

# SHRINKING THE INTERNATIONAL LABOR CODE: AN UNINTENDED CONSEQUENCE OF THE 1998 ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK?

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## I. INTRODUCTION: PUTTING THE TRADE AND LABOR DEBATE INTO AN ILO PERSPECTIVE

In February 2004, the World Commission on the Social Dimensions of Globalization issued its long-awaited report. The Commission was appointed by the Governing Body of the International Labor Organization (ILO or “the Organization”) in 2001 with the mandate of preparing a “major authoritative report” with a particular emphasis on “the interaction between the global economy and the world of work.”<sup>1</sup> Even by the standards of most of its predecessors in the genre of world commissions, this one boasted a large and influential group of Commissioners and was launched with significant fanfare. It was chaired by two Heads of State (from Finland and Tanzania) and included 19 Commissioners “of recognized eminence and authority.”<sup>2</sup> The Commission also included a former President of Uruguay, a former Prime Minister of Italy,

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1. WORLD COMM’N ON THE SOC. DIMENSIONS OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL annex 2, at 148 (2004), available at <http://www.commissiononglobalization.org/homelinks/AFairGlobalization.pdf> [hereinafter A FAIR GLOBALIZATION].

2. *Id.*

Nobel Prize-winning economist Joseph Stiglitz, the President of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the President of the International Organization of Employers.<sup>3</sup> One of the central challenges for the World Commission was to identify the best means by which the global trade agenda could best be reconciled with the ILO's longstanding emphasis on the protection of workers' rights.

Unsurprisingly, the Commission concluded that "core labour standards" must be a key part of the "broader international agenda for development" identified in the report and called for a reinforcement of "the capacity of the ILO to promote" such standards.<sup>4</sup> But the real questions that it was called upon to answer in this respect were how such broad, yet worthy, goals can be effectively promoted and how an agenda of both growth and social equity can be combined. The Commission answered this part of its mandate by proposing a four part agenda, which is considered in detail below.<sup>5</sup> The Commission has made a major contribution to the global debate on the appropriate relationship between the world trade and labor agendas by identifying the most important steps that it considers should be taken.

The most striking aspect of its prescriptions is the heavy emphasis upon the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.<sup>6</sup> In this respect, the Commission has added its influential imprimatur to a trend, emerging since the mid-1990s, towards an almost exclusive concentration on the small group of four core labor standards identified in the Declaration,<sup>7</sup> at the expense of the much broader body of labor standards reflected in the International Labor Code.

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3. *Id.* annex 2, at 149-151.

4. *Id.* ¶ 426, at 98.

5. *Id.* For a detailed analysis of the Commission's proposal, see *infra* Part III.

6. See, e.g., A FAIR GLOBALIZATION, *supra* note 1, ¶ 373 (noting that the "best way to achieve [the promotion of the rights of workers in developing and industrialized nations] is adherence to the ILO Declaration"). For the ILO Declaration, see ILO Declaration on Fundamental Principles and Rights at Work, June 1998, 37 I.L.M. 1237 (1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/index.htm>.

7. ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 6, ¶ 2(a)-(d), 37 I.L.M. at 1237-38.

The Code, made up of the accumulated body of standards adopted by the ILO over the years since its creation in 1919, embodies the ILO's *acquis*, to use the term of art applied in relation to the law of the European Union.

It is our contention that, although the Declaration was originally and continues to be promoted as a complement to the ILO's much broader traditional approach of advocating a more comprehensive range of standards and emphasizing the need to monitor or supervise compliance with those standards, the consequences of its adoption have actually been quite different. In practice, the Declaration is playing a central role in efforts to replace the broader labor rights agenda with a narrow focus on a much more limited corpus of four core labor standards and to move towards an approach that is fundamentally promotional, rather than grounded in firm legal obligations and involving targeted institutional responses to violations of labor rights.

In this Article, we start by situating the ILO in the context of the historical debate over the linkage between trade and labor standards.<sup>8</sup> We then examine the agenda put forward by the World Commission in 2004, which we argue to be symptomatic of the new preferred approach to labor standards.<sup>9</sup> Next, we consider three ways in which these developments undermine the traditional conception of international labor standards.<sup>10</sup> The first is the loss of a unified approach to the way in which labor standards are identified and defined, as a variety of new actors are encouraged to set their own standards in the context of determining what they will do in relation to each of the core standards. The resulting incoherence risks eroding the erstwhile universality of standards.<sup>11</sup> The second negative consequence is the privileging of a core set of largely procedural and essentially civil and political labor rights, thus conforming to the preferences of neo-liberal economic approaches. This imbalance has serious ramifications not only for the protection of rights at work (many of which are eco-

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8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Part IV.A. It should be noted here that the term "universality" is used to denote the aspiration to set a standard which could be adopted equally well in any and all states, rather than to refer to formal universality in the sense of a standard which has been accepted *de lege* by almost every state.

conomic and social in nature) but also beyond the labor area for the indivisibility of human rights in general.<sup>12</sup> The third consequence concerns the move heralded by the Declaration into determinedly soft promotional techniques for encouraging respect for workers' rights. Although the ILO has recently moved to use stronger measures in the case of Myanmar,<sup>13</sup> there is no reason to think that this presages a more general move beyond the soft measures mandated by the Declaration. While the normal supervisory arrangements remain in place, especially in relation to ratified conventions, we argue that this system is being gradually downgraded in practice, if not in theory, in favor of the Declaration approach.<sup>14</sup>

This Article is intended to provoke the sort of reflection that is generally absent from the labor standards debate (or, to use the preferred terminology in the United States, the workers' rights debate). It is intentionally written in a somewhat polemical tone, one designed to highlight our view that it is essential that the problems we discern should not continue to be minimized by labor rights proponents. Unless appropriate remedial steps are taken in the years ahead, a mirage, created by the considerable formal success of the Declaration in attracting public attention to the core labor standards concept, will be permitted to conceal a retrogressive trend in relation to efforts to defend labor rights globally.

## II. SITUATING THE ILO IN THE DEBATE OVER THE LINKAGE BETWEEN TRADE AND LABOR STANDARDS

In order to fully appreciate the significance of current developments in relation to international labor standards, including the significance of the 1998 Declaration and the outcome of the deliberations of the World Commission, it is essential to provide some historical background. The main theme of the analysis is that efforts to achieve linkage have been going on for well over a century and that any steps taken now are unlikely to be dispositive of the matter.

Efforts to build an international system of labor standards received a vital, if incomplete, push as a result of pressures to protect workers' standards that emerged most clearly at the

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12. See *infra* Part IV.B.

13. See *infra* text accompanying notes 54-59.

14. See *infra* Part IV.C.

end of each of the two World Wars. A campaign began in the late nineteenth century, in the context of what is today commonly recognized as one of the first major waves of globalization, to ensure that abusive labor standards did not result in an unfair trade advantage for particular countries led eventually to the creation of the ILO, in the aftermath of the First World War. The rationale given during the Versailles Peace Treaty to justify the establishment of the Organization was significantly trade-driven. After World War II, the links between social and economic policy were given unprecedented recognition in both the Declaration of Philadelphia,<sup>15</sup> which was annexed to the ILO Constitution, and in the U.N. Charter. The 1947 draft Constitution of the aborted International Trade Organization<sup>16</sup> gave full recognition to this link. These initiatives signaled some sort of consensus on the importance of international efforts to promote workers' rights and it was one which was more or less maintained until the end of the 1980s.

The consensus was broken by several factors, the most important of which was the collapse of the Cold War political order that had ensured that the West had a strong stake in maintaining ILO procedures in order to demonstrate its own commitment to the ILO social justice principles and to highlight the deficiencies in the approach championed by the communist countries, which portrayed themselves as the true champions of the workers. But the ILO's insistence on respect for freedom of association and on non-discrimination became less appealing when the prime targets were no longer communist governments, such as those in Poland, Czechoslovakia, and the USSR, but were those in developing economies in which the West had invested or in the former Communist bloc countries that were embracing full-blown capitalism. A very important related phenomenon was the transformation of the international trade regime from one with limited geographical membership and somewhat qualified rules, to one with universal appeal and a set of philosophical underpinnings that had become increasingly neo-liberal.

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15. Constitution of the International Labor Organization, *as amended* Oct. 9, 1946, Annex, 62 Stat. 3485, 3554, 15 U.N.T.S. 35, 106, *available at* <http://www.ilo.org>.

16. Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/Conf.2/78 (1948).

A. *Four Options for Responding to Changes in Trade and Labor*

The demise of the post-World War II consensus coincided with an increasing obsolescence of many of the techniques used by the ILO.<sup>17</sup> As a result, governments, employers, and other actors were faced with the choice of renovating or redesigning the global regime or of developing alternative approaches in order to respond to the changing characteristics of labor markets. In essence, four alternatives were available:

(a) to reinvigorate and strengthen the ILO system on its own terms;

(b) to link the ILO system to the world trading system, either along the lines originally proposed in the 1947 Havana Charter or in more innovative ways;

(c) to repudiate the international labor standards approach on the basis of pragmatic, as well as ideological, considerations; or

(d) to move towards more flexible, selective, and decentralized approaches, with a greater or lesser degree of reliance on the ILO.

1. *Option (a)*

In the past decade, the first of these options has been pursued by the European Union (E.U.) but not by many other actors, partly because of a lack of political will, partly because the United States, for all its rhetorical commitment, is not especially interested in strengthening the ILO per se, and partly because of political and institutional paralysis within the ILO. The E.U. proposals included reinforcement of “the effectiveness of ILO supervision, including better publicity, more effective follow-up and ways of enhancing the status of the findings of the ILO supervisory mechanism throughout the international system.”<sup>18</sup> In addition, it was suggested that the E.U.

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17. That obsolescence and how it might be overcome are important elements of a wider analysis of which the present Article is only a small part.

18. Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee: Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM(2001) 416 final at 21, *available at* <http://europa.eu.int> [hereinafter Promoting Core Labour Standards]. For a background analysis of events before this Communication, see Barbara Brandtner & Allan Rosas,

should take ILO findings systematically into account,<sup>19</sup> not only in multilateral dealings but also in its bilateral dealings, a prospect that understandably worried many developing countries that were recipients of E.U. aid. The E.U. also suggested consideration of “new incentive mechanisms to promote respect for core labour standards” and of “a new mechanism for the regular review of social policy at the country level.”<sup>20</sup> But it seemed that, the more serious these proposals became, the more convinced opponents became that they were motivated by protectionism.

