

audience that extends beyond the ILO and its traditional constituency to a range of “others”: other institutions of international economic policy like the World Trade Organization, and the Organization for Economic Cooperation and Development, and national actors beyond ministers of labor like trade and foreign affairs; and, other non-state actors, including corporate actors like multinational enterprises and civil society groups that are defined by identities or status (e.g., age, gender, race/ethnicity, religion, or immigration status) other than strictly and exclusively that of “worker.” And in the process it is harnessing the renewed ability to persuade concerned policy makers that in the face of a deeply inequitable global environment, a strong ILO is in our global best interest<sup>9</sup>: if you seek peace, cultivate justice.<sup>10</sup>

## THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION

By Laurence R. Helfer\*

### INTRODUCTION

For the first time in nearly a decade, the Society has devoted a panel to international labor law.<sup>1</sup> In a world increasingly dominated by the effects of globalization, it is surprising that this body of international law and the organization responsible for developing it—the International Labour Organization (ILO)—have received such short shrift. The ILO has, after all, close to a century of experience grappling with the effects of transborder flows of goods and services on the people who produce them. These are subjects of great interest in this era of offshoring and outsourcing.

Part of the reason why the international labor law has received limited attention from scholars, policymakers, and NGOs is that the ILO is widely perceived to be a weak and ineffectual institution. Even international law’s cognoscenti have expressed the view that the ILO has “been around forever,” it has “also has done nothing forever, [and] so . . . is not terribly interesting.”<sup>2</sup> To be candid, this critique has some bite—but only some. It should hardly be surprising that an organization that has survived since the end of the First World War has experienced periods of greater and lesser efficacy.<sup>3</sup>

Over the last few years, however, the ILO, led by its Director General and the ILO Office, has ushered in a period of innovation. It has learned from the successful strategies of other international organizations and from its own past mistakes to reform its structures and functions. Because many of these developments are unknown outside the ILO, I begin my remarks with a brief discussion of four ways in which the organization has reoriented its mandate to reflect better the demands of a globalized economy.<sup>4</sup> I then offer three suggestions for future initiatives that the ILO should undertake to bolster these reforms.

<sup>9</sup> See Francis Maupain, *Persuasion et contrainte aux fins de la mise en oeuvre des normes et objectifs de l’OIT*, in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L’AVENIR: MÉLANGES EN L’HONNEUR DE NICOLAS VALTICOS 687* (Jean-Claude Javillier & Bernard Gernigon eds., 2004).

<sup>10</sup> *Si vas pacem cole justitiam*, inscription on the founding stone of the ILO’s first building, which now houses the WTO.

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<sup>1</sup> *Is There an Emerging Transnational Regime for Labor Standards?* 93 ASIL PROC. 380 (1999).

<sup>2</sup> *The Challenge of Non-State Actors*, 92 ASIL PROC. 20, 35 (1998) (statement of Jessica Tuchman Mathews, President of the Carnegie Endowment for International Peace).

<sup>3</sup> For an analysis of the ILO’s rich and varied history, see Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

<sup>4</sup> For a more detailed discussion of these issues, see *id.* at 704–17.

#### FOUR RECENT INNOVATIONS AT THE ILO

The first and most prominent change in the ILO is the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work. The Declaration requires ILO member states “to respect, to promote and to realize, in good faith[,]” the “principles concerning” four fundamental labor rights—freedom of association, elimination of forced labor, abolition of child labor, and non-discrimination in employment.<sup>5</sup> Because these obligations emanate directly from the ILO constitution, they apply to all member states without regard to the treaties they have ratified or their level of economic development. The Declaration thus creates a new, universally applicable normative polestar for international labor law, one that has since become the benchmark for workers’ rights protections in other international regimes.<sup>6</sup>

A second innovation is the campaign launched by the Director General to encourage all member states to ratify eight conventions that protect fundamental labor rights with greater specificity than the Declaration. The campaign has generated close to 500 new ratifications.<sup>7</sup> What is equally remarkable, however, is that ILO officials have actively and successfully pressured governments to ratify legal instruments that the organization had previously adopted.

