctly comply with fundamental labour standards. However, the system is time consuming, both when it comes to compliance with the system and when analysing the results of its supervision. Another negative aspect is that the system is ineffective when dealing with the difficult cases, because it lacks a mechanism of strong enforcement. Lastly, even though the ILO is a tripartite organization, the supervisory system only addresses states. The ILO can thus be regarded as an essential part in progressing fundamental labour standards in the daily reality of workers across the globe, but it is incomplete on its own in the globalized market of today.

196 ILO 2024 B, para. I.3-7.