## 2. *Option (b)*

The second option was promoted primarily by the United States with support from its European allies, as long as proposals focused on carrots rather than sticks. But the United States proposals were invariably linked to the imposition of sanctions in the event of violations of the standards. This more or less guaranteed that there would be strong and concerted resistance on the part of most developing countries, who felt that such a link would be just another stick with which to beat them and that the United States would invoke such powers in situations in which the principal motivation was to diminish trade competition rather than to improve the situation of Third World workers.

## 3. *Option (c)*

The third option involves a straightforward rejection of the conventional wisdom on labor standards. That conventional view was well captured by Sabel, O'Rourke, and Fung:

[T]he present wave of globalization has given rise to widespread abuses, including child labor, punishingly long work days, harsh discipline, hazardous work conditions, sexual predation, and suppression of the freedom to associate and organize. These forms of servitude recall outright slavery in some instances, and provoke moral outrage the world over whenever they come to light.

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*Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L. 468 (1998).

19. See Promoting Core Labour Standards, *supra* note 18, at 21.

20. *Id.*

There is broad agreement among the world's publics that labor markets must be re-regulated to curb these abuses.<sup>21</sup>

But the third option would deny that regulation is the answer. It is a policy response that one could barely contemplate until the fall of the Berlin Wall and the subsequent impact of the various forces of globalization. Since many of these forces were driven by a neo-liberal emphasis on deregulation of all markets including, and especially, the labor market, the case for labor standards has been subjected to far-reaching challenges. In the name of flexibility and competition, strong arguments have been put forward for treating labor standards as impediments to market freedom and, thus, to the promotion of economic development. For present purposes, it is perhaps best illustrated by revisionist analyses of U.S. constitutional law that seek to show that the overturning of the so-called *Lochner* era was a mistake. *Lochner v. New York*<sup>22</sup> was the high point in a series of cases in which the Supreme Court held that common law rights to property and to contractual autonomy could not be overridden by congressional legislative attempts to regulate working hours and conditions such as minimum wages. Although the U.S. Constitution did not explicitly recognize any right to "liberty of contract," the Court effectively read it into the Due Process Clause of the Fourteenth Amendment.<sup>23</sup> In later years, this approach was definitively overturned and the Court looked benignly upon efforts to ensure workers' rights—an approach that continues to prevail today.<sup>24</sup> In a recent analysis, it has been argued that the *Lochner* approach was far better economic theory than the regulatory assumptions that came to replace it:

[*Lochner*] allowed greater room for workers and their employers to create hours of work that suited their concrete situations. Long and painful hours would decline when advances in productivity made them

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21. Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 1 (Social Protection Discussion Paper Series, No. 0011, 2000), available at <http://www.worldbank.org>.

22. *Lochner v. New York*, 198 U.S. 45 (1905).

23. *Id.* at 53-54.

24. See generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 881-83 (1987) (discussing the rise and fall of *Lochner*).

unnecessary, but it does not follow that good things would come from forcing those hours to fall before any such advance took place.<sup>25</sup>

Although his historical analysis deals with the situation in the nineteenth and early twentieth centuries, the author quoted above argues that the lessons for today have yet to be learned: “In the twenty-first century, those laws still stand as an obstacle to getting the package of hours and wages that suits workers, in terms of work during the daytime, with flexible hours, and benefits determined by demand rather than by their relative ability to circumvent hours rules.”<sup>26</sup>

At the international level, there is no shortage of commentators seeking to promote similar analyses in relation to international efforts to promote labor rights. For example, the Report of the World Commission on the Social Dimensions of Globalization was said by one commentator to be “long on pious aspirations and short on rigorous analysis.”<sup>27</sup> In his view “[d]emocracy, sovereignty and higher labour standards do not always, or even necessarily, go together with faster economic growth and more widely spread prosperity. Sometimes, we have to choose.”<sup>28</sup> The clear implication was that countries might opt for prosperity rather than labor standards, assuming that the two do not go together. Another commentator characterized much of the Report as “starry-eyed and pie-in-the-sky.”<sup>29</sup> He made a similar argument, albeit on a scale going beyond a focus on mere labor standards: “Democracy and civil society are no doubt fine things—social equity and the rule of law are certainly more likely in societies where they are present—but the embarrassing truth is that they are neither necessary nor sufficient to achieve economic growth.”<sup>30</sup>

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25. Christopher T. Wonnell, *Lochner v. New York as Economic Theory* 97 (University of San Diego, Public Law and Legal Theory, Working Paper No. 24, 2000-2001), available at <http://papers.ssrn.com/abstract=285433>.

26. *Id.*

27. Martin Wolf, *Growth Requires Painful Choices, Not Platitudes*, FIN. TIMES, Mar. 3, 2004, at 19.

28. *Id.*

29. Janadas Devan, *Bigger Markets, Faster Pace . . . But Who's in Charge?*, STRAITS TIMES, Mar. 12, 2004, at 11.

30. *Id.*

The principal point for the present analysis is that, although the third option of abandoning labor standards to the free market is not formally on the international negotiating table, it has significant support. We would go further and argue that its influence is shaping the form that that fourth option now appears to be taking.

#### 4. *Option (d)*

As the first two options, with their focus on comprehensive international institution building, became untenable, the struggle moved to a battle between the third and fourth options—a battle that is still far from over. Approaches such as that reflected in the 1998 Declaration and in efforts to address labor standards on the basis of corporate social responsibility schemes both fall clearly into the fourth option, but neither of them excludes a continuing role for more traditional methods of supervision as well. However, in some of the schemes that have been put forward for the development of more flexible, selective, and decentralized approaches, the role of the ILO has often been little more than residual.

This is also true of the analyses put forward by scholars. One scheme for decentralization, proposed by David M. Trubek, Jim Mosher, and Jeffrey S. Rothstein, seeks to build a theory of labor standards respect upon the analytical framework of “transnationalism,”<sup>31</sup> which its proponents have developed mainly in the human rights and environmental fields,<sup>32</sup> but which has not been specifically applied to labor rights. This approach seeks to combine flexibility with a significant ongoing ILO role,<sup>33</sup> but others, such as the “ratcheting” approach, seem to imply an ILO role that is residual or post facto at best.<sup>34</sup>

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31. David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187 (2000).

32. See, e.g., MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 79-81 (1998) (discussing transnationalism in the human rights context).

33. Trubek et al., *supra* note 31, at 1197 (discussing the role of the ILO).

34. See Sabel et al., *supra* note 21, at 1-6; Justine Nolan & Michael Posner, *International Standards to Promote Labor Rights: The Role of the United States Government*, 2000 COLUM. BUS. L. REV. 529, 535-43.

The fourth option has, however, motivated a veritable renaissance of interest in international labor rights over the past decade. Far more so than during previous decades, labor rights issues are appearing on the international agendas of multilateral and regional institutions, governments, the private sector, and NGOs. Although there is presently little or no prospect of the inclusion of a social clause within the global trading regime, references to workers' rights are increasingly being incorporated within institutional and policy frameworks at the international and regional levels. Two common threads can be found running through the approach of the many actors regarding their attention to workers' rights. The first is that all adopt a core standards approach, rather than a labor rights approach. The second is that the ILO and its system of international labor standards is almost invariably invoked, but, upon closer inspection, its role remains tangential at best.

The core standards approach has a strong pedigree within the context of the post-war trade and labor debate. From the aborted Havana Charter of 1947, through the various Generalized System of Preferences schemes and industry codes of conduct, to the rules adopted by regional trading blocs such as the E.U. and Mercosur, a link between trade and labor rights has been constructed upon the basis of a limited set of workers' rights, almost randomly designated as either core, basic, fundamental, or internationally recognized. The core standards approach did not emerge in the discourse of the labor movement; this minimalist approach to international labor regulation was largely confined to the trade sphere until globalization and post Cold War neo-liberalism made trade the most pervasive and important item on the international agenda. Thereafter, the core standards approach started to spread beyond the trade sphere. Thus, international financial institutions (IFIs) are increasingly integrating core labor standards into their policy analysis, partner dialogues, and, in some cases, into lending conditionality.<sup>35</sup> Both the Interna-

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35. The World Bank's position on labor standards has been evolving gradually in recent years, although, in operational terms, it still remains vague. In 2000, a Bank report observed that, inspired by the 1998 ILO Declaration, the "Bank promotes an atmosphere conducive to the achievement of core labor standards." World Bank, *Core Labor Standards and the World Bank* (2000), at <http://wbln0018.worldbank.org/HDNet/HDdocs.nsf/0/65510796ed04ac1685256961004c6e7c?OpenDocument>. This stopped short

tional Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) now allow child labor and forced labor conditionality.<sup>36</sup> In the social development sphere, core labor standards also share the stage along with environment and human rights, in the U.N. Secretary General's 1999 Global Compact Initiative.<sup>37</sup>

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of a clear commitment. Two years later, a Core Labor Standards Toolkit noted that "[w]hile there is no official World Bank policy on CLS, the economic, social, and human development issues embedded in the standards make them relevant for Bank work." World Bank, *Step 1: Core Labor Standards and Development* § III (2002), at <http://wbln0018.worldbank.org/HDNet/hddocs.nsf/2d5135ecbf351de6852566a90069b8b6/e7cf11f0d46aba5985256967005b5649?OpenDocument>. But it added that "[c]ompliance with core labor standards is not a condition for lending or technical assistance in client countries." *Id.* Nevertheless, "Bank staff are encouraged to analyze core labor standards in the Country Assistance Strategies of . . . eligible borrowers." *Id.* In practice, however, the latter concession has apparently led to no significant enhancement of the attention paid to labor standards. Thus, a recent critique indicates that:

[A]n analysis of 25 recent IFI country-level policy documents (World Bank CASs and IMF Article IV and loan review documents) found that CLS were mentioned in just one document . . . . However most of the 25 IFI documents analyzed did contain recommendations on labour policy. With few exceptions the advice was to increase 'labour market flexibility' . . . ."

