

## **Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work**

*By Erika de Wet\**

### **A. Introduction**

#### *I. Promotion, Persuasion and the Mandate of the International Labour Organization*

The current contribution will elaborate on the manner in which the Declaration of the International Labour Organization (ILO) on Fundamental Principles and Rights at Work<sup>1</sup> (hereinafter the 1998 Declaration) functions as an instrument of governance for the purpose of promotion and persuasion. The purpose of this activity is to improve the observance by States of certain principles contained in the 1998 Declaration. At the outset one should stress that this governance technique is a trade mark of the ILO as a whole and not only of the 1998 Declaration. The basic premise of the ILO is to rely on cooperation and dialogue rather than sanctions in its efforts to realize its goals.

Public promotion and moral persuasion involve mobilizing peer pressure and shaming through the threat, or act, of exposing breaches of international labour standards to the international community. Technical assistance, which constitutes a particular concretisation of promotion and persuasion, ranges from advising on

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\* *Dr. Iur., LL.M (Harvard); Professor of International Constitutional Law, Universiteit van Amsterdam, The Netherlands; Extraordinary Professor, North-West University (Potchefstroom campus South Africa) and at the University of Pretoria (South Africa). The research was conducted during a sojourn at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany), with the financial support of the Alexander von Humboldt Foundation. This contribution also forms part of a so-called VICI Project of the Netherlands Organisation for Scientific Research (NWO) titled: The emerging international constitutional order: the implications of hierarchy in international law for the coherence and legitimacy of international decision-making. The author would like to thank Mr. Lee Swepton and Ms. Anne Trebilcock for critical comments to earlier drafts. Email: e.dewet@uva.nl.*

<sup>1</sup> Adopted by the International Labour Conference, 86th Session, 18 June 1998. See International Labour Conference, Record of Proceedings, Nos. 20 and 22 (86th Session Geneva 1998).

legislative reform and training of government officials to strengthening the capacity of governments, workers organisations and employers organisations for realizing international labour standards.<sup>2</sup> The ILO does not have the means or the mandate to engage in governance techniques such as black-listing or the imposition of financial sanctions, as may be the case with, for example, the United Nations Security Council. Instead, its governance techniques are more comparable to those of many human rights supervisory bodies within the United Nations system. All of these systems rely on reporting, dialogue and technical assistance as a mechanism for enforcing certain international obligations and none of them possess any coercive powers.

In the case of the ILO the 1998 Declaration attempted to intensify the impact of these techniques by placing certain fundamental principles at the centre of its activities and thereby sharpening the focus of its governance techniques. This implies that the public authority exercised by the 1998 Declaration takes the form of “determination through influence.”<sup>3</sup> The promotional activities encourage the ILO’s tripartite constituents (see section A.2. below) to adopt legislation and practices that further a particular public interest in the form of decent working conditions. In this manner the tripartite constituents are pressured to conform to a certain behaviour, which implies a *de facto* (albeit sometimes modest) limitation of their freedom to determine labour conditions without external constraints. The influence exercised in this manner can be avoided, but this would result at the cost of losing face or reputation. The promotional activities are “public” in as far as they take place within the framework provided for and in accordance with the principles articulated by the ILO Member States in the ILO Constitution.

### 1. *The Origin and Purpose of the ILO*

Before engaging in an analysis of the technique of promotion and persuasion as embodied in the 1998 ILO Declaration, one should explain the institutional setting in which this instrument functions, including the origin and purpose of the ILO. The ILO is the United Nations specialized agency, which seeks the promotion of social justice and human rights since the end of the First World War through the creation of decent working-conditions. Its standard-setting activities are directed

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<sup>2</sup> Austina Reed and Charlotte Yates, *The ILO Declaration on Fundamental Principles and Rights at Work: The Limitations to Global Labour Standards*, in *THE AUTO PACT: INVEST, LABOUR AND THE WTO* 249 (Maureen Irish ed., 2004). Within the national context the social partners are also mobilized around the 1998 Declaration through technical assistance projects. This, in turn, can lead to institutional and legislative reform in areas pertaining to the eight fundamental Conventions. Available at: <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE>. See also, *infra*, note 44.

<sup>3</sup> For a definition of “public authority,” see von Bogdandy, Dann and Goldmann, in this issue.

principally at the workforce in the formal as well as informal economy.<sup>4</sup> The ILO was founded in 1919 and is the only surviving significant creation of the Treaty of Versailles, which also brought the League of Nations into being.

Attempts to internationalize labour regulation date back to the nineteenth century when, in the wake of the industrial revolution, labour activists such as Robert Owen (1771-1853) and Daniel Legrand (1783-1859) advocated the need for an international labour organisation. In 1901, these efforts resulted in the foundation of the forerunner to the ILO, the International Association for Labour Legislation, based in Basel. Before the outbreak of the First World War, the Association engaged in the translation and publication of European labour laws and initiated the first two labour Conventions, which banned the use of white phosphorous and regulated night work in industry by women and young persons.<sup>5</sup>

The creation of the ILO at the end of the First World War was underpinned by four motivations. First, improving working conditions was considered a humanitarian issue. Second, there was a broad consensus that industrial peace and international peace were closely related and there was considerable fear for social disorder due to deteriorating labour conditions. Thirdly, there was economic concern about the consequences of the cost of production of social reform and the unequal playing field that would result, if such reforms were undertaken only by some. Finally, the parties at the table in Versailles were convinced that if social protection was not increased, world peace would be severely threatened by countries that undermined labour standards and promoted social dumping.<sup>6</sup> The adoption of the ILO Constitution in Part XIII of the Treaty of Versailles created an institutional framework for the setting and implementation of international labour standards. This framework was subsequently complemented by the Declaration of Philadelphia of 1944, which in 1946 became an integral part of the Constitution and reaffirmed the fundamental

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<sup>4</sup> The formal economy pertains to income-generating activities that take place within a formal regulatory framework. The informal economy concerns those income generating activities which take place outside the formal regulatory framework. See Reed and Yates (note 2), at 248. For the extent to which international labour standards address people in the informal economy, see Anne Trebilcock, *International Labour Standards and the Informal Economy*, in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS* 588 *et seq.* (ILO ed., 2004).

<sup>5</sup> International Labour Office, *Women and Work: Selected ILO policy documents*, 3 (1994); HÉCTOR G. BARTOLEMEI DE LA CRUZ *ET AL.*, *THE INTERNATIONAL LABOUR ORGANIZATION* 4 *et seq.* (1996).

