



# The ILO Stumbling towards Its Centenary Anniversary

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## Abstract

Throughout the 20<sup>th</sup> century, the International Labour Organization ('ILO') has played a significant and successful role in the international advancement of social justice. However, in the past 10–15 years the impact of the organization has decreased. Its legislative machinery seems to have come to a standstill. Hardly any influential modern legal instruments have been developed in these years. The ILO's monitoring system via the Committee of Experts is in danger to be weakened, mainly due to questions from within the organization. The boat that passed by flying the corporate social responsibility ('CSR') flag, has been missed. A powerful and unanimous signal, for instance by adopting a Framework Convention on Decent Work, is necessary if the organization is to survive in the 21<sup>st</sup> century.

## Keywords

ILO – centenary – achievements – challenges – areas for improvement

## 1 Introduction

In 2019, the International Labour Organization ('ILO') will have existed for 100 years.

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It was one of the first international organizations in the world, established in the aftermath of the First World War at a time of great industrial unrest and the emergence of the worker's movement. After the Second World War, the ILO became part of the United Nations 'family', as a 'specialised agency' together with—for instance—the Food and Agriculture Organization ('FAO') (food), the United Nations Educational, Scientific, and Cultural Organization ('UNESCO') (education/heritage), the World Health Organization ('WHO') (health), World Bank, and 10 others.

In the newspapers, the ILO is mostly known for its statistics, data and (economic) studies on child labour and forced labour, the level of unemployment in the world and its regions, the high level/low level of (minimum) incomes, safety at work, social security levels, and other similar information. That the ILO was, and still is, also highly active in matters concerning labour regulations and social policy on a global scale is less widely known and the same applies for its activities related to monitoring the implementation and application of these regulations. Also, the fact that the ILO plays a significant and active role in the enforcement of classic human rights on the work floor is something that generally remains underexposed. The freedom of association touches on the freedom of expression and the freedom to demonstrate, and thus the ILO monitoring system also regularly deals, relatively successfully, with these aspects.<sup>1</sup>

In this contribution, I would like to reflect critically on a number of issues that have been rather troubling for the ILO in recent years. In doing so, the question will inevitably arise whether another 100-year term is on the cards for the ILO.

For the purposes of clarification, attention will first briefly be paid to the actual mandate of the ILO which concerns social justice. At the time of the ILO's establishment in 1919, it addressed improvements in the miserable working conditions of workers in factories and on the land.

International competition between countries hampered the creation of a level playing field for labour conditions, which meant that poor working conditions in one country actually prevented the improvement of conditions in another country. Only by drawing up international agreements could this issue be addressed.

When the mandate was renewed in 1944 (the *Declaration of Philadelphia*) the inextricable link between the social, economic, and financial problems in the world was recognised and the objective of the ILO was broadened in terms of human values and ambitions.

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1 H Bartolomei de la Cruz, G Von Potobsky and L Swepston, *The ILO, the International Standards System and Basic Human Rights* (Westview Press, 1996); *ILO Constitution*, annex ('Declaration concerning the aims and purposes of the International Labour Organisation') <[http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO)>.

“All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”. Work to a large extent determines human dignity, and a worker is not a tradable mass product: “labour is not a commodity”.<sup>2</sup>

From this solid moral basis, in the aftermath of the Second World War the ILO developed further and wrote an ‘International Labour Code’ in the form of Conventions and Recommendations, and refined and improved the monitoring of the implementation and application of these in practice.

## 2 The Legislation Machinery

### 2.1 *Sand in the Machinery*

From the very beginning, the ILO has had a tripartite organizational structure, an international ‘polderclub’ *avant la lettre*—before this Dutch term, for a time, made worldwide furore in the 1990s via the cabinet of Dutch Prime Minister Kok and also President Bill Clinton (‘the polder-model’). This model is based on the idea that the social partners, together with the government, seek and reach consensus in the national arena about important socio-economic issues. In the ILO, this model has always existed. Government authorities, employers, associations, and trade unions constituted the management of the ILO from the start. Social dialogue is key to the ILO.

Each year in June the International Labour Conference (‘ILC’) is held in Geneva. All 187 ILO member states send a delegation comprising four persons: two on behalf of the government, one appointed by the employers’ organizations, and one appointed by the workers’ organizations. Together with almost all ministers of labour in the world and the advisors of the sections, around 4,000 people participate in the ILC each year over this two-week period. During the ILC, Conventions and Recommendations are adopted. The agenda of the ILC is prepared and followed through by the Governing Body (‘GB’), which also has a tripartite structure.

