

### Global economic structures and "global governance" in labour regulation policy

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# Global Economic Structures and “Global Governance” in Labour Regulation Policy\*

1. Introduction
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## 1. Introduction

With regard to the debate surrounding current global economic trends and their impact on cross-border economic activities much is heard of the World Trade Organization (WTO), that relatively young organization entrusted with the expansion and regulation of international free trade. It is in this arena that the struggle for the introduction of so-called compulsory social standards takes place. Much less seldom is attention drawn to that other international organization whose mandate and primary task encompasses the establishment of minimum international standards in the spheres of labour and social policies, the International Labour Organization (ILO). However, it is this organization that actually assumes the crucial role with regard to the emergence of global rules in the area of labour and social policy (global governance). This all the more so since, although international, it is not purely intergovernmental.

Since it was set up in 1919 it has been the task of the ILO to shape international labour and social policy.<sup>1</sup> Following the foundation of the United Nations organization, the ILO received support for its international norm-setting activities via the general Declaration of Human Rights, various pacts on human rights and other relevant UN Conventions<sup>2</sup>. It is true that from a purely regional perspective the European Union (EU) is most important concerning regulation in the fields of labour and social policy.<sup>3</sup> However, since this paper deals with the signifi-

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1 Cf. Manes, Alfred, 1918.

2 A few months after the ILO Convention No. 87 on Freedom of Association was adopted in 1948 a similar wording was adopted by the UN in the General Declaration of Human Rights, with direct reference to Convention No. 87 (cf. Swepston, 1998, p. 171 ff). Also the two international pacts on civil and human rights as well as economic, social and cultural rights adopted by the United Nations in 1966 are of consequence in this context and are based on Conventions previously adopted by the ILO (cf. Swepston, 2002, p. 5 and Simma/Bennigsen, 1999, p. 1486).

3 As opposed to the ILO, the EU constitutes a legal space whose underlying economic structures are relatively homogeneous. From the broad spectrum of labour standards covered by the ILO, there is a tendency for the

cance of global structures in the political area of labour and social policy, it is the ILO that remains the center of focus. First, the political structures and activities of the ILO are outlined. This is followed by an analysis of the consequences of globalisation with regard to fulfilling the organization's mandate and an appraisal of the new political strategy being pursued by the ILO.

## **2. Task and structures of the ILO**

The ILO was set up at the end of the First World War. It resulted from a coalition of social-democratic trade unions and the British Government in connection with the peace negotiations. Its foundation is notified in Chapter XIII of the Treaty of Versailles. The organization's task is set out in the preamble to its constitution: It is dedicated to the worldwide improvement of working and living conditions, and encompasses three main objectives: To aspire to ideals of justice and humanity, the political goal to promote world unity and world peace by means of social justice, and the economic interest in fair international trade to avoid that "the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". This linkage of social values with the idea of international regulation in face of an inter-dependent world is characteristic for the International Labour Organization. Yet, it raises general questions about the nature of the ILO's policy domain which will be taken up in the following considerations.

The members of the ILO are nation states. These are represented in the ILO by representatives of the government as well as by representatives of local employer and worker organizations. The day-by-day business of the organization is also determined by these three constituent member groups, both in the Governing Body (executive body of the ILO) and its committees, as well as in the International Labour Conference (the plenary body with representatives of the members) and its committees. Thus, in contrast to all other UN organizations, the constitution of the ILO provides for codetermination on the part of the social groups concerned.<sup>4</sup> In 1934 the ILO became autonomous so that it could continue to exist following the breakup of

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EU to concentrate on work and health protection, as well as measures to ensure equitable treatment in employment and work. Other subject areas, such as work relations and social policy, for instance, tend to come up against stronger resistance in the EU. The adoption of social human rights in the European Charter on Civil Rights ceremoniously proclaimed by the European Council, the European Parliament and the European Commission on 7 December 2000 in Nice may perhaps increase the chance of combining EU trade policy with social human rights. Cf. Hausmann, 2001, p. 54 ff. On the relationship between EU and ILO see Böhmert, 2001.