<sup>6</sup> CHRISTINE KAUFMANN, *GLOBALISATION AND LABOUR RIGHTS: THE CONFLICT BETWEEN CORE LABOUR RIGHTS AND INTERNATIONAL ECONOMIC LAW* 49 (2007); Nicolas Valticos and Geraldo Von Potobsky, *International Labour Law*, in *I INTERNATIONAL ENCYCLOPEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS* 34 *et seq.* (ILO ed., 1994).

principles on which the ILO is based.<sup>7</sup> In 1946, the ILO became the first specialized agency of the United Nations (UN), in accordance with Article 57 of the UN Charter.<sup>8</sup>

## 2. *Organs and Standard Setting*

A unique feature of the ILO is its tripartite structure, in accordance with which representatives of governments, employers and workers are represented in all of its executive bodies.<sup>9</sup> The inclusion of representatives of workers and unions alongside those of governments in the norm-setting activities of the ILO was aimed at strengthening the acceptance and enforcement of the international labour standards by those most affected by these standards. The ILO executive bodies concern in particular the International Labour Conference and the Governing body. The International Labour Conference meets annually in Geneva and each Member State is represented by two government delegates, an employer delegate and a worker delegate. The International Labour Conference establishes and adopts international labour standards, sets a discussion forum for important labour issues, as well as supervises the application of international labour standards at the national level.<sup>10</sup>

The Governing Body constitutes the executive council of the ILO and is composed of 28 government members, 14 employer members and 14 worker members. During its three annual meetings in Geneva it sets the policy of the ILO, including the setting of the agenda of the International Labour Conference and bi-annual budget, which are then submitted to the International Labour Conference for adoption, as well as the election of the Director-General of the ILO.<sup>11</sup> The International Labour Office is the permanent secretariat of the ILO and constitutes the focal point for the overall activities of the organization. It is accountable to the Governing Body and functions under the leadership of a Director General, who is elected for a five-year

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<sup>7</sup> KAUFMANN (note 6), at 51.

<sup>8</sup> The agreement also specifically committed the ILO to operating consistently with the purposes of the UN Charter and, in particular, Art. 55. See Janelle Diller, *UN Sanctions—The ILO Experience*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 197 (Vera Gowlland-Debbas ed., 2001).

<sup>9</sup> KAUFMANN (note 6), at 50.

<sup>10</sup> Valticos and Von Potobsky (note 6), at 40 *et seq.*

<sup>11</sup> Ten of the government seats are permanently held by States of chief industrial importance. Representatives of other member States are elected in the Conference every three years, taking into account geographical distribution. The employers and workers elect their own representatives respectively. See also Valticos and Von Potobsky (note 6), at 42 *et seq.*

renewable term.<sup>12</sup> The International Labour Office currently employs almost 2000 officials at the Geneva headquarters and 40 field offices around the world.<sup>13</sup>

The standard setting activity of the ILO has traditionally been achieved through Conventions and Recommendations.<sup>14</sup> Conventions are international treaties that are open to ratification by Member States. Recommendations are intended to guide national action, but are not open to ratification and are not legally binding. Member States are obliged to bring all Conventions and Recommendations to the attention of their Parliaments or other authorities that are competent to ratify international treaties and enact implementing legislation, within 18 months after the adoption of the respective instrument by the International Labour Conference.<sup>15</sup>

The ratification rate of most of the Conventions has remained low throughout the years.<sup>16</sup> On the one hand, it would not be accurate to measure the impact of the ILO Conventions exclusively on the basis of their formal ratification. The ongoing dialogue between the International Labour Office and States means that many labour laws that are adopted are influenced by the standards reflected in these Conventions, regardless of whether they are ratified. On the other hand, the formal ratification rate and impact of the Conventions do suffer as a result of several factors pertaining to their substance and manner of adoption. These factors include the increasingly detailed and sectoralized (specialized) nature of the Conventions; the tendency of the workers' group to secure maximum protection that remains out of reach for many developing countries<sup>17</sup>; the lack of involvement of the ILO regional field offices during the standard-setting process; as well as insufficient appreciation

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<sup>12</sup> Valticos and Von Potobsky (note 6), at 43; *see also*: <https://www.ilo.org> (last visited 3 June 2008).

<sup>13</sup> The ILO has international legal personality and currently consists of 181 member States. *See* Art. 39 ILO Constitution, text available at: <https://www.ilo.org> (last visited 3 June 2008).

<sup>14</sup> In light of the tripartite nature of the ILO, no reservations against ILO Conventions are possible. Valticos and Von Potobsky (note 6), at 40; KAUFMANN (note 6), at 50.

<sup>15</sup> Art. 19(5)(b) ILO Constitution, text available at: <https://www.ilo.org> (last visited 3 June 2008).

<sup>16</sup> For example, of the 17 Conventions adopted by the Conference during the 1980s, the highest number of ratifications registered for any of these instruments were 73. Of the 14 Conventions adopted during 1990, only the Prohibition of the Worst Forms of Child Labour Convention, 1999 (No 182) attracted a high number of ratifications. Of the remaining conventions, the highest ratification rate was 20. *See* William R. Simpson, *Standard-Setting and Supervision: A System in Difficulty*, in *LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 52* (ILO ed., 2004).

<sup>17</sup> European Union Member States in particular tend to force standards to their level of achievement, without considering the needs of developing countries. For their part, many developing countries do not sufficiently take part in the negotiation process.

of the social realities by the technical units of the International Labour Office and certain interests groups within the Governing Body, where many of the standards initiate.<sup>18</sup> In addition, the intensification of globalization during the 1990s resulted in a discussion of the utility of international labour standards in the post Cold War era. Many governments argued that they deprive countries of their competitive advantage.<sup>19</sup>

By the mid 1990s, it was clear that the ILO standard-setting mechanism was facing severe challenges. The organization had to redefine its role and priorities in order to survive in the post Cold War era. The ILO commenced with a renewal process which inter alia resulted in the withdrawal of several older standards, following a Governing Body review of all pre-1985 standards between 1995 and 2002.<sup>20</sup> At the time it also designated 73 Conventions as fully up to date.<sup>21</sup> In addition, The ILO decided to sharpen its profile by concentrating its promotional activities on so-called fundamental rights and principles at work. This decision ultimately resulted in the adoption of the 1998 Declaration which, as will be explained below, was identified as a feasible vehicle for the promotion of these rights and principles.

### *3. The Adoption of the 1998 Declaration: Streamlining and Focusing Promotional Activities*

The text of the 1998 Declaration and its follow-up mechanism, which was adopted unanimously by the International Labour Conference on 18 June 1998, had been negotiated over a period of two years and in close collaboration with all ILO tripartite constituents (governments, employer organizations and workers organizations).<sup>22</sup> Input was also received from United Nations specialized agencies and non-governmental organizations (NGOs) with ILO observer status. However, unlike the tripartite constituents of the ILO, these entities do not have voting rights within the organization and their influence was therefore indirect.