Global Unions, Reforming the IMF and the World Bank to Meet the Millennium Development Goals, Statement to the 2003 Annual Meetings of the IMF and World Bank, (Sept. 23-24, 2003) (transcript available at <http://www.icftu.org/displaydocument.asp?Index=991218570&Language=en>).

36. See MULTILATERAL INV. GUARANTEE AGENCY, MIGA'S ENVIRONMENTAL AND SOCIAL REVIEW PROCEDURES ¶ 15, at [http://www.miga.org/screens/policies/disclose/soc\\_rev.htm](http://www.miga.org/screens/policies/disclose/soc_rev.htm) (last visited May 1, 2004); ENVTL. DIV., INT'L FIN. CORP., IFC POLICY STATEMENT ON FORCED LABOR AND HARMFUL CHILD LABOR (1998), available at [http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_ChildLabor/\\$FILE/ChildForcedLabor.pdf](http://ifcln1.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf). At World Bank Group level, the Structural Adjustment Participatory Review Initiative (SAPRI) seeks to engage trade unions and non-governmental organizations in reviews of Bank policy effects on workers and other social actors. See World Bank Group, *Structural Adjustment Participatory Review Initiative: Project Description*, at <http://www.worldbank.org/research/sapri/saprdescnew.htm> (last visited Oct. 4, 2004); World Bank Group, *Structural Adjustment Participatory Review Initiative: Standard Operating Procedures* (1997), at <http://www.worldbank.org/research/sapri/saprisop.htm> (last visited Oct. 4, 2004).

37. For more on the Global Compact Initiative, see The Global Compact Office, United Nations, *What is the Global Compact?*, at <http://www.unglobalcompact.org> (last visited May 1, 2004).

The 1998 ILO Declaration's endorsement of this approach has facilitated a level of consensus around international labor rights not seen since the early post-war days of the ILO. This consensus appears to support an approach to international labor regulation that (1) is based on a core set of concerns; (2) defines those core concerns in terms of broad principles, rather than human rights; (3) allows various actors (governments, multinational enterprises (MNEs), trade and industry groups, and even NGO coalitions) to define and enforce standards; and (4) de-emphasizes legal enforcement in favor of promotional techniques, dialogue, and technical assistance. This consensus has evolved relatively rapidly over the past few years. What has gone largely unacknowledged is the extent to which it implicitly sidelines the traditional ILO approach, an issue to which we return below when we examine the key characteristics of that approach. But, rather than lamenting the marginalization of that approach, most commentators have been uniformly enthusiastic about the new strategy and have particularly celebrated the fact that actors traditionally seen as opponents of the social clause (such as transnational employers and trade unions in the South) have finally taken labor standards on board.

### B. *The Role of the ILO in the New Approach*

Until the late 1990s, the lion's share of the trade and human rights debate was focused outside the ILO. Although it was the original international forum for the promotion and upholding of labor standards, it seemed to be an unattractive forum in which to situate the central debate over a social clause which would link access to trade to respect for labor standards. Those actors who favored a strong linkage were more interested in making a breakthrough in this regard within the World Trade Organization (WTO), which was widely assumed to be a much more powerful organization because of the possibility that sanctions might attach to violations of its norms. As the Commission of the European Communities put it:

Existing international economic and social rules and structures are unbalanced at the global level. Global market governance has developed more quickly than global *social* governance. The ILO enforcement

mechanism, being limited to ratified conventions, has limited effectiveness. By comparison, the World Trade Organization (WTO), with its rules-based system and binding dispute settlement mechanism, is a strong and relatively effective organization. This relative strength of the WTO has led to calls that it take upon itself to act in areas outside the trade field, thus using its instruments to reinforce governance in other policy areas, such as labour standards and the environment.<sup>38</sup>

But those who wanted a weak linkage, or none at all, tended to view the ILO as too threatening, especially if a new consensus were to emerge that would enable its supervisory procedures to be systematically and effectively mobilized. The advent of the North American Free Trade Agreement (NAFTA) in 1994<sup>39</sup> had also shifted the locus of attention for many labor rights proponents. Others were more interested in the possibilities of exploiting the provisions of national legislation in countries such as the United States, where there was the possibility of imposing unilateral sanctions in response to violations of the internationally recognized workers' rights standards contained in the Omnibus Trade and Competitiveness Act of 1988, which expanded the provisions of the Trade Act of 1974.<sup>40</sup>

But once the WTO made clear in 1996 that it was not prepared to assume a role in this area, the ILO suddenly became the renewed focus of debates. This was in the interests of those who wanted some international organization to take a strong role and it was also in the interests of those who were mainly concerned that enough was done elsewhere to make sure that pressure and attention were deflected away from the WTO. As Kimberly Ann Elliott put it, the ILO, "long ignored and belittled, [was] suddenly popular with various constituencies . . . ."<sup>41</sup> The 1998 Declaration was the principal outcome

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38. Promoting Core Labour Standards, *supra* note 18, at 3.

39. See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993) (entered into force Jan. 1, 1994).

40. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 2901 (2000)).

41. KIMBERLY ANN ELLIOTT, THE ILO AND ENFORCEMENT OF CORE LABOR STANDARDS 1 (Inst. for Int'l Econ., International Economics Policy Briefs No. 00-6, 2000), available at <http://www.iie.com/publications/pb/pb00-6.pdf>.

of this process. Its genesis has been discussed in detail elsewhere<sup>42</sup> and we do not propose to replicate those analyses.

In essence, our view is that the ILO should continue to be the principal forum within which to advance international efforts to protect labor standards and that its essential strength lies in its system of conventions and the supervision of obligations accepted by states. While there is certainly much room for other initiatives, both governmentally sponsored and within the private sector, it is the actual and, especially, the potential role of the ILO system of standards that should be central to efforts to protect labor standards. The Declaration appears to be designed to achieve this goal and its sponsors were keen to underline this fact.

We would contend, however, that the Declaration is coming to overshadow and risks eventually marginalizing the bulk of the ILO's traditional work on labor standards. We acknowledge that the non-Declaration-based ILO system for the protection of labor rights is badly in need of a major overhaul in order to make it more effective in responding to the changing conditions associated with globalization. But we believe that it should be complemented and not effectively replaced by a soft promotional system of the type established under the Declaration, with its emphasis on only four core standards and its reliance upon often ill-defined standards. The Declaration can valuably complement these other techniques, but the links need to be made more visible and straightforward and efforts must be made to prevent the emergence of a two-track system.

### III. THE WORLD COMMISSION REPORT

In a strong defense of recent efforts within the ILO to reinforce its promotion of workers' rights in the contemporary international climate, Virginia Leary has pointed to three encouraging signs. One is the adoption of the 1998 Declaration, which she strongly supports. Another is the establishment of a Working Party on Social Aspects of Globalization, which was the ILO Governing Body group that recommended the appointment of the World Commission. The third is the estab-

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42. See, e.g., Anil Verma, *Global Labour Standards: Can We Get from Here to There?*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 515, 518-19 (2003); Brian A. Langille, *The ILO and the New Economy: Recent Developments*, 15 INT'L J. COMP. LAB. L. & INDUS. REL. 229 (1999).

lishment of the World Commission itself.<sup>43</sup> Leary's approach is indicative of the high hopes that labor rights proponents have vested in this initiative and it is, therefore, important to scrutinize carefully the Commission's recommendations in this key area.

As noted above, the Commission put forward a four point agenda regarding labor standards. It consists of: (1) mainstreaming; (2) technical assistance; (3) increased resources for the ILO; and (4) possible sanctions for persistent violations of labor rights. We need to examine each of these options in turn.<sup>44</sup>

The first element is to adopt a strategy of mainstreaming. While the World Commission does not use that term, it is an expression that is well known in the human rights domain and that perfectly describes the proposed strategy. Thus, the Commission addresses itself to "all relevant international institutions" and calls upon them to "assume their part in promoting the core international labour standards and the Declaration . . . ."<sup>45</sup> More specifically, those institutions are called upon to "ensure that no aspect of their policies or programmes impedes realization" of the core standards.<sup>46</sup> The strategy of mainstreaming is usually premised upon a recognition (even if it remains unacknowledged), that the human rights actor on its own lacks much of the clout necessary to achieve the goals in question and that it, therefore, needs to invoke the assistance of other more powerful actors. While the Commission does not identify those actors specifically, it is clear that at least the World Trade Organization and the World Bank would be among those to which the invocation is directed. In so far as the invocation is addressed to the WTO, it is, in most respects, a convenient fudge since that organization has made it clear in the Declaration adopted at its Singapore Ministerial Meeting

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43. Virginia A. Leary, "Form Follows Function:" *Formulations of International Labor Standards: Treaties, Codes, Soft Law, Trade Agreements*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY 179, 185-86 (Robert J. Flanagan & William B. Gould eds., 2003).

44. See A FAIR GLOBALIZATION, *supra* note 1, ¶ 426, at 98.

45. *Id.*

46. *Id.*

in 1996<sup>47</sup> that it saw no role for itself in relation to labor standards and that the ILO “is the competent body to set and deal with these [internationally recognized core labor] standards,” and reaffirmed the Ministers’ support for the ILO in “its work in promoting them.”<sup>48</sup>

Two other dimensions of this first element are also worthy of attention. First, the focus of the recommendation is explicitly on core labor standards and not on either labor standards in general or on the conventions which have been specifically ratified by individual states. Second, the standard of responsibility specified is a very vague and potentially undemanding one. Institutions are asked to ensure that their work does not “impede” realization of those standards, rather than being asked to facilitate realization or actively to promote it.

The second element, to increase technical assistance, is less problematic. The World Commission first draws a distinction between situations in which the Declaration standards have not been implemented due to a lack of political will and those where a lack of capacity is the problem. In practice, of course, such a distinction is very hard to draw, mainly because many states will be lacking in both in almost equal measure.<sup>49</sup> But, where capacity is the obstacle, the Commission recommends that “existing technical assistance programmes for the implementation of standards should be stepped up, including the strengthening of labour administrations, training, and assistance to the organization of workers and enterprises. This should include reinforcement of existing action to eliminate child labour.”<sup>50</sup>

This is a very traditional ILO approach but it is noteworthy that the recommendation again refers not to labor rights in general but only to the core standards (the “fundamental principles and rights at work”<sup>51</sup>). It is also significant that no new programs or innovations are called for, thereby assuming

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47. Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC (Dec. 13, 1996), *reprinted in* 36 I.L.M. 218, *available at* <http://docsonline.wto.org/>.