The day-to-day work of the ILO is largely carried out by the ILO Office, which is located in Geneva, and where around 1,200 people work. The Office is run by the Director-General; as of 2012, a position held by Guy Ryder from the United Kingdom. Around another 800 employees are spread over regional offices throughout the world. This is all paid for by the member states, some of

<sup>2</sup> *ILO Constitution*, annex (‘Declaration concerning the aims and purposes of the International Labour Organisation’) II(a) <[http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO)>.

which contribute more than others. The ILO has a bi-annual budget of around USD 800 million.

The legislation machine of the ILO has been working on full power for a long time, and this has resulted in many (189) Conventions and even more (204) Recommendations.

The Conventions deal with broad and diverse topics. A rough division is as follows:

- Fundamental labour rights (freedom of association/collective bargaining, prohibition of child labour, forced labour, and discrimination at the workplace);
- Working conditions, occupational health, safety at work;
- Employment and social policy; and,
- Social security.

This division can, of course, be refined further.

A number of the Conventions and Recommendations are (significantly) out of date. For a number of years, an attempt has been made to review the regulations, to shelf them, or bring them up to date. Some Conventions are totally outdated and can be phased out. For instance, *Convention 28 (1929)—Protection against Accidents of Workers Employed in Loading and Unloading of Ships (Dockers)*—was withdrawn by the ILC in 2017. The review and updating of the existing regulations has proven to be a long and complicated process.<sup>3</sup>

It is noticeable that in the period after 2010 only one new Convention has been concluded. In comparison, there were six in the period 2000–2010, while in the 20<sup>th</sup> century there were certain decades when 16 (1980–1990), or even 23 (1970–1980), Conventions were adopted. The Conventions are normally indicated with a number, where those with the highest number are the most recent. The most recent Convention, numbered 189, dates back to 2011 and deals with Domestic Workers. Up to now, this Convention has been ratified by 23 (out of 187) member states (at the ILO website, <http://www.ilo.org>, one can find the actual status concerning the number of ratifications of every Convention, as well as the member states that did ratify, and when).

And this is where we hit a sore spot where the ILO is concerned. The number of ratifications of many Conventions is miserably low. Pursuant to article 19,

3 For some years there has been a programme within the ILO with the name 'Standards Review Mechanism', see: International Labour Organization, *Standards Review Mechanism Tripartite Working Group* <[http://www.ilo.org/global/standards/WCMS\\_449687/lang--en/index.htm](http://www.ilo.org/global/standards/WCMS_449687/lang--en/index.htm)>.

paragraph 5 of the *ILO Constitution*, the member States are obliged to consider the ratification of the concluded Conventions, but are in no way obliged to.

The fact that many Conventions are ratified to a (sometimes very) limited extent, and therefore have far less possible impact in the national setting, was one of the reasons that employers and a lot of government authorities in the ILO have had success in their call for fewer regulations. The figures provided above over the last 40 years clearly show that the production of regulations has tapered off, to the despair of the trade unions in the ILO.

In this current age of nationalism, populism, protectionism, and patriotism it is not expected that many more Conventions will come from the ILO. However, the legally much weaker Recommendations are still being adopted—for example, on the transition from informal to formal work relations in 2015.<sup>4</sup> Far more than half of all workers in the world work without a formal contract. In article 10 of Recommendation 204, the member states are requested to ensure that an integrated policy framework is included in national development strategies to facilitate the transition to the formal economy. It also addresses the issues that should be taken up in these national policy frameworks.

In addition to the above, discussions at the ILC often end up as Resolutions which, although fine, have little actual legal value. An example was in 2016 on Decent Work in Global Supply Chains.<sup>5</sup> Since the Decent Work Agenda has already for many years been at the heart of the ILO policies, it is disappointing that no strong legal instrument has been created to support this Agenda. Why is there no Decent Work Framework Convention? In such a Convention, the ILO could integrate and, where necessary, renew the existing instruments in order to realise its Decent Work Agenda plus UN Sustainable Development 2030 Goal 8 concerning Decent Work (see note 37). It could add to this Convention possible new regulation concerning Global Supply Chains based on the Resolution mentioned above. That would really be a clear and remarkable signal to celebrate its centenary anniversary.

## 2.2 *Success Story*

There are of course also positive developments to report. In relation to the subject of fundamental labour rights, the ILO has certainly been very successful

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4 International Labour Organization, *Recommendation 204: concerning the Transition from the Informal to the Formal Economy* (2015) <[http://www.ilo.org/ilc/ILCSessions/104/texts-adopted/WCMS\\_377774/lang--en/index.htm](http://www.ilo.org/ilc/ILCSessions/104/texts-adopted/WCMS_377774/lang--en/index.htm)>.

