

1 Latecomers to the ILO and the Authorship and
 Ownership of the International Labor Code

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Abstract

The article examines the extent to which latecomers to the International Labour Organisation (ILO) that comprise more than one half of the organization could be said to have contributed to the establishment of the International Labour Code, about two thirds of which had already been established by the time that they began to join the ILO as politically sovereign independent states. The article focuses on the recent work of the ILO Working Party on Policy Regarding the Revision of Standards (1994-2002). It evaluates both the significance of outcomes of the Working Party's achievements and the role of the latecomers in that enterprise. It shows that the latecomers have appropriated the ILO dynamic and utilized the ILO's Working Party and Committee structures both to project matters of foremost concern to themselves onto the agenda of the ILO and to update the International Labour Code by evaluating, categorizing, and suspending some of the Conventions and Recommendations that they had deemed to be irrelevant. It concludes that after the conclusion of the work of the Working Party on Policy Regarding the Revision of Standards, latecomers to the ILO have become equal co-authors and co-owners of the International Labour Code together with all the other member states parties of the ILO.

I. Introduction

The province of international law has amplified and displaced the Austinian handicap, which previously begged the question of whether international law was in fact law.¹ However, an

unyielding band of its detractors appear to be congregating now under the charge that international law is international only in name but Western centric in practice. They argue that it is created by Western states for the pursuit and service of Western interests. For this reason, it could neither command the universal appeal that is implied in its title of "international law" nor service genuinely international concerns. They conclude that therefore, the labeling of what is essentially Western oriented law as international law diminishes both the symbolic validation of the standards at issue and the legitimacy of the international legal system in general because of the apparent contrast between international law's own purpose and its practice. One way of correcting this would be to represent international law consistently with its origin, purpose, focus, and pursuit. Another would be to renew international law altogether so that all of its stakeholders are seen to be co-authors and co-owners of its code and its practice. The International Labour Organisation has gone for the latter approach.

This article examines and evaluates the ILO's recent effort to renew its International Labour Code of 185 Conventions and 195 Recommendations²--the majority of which had been concluded by

the mid-1960s when through the United Nations decolonization program Western colonies in Asia, Africa, and Latin America began to join the ILO as sovereign independent states. These former colonies, which comprise more than one-half of the ILO membership of 180 countries,³ had played no part in the creation of nearly two-thirds of the current International Labour Code. The article shows that through work of the ILO Working Party on Policy Regarding the Revision of Standards (1994-2002)⁴ the ILO has transformed and renewed its labor code in a way that has enabled latecomers to the organization to fully appropriate its standards. Without these "renewal-seeking interventions" these latecomers to the ILO would have remained objects of the International Labour Code in spite of them numbering more than one-half of the organization's membership. The previous situation would have become increasingly unsustainable because of the ILO's uniqueness among other international organizations and also for reasons of authenticity and legitimacy.

A. Uniqueness of the ILO

The ILO is unique among the institutions, organs and specialized agencies of the UN family in two ways. It is the only surviving

institution created by the Peace Treaty of Versailles (1919) and is widely acknowledged to have inspired the procedures and principles of both the UN (1945) and the UDHR (1948). The ILO has elected the setting of international labor policy and standards, and the provision of technical assistance to states as the principal means of pursuing its mission--pursuit of social justice for all.⁵ It is the only organization that is governed by the principles of universality and tripartism--*the ILO dynamic*. Its mission and dynamic recommend equal participation of member states parties in its procedures, especially standard setting.

As a policy, tripartism requires that all stakeholders within and between nation states engage in social dialogue whenever matters referring to policy and standard setting are under consideration. In other words, no policy change could be inaugurated or effected, or new standards developed without the participation at both national and international levels of the governments', employers', and workers' representatives.

ILO standards are universal in that they create obligations even for member states parties that have not yet ratified them. This is a novel departure from general international law, which does not recognize any legal obligations for a State *viz* an

international treaty that the State has not ratified,⁶ except the requirement that states should refrain from acts that may be inconsistent with the object and purpose of treaties that they have signed up to.

This is achieved through Article 19 of the ILO Constitution (1919) which obliges member states to submit to their competent authority, in principle the legislative assembly, all Conventions and Recommendations adopted by the ILO Conference "for the enactment of legislation or other action" within a period of twelve **to** eighteen months. The idea is to ensure national public debate on the issues referred to in ILO instruments with a view to promoting their implementation. Since the amendment of the ILO Constitution in 1946, member states **p**arties are also required under Article 19 to submit periodic reports to the ILO, on the position of their law and practice in regard to the matters dealt with in the Conventions that they have not ratified and in Recommendations of the ILO Conference.

These two requirements give the ILO a unique standards policy in an international legal system that is premised on consent-based treaty obligations. This policy was enhanced by the adoption in 1998 of the ILO Declaration on Fundamental Principles and Rights at Work.⁷ The Declaration cemented member

states' obligations to ILO principles by committing them to recognize, promote, protect, and ensure respect for the dignity of individuals *qua* human beings **in specific areas regardless of a State's level of economic development and regardless of whether a State had previously ratified the relevant Conventions. Covered areas include freedom of association and the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in employment and occupation.**

Although **the universal jurisdiction of ILO Conventions and Recommendations applies only to** member states parties of the ILO, the fact that more than one-half of the organization's membership had not been involved in the creation of almost two-thirds of the current International Labour Code justified questions about authorship and ownership of international labor law. It would raise questions about the fitness of the ILO for its mission to secure social justice as a means of facilitating international peace and security particularly because the *status quo* gave an appearance of discrimination in the allocation of responsibility amongst its membership.