48. *Id.* ¶ 4, *reprinted in* 36 I.L.M. at 221. *See generally* Virginia A. Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT’L L. 118 (1997) (discussing the significance of the WTO’s statement).

49. A FAIR GLOBALIZATION, *supra* note 1, ¶ 426, at 94.

50. *Id.*

51. *Id.*

that a lack of ILO resources is not a major problem. However, ILO resources are specifically addressed by the third element of the agenda.

The third element is to strengthen the ILO by increasing the resources available to it for the following specific purposes: "fair and appropriate supervision and monitoring, for promotional assistance, and for the Follow-up to the Declaration . . . and other procedures established in the ILO's Constitution."<sup>52</sup> Once again, the emphasis is upon the Declaration, but it must also be said that this particular recommendation might leave the door open for strengthening some of the more traditional ILO labor standards mechanisms. But the addition of the phrase "fair and appropriate" to describe the supervisory and monitoring activities that should be supported can only be interpreted as implying that not all of the ILO's procedures could or should be thus characterized. It is clearly a qualification inserted in response to criticisms of some of the supervisory work being undertaken. The reference to "other procedures established in the ILO's Constitution" also needs to be read in a technical manner as excluding, for example, the work of the Committee on Freedom of Association, which is not established by the Constitution but simply based on principles contained in it. Overall, this third element, especially when combined with the first two, exhibits a marked reluctance to endorse the mainstream ILO supervisory activities in relation to labor standards. It also places an emphasis on the Declaration procedures, which are the only procedures specified, and reinforces emphasis by an additional reference to promotional assistance.

The fourth and final element is to use a procedure specified in Article 33 of the ILO Constitution<sup>53</sup> in order to secure

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52. *Id.*

53. Article 33 provides that:

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Constitution of the International Labor Organization, *as amended* Oct. 9, 1946, art. 33, 62 Stat. 3485, 3542, 15 U.N.T.S. 36, 92, *available at* <http://www.ilo.org/public/english/about/iloconst.htm>.

what the World Commission terms “enforcement” in response to situations “where persistent violations of rights continue despite recommendations of the ILO’s supervisory mechanisms.”<sup>54</sup> This procedure has only been invoked once in the history of the ILO and that was in relation to Myanmar. In that case, an ILO Commission of Inquiry found in 1998 that serious problems of forced labor existed within the country.<sup>55</sup> In 2000, the ILO Conference threatened to impose a range of sanctions that might include: Convening a special sitting of the ILO’s Committee on the Application of Standards to focus solely on this issue;<sup>56</sup> adopting a recommendation to all ILO members—governments, employers, and workers—that “they review . . . their relations” with Myanmar and “take appropriate measures to ensure” that such relations do not “perpetuate or extend the system of forced or compulsory labour” in that country;<sup>57</sup> suggesting that other international organizations should reconsider any cooperative activities they undertake with Myanmar and terminate any activity related to forced labor;<sup>58</sup> and suggesting that the U.N. Economic and Social Council and/or the General Assembly might call upon governments and international agencies to ensure that, by their involvement, they are not “directly or indirectly abetting the practice of forced or compulsory labour.”<sup>59</sup> The measures anticipated have so far not included suspension of Myanmar’s membership from the ILO or the adoption of trade sanctions by the Security Council or individual states.<sup>60</sup> As of March

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54. A FAIR GLOBALIZATION, *supra* note 1, ¶ 426, at 98.

55. *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* ¶¶ 528-38 (July 2, 1998), at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb273/myanmar.htm>.

56. Int’l Labour Conference, Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constitution on the Subject of Myanmar, 88th Sess., Geneva ¶ 1(a) (2000), at <http://www.ilo.org/public/english/standards/realm/ilc/ilc88/resolutions.htm#1>.

57. *Id.* ¶ 1(b).

58. *Id.* ¶ 1(c).

59. *Id.* ¶ 1(c)-(d).

60. *Id.*

2004, none of these steps had been taken as the two sides continued a long running diplomatic game of cat and mouse.<sup>61</sup>

Despite the ILO's reluctance to proceed down the Article 33 path, even in relation to Myanmar, the fact remains that this provision lies very much at the hard end of the spectrum of measures open to an international organization in such cases. Therefore, its invocation is not a matter to be taken lightly, and the World Commission's suggestion that such a last resort measure could be used more frequently in the future is significant. What is odd, however, is that the resort to sanctions seems rather far away on the spectrum from each of the other three elements identified. The Commission might reasonably have been expected to devote at least some attention to strengthening other aspects of the existing supervisory machinery before moving to that final level.

On the basis of this review of the recommendations adopted by the World Commission, several conclusions seem appropriate. The first is that, despite expectations that the trade and labor linkage would occupy a significant part of the report, relatively little space is devoted to the issue of enhancing respect for labor standards. The second, and most important for the present analysis, is that the report focuses very heavily on the 1998 Declaration and the concept of core labor standards and, by implication at least, seems to diminish the importance of other means by which ILO standards are being protected. The third is that, despite the reference to Article 33, the report is essentially concerned with promotional measures of the type associated with the Declaration rather than any of the more formal supervisory mechanisms of the ILO.

#### IV. THE IMPACT OF THE 1998 DECLARATION ON THE TRADITIONAL ILO SYSTEM

The new consensus in favor of the core standards approach stands in marked contrast to the ILO's traditional international labor standards system, which was characterized by various features largely absent from the new approach. They include an open process for the debate and adoption of stan-

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61. See COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INT'L LABOUR ORG., INDIVIDUAL OBSERVATION CONCERNING CONVENTION NO. 29, FORCED LABOUR, 1930 MYANMAR ¶ 43 (2004), at <http://www.ilo.org/ilolex>.

dards in which a certain equality among the different participants is respected, reasonably clearly-defined standards, a system capable of providing interpretative clarification and generating a gradually cumulating jurisprudence, a forum in which different actors' views can be aired systematically, and a supervisory mechanism designed to promote compliance.<sup>62</sup>

One could argue that the core labor standards approach has much more to recommend it than the old system that it effectively seeks to replace and that little will be lost in the transition. Curiously, however, both the diplomats who drafted the Declaration and the academic commentators who are promoting new approaches are uniformly anxious to pay homage to the links between the traditional ILO system and the new core standards approach. Perhaps the most striking aspect of the new approaches that have been proposed is the extent to which they provide no substitute for the mobilizing power of internationally accepted rights, with their connotations of legitimacy, determinacy, and solidarity. These approaches generally discount the role of national governments and the responsibilities of other governments working through the international community and, instead, rely upon individual initiatives by key actors. In particular, the consumer movement, as manifested in a small range of cases and working in or from the United States and a handful of other developed countries, is seen as the key to the future. Thus U.S. groups, such as the Campaign for Labor Rights,<sup>63</sup> or British

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62. For more on the ILO's approach to human rights, including its systems, techniques, and procedures, see generally Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580, 580-619 (Philip Alston ed. 1992) [hereinafter Leary, *ILO Lessons*].

63. For more on the Campaign for Labour Rights, see CAMPAIGN FOR LABOUR RIGHTS, ABOUT CLR (2004), at <http://www.campaignforlaborrights.org/whois.html>. "At a time when U.S. consumers are becoming more concerned and aware of the conditions under which their goods are produced, CLR pushes for disclosure and accountability within the current trend of economic globalization. CLR works to have the right to organize recognized as a fundamental human right." *Id.* However, the right to organize has been recognized as a fundamental right in every major human rights instrument since at least the Universal Declaration of Human Rights of 1948. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217(A), 3d Sess. art. 23(4), U.N. Doc. A/810 (1948). Thus, implementation is much more of a challenge than is recognition.

groups, such as the Ethical Consumer Research Association,<sup>64</sup> devote much of their energies to promoting and publicizing selective boycotts of a wide range of consumer products. While it is tempting to have such faith in consumers, it seems more likely that they will prove to be as fickle in their ability to maintain boycotts and selectivity as they are in their fashion purchasing preferences.

In the remaining parts of this Article we analyze the three aspects that we believe provide the greatest contrast between the traditional ILO system and the core labor standards (CLS) approach.

### A. *Coherence*

The emergence of the CLS approach is, in our view, a potential step towards the loss of a controlled approach to the way in which labor standards are identified and defined. The failure to link the content of the core standards in any definitive way to the terms of agreed conventions is a way of empowering a variety of new actors, such as multinational corporations and trade groups in the apparel, footwear, petroleum, and other industries, to set their own standards in determining what they will do in relation to each of the core labor rights. This will lead, not only to a heterogeneous outcome, but also to a chaotic and possibly destructive one that stands in stark contrast to the International Labor Code's reliance upon a single, global institutional framework to set standards (although implementation remained a local- or national-level activity). The ILO maintains the sole global system of labor standards. Regional systems exist, but none can match the breadth of the ILO's reach, especially in terms of member states and the in-

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64. For more on the Ethical Consumer Research Association, see Ethical Consumer Research Ass'n, *About ECRA*, at <http://www.ethicalconsumer.org/aboutec/aboutus.htm> (last visited Oct. 4, 2004). The group's list of current boycotts gives an indication of the scope of the ambitions of the movement. Starting alphabetically there are boycotts under the letter "A" against Adidas for using kangaroo skin in football boots, major airlines for transporting monkeys to be used for research, American Home Products for using horses in drug production, Aqua Babies for giving tiny fish like goldfish a "miserable existence and untimely death" from life in a mini-aquarium, etc. See Ethical Consumer Research Ass'n, *Boycotts list*, ETHICAL CONSUMER, at [http://www.ethicalconsumer.org/boycotts/boycotts\\_list.htm](http://www.ethicalconsumer.org/boycotts/boycotts_list.htm) (last visited May 1, 2004).

volvement of the tripartite actors in standard-setting, promotional, and monitoring activities. Standards adopted by the International Labour Conference (ILC) are recognized by virtually all public actors, from multilateral institutions to national governments. The principal consequence of that recognition is that adoption of a labor standard by the ILC reflects a broad-based agreement on the content and applicability of the standard. In addition to being relatively detailed in their definition of workers' rights, ILO conventions are usually elaborated upon by the (normal) adoption of an accompanying recommendation and, in the long run, by the jurisprudence of supervisory bodies on the application of the standard in question. Much of the reputation of the classic ILO system was based on the certainty and coherence engendered by this approach.