5 ILC, *Resolution on Decent Work in Global Supply Chains* (2016) <[http://www.ilo.org/ilc/ILC Sessions/105/texts-adopted/WCMS\\_497555/lang--en/index.htm](http://www.ilo.org/ilc/ILC Sessions/105/texts-adopted/WCMS_497555/lang--en/index.htm)>.

with regard to ratifications and impact. In 1998, the 'Declaration on Fundamental Principles and Rights at Work' was adopted which was based on 8 Conventions. This Declaration concerned the freedom of association (Convention 87) and collective bargaining (Convention 98), the prohibition of child labour (Conventions 138 and 182), the prohibition of forced labour (Conventions 29 and 105), and the prohibition of discrimination at work (Conventions 100 and 111).<sup>6</sup>

In the years following 1998, an intensive campaign was launched to stimulate the member states to at least ratify these eight 'core' Conventions, and this has been widely achieved. These fundamental Conventions have now reached a degree of ratification of more than 85 per cent, which is a tremendous achievement.<sup>7</sup>

Unfortunately, there is also a bone of contention here, since it must be conceded that certain countries with high populations such as China, India, and the United States (over three billion citizens combined) have only ratified a number of these fundamental Conventions and certainly not all eight.<sup>8</sup> The US traditionally ratifies very few Conventions, pointing to the federal character of the country and the large degree of legislative independence of the 52 separate states. China and India also have their own reasons for not wanting to proceed to ratification.

As a result, Convention 87 (freedom of association) has not been ratified by the US, China, and India and the same holds for Convention 98 (collective bargaining). Both Conventions form the cornerstones of the organization, as is often pointed out in ILO documents. Without freedom of association and collective bargaining on employment conditions, the existence of the ILO is inconceivable.

6 International Labour Organization, *Declaration on Fundamental Principles and Rights at Work* (1998) <<http://www.ilo.org/declaration/lang-en/index.htm>>.

7 Convention 29 has 178 ratifications, Convention 87 has 154, Convention 98 has 164, Convention 100 has 172, Convention 105 has 175, Convention 111 has 173, Convention 138 has 169, and Convention 182 has 180. The maximum number of possible ratifications is 187. See: International Labour Organization, *Ratifications by Convention* <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12001>>.

8 The US only ratified Convention 105 (forced labour) and 182 (child labour); China Convention 100 (equal pay), Convention 111 (discrimination), Convention 138 (child labour), and Convention 182 (child labour); and India Convention 29 (forced labour), Convention 100 (equal pay), Convention 105 (forced labour) and Convention 111 (discrimination). See: International Labour Organization, *Ratifications by Convention* <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12001>>.

### 3 The Monitoring Mechanism

#### 3.1 *General and Special Procedures*

Generating regulations without monitoring their implementation and application in practice is not very meaningful. Certainly, in the international arena where treaties following ratification have to be imbedded in the national context, a system of monitoring is by no means a luxury. For this purpose, the ILO has set up a fairly solid monitoring system that is anchored in the *Constitution* and the regulations based on it.

The principle rule is that the member states that have ratified Conventions regularly report to the ILO Office on the implementation and impact of the ratified Conventions in their national context. These reports by national government authorities can be supplemented by comments from national trade unions and employers' organizations. All this, of course, in line with the customary tripartite structure. The reports from the member states are submitted each year to the Committee of Experts ('CoE'), a group of 20 experts (judges/professors of labour law) from all regions of the world. This Committee meets in Geneva every year in November for three weeks to study the reports and to pass judgement on them. The CoE report is then published the following year in February or March.<sup>9</sup> This is normally an extensive study, in which the country reports are critically evaluated in relation to each Convention and countries are frequently requested to amend their laws and/or practices so they are more in line with the Conventions they ratified.

The CoE report is then discussed in June at the annual ILC. A standing committee meets for ten days during the conference to discuss the report by the experts and in particular a list of around 30 countries about which the CoE was highly critical in its report. In 'ILO speak' this ILC committee is called the Committee on the Application of Standards, also abbreviated to 'CAS'. The list of countries discussed is drawn up each year just before the ILC, and is referred to in the corridors as the 'Black List'. Member States would rather not appear on this list and their representatives do their utmost to prevent this. A place on the list usually entails a critical judgement by the CAS concerning the country in question. The CAS report is put to the ILC for approval at the end of the ILC. Approval is always given, and the report is then made public.<sup>10</sup>

9 International Labour Organization, *Information and reports on the application of Conventions and Recommendations* <<http://www.ilo.org/public/libdoc/ilo/P/09661/>>.