B. Authenticity of the ILO

David Miller defines social justice as that which people generally conceive to encapsulate fairness and justice. “[S]ocial justice has always been, and must always be, a critical idea, one that challenges us to reform our institutions and practices in the name of greater fairness.”⁸ Seniority in membership of the ILO alone can never be a sufficient justification for the manifest unequal exercise of power by states in the authorship of the International Labour Code. Therefore, the insistence upon a labor code, two-thirds of which had been established by the time that latecomers that form more than one-half of the ILO’s membership joined up was always going to be difficult because of its appearance of unfairness.

While it could be argued that latecomers to the ILO might have been attracted to the organization by its norms, and therefore, that there was nothing wrong with the *status quo*, the reverse could also be argued with similar force. That is, that some states parties might have joined the organization for other reasons, including the quest to use the ILO procedure and purpose as a tool for the pursuit of other goals not yet listed or prioritized by the ILO. For this reason the focus should be on whether the upholding of the *status quo* enhances or

diminishes the legitimacy of the International Labour Code. Franck defines legitimacy as a rule **or the** system's pull of its addressees towards compliance.⁹ The greater the legitimacy, the stronger the pull and vice versa. In this sense states' perceptions of legitimacy and of social justice have the potential to determine the efficacy of the International Labour Code.

II. Origin, Purpose and Pursuits of the ILO

Socially, the idea to establish common minimum labor standards was provoked by both ethical and economic concerns over the human cost of the Industrial Revolution back in the early nineteenth century. The *status quo* increasingly became unacceptable on humanitarian grounds as the maximum working hours per day and week, the provision of an adequate living wage, the protection of workers against ill health arising out of their employment, the recognition of the principle that work of equal value required equal remuneration, the protection of migrant workers, and other issues became paramount.¹⁰ The end of the first World War viewed the social injustices in and arising out of employment practice as **some** of the biggest threats to

lasting international peace and security.¹¹

Formally, the Treaty of Versailles (1919) provided for the creation of the International Labour Organisation for the purpose of attending the existing conditions of labor that evidenced "such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled."¹² Considerations of humanity and fear of unfair competition galvanized the commitment to secure a universal social policy for the global world of work. To achieve this ideal the ILO would have to become an information-processing center. Enormous, exact, and comparable information would need to be collated and processed and then applied to the standard setting initiative--the ILO's principal mode of pursuing its objectives. The first Director-General of the ILO, Albert Thomas¹³ wondered in what directions, and up to what precise point, such legislation could be instituted and applied.

By what methods--uniform or diverse--can the same standard of life, conditions of labour equally humane, the same dignity for the wage-earner in his work, be secured at the same time in industry, in commerce, in transport and in agriculture? In what measure, . . . is the careful consideration of "differences of climate, habits and customs, of economic opportunity, and industrial tradition" consistent with progress towards more nearly uniform conditions of labour, which is one of the chief concerns of the [ILO]? . . . Finally, how far can international control

be harmonised with national sovereignty?

The Gompers Commission¹⁴ comprising representatives from nine Western nations, namely the United Kingdom, the United States France, Italy, Japan, Cuba, Belgium, Czechoslovakia, and Poland] wrote the constitutive document of the ILO sometime between January and April 1919. Albert Thomas writes that the idea was to create a permanent international organization that would establish humane conditions of labor and institute and apply everywhere a system of international labor legislation subject to reservations imposed by the sovereignty of each state and the conditions prevailing therein.¹⁵

The "purpose jurisdiction" of the organization **also** encapsulated African, Asian, South American, and other workers, especially those under colonial domination. The "subject jurisdiction" of the ILO, that is, inhuman conditions of labor resulting in injustice, hardship, and privation also included African, Asian, South American, and other workers especially because of the effects of colonialism. Their colonial masters could not morally be relied upon to ensure humane conditions for employees. Therefore, the subject and purpose jurisdictions of the ILO generated legitimate expectations of the organization among all those that grasped the remit of the organization.

Among these was Pope Paul VI who called for the genuine internationalization of international labor law.¹⁶ But did the organization itself grasp the idea?

A. Development of ILO Standards in the First Forty Years

In the first forty years of its existence the ILO concentrated on developing and enforcing international labor standards that sought to improve working conditions for large numbers of people. The priority areas were listed as

the regulation of the hours of work . . . , the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of employment the protection of children, young persons and women, provision for old age and injury, protection of [workers employed abroad] . . . [and] recognition of the principle of freedom of association.¹⁷

In the first twenty years sixty-seven conventions and sixty-six recommendations were adopted. They included conventions on indigenous peoples, which specifically targeted the welfare of those in dependent territories or colonies.¹⁸ However, the Great Depression¹⁹ compelled an adjustment in the focus of the organization to that of the quality of employment.

In 1934, the United States, which was not a member of the League of Nations, became a member state party of the ILO. The

election of United States David Morse to the office of Director-General of the ILO in 1948 coincided with the renewed development of the ILO's work on labor standards and the launch of its technical cooperation scheme.²⁰

Post World War II conventions focused on human rights and more technical labor issues. Convention No. 87 on Freedom of Association was adopted in 1948, to establish the ILO's most fundamental democratic right in the world of work. A special tripartite Committee on Freedom of Association (**CFA**) has assisted with more than 2000 cases in the last five decades.²¹

However, it was not until after the World War II, and then only after the swinging into action of the decolonization program under the UN Trusteeship Council, that former Western colonies began to take up membership of the ILO in sufficiently significant numbers to affect directly the policy and norm development programs of the ILO. Prior to that these former colonies do not appear to have had any real opportunity directly to participate in the ILO's norm creating endeavors even though their predicament of colonial subjugation and servitude was typical of the sort of situation that the purpose jurisdiction of the ILO targeted. To date, none of the seven Director-Generals of the organization has come from Africa. In fact the

only non-Western Director-General has been Chile's Juan Somavia who took office in March of 1999.