4 See Sen, 1999, for the significance of this constitutional structure with regard to the justice aspect.

the League of Nations. In 1946 the ILO became the first special agency of the United Nations. Its membership is potentially universal. After being founded with a total of 45 member states, ILO membership has since risen to 176 nation states in 2003.

The ILO pursues its task with three forms of activity: The historically most important form is the establishment of *international labour standards*. At the time the ILO was founded there were also moves to set up a parliament for labour-related affairs, as proposed at the trade union conferences held in Bern in 1917 and 1919. This proposal failed to obtain majority support. In its place two different forms of international standard setting, or norm creation were decided upon: On the one hand, standards in the form of *Conventions* which needed to be ratified, and on the other hand in the form of *recommendations* to the member states.

The second form of activity pursued by the ILO is in the field of *technical assistance and co-operation*. Especially in the wake of decolonisation in the 1960s the ILO has become more deeply engaged in various forms of activity involving technical assistance and co-operation. And the third is concerned with *research and information*. The International Labour Office, which functions as ILO secretariat, soon became a collecting-point for the empirical results of self-funded and self-initiated research projects, as well as for relevant statistical information. As consequence of the world economic crisis of the 1920s, the ILO was quick to perceive the importance of grounding a common view of the world's labour-related issues with scientific evidence. Since the 1990s these efforts have been stepped up and the organization's research activities have been expanded considerably.

This organizational frame gave rise to international Conventions and recommendations in a multitude of areas that are broken down by the ILO into the following regulatory categories: They are concerned with *basic human rights* (ranging from freedom of association to the abolition of forced labour and child labour and including non-discrimination), *employment* (from employment policy, job protection, labour market administration to vocational training), *general working conditions* (from the regulation of minimum wages to working hours, work breaks and holidays), *labour administration* (from labour supervision to labour statistics and tripartite consultation), *labour relations, labour protection and health promotion, social security* (from sick-pay to provision for retirement, invalidity, accidents at work and vocational diseases up to unemployment benefits), norms specifically aimed at *particular groups of workers* such as women, adolescents, elderly employees, migrant workers or tribal peoples,

and finally norms that refer to *specific fields of employment*, such as international shipping, plantation labour, nursing and catering outlets.<sup>5</sup>

Since the founding of the ILO a lively debate has been continuing with regard to the typification and legal status of the Conventions that are concluded by the International Labour Conference with at least two thirds of the delegates votes.<sup>6</sup> This can be explained by the special way resolutions concerning international standards are arrived at and the designated system of supervision and complaints. Albert Thomas, the ILO's first Director General, views the ILO Conventions as a compromise between the two different camps of legal thought that comprehend international Conventions either as agreements or as contracts. The actual focus of the discussion was indeed whether the Conventions formulating general standards adopted by the International Labour Conference were to be treated as international law agreed to by an international legislative body (whereby a state's obligations would be towards the ILO, in treaty-law), or whether the Conventions have more in common with international treaty-contracts (the contents of which constitute obligations by states towards each other).<sup>7</sup>

It is significant for this debate that the Conventions are deliberated in a tripartite conference in which governments are not in the majority, and that it is not necessary for the adoption of Conventions for government delegates to be unanimous, but rather to achieve a qualified majority of all three member groups. In addition to this, ILO Conventions are not subject to reservations. There are also no procedures for signatures. Back in the thirties one of the ILO's former Director Generals, C.W. Jenks, had already worked out the four fundamental distinctions between ILO Conventions and traditional diplomatic treaties: a) the participation of social groups at decision-making conferences, b) the obligation of all member states to put forward adopted instruments of international standards to their respective national instances for deliberation, c) the fact that Conventions formulate a detailed policy whose general line is laid down in the constitution of 1919, later repeated in the Philadelphia Declaration of 1944, and finally d) the system of supervision with regard to the Conventions' implementation.<sup>8</sup>

In support of this line of argumentation, high-ranking personalities working in the area of labour standards at ILO headquarters, Valticos, Bartolomei de la Cruz, Potobsky and Swepton,

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5 Cf. International Labour Office, 2002. The designation of certain labour standards as belonging to the area of general human rights was not practised until the mid 1990s.

