

## SETTING THE RECORD STRAIGHT ABOUT INTERNATIONAL LABOR STANDARD SETTING

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In *Imagining Post “Geneva Consensus” Labor Law for Post “Washington Consensus” Development*, Brian Langille renders a useful service by reviewing contemporary thinking in the field of development and prodding reflection on its possible implications for national and international labor law. I would certainly agree with his remarks that there is no trade-off between the political economy of decency and efficiency, that the ILO Constitution is an instrument that opens the door to many possibilities, and that labor law is not (inherently) limited to employees. However, his analysis of the genesis of international labor standards and their use widely misses the mark. In essence, to make his point he sets up and knocks down a strawman. He paints a broadbrush picture that does not accurately represent important features of the system, including an appreciation of the different roles played by the ILO’s governing structures and the ILO secretariat. In the process, he remains closed to seeing the relevance that ILO standards can have to development. A more nuanced analysis of the content of such standards in light of labor market trends and the need for a balanced globalization would be a more productive path to follow. His plea for principles over rules ignores the fact that we already have a number of principles,<sup>1</sup> and that on their own, they are clearly insufficient.

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1. Indeed, it might be argued that the Universal Declaration of Human Rights of 1948, which contains a number of labor provisions, did the job. If only that were true . . .

## I. LANGILLE'S PORTRAYAL OF THE INTERNATIONAL LABOR STANDARDS SYSTEM

As the seat of numerous international organizations, Geneva has inspired many a "consensus."<sup>2</sup> The "Geneva consensus" portrayed by Langille in Section III of his article postulates a normative system of the International Labour Organization that is:

- imposed externally and top-down
- a-contextual because [author, perhaps add "it is"?] universal
- comprehensive and detailed
- "hard" law backed by sanctions through real or desired conditionality
- resistant to alternate strategies.

This characterization misunderstands where ILO standards come from and how they are developed. It also exaggerates the extent of detail in many Conventions and ignores the availability of flexibility devices. Most disturbingly, Langille's argument may ultimately question the very idea of the universality of human rights and the imperative of their effective enforcement for enabling the human freedom he extols to spread its wings and fly.

## II. THE ORIGIN AND DRAFTING OF ILO STANDARDS: ARE THEY REALLY IMPOSED TOP DOWN?

International labor standards emerge from a concern that global action is needed to tackle a problem. Rather than being "visited upon States by a dedicated agency" (to use Langille's phrase), ILO standards emerge in a process that involves these States at all stages. In the tripartite context of the ILO, the term "Member States" encompasses the representatives of Employers and Workers, who alongside those of government take the decisions about which items will be considered for possible standard-setting.<sup>3</sup> The structural

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2. The best known today is probably the one put forth by Pascal Lamy, Director-General of the World Trade Organization in 2006. Pascal Lamy, Making Trade Work for Development: Time for a Geneva Consensus, Emile Noel Lecture, New York University Law School, New York (Oct. 30, 2006), *available at* <http://centers.law.nyu.edu/jeanmonnet/fellowsforum/documents/emilenoellecturefall06.pdf>.

3. While the ILO secretariat is charged under Article 10, paragraph 1 of the ILO Constitution with proposing subjects for possible standard-setting, if the Governing Body does not wish the topic to appear on the Conference agenda, the suggestion will die. In addition, a government, a representative employer or worker organization, or a public international organization can propose ideas for standards (ILO Constitution, Article 14, paragraph 1). All ILO documents referenced are *available at* <http://www.ilo.org>.

feature of tripartism is intended to ensure that rules governing labor markets are responsive to those who live them on a daily basis.

The Constitution foresees “adequate consultation of Members” prior to the adoption of a Convention or a Recommendation (Article 14, paragraph 2). They can object to the inclusion of an item or have it removed from the agenda (Article 16). The Standing Orders of the Conference further specify consultation at all stages of drafting the preparatory reports, proposed conclusions, and draft instruments.<sup>4</sup> Beyond this, in recent years this intensive process has been supplemented by informal consultations for proposed instruments. In short, the tripartite process is a far cry from one that is imposed by an agency.

In addition, adoption of a Convention or a Recommendation by the Conference requires a majority of two-thirds of the votes cast by the delegates present (Article 19, paragraph 2), the vast majority of whom come from developing countries. A vote is void unless the total number of votes cast is equal to half the number of the delegates attending the Conference (Article 17, paragraph 3)—the so-called quorum rule. These two provisions safeguard against a minority of delegates dictating their views on others. In each delegation, the government has two votes to balance the single votes of employer and worker representatives (Article 3, paragraph 1).