Nonetheless, it is an idea's appeal rather than the personality of its messenger that determines its success or failure. Great ideas always surprise even their most ambitious optimists by assuming a life of their own that goes well beyond the expectations of even their surest advocates. The core values of the ILO, namely freedom, humanitarianism, social justice, and peace building gave the organization enormous universal appeal especially because of the ubiquitous prevalence of social injustice. It is this prevalence of social injustice that has prompted and institutionalized as visionaries people such as Mahatma Ghandi, Martin Luther King Jr., Nelson Mandela, William Wilberforce, and others. Their examples remind us continually of the need to work towards social justice and to guard against complacency in the cause of freedom and human rights protection for all.

Humanitarianism targets the promotion, protection, and preservation of the inherent dignity of every human being while social justice seeks either to limit or, knock out from society unfairness that hinders self-actualisation of any human being. Peace is the matrix on which the human condition thrives the

best. Whatever differences nations may have one with another they will always find, if they search, that the core values of the ILO are timeless and have a universal appeal.

The millions of Africans that suffered as a result of the slave trade between 1502 when African slaves were first reported in the New World, and 1833, when the practice was formally abolished, would argue that the ILO was the organization that their time desperately needed but did not have. ILO values are as attractive today as they have ever been. It is not surprising that the purpose and subject jurisdictions of the ILO had destined the organization with a universal appeal right from the start.

To be sure, international law's legitimacy would be less problematic if states enjoyed equal opportunity to moot, purvey and enforce its values and standards. However, there must be a higher ideal than that of equality of authorship in institution building, standard setting and practice thereof. That must be the self-evident equality of access to ownership of manifestly universal principles that offer the best hope for actualisation of human dignity. It is settled that mere existence of a constitution, however comprehensive and elegant, is simply promissory until people know and understand its provisions, have

faith that their governments will not overrule it, and believe that their rights as promulgated within it, will indeed be upheld.²²

Member states parties' contribution to the development of the International Labour Code is measurable in two ways. The first is by examining the extent to which latecomers to the ILO have voluntarily appropriated as their own, the ILO's purposes, promises and aspirations for a free, just, equal, and peaceful world. The second is by evaluating the ILO's reaction to this appropriation and the dynamic fostered between latecomers to the ILO and the organization as a result of that reaction. For latecomers to the ILO to be said to have sufficiently appropriated ILO processes and procedures it must be shown that a change in the normative standards **and/or**, standards policy of the ILO had occurred that was either:

(a) Attributable to the involvement of latecomers with the organization. It would have to be shown that but for the participation of these latecomers to the organization, the organization might not have evolved such new standards or practice--*extreme appropriation*; or

(b) Attributable to the participation of latecomers in common concert with other member States of the organization. It would have to be shown that but for the instigation or significant influence of latecomers in the organization, the organization might not have evolved such new standards or practice--*full appropriation*.²³

III. ILO Committee Strategy

The establishment of the Working Party on Policy Regarding the Revision of Standards (1994-2002)²⁴ is typical of ILO working practice because much of the work of the ILO on standard setting is conducted in committees of the tripartite ILO Governing Body, the executive body of the International Labour Office. The ILO Governing Body takes serious decisions on ILO policy, decides the agenda of the International Labour Conference, adopts the draft program and budget of the organization for submission to the ILO Conference, and elects the Director-General of the ILO. Therefore, to address adequately the question **of** whether these latecomers to the ILO have made a contribution to the creation of the International Labour Code and to its enforcement procedures, we must **also** examine their involvement **in** and effect **on** the work of ILO Governing Body Committees.

The Governing Body has six committees.²⁵ Their functions vary from **enforcing** or monitoring states compliance with their obligations under the International Labour Code; advising the ILO Governing body on technical issues such as entering into treaties with other legal entities, determining both the efficiency and coherency of the international labour code and

its enforcement strategies; to mere planning and tying up of loose ends in the organization's activities. **In addition** to these committees, the ILO Governing Body may establish working parties to oversee specific tasks. The ILO Working Party on the Social Dimension of Globalization (WP/SDG) was established in November of 1994 specifically as a forum for the discussion of all matters relating to the topic.²⁶ It immediately set itself in 1995 the task of assisting in making the corpus of international labour standards more operational and "readable."²⁷

The CFA was established at the 117th session of the Governing Body in 1951 for the purpose of monitoring states parties' compliance with their Constitutional and Convention obligations on the right to organize. It comprises nine members, three from each of the three groups of government, worker, and employer representatives and chaired by an independent expert. On 26, 27 May and 3 June 2005, the committee met under the Chairmanship of Professor Paul van Heijden in Geneva. In 120 cases before the committee the governments complained against **were** requested to submit their observations. The committee examined the merits of thirty-five of these cases and reached definitive conclusions in 22 and interim conclusions in thirteen. The remaining cases were adjourned.²⁸

The Programme, Financial and Administrative Committee (PFA) is responsible for financial and general administrative matters and for personnel questions. The Committee on Employment and Social Policy (ESP) is an advisory body. It advises the ILO Governing Body on ILO policies and activities in such areas as employment, training, enterprise development and cooperatives, industrial relations and labour administration, working conditions and environment, and social security.

The Committee on Sectoral and Technical Meetings and Related Issues (STM) has a managerial function, assisting the ILO Governing Body with preparatory, planning, and follow up issues in ILO sectoral committees and meetings, ILO technical meetings, meetings of experts and the review of the ILO Sectoral Activities Programme and ILO sectoral and technical meetings. The Committee on Technical Cooperation (TC) is an advisory body. It advises the Governing Body on matters relating to ILO technical cooperation programs under all sources of funding.