6 For more concerning this debate see in particular Bartolomei de la Cruz, Héctor/Potobsky, Geraldo von/Swepton, Lee, 1996, pp.23.

7 Loc. Cit. P. 22; Reference is made to the position assumed by Scelle vis à vis Mahaim, Ramadier and others.

8 See, for instance, Jenks, C.W., 1970.

for instance, have highlighted three peculiarities of ILO Conventions that reach beyond the legal character of the usual international treaties: The institutional character of standards, the tripartite composition of the decision-making conference and the effect that the Conventions have on all ILO members, independent of whether or not they go on to ratify the Conventions. They point out that the Conventions are generally regarded as constituting reference systems for international standards with regard to labour-related fields of policy. Inasmuch they exert a real effect, regardless of whether and by how many nations they are subsequently ratified. Their special power lies additionally in the fact that ratified Conventions retain their binding character even in the event that a state withdraws from the ILO, South Africa's thirty-year absence from the ILO (from 1964 to 1994) being a case in point. And some Conventions have a binding effect even on those members who consciously choose not to ratify them, insofar as they reflect principles that are enshrined within the ILO constitution that a state agrees to recognise on becoming a member of the organization. This view, pronounced by Bartolomei de la Cruz, Potobsky and Swepston in 1996, is incorporated in the *Declaration on Fundamental Principles and Rights at Work* that was unanimously adopted by the International Labour Conference in 1998 together with a Follow-up with a new mechanism for the promotion of eight Conventions of human rights nature (core labour standards) (cf. section 3).

The ILO practices an elaborate set of procedures to monitor whether states actually adhere to their commitments under Conventions: *firstly*, the regular *reporting system*. Under this reporting system states are obliged to submit regular reports to the International Labour Office concerning the status within their country with regard to the Conventions they have ratified. Governments have to consult the most representative employees and employers associations to obtain their comments on the contents of the state-report. These regular reports are examined by an elected panel of independent jurists (Committee of Experts on the Application of Recommendations and Conventions, CEARC). Their subsequent report is then brought before the responsible Conference Committee on the Application of Recommendations and Conventions (CCARC) for discussion at the annual meetings of the International Labour Conference, where a selected number of cases is then openly debated with government representatives of the countries concerned.

*Secondly*, with reference to Article 19 of the ILO constitution, within the frame of the agreed Follow-up measures the Declaration on Fundamental Principles and Rights at work passed by the International Labour Conference in 1998, all members are duly bound according to a fixed and constantly improving procedure each year to explain why they have been unable to ratify

any of the eight Conventions listed in the aforementioned *Declaration* that in the meanwhile count as international core labour standards.<sup>9</sup> The core Conventions referred to are Convention No. 29 from 1930 concerning forced labour; Convention No. 87 from 1948 concerning freedom of association and protection of the right to organize; Convention No. 98 from 1949 concerning the right to organize and collective bargaining, Convention No. 100 from 1951 concerning equal remuneration; Convention No. 105 from 1957 concerning abolition of forced labour; Convention No. 111 from 1958 discrimination (employment and occupation); Convention No. 138 from 1973 concerning minimum age and Convention No. 182 from 1999 concerning worst forms of child labour. The reporting system in the frame of the agreed upon Follow-up arising from the *Declaration on Fundamental Principles and Rights at Work* is not equal to the regular reporting and monitoring system; rather, there is special emphasis on its deliberately promoting character, in the way it was expressed by many members in the Conference discussion about the Declaration.

*Thirdly*, among the monitoring procedures one also finds the *right of complaint* and the *right of representation* that pursuant to the constitution can be utilised by trade unions and employers' associations, or by conference delegates and governments against other members<sup>10</sup>. The complaint and representation procedures prescribe strictly standardised procedures that can be designated as quasi judicial. In the case of fact-finding committees commissioned by the Governing Body, the committee members, in the same way as judges at the International Court of Justice, swear on oath that they will fulfil their task in an impartial and conscientious manner.