### III. CONTEXTUALITY AND UNIVERSALITY

Langille maintains that ILO standards “are not viewed as general principles which members actually determine to be in their self interest if made concrete in a manner that fits local circumstances.”<sup>5</sup> Yet for standard-setting, the ILO has a number of ways to create contextuality. As Langille concedes, the Constitution contemplates taking into account “climatic conditions, imperfect development of industrial organisation, or other special circumstances”<sup>6</sup> of countries that would suggest modifications of proposed standards (Article 19, paragraph 3). While singling out countries in Conventions was

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4. Standing Orders of the International Labour Conference, articles 38–40 and 44–45. See also article 6 providing for the appointment of a Conference Drafting Committee (on which the three constituents are represented) and articles 59 and 67 on the drafting committee of technical committees that are considering draft instruments. The Standing Orders are available at <http://www.ilo.org/public/english/standards/reln/ilc/ilc-so.htm>.

5. Brian Langille, *Imagining Post “Geneva Consensus” Labor Law for Post “Washington Consensus” Development*, 31 COMP. LAB. L. & POL’Y J. [author, page numbers to be inserted after issue is paginated], [] (2010).

6. *Id.* at [].

abandoned very early in the organization's history, a range of "flexibility devices" developed in standard-setting provides considerable latitude to accommodate specific contexts.<sup>7</sup> Such options may be suggested initially by the ILO secretariat or put forward by conference delegates as amendments to a text. Flexibility devices take several forms. A common technique is to permit a State, at the time of ratification, to exclude branches of economic activity or categories of workers, normally following consultation with employer and worker organizations. Another method offers options in relation to substantive obligations, such as acceptance of only specified branches of social security. A further device is illustrated by the Minimum Age Convention 1975 (No. 138), which permits developing countries to set, within limits, an age lower than the general minimum specified in the instrument. Furthermore, this instrument, like a number of others, provides for progressive implementation of certain provisions.<sup>8</sup> Sometimes a Convention will build in periodic review of the effectiveness of measures taken under the instrument, with a view to their adjustment in light of experience.<sup>9</sup> Occasionally, an ILO Convention confronts local customs head-on, as in the Indigenous and Tribal Peoples Convention 1989 (No. 169).<sup>10</sup> In a rather different way, ILO Conventions that focus on particular branches of economic activity, such as agriculture work, construction, or mining, also reflect contextuality. At the same time, however, this opens them up more easily to claims of excessive detail or duplication. This suggests that

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7. These are described in ILO, *Rules of the Game: A Brief Introduction to International Labour Standards 17* (rev. ed. 2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_108393.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf); analyzed in Georges Politakis, *Deconstructing flexibility in international Labour Conventions*, in Jean-Claude Javillier, Bernard Gernigon & Georges P. Politakis, *Les Normes Internationales du Travail: Un Patrimoine pour l'Avenir* 463 (2004), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_087423.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087423.pdf). For the historical background, see Francis Maupain, *L'OIT, la Justice sociale et la mondialisation*, 278 RECUEIL DES COURS 201, 252 (1999).

8. ILO, *MANUAL FOR DRAFTING ILO INSTRUMENTS* appendix (2007), available at <http://www.ilo.org/public/english/bureau/leg/man.pdf>.

9. For example, the provision in the Occupational Safety and Health Convention, 1981 (No. 155) stating, "The situation regarding occupational safety and health and the working environment shall be reviewed at appropriate intervals, either over-all or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results." ILO, *Occupational Safety and Health Convention*, Aug. 11, 1983, C155, art. 7, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C155>.

10. The instrument calls for due regard to customs and customary law when applying national laws and regulations to the peoples concerned, and notes that they have a right to retain their own customs and institutions where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. *Indigenous and Tribal Peoples Convention*, June 27, 1989, art. 8, available at <http://www2.ohchr.org/english/law/indigenous.htm>.

the various lines of attack used by Langille need to be seen in a wider context that responds to Hepple's concern for standards in the context of a global economy (see below).

Still more important for our discussion is the scope given to governments as to *how* they will implement an instrument.<sup>11</sup> Once a State has exercised its free choice to ratify a treaty with a reporting regime, it delegates authority to participate in it.<sup>12</sup> In the ILO, it is to report on "the measures which it has taken to give effect to the provisions of Conventions to which it is a party" (ILO Constitution, Article 22). While some Conventions require or overtly favor implementation by legislation, a number of them provide that the instrument may be implemented by laws or regulations, collective agreements, arbitration awards, or court decisions, a combination of these means or in any other manner appropriate to national conditions and practice.<sup>13</sup> Some remain silent on the means of application. The report forms approved by the ILO Governing Body to be sent to States ask not only about legislation, they request statistics, information on the methods by which application is supervised and enforced, and any information received from employers' or workers' organizations about the practical application of a Convention. The Constitution requires that a State "give effect" to a Convention it has voluntarily ratified; it does not specify how. This leaves space to countenance local circumstances.<sup>14</sup>

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11. This approach is paralleled in the 2008 Declaration on Social Justice for a Fair Globalization, which lets each State determine how it will achieve the four ILO strategic objectives, with due regard to, inter alia, its existing international obligations, fundamental principles and rights and work and the principles and provisions of international labor standards (Part I.C), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_099766.pdf).