10 ILC, *Reports and documents of the 106th Session of the International Labour Conference (2017)* <<http://www.ilo.org/ilc/ILCSessions/106/reports/reports-to-the-conference/lang--en/nextRow--10/index.htm>>.

In subsequent reports the countries that received critical commentary and calls to amend their legislation and/or behaviour, must indicate in what way they have met these requirements.

Sometimes an ILO delegation goes to the country in question to see at close hand what the problem is and to look at what can be done. This could be helpful for writing new laws, but sometimes also visiting trades union leaders who, for example, ended up in prison after a strike. It is then seen if and when they can be freed, if that was requested by the CAS. I myself, for example, as an official representative of the ILO visited Dita Sari in prison in Jakarta. She had been sentenced to eight years' imprisonment for organising a trades union demonstration. I also pleaded for her release to the labour and justice ministers in Indonesia. After all, the CAS had given its opinion that she was to be freed. Six months after my visit she was indeed released and came to Geneva to thank the ILO. She had spent three years in prison.<sup>11</sup>

Besides this set cycle of annual monitoring (country report; CoE; CAS; ILC) there are also other special monitoring procedures. In the first place, the Committee which monitors freedom of association, the Committee on Freedom of Association, the 'CFA'. This is a standing committee of the Governing Body which is charged with handling complaints from trade unions or employers' organizations about the ILO's fundamental principles of freedom of organization and freedom of collective bargaining of the social partners. Again, it would be difficult to imagine the ILO without these principles. They are fleshed out in Conventions 87 (freedom of association) and 98 (collective bargaining), and also constitute part of the fundamental labour rights.

The CFA meets three times a year and handles around 40 complaints at each meeting. The Committee's report is submitted to the Governing Body for approval and contains recommendations for the Member State against which the complaint was made. Each report by the CFA is published after it has been drawn up at a closed meeting.<sup>12</sup>

Around 3,400 complaints have been dealt with since the beginning of the CFA in 1952, and it does not look like the CFA will become idle in the future. The recommendations by the CFA are implemented in 75 per cent of the cases

11 S Tjandra, *Labour Law and Development in Indonesia* (Doctoral Thesis, Leiden University, 2016) 77.

12 CFA, *Reports on the Committee on Freedom of Association* <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/genericdocument/wcms\\_159872.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_159872.pdf)>.



which is a high success rate and has a great deal of impact. This determines to a certain degree the 'popularity' of the CFA.<sup>13</sup>

It is remarkable that complaints can also be submitted to the CFA against member states who have not ratified the principal Conventions 87 and 98, such as the US and China.<sup>14</sup> Since in this case fundamental principles are at stake, this is justified.<sup>15</sup>

In addition, the 'Article 24' procedures can be mentioned here. In article 24 of the *ILO Constitution*, employers and trade unions have the right to submit a complaint ('representation') about a member state if it is deemed that this state is not observing a ratified ILO Convention. The number of this type of complaints has increased in recent years. In 2014, thirteen complaints had been dealt with.<sup>16</sup> A complaint is dealt with by an ad hoc-appointed tripartite committee.

Finally, the 'grand finale' when it comes to monitoring: an article 26 *Constitution* procedure. If a member state persistently responds in an inadequate manner to recommendations made by the CAS or the CFA, a Committee of Inquiry can be appointed which investigates whether penalty measures need to be taken against the member state in question.

This procedure is considered serious and damaging for the international standing of the member state in question. It was taken, for example, against Myanmar (Burma) in relation to forced labour. Qatar was also on the list of article 26 'candidates' due to the unsafe working conditions of migrant workers

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- 13 CFA, *The Committee on Freedom of Association: Its impact over 50 years* (2001) <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/publication/wcms\\_087814.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087814.pdf)>.
- 14 See recently concerning China: CFA, *Case No 3184, Report No 380* (November 2016), published in (2017) 3(2) *International Labour Rights Case Law* 151, with a comment by Alan Neal, 'Guaranteeing Freedom of Association in China's Socialist Market Economy' (2017) 3(2) *International Labour Rights Case Law* 158.
- 15 See for the legal basis of this: Annex 1, 'Special procedures for the examination in the ILO of complaints alleging violations of freedom of association', in *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Organization, 5<sup>th</sup> revised ed, 2006) 231 and 235.
- 16 Abdul G Koroma and Paul F van der Heijden, *Review of ILO Supervisory Mechanism in International Labour Organization Governing Body, The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association* (29 February 2016) [94] <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_456451.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_456451.pdf)>.

during the construction of football stadiums for the 2022 World Cup. In the past 60 years, this type of procedure has only been initiated on 12 occasions.<sup>17</sup>

In international law circles the ILO monitoring system is generally praised for having proven to be efficient and influential, compared to the mechanisms of other international organizations.<sup>18</sup> It is not based on power, but on dialogue and the power of persuasion, sometimes also making use of ‘naming and shaming’ in the media.