### 1. *Three Principle Problems with the ILO's Loss of Control*

There are three principal problems with this loss of control. They concern, first, the fact that the 1998 Declaration singles out such a small group of standards; second, the identification of which standards are to be considered core standards; and third, the content attributed to a particular standard such as non-discrimination or forced labor.

The first problem, to which we also return below, concerns the singling out of only four core standards in the 1998 Declaration. The problem is not the choice of incorrect, or too few, standards, but that there may not be an acceptable set of core standards. Before the Declaration's adoption, the ILO system did not accord prominence to certain standards in the way a core standards approach does. It recognized that there existed certain fundamental principles of the Organization, such as freedom of association, and it recognized that certain of its conventions and recommendations covered areas of human rights as identified in the two International Human Rights Covenants. However, the notion that a small set of four principles could ensure all working conditions globally is antithetical to the conception of international standards in the ILO system. The certainty provided by the ILO system was its global application, settled definitions, and clarity of obligations. This certainty was increasingly lost as a multitude of core sets were adopted, without reference to the ILO, without

any centralized debate, without a view beyond the interests of single actors, and often without any deep understanding or expertise in the issue of labor standards.

The second problem concerns the ad hoc way in which the trade-based core standards approach arrived at definitions of core standards. While the various actors defining those core standards could have used ILO standards as a basis for choosing and defining core rights, they generally have not.<sup>65</sup> As various MNEs, industry groups, NGOs, governments, and international organizations adopted (and sometimes defined) their core sets, often in the context of the nebulous concept of corporate social responsibility, self-interest came to the fore and coherence disappeared. Certain rights, such as non-discrimination, appeared in more initiatives than did others, but, overall, there developed a large disparity in what was considered fundamental. Even initiatives based on internationally recognized workers' rights felt the need to define selectively what this encompassed. The main factor in setting and defining standards became the interest of the promoter. In the private sector, the dominance of self-interest is evidenced by the consensus around certain labor standards within certain industries (e.g., child labor in textile and footwear industries). At a broader level, multinational corporations have little interest in promoting freedom of association, but they are increasingly interested in encouraging the perception that they are addressing labor issues. As a result, they adopt codes of conduct

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65. With reference to private sector codes of conduct, see, for example, Working Party on the Social Dimensions of the Liberalization of Int'l Trade, Int'l Labour Org., *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues*, 273d Sess., Geneva, ¶¶ 53-59, ILO Doc. GB.273/WP/SDL/1 (Rev.1) (1998), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/sdl-1.htm> [hereinafter *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives*]. Not even national GSP schemes agree on the number of rights, let alone their content. See also the example of the North American Agreement on Labor Cooperation, which identifies eleven workers' rights, only three of which are enforceable through sanctions and of which only one is an ILO core standard as defined by the 1998 Declaration. See North American Agreement on Labor Cooperation, Sept. 8-14, 1993, Annex 1, 32 I.L.M. 1499, 1515-16, available at <http://www.naalc.org/english/agreement.shtml>. The adoption of the ILO Declaration in 1998 gives some opportunity for core sets to be defined by reference to its text.

that commit themselves to a safe workplace but stay silent on the right to form unions. For other multinational corporations, freedom of association is non-negotiable but health and safety is ignored. Thus, depending on the regime in which one is operating, core rights can mean a variety of things.

In 1998, the ILO compiled a database of approximately 215 separate corporate social responsibility initiatives and its survey of their content confirmed the dominance of self-interest in identifying core labor standards.<sup>66</sup> In a report issued 5 years later, in 2003, the database had expanded to 300 initiatives, but the ILO concluded that the corporate codes and policies that it surveyed “contain relatively few references to the fundamental international labour standards”<sup>67</sup> (referring presumably to the CLS rather than to any broader understanding). While some of the codes and policies referred to the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (adopted in 1977 but updated in 2000 to incorporate a reference to the CLS contained in the 1998 Declaration), “most of them do not.”<sup>68</sup> Finally, the report noted that some of them “even contain language that could be interpreted as undermining international labour standards.”<sup>69</sup>

The third problem concerns the content of the standards that are acknowledged. Almost all the new core standards regimes choose a core set of standards, by definition.<sup>70</sup> But very few go further by defining the content of each of those standards. For example, although some 33% of multi-stakeholder initiatives surveyed by the ILO in 2001 contain some reference

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66. *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives*, *supra* note 65. Health and safety issues were dealt with in approximately 75% of the codes surveyed, while freedom of association appeared in only approximately 15% of them. *Id.* ¶¶ 56, 58.

67. *Information Note on Corporate Social Responsibility and International Labour Standards*, ¶ 6, ILO doc. GB.286/WP/SDG/4(Rev.) (2003), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/sdg-4.pdf> [hereinafter *Information Note*].

68. *Id.*

69. *Id.*

70. Very few rely on formulations such as “internationally recognized rights” without further defining what this means.

to freedom of association,<sup>71</sup> a great many corporate social responsibility codes and policies are content to describe their commitment in rather bland and imprecise language, such as “recogniz[ing] the right of employees to freely associate.”<sup>72</sup> Clearly, choosing either to define or not define the content of standards presents problems for the coherence of international labor standards. By defining the content of standards without reference to a broader definition (such as ILO conventions), the right is liable to be circumscribed. Commitment solely to a broad statement of principle, on the other hand, can make the standard potentially meaningless and leave its definition open to abuse by the more powerful party in a dispute.

ILO standards, while not (until recently) providing a ready-made set of core rights, present an obvious benchmark for avoiding discrepancies in definitions and content. Sometimes they have served this purpose. But, more often, the detailed conventions of the Organization are seen not only as embodying the rigidities of the old system, but also as undermining the simplicity and blandness that make the core standards approach so attractive to such a wide range of actors. The result is a tendency towards a decrease in the level of protections and obligations, since a bald statement of a right or strictly limited definition allows the development of a lowest common denominator approach to content. Various commentators have proposed that standards should be permitted to evolve in a more or less spontaneous fashion rather than relying upon any guaranteed floor identified by the ILO. The most sophisticated such approach is the ratcheting labor standards scheme under which the setting of effective standards is based on current best practices among employers and, thus,

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71. MICHAEL URMINSKY, SELF-REGULATION IN THE WORKPLACE: CODES OF CONDUCT, SOCIAL LABELING AND SOCIALLY RESPONSIBLE INVESTMENT 26 (Job Creation and Enterp. Dev. Dep't, Int'l Labour Office, MCC Working Paper No. 1), available at <http://www.ilo.org/public/english/employment/multi/download/wp1mcc.pdf> (last visited Oct. 1, 2004).

72. The example is taken from Timberland Co., *Code of Conduct* (listing standards with which Timberland expects its business partners to comply), available at <http://www.timberland.com/timberland/download/english%20feb02.pdf> (last visited Oct. 1, 2004).

varies significantly across nations, as well as within countries and industries.<sup>73</sup>

## 2. *Transposition of Conventional Obligations onto Non-State Actors*

These concerns have been countered with the argument that the obligations imposed by ILO conventions, as they are addressed to states, cannot be merely transposed onto non-state actors such as MNEs or even other international organizations. The argument is that it is inevitable that international labor standards will be set and enforced through non-state actors because global regulatory regimes are seeing an inexorable power shift away from domestic government towards more collaborative power structures involving civil society, business, and transnational public organizations.<sup>74</sup> How can these actors take on the contents of ILO conventions, which either give individuals classic rights against the state<sup>75</sup> or require the declaration and pursuit of a national policy or are related to the level of national development.<sup>76</sup> This argument has some force. Such standards clearly need to be elaborated and expanded for use by non-state actors. Nonetheless, the increasing sharing of power between state and non-state actors should not result in the loss of a comprehensive floor of enforceable labor standards applicable transitionally. The point here is that this sharing risks fragmentation and incoherence. It has been suggested that ILO standards can be modified for use by non-state actors, as long as, in doing so, reference is made to the philosophy underlying the ILO regime that sees international labor standards as a constraint on the power of capital.<sup>77</sup> Such modification, in practice, would encourage private sector

73. Sabel et al., *supra* note 21, at 4, 8, 36.

74. Jessica T. Matthews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50.

75. Such rights include an obligation on the state to “suppress” the use of forced labor. See International Labour Organization Abolition of Forced Labour Convention, No. 105, June 25, 1957, art. 1, 320 U.N.T.S. 291, available at <http://www.ilo.org/ilolex/english/convdsp1.htm>.

76. An example is the C138 Minimum Age Convention. See International Labour Organization Convention Concerning Minimum Age for Admission to Employment, No. 138, *opened for signature* June 26, 1973, 1015 U.N.T.S. 297, available at <http://www.ilo.org/ilolex/english/convdsp1.htm>.

77. Jill Murray, *Labor Rights/Corporate Responsibilities: The Role of the ILO Labour Standards*, in CORPORATE RESPONSIBILITY & LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 31, 31-32 (Rhys Jenkins et al. eds., 2002).

initiatives to set restraints on their own corporate power. However, the dearth of references to freedom of association in corporate codes of conduct suggests that this is wishful thinking.<sup>78</sup>

In some ways, these developments are self-perpetuating. As labor activists are presented with an array of possible standards regimes through which a matter might be pursued (instead of the traditional unitary path of first exhausting remedies provided by national labor law before going to the ILO), they are naturally looking for the regime offering the best chances of success and the most attractive remedies. It is clear how the ILO regime is marginalized in this way, such as when anti-sweatshop campaigners build litigation strategies entirely around bilateral measures (such as the provisions contained in Section 301(d) of the Trade Act of 1974) and developing country unions press claims against developing country employers by enlisting the support of activists in the North in transnational labor advocacy networks, rather than by invoking national ILO-compliant laws. The ILO and its standards are barely visible in much of this activity. Part of the reason is, of course, the failure of governments and other actors to reform or transform the ILO itself. Many of the actors relying on these new standards regimes do not have access to the ILO system, unless they are prepared to work through a trade union or sympathetic government. The critical point is that the fragmentation of the international standards regime that is entailed by these developments inevitably weakens the coherence of international labor standards and, thereby, the protection of workers' rights.