12. Oona Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 123 (2008).

13. See, e.g., Night Work Convention, 1990, Jan. 4, 1991, No. 171, art. 11, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C171>; the Workers with Family Responsibilities Convention, 1981, Aug. 11, 1983, No. 156, Art. 10, ¶ 1, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156>. Where legislation or regulations may be required, the option of an administrative determination by action through a competent authority is usually present. See, e.g., Worst Forms of Child Labour Convention, 1999, No. 182, June 17, 1999, Art. 4, para. 1, available at <http://www2.ohchr.org/english/law/childlabour.htm>.

14. Or at least theoretically—Blackett's analysis of developing country labor law reform in a context of neoliberalism identifies considerable constraints on countries' actual options. Adelle Blackett, *Trade liberalization, labour law and development: A contextualization*, ILO, International Institute for Labour Studies, Geneva, Discussion Paper DP/179/2007 (2007), available at <http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp17907.pdf>. But in my view this reflects a problem of international and national policy coherence rather than necessarily a fatal flaw in the ILO standards system.

In Section V of his article, Langille advocates “a shift from the universal to the local/contextual/embedded.”<sup>15</sup> Here he is confusing comments about valuable lessons from failed transplant rule-of-law reform efforts with human rights enjoyed by all people. The “local/contextual/embedded” is indeed critical to effectively passing on “the message” about rights and enhancing access to justice. However, it cannot be used as a pretext to deny rights or the support needed for their enforcement.

International Labor Conventions are indeed universal, but why Langille sees this as a problem for human freedom is a mystery. Proponents of the capabilities approach, including Amartya Sen, do not reject universality *per se*. Indeed, respect for certain rights (as well as principles)<sup>16</sup> enables capabilities to be realized. As Fredman notes, “The logical conclusion of Sen’s approach is to require positive action to be taken to enhance individuals’ capability sets . . . Sen’s theory of freedom as agency demonstrates that the concept of freedom underlying human rights entails positive as well as negative duties.”<sup>17</sup>

Langille seems to fall into the trap of what Nussbaum (another proponent of Sen’s development as freedom approach) has called “the argument for paternalism,” whereby a set of universal norms is seen as telling people what is good for them. Speaking of liberties in relation to religion, she notes that they “require a universalist account for their recognition and their protection against those who don’t want other people to make choices for themselves.”<sup>18</sup> Building on Sen’s work, Nussbaum provides strong reasons to construct a universal account, including not only the liberties themselves but also forms of economic empowerment that are crucial to making the liberties truly available.<sup>19</sup> As she observes, “The state that is going to guarantee people rights effectively is going to have to take a stand

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15. Langille, *supra* note 5, at [ ].

16. For a description of how these terms are used in international law more generally, see Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 1, 26–29 (Virginia A. Leary & Daniel Warner eds., 2006).

17. SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 13 (2008). For a thought-provoking discussion of the disjunction between human rights gaining an unprecedented normative status and being embraced as integral to the reconceptualizing of development as freedom, see Kerry Rittich, *Social Rights and Social Policy: Transformations on the International Landscape*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 107, 111 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

18. MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 52 (2000).

19. *Id.* at 55.

about more than the importance of these basic rights themselves.”<sup>20</sup> One way to do this is through international labor standards.

The ILO and others have long been pointing out the relevance of international labour standards to development,<sup>21</sup> messages echoed in many global and regional instruments and fora. In 2008, the high-level, independent Commission on Legal Empowerment of the Poor joined this view when it identified labor and other rights as among the pillars leading to systemic change.<sup>22</sup> As this group of world leaders and economists noted, “A well-designed system of labour rights should provide both protection and opportunity. The Universal Declaration of Human Rights sets out a series of labour rights, as does a long tradition of internationally agreed labour standards . . . Recognition and enforcement of the rights of individual workers and of their organizations is critical for breaking the cycle of poverty.”<sup>23</sup> Universality can and should promote the empowerment that may grow out of human freedom.

#### IV. COMPREHENSIVENESS AND DETAIL

When ILO standards are accused of excessive zeal in relation to their comprehensiveness and detail, it is important to examine their actual content. One of the rationales (although not the decisive one) behind the 1998 ILO Declaration on Fundamental Principles and Rights at Work was a belief that even core ILO Conventions were too detailed to permit their widespread ratification. This has been belied by two elements. First, of the eight ILO Conventions whose principles are reflected in the 1998 Declaration, none contains more than five articles that lay down rights or substantive obligations.<sup>24</sup> Second, the Declaration itself promoted their ratification, and they are now approaching universal ratification. Broadbrush claims that other ILO Conventions are too detailed and unratifiable should

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20. *Id.* at 54.

21. *See, e.g.*, WERNER SENGENBERGER, GLOBALIZATION AND SOCIAL PROGRESS: THE ROLE AND IMPACT OF INTERNATIONAL LABOUR STANDARDS (2002).