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<sup>18</sup> Simpson (note 16), at 50 *et seq.*

<sup>19</sup> KAUFMANN (note 6), at 50.

<sup>20</sup> Of the prior 185 conventions, Nos 4, 15, 20, 21, 28, 31, 34-40, 43, 46, 48-51, 60, 61, 64-67, 86, 91 and 104 have been withdrawn. Of the 195 Recommendations, Nos. 1, 5, 11, 15, 37-39, 42, 45, 50, 51, 54, 56, 59, 63-66, 72 and 73 have been withdrawn. See KAUFMANN (note 6), at 51; Brian A. Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 425 (2005).

<sup>21</sup> In 1997 the International Labour Conference adopted an amendment to the ILO Constitution, which would allow for the abrogation of a convention in force but recognized as obsolete if two-thirds of delegates voted for such a measure. This amendment has been ratified by more than 80 states but still falls short of the requirements for entering into force. Available at: <http://www.ilo.org>.

<sup>22</sup> ILO Press Release, 98/23, 29 May 1998.

The timing of the 1998 Declaration was the result of the concerns during the 1990s both within and outside the ILO over the processes of globalization and the possible social consequences of trade de-regulation.<sup>23</sup> On the one hand, there was a quest for more flexibility in labour standards, whilst on the other hand there were concerns that the lowering of international labour standards would result in social dumping practices, where cheaply manufactured goods were sold below the cost of production. Within the ILO the conviction grew that in order to promote international labour standards effectively in these circumstances it needed to adopt a more flexible approach. Its promotional activities should focus in particular on standards which enjoy universal acceptance, as the universality claim would strengthen the moral and political case for their implementation.<sup>24</sup> In addition, the promotion should focus on the principles embodied in the standards, rather than the detailed standards themselves.

At the United Nations World Summit for Social Development,<sup>25</sup> which took place in Copenhagen on 12 March 1995,<sup>26</sup> a consensus emerged in relation to four categories of ILO standards which should be respected in employment relations, namely freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour and the elimination of discrimination in respect of employment and occupation.<sup>27</sup> The 117 Heads of State and Government in Copenhagen encouraged governments to enhance the quality of work and employment by fully implementing ILO Conventions on fundamental rights in States that have ratified them and to take into account the principles embodied in those Conventions in States that have

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<sup>23</sup> ILO Press Release, 98/23, 29 May 1998.

<sup>24</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 5 (86th Session, Geneva 1998).

<sup>25</sup> Final Copenhagen Declaration and the Program of Action, Report of the World Summit for Social Development, Copenhagen, 6-12 March 1995, UN Doc. A./CONF./166/9, para. 54(b).

<sup>26</sup> The ILO participated in the negotiations leading up to the adoption of the Programme of Action on workers' fundamental rights at the Copenhagen summit. See International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 1 (86th Session, Geneva 1998).

<sup>27</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 5 (86th Session, Geneva 1998). See also Art. 2(a)-(d) of the 1998 Declaration, text available at: <http://www.ilo.org> (last visited 3 June 2008).



not.<sup>28</sup> Subsequently, the Council of Ministers of the World Trade Organisation (WTO) expressed its renewed commitment to internationally recognized core labour standards in the Final Declaration of the World Trade Organisation (WTO) meeting at Singapore in 1996,<sup>29</sup> as did the OECD in its study of core labour rights and international trade, also published in 1996.<sup>30</sup>

Following the Singapore WTO Ministerial Conference, the ILO Governing Body decided to place the issue of a “Declaration on Fundamentals Principles and Rights at Work” on the agenda of the 86<sup>th</sup> Session of the International Labour Conference. The initiative came from within the employers group and was eventually supported by a number of governments and the workers’ group.<sup>31</sup> As far as the scope of the Declaration was concerned, the ILO constituents ultimately agreed to limit it to the same four categories of rights and principles mentioned in the Copenhagen Declaration.<sup>32</sup>

As far as the choice of a declaration as format for the promotion of fundamental labour standards is concerned, one should keep in mind that by the time the Singapore Ministerial meeting took place in 1996, it was clear that the promotion of labour standards through the inclusion of social clauses in free trade agreements had very little chance of success.<sup>33</sup> A non-binding declaration, which in the United Nations system constitutes a “formal and solemn instrument suitable for rare occasions when principles of lasting importance are being enunciated,”<sup>34</sup> was a feasible substitute. From the perspective of promotion and persuasion, the format of a dec-

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<sup>28</sup> ILO Press Release, 98/23, 29 May 1998.

<sup>29</sup> WTO Singapore Ministerial Declaration, 13 December 1996, WTO Doc. WT/MIN(96)/DEC, 18 December 1996, para. 4, available at: <http://www.wto.org> (last visited 3 June 2008).

<sup>30</sup> See also OECD, TRADE EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS’ RIGHTS AND INTERNATIONAL TRADE (OECD Publishing, Paris 1996); OECD, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS (OECD Publishing, Paris 2000).

<sup>31</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 4 (86<sup>th</sup> Session, Geneva 1998).

<sup>32</sup> GB 270/3/1, 270<sup>th</sup> Session, November 1997, para. 19.

<sup>33</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 5 (86<sup>th</sup> Session, Geneva 1998).

<sup>34</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 7 (86<sup>th</sup> Session, Geneva 1998); Memorandum of the United Nations Office of Legal Affairs, E/CN.4/L.610/, 2 April 1962.



laration was supposed to add special weight to the moral and political standing of its contents, since it resembles a special moment in the history of the ILO.<sup>35</sup> In essence therefore, the substance and form of the 1998 Declaration attempts to enhance its promotional impact by focusing on universally accepted principles (which underlines their moral authority) and by choosing a format (declaration) with a particular pedigree within the United Nations system.

## **B. Legal Analysis**

### *I. The Nature and Scope of the Fundamental Principles in the 1998 Declaration*

#### *1. The Relationship with the ILO Constitution and ILO Conventions*

The 1998 Declaration departs from the premise that the obligation to respect the principles of freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour and the elimination of discrimination in respect of employment and occupation, arise from the ILO Constitution itself.<sup>36</sup> The obligation to respect, promote and realize these four categories of principles thus arises from the very fact of membership in the ILO and the 1998 Declaration does not establish new legal obligations for Member States.<sup>37</sup> By linking a non-binding vehicle for promotion to binding legal obligations in this manner, the persuasive character of the vehicle is strengthened. The underlying message is that although the “packaging” of the obligations may be non-binding, States cannot distance them from the substance contained therein.