Of course, there are also disadvantages attached to this. The system is often found to be obscure and ‘byzantine’, and it often takes a long time before results are achieved. Requested by the Governing Body (‘GB’) in 2015, as chairman of the CFA, together with Judge Koroma, chairman of the CoE, we carried out a study on the monitoring mechanism and possible improvements to this.<sup>19</sup> No decisions have been made yet by the GB as a follow up of this report.

### 3.2 *Quarrel about the Right to Strike*

In 2012 a serious quarrel broke out in the ILO about the right to strike.

At the meeting of the CAS in June 2012 there were as usual countries on the ‘black list’, where a violation of Convention 87 and the related right to strike had been observed by the CoE. To the astonishment of many, the employers’ delegation in the CAS claimed that the right to strike could not be taken from Convention 87 and it was also no longer prepared to support conclusions of the CAS, in which the right to strike in a country was criticised.

This position was unacceptable to the trade unions and placed a bomb under the whole monitoring mechanism as it had functioned up till 2012. The CAS did not deal with the ‘black list’ at all that year; the disagreement came to a head and relations soured. One of the most serious conflicts in the long history of the ILO had been born.

And it has still not been resolved, even though in 2015 a kind of truce was agreed in the form of a Joint Statement by trades unions and employers, which also received support from government authorities.<sup>20</sup> In this Joint Statement

<sup>17</sup> Ibid [95].

<sup>18</sup> See Francis Maupain, ‘The ILO Regular Supervisory System: A Model in Crisis?’ (2013) 10(1) *International Organizations Law Review* 117.

<sup>19</sup> Ibid. This report was discussed in the Governing Body of March and November 2016, and in November 2017, see ‘Draft Minutes: Institutional Section’, ILO Doc GB.331/INS/PV/Draft (9 November 2017) for the minutes of the November 2017 Session of the Governing Body.

<sup>20</sup> International Labour Organization, *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike and the modalities and practices of strike action at national level* (2015) <[http://www.ilo.org/global/meetings-and-events/WCMS\\_339518/lang-en/index.htm](http://www.ilo.org/global/meetings-and-events/WCMS_339518/lang-en/index.htm)>.

the right to collective action is acknowledged for both parties, so action can be organised by employers (lockout) and/or workers (strike). There is no mention at all in this Joint Statement of Convention 87 and its interpretation.

In the years up to 2012, the CoE provided the following interpretation concerning Convention 87. The right to strike is a fundamental right, arising from the right to belong to a trade union and to collective bargaining. It must be exercised in a peaceful manner. It is not an absolute right; limitations can be placed. For example, in the case of a strike concerning essential services such as hospital care or power supply. The discontinuation of these services may not put lives in danger, or danger the security and health of the total population or a section of it. A minimum service level during a strike can be obligatory where it concerns the prevention of accidents or the safety of machinery and instruments. In addition to this, procedural requirements exist such as the timely notification of a strike and the requirement to cooperate during reconciliation attempts.

This interpretation has arisen throughout a period of many years, during which time the CoE wrote reports dealing with the application of Convention 87 in practice in numerous countries.

The CFA has also applied this interpretation during the past 60 years, again using specific cases which were put to it.<sup>21</sup>

Considering this lengthy history concerning the interpretation, when in 2012 the employers claimed a completely different interpretation the astonishment and anger of the trade unions is understandable.

The interpretation of Convention 87 including the right to strike, as provided by the CoE, CAS, and CFA, was reflected in numerous ILO member states in the case of strike action. The interpretation by the CoE and CFA, though not legally binding, is usually considered by national courts to be authoritative and is adopted in their judgments. This is especially important for countries without any national legislation on strike actions. Like for instance the Netherlands, where no legislation nor any reference to strike in the *Constitution* is made. The Supreme Court in the Netherlands had to decide about the existence of a right to strike by absence of national law and did so in a case in 1986 concerning a strike at the national railway company (the 'Nederlandse Spoorwegen', or 'NS'). The Court made use of article 6 paragraph 4 of the *European Social Charter* as

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21 Maupain, above n 18; Janice R Bellace, 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* 29; Lee Sweptson, 'Crisis in the ILO Supervisory System: Dispute over The Right to Strike' (2013) 29(2) *International Journal of Comparative Labour Law and Industrial Relations* 199.

interpreted by the European Committee of Social Rights.<sup>22</sup> This Committee acted in the same way as the ILO's CoE and concluded along the same lines as the ILO about the right to strike.