22. 1 COMMISSION ON LEGAL EMPOWERMENT OF THE POOR: MAKING THE LAW WORK FOR EVERYONE 27 (2008).

23. *Id.* at 36–37.

24. Additional provisions define terms, permit exclusions or address procedural matters such as registration of ratifications. The contention that Minimum Age Convention, 1973, No. 138, June 16, 1976, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>, and Worst Forms of Child Labour Convention, *supra* note 11, take fundamentally different approaches in terms of their drafting is highly questionable. While the full text of the Forced Labour Convention, 1930, No. 29, May 1, 1932, *available at* <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>, is indeed long, since the use of forced labor by colonial powers is now of historical interest only, less than a handful of its articles are currently enforceable in practice.

therefore be closely scrutinized. Some may be for some countries, but others are certainly not. The follow-up to the 2008 Declaration on Social Justice for a Fair Globalization<sup>25</sup> holds the promise that new use of the long-standing constitutional mechanism for examining obstacles to ratification (Article 19, paragraph 5) will offer impetus for a more differentiated, inter-disciplinary, and gender-aware look into the situation. Another distinction relates to the nature of the content of a convention. Does the instrument set out rights, obligations, prohibitions? Does it call for a national policy? Or does it attempt to deal with issues relating to the organization of government functions? For the most part, the rights, obligations, and prohibitions that are set out tend to be rather barebones<sup>26</sup> (although when particular industries are addressed, the tendency to detail is greater). Calls for national policy normally just list the issues the policy should address, without detailing specifics about how it is to be pursued.

When it comes to governance issues, however, an argument might be made that the ILO constituents have sometimes been a bit too eager to ask States to employ means of organizing government that over time will inevitably undergo change. This is a paradox from the viewpoint of those who generally favor process instruments. On that point, it will be interesting to see whether the campaign for the ratification of the four “governance standards” (formerly promoted as “priority Conventions”) under the follow-up to the 2008 ILO Declaration will prove as successful as the earlier one for the fundamental Conventions. Of the instruments identified, the Employment Policy Convention 1964 (No. 122) should be the low-hanging fruit, since this brief instrument basically requires a State to “declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment” (Article 1).<sup>27</sup>

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25. On the importance of realizing the potential of the Declaration, see Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization*, 20 EUR. J. INT'L L. 823 (2009).

26. For example, “A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body. . . .” Termination of Employment Convention, 1982, No. 156, Nov. 23, 1985, art. 8, ¶ 1, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>; “Employers shall be prohibited from limiting in any manner the freedom of the worker to dispose of his wages,” Protection of Wages Convention, 1949, No. 95, Sept. 24, 1952, art. 6.

27. This is somewhat further specified, but not in terms of having an employment relationship, and the text contains a flexibility clause: “The said policy shall take due account of the stage and level of economic development and mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.” Employment Policy Convention, 1964, No. 122, July 15, 1966, Art. 1, ¶ 3. The review of measures taken for attaining the objectives is also to be “by such methods and to such extent as may be appropriate under national conditions,” *id.* at art. 2.

The Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144) should also pose few problems to most governments. It is detailed as to the ILO matters on which tripartite bodies are to be consulted, but the primary obligation is to “undertake to operate procedures which ensure effective consultation” on those questions with “the most representative organisations of employers and workers enjoying the right to freedom of association” (Articles 1 and 2, paragraph 1). It is a classic “process” norm that has the added virtue of reinforcing another one—freedom of association. The nature and form of the procedures “shall be determined in each country in accordance with national practice, after consultation . . .” (Article 2, paragraph 2).

A more difficult proposition could be faced by the two Conventions on labor inspection, No. 81 and No. 129,<sup>28</sup> since they contain several other types of requirements. Those essentially aimed at integrity, independence, and the effective functioning of labor inspectors dovetail nicely with anti-corruption governance concerns reflected in the United Nations Convention against Corruption (2003). And as a general matter, the labor inspection Conventions echo a concern for “enforceability” of law that is countenanced even by the “thinnest” of rule of law approaches, i.e., those focusing on process values.<sup>29</sup> Moreover, each of these ILO instruments provides options to exclude (or not) certain groups of undertakings or workers, thereby providing flexibility. Furthermore, their wording is not limited to inspections of situations involving workers in employment relationships. However, the provisions that address the organization of inspection services imply serious budgetary outlays, which are likely to be resisted by international financial institutions despite their theoretical “Greenspanian moment.” The labor inspection conventions face a still greater obstacle: by enabling a strong governmental response to violations of national labor law, these instruments run counter to the still prevailing practice, if not the new rhetoric, of these institutions. Perhaps for that reason, the 2008 Declaration Follow-up referred to governance instruments in connection with updating as well as promotion.<sup>30</sup> In addition it will be important to see whether the ILO expands the concept of

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28. The Labour Inspection Convention, 1947, No. 81, Apr. 7, 1950, which is accompanied by a Protocol adopted in 1995, and the Labour Inspection (Agriculture) Convention, 1969, No. 129, Jan. 19, 1972.