As far as the right to freedom of association is concerned, it is well established that the obligation to respect this principles stems directly from the Constitution, given that Article I(b) of the Declaration of Philadelphia (which forms an integral part of the ILO Constitution) describes this principle as essential for sustained progress.<sup>38</sup> The remaining categories of fundamental principles are also mentioned in the Constitution, but in less strong language.<sup>39</sup> In fact, the references to these principles in

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<sup>35</sup> The Declaration of Philadelphia, which constitutes an integral part of the ILO Constitution, is the only binding Declaration ever adopted by the International Labour Conference.

<sup>36</sup> Art. 2(a)-(d) of the 1998 Declaration, text available at: <http://www.ilo.org> (last visited 3 June 2008).

<sup>37</sup> GB. 270/3/1, 270th Session, November 1997, para. 18.

<sup>38</sup> See Max Rood, *New Developments within the ILO Supervisory System*, in *LABOUR LAW, HUMAN RIGHTS AND SOCIAL JUSTICE* 90 (Roger Blanpain ed., 2001); KAUFMANN (note 6), at 59.

<sup>39</sup> The principle of forced labour is not explicitly mentioned in the Preamble or the Declaration of Philadelphia, but is derived from the values proclaimed in these texts (in particular dignity and equal

the Preamble to the ILO Constitution are no stronger than references to other principles such as health and safety and social security, which were not included in the 1998 Declaration. This does raise the question why only these four categories of fundamental principles were included in the 1998 Declaration as opposed to all principles, which enjoy constitutional reference.

Support for their inclusion can be found in the fact that the ILO has for many years in practice acknowledged these four categories as representing fundamental standards, which have to be distinguished from those standards which represent essential infrastructure for the protection of workers and social progress; as well as standards aimed at ensuring specific levels of protection for (certain categories of) workers.<sup>40</sup> Their inclusion was also motivated with the argument that the four categories of fundamental principles constituted process-oriented standards which create the legal framework necessary for negotiating other labour standards of a substantive nature. The core principles would therefore form a prerequisite for the realisation of any substantive rights.<sup>41</sup> However, it is questionable whether any of the principles embodied by the categories of fundamental rights are indeed only process-oriented. The mere fact that they are formulated in a flexible manner and do not prescribe any concrete outcome does not detract from the fact that they are essentially directed towards the achievement of a substantive goal. Seen in this light, it is difficult to see why these principles would necessarily be less substance oriented (or necessarily more process oriented) than those aimed at health and safety at the workplace, for example, or why they would necessarily be more fundamental.

During the drafting process Member States insisted that the principles contained in the 1998 Declaration only encompass the essence of the obligations, as opposed to any detailed legal obligations that come with ratification of the relevant Conventions.<sup>42</sup> This raises the question of the exact scope of the “essence of the obliga-

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opportunity). See Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 444 (2005); GB.270/3/1, 270th Session, November 1997, para. 18.

<sup>40</sup> CLARENCE WILFRED JENKS, *LAW, FREEDOM AND WELFARE* 103 (1963); Mouloud Boumghar, *La Déclaration de L'organisation internationale du travail du 18 Juin 1998 relative aux principes et droit fondamentaux au travail: une technique juridique singulière de relance des conventions fondamentales*, 10 AFRICAN YEARBOOK OF INTERNATIONAL LAW 369-370 (2002).

<sup>41</sup> GB.270/3/1, 270th Session, November 1997, paras. 16, 19; International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 430-431 (86th Session, Geneva 1998); Langille (note 20).

<sup>42</sup> KAUFMANN (note 6), at 76.

tions.”<sup>43</sup> In particular, it was unclear at the time of the adoption of the 1998 Declaration if and to what extent they would overlap with the obligations in the eight fundamental Conventions<sup>44</sup> that cover the same categories as the 1998 Declaration.<sup>45</sup> Stated differently, the question arose whether the difference in scope between the principles and Conventional obligations would lead to a fragmentation of ILO Standards within the ILO itself. However, in practice this risk seems less relevant, as the ratification rate of the fundamental Conventions has - since the adoption of the 1998 Declaration - improved to the point where the vast majority of States are now also bound by the Conventional obligations.<sup>46</sup>

On a formal level the promotional impact of the 1998 Declaration has therefore been successful, as it has led to a higher number of Conventional ratifications.<sup>47</sup> At the same time, however, many States that have ratified the fundamental Conven-

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<sup>43</sup> See Philip Alston, *Core Labour Standards and the Transformation of the International Labour Regime*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 494 (2004) (claiming that the 1998 Declaration detaches the core rights themselves from the details of the relevant conventions and the work done by the supervisory bodies in applying those standards over the years).

<sup>44</sup> The ILO classified those Conventions which contain the core ILO standards as fundamental Conventions. It concerns standards which the ILO has for many years in practice acknowledged as being of a fundamental nature. They include the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (148 ratifications); Right to Organize and Collective Bargaining Convention, 1949 (No. 98) (158 ratifications); Forced Labour Convention, 1930 (No. 29) (172 ratifications); Abolition of Forced Labour Convention, 1957 (No. 105) (167 ratifications); Minimum Age Convention, 1973 (No. 138) (150 ratifications); Worst Forms of Child Labour, 1999 (No. 182) (165 ratifications); Equal Remuneration Convention, 1951 (No. 100) (164 ratifications); Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (166 ratifications). Status of ratifications available at: <http://www.ilo.org> (last visited 3 June 2008). For the reporting obligations entailed by these Conventions, see section B.II.1.

<sup>45</sup> See Art. 1(b) of the 1998 Declaration, text available at: <http://www.ilo.org> (last visited 3 June 2008). The ILO's Governing Body has also designated another four conventions as priority instruments, thereby encouraging member states to ratify them because of their importance for the functioning of the international labour standards system. These include Labour Inspection Convention, 1947 (No. 81) (137 ratifications); Labour Inspection (Agriculture) Convention, 1969 (No. 129) (46 ratifications); Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) (122 ratifications); Employment Policy Convention, 1964 (No. 122) (97 ratifications). Status of ratifications available at: <http://www.ilo.org> (last visited 3 June 2008).

<sup>46</sup> The supervisory machinery which is based on reports compiled by States and the ILO respectively (see B.II below) also focuses on the standards as defined in the respective fundamental Conventions. For example, the Director General's 2005 Global Report, *A Global Alliance against Forced Labour* (2007), 5 *et seq.*, stated that the ILO's definition of forced labour comprises two basic elements. These include work or service that is exacted under the menace of a penalty and is undertaken involuntarily. It then draws on the work of the ILO's supervisory bodies when supervising ratified Conventions to elaborate on the contents of these elements.