The Committee on Legal Issues and International Labour Standards (LILS) has numerous substantive and procedural responsibilities. They include consideration of matters relating to Standing Orders; standard setting and procedures, including the approval of report forms for ILO Conventions and

Recommendations and the selection of instruments for Article 19 reporting; and ensuring the recognition, promotion and protection of human rights, especially anti-discrimination obligations of states. At its 262nd Session in March/April 1995 the ILO Governing Body approved the establishment of a working party under the LILS, specifically to address the possibility of reviewing of ILO standards--the Working Party on Policy regarding the Revision of Standards (WP/PRS). This followed discussions on standard-setting policy at the International Labour Conference in 1994. The **WP/PRS** was established for the specific purpose of:

1. Determining the actual revision needs of the international labour code;
2. Formulating the criteria that could be applied in the effort to revise the international labour code the revision of standards;
3. Studying the international labour code to determine areas where evaluation of standards may be needed;
4. Ensuring coherency in the standard-setting system procedures; analysing the difficulties and obstacles involved in the ratification of ILO Conventions;
5. Suggesting the measures for improving the ratification of Conventions that have been revised.²⁹

Because the majority of the International Labour Code was already in place when latecomers began to take up membership of the ILO, they could be said to be aliens to the code that regulates them. However, the purposes of the **LILS** and in

particular its **WP/PRS** could be said to have presented late arrivals at the ILO with the opportunity to streamline the International Labour Code through the revision of its standards. If it succeeded this project would make these late arrivals co-authors and co-owners of the international labour code. But this could only happen if the late arrivals to the ILO, including African, Asian, South American and other states actually engaged these ILO bodies for that purpose. **The LILS'** meetings are private **and the committee is** comprised of sixteen government members (four from each region), eight employer members and eight worker members.

IV. The Latecomers and the ILO's Standard Revision Process

The First Session of the ILO Conference held in October 1919 in Washington, DC adopted six Conventions and six Recommendations. They dealt with issues that were prioritized either as urgent, or as mature and included hours of work in industry, unemployment, night work of women, maternity protection, and minimum age for admission to employment and night work of young persons in industry. This was a record setting achievement among international organisations regarding the rapidity in the

accumulation of conventions and recommendations. This raised the question of quality, efficacy, and potential longevity of the standards created. In acknowledgment of this the ILO adopted in 1922 the double discussion procedure (DDP)³⁰ as a means of ensuring depth and breath in the formulation of the International Labour Code.

The procedure requires that a technical committee consider over two sessions (usually consecutive) the proposed new standards. In spite of this, the ILO **also** realized that the dynamism that is both inherent and typical of the labor market means that their standards quickly and easily can become incongruous to the new character or subtleties of the mischief that they were intended to address. To deal with this threat, the ILO introduced into the Standing Orders of the Governing Body in 1928 a specific procedure for the revision of Conventions. This was followed in 1929 by the introduction into the Standing Orders of the ILO Conference, a specific procedure for the revision of the labor code.

The 1929 procedure was successfully applied for the first time in 1931 to deal with concerns that certain technical provisions of the Convention were holding states parties from ratifying the instrument. This achieved the revision of

Convention No. 28 (1929) on the Protection Against Accidents for Dock Workers.³¹ One effect of the "revisionist strategy" is that it helps ensure that ILO standards remain relevant to the constantly moving and changing labor environment. It keeps check on the mischief previously dealt with in **earlier** Conventions. The "Convention revision strategy" has been dormant since. This could be a result of one of two things.

The first possible explanation for this **dormancy** is that other strategies have been established that are more efficient and more suited to the task. One example is the generation of efficient standards at the outset. The generation of sufficiently broad, profound, and efficient standards that cater **to** the immediate, medium and long term aspects effects of the mischief sought to be regulated reduces the need for revising ILO standards.

A second possible explanation for the dormancy of the standard revision exercise is that the ILO has deliberately decided to "switch off" those of its mechanisms that might empower late-comers to the organization over their senior partners in the organization--a strategy that has worked elsewhere in the UN.

For instance, during the cold war era the Western states

had the practice of decisively settling in the UN General Assembly major policy issues that appeared to be in the jurisdiction of the Security Council. That practice circumvented the potential deployment of the veto power by the other permanent member states of the Security Council. That all changed with the granting of political independence to former colonial states who soon assumed a majority in the UN General Assembly. With votes determined on a majority system as opposed to consensus, Western states switched discussion of all major, critical, **and** policy issues to the Security Council.

Continued discussion and resolution in the UN General Assembly of any such major, critical and policy issues in international law would have empowered the newly independent states, something that the West was not prepared to do, ready to do, or will ever do. However, the latter analogy does not fit with both the vision and practice of the ILO.³² **This leaves us with the view that other ILO strategies that are more suitably placed and more efficient have emerged and superseded the DDP.**

Besides, the revision of Conventions invariably raises the issue of the consequences³³ of the coexistence of several or multiple texts on the same issue. That is also inconsistent with one of the objects and purposes of the ILO, namely, to institute

a universal, uniform labor code that serves as "chief coordinator of social policy" on the one hand and as "fair economic competition curator" among states on the other. The co-existence of multiple conventions within the International Labour Code would cease to be an issue if all previous Conventions were regarded as interim or intermediate objectives for states that wished to ensure protection of the values at issue but not yet ready to go all the way--progressive analysis.

The falsity of this argument lies in that it assumes that successive Conventions merely up the threshold of sufficiency in the protection of the values at **issue** without altering either the values **themselves** or even their content. Revision of norms can target either or both the values and their content, and also the recognition and threshold criteria. In such cases the progressive analysis fails.

Could a repeal of the earlier Convention(s) resolve the issue of inconsistency in the labor code? Conventions or Treaties are the only way that states purposively create legally binding obligations **with one** another under international law. In this sense, Treaties or Conventions raise contractual obligations for involved states. Consequently, the ILO could not revise the obligations arising for states therefrom.