Also in multiple Asian states, as for instance Cambodia and Thailand, there was a discussion about the right to strike in the national and ILO context. In Thailand, for example, the prohibition of an occupational health and safety initiative by railway workers caused debate, while in Cambodia the disharmony of the ILO on this issue was stressed.<sup>23</sup> What was behind this?

In 2012, the employers' representatives in the ILO took the stance that the words 'strike' or 'collective action' are not mentioned in Convention 87 and/or 98, and that the CoE had overstepped the bounds of its authority in its interpretation. The employers also stressed that the experts are 'only' experts from outside the ILO and are not representatives from the ILO. The employers also questioned the mandate and capacity of the CoE. This viewpoint had already been put forward earlier by the employers' representatives in the discussions in the CAS, but this had not been accepted by the other parties.

After the discussions, the employers' representatives usually agreed upon the conclusions of the CAS supporting the interpretation of the CoE. Until 2012, that is: since then, no conclusions dealing with the right to strike have been included in the reports of the CAS.

The actions of the employers concerning this issue have led to a great deal of time-consuming internal consultations within the ILO, and to many external publications.<sup>24</sup>

The legal solution for this issue concerning interpretation is provided in the *Constitution* of the ILO. Article 37 offers two possibilities: (1) the appointment of an independent ad hoc Tribunal that can resolve the issue, or (2) to bring the issue before the International Court of Justice in The Hague for advice. None of these possible procedures have been used in the past. Until now, the employers' representatives have not been prepared to agree to one of these possibilities, and there were also not enough government authorities to help

22 *NV Nederlands Spoorwegen v Vervoersbond FNV and Ors* (Supreme Court of the Netherlands, 30 May 1986), in *Nederlandse Jurisprudentie* 1986, 688 spec. PAS.

23 Ruwan Subasinghe, 'There can be no compromise on the right to strike', *Equal Times* (online), 21 October 2014 <<https://www.equaltimes.org/there-can-be-no-compromise-on-the?lang=en#.WgLaTlvWyUl>>; Shane Worrell, 'Groups tell ILO to retract "right to strike" claim', *The Phnom Penh Post* (online), 6 February 2014 <<http://www.phnompenhpost.com/national/groups-tell-ilo-retract-right-strike-claim>>.

24 See above n 20.

the unions, who had in particular suggested the solution provided in (2), to a majority of votes. So the ILO is now 'stuck in the mud' with this issue.

It is undeniable that the position of the ILO has been weakened as a result of this quarrel. Throughout the world, it can now be claimed that the interpretation of Conventions by the CoE is not always unanimously supported by the ILO, and that different views exist within the organization.

As a result, the ILO's position has become less authoritative, and this was probably what the employers set out to achieve.

#### 4 CSR and the ILO

Corporate Social Responsibility ('CSR') is on the rise as a modern way in which corporations want to demonstrate their involvement in society. The thinking behind CSR is also reflected in the continuous debate on Corporate Governance and the ensuing Codes of Conduct. Corporations in the private sector are not just concerned with achieving profit for their shareholders, but the sustainability of our planet and the welfare of its inhabitants are, or should be also of great concern to them. Besides the shareholders, there are also other stakeholders. Businesses want to behave as industrial citizens who adhere to fundamental standards in the area of the environment, labour, and zero corruption. Not only is the short term important, continuity and the long(er) term require attention too.<sup>25</sup>

This 'Triple P' of People, Planet, and Profit originated towards the end of last century, and since then a whole movement has taken off which is presently referred to under the heading 'Business and Human Rights'. At the invitation of—at that time—the Secretary General of the UN, Kofi Annan, multinational corporations have united in the UN Global Compact. This organization has drawn up 'Ten Principles' on the conduct of multinationals in the world. These principles deal with four topics: human rights, the environment, fundamental labour rights, and corruption.<sup>26</sup>

The UN also put Harvard professor John Ruggie to work, and after a number of years of study he came up with the Ruggie Principles, in which he untangled

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25 F C A van Haasteren, *Decent Flexibility* (Wolters Kluwer, 2016) 206 (originally published as a PhD Thesis at Leiden University in 2016).

