Ruminations on the Past, Present and Future of International Labor Standards: Empowering Law in the Brave New Economic World

By Marley S. Weiss

Copyright 2008 Marley S. Weiss

I. Introduction

International labor standards are among the oldest international standards pertaining to the conduct of private, as well as public, economic actors. They long predate the post-World War II body of international human rights instruments. The International Labour Organization (ILO), the international organization under whose auspices most international labor standards have been promulgated, dates back to 1919 and the era of the League of Nations.¹

Far from being settled, however, nearly every aspect of the current international labor standards regime is in flux: the role of labor standards in the international legal, economic, political, and social order, as well as in the parallel domestic orders; the modes by which standards are brought into being; the manner and means of their implementation and enforcement; the degree to which they may be binding solely on nation-state parties, and enforceable only at their behest; and the extent to which private actors, such as employer associations, trade union associations, worker rights non-governmental organizations (NGOs), and individuals, play roles in the creation and enforcement of international labor norms. Although the substantive content of international labor standards is changing at a far less blistering pace, important alterations in priorities for these standards also gradually are becoming manifest. Predicting the future of international labor standards in such a dramatically shifting environment may be a sufficiently hazardous occupation to itself require a protective labor standard.

Needless to say, these developments are not happening in a vacuum. They should be placed in the surrounding context of similar changes in the overall international legal order. The changes in standard setting, implementation and enforcement as to international labor measures are part and parcel of the rapidly shifting landscape for adoption and implementation of international instruments of all types.

The international legal regime changes are in turn influenced by and in their turn influence the massive technological change of the past few decades; accelerating economic integration and globalization; vastly expanded cross-border mobility of goods, services, direct investment capital, portfolio capital, and people; and intensified international competition in the markets for goods, services, capital and labor. The international political landscape also provides a moving target, interacting with these economic and legal factors. Varying degrees of regional political integration are shifting the locus of political authority upwards, particularly within Europe. Simultaneously, contradictory, albeit spotty pressures toward political disintegration are occurring, variously including downward devolution of authority in countries such as the United Kingdom, and threatened break-up into sub-units of nation-states composed of

historically distinct ethnic or linguistic populations, including the former Yugoslavia, Spain, Belgium, and Canada. In the developing world, some nation-states are dissolving into tribal warfare or anarchy.

The international labor standards field stands at the intersection, buffeted by cross-cutting pressures, a part of, yet distinct from these developments. It is uniquely economic and social simultaneously, with aspects of human rights and trade and economic law. Labor is, after all, a factor of production, yet not a commodity; in this, the American Clayton Act of 1914² and the ILO Declaration of Philadelphia of 1944³ are in accord. Unlike typical "first generation" international human rights – civil and political rights which involve claims of individuals as against governmental action – labor rights involve claims related to conduct of private employers as well as the state. They thus pose unique problems as to implementation and enforcement. Norms set by international labor standards effectively must be transmitted through at least two layers of policymaking to reach their aim of affecting workplace conditions: first, the nation-state legal and regulatory level, and second, the employer or collective bargaining labor practice-setting level.⁴

At the same time, labor rights are quite distinct from typical "second generation" human rights – economic and social rights such as the right to health care, education, social welfare provision, or retirement income security. Second generation rights pose special issues because they involve affirmative claims upon nation-state treasuries. Labor rights, on the other hand, entail governmental budgetary allocation only to the extent of governmental labor inspectorate or enforcement agency funding, leaving aside their impact on the government in its capacity as public employer. Instead, labor standards obligate government expenditure of internal *political* capital. Moreover, they restrain governments from using reduction of domestic labor standards below international minima as a means of competing in international markets to attract and retain internationally-mobile capital, or as an indirect subsidy for the production of domestic goods and services, to artificially enhance their international competitiveness.

This article will sketch out the historical trajectory of transformation in the manner and means, participants and roles involved in creation, implementation and enforcement of international labor standards, as well as their content. This will lay a foundation for some remarks about their future. Of necessity, it will paint a picture in very broad strokes. The next section will briefly examine the history of international labor norm-setting. Section III will outline the current state of affairs. It will conclude with some speculative rumination about the future.

II. Past as Prologue

It would be an oversimplification to say that throughout much of the twentieth century, the nation-state had a near-monopoly over the creation, implementation, and enforcement of international law. For most purposes, however, this simplified characterization would suffice. There is a reason, after all, that the field was initially dubbed "the law of nations."

The glaring exception is the process of creation of labor standards within the ILO. From its inception, the ILO was built upon a tripartite structure, in which member nation-state governments were entitled to name two representatives of their own, plus one representative each for the country's trade union movement and employer association. The Member State governments have always been required to nominate the labor and management delegates "in agreement with" the peak organizations which are "most representative of employers or workpeople, as the case may be, in their respective countries." The notion of functional democracy, of participation in standard setting as well as supervision of implementation by representatives of the two main sides in economic and social policy – labor and management – has been applied consistently throughout the ILO system in the course of its existence.