29. See, e.g., MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 29–30 (2008).

30. See Part A, clause vi) and the footnote listing the four Conventions mentioned.

“governance instruments” to include more structural ones such as those addressing public contracting, private employment agencies,<sup>31</sup> and the like.

Through several routes, the Organization has already taken steps to trim its body of “up-to-date” standards down from among the 188 Conventions adopted since 1919 to the current 71.<sup>32</sup> The Governing Body Working Party on Policy regarding the Revision of Standards (the “Cartier Working Party”) considered any convention adopted after 1985, along with earlier instruments it selected, as up-to-date.<sup>33</sup> A constitutional amendment that is nearing entry into force will empower the Conference to declare obsolete a Convention that “has lost its purpose” or “no longer makes a useful contribution to attaining the objectives of the Organization.”<sup>34</sup> For standards to keep pace with change and retain credibility, this review process should continue, without an erosion of rights that (in Hepple’s terms) underpin equality of capabilities—and not just individual freedoms.

As for comprehensiveness, this is very much a question of perspective. The suggestion that comprehensiveness is undesirable in itself seems somewhat strange. For a person trapped in poverty whose work falls outside the scope of an employment relationship, or a domestic employee excluded from national legislative coverage, the scope of ILO Conventions is not comprehensive enough. I would agree with Hepple when he says, “The real question posed by globalisation, however, is not whether there are too many standards, but whether or not the standards set are the ones that are needed to counteract the effects of globalisation on the majority of the world’s workers, and whether these standards are being effectively implemented.”<sup>35</sup>

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31. *E.g.*, the Labour Clauses (Public Contracts) Convention, 1949, No. 94, Sept. 20, 1952, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C094>; the Private Employment Agencies Convention, 1997, No. 181, May 10, 2000, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181>.

32. This number will be affected shortly by the entry into force of the path-breaking consolidated Maritime Labour Convention 2006.

33. See its final report in ILO, GB. 283/LILS/WP/PRS/1/1 (Mar. 2002), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-10-2.pdf>. The date of reference is now twenty-five years old, covering a period of rapid change. This in itself suggests that a new review may be in order.

34. Instrument for the Amendment of the Constitution of the International Labour Organisation, 1997, ratified by 114 of the currently required total of 122 of the ILO’s 183 Member States (data from 26 January 2010), available at <http://www.ilo.org/public/english/bureau/leg/amend/1997.htm>.

35. BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 39 (2005).

## V. “HARD” LAW, SANCTIONS, AND CONDITIONALITY

A further leg of Langille’s strawman is that the ILO standards system is sanctions-based, or at least a “wanabee” version. This is a curious assertion from the author who only a few years ago summed up the ILO Constitution and its standards system with these words: “all of this is a game of moral persuasion and, at most, public shaming. It is a decidedly soft law system. There are in fact no sanctions. . . .”<sup>36</sup>

The ILO Constitution does not refer to sanctions, and it was even amended to remove reference to measures “of an economic and financial character.”<sup>37</sup> Its Article 33 does empower the Governing Body to recommend to the Conference “such action as it may deem wise and expedient to secure compliance” with the recommendations of a Commission of Inquiry. As for representations and complaints under the Constitution, the invocation of Article 24 and/or Article 26 has been vital to bring world attention to major human rights violations in the world of work over the years in Chile, Myanmar, Poland, Venezuela, and most recently Zimbabwe, to name only a few. These procedures are far from what Langille terms “irrelevancies” to those affected.

Regular reporting under Articles 19 and 22 of the Constitution permits nudging over time, encouragement of improvements, and—where justified—stronger calls for change that can eventually bear fruit.<sup>38</sup> The extent to which they are effective relates to the presence of stronger alternatives looming in the wings. It also puts information on the table that is available worldwide to states and non-state actors.<sup>39</sup> While the response rate in ILO regular reporting, ranging from 65–70%, is regularly deplored,<sup>40</sup> it compares favorably with other

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36. Brian A. Langille, *Core Labour Rights: The True Story*, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 89, 94 (Virginia A. Leary & Daniel Warner eds., 2006).

37. ILO Constitution, Annex, available at <http://www.ilo.org/ilolex/english/constq.htm>. In a 1946 amendment, former Article 28, which in relation to findings of a Commission of Inquiry referred to measures of an economic character, was replaced by Article 33.

38. See, e.g., the bibliography annexed to ILO, Rules of the Game, *supra* note 5; Lee Swepton, *The International Labour Organization and Human Rights: Access to the ILO*, in INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS 291–300 (Gudmundur Alfredsson et al. eds., 2009).

39. Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 L. & CONTEMP. PROB. 193, 214 (2008); SENGENBERGER, *supra* note 18; Swepton, *supra* note 35.