<sup>47</sup> Maupain (note 39), at 455; Simpson (note 16), at 63.

tions have not yet brought their laws and practices in line with their Conventional obligations. Cynics would therefore argue that their ratification had more to do with escaping the reporting burden that the 1998 Declaration imposes, than genuine progress in implementing fundamental ILO standards.<sup>48</sup> Even though such cynicism would not be justified in all cases, one should indeed be cautious not to equate the successful promotion of the principles in the 1998 Declaration with the formal ratification of the eight fundamental Conventions, but also to give due consideration to the extent to which they have been implemented.

## 2. *Relationship with Other International Regulatory Regimes*

As far as the risk of fragmentation in the application of standards is concerned, one should keep in mind that standards similar to the ILO core labour standards have also been included in other international (human rights) instruments, to which ILO Member States may be a party. These include the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the United Nations Convention on the Rights of the Child (CRC); the European Convention of Human Rights (ECHR); the European Social Charter (ESC); and the European Union Charter of Fundamental Rights (EU Charter).<sup>49</sup> References to labour standards also increasingly feature in the programs of the Bretton Woods institutions such as the World Bank and the International Monetary Fund (IMF), regional Development Banks and the United Nations Global Compact for the advancement of ten universal principles in the areas of human rights, labour, the environment and anti-corruption.<sup>50</sup>

This overlap in mandates implies that fragmentation of standards can result from the manner in which these other instruments are interpreted and applied in practice. These supervisory bodies are in no way bound by the ILO Constitution, ILO Conventions or Recommendations, or the 1998 Declaration. There is no guarantee that they will interpret the core rights and principles contained in the 1998 Declaration (or any other ILO instrument) – to the extent that it overlaps with its own

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<sup>48</sup> Simpson (note 16), at 63.

<sup>49</sup> For example the right to freedom of association in Art. 22 ICCPR; the prohibition of forced labour in Art. 8(3) ICCPR; the prohibition of exploitative child labour in Art.32 Convention on the Rights of the Child and Art. 10(3) ICESCR; the prohibition of discrimination in employment and occupation in Art. 2(2) and Art. 6 ICESCR.

<sup>50</sup> For the 10 principles of the Global Compact, which became operational on 26 July 2000, See: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. The wording on labor standards were taken from the 1998 Declaration.

mandate – in a manner that corresponds to the ILO’s own vision in this regard.<sup>51</sup> It would, of course, not be accurate to attribute such potential fragmentation exclusively to the existence of the 1998 Declaration. The risk of inconsistent interpretation of standards initially adopted in ILO Conventions and Recommendations and subsequently also guaranteed in international or regional human rights instruments would also exist in the absence of the 1998 Declaration. However, it is fair to argue that the adding of any additional international instruments (such as the 1998 Declaration) to the existing body of international standards complicates the interpretation process with which international supervisory bodies is confronted with and in this manner increases the risk of fragmentation.

A few selected examples will illustrate that the relationship between the 1998 Declaration and other (human rights) instruments can be one of cooperation or one of competition, depending on the case at hand. Cooperation would imply an affirmation by other international monitoring bodies of the ILO’s own interpretation of the scope of the rights and principles contained in the 1998 Declaration. This, in turn, would reinforce the promotional impact of the 1998 Declaration. Competition, on the other hand, would imply a different interpretation of the scope of such rights and principles. The resulting fragmentary effect would weaken the promotional impact of the 1998 Declaration.

An example of cooperation can be found in the fact that an ILO representative is present during the reviewing procedures foreseen under the ICCPR, ICESCR and ESC. In addition, the supervisory mechanisms for the ILO, ICCPR, ICESCR and ESC allows for the coordination of state reports in relation to overlapping areas.<sup>52</sup> The human rights supervisory bodies do also in practice often refer to ILO practice when interpreting rights and obligations that overlap with ILO core labour standards.<sup>53</sup>

The risk of competing mandates and resulting fragmentation in the application of standards seems more prominent in relation to the programs of the Bretton Woods

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<sup>51</sup> Alston (note 43), at 477. See also Information Note on Corporate Social Responsibility and International Labour Standards, para. 6, ILO Doc. GB.286/WP/SDG/4(Rev.), 2003, text available at: <https://www.ilo.org> (last visited 3 June 2008).

<sup>52</sup> See Arts. 66 *et seq.* ICESCR; Art. 40 ICCPR; and Arts. 21 *et seq.* ESC, texts available at: <https://www.unhchr.ch> (last visited 3 June 2008).

<sup>53</sup> For example, when defining forced labour, the Committee on Economic, Social and Cultural rights (the supervisory body to the ICESCR) referred to the Forced Labour Convention of 1930 (No. 29) and the Abolition of Forced Labour Convention of 1957 (No. 105), as well as Art. 8(3) ICCPR. See Committee on Economic, Social and Cultural Rights, General Comment No. 18 (Right to Work), 6 February 2006, E/C.12/GC/18, para. 9, text available at: <https://www.unhchr.ch> (last visited 3 June 2008).

institutions. Whilst the IMF structural adjustment programs have thus far not included any requirements on compliance with the principles contained in the 1998 Declaration, the World Bank nowadays regularly imposes conditions regarding harmful child labour on its financial assistance.<sup>54</sup> However, the conditions imposed by the Bank require domestic regulation of child labour, without referring to the 1998 ILO Declaration. The definition of the standards at stake is therefore left to the States with the risk of fragmenting or even undermining the rights and principles in the 1998 Declaration.<sup>55</sup> Similarly, the World Bank has commenced with the mainstreaming of gender equality into its programs, but without referring to the 1998 ILO Declaration.<sup>56</sup> A recent move towards cooperation can be found in the Performance Standards on Social and Environmental Sustainability, adopted by the International Finance Corporation of the World Bank Group on 30 April 2006. These standards, which are aimed at private sector projects in emerging markets, explicitly refer to observance of core ILO labour standards.<sup>57</sup>

This reference to private sector projects also touches on the issue of the growing number of private corporate social responsibility initiatives and their potential fragmentary impact on the 1998 Declaration.<sup>58</sup> Although the 1998 Declaration primarily (some would even say only)<sup>59</sup> addresses States, the reality is that non-State actors have an increasing impact.<sup>60</sup> Towards the end of the first reporting cycle under the 1998 Declaration follow-up procedure (see section B.II.1. below), the ILO had surveyed 300 corporate initiatives on labour standards. However, only a handful attempted to define their mandate with reference to core international labour

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<sup>54</sup> See KAUFMANN (note 6), at 108 *et seq.*

<sup>55</sup> In addition, the notion of harmful child labour is narrower than the ILO approach which is aimed at the elimination of child labour.

<sup>56</sup> WORLD BANK, *ENGENDERING DEVELOPMENT THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE, SUMMARY* (World Bank, Washington 2000); KAUFMANN (note 6), at 38.