A. The Standard Setting Process

Under the ILO Constitution, international labor standard setting may take two forms: Conventions and Recommendations. Both are adopted by a two-thirds majority vote of the delegates present at the International Labour Conference, the annual general assembly of the four delegates from each Member State. Labor and management delegates are not subject to instruction by their home government.

Adoption of a Convention by the body obligates the government of each Member State promptly to present the instrument to its proper authorities for ratification, and to report back to the ILO on whether the country has ratified it. A Convention then becomes binding upon the State upon ratification. This obligates the government to bring its domestic law into conformity with the convention and to ensure domestic implementation. A Member State which does not ratify is not bound to implement the Convention, but it is required to report periodically on its domestic implementation of the substance of the instrument. As to Recommendations, the Member States commit to bringing the international prescription to the attention of their governmental authorities "for their consideration with a view to effect being given it by national legislation or otherwise," but they have no obligation to implement the terms. They must, however, report periodically on implementation of the substance of the Recommendation.

Traditional ideas of Member State sovereignty, particularly the understanding that a country would be bound on the international plane only as to instruments to which it had individually consented, were thus bent but not broken by the ILO "legislative" structure. The multilateral negotiation of ILO instruments has always involved active participation by the business and worker sides, along with government delegates. This opening to participation by and formal allocation of voting rights to non-governmental actors has remained a rarity in international organizations. The ILO scheme has blazed the path for the most prominent modern example, the role of the social partners in developing labor and other social legislation in the European Union's processes. Nevertheless, the Member States have retained ultimate individual control over whether their country would be bound by any ILO Convention, since each has remained free not to ratify, and each retains formal freedom of action as to Recommendations.

Dilution of the Member States' governmental legislative monopoly power did not occur by accident. It happened in response to crisis.

[During negotiation for the peace treaty at the conclusion of World War I, a] revolutionary temper was widespread: the Bolshevik revolution in Russia had been followed by the regime of Béla Kun, in Hungary; the shop steward movement in Great Britain had honeycombed many of the larger trade unions and undermined the authority of their constitutional executives; the trade union movements in France and Italy showed signs of becoming more and more extremist; millions of men, trained in the use of arms, to whom extravagant promises had been freely made were about to be demobilized; the wave of unrest had spread even to such stable and peaceful democracies as the Netherlands and Switzerland. How gravely the situation was viewed may be indicated by the fact that during the Peace Conference itself Clemenceau moved many thousands of troops into Paris as a precaution against rioting in the streets.

* * * In other circumstances it is indeed highly probable that some of the more daring innovations in [the details of the proposed organization], such as the provision that non-Government delegates should enjoy equal voting power and equal status with Government delegates in the International Labour Conference, would have been considered unacceptable. 15

The employer and worker side representatives to the ILO were intended from the outset to be independent of government, and loyal instead to their respective capital and labor interests. ¹⁶ However, it quickly became evident that the extent to which this formal structure could be fulfilled in practice depended upon the degree to which, in any given country, a free and non-governmentally controlled business sector was present, as well as a trade union or other organized worker representation movement existing independent of both government and employer domination. ¹⁷

The ILO standard-setting model thus differs from the approach to adoption of instruments by the United Nations (U.N.) General Assembly in two dimensions: the make-up of the body and its legislative process, on the one hand, and the nature of the instruments, on the other. The tripartite functional representation as part of the ILO goes some way to cure the democratic deficit embedded in most international organizations. That democratic deficit is an amalgam of the lack of internal democracy in many Member States, couples with the inherent incompatibility with any idea of "one person, one vote" or representation in proportion to population with the normal international organization rule of one nation-state, one vote.

The second difference is the nature of the instruments themselves. The ILO has always designed its instruments – not only the binding Conventions, but the non-binding guidance instruments, the Recommendations – to be "legislative in character." They are

all intended to provide definite terms for transposition to domestic Member State law or regulation. ILO officials regularly refer to ILO instruments as "international labor legislation," and to the corpus of Conventions and Recommendations as constituting an "international labor code. ILO instruments "represent something very different from, and something much more difficult to formulate than the resolutions frequently adopted by [the U.N. and similar] international bodies which aim only at arriving at a collective opinion on some restrictive though possibly very important issue."¹⁸

B. The Process for Implementation and Monitoring for Compliance with ILO Standards

The ILO has pioneered the creation of a routinized, formalized system for inducing Member State fulfillment of the obligations they have assumed under ILO processes, again incorporating tripartite participation.¹⁹ Each Member State must report to the ILO annually on "the measures which it has taken to give effect to the provisions of Conventions to which it is a party."²⁰ These reports are reviewed by a committee of independent experts, the Committee of Experts on the Application of Conventions and Recommendations.²¹ The Committee of Experts drafts comments, including observations as to the degree of compliance of the Member State's law and practice with its obligations under the Conventions it has ratified. Its comments are compiled in an annual report. When the Committee of Experts has found that the Member State may have failed to fully apply a ratified convention, the Conference Committee on the Application of Standards, a tripartite committee of the International Labour Conference, reviews the experts' report, and may hold a public forum with participation by the Member State. The Conference Committee then drafts and submits a report on such cases to the annual Conference, with a special section devoted to cases of persistent failure.²² As previously noted, Member States also must report at intervals specified by the ILO Governing Body on their activities to implement the substance of unratified Conventions and Recommendations; the Committee of Experts reviews and reports on these as well.²³