To deal with this issue the ILO Conference voted in June 1997 to amend the ILO Constitution by adding a ninth paragraph to Article 19.³⁴ It provides that:

Acting on a proposal of the Governing Body, the Conference may, by a majority of two-thirds of the votes cast by the delegates present, abrogate any Convention adopted in accordance with the provisions of this article if it appears that the Convention has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the **Organisation**.³⁵

This provision was intended to institute the ILO Convention abrogation mechanism, that would be invoked where the activities covered by a Convention no longer existed or where the Convention no longer served any purpose. A two-thirds majority vote of delegates attending the International Labour Conference would ensure that. However, the amendment has not come into force. It **has** yet to secure the required minimum number of ratifications.

Therefore, the ILO has had to adopt other strategies for keeping its labor code consistent with modern day requirements. In this connection the ILO Governing Body has adopted the strategy of creating revising Conventions that replace older ones, and protocols, which add new provisions to older Conventions. The protocols create new voluntary obligations for ratifying states. States that do not ratify the protocols still

must report to the ILO the action that they have taken to ensure Protocol standards. Nonetheless, the replacement of standards is more flexible than revising them because the former enables the creation of more far-reaching standards than the latter.³⁶ The ILO Governing Body's **Committee on LILS** and its **WP/PRS** have played a major role in the updating of ILO standards.

Within the first eight years of the creation of the **WP/PRS** all ILO standards adopted before 1985, save the Fundamental and Priority Conventions, **were** reviewed for their efficacy.³⁷ The review concluded that seventy-one Conventions--including the Fundamental Conventions and all those Conventions adopted after 1985--were "up-to-date" and recommended their active promotion. The remaining ones either needed to be revised, abrogated, or studied further. What role, if any, have the latecomer states played in reaching these decisions?

A. Latecomers and the ILO Working Party on Policy Regarding the Revision of Standards

The Working Party was a sub-committee of the **LILS Committee**. Although the Working Party no longer exists, its work is still being followed up through LILS.³⁸ The Working Party³⁹ began its

work in November 1995 and finished in March 2002. It comprised thirty-two members as follows: sixteen government members (four from each region,) eight employer members, and eight worker members.⁴⁰ Its meetings were held in private.

The privacy attached to the proceedings hampers discovery of the actual positions taken during deliberations of the Working Party. Therefore, the effort of the **WP/PRS** could not be examined in a way that ascribed positions to individuals or the states that they represented. Moreover, ILO Reports on the proceedings of the Working Party's deliberations simply refer to the positions adopted by each of the tripartite bodies, i.e. Workers' representatives, employers' representatives, and governments' representatives as if members always adopt a partisan approach to their task. Assumptions of such unity are not realistic.

Therefore, the reporting procedure adopted by the ILO for these purposes is difficult to justify and frustrating for anyone trying to discover the specific input of particular regions into the work of the **WP/PRS**.

In addition, the independent status of both the workers' and the employers' representatives on the **WP/PRS** meant that they were not under instruction regarding the positions that they

took in the debates and in the votes that they cast. Therefore, one would expect there to be occasions when decisions of the **WP/PRS** did not so easily fall into the categories of workers' representatives' and employers' representatives views. "Cross views" where some employers' representatives were persuaded by the line advocated by workers' representatives and vice versa are not discussed in the published reports, as if they never happened at all. However, the private nature of the proceedings of the **WP/PRS** safeguards the possibility of "cross views." This private nature of the proceedings of the Working Party provides a fertile atmosphere for thorough, profound and objective examination of the issues.

A victim of its own success, the Working Party was discontinued in 2002 because it had fulfilled its mission of rejuvenating and strengthening the standard-setting system.⁴¹ By then it had reviewed all ILO standards adopted before 1985, save the Fundamental and Priority Conventions.⁴² The review concluded among other things that seventy-one conventions, including the Fundamental Conventions and all those conventions adopted after 1985 were "up-to-date" and recommended their active promotion. The remaining ones were recommended for revision or shelving. Two more conventions were designated for promotion following the

2004 International Labour Conference.⁴³

The Governing Body reports chronicled the work and achievements of the Working Party.⁴⁴ In June 2002, the newly elected Governing Body approved the reconstitution for the period 2002-2005 of all its committees and subcommittees, with the exception of the **WP/PRS** of its LILS.⁴⁵ Whatever the actual contributions of latecomer states representatives on the Working Party, the ILO practice of collective responsibility for its committees and Working Parties means that no credit can be ascribed individually to members of these committees or to their regions. That means that overall the achievements and or failures of these organs are attributable to the organs themselves and not to their membership.

Thus, latecomers' involvement in the ILO objective of authoritatively updating the International Labour Code gave them co-editorial control over the whole of the labor code so that the end result could be said to be an international labour code that has been both co-authored and approved by all the four regions of the world through their representation in the Working Party. Consequently, this revised International Labour Code is co-owned also by latecomer states who in spite of taking up membership of the ILO very late in the day regarding the

establishment of the labor code, have engaged the committees and Working Parties of the ILO's Governing Body in equal partnership with their African, American, Asian, and European counterparts to declare the authenticity of all the labor standards.

In partnership with representatives from the other regions, latecomer state representatives on the **WP/PRS** endorsed the Fundamental and Priority Conventions of the ILO and placed them beyond revision. This categorized the standards referred to in those Conventions as immutable.

The Fundamental Conventions are basic Conventions of the ILO, which are a precondition to all the others regardless of any distinguished variables in the economic, social, or political condition of states parties to the ILO. These eight Conventions relate to freedom of association, Convention No. 87 (1948 and Convention No. 98 (1949); abolition of forced labour, Convention No. 29 (1930) and Convention No. 105 (1957); equality, Convention No. 111 (1958) and Convention No. 100 (1951); and the elimination of child labor Convention No. 138 (1973) and Convention No. 182 (1999).

The Priority Conventions are:

1. The Tripartite Consultation (International Labour Standards) Convention No. 144 (1976). The Convention seeks to

ensure effective consultation between the representatives of government, employers, and workers on international labor standards. This unique tripartite system of the ILO has fostered and maintained social dialogue among the core stakeholders in industrial relations within and among member states of the organization. It enables workers' representatives and employers' representatives to participate equally with those of governments in discussions and decision-making on issues of mutual concern.