<sup>57</sup> Principle 2, available at: <http://www.ifc.org/ifcext/enviro.nsf/Content/SustainabilityPolicy> (last visited 3 June 2008); Sec. IV of the OECD Guidelines for Multinational Enterprises, which resembles the core ILO standards, available at: <http://www.oecd.org/>. See Schuler, in this issue.

<sup>58</sup> See KAUFMANN (note 6), at 108 *et seq.*

<sup>59</sup> Maupain (note 39), at 452.

<sup>60</sup> A fact recognized during the drafting process. See ILO, Report of the Director General, *The ILO, Standard Setting and Globalization*, International Labour Conference, 85th Session, 1997, 14. See also Alston (note 43), at 470; KAUFMANN (note 6), at 76.

standards.<sup>61</sup> It is therefore fair to question whether, when implemented at the enterprise level, these private corporate initiatives correspond in substance to the core ILO labour rights and principles.

In summary therefore, the promotional impact of the 1998 Declaration in relation to other regulatory regimes is mixed. Whereas there are indications of cooperation between the ILO and a number of international institutions, this cooperation is still underdeveloped. The same applies to cooperation with the private sector, whose social initiatives often take no (visible) account of the 1998 Declaration.

## II. *Overseeing the Implementation of the 1998 Declaration*

### 1. *Reporting Under the Follow-up Mechanism to the 1998 Declaration*

The oversight mechanism in place for the 1998 Declaration is based on the premise that the ILO's role is first and foremost to create awareness for the fact that progress and social justice can be a sound investment for stability and the long-term competitiveness of the economy.<sup>62</sup> The 1998 Declaration attempts to create such awareness through reporting and technical assistance.<sup>63</sup> It provides for two types of reporting, namely State reporting that involves governments and workers' and employers' organisations in the respective Member States, and a thematic Global Report, prepared by the International Labour Office. These reports serve as an empirical basis for a dialogue with States, which is aimed at identifying problem areas and promoting solutions. In addition, it provides a basis for identifying areas where the ILO can assist States in overcoming problems in implementation through technical assistance, as well as assist the ILO itself in orienting its work.<sup>64</sup>

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<sup>61</sup> Alston (note 43), at 477. Information Note on Corporate Social Responsibility and International Labour Standards, Para. 6, ILO Doc. GB.286/WP/SDG/4(Rev.), 2003, available at: [www.ilo.org](http://www.ilo.org) (last visited 3 June 2008).

<sup>62</sup> ILO, Report of the Director General, *The ILO, Standard Setting and Globalization*, International Labour Conference, 85th Session, 1997, 11.

<sup>63</sup> Para. IV.2, Annex to 1998 ILO Declaration, available at: <http://www.ilo.org> (last visited 3 June 2008) (providing for a review of the entire follow up process, which has been scheduled to take place in 2008).

<sup>64</sup> An example is the creation of the Special Action Programme on Forced Labour, which grew out of the discussion of the first Global Report on that topic. It filled an operational void in the ILO's work in support of Member States' efforts to eliminate modern as well as traditional forms of forced labour. See: <http://www.ilo.org/sapfl/lang-en/index.htm>. See also International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 12 (86th Session, Geneva 1998). See also Hilary Kellerson, *La Déclaration de 1998 de l'OIT sur les principes et droits fondamentaux: Un défi pour l'avenir*, 137 REVUE INTERNATIONALE DU TRAVAIL 245 *et seq.* (1998).



The State reporting obligation in the follow-up mechanism is directed at Member States who have not yet ratified (all of) the fundamental Conventions. It requires annual reporting by States and the information provided in this manner is subsequently compiled by the International Labour Office in an Annual Review, which is then reviewed by a group of five Expert Advisers.<sup>65</sup> This group is appointed by and reports to the Governing Body. It adds its own introduction to the Annual Review received from the International Labour Office, draws attention to aspects that seem to call for more in-depth discussion, and may propose to the Governing Body any adjustment that they think desirable to the reporting procedure.<sup>66</sup>

One should point out that the reporting obligation described in the follow-up obligation does not introduce a new obligation, but rather clarifies the modalities for an obligation that has its roots in Article 19(5)(e) and Article 19(6)(b) and (d) of the ILO Constitution. These articles oblige each Member State to report to the Director General of the ILO, at appropriate intervals as requested by the Governing Body, on the position of its laws and practice in respect of specific, *non-ratified* Conventions and Recommendations.<sup>67</sup> In this manner, Member States have the opportunity to explain their laws and practice on issues covered by the instruments in question, as well as the reasons preventing ratification.<sup>68</sup> Generally speaking (in as far as all ILO Conventions are concerned), this reporting obligation is only triggered when requested by the Governing Body. States are also not obliged to come up with additional information (as can be the case when reporting on *ratified* Conventions).<sup>69</sup>

The follow-up mechanism under the 1998 Declaration fine-tunes this obligation in relation to the non-ratified fundamental Conventions, both in terms of the emphasis of the reports and their frequency. In relation to the emphasis, the questions articulated in the report forms focus on identifying the type of technical cooperation required for overcoming difficulties in giving effect to the rights and principles in the 1998 Declaration. This differs from the reporting forms approved by the Governing

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<sup>65</sup> ILO Governing Body, Minutes of the 274th Session, 6th Sitting (1999); See also para. II.B.3 of the Annex to the 1998 ILO Declaration, available at: <https://www.ilo.org> (last visited 3 June 2008).

<sup>66</sup> Momar N'Diaye, *The Annual Review and the Promotion of the 1998 Declaration on Fundamental Principles and Rights at Work: Developments and Initial Impact Assessment*, in LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 421 (ILO ed., 2004); Simpson (note 16), at 63; Rood (note 38), at 88.

<sup>67</sup> N'Diaye (note 66), at 420; Rood (note 38), at 88.

<sup>68</sup> Rood (note 38), at 89.

<sup>69</sup> *Id.*

Body under Articles 19 of ILO Constitution, which mainly focus on the legal provision in place in relation to the relevant Conventions and Recommendations.