A separate, more intense procedure handled by the Governing Body Committee on Freedom of Association, another tripartite body, responds to the volume of claims of Member State failure to fully implement workers' right to freedom of association and collective bargaining, the principle of which is deemed binding on all Member States on the basis of the ILO Constitution.²⁴ Under still other special procedures, trade unions and employer associations may submit to the ILO a "representation" claiming that a Member State "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party,"²⁵ and one Member State may submit a complaint of violation by another Member States of its ILO obligations.²⁶ This type of complaint may trigger more serious procedures, including the establishment of a Commission of Inquiry to conduct factfinding and recommend a resolution, with possible resort to the International Court of Justice.²⁷

The ILO's effort to build in a regular, obligatory process for governments to engage in self-reflection and reporting on their compliance, subject to review by committee of legal experts, has been widely copied, with adaptive modifications in many

other international regimes. It has been especially influential in the development of U.N. agencies overseeing international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁹ Some similar elements also appear in the supervisory processes of international economic regimes such as that of the World Trade Organization.³⁰ The possibility of submission of complaints of violations by Member States is another ILO innovation emulated, albeit for the most part, in weakened form, by other international human rights bodies. In the course of adaptation, however, other international organizations have eliminated or watered-down the role of trade union bodies, employer associations and other NGOs in the monitoring process. The notion of expert committees, on the other hand, to assess the legal technicalities of compliance has widely emulated.

C. The Substance of the International Standards

One can chart important changes in the priorities of ILO labor legislation in different eras, both in terms of specially-protected categories of workers as well as in substantive focus. During the founding period, from 1919 until the Declaration of Philadelphia in 1944, underage workers were a primary focus of ILO legislation during its first two decades, although much of its covered only certain industries, occupations, or narrowly selected working conditions.³¹ It was only in 1973, that the core labor convention requiring ratifying countries to set an across-the-board minimum age for child labor was adopted.³² The other core convention, prohibiting the worst, most dangerous and most exploitative forms of child labor, did not gain enactment until the present period, in 1999.³³

Apart from child labor, the greatest attention in the early period of the ILO for a discrete class of workers was addressed to women workers. The ILO adopted measures excluding women from exposure to occupational health and safety hazards such as lead poisoning, from occupations such as underground work, and from night time work, and also enacted a series of protective instruments regarding pregnancy and maternity, all predicated on women's presumed fragility as well as their expected role as caretaker within the family.³⁴ Despite some lip service to equality for women, however, no ILO instruments were adopted to ensure equality of remuneration, employment, access to employment or training for women until the 1950s.³⁵ The major social security convention adopted in 1952, remained predicated upon the then-dominant, male breadwinner model.³⁶ The equality conventions remained in tension with protective labor measures targeting women workers, maternity, and female family responsibilities. In the last two decades of the twentieth century, the ILO finally embraced gender equality. In 1981, a gender neutral instrument displaced earlier ones supporting "workers with family responsibilities."³⁷ In 1990 a protocol to the 1948 Night Work (Women) Convention and a mostly gender-neutral Night Work Convention were adopted. 38 Other pieces of modern, gender neutral ILO legislation aimed at improving the position of women in the labor market include 1994 measures regarding part-time workers, and 1996 instruments regarding home-based workers.³⁹

In terms of conditions of work, too, the focus of ILO legislation has shifted considerably over time. In its early years, wages⁴⁰ and working time received the most attention, leading up to the convention establishing the forty-hour week.⁴¹ Occupational health and safety measures, in addition to those limiting working time,⁴² and measures fragmentarily providing for social security and social insurance of workers, were enacted during this time.⁴³ Convention No. 29, the Forced Labour Convention, and two accompanying recommendations were adopted in 1930. In 1957, Convention No. 105, Abolition of Forced Labour completed the ILO's legislation on this subject.

Little was done, however, regarding collective bargaining and industrial relations in the inter-war period. A strong emphasis on industrial relations may be seen throughout the post-World War II era until the late 1980s. Besides the core labor rights instruments on freedom of association, the right to organize and collective bargaining, measures were adopted regarding collective bargaining in the public as well as private sectors, for protection of workers' representatives, and for tripartite national level consultations on labor laws and industrial relations policy. A 1952 comprehensive convention was adopted setting minimum standards for social security and social insurance in nine separate dimensions of worker earnings protection against risk. Job security was also emphasized through the 1980s as critically important to workers and their representatives.

Of the eight conventions today considered to encompass core labor standards, only Convention No. 29 prohibiting forced labor, dates back to the initial era, and only one, Convention No. 182, Worst Forms of Child Labor, was enacted in 1999, post-dating this second period. The other six include Convention No. 87, Freedom of Association and Protection of the Right to Organise (1948), Convention No. 98, Right to Organise and Collective Bargaining (1949), Convention No. 105, Abolition of Forced Labour (1957), Convention No. 100, Equal Remuneration (1951), Convention No. 111, Discrimination (Employment and Occupation) (1958), and Convention No. 138, Minimum Age (1973). Together these cover the four areas of ILO labor rights considered to constitute as fundamental human rights: freedom of association, prohibition against forced labor, nondiscrimination in occupation, employment and remuneration, and child labor.