The use of core standards language by the ILO has been accompanied by this incoherence in approach. The high point of what Bob Hepple calls the ILO's "retreat to 'core' standards"<sup>79</sup> is the 1998 Declaration. While the text is one of the few that links core standards to the ILO conventions, the link is vague, using almost circular reasoning. The Declaration recalls that the ILO's fundamental principles "have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both in-

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78. See *supra* text accompanying note 72.

79. Bob Hepple, *New Approaches to International Labour Organization*, 26 *INDUS. L.J.* 353, 358 (1997).

side and outside the Organization.”<sup>80</sup> Members are then enjoined to respect “the principles concerning the fundamental rights which are the subject of those Conventions.”<sup>81</sup> Are member states that have not ratified the “fundamental” conventions bound by the terms of those conventions? Most would say clearly no.<sup>82</sup> So, the ILO is left with a set of core standards influenced but not clearly or necessarily defined by its own conventions.

### 3. *The Pragmatist Approach*

Sean Cooney has put forward one of the strongest scholarly defenses of a flexible approach to labor standards largely detached from the Conventions of the ILO and, presumably, from the entire corpus of international human rights law (which, as noted earlier, covers a wide spectrum of labor rights).<sup>83</sup> He defends what he terms a pragmatist approach, which seems to owe much to the philosophical reflections of

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80. ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 6, ¶ 1(b), 37 I.L.M. at 1237.

81. *Id.* ¶ 2, 37 I.L.M. at 1237.

82. This view has been forcefully expressed by Edward Potter, Vice-Chairman of the ILO Committee that drafted the Declaration and representative of the United States Employers' Group in the ILO. In the 2003 debates in the International Labour Conference, he stated that the content of the principle of non-discrimination which is contained in the Declaration is not the same as the content of the two relevant ILO Conventions on this subject (No. 100 and No. 111):

The governmental commitment encompasses the scope of these two Conventions without the detailed legal obligations . . . .

It is clear that Members have no obligations as concerns the specific provisions of the Conventions they have not ratified. Moreover, the Declaration is no wider in scope than the fundamental Conventions themselves.

Int'l Labour Conference, 91st Sess., 13th mtg., No. 14, at 1 (2003) (provisional record), available at <http://www.ilo.org/public/english/standards/reln/ilc/ilc91/pdf/pr-14.pdf>. See also BRIAN LANGILLE, FREEDOM OF ASSOCIATION AND THE EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING: A REFLECTION UPON OUR FUNDAMENTAL COMMITMENTS 2 (“These constitutional duties are not, and expressly not, the ‘specific rights and obligations in Conventions . . . .’ The Declaration is a statement of institutional values . . . .”), available at <http://www.oit.org.pe/spanish/260ameri/oitreg/activid/proyectos/actrav/edob/material/declapdf/english/pdf/papers/langille.pdf> (last visited May 1, 2004).

83. Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 383 (1999).

Dewey.<sup>84</sup> He defines this approach as one that “rejects the notion that social problems are best solved by first developing fixed principles, and then applying them to concrete situations.”<sup>85</sup> The rights approach, or fixed principles approach, is said to fail in part because it is unable to take account of all relevant contextual considerations or to adjust to unintended consequences. In that respect, the analysis is remarkably similar to that of Friedrich Hayek, whose embrace of the market was justified in almost identical terms.<sup>86</sup> But instead of embracing Hayek’s ordo-liberal solution, the pragmatist approach relies upon a “method of experimental inquiry combined with free and full discussion—which means, in the case of social problems, the maximum use of the capacities of citizens for proposing courses of action, for testing them, and for evaluating the results.”<sup>87</sup> The emphasis is on experimentation, which leads those involved to reconceptualize the problems they face and to define their goals accordingly.<sup>88</sup>

Cooney acknowledges that this approach might not be compatible with the ILO’s approach to defining labor rights, which is largely a top-down approach, despite its efforts to involve social partners as much as possible (a notion once defined by reference to the government, workers, and employers, but that now embraces civil society more generally).<sup>89</sup> Nonetheless, he insists that pragmatist approaches might lead to a better understanding of what rights are really all about and relies upon a Habermasian understanding of rights as legal expressions of shared moral convictions evolving from dialogue between peoples.<sup>90</sup> Consistent with this approach, he endorses the concept of a “transformative dialogue” that defines rights through a process “in which marginalized groups

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84. For Dewey’s philosophy, see JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 3 (Gateway Books 1946) (1927); JOHN DEWEY, *DEMOCRACY AND EDUCATION* 375-87 (MacMillan Co. 1938) (1916).

85. Cooney, *supra* note 83, at 383.

86. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 227-28 (1960).

87. Cooney, *supra* note 83, at 384 (quoting Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1682 (1990) [hereinafter Putnam, *Reconsideration*]).

88. *Id.*

89. *Id.* at 389-94.

90. *Id.* at 394.

are included and disparities in power are acknowledged.<sup>91</sup> He also calls for a “discursive understanding of human rights” which might involve “dialogic encounters” among ILO participants as they “search to understand the others’ position and arrive at a common position on discrete issues.”<sup>92</sup> Such a process might lead to the adoption of “common positions” that, in turn, “may lead to future agreement on issues that are now deeply controversial.”<sup>93</sup> The big advantage of this discursive approach is that it “supports an understanding of fundamental labor standards as partial and revisable.”<sup>94</sup>

But there are a number of problems with this analysis. First, it is modeled largely on theories of citizen participation and tailoring to local circumstances that tend to assume the existence of more or less democratic polities in which these processes can take place. Thus, the writings of Jurgen Habermas,<sup>95</sup> Hilary Putnam,<sup>96</sup> Charles Sabel,<sup>97</sup> and others on whom Cooney relies are not as easily transposable to a system capable of identifying the labor standards that should apply in Myanmar, Equatorial Guinea, and Belarus. Second, Cooney never really spells out how it might be possible to reconcile his embrace of processes that are likely to give rise to subjective, open-ended, heterogeneous, and entirely flexible standards with his concern to uphold the ILO convention-based standards of which he speaks approvingly at certain points. Third, in a transition that mirrors the perspectives reflected in the 1998 Declaration, he moves from his call for a discursive or dialogic approach to the conclusion that “[t]he need for a common moral position is another reason for prioritizing the worst abuses.”<sup>98</sup> He asserts that:

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91. *Id.* at 395 (citing Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 33 (1997)).

92. *Id.*

93. *Id.* at 395-96.

94. *Id.* at 396.

95. JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER* ch. 7 (1998), *cited in* Cooney, *supra* note 83, at 394.

96. HILARY PUTNAM, *PRAGMATISM: AN OPEN QUESTION* (1995), *cited in* Cooney, *supra* note 83, at 383; Putnam, *Reconsideration*, *supra* note 87, *cited in* Cooney, *supra* note 83, at 384, 394.

97. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998), *cited in* Cooney, *supra* note 83, at 383.

98. Cooney, *supra* note 83, at 396.

It is more likely that there will be agreement that the sale and trafficking of children is wrong than on the appropriate minimum age, that the sexual abuse of women in the workplace is wrong than on whether anti-discrimination laws should apply to religious institutions, that the beating of workers peacefully associating is wrong, than on what constitutes freedom from governmental interference in a union. Again, the unanimous support given to the 1999 Convention on the Worst Forms of Child Labour provides a powerful empirical demonstration of this intuition.<sup>99</sup>

Rather than showing how dialogue or discourse would lead to such a set of understandings, he has simply enunciated a set of priorities, which, for all its merits, happens to endorse current Western elite sensibilities. He makes no attempt to demonstrate how, exactly, such priorities have emerged or would emerge if the sort of open-ended, locally contingent dialogues that he advocates had taken place. It seems at least plausible to us that local dialogues in some contexts might actually reverse the priorities that seem self-evident to him. Thus, a systematic practice of putting children to work at a young age, depriving them of education and the possibility of escaping from the vicious circle of poverty and exploitation, might seem to be a greater evil than a much less prevalent practice of selling and trafficking in children. Or, an emphasis on eliminating workplace sexual harassment might seem much less important than overcoming the systematic imposition of rules that are fundamentally offensive to the religious beliefs of a large proportion of the population.

Finally, his suggestion that ILO's adoption in 1999 of the Convention on the Worst Forms of Child Labour "provides a powerful empirical demonstration of this intuition"<sup>100</sup> not only contradicts the suggestion that sale and trafficking is a greater concern to the masses than minimum age, but also acknowledges that his priorities derive from an intuition rather than from any extended discourse with marginalized groups. There are many who would argue that the latter would defend the continuation of child labor until such time as their children are provided with other more viable life choices.

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99. *Id.*

100. *Id.*

The purpose of this critical engagement with the pragmatist approach is to argue that, whatever its theoretical merits, its practical application still leaves much to be desired. For the majority of exploited workers who live in societies in which their voices count for little or nothing, it is not appealing to reject ILO labor standards in favor of an open-ended set of standards chosen within a system in which they have no influence.

### B. *Universality and Interdependence*

The CLS are homogeneous in one respect: their nature as civil or political rights. Freedom of association, non-discrimination, and freedom from forced labor and child labor—the four standards contained in the 1998 Declaration—are classic “negative” rights in the sense that they require governments to refrain from certain activities and to prevent others from engaging in them. But the list contains none of the so-called “positive” rights, or economic and social rights, that require the government to actively promote certain minimum standards.<sup>101</sup>

The choice of standards is not neutral. Rather, it reveals the interests and the ideological preferences of the key actors who have taken the lead in promoting the slimmed down concept of core standards. According to the rhetoric, these standards are accorded prominence because they are matters of human rights and because they have a facilitative or foundational quality, in the sense that all other rights at work can arguably be achieved if these core rights are respected. But this prioritization is precisely the approach that is eschewed by the insistence in human rights standards that all rights are indivisible and interdependent.