26 United Nations, *The Ten Principles of the UN Global Compact* <[www.unglobalcompact.org](http://www.unglobalcompact.org)>.

the web of responsibilities of states and businesses in the field of human rights.<sup>27</sup>

Essentially, this concerns the need to protect, respect, and remedy. States are responsible for the first element (“to protect citizens from violations of human rights”), while businesses can be held accountable for respecting human rights (the corporate responsibility “to respect” human rights), and the third one (“to remedy”) is a shared responsibility of states and business to provide legal and non-legal remedies to victims of violations of human rights. This approach has led to a framework that is applied by the UN Human Rights Council.<sup>28</sup>

These texts, the Global Compact and the UN Framework for Business and Human Rights, always refer to the fundamental labour rights as formulated by the ILO in the Declaration on the Fundamental Principles and Rights at Work dating from 1998 (see above).

Besides these UN activities, in 2011 the OECD revised and updated the Guidelines for multinational enterprises.<sup>29</sup> This ‘Code of Conduct’ also refers to the fundamental labour rights, as formulated by the ILO. Many multinationals support the Code of Conduct of the OECD which also includes responsibilities for the supply chain and a dispute resolution procedure at National Contact Points (‘NCP’).

For instance, The Netherlands has such a National Contact Point where complaints can be submitted regarding conduct of multinationals that is in conflict with the OECD Guidelines.<sup>30</sup> Recently the Dutch NCP mediated an agreement between Heineken NV, the holding of the Dutch brewing company, and ex-workers from Bralima, a Heineken subsidiary in the Democratic Republic of Congo. The workers complained about an unlawful dismissal by Bralima and were successful in The Hague in their claim for compensation.<sup>31</sup>

It is remarkable that the ILO was not visible and/or very active in this CSR development, that took place under the guidance of the UN in New York and CEO’s of big multinational companies.

Indeed, in 1977, the ILO drew up a ‘Code of Conduct’ for multinationals and this was last revised in 2016, but this text is too long and complicated. Probably

27 OHCHR, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008) <<http://www.undocs.org/A/HRC/8/5>>.

28 Ibid.

29 OECD, *Guidelines for multinational enterprises* <<http://www.oecd.org/corporate/mne/>>.

30 Dutch Ministry of Foreign Affairs, *National Contact Point OECD Guidelines* <<https://www.oecdguidelines.nl/>>.

31 Dutch National Contact Point, *Final statement former employees of Bralima vs. Bralima and Heineken* (2017) <<https://www.oecdguidelines.nl/notifications/news/2017/08/18/final-statement-notification-former-employees-bralima-vs.-bralima-heineken>>.

because of that it has not been authoritative. On top of that, it includes no dispute resolution procedure, like the OECD Code and has, for that reason, less value.<sup>32</sup>

Many large(r) businesses that operate internationally are thus bound on a voluntary basis, via the Global Compact or otherwise, to the Codes of Conduct. These nearly always contain references to (all or some of) the fundamental labour rights of the ILO.

Though this last statement is true, the ILO has great difficulty positioning itself in the fast and extensive developments in international CSR. It has missed the boat entirely in this regard. CSR procedures work often in a more flexible way, and are more contemporary and appealing than the bureaucratic and cumbersome ILO way of working.

Perhaps a reason for this is that the employers in the ILO are represented by the IOE, the International Organisation of Employers, whose members are composed of employers' organizations from the member states. Therefore, businesses themselves are not a member of the IOE, but their national employers' organizations are. In the case of the Global Compact, businesses are members which would appear to create a more dynamic environment with CEOs coming to the meetings and podiums, instead of 'bureaucrats' from employers' organizations.

Private businesses have no role within the ILO. States are members of the ILO, not businesses. If in an ILO member state there are problems with a business concerning fundamental labour rights, in the context of the ILO only the state in question can be held to account, which in turn in the national context can call the business in question to order. If a business violates a Code of Conduct to which it is bound, it can be held to account directly via a dispute resolution procedure such as, for example, at the OECD; or if such a procedure is not applicable, via a civil procedure in the country. Public international law (such as ILO Conventions) on the one hand and international 'soft law' (such as codes of conduct) on the other hand, are increasingly being developed concurrently.<sup>33</sup> Besides the ILO, there are more and more organizations who are concerned with international labour rights. This gives grounds for optimism

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32 International Labour Organization, *Tripartite Declaration of Principles concerning multinational enterprises and social policy* (2016) <[http://www.ilo.org/empent/Publications/WCMS\\_094386/lang-en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm)>.