D. Influence of the ILO Legislation on Law and Practice

The key question as to international instruments, including those of the ILO, must be the extent to which they influence national domestic law, and governmental and employer practice in fulfilling the rights ostensibly created for workers. Here, it could be said, the ILO's record is mixed, although better than that of most international organizations.

It seems clear that the ILO system of obligation, reporting and monitoring has been fairly effective at inducing Member States formally to adopt legislation transplanting the provisions of many Conventions or modifying prior law to bring it into compliance. Moreover, ratification of a Convention often influences a Member State

government by preventing subsequent lowering of its domestic labor standards. Even unratified Conventions and non-binding Recommendations have a strong influence. One can find national legislative provisions in a vast number of countries plainly modeled on the template created by particular ILO instruments, which serve a role similar to that of model codes in the development of American domestic law in fields dominated by state legislation.

Case studies have confirmed the leading influence of ILO standards on positive law adopted by developed and developing countries alike. The ILO reporting and supervision process has been fairly effective at detecting failures to bring domestic legislation into formal compliance with ratified conventions and in motivating countries to modify their laws to become compliant. Technical assistance provided by the ILO to developing countries has furthered this trend. Moreover, ILO standards influence the terms of collective bargaining agreements, whether labor contracts occupy a place equivalent to legislation in the national industrial relations order or simply apply between the employer and trade union parties. The ILO standards on positive law adopted by the ILO to developing countries has furthered this trend.

Finally, ILO instruments have strongly influenced the enactment of labor rights provisions in universal human rights instruments addressing the same topics under the auspices of the United Nations, regional human rights provisions such as those in the European Social Charter and the Inter-American Convention on Human Rights, as well as labor rights provisions in the foundational treaty of the European Community. These international instruments, in turn, further pressure and support national governments in incorporating similar content into domestic law.

Three major areas of relative failure had become apparent, however, by the mid-1990s. First, the ILO has been less effective in persuading non-ratifying countries to ratify and bind themselves by many duly enacted ILO conventions, including some of the most fundamental ones. Second, the ILO supervision process has been far less successful at addressing failure to effectively implement the principles established in ILO norms, once national legislation has been adopted in formal compliance with the ILO standard. Problems arise as to Member State enforcement of its domestic implementing legislation, particularly when countries rely on labor inspectorates or other government-initiated enforcement rather than worker or trade union-instituted enforcement litigation. Difficulties also are caused by systemic failures in the rule of law, including corruption and incompetence, among both inspectors and adjudicatory bodies. Third, it has become progressively harder to gain enactment of binding Conventions within the ILO, since heightened opposition by employer delegates leads to substitution of non-binding Recommendations or to the enactment of nothing at all.⁵² These flaws remain the Achilles heels of the ILO system as well as other international regimes involving labor rights, although the ILO has pursued major new initiatives in an effort to respond to these problems.

III. On the Edge: Present Trends Destabilizing Established Regimes and Speculations for the Future

A. The ILO Declaration of Fundamental Rights

A major innovation by the ILO in the mid-1990s was the organization's adoption of the ILO Declaration on Fundamental Principles and Rights at Work, and the Follow-up to the Declaration, which creates a special reporting and monitoring system for labor rights designated as fundamental – freedom of association and collective bargaining, forced labor, nondiscrimination, and child labor. Its legal basis was that by becoming members and binding themselves by the ILO Constitution, all Member States became obligated to observe the principles as to the four fundamental rights, if not the details as embodied in the ILO Conventions and Recommendations covering these subjects. The failure of many large Member States to adopt some of the core labor standards conventions, therefore, was partially surmounted by adoption of the Declaration, explicitly binding them to observe the principles at stake. The Declaration subjects countries to an obligation of annual reporting as to those core Conventions the Member State has yet to ratify, more systematic and rigorous than the one otherwise applicable to unratified Conventions, although less stringent than the supervision applicable to ratified, binding conventions. The Declaration also initiated a system of global annual reports, rotating, one subject per year, through each of the four areas of fundamental rights. These reports provide a means to measure global progress towards vindicating these rights for workers, both comparatively across countries and throughout the world.⁵³

The creation of this supervision system may enhance the motivation for countries which have not yet ratified core labor conventions to do so, although this hope does not seem to have produced many results to date. On the other hand, it may be producing stronger effects at the national level in actual implementation in some countries, or at least, through the glare of potential publicity, reducing the likelihood of backsliding among nation-states competing for global capital and jobs provided by multinationals. The "follow-up" is, however, a process wholly limited to the sunshine effect in terms of sanctions. Indeed, it is characterized as "promotional," that is, the Declaration is designed to function more as a carrot, than a stick.