Articles 24 and 25 of the ILO Constitution provide for a right of representation that can only be set in motion by an employees' or employers' association. The substance of a representation is the reproach that a member state has failed to implement measures that would to a satisfactory extent ensure observance of commitments contained in a Convention. The Governing Body decides whether a representation can be accepted and if so passes it on to the government concerned to comment on the representation. In the event that the government does not respond "within a reasonable period", or should the Governing Body "consider such response to be inadequate it has the right to make the complaint public and, if it should see fit, also to publish the response."

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<sup>9</sup> Pursuant to Article 19 of the ILO Constitution governments principally are called upon on a regular basis to name impediments to ratification with regard to certain Conventions, selected for supervision by the Governing Body.

<sup>10</sup> Governments may only submit a complaint if they themselves have ratified the Convention in question.



Initially, only infrequent use was made of the possibility to lodge representations. Between World War II and 1978 only 14 representatives were registered; between 1978 and 1994 the number had already risen to 45. Alone in the year 1995 there was a total of 14 representations.<sup>11</sup> Precise procedures are in place that regulate how representations are to be dealt with. These refer to the acceptance of a representation by the Governing Body, transferral to and examination by a sub-committee of the Governing Body, and the subsequent conclusion. A member of the government concerned may take part in meetings of the Governing Body where the case is dealt with. This representative has the right to make comments, but no voting rights, and the meetings are held in camera. The most far-reaching action that the Governing Body may resort to regarding a case of representation is to make the case public in the ILO's official bulletin. So far this has only happened once. That was in 1977 concerning a complaint against Czechoslovakia under the purview of Convention No. 111 from 1958 that calls for an end to discrimination in employment and at the workplace.<sup>12</sup> As a rule the Governing Body calls upon the member state concerned to continue to keep the Committee of Experts on the Application of Conventions and Recommendations informed about steps taken subsequent to a representation within the frame of the regular monitoring system on the application of conventions and recommendations. Furthermore, the Governing Body has the right to examine a representation under the complaints procedure laid down by Articles 26 et seq. of the ILO Constitution.

Article 26 accords governments, conference delegates as well as the Governing Body have the right *ex officio* to file a complaint against another member who has not sufficiently ensured implementation of a ratified ILO Convention. For example, as consequence of a complaint made in 1984 under the purview of Convention No. 111 (complaint arising from the "Radikalenerlass", or "Berufsverbot", i.e. non-admission to a public profession) the Federal Government of Germany was the addressee of a complaint initiated by the Governing Body. The complaints procedure can be set in motion regardless of whether or not the government of the country concerned decides to co-operate in the investigation of the case. On the basis of the report submitted by the Commission of Inquiry<sup>13</sup> the Governing Body decides on the measures it deems to be appropriate. The government concerned has the right to call up the International Court of Justice, or otherwise it is obliged to conform to these recommendations. As a

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<sup>11</sup> Taken from Bartolomei de la Cruz/von Potobsky/Swepston, 1996, *op. Cit.*, p. 89, footnote 1.

<sup>12</sup> In all cases not involving the formal step of publication, however, the Governing Body does publish a report as part of its regular working papers.

matter of fact, all countries that have been addressees of complaints so far – with but two exceptions – have adopted the recommendations; subsequent observance of the issue once again becomes the subject of regular monitoring procedures for the application of ratified Conventions.<sup>14</sup> As opposed to the period before 1961, during which there had been no such filing of complaint procedures, between 1961 and 1994 there were no less than 22, of which five were submitted by governments, ten by conference delegates and two by the ILO Governing Body. All those submissions of complaints on the part of conference delegates involved one of the fundamental or core Conventions.

With regard to monitoring problems related to the right of free associations the Governing Body, following an earlier request from the Economic and Social Council of the United Nations, in 1951 set up a special committee whose sole task was to look into cases involving breaches of the right of association. By the end of the twentieth century this Committee on