2. The Labour Inspection Convention, No. 81 (1947) and its Protocol of 1995

3. The Labour Inspection (Agriculture) Convention, No. 129 (1969).

4. Conventions Nos. 81 and 129 oblige the maintenance of a system of labor inspection in industrial, commercial and agricultural workplaces. Such systems must operate to the standards set in these instruments. The Protocol extends the scope of Convention No. 81 to the non-commercial service sector.

5. The Employment Policy Convention, No. 122 (1964), which promotes full, productive and freely chosen employment. The Convention's objective is to ensure that state pursue "an active policy designed to promote full employment with a view to stimulating economic growth and development, raising levels of

living, meeting manpower requirements and overcoming unemployment and underemployment." Recommendation No. 122 supplements the Convention.

In spite of precluding both the Fundamental and the Priority Conventions from their review process, the Working Party retained an interest in them both, reporting on the results of the campaign to encourage states to ratify and implement them. In its report of March 2000 on the follow-up action taken by the International Labour Office on previous recommendations of the Working Party, the Working Party observed a significant increase in the level of ratifications of the eight Fundamental Conventions.⁴⁶ Twenty-nine new ratifications had been registered for the Priority Conventions since 1995 and seven of them in 1999. Since 1995, seventeen ratifications had been registered for Convention No. 44 on Tripartite Consultation (International Labour Standards) five of them in 1999. Africa, Latin America, Arab states, and Azerbaijan were listed as targets for a special promotional campaign for ratification of Convention No. 81 on labor inspection.

This development cannot be attributed to one factor alone, but certainly, we should not discount the potential contribution of the regional seminars, lectures, and meetings organized by

the ILO in several places in 1999, including Costa Rica, El Salvador, Guatemala, Honduras, Panama, and the Dominican Republic and also in Turin, the Bahamas, Bangladesh, Bosnia and Herzegovina, Egypt, India, Nicaragua, Pakistan, **and elsewhere** to promote these elite standards.

Following on from that the Working Party then reviewed the remaining Conventions except those established after 1985, which were considered to be both recent and current and therefore up to date. But as curator of the International Labour Code, the Working Party promoted these Conventions for ratification. The Working Party reports that between 1995 and 2000 those up to date Conventions attracted 86 new ratifications. It commends the committee of experts' involvement in the promotional process by drawing governments' attention to up to date instruments that they could ratify.⁴⁷

The Working Party's review process resulted in recommendations to the ILO Governing Body either to:

- 1) Defer review of Conventions until after further studies had been undertaken on the subject,⁴⁸
- 2) Withdraw instruments that were obsolete because they had not come into force at all,⁴⁹
- 3) Shelve instruments in the light of later Conventions

on the same topic,⁵⁰

4) Revise instruments, or⁵¹

5) Replace them altogether.

Instruments recommended for revision included Convention Nos. 153 (1979), 13 (1921), 27 (1929), 119 (1963), 127 (1967), 136 (1971)--dealing with occupational safety and health; 3 (1919), 103 (1952)--on maternity protection; 6 (1919), 79 (1946), 90 (1948)--dealing with night work of children and young persons; and 16 (1921), 73 (1946)--on seafarers.⁵²

Updating Conventions is one task and getting states to implement them **is** another. Until the latter is achieved, accomplishments in the former task serve precious little value. States sometimes fail to execute in full the request to denounce previous Conventions while at the same time ratifying the new ones.

In 2000 the Working Party determined that over fifty Conventions were out of date. The Governing **B**ody then invited states to ratify the recent instrument while denouncing the corresponding previous one.⁵³ This has resulted in denunciations that are not preceded or accompanied by ratifications of later instruments. In this sense, states have used the opportunity to limit their obligations to universal requirements under the ILO

constitution where they previously had more binding voluntary obligations that come with ratification. This is also because different Conventions carry different procedural requirements for disengagement. That can hinder the simultaneity envisaged by the Working Party regarding denunciation and ratification of the recent instrument. Moreover, ILO surveys show that revised Conventions do "not always attract[] a large number of ratifications, and in certain cases the older Conventions have remained in force."⁵⁴

In 2000 the Working Party follow-up report indicated that since it began its work eighty-four new ratifications of revised Conventions and 100 denunciations of outdated Conventions had been registered. Ninety of these denunciations had resulted directly from the ratification of revised Conventions or related to the ratification of a corresponding up to date Convention. Follow up meetings to ensure that the recommendations of the committee were given serious consideration are widely reported. This review procedure was repeated with Recommendations⁵⁵ of the ILO.

V. Conclusions

This article has shown that the ILO had already established almost two-thirds of the current labor standards by the time that latecomers to the organization had begun to take up membership. The majority of these latecomers to the ILO comprise former colonies of Western states. Because the ILO has adopted standard setting as the primary means of pursuing its mission of facilitating international peace and security by pursuing social justice, its Conventions are universally binding against its membership. The problem this created was that of authorship and ownership of that code by all of its membership since the code was equally binding upon them.

It was curious that an organization that champions social justice, operates on the principle of universal application of its standards, and is premised on social dialogue that includes the three main stakeholders, namely, states, employers, and workers unions would persist with such a manifestly unfair arrangement. Through the work of the **WP/PRS** (1994-2002) latecomers to the ILO from all the four regions, namely, Africa, Asia, America, and Europe have become co-authors and co-owners of the International Labour Code.