40. See annual reports of the Committee of Experts on the Application of Conventions and Recommendations published by the ILO, available at [http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CommitteeofExperts/lang--en/index.htm](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CommitteeofExperts/lang--en/index.htm).

such regimes. Langille correctly points out that comments of the Committee of Experts on the Application of Conventions and Recommendations focus mainly on law. This mirrors the information they receive from officials in countries, despite the requests contained in the report forms and the efforts of ILO standards specialists based in field offices. The absence of other information, such as labor statistics, is itself a symptom of weak capacity within Member States. This is a huge and recurring task that the ILO alone will not be able to fulfill. Policy coherence begins at home, and the labor ministry and labor statistics office are too often the neglected stepchildren of government.

In relation to the supervision of standards, there is scope for greater appreciation of context—not in terms of backing away from commitments voluntarily undertaken, but in how various categories of States are approached. Some research suggests that a more differentiated approach would be more effective for reaching certain countries. Based on an in-depth analysis of the ILO regime, Weisband concludes that overall, global benchmarking reduces the risks of member state “defection” from core international labor standards and thereby promotes monitoring by learning or discursive multilateralism.<sup>41</sup> At the same time, however, he finds the ILO monitoring system ineffective in relation to the behavior of a relatively small subset of States (which he refers to as deviant cases or pariah States). Ultimately, he observes, “the test of the effectiveness and legitimacy of a multilateral monitoring regime like the ILO supervisory system is the level of *both* compliance and responsiveness which it enjoys and commands.”<sup>42</sup> Overall his assessment is positive for the ILO, but the findings provide food for thought.<sup>43</sup>

## VI. RESISTANCE TO ALTERNATIVE STRATEGIES

Langille further claims that “Any suggestion to move away from the Consensus and its hard law system, in order to find alternative strategies, will be seen as threats to undermine the very fabric of the system and as totally inconsistent with the Consensus.”<sup>44</sup> Although—as in any institution—there are internal and external forces balking at change, this is a clear overstatement about the ILO. Otherwise, none

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41. Edward Weisband, *Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime*, 44 INT'L STUD. Q. 643 (2000).

42. *Id.* at 661.

43. Interestingly, a similar but more differentiated topology is sketched, in relation to resistance to rule of law reforms, by Trebilcock & Daniels, *supra* note 26, at 352–54.

44. Langille, *supra* note 5, at [ ].

of the following approaches to use soft law, streamline the body of standards or use them as development tools would have been pursued within the ILO:

- the ILO Declarations of 1998 and 2008, which were proposed to complement rather than contradict ILO standards;
- the “integrated approach” to international labor standards,<sup>45</sup> illustrated for example by the Occupational Safety and Health Framework Convention and Recommendation (2005) and the radically new approach taken in the Maritime Labour Convention (2006) to consolidate over sixty instruments and introduce a fresh means for its own updating;
- a “standards strategy” and proposed plan of action (including country profiles), part of which has been adopted in stages by the ILO Governing Body since 2005;<sup>46</sup>
- the ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (2006), which emerged in part out of the reluctance of destination States to ratify international instruments on migrant workers;
- Decent Work Country Programmes in which ILO constituents themselves determine their priorities, drawing on the integrated nature of the ILO’s objectives, including standards, and coordination of these with national development frameworks;<sup>47</sup> and,

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45. This approach aims at improving the coherence, relevance and impact of standards-related activities and developing a plan of action that includes a package of tools on a particular subject. The tools may include conventions and recommendations as well as many other elements. ILO, *Rules of the Game*, *supra* note 5, at 16.

46. For the most recent status of reforms already adopted, and others proposed for future consideration, see GB.306/LILS/4(Rev.) (Nov. 2009), *available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_116711.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_116711.pdf); report of the discussion in GB.306/10/2(Rev.) (Nov. 2009), *available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_117711.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_117711.pdf).

47.

The content of DWCPs varies from country to country based on national circumstances. . . . The best DWCPs are focused and prioritized in terms of their Country Programme Outcomes and recognize that tripartism, social dialogue and international labour standards are central to the planning and implementation of a coherent and integrated ILO programme of assistance to constituents in member States. They are closely aligned with national development strategies, including Poverty Reduction Strategies and UN Development Assistance Frameworks, where applicable.

- innovative initiatives incorporating standards elements, such as the well known International Programme for the Elimination of Child Labour, the Better Work Programme involving a partnership between the ILO and the International Finance Corporation, the *Toolkit for Mainstreaming Employment and Decent Work* adopted by the Chief Executives Board of the UN system,<sup>48</sup> decent work indicators derived from standards,<sup>49</sup> and codes of practice on various subjects, among others.