A third and related change concerns the pruning of international labor law’s dead wood. The ILO has adopted 185 treaties and a similar number of recommendations since 1919, a majority of which are now moribund. In an effort to clean house, the ILO Office advocated the removal of outdated instruments from the ILO monitoring system. It has urged states to denounce old treaties and ratify their corresponding revising conventions, and it has proposed an amendment of the ILO constitution to authorize the organization to abrogate outmoded treaties still in force.

A fourth development relates to the organization’s response to Myanmar’s flagrant breaches of the 1930 Forced Labor Convention and the Declaration’s parallel ban on forced labor. The hostile response of the country’s military leaders ruled out the shaming strategies that are the bread and butter of ILO monitoring, leaving sanctions as the only viable option. Although the organization had never exercised its authority to penalize one of its member states, in 2000 it adopted a resolution invoking the compliance clause in the ILO constitution for the first time. Since then the membership has proceeded cautiously and incrementally as military officials have prevaricated in response to various forms of pressure by ILO officials. Myanmar’s continuing recalcitrance raises important credibility issues for the organization, a subject that I address in greater detail below.

#### THREE FUTURE INITIATIVES FOR THE ILO

The four changes summarized above indicate that the ILO has made substantial progress in reforming its activities and restructuring international labor law. There are challenges ahead for the organization, however, and this section identifies three of the most important.

First, the ILO has fallen behind on corporate social responsibility (CSR) issues. In 1977 it adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and

<sup>5</sup> Int’l Lab. Org., Declaration on Fundamental Principles and Rights at Work ¶ 2 (June 1998).

<sup>6</sup> Office of the U.S. Trade Representative, Bipartisan Agreement on Trade Policy: Labor (May 2007), available at <[http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2007/asset\\_upload\\_file627\\_11284](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file627_11284)>.pdf (setting forth an agreement between the Congress and the President to include in future trade treaties “enforceable reciprocal obligation[s] . . . to adopt and maintain” the international labor principles contained in the 1998 Declaration).

<sup>7</sup> Helfer, *supra*, at 708–09.

Social Policy.<sup>8</sup> This was one of the earliest instruments articulating the legal and political commitments of corporations, and it could have served as the basis for future developments relating to workplace protections and human rights. As the Tripartite Declaration has aged, however, it has been eclipsed by an explosion of CSR initiatives in UN agencies, regional organizations, and private standard-setting bodies. These initiatives have generated a surfeit of competing codes of conduct, guidelines, and nonbinding norms, each of which seeks to guide corporate behavior.

These duplicative standards have created confusion and have enabled multinational businesses to forum-shop for the most favorable standards. The ILO has done little to address these problems. Its Subcommittee on Multinational Enterprises has taken some modest steps, such as gathering information, sharing existing best practices, and surveying the implementation of the Tripartite Declaration. But the Subcommittee's work does not enjoy strong institutional support.<sup>9</sup>

The ILO needs to promote CSR issues with the same or greater zeal that it has used to promote the 1998 Declaration. The ILO is the only international organization in which employers and workers are fully fledged members. It is thus uniquely positioned to take a leadership role in promulgating and monitoring a comprehensive set of CSR standards that integrates the most effective elements from the many alternatives developed in other international venues.

A second challenge the organization faces is how to forge closer links with human rights and consumer NGOs. One of the paradoxes of admitting worker and employer groups as members has been the marginalization of other non-state actors. The absence of these actors mattered little when governments, trade unions, and employer associations were the most important social and political forces in the ILO's member countries. But as the corporatist model of social relations has atrophied with the decline of organized labor, ILO officials have not made sufficient attempts to include civil society groups in the organization's work.

To be sure, there have been some successful initiatives, such as the campaigns against child labor in Pakistan's soccer ball stitching industry and in certain agricultural sectors in Africa. But these efforts have yet to be systematized or extended beyond child labor. To jump-start the process, the ILO should adopt an aggressive affirmative action campaign for civil society. Rather than working with NGOs on a piecemeal basis, the organization should actively reach out to non-state actors and include them as partners in future ILO initiatives. Such a campaign will likely be controversial with workers and employers wary of diluting their authority in the organization. It is essential, however, if the ILO is going to thrive in a legal and political environment in which civil society groups have increasing influence.