Moreover, by elevating certain labor standard topics to "core" and "fundamental" status, the Declaration may implicitly devalue others. It is ironic that during its founding period, the ILO's strongest emphasis was on minimum wages, limiting working hours, and protecting worker health and safety, and in its second period, job security and income protection were added as subjects of primary concern. These are excluded from the Declaration, hence from enhanced reporting and monitoring.

B. Sources Outside the ILO Monitoring and Pressuring for Compliance

Throughout most of the ILO's history, the only mechanisms for inducing Member State compliance with their obligations were the ILO's own reporting and supervision procedures. Since the ILO system rests almost entirely on hortatory powers of persuasion rather than coercive or financial remedies to enforce obligations, it has widely been seen as toothless. Neoliberalism domestically, and free trade internationally have created increasingly powerful forces undermining domestic efforts to improve, or even maintain

labor standards, both in law and in practice. The comparative weakness of relying wholly on the "sunshine effect" of public exposure and pressure has led many to question the modern relevance of the ILO, to urge "linkage" of World Trade Organization enforcement mechanisms to ILO supervision and monitoring, or to demand changes in the sanctions for Member States who violate their commitments under binding ILO instruments.

At the same time, however, other bodies of domestic and international law have incorporated fundamental ILO standards by reference, leading to sources of sanction against violations of ILO standards wholly external to the organization itself. The United States and later the European Community have created preferential trade rules for less developed countries, adopting General System of Preferences laws which condition advantageous trade treatment, among other requirements, on these countries' observance of specified labor rights.⁵⁴ At the start of the Clinton administration in 1993, the negotiation of the North American Agreement on Labor Cooperation (NAALC), the labor side agreement to the North American Free Trade Agreement (NAFTA), initiated a string of U.S.-negotiated plurilateral and bilateral free trade agreements which incorporated labor rights obligations. The U.S.-Jordan Free Trade Agreement, negotiated in 2000 at the end of the second term of the Clinton Administration, created a new template for these provisions, incorporating them within the text of the main trade agreement, placing them within the enforcement machinery for trade-related violations, and including either trade sanctions or monetary fines as a remedy for violations. Setting a precedent for future U.S. free trade agreements, it used ILO standards as the benchmark for the party countries' own labor legislation. The Bipartisan Trade Promotion Authority Act. 55 the measure authorizing "fast track" (a/k/a "trade promotion authority"), up-or-down voting for legislative treatment of trade agreements negotiated by the executive and submitted for Congressional approval and implementation, incorporated this template, as did later versions of the GSP legislation.⁵⁶ Finally, as to violations of those labor norms that constitute fundamental human rights, the Alien Tort Claims Act⁵⁷ in the U.S. may under certain circumstances support a civil tort action in domestic U.S. courts, complete with tort damages running not only against governments, but sometimes against private sector employers.⁵⁸

Not only governments but also private actors have created processes leveraging ILO core standards to legitimate international codes of conduct relying on the threat of consumer boycotts to pressure multinationals to ensure that their own foreign factories as well as those of their subcontractors or others in their supply chain bring their employment policies and practices into conformity. In addition, government bodies such as the U.S. State Department, as well as private nongovernmental organizations such as Human Rights Watch monitor and issue reports on systematic labor rights observance or violation in individual countries, and as to specific international labor standards.

Thus a decentered network has developed of international, national, public and private actors using public and private instruments to press employers and nation-state governments to fulfill the objectives of core ILO standards. This is a part of a much

broader process of development of similar international networks around a wide range of issues.

Notwithstanding those who celebrate the gradual emergence of such international governance networks and nodes, however, others are less sanguine about the decline of democratic control over norm setting and norm enforcement accompanying the decline of the hegemony of the Member State. In the labor standards area, disquiet is especially pronounced among those concerned about the increasing power of multinationals relative both to nation-states and international organizations. The shift in power to global corporate actors is progressively reducing the ability of nation-states to set and enforce meaningful labor standards, and of the ILO, trade unions and worker rights NGOs, at national and international levels, to monitor and press for compliance on the part of both governments and businesses.

One unintended consequence of the ILO Declaration on Fundamental Principles and Rights at Work may be to increase the likelihood of inclusion of these four areas of labor standards in external measures and instruments such as those mentioned above, since they have received the heightened international legitimation of constituting "universal" and "fundamental" rights. Conversely, this may decrease the likelihood of inclusion of other areas of equal importance for many workers, including some of longstanding central focus to the ILO such as minimum wages, limitations on working hours, job security, and social insurance. The U.S., for example, has been inconsistent in which ILO-derived labor standards it has included in its plurilateral and bilateral free trade agreements. 61

There is also the possibility that as sources of implementation of ILO-derived labor rights cover more terrain in countries, companies, and industries, and have intensified enforcement bite, the feedback effect of this may render nation-states more reluctant to ratify ILO conventions or to vote for adoption of new ones going forward.