This has been ensured by the participation on equal footing of the governments' representatives, workers' representatives

and employers' representatives in the Working Party's effort to determine and confirm:

- 1) What the Fundamental and Priority ILO standards should be?
- 2) What standards were inconsistent with current needs of the Organization in its effort to ensure that pursuit of economic progress (the economic factor) was tempered by considerations of social justice and human rights? (the social factor)
- 3) What standards were in need of revision, shelving or replacement?
- 4) What standards needed further scrutiny before a decision could be taken on whether to shelve, revise or defer a decision?⁵⁶

The Working Party ensured that the entire gamut of the International Labour Code had been audited when it was wound up in 2002. Its recommendations were followed through right up to the ILO Conference level where decisions to implement them were taken. It appears therefore, that latecomers to the ILO have become authentic co-authors and co-owners of the International Labour Code through the work of the **WP/PRS** (1994-2002). However, the reporting procedures of the ILO attribute deliberations of its organs to workers' representatives and employers' representatives. This hinders discovery of participants' personal or regional contributions and underlines the universal ownership of outcomes rather than their personal or regional instigators. Perhaps other UN bodies that may be concerned to enhance the legitimacy of their standards and practice could

adopt the ILO renewal-seeking strategy to achieve that. Revising of standards and practice of international bodies so that they manifest equal authorship and ownership of the programs that they administer is consistent with international law's cardinal principle of equality of states.

Endnotes

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1. Discussing this phenomenon see Ben Chigara, *The International Tribunal for the Law of the Sea and Customary International Law*, 22 LOYOLA L. A. INT'L & COMP. L. REV. 433 (2000).
2. As of November 2005.
3. See generally International Labour Organisation website, <http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm>.
4. Established in November 1994. See International Labour Office, *Report of the Working Party on Policy Regarding the Revision of Standards*, Governing Body, GB.267/LILS/4/2(REV.) 267th session (Nov. 1996).
5. INTERNATIONAL LABOUR ORGANISATION (ILO), *THE ILO: WHAT IT IS. WHAT IT DOES.*, available at http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf.
6. See North Sea Continental Shelf Cases, 4 ICJ Reports 3 (1969). For commentary, see BEN CHIGARA, *LEGITIMACY DEFICIT IN CUSTOM: A DECONSTRUCTIONIST CRITIQUE* ch. 7 (2001).
7. See ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN.
8. DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE*, at p.x (1999).
9. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 12 (1990).
10. See **ILO CONST.**, pmbl., available at <http://www.ilo.org/public/english/about/iloconst.htm>.
11. See Treaty of Versailles, Pt. XIII (28 June 1919), available at <http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html>.
12. *Id.* art. 387, pmble.
13. Albert Thomas, *The International Labour Organisation, Its Origins, Development and Future*, 1 INT'L LABOUR REV. 5 (1921); republished *Introduction: 75 Years of the International Labour Review: A Retrospective* 135 INT'L LABOUR REV. 251 (1996).
14. **Named after the head of the American Federation of Labor (AFL) who chaired the Commission on International Labour.** *THE ILO: WHAT IT IS. WHAT IT DOES*, *supra* note 5, at 4.
15. Thomas, *supra* note 13, at 5; *Introduction: 75 Years of the International Labour Review*, *supra* note 13.

16. See Nicolas Valticos, *Fifty Years of standard-setting activities by the International Labour Organisation*, 135 INT'L LABOUR REV. 393, 396 (1996).

17. ILO CONST., *supra* note 10, pmb1.

18. *E.g.*, Recruiting of Indigenous Workers Convention, 30 June 1936, ILO Convention No. 50; Contracts of Employment (Indigenous Workers) Convention, 27 June 1939, ILO Convention No. 64.

19. The Great Depression was an economic slump in North America, Europe, and other industrialized areas of the world that began in 1929 and lasted until about 1939. It was the longest and most severe depression ever experienced by the industrialized Western world.

20. ILO, *From technical cooperation to active Partnership*, available at <http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/page6.pdf>

21. ILO, *Amnesty International's concerns relevant to the 92nd International Labor Conference, 1 to 17 June 2004*, available at <http://web.amnesty.org/library/index/engior420082004>

22

. See generally Date-Bah, SK (1998) "Rights of indigenous people in relation to natural resources development: An African's perspective", *Journal of Energy and Natural Resources Law*, vol.16 No.4 p.389.

23

. **The intervention of the ILO WP/PRS (1994-2002) infra.** Section III.A - indicates that the International Labor Code is jointly owned by both the old and the late comers to the Organization.

24. See *Report of the Working Party on Policy Regarding the Revision of Standards*, *supra* note 4.

25. ILO, **Appointment of Governing Body committees of various bodies, Governing Body**, GB.275/2 275th session, (June 1999).

26. See ILO Report of the World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (2004).

27. See *Report of the Working Party on Policy Regarding the Revision of Standards*, *supra* note 4.

28. **ILO Report of the Committee on Freedom of Association, Application of International Labour Standards** (LibSynd) Report No. 337 (June 2005), available at <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>.

29. **Add cite.**

30. Describing this procedure, see ILO CONST., *supra* note 10, art. 10 (Standing Orders of the Governing Body); *Id.* at art. 39, (Standing Orders of the ILO Conference). Maritime Conventions have a separate arrangement.
31. The novelty of this procedure is typified by the failure of the League of Nations to have the treaty establishing the International Trade Organisation ratified for similar reasons.
32. See *infra* note 36.
33. See, e.g., International Labour Office, *Manual for Drafting ILO Instruments* 18 (2006), available at <http://www.ilo.org/public/english/burewu/leg/man.pdf>.
34. ILO, *Reports of the Committee on Legal Issues and International Labour Standards*, Governing Body, GB.270/9/1 and Corr. 270th session Geneva (Nov. 1997), available at <http://www.ilo.org/public/english/bureau/leg/amend/1997.htm>.
35. ILO Const., *supra* note 10, art. 19, ¶9.
36. ILO, *Report of the Working Party on Policy regarding the Revision of Standards*, Governing Body, GB.273/LILS/4 (Rev.1) 273d session (Nov. 1998), ¶ 75.
37. ILO, *Updating International Labour Standards* (June 2005), available at <http://www.ilo.org/public/english/standards/norm/introduction/created.htm>.
38. See ILO, *Improvements in the standards-related activities of the ILO: Outlines of a future strategic orientation for standards and for implementing standards-related policies and procedures*, Governing Body, GB.294/LILS/4, 294th session (Nov. 2005), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/lils-4.pdf>
39. The original Working Party was comprised of the following states: Australia, Chile, Czech Republic, Egypt, France, Indonesia, Islamic Republic of Iran, Japan, Mexico, Nicaragua, Norway, Russian Federation, Sudan, Swaziland, Tunisia, and United States.
40. At its establishment the WP/PRS elected Mr. J.L. Cartier of the government of France as Chair. The Vice-Chairs were Ms. C. Hak of the Netherlands (employers), and Mr. J.C. Parrot of Canada (workers). The membership changed over its eight years of work, as did the officers. Mr. Cartier, however, presided over its entire work. As a result, in discussions, the WP/PRS is often referred to as the "Cartier Group."