Where the ILO secretariat has proved less amenable to change is in relation to translating the vision of policy integration (expressed in Part I.B of the 2008 Declaration as the “inseparable, interrelated and mutually supportive” nature of the ILO’s strategic objectives) into its day-to-day work. In my opinion, only a radical restructuring of the internal budgetary allocation process would achieve this result, with resources attached not to administrative units, but rather to integrated goals that encompass development-supportive international labor standards. This would be one way to bridge the cultural divide between the professions of law and economics that characterizes international institutions more widely.<sup>50</sup>

#### VII. CONCLUDING COMMENTS: IS CONSENSUS REALLY THE PROBLEM?

The system of adoption and supervision of ILO Conventions is certainly not perfect.<sup>51</sup> It is, however, not hostage to a paralyzing consensus, as Langille contends, but sometimes rather to an *absence of consensus*. At the risk of some exaggeration, the representatives of the employers on the ILO Governing Body seem to oppose new Conventions virtually as a matter of principle, while the workers see

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ILO, BRINGING FOCUS TO ILO COUNTRY-LEVEL CONTRIBUTIONS: A GUIDEBOOK FOR DEVELOPING AND IMPLEMENTING DECENT WORK COUNTRY PROGRAMMES 3 (Version 2, 2008), available at <http://www.ilo.org/public/english/bureau/program/dwcp/download/guidev2.pdf>.

48. CEB/ILO, *Toolkit for Mainstreaming Employment and Decent Work: Country-Level Application 66–67* (2008), available at [http://www.ilo.org/public/english/bureau/pardev/download/toolkit\\_country\\_en.pdf](http://www.ilo.org/public/english/bureau/pardev/download/toolkit_country_en.pdf).

49. See, e.g., Monique Zarka-Martres & Monique Guichard-Kelly, *Decent work, indicators and standards* (ILO Policy Integration Department Working Paper No. 58, 2005), available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms\\_079162.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079162.pdf).

50. See, e.g., Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AMER. J. INT’L L. 647 (2009).

51. Bob Hepple, for instance, has summarized some shortcomings and offered reasons for them. HEPPLÉ, *supra* note 32, at 35–56.

earlier promises to promote standards as unfulfilled and fear that revision of standards will only weaken protection. Governments, perhaps represented by officials having limited familiarity with development theory, seem fixated on avoiding any additional reporting or funding obligations. In ILO meetings, statements sometimes begin by walling off issues a group is not even willing to discuss. This is a mix that against all odds can, fortunately, yield an important declaration from time to time, but it has a poor track record when it comes to tackling “business as usual” in any sort of fundamental way. Langille’s prescription of shifts from “all at once” to “a few things at a time” and from “grand solutions to removing concrete identifiable roadblocks” is already being followed by the ILO Governing Body. Unfortunately, in the face of major shifts in the organization of work, it is this very slow pace of reform that risks eroding the relevance of standards in the longer term.

At the same time, Langille overlooks three major shortcomings in the international labor standards regime: (a) the international community’s shying away from workable normative responses to the really hard issues that would create a fairer globalization<sup>52</sup> (such as free movement of people, creation of a global social protection floor delinked to employment, changes related to supply chains, investment policies with a labor component), (b) the lack of a thorough gender analysis of the body of ILO instruments through a development lens, and (c) under-utilization of technology or new working methods for the development and supervision of standards.<sup>53</sup> It begins to look like the problem is not one of consensus, but rather of its absence.

In my view, one proof of the pudding will come in 2011, when the International Labour Conference is scheduled to focus on social protection, a year after it has discussed employment in the wake of the financial crisis. When it comes to the standards equation, will the exercise be content with reaffirming past solutions, or will it draw effectively on the many ideas that have been proposed for extending social protection to all?<sup>54</sup> Will it give more than superficial treatment

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52. See WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL (2004), available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

53. As examples, see proposals for change made to the Legal Issues and Labour Standards Committee of the Governing Body and their discussion, most recently in November 2009.

54. See ILO, Setting Social Security Standards in a Global Society (Social Security Policy Briefings, Paper 2, 2008); and the various proposals by Alain Supiot, *The Position of Social Security in the System of International Labor Standards*, 27 COMP. LAB. L. & POL’Y J. 113 (2006); Alain Supiot, *The Outlines of a Framework Agreement on the Extension of Social Protection*, 27 COMP. LAB. L. & POL’Y J. 273 (2006); Adrián Goldín, *Extending Social Security Coverage: The Normative Route*, 27 COMP. LAB. L. & POL’Y J. 257 (2006); Simon Deakin & Mark Freedland,

to gender in assessing how standards deliver on the Decent Work Agenda for both men and women? The hard work of analyzing labor markets through a gender lens, and applying this knowledge to the body of the Conventions and Recommendations that the ILO considers up to date, remains to be done.<sup>55</sup> Such an exercise would automatically pick up the phenomena of so-called “informality” that hampers inclusive development for both men and women.