C. Fragmentation of International Labor Standards and Standard-setting

There is another reason for both the dearth of enforcement of internationally-derived labor rights, particularly in developing countries, and problems in persuading them to ratify labor standards. In developing and less developed countries, the informal sector makes up a large share of the overall economy, and of overall work possibilities for the labor force. National legislation regularly exempts such informal businesses from coverage, rendering labor standards unenforceable for a high proportion of workers. Moreover, even when the labor law formally applies, the practiculities of enforcement against marginal employers or in cases of formal self-employment or micro-business is likely to make the legal rights a dead letter. In areas such as social security, the extreme fragmentation of the working world in and of itself poses an important barrier to extension of coverage of basic social insurance schemes to many workers.

The ILO has undertaken an effort to address these sorts of problems with innovative approaches, which could involve a third way, a negotiated arrangement

between the individual nation-state and the ILO, tailored to address the country's obstacles, and coupled with the carrot of technical and perhaps also financial assistance. The national undertaking would be largely in the nature of goals and timetables, rather than hard law, contract like obligations, and bears some similarity to elements of the Open Method of Coordination of the European Union. Whether such an approach, if adopted, will surmount existing problems, or by producing greater fragmentation in international labor law, exacerbate enforcement difficulties, remains to be seen.⁶²

D. Disruption of Unitary Representation at International and National Levels: Boon or Bane

The predominant role of nation-states in negotiating, adopting, ratifying, transposing into domestic law, and enforcing international instruments is under increasing pressure from both above and below; in parallel, the predominant role of trade unions and of employer associations as functional representatives is under pressure as their respective representativity declines. From above, pressures on nation-state sovereignty are manifest in the growing number of international organizations empowered through their constitutional treaties to adopt international legal measures binding on Member States, especially international schemes incorporating adjudicatory bodies empowered to dispositively and bindingly interpret the governing international legal instruments. From below, international human rights doctrines of individual claiming rights against nation-states are expanding into individual claiming rights against multinationals and other private actors. In addition, international NGOs are playing increasing roles in enforcement of international trade as well as human rights norms, and are pressing vocally for expanded roles in the negotiation and setting of the standards themselves. At the functional level, the growing roles of worker rights NGOs and trade associations are cutting into the previous predominant role of trade unions and employer associations in unitarily representing workers and employers respectively.

There is some irony in the idea of the ILO negotiating country-by-country agreements aimed at gradually bringing laggard Member States into compliance with international standards. During the pre-World War II history of the ILO, few overall instruments were enacted, while many were adopted on a fragmented basis, industry-by-industry or sector-by-sector. This was viewed as thwarting the basic purpose of taking minimum standards out of competition, among countries, among industries, and among companies. The risks of fragmentation and a downward competitive spiral in labor standards or their application to actual working conditions, may only be aggravated by the codes of conduct and other NGO initiatives, as well as global and international collective agreements, which likewise represent a partial return the fragmented approach of the earlier epoch. They are negotiated to each cover a single multinational company nad its supply chain, or, less often, a portion of a global industry.

This writer is deeply skeptical about whether these developments merit heralding as a leading edge towards a new international order with renewed and enhanced power for workers' interests. Instead, one cannot help but be concerned about the divide and conquer potential of fragmentation on all three of the tripartite sides at international as

well as domestic levels. The future of international labor standards may be more formal standards, covering fewer and fewer countries, companies and workers, posing ever greater obstacles to turning the law on the books into workers' reality in fact.

At the same time, innovative trade union and worker organizations are combining across boundaries to push the limits of transnational labor cooperation, pooling their economic and political power to improve each other's collective bargaining power. The optimistic scenario is that in the end, at least some of the workers of the world will unite, using their shared collective leverage, coupled with the moral suasion of international norms, to make a reality of international labor standards.

¹ On the origins and history of the ILO, see generally Albert Thomas, *The International Labour Organisation, Its Origins, Development and Future*, 1 INT'L LAB. REV. 5 (1921); C. Wilfred Jenks, *The Origins of the International Labor Organization*, 30 INT'L LAB. REV. 575 (1934); Edward Phelan, *The Contribution of the I.L.O. to Peace*, 59 INT'L LAB. REV. 607 (1949). The Constitution of the International Labour Organisation, as originally adopted, constitutes Part XIII of the Treaty of Versailles, June 28, 1991, T.S. 874, 2 Bevans 241 [hereinafter "Original ILO Constitution"].

² 38 Stat. 731, codified as 15 U.S.C. § 17 (2007).

³ Annex to the Constitution of the International Labour Organisation, as amended, Oct. 9, 1946, T.I.A.S. 1868. The "General Principles of the ILO," contained in Original ILO Constitution, Art. 427, likewise emphasize "that labour should not be regarded merely as an article of commerce. . ." and declare this to be the first "guiding principle."

⁴ I discuss this problem in greater detail in "Architectural Digest for International Trade and Labor Law; Regional Free Trade Agreements and Minimum Criteria for Enforceable Social Clauses," University of Maryland Legal Studies Research Paper No. 2006-2, *available at* http://ssrn.com/abstract=879743.

⁵ Original ILO Constitution, Art. 389. The substantially identical current provision is Constitution of the International Labour Organisation, as amended, June 22, 1972, 25 U.S.T. 3253, Art. 3 § 1, *available at* http://www.ilo.org/ilolex/english/iloconst.htm [hereinafter "Current ILO Constitution"].