41. The last members of the Working Party on Policy Regarding the Revision of Standards (1999--2002) were: *Chairperson*: M. Cartier (France); *Employer Vice-Chairperson*: Sr. Funes de Rioja; *Worker Vice-Chairperson*: Mr. Edstrom. *Government members*: Benin; Colombia; Republic of Korea; Croatia; United States; Ethiopia; France; Ghana; Indonesia; Malaysia; Mexico; Namibia; New Zealand; Russian Federation; Switzerland; Trinidad and Tobago; *Substitutes*: Bangladesh; Canada; Denmark; Dominican Republic; Guatemala; India; Iran, Islamic Republic; Japan; Netherlands; Philippines; Slovakia; Venezuela; *Employer members*: M. Boisson; Mr. Durling; Mr. Niles; M. Sanzouango; Mr. Botha; Sr. Funes de Rioja; Mr. Noakes; Mr. Tabani; *Worker members*: Mr. Agyei; Mr. Ahmed; M. Blondel; Mr. Edstrom; Mr. Mansfield; M. Murangira; M. Panot; Mr. Zellhoefer; *Substitutes*: Mr. Basnet; Sr. Daer; Mr. Patel; Mr. Wojcik; Sr. Olivia Mirand Oliveira; Mr. Rampak; Ms. Swai.

42. ILO, *Updating International Labour Standards*, *supra* note 37.

43. *Id.*

44. See ILO, *Publication of the results of the work of the Working Party on Policy regarding the Revision of Standards*, Governing Body, GB.283/LILS/WP/PRS/4, 283d session (Mar. 2002); ILO, *Follow-up to the recommendations of the Working Party: Information note on the progress of work and decisions taken regarding the revision of standards*, Governing Body, GB.283/LILS/WP/PRS/1/2, 283d session (Mar. 2002); ILO, *Conventions in need of revision (second stage)*, Governing Body, GB.267/LILS/WP/PRS/2, 267th session, (Nov. 1996); ILO, *Report of the Working Party on Policy regarding the Revision of Standards: Part II, Conventions in need of revision (Phase 2)*, Governing Body, GB.267/LILS/4/2(Rev.) 267th session (Nov. 1996); ILO, *Deferred examination of Conventions: Termination of Employment Convention 1982 (No. 158) (Short Survey)*, Governing Body, GB.280/LILS/WP/PRS/2/2 280th session (Mar. 2001); ILO, *Follow-up on the recommendations of the Working Party: Results of the work of the Joint Maritime Commission*, Governing Body, GB.280/LILS/WP/PRS/1/3 280th session (Mar. 2001); ILO, *Follow-up on the Recommendations of the Working Party*, Governing Body, GB.277/LILS/WP/PRS/1/1 277th session (Mar. 2000); ILO, *Follow-up on the Recommendations of the Working Party: Information note on the progress of work and decisions taken regarding the revision of standards*, Governing Body, GB.283/LILS/WP/PRS/1/2 283rd session (Mar. 2002). For a comprehensive report, see <http://www.ilo.org/public/english/standards/relm/gb/gbdoc.htm>.

45. Correspondence from ILO Office to author (15 Nov. 2005) (on file with author).

46. ILO, *Follow-up on the recommendations of the Working Party*, Governing Body, GB277/LILS/WP/PRS/1/1 277th session, (Mar. 2000).

47. *Id.*

48. In 2000 the Governing body deferred plans to shelve Conventions 63, 4, 41. See *id.* apx. at ¶ 28.

49. The International Labour Conference in considered in 2000, the Working Party's recommendation to withdraw obsolete Conventions that had not entered into force. These included Conventions Nos. 31, 46, 51, 61 and 66. At the 2002 International Labour Conference considered the Working Party's recommendation to withdraw at least twenty Recommendations. See *id.*

50. These are Conventions that no longer correspond to current needs. They have become outmoded or obsolete. Their ratification is not encouraged, and reports on their application are no longer requested. In 2000 the Governing Body shelved twenty-seven Conventions relating to such issues as hours of work, night work, occupational safety and health, social security, minimum age, migrant workers, indigenous workers and seafarers general conditions of employment. For particulars, see *id.* apx. at ¶ 28.

51. Two of the revised Conventions, namely No.176 on Safety and Health in Mines and No.181 on Private Employment Agencies exceeded all expectations in gaining ratifications. This was due in part to promotional activities undertaken by the International Labour Office in relation to Convention No.181 in Cyprus, Ethiopia, Namibia, Mexico, Israel, Mexico, and Norway. *Id.*

52. See *id.* apx. at ¶ 7.

53. For examples and details, see *id.* apx. at ¶¶ 13-20.

54. *Id.* apx. at ¶ 13.

55

. For details, see *id.* apx. at ¶¶ 38-48.

56. See also <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/prs-5.pdf>.