As Langille has reminded us, contemporary trends risk robbing labor law of its intellectual underpinnings.<sup>56</sup> The real challenge is thus the identity crisis of labor law in relation to work and social protection, and the implications this holds for international labor standards.<sup>57</sup> Sen has observed that concentration only on labor legislation is inadequate: “the linkages between economic, political and social actions can be critical to the realization of rights.”<sup>58</sup> However, national labor law systems are in crisis not only because of the breakdown of the intellectual underpinning; there is also a serious failure of enforcement where the original construct still remains largely valid.<sup>59</sup> Before national labor law (or indeed some other system yet to be invented)<sup>60</sup> comes to grips effectively with the emerging realities of work in a globalized but stubbornly unequal

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*Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, 27 COMP. LAB. L. & POL'Y J. 151 (2006); R. Filai Meknassi, *Extending Social Security in the Developing Countries: Between Universal Entitlement and the Selectiveness of International Standards*, 27 COMP. LAB. L. & POL'Y J. 207 (2006); as well as those of Jennifer Tooze, *The Rights to Social Security and Social Assistance: Towards an Analytical Framework*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 331 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

55. The recent ILO report, *Gender equality at the heart of decent work* (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_105119.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_105119.pdf), highlighted “gender-friendly” instruments, but did not include an analysis of the full body of standards. Murray has argued convincingly that much of this body is based on a male breadwinner concept that is out of touch with reality. Jill Murray, *ILO and Working Conditions—An Historical Analysis* 9–12 (ILO, International Institute for Labour Studies, Geneva, 2008), available at [http://www.ilo.org/public/english/century/information\\_resources/download/murray.pdf](http://www.ilo.org/public/english/century/information_resources/download/murray.pdf). General Recommendations adopted by the Committee of Experts set up under the Convention on the Elimination of All Forms of Discrimination against Women and analyses prepared by UNITAR and UNIFEM could inform an inter-disciplinary gender analysis.

56. See, e.g., Mark Freedland, *From the Contract of Employment to the Personal Work Nexus*, 35 INDUS. L.J. 1, 28–29 (2006).

57. It is somewhat ironic that just as the employment relationship is showing signs of fraying as the organizational principle around work, the ILO has reaffirmed its centrality in both the 2008 Declaration and the Employment Relationship Recommendation, 2006, No. 198, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R198>.

58. Amartya Sen, *Work and Rights*, 139 INT'L L. REV. 119, 127 (2000).

59. See, e.g., THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOUR MARKET (Annette Bernhardt et al. eds., 2008).

60. For a review of some possible scenarios, see Antonio Ojeda Avilés, *The “Externalization” of Labour Law*, 148 INT'L LAB. REV. 47 (2009).

world, it will be difficult for future international labor standards to do so.

One of the sub-texts of the 2008 Declaration, like the Declaration of Philadelphia and the 1998 Declaration that it complements, is that international labor standards can contribute to Members' development efforts. All of these instruments recognize that the ILO will not achieve this result on its own, a view shared by development agencies. As noted by the Department for International Development of the United Kingdom, "The ILO is providing support to member states to ensure that objectives of decent work are addressed as an integral part of the development process . . . Although the ILO leads on the promotion of labour standards, other development agencies should also contribute to the promotion of labour standards and labour rights."<sup>61</sup> In my view, more attention should be paid to understanding and documenting how particular international labor standards support development and how respect for them in practice for all concerned, individually and collectively, can be effectively pursued. This implies a more thorough analysis of where existing instruments already offer scope for this, and where gaps exist in light of the diverse configurations of work. Many, but not all, ILO standards are far from being irrelevant or inapplicable to the informal economy. They may only be in need of additional means of implementation,<sup>62</sup> especially where collective action is concerned. Langille is, as he points out, posing a larger question. However, I remained unconvinced that the human freedom narrative will be sufficient to inform the design and delivery of a new system for realizing labor rights.

Human freedom may indeed be "both the end and the path," as Langille argues, but along that path some markers and the occasional guard rail are needed to avoid people falling off the cliff. Over time, the ILO moved from seeing international labor standards as "the" tool to carry out its mandate to understanding them in the 2008 Declaration as both an objective and one of the tools for achieving its goals. Does this tool need further sharpening? Certainly. But abandoning the ILO standards system altogether before a better

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61. DFID, *Labour Standards and Poverty Reduction 24–25 (2004)*, available at <http://www.dfid.gov.uk/Documents/publications/labourstandardsJune04.pdf>. DFID highlights the instruments available to all bilateral and multilateral development organizations: policy dialogue with governments, technical assistance for regulatory capacity in governments (e.g., health and safety inspectorates); support for building organizational capacity for the marginalized; and project action to protect rights.

62. Anne Trebilcock, *International labour standards and the informal economy*, in *Les Normes Internationales du Travail*, *supra* note 5, at 613.

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alternative is in place is not the answer. Langille argues that it could be a system that aims at assisting Member States achieve their goals. Within the broader Decent Work Agenda, the ILO standards regime *is* such a system, albeit one that will need to continue to evolve. In any field, it is useful to return to first principles and to posit theories. Such analysis needs to understand better what is working, what is not, and why.