Another consequence of the use of the concept of core rights is that actors can promote them on the basis of the ques-

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101. We have placed the terms “positive” and “negative” in quotation marks in order to highlight the contested nature of such terminology, although it is useful in a context such as this in calling up stereotypical characterizations of the differences between the two principal sets of human rights. On the positive/negative dichotomy, see STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 1 (1999) (noting that “The opposition between two fundamentally different sorts of claim—between ‘negative rights’ . . . and ‘positive rights’ . . .—is quite familiar. But it is anything but self-evident.”).

tionable assumptions that are generally made in relation to civil and political rights, such as the claim that their implications are the same in all countries regardless of the level of a country's economic development. This simplistic insistence on the absoluteness of civil and political rights conceals the fact that the majority of those rights assume a very different meaning from one society to another (as indeed they should). Similarly, civil and political rights are often said to be cost-free in terms of their impact on production costs (or at least not costly, in contrast to economic and social rights). The opposite stereotypes are generally assumed to apply in relation to economic and social rights: that they are entirely dependent upon levels of development within a society and upon the level of resources available to promote a particular goal. This is not the place to debate these longstanding issues, which have pre-occupied human rights discussions for decade, but the point is simply that the CLS approach takes a very firm position on one side of the debate over priorities among rights.

Even if this prioritization was acceptable within the trade sphere, once core standards are promoted as the key international labor standards for all purposes, the essential economic and social component of rights at work is lost (including components such as safety and health in the workplace, maternity provisions, pension entitlements, disability arrangements, and leave).<sup>102</sup> This skewing in favor of civil and political rights is the antithesis of the ILO approach, which led the way in the promotion of a non-discriminating approach to the two sets of rights, based on an overarching commitment to social justice. By a remarkable feat of disingenuity, many labor rights activists (and scholars) involved in the core standards debate have been content to justify core standards by reference to human rights norms contained in various international texts including the U.N.'s International Human Rights Covenants, while generally failing to comment on the highly selective nature of this grounding or the fact that various clearly-recognized human

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102. DiMatteo et al. have characterized the Declaration as offering "de minimus [sic] protection," and observe that it does not protect "[r]ights to workplace safety, limits on the hours of work and rights to periods of rest, and freedom from workplace abuse," nor does it "assert a global minimum wage, or create a right to a fair or living wage." Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 124 (2003).

rights are simply omitted from the list of what is now deemed fundamental or core.<sup>103</sup> But, as Macklem has observed, the rights reflected in the 1998 Declaration have a “partial and negative nature” and the result is to limit the Declaration’s “transformative potential to address some of the deeper causes of injustice at work.”<sup>104</sup>

Thus, the core approach risks undermining the indivisibility of the overall corpus of the International Labor Code. If a transnational corporation or government can satisfy its (international) labor obligations by abiding by a vague set of core standards promoting selected civil and political rights, what incentive has it to accept (or, in the case of a government, to ratify) any existing non-core ILO standards relating to economic and social rights? Can a system that does not address economic and social rights rightly be termed an international labor standards system? The ILO has historically championed the interdependence of civil and political and economic and social rights at work, arguing that the traditional categories used within the U.N. made little sense in relation to the labor market. Freedom of association and the right to collectively bargain may give workers a voice, but, by themselves, they will not redress the power imbalance between capital and labor. As Compa points out, the rights of workers to accident insurance and pensions are essentially no different than laws providing for compensation for acts of discrimination or forced labor.<sup>105</sup>

Why is this so troubling? First, it undermines the interdependence of human rights at a time when social and economic rights are under increasing attack. Second, the excision of economic and social rights from core standards not only discards many (and arguably some of the most important) ILO standards, but also excludes regulation of areas of particular significance in the employment relationship. By agreeing to this exclusion, labor rights advocates are not only “risk[ing] a grave loss of [advocacy] space,”<sup>106</sup> but also are giving away the heart-

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103. An exception is the article by Di Matteo et al. *See supra* note 102.

104. Patrick Macklem, *Labour Law Beyond Borders*, 5 J. INT’L ECON. L. 605, 620 (2002).

105. Lance Compa, *Core Labour Rights: Promise and Peril*, 9 INT’L UNION RTS., Issue 3, at 20-21.

106. *Id.* at 21.

land of labor rights. Finally, in relying purely on broadly applicable civil rights, core standards blur the distinction between people in a work context and those outside it. The privileged position of the employment relationship is weakened and labor risks becoming a commodity.

### C. *Monitoring and Supervision*

One of the most widely praised aspects of the ILO's approach to labor rights, at least over the past 75 years or so, is its emphasis on the monitoring and supervision of the extent to which governments have complied with the obligations they have assumed under ILO Conventions or by virtue of their acceptance of the principles contained in the ILO Constitution.<sup>107</sup> Although the 1998 Declaration was very vague on follow-up, its potential in terms of monitoring very quickly became one of the principal selling points invoked by its supporters. This is well illustrated by a speech given by Senator Daniel Patrick Moynihan (D-N.Y.) in the U.S. Senate immediately after the Declaration's adoption.<sup>108</sup> Senator Moynihan, whose doctoral thesis written many years earlier at the Fletcher School of Law and Diplomacy was about the ILO, chose to emphasize the monitoring arrangements. He recalled that the U.S. Secretary of Labor had characterized the new Declaration and its follow-up mechanism as "a big step forward for the ILO and its members," while the President of the AFL-CIO called it "an historic breakthrough."<sup>109</sup> But, for Moynihan, the real significance of the Declaration was:

[T]he monitoring mechanism, the element that will, if implemented properly, ensure that something will come of all this. For example, the follow-up mechanism will take a look at how China is doing on prison labor, how Pakistan is doing on child labor, how the United States performs with respect to freedom of association. Yes, we will be examined, too.

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107. For useful overviews of how the ILO supervisory system works, or at least how it should work, see Leary, *ILO Lessons*, *supra* note 62, at 595-609; RICHARD B. FREEMAN & KIMBERLY ANN ELLIOT, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 95-100 (2003).

108. See 144 CONG. REC. S6907 (1998) (statement of Sen. Moynihan).

109. *Id.*

. . . Its monitoring mechanism could evolve into an effective tool for upgrading global compliance with these core labor standards. I have argued that the monitoring system ought to include inspections, an idea that could gain acceptance over time.<sup>110</sup>

But, for all his optimism on this score, Moynihan did not describe in any detail the arrangements that were actually included in the Annex to the Declaration dealing explicitly with “follow-up.”<sup>111</sup> That is not surprising given the lengths that the drafters went to, as part of securing the necessary consensus, to reassure those who feared that the Declaration might indeed involve serious monitoring. Thus, the “Follow-up to the Declaration” proclaimed that activities were to be “of a strictly promotional nature” and that their emphasis would be on “the identification of areas in which the assistance of the Organization through its technical cooperation activities may prove useful to its Members. . . .”<sup>112</sup>

In a formula that purported to reassure those who valued the ILO’s monitoring achievements, the statement went on to insist that the new mechanism “is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.”<sup>113</sup> In other words, there is a dual track system and the Declaration was neither to degenerate into a serious monitoring mechanism nor be infected by the ongoing activities under those other mechanisms. Instead, the follow-up is to be confined to the preparation of two annual reports.<sup>114</sup> The first concerns the implementation of the core labor standards by those ILO Members who have not ratified one or more of the eight conventions which are linked to the four core standards.<sup>115</sup> The outcome is an annual report, prepared under the auspices of “a group of experts appointed for this purpose by the Governing

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110. *Id.* at S9608.

111. ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 6, Annex, Follow-up to the Declaration, 37 I.L.M. at 1238.

112. *Id.* § I(2), 37 I.L.M. at 1238.

113. *Id.*

114. *Id.* §§ II-III, 37 I.L.M. at 1239-40.

115. *Id.* § II(A), 37 I.L.M. at 1239.

Body.”<sup>116</sup> In addition, the ILO Director-General prepares annually a Global Report dealing with one of the four principles each year.<sup>117</sup> In the words of the Annex on follow-up:

The purpose of this report is to provide a dynamic global picture [of the right in question] and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out.<sup>118</sup>

It is beyond the scope of the present analysis to undertake a systematic evaluation of the results so far produced under the follow-up. It must suffice to say that most observers have agreed that the Director-General’s reports have been professionally prepared and informative, but in a general rather than specific sense.<sup>119</sup> While specific countries are named, the reports have been criticized for failing to distinguish between fundamental or major violations on the one hand, and more technical legal obligations on the other.<sup>120</sup> But, as the critics acknowledge, “[g]oing beyond naming names to more clearly prioritizing violations or to putting countries in categories by degree of violation is politically sensitive and unlikely to occur in the foreseeable future.”<sup>121</sup> As for the reports submitted by governments under the follow-up mechanism and the use made of them by the ILO, a candid assessment by a senior ILO official in 2003 does not provide grounds for much optimism that a serious monitoring mechanism is emerging. The following paraphrases Constance Thomas, Section Chief of the

116. *Id.* § II(B)(3), 37 I.L.M. at 1239.

117. *Id.* § III, 37 I.L.M. at 1239-40.

118. *Id.* § III(A)(1), 37 I.L.M. at 1239.

119. For example, one observer noted that “[i]n these reports, the ILO staff does evaluate and verify information from the country reports and a variety of other sources. . . . [T]hese reports have ‘very high quality’ and ‘a long shelf life.’ ‘If I were to make a list of the top five sources,’ said the observer, ‘the global reports ‘would be in the list of [the] top five.’” MONITORING INTERNATIONAL LABOR STANDARDS: QUALITY OF INFORMATION, SUMMARY OF A WORKSHOP 45 (Margaret Hilton ed., 2003) (paraphrasing and quoting Sandra Polaski) [hereinafter MONITORING INTERNATIONAL LABOR STANDARDS].

120. ELLIOTT, *supra* note 41, at 3.

121. *Id.*

Equality and Employment Branch in the ILO Department of International Labour Standards:

[Thomas] noted that the ILO does not scrutinize the country reports it receives as the follow-up to the 1998 Declaration of Fundamental Principles and Rights at Work but simply accepts them. This approach differs greatly from that taken by Thomas and others in the supervisory arm of the ILO. She would never accept such reports at face value.<sup>122</sup>

Similarly, country studies undertaken in connection with the promotion of the 1998 Declaration appear to be relatively formalist, if not perfunctory. Thus, two studies of national labor laws published in 2003 and 2004 make clear that they are confined to the standards dealt with in the Declaration and do not go beyond those, that they only focused on assessing the extent to which laws on the statute books conformed with the relevant standards, that their aim was to “provide an objective summary account rather than a detailed analysis,” and that there was no attempt to evaluate “the practice and enforcement of the relevant labour laws.”<sup>123</sup> It is little wonder that one of the governments surveyed, Guatemala, responded that although the document had been “circulated to the social partners” as soon as it had arrived, “no comments were received from them.”<sup>124</sup>

Proponents of the Declaration would, however, argue that Senator Moynihan got it wrong and that it was never intended to provide the basis for serious country-level monitoring, whether the target be China or the United States, as Moynihan

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122. MONITORING INTERNATIONAL LABOR STANDARDS, *supra* note 119, at 44.