⁶ Original ILO Constitution, Art. 389; Current ILO Constitution, Art. 3 § 5. This language has remained unchanged since the original version.

⁷ Original ILO Constitution, Art. 405; Current ILO Constitution, Art. 19.

⁸ Original ILO Constitution, Arts. 389, 405; Current ILO Constitution, Art. 3, 19.

⁹ Original ILO Constitution, Art. 390(1); Current ILO Constitution, Art. 4(1).

¹⁰ *Id.*, Art. 19(5)(b), (c). These provisions were strengthened from the version in Original ILO Constitution Art. 405.

¹¹ Current ILO Constitution, Art. 19(5)(d),(e).

¹² *Id.*, Art. 19(6)(a). The original language differed in wording but not in the substance of the obligation. *See* Original ILO Constitution, Art. 405.

¹³ *Id.*, Art. 405; Current ILO Constitution, Art. 19(6)(c).

¹⁴ See Treaty Establishing the European Community (Consolidated Version), Arts. 138, 139.

¹⁵ Phelan, *supra* note 1, 59 INT'L LAB. REV. at 608-09. Edward Phelan served as the Director-General of the ILO during World War II.

¹⁶ Original ILO Constitution, Arts. 389, 390; Current ILO Constitution, Arts. 3(9), 4(3).

¹⁷ See, e.g., Phelan, supra note 1, 1 INT'L LAB. REV. at 622.

¹⁸ Phelan, supra note 1, 1 INT'L LAB. REV. at 614.

¹⁹ See generally, e.g., Nicolas Valticos, International Labor Standards and Human Rights: Approaching the Year 2000, 137 INT'L LAB. REV. 135, 143 (1998); Lee Swepston, Human rights law and freedom of association: Development through ILO supervision, 137 INT'L LAB. REV. 169 (1998).

²⁰ Current ILO Constitution, Art. 22.

²¹ On the Committee of Experts, see generally Isabelle Boivin & Alberto Odero, *The Committee of Experts on the Application of Conventions and Recommendations: Progress achieved in national labour legislation*, 145 INT'L LAB. REV. 207 (2006).

²² See, e.g., Patrick Bollé, Perspectives: Supervising Labour Standards and Human Rights: The Case of Forced Labour in Myanmar (Burma), 137 INT'L LAB. REV. 391, 396 (1998).

²³ Current ILO Constitution, Arts. 19(5)(e), 19(6)(d). See, e.g., Bollé, supra note 22, at 404.

²⁴ See Swepston, supra note 19, at 175-76. See also Valticos, supra note 19, at 143-44; Boivin & Odero, supra note 21, at 207.

²⁵ Current ILO Constitution, Art. 24. *See*, *e.g.*, Bollé, *supra* note 22, at 397; Swepston, *supra* note 19, at 174-75.

- ²⁶ Current ILO Constitution, Arts. 26, 30. *See*, e.g., Bollé, *supra* note 22, at 397-98; Landy, *The Influence of International Labour Standards: Possibilities and Performance*, 101 INT'L LAB. REV. 555, 584-85 (1970).
- ²⁷ *Id.* Arts. 29, 31, 32, 33. *See* Bollé, *supra* note 22.
- ²⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, S. Exec. Doc. E, 95-2 (1978), 6 I.L.M. 368 (1967).
- ²⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, S. Exec. Doc. D, 95-2 (1978), 6 I.L.M. 368. Moreover, the ICCPR Art. 22, and ICESCR, Art. 8 provisions on freedom of association each cross-reference ILO Convention No. 87, to ensure legislative consistency. *See* Swepston, *supra* note 19, at 172-73.
- ³⁰ General Agreement on Tariffs and Trade 1994 [hereinafter "GATT 1994"], and Marrakesh Agreement Establishing the World Trade Organization, Annex 1A to GATT 1994, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994); Final Act Embodyng the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).
- ³¹ General minimum age instruments from this period include Convention No. 5, Minimum Age (Industry) (1919); Convention No. 59 (Minimum Age (Industry) (Revised) (1937); Convention No. 10, Minimum Age (Agriculture) (1921); Convention No. 33, Minimum Age (Non-industrial Employment) (1932); Convention No. 60, Minimum Age (Non-industrial Employment) (Revised) (1937) Recommendation No. 41, Minimum Age (Non-Industrial Employment) (1932); Recommendation No.52, Minimum Age (Family Undertakings) (1937). For specialized instruments regarding young workers see ILO, International Labour Standards by Subject at 2-4,7, 12, 15, 18-19 (2007) (listing Conventions and Recommendations), *available at* http://www.ilo.org/ilolex/english/subjectE.htm.
- ³² Convention No. 138, Minimum Age (1973). *See also* Recommendation No. 146, Minimum Age (1973).
- ³³ Convention No. 182, Worst Forms of Child Labor (1999). *See also* Recommendation No. 190, Worst Forms of Child Labor (1999).
- ³⁴ Convention No. 4, Night Work (Women) (1919);. Convention No. 41, Night Work (Women) (Revised) (1934); Convention No. 3, Maternity Protection (1919); Recommendation No. 12, Maternity Protection (Agriculture) (1921); Convention No. 45, Underground Work (Women) (1935); Recommendation No. 4, Lead Poisoning (Women and Children) (1919); Recommendation No. 26, Migration (Protection of Females at Sea) (1926).
- ³⁵ Convention No. 100, Equal Remuneration (1951); Recommendation No. 90, Equal Remuneration (1951); Convention No. 111, Discrimination (Employment and Occupation) (1958) Recommendation No. 111, Discrimination (Employment and Occupation) (1958).
- ³⁶ Convention No. 102, Social Security (Minimum Standards) (1952). See Simon Deakin & Mark Freedland, Updating International Labor Standards in the Area of Social Security: A Framework for Analysis, 27 COMP. LAB. L. & POL'Y J. 151, 157 (2006); Alain Supiot, The Outlines of a Framework Agreement on the Extension of Social Protection, 27 COMP. LAB. L. & POL'Y J. 272, 285-86 (2006).