Third and finally, the ILO must take a firm position on sanctions against Myanmar. The existing approach of applying incremental pressure has produced only limited results. The country's military rulers know when and just how much to yield to avoid serious condemnations. What the ILO's many investigations and resolutions have done, however, is to create a solid factual and legal record of non-compliance to support a future resolution authorizing its member states to impose stringent economic sanctions against the country and its leadership.

If the ILO is nervous about adopting such a resolution, it might first seek an advisory opinion from the International Court of Justice. The ILO Office has studied this option as

<sup>8</sup> International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 17 ILM 422 (1978).

<sup>9</sup> Virginia A. Leary, *Nonbinding Accords in the Field of Labor*, in *INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS* 247, 250 (Edith Brown Weiss ed., 1997).

well as the possibility of requesting the prosecutor of the International Criminal Court to commence an investigation of forced labor in Myanmar as a crime against humanity.<sup>10</sup> Either move would markedly increase the ILO's visibility and put added pressure on the country to comply with its treaty obligations. By contrast, if the ILO shies away from imposing sanctions when the violations of international labor law are so flagrant and well-documented, it will undermine its recent innovations and will only add to its past reputation as a weak and ineffectual organization.<sup>11</sup>

## THE FUTURE OF ILO LAW, AND THE ILO

*By Brian Langille\**

The main claim of this essay is that the relationship between ILO law, on the one hand, and the ILO itself, on the other, is an important but neglected topic. Clarifying this relationship is a matter of great importance for the organization.

The ILO's constitution, in its original 1919 preamble and in the 1944 Declaration of Philadelphia, makes many claims about how the world is and how it ought to be.<sup>1</sup> It sets out the goals and aspirations, that is, the purposes or "ends" of the organization. The constitutional text, which follows the preamble, articulates the means for achieving those ends. Reading the constitutional text, it would appear that law is *the* means for achieving those ends. The text is all about the creation of law and then the application of that law. Nothing else. This is not a technical legal point but, rather, a point that carries significant weight and has great explanatory power in connection with the critical dilemmas facing the ILO. It has real implications for the legitimacy of ILO activities, their effectiveness, and for the future of the organization.

Let me explain this assertion. We can begin by repeating what many others have said—ILO law is in trouble. The indicia of this are plentiful, but the main points are these. First, lawmaking is slowly coming to a halt at the ILO. Second, ratification rates are generally poor for laws that do get made. Third, reporting rates are poor for those laws made and ratified. And, finally, no objective method exists to assess the real, as opposed to formal, impact of the law when it is made, ratified, and reported on—i.e., fully operable. All of this has happened for a reason, which I discuss below. But first it is important to see where these truths have led the ILO.

The result is that ILO law, the ILO's constitutional means of action, is unavailable to advance the ends it is meant to serve. As a result, it is increasingly an irrelevancy to the ILO. A large chasm has grown between the "legal," on the one hand, and the real life "economic" or "development," on the other side of the "House." Because the legal means are not available, non-legal methods of direct operation become the normal mode of operation. The legal wheels, to the extent they spin, spin freely. Major initiatives do not move through the constitutionally mandated parliamentary process. No one votes for them. Much of the

<sup>10</sup> Int'l Lab. Off., Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.297/8/2 (Geneva, Nov. 2006).

<sup>11</sup> On February 26, 2007, Myanmar agreed to the appointment of an ILO Liaison Officer who will receive and review complaints of forced labor in the country. Int'l Lab. Off., Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB 298/5/1 (Geneva, Mar. 2007). It remains to be seen whether Myanmar will honor these new commitments.

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<sup>1</sup> For a discussion, see Brian Langille, *Re-reading the Preamble to the 1919 ILO Constitution*, 42 COLUM. J. TRANSNAT'L L. 87 (2003).