123. INT’L LABOUR ORG., FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOUR LAW STUDY, DOMINICAN REPUBLIC iii, *available at* <http://www.ilo.org/public/english/dialogue/download/dominican.pdf> (last visited May 1, 2004); INT’L LABOUR ORG., FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A LABOUR LAW STUDY, COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS, NICARAGUA iii (2003), *available at* <http://www.ilo.org/public/english/dialogue/download/cafta.pdf> [hereinafter FUNDAMENTAL PRINCIPLES: COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS, NICARAGUA]. Both reports contain the same restrictive language.

124. FUNDAMENTAL PRINCIPLES: COSTA RICA, EL SALVADOR, GUATEMALA, HONDURAS, NICARAGUA, *supra* note 123, Annex II at 49.

had rather optimistically suggested.<sup>125</sup> Instead, they would point to the diverse array of monitoring and other initiatives launched outside the ILO but which often make reference to the Declaration. Indeed, one of the bright spots noted by the ILO in its 2003 overview of corporate social responsibility approaches and their relationship to international labor standards was the increased number of multi-stakeholder initiatives, by which it means cooperative efforts involving one or more groups from among the relevant NGOs, trade unions, companies, or industry associations.<sup>126</sup> In contrast to individual corporate or other initiatives, these multi-stakeholder efforts were more likely to contain some provisions relating to monitoring and were also likely to refer specifically to the ILO standards. But the ILO remained reluctant to express enthusiasm in relation to this trend, noting instead: "How this type of initiative is implemented and monitored in companies and how effective these initiatives are in achieving their objectives is, however, hotly debated."<sup>127</sup>

Private sector initiatives are the source of the largest number of core standards arrangements, including the proliferation of codes of conduct, social labeling and ethical investment initiatives. Where it exists, enforcement in private schemes is largely limited to monitoring of standards, either internally (by the industry group or company), or by external private groups (professional auditors, NGOs, trade unions or alliances). However, the voluntary nature of the system greatly limits public involvement. In addition, with the exception of the possibility of suits brought under trade practices or misrepresentation laws, compliance with core standards commitments is unlikely to come before a court. Nonetheless, it has recently been argued that U.S. courts should allow claims under the Alien Tort Claims Act (ATCA)<sup>128</sup> to compel transnational corporations to uphold international labor rights for foreign workers.<sup>129</sup> Since the success of such actions would re-

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125. See 144 CONG. REC. S6907, 6908 (1998) (statement of Sen. Moynihan).

126. *Information Note*, *supra* note 67 ¶ 7.

127. *Id.*

128. 28 U.S.C. § 1350 (2003).

129. Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 263 (2004).

quire U.S. federal courts to accept the view that the law of nations includes torts committed in relation to each of the core labor standards, it seems unlikely that ATCA will be of great significance in this context in the near future.

Many private sector initiatives have no supervision or enforcement mechanisms at all. The proliferation of private sector initiatives is such that defects in the supervision of high profile companies are becoming well known. But the scrutiny of even these companies' practices relies heavily on the actions and interest of actors outside of the country in which the labor is engaged and it relies on the vulnerability or goodwill of the company. This lack of country-based, public supervision, which is the basis of enforcement of ILO standards, typifies the problems with enforcement of private sector initiatives.<sup>130</sup>

Moreover, corporate initiatives are usually designed to avoid stronger measures of such accountability, whether under national law or pursuant to international supervisory procedures. It is not surprising that corporations prefer to adopt their own codes of conduct, to rely Guidelines for Multinational Enterprises adopted by the Organization for Economic Co-operation and Development,<sup>131</sup> or to become a partner in the U.N. Global Compact Initiative. But, in order for the latter forms of accountability to work, we must assume that consumer protests will bite and that extraordinary efforts to protect the integrity of a given brand will occur. Common wisdom holds that the quid pro quo for this soft approach to labor issues is the fact that a much broader range of actors have, as a result, become involved in labor standards promotion, particularly large corporations and even international financial institutions. But this claim is misleading because it fails to acknowledge that the formal ILO monitoring system is ultimately based on national application of conventions through domestic labor laws, and that those actors already have every chance to support labor standards in that context.

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130. In a perverse way, the highest profile private codes of conduct are becoming increasingly detailed, especially in relation to commitments to occupational health and safety, in some cases more detailed than ILO standards on the subject.

131. See *ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001)* (first issued in 1976 and revised in 2000), available at <http://www.oecd.org/dataoecd/12/21/1903291.pdf>.

Regardless of codes of conduct, the aberrant actions of a transnational corporation can still result in a host country's government being brought before the ILO Committee on Freedom of Association at the instigation of a trade union, or before the Committee of Experts.

The importance of having a significant supervisory dimension to the promotion of labor standards is underscored by most proposals put forward by labor rights proponents. For example, in a comprehensive set of proposals mooted for ILO reform in 1999, Cooney was entirely amenable to the move away from rights terminology. He suggested that in a reformed system, "[t]he definition [of labor standards] and process need not be . . . expressed as conventions or recommendations, or in the language of rights, if this proved inappropriate, ineffective, or divisive."<sup>132</sup> But, in what might otherwise appear to be an attempt to have his cake and eat it, he goes on to add that "[i]n some circumstances, however, the convention and recommendation procedures would be appropriate: . . . those procedures have the advantage of triggering monitoring mechanisms stipulated in the Constitution."<sup>133</sup>

The same analysis might be applied to the recommendations of the World Commission, with their consistent emphasis upon the Declaration and related promotional approaches, without reference to the body of Conventions and Recommendations, followed by a suggestion that the strongest sanctions available to the ILO (use of Article 33 of the Constitution) should be invoked more often. But there is a difference between these two approaches. Unlike Cooney's approach, that of the World Commission is not necessarily predicated upon the invocation of the legal standards contained in ratified Conventions. Article 33 can be applied by the Governing Body in any instance as a follow up to the report of the relatively rarely invoked Commission of Inquiry.

The final element in this analysis is to suggest that the traditional supervisory mechanisms of the ILO are now waning in importance, that they are not getting the funding they deserve, and that, gradually, they will attract less and less interest as alternative initiatives proliferate under the umbrella of the Declaration and as governments and employers decide that

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132. See Cooney, *supra* note 83, at 387.

133. *Id.*

the latter provide a much more acceptable context in which to be held accountable.

## V. CONCLUSION

In essence, our thesis is that the concept and practice of international labor standards, implemented within a framework established in the 1920s and subsequently developed and overseen by the ILO, has, in the space of only ten years, been systematically superceded by a nebulous, open-ended, and essentially self-defined and self-evaluated system of so-called core labor standards. High hopes are held for this new system that, in contrast to what is portrayed as an increasingly anachronistic ILO approach, is said to respond to the imperatives of a globalized world economy and to have various characteristics which will enable it to adapt to changed and changing circumstances. The most encouraging aspect of the new approach is the extent to which it has been endorsed, adapted, and adopted by a wide range of actors and given recognition through various initiatives pursued through both the public and private sectors. There is surely strong cause for labor rights proponents to celebrate: Governments are regularly including core labor rights provisions in international agreements; the ILO has succeeded in adopting a new Declaration that purports to require respect for core rights from all governments, whether or not they are parties to the corresponding ILO conventions; key transnational corporations and industry groups are formally committing themselves to respect minimum standards; and major NGO and labor coalitions, reinforced by consumer and student groups, are promoting core standards and monitoring their status.

Rather than growing out of the ILO system, these new approaches marginalize the Organization while placing responsibility for the setting and enforcement of labor standards at the international level in the hands of other actors. As consensus grows around these developments through their adoption by an increasing number of actors, the result is a watering down or even an undermining of the notion of international labor standards, both in content and enforcement, to the point at which everyone is embracing labor standards but no one is applying clearly defined, broad-based, enforceable international labor standards. Even the ILO is backing away from its own system at a rapid but unacknowledged rate.

In brief, our contention is that the much touted new mosaic could only be put in place at a rather high price and that a coherent, valid, and potentially relatively effective system of international labor standards has been more or less sidelined in exchange for a system that is deeply flawed and has little likelihood of success in the longer term, at least in areas outside North America, in fields where specifically marketed consumer goods are not involved, and where American trade and labor interests are not specifically implicated.

We realize that this is at once both a radical and a conservative diagnosis. The most predicable criticism of the views in this Article is that they yearn for a global environment that no longer exists. Hard standards, set and enforced by a central public actor, are a thing of the past. Reduced capacity of governments, growing dependence on a competitive trade environment for wealth creation, increasing inequalities between developed and developing countries, collapsing trades union membership, the rising non-union NGO influence, post-industrial, service-based economies, growing non-standard work practices, increasingly employee share-ownership: a predictable list of realities is given to suggest that international labor standards of the type championed by this paper are now unsustainable. This, however, would be to largely miss the argument. We are not advocating a return to the ILO system of the 1960s. That is impossible. What we argue is that there is a need to accept recent developments in international labor markets which demand a greater degree of flexibility, but that this can be done through a combination of major reforms to the ILO system and a selective use of some of the new techniques that have been explored by the commentators whose work we have alluded to above. A truly international system, built around a strong and flexible ILO, is the one that is best capable of delivering a package of labor rights which can truly be said to satisfy the requirements of international human rights standards. This includes a clear and uniform catalogue of rights, entitlement to which does not depend on geographical position or industry (especially freedom of association), an independent assessment of what matters should be regulated, an independent review of disputes, a broader conception of labor regulation in order to distinguish the employment contract from other commercial contracts, and the opportunity to raise labor standards in line with development and wealth.