³⁷ Convention No. 156, Workers with Family Responsibilities (1981), superseding Recommendation No. 123, Employment (Women with Family Responsibilities) Recommendation (1965).

- ³⁸ Convention No. 171, Night Work (1990); Protocol of 1990 to Convention No. 89, Night Work (Women) (Revised) (1948).
- ³⁹ Convention No. 175, Part-Time Work (1994); Recommendation No. 182, Part-Time Work (1994); Convention No. 177, Home Work (1996); Recommendation No. 184, Home Work (1996). However, only five countries have ratified Convention No. 177. http://www.ilo.org/ilolex/cgi-lex.ratifce.pl?C177 (last visited January 25, 2008).
- ⁴⁰ Convention No. 26, Minimum Wage-Fixing Machinery (1928); Recommendation No. 30, Minimum Wage-Fixing Machinery (1928); Convention No. 52, Holidays with Pay (1936); Recommendation No. 47, Holidays with Pay (1936); Convention No. 54, Holiday with Pay (Sea) (1936).
- ⁴¹ Convention No. 47, Forty-Hour Week (1935). For earlier instruments regulating hours of work in specific industries and occupations, see International Labour Standards by Subject, *supra* note 31, at 9-11.

⁴² See id. at 11-13.

⁴⁴ On the immediate, post-World War II period, see generally *The International Labour Organisation Since the War*, 67 INT'L LAB. REV. 109, 129, 143-46 (1953).

⁴⁵ The most significant include Convention No. 87, Freedom of Association and Protection of the Right to Organise (1948); Convention No. 98, Right to Organise and Collective Bargaining (1949); Convention No. 135, Workers' Representatives (1971); Convention No.151, Labour Relations (Public Service) (1978); Convention No. 154, Collective Bargaining (1981); Recommendation No. 113, Consultation (Industrial and National Levels) (1960); Convention No. 144, Tripartite Consultation (International Labour Standards) (1976).

⁴⁶ Convention No. 102, Social Security (Minimum Standards) (1952). See generally The International Labour Organisation Since the War, supra note 44, at 146-49. An excellent review of the substance of this instrument and prospects for its future may be found in Deakin & Freedland, supra note 36.

⁴⁷ See Convention No. 158, Termination of Employment (1982). See also Recommendation No. 119, Termination of Employment (1963); Recommendation No. 166, Termination of Employment (1982).

⁴⁸ See generally, e.g., Landy, supra note 26, and the national studies cited therein, id. at 560 n. 1; Boivin & Odero, supra note 21.

⁴⁹ See, e.g., Landy, supra note 26, at 591-95.

⁵⁰ See, e.g., id. at 589.

⁵¹ See, e.g., id. at 598-02; as to freedom of association guarantees, see also Swepston supra note 19, at 171-74.

⁵² See, e.g., Harold Dunning, The origins of Convention No. 87 on freedom of association and the right to organize, 137 INT'L LAB. REV. 149, 166 (1998).

⁵³ See generally Hilary Kellerson, The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future, 137 INT'L LAB. REV. 223 (1998).

⁵⁴ See generally, e.g., James Atleson, et al., International Labor Law: Cases and Materials on Workers' Rights in the Global Economy 438-74 (2008).

⁵⁵ Bipartisan Trade Promotion Authority Act of 2002 (BTPAA), 19 U.S.C. §§ 3801-3813, Title XXI of P.L. 107-210, the Trade Act of 2002.

⁵⁶ See generally, e.g., Marley S. Weiss, Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, Via Chile, To Latin America and Beyond, 37 U.S.F. L. Rev. 689 (2003).

⁵⁷ 28 U.S.C. § 1350 (2007).

58 See generally, e.g., ATLESON et al., supra note 54, at 571-623.

⁵⁹ See generally, e.g., id. at 475-570.

⁶⁰ See generally, e.g., id. at 174-93.

⁶¹ See Weiss, supra note 56.

⁶² See Supiot, supra note 36; Deakin & Freedland, supra note 36.

⁴³ See id. at 13-16.