The reporting procedure under the follow-up mechanism is also more arduous in terms of frequency than that under article 19 of the ILO Constitution, as it requires *annual* reporting in relation to the legal situation concerning all non-ratified fundamental Conventions.<sup>70</sup> In fact, the annual reporting cycle is even more frequent than in the case of ratified Conventions in accordance with Article 22 of the ILO Constitution. The State reporting cycle for ratified fundamental Conventions and priority Conventions<sup>71</sup> is currently two years, while for all other ratified Conventions (with the exception of those conventions that are shelved), reports must be submitted every five years, or more often if requested. The state reporting under the 1998 Declaration commenced in 2000 with a governmental reporting rate of 56%. By the end of the first cycle the reporting averaged at 62%, while since 2006 it has been close to 100%.<sup>72</sup>

In accordance with the tripartite nature of the ILO, the reporting procedure under the 1998 Declaration must also involve the social partners in the form of workers and employers organisations. This obligation also stems from the ILO Constitution, notably Article 23(2), according to which a copy of government reports under Article 19 of the ILO Constitution must be communicated to the most representative employers' and workers' organizations within the respective member State. Although the rate of formal comments by the social partners remains low, at an average of 37% of reports received,<sup>73</sup> the actual input of the social partners in the annual reports is higher. In States which have ratified the Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144), the annual reports are drawn up in consultation with the social partners, who then do not submit additional, separate comments. However, in 2004 the Expert Advisors drew attention to the low reporting rate and suggested expanded participation of civil society groups during the reporting process. This suggestion was, however, not met with much

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<sup>70</sup> Para. A.1. and Para. B.1, Annex to 1998 ILO Declaration, available at: <https://www.ilo.org> (last visited 3 June 2008); see also Simpson (note 16), 63; Rood (note 38), 92; Kaufmann (note 6), 73.

<sup>71</sup> See (note 45).

<sup>72</sup> Although the reporting rate has increased significantly since 2006, the number of countries subject to the follow-up mechanism has shrunk, as the fundamental Conventions become increasingly ratified. See N'Diaye (note 66), at 419.

<sup>73</sup> Comments are mainly received from the International Confederation of Free Trade Unions, which concentrate on the principle of freedom of association and the right to collective bargaining. At the same time, the input by the workers' and employers' organizations increased in 2005 to more than for the whole period between 2000 and 2004. See N'Diaye (note 66), at 417, 419; Alston (note 43), at 474.

enthusiasm by workers and employers organizations.<sup>74</sup> This reluctance seems to be related, at least in part, to a fear on the part of these social partners of a (further) dilution of their influence in the ILO if additional civil society groups were involved in the reporting process.

The State reporting is complemented by the annual Global Report, drafted by the International Labour Office under the auspices of the Director-General and submitted to the International Labour Conference for examination. It is thematic in nature and covers the four fundamental rights in cycles of four years. In this manner it attempts to give a regular global overview of the situation regarding a particular fundamental principal. The first Global Report was issued in 2000 and addressed freedom of association. The subsequent reports respectively focused on forced labour, child labour, and discrimination respectively. The second cycle commenced in 2004 with a report on Organizing for Social Justice, followed by the 2005 study on a Global Alliance against Forced Labour; the 2006 Report on the End of Child Labour within Reach and the 2007 Global Report on Discrimination at Work.<sup>75</sup>

When drafting the Global Report, the International Labour Office draws on the annual reports provided by member States under follow-up mechanism to the 1998 Declaration (and Article 19 ILO Constitution) where it concerns non-ratified fundamental Conventions, as well as Article 22 of the ILO Constitution, where it concerns ratified fundamental Conventions.<sup>76</sup> The Global Report serves to highlight those aspects of the right in question that require greater attention and serves as a basis for determining priorities for technical cooperation.<sup>77</sup>

One could therefore conclude that whilst the promotional impact of the 1998's supervisory mechanism evidences success on the formal level (higher ratification rate of ILO fundamental Conventions), it remains debatable whether it has succeeded in mobilizing the social partners to participate in the promotional procedures, and whether the formal ratifications were also accompanied by extensive implementation of the relevant obligations in practice. During the first cycle of reporting, substantive success was also hampered by the fact that the ILO had difficulty in absorbing the resources which were made available (notably by the United States gov-

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<sup>74</sup> ILO Doc. GB.289/4; N'Diaye (note 66), at 424.

<sup>75</sup> Texts available at: <http://www.ilo.org> (last visited 3 June 2008).

<sup>76</sup> Para. II.B.1, Annex to 1998 ILO Declaration, available at: <http://www.ilo.org> (last visited 3 June 2008).

<sup>77</sup>For example, since the launch of the follow-up plan, the ILO has attempted to shed light on old and new manifestations of forced labour and to address them through technical cooperation. *See* Maupain (note 39), at 446, 456.

ernment) for the purpose of technical assistance. This was due to a lack of sufficiently trained and experienced staff who could respond to the high number of governmental requests for assistance.<sup>78</sup>

## 2. *The Complaints Procedure for the Violation of Freedom of Association*

Additional supervisory mechanisms to the ones provided for in the follow-up mechanism to the 1998 declaration are, in principle, only available to the extent that Member States have ratified the respective fundamental Conventions. Where this has happened, Member States are bound by the reporting and complaints (“naming and shaming”) procedures provided for in Articles 22, 24 and 26 of the ILO Constitution.<sup>79</sup> There is, however, one instance in which an additional supervisory procedure exists within the ILO – regardless of whether the Member States have ratified the relevant fundamental Conventions. Already in 1951, the ILO Governing Body created the Committee on Freedom of Association (CFA) with the purpose of examining complaints pertaining to the violation of freedom of association in ILO member States. The CFA is a tripartite body, to which governments of ILO member States, as well as organisations of workers or employers, whether national or international, can file complaints. Complaints are directed at the government of an ILO Member State of the ILO, irrespective of whether the State concerned has ratified the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87) or the Right to Organize and Collective Bargaining Convention of 1949 (No. 98).<sup>80</sup>

Since its establishment in 1951, the CFA has dealt with more than 2300 alleged violations of trade union rights. Despite being non-binding, its conclusions carry con-

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<sup>78</sup> The problem of absorption of extra budgetary resources affects the ILO as a whole and is not exclusively related to funds provided under stimulus of the Declaration. The reasons (such as slow recruitment) are largely systemic. For instances where resources have been effectively applied in relation to requests for technical assistance under the follow-up mechanism, see: [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.PROJECTSLIST?var\\_language=EN](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.PROJECTSLIST?var_language=EN). See also N’Diaye (note 66), 419.

<sup>79</sup> See Rood (note 38), at 88 *et seq.* and Simpson (note 16), at 66 *et seq.* (generally on reporting and complaints procedures).

<sup>80</sup> This committee should be distinguished from the tripartite Fact-finding and Conciliation Commission on Freedom of Association (FCCA), which was created in 1950 through agreement between the United Nations Economic and Social Council (ECOSOC) and the ILO Governing Body (enclosed under B in *ILO, Law on Freedom of Association, Standards and Procedures*, Geneva 1995). This body also deals with alleged violations of trade union rights in countries that have not ratified the relevant fundamental Conventions. However the FCCA mechanism can only be triggered if the countries concerned have consented to the authority of the FCCA and is not used frequently. See Simpson (note 16), at 68; Rood (note 38), at 59, 89 *et seq.*

siderable weight and its problem-solving, non-legalistic approach to trade union issues has often been praised.<sup>81</sup> On the one hand, the procedure represents moral persuasion through “naming and shaming,” as it is directed at exposing specific violations of trade union rights by a particular country. On the other hand, it is also promotional as it is engaged in finding solutions for specific problems which can also serve as an example to other ILO member States.<sup>82</sup>

It is important to highlight that this procedure was introduced long before the adoption of the 1998 Declaration and functions independent from it. A similar procedure does not exist for any of the other core principles enshrined in the 1998 Declaration and is unlikely to be introduced in the near or intermediate future, due to insufficient support from ILO member States.<sup>83</sup> The extra dimension of promotion and persuasion represented by this procedure will therefore remain limited to the principle of freedom of association.