33 Ruben Zandvliet and Paul van der Heijden, 'The Rapprochement of ILO standards and CSR mechanisms: towards a positive understanding of the "privatisation" of international labour standards' in Axel Marx et al. (eds), *Global Governance of Labour Rights* (Edward Elgar, 2015) 170–189.

where the realisation of these rights is concerned, but it is also confusing (for example, who is responsible for monitoring?). There is also the risk of different interpretations of the same applicable standards by different dispute settlement authorities.<sup>34</sup>

## 5 Decent Work and UN Sustainable Development Goals 2030

The leading ILO guideline in recent years in the area of policy making and policy implementation has been the advancement of 'Decent Work'. The former Director-General of the ILO, Juan Somavia, who set the course for the organization, explains this concept as follows:

If you ask people on the streets or out in the country what they want in the midst of all the new uncertainties that globalisation has brought, the answer is: work. Work with which they can provide for the needs of their families, can send their children to school, work that ensures an income after they have retired, work with which they will be treated fairly and their rights respected. That is Decent Work.<sup>35</sup>

The ILO has built its agenda around this concept. It concerns the protection of fundamental labour rights, the creation of jobs, safe and healthy working conditions, and social security.

In 2015, the UN formulated its policy objectives up to 2030, in UN terms referred to as the Sustainable Development Goals ('SDGs').<sup>36</sup> There are 17 in total. SDG number 8 is entitled 'Decent Work and Economic Growth'. This therefore raises the ILO policy agenda to the level of the United Nations, and as a result it receives more global emphasis. The EU has also embraced the concept 'Decent Work' for the further development of a social Europe via the Social Pillar that is being set up as a response to Euro sceptics.<sup>37</sup>

34 The Hague Institute for Global Justice, *Ensuring Coherence in Fundamental Labor Rights Case Law: Challenges and Opportunities* (2016) <<http://www.thehagueinstituteforglobaljustice.org/thinking-doing/publication/ensuring-coherence-in-fundamental-labor-rights-case-law-challenges-and-opportunities/>>.

35 Klara Boonstra, 'Negentig jaar Internationale Arbeidsorganisatie: negentig jaar roeien tegen de stroom in?' (2010) 38 *Vereniging voor Arbeidsrecht* 1.

36 UN, *Sustainable Development Goals: 17 Goals to transform our World* (2015) <<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

37 European Union, *European Pillar of Social Rights* <[https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en)>.



In the programme to mark its 100-year anniversary in 2019, the ILO has set up an extensive project entitled ‘The Future of Work’.<sup>38</sup>

The high-speed, often disruptive changes in the business sector as a result of innovative (digital) technology, globalisation, progressive flexibilisation (“the non-standard has become standard”, ILO Director-General Guy Ryder said at the 65-year anniversary of the Dutch National Social and Economic Council, which I attended), robotisation, and other such far-reaching developments give reason to take a good look at the objectives and the existence of the ILO. The necessity to advance social justice through international laws and the monitoring of these is just as pressing today as it was in 1919, but the question is increasingly: how can this be best achieved?

## 6 Conclusion

Throughout almost the whole of the 20th century, the ILO has played a significant role in the international advancement of social justice. In 1969 it received the Nobel Peace Prize for its efforts. Lasting peace cannot be achieved without social justice. If there is no decent and safe work, and no social security, then the chance of lasting world peace is very small indeed. The ILO was successful in bringing about an extensive ‘International Labour Code’ and monitoring and correctly implementing this in the member states. For this, it has rightly received international recognition and praise. Although the ILO still is successful in many of its operations, in the past 10–15 years some dents have started to appear in the glowing reputation of the organization. Its legislative machinery has more or less come to a standstill. Hardly any influential new and modern instruments have been developed in that period to address and make an impression on the fast and significantly changing world. The internal squabbling about the right to strike takes up much time and is disadvantageous to the atmosphere.

The ILO’s monitoring system via the CoE and other mechanisms is being questioned from within the organization and as a result it is in danger to be weakened.

The boat that passed by flying the CSR flag, has been missed.

A powerful and unanimous signal on the occasion of the 100-year anniversary in 2019 is necessary if the organization is to survive in the 21st century.<sup>39</sup>

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38 International Labour Organization, *The Future of Work* <<http://www.ilo.org/global/topics/future-of-work/lang-en/index.htm>>.

39 See also about the future of the ILO: Francis Maupain, *The Future of the International Labour Organisation in the Global Economy* (Hart Publishing, 2013).

Such a powerful signal could be the drafting and adoption of a Framework Convention on Decent Work. This would also perfectly fit into a policy of realisation of UN Sustainable Development Goal 8, concerning Decent Work. Without the use of this strongest possible ILO's legal instrument it will be very hard to meet that specific Goal.