### C. Assessment and Conclusion

The 1998 Declaration attempts to revitalize the role of the ILO in the globalized economy by singling out certain core labour standards and devising a special reporting procedure, accompanied by technical assistance, in order to promote their observance within Member States. The promotional technique has been successful on the formal level as it has led to a significant increase in ratification of the eight fundamental ILO Conventions that concretize the principles contained in the 1998 Declaration. Stated differently, the concentration of the promotional activities on “core business” strengthened the fundamental standards of the ILO amongst its different stakeholders on the formal level. However, formal ratification does not in and of itself constitute effective substantive implementation of the obligations in question and it remains debatable whether the technique of promotion and persuasion is itself (in the absence of coercive powers) sufficient to ensure such implementation. This factor, as well as criticism pertaining to the substance and addressees of the 1998 Declaration, raises questions about its legitimacy.

For the purpose of this contribution, legitimacy involves both substantive and procedural legitimacy.<sup>84</sup> Substantive legitimacy implies that there is agreement by

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<sup>81</sup> Simpson (note 16), at 68.

<sup>82</sup> See Simpson (note 16), at 68 *et seq.*; Alston (note 43), at 445.

<sup>83</sup> International Labour Conference, Report VII, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, 3 (86th Session, Geneva 1998); Maupain (note 39), at 444.

<sup>84</sup> Reed and Yates (note 2), at 246.

those affected on the content of the norms in question and therefore also an implicit acceptance that all affected will abide by such norms.<sup>85</sup> Procedural or institutional legitimacy rests on accepting the make-up of the decision-making process and institutions and entities involved in making the decisions. Procedural legitimacy is more likely conferred on those decision-making processes which qualify as representative of those affected by them and which are characterized by transparency and accountability.<sup>86</sup>

As far as the substance of the 1998 Declaration is concerned, authors have criticized it for being highly selective and not based on the consistent application of any compelling economic, philosophical or legal criteria.<sup>87</sup> This criticism is not so much directed at the fact that the four categories of core labour standards were included in the 1998 Declaration, but rather at the fact that only these categories were included whereas other standards – which can also be traced back to the ILO Constitution – were not and in this manner “demoted” to a lower status. Moreover, since their adoption, the principles in the 1998 Declaration have benefited from additional promotional activities and resources made available for technical assistance. Even though the resources in question were specifically made available by States for this purpose and did not imply a diversion of existing resources away from other standards, such differential treatment enhanced the perception that those categories of labour standards not included in the 1998 Declaration were relegated to second class standards.<sup>88</sup>

Criticism is further directed at the procedural legitimacy of the 1998 Declaration’s follow-up mechanism, both in terms of its (lack of) representativeness and its weak accountability mechanisms. Due to the ILO’s unique tripartite structure, non-state actors in the form of employers’ and workers’ organizations have always had a formalized role in any decision-making processes, including those pertaining to the 1998 Declaration and its follow-up mechanism. This singles out the ILO from most other international organizations where such a formalized role does not exist. However, given the challenges that unions and labour movements face within many domestic jurisdictions, it is questionable whether those participating are indeed representative of those affected by the impact of the 1998 Declaration.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> KAUFMANN (note 6), at 71.

<sup>88</sup> Alston (note 43), at 458, 488. For a denial of the existence of any hierarchy in relation to ILO standards, see Maupain (note 39), at 447.

Unions and labour movements in many countries have lost legitimacy within their own national borders, as more and more workers find themselves outside labour relation frameworks which might once have protected them.<sup>89</sup> Moreover, whereas private capital and States have developed the capacity for international coordination and action, unions have remained nationally bound institutions with weak international coordinative institutions and capacity. As a result, labour movements tend to be far-removed from where the decision-making takes place, which further weakens their credibility within their respective domestic jurisdictions. In essence, the legitimacy of the tripartite system itself is at stake and this constitutes one of the most fundamental challenges confronting the efficacy of the 1998 Declaration and that of the ILO as a whole.<sup>90</sup> When raising this point one has to acknowledge that it is not easy to identify other actors outside of the organised labour movement, that would be more representative of those affected by the impact of the 1998 Declaration (or ILO standards in general). However, this fact would arguably not suffice to dispel the ILO's own legitimacy concerns. In relation to the 1998 Declaration, the social partners should therefore reconsider the advice of the Expert Advisors in 2004, according to which the participation of civil society groups during the reporting process should be expanded.<sup>91</sup>

Noticeably absent from all ILO accountability mechanisms – including those pertaining to the 1998 Declaration – is any form of coercion such as (financial) sanctions or exclusion from ILO membership. Instead, it relies on public promotion, moral persuasion and the provision of technical assistance, which simultaneously function as mechanisms of supervision (“enforcement”) and accountability. These methods are similar to those applied by most United Nations supervisory bodies in the field of human rights and rest on the assumption that increased awareness, knowledge and expertise are the critical pathways for changing government policies and behaviours.<sup>92</sup> Thus, the assumption embedded in ILO practices is that once countries agree to take action to improve labour rights and working conditions, the greatest obstacle to their correction of poor labour standards lies in lack of knowledge and expertise (which can be overcome by technical assistance).

However, it is questionable whether these mechanisms are sufficient in an era where the 1998 Declaration's moral authority is facing strong competition from financially powerful institutions such as the World Bank and the IMF and other

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<sup>89</sup> Reed and Yates (note 2), at 252; Alston (note 43), at 475.

<sup>90</sup> *Id.*

<sup>91</sup> ILO Doc. GB.289/4; N'Diaye (note 66), 424.

<sup>92</sup> Reed and Yates (note 2), at 250.



actors who propagate a model in which the market, as opposed to defined minimum standards, is paramount in determining the allocation of resources and rights.<sup>93</sup> It is therefore likely that a certain disparity between the formal success of the promotional technique represented by the 1998 Declaration (i.e. high ratification rate of fundamental ILO Conventions) and substantive success (effective implementation of the relevant obligations and participation of all affected parties in the implementation process) will remain a reality in future.

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<sup>93</sup> Reed and Yates (note 2), at 251; Alston (note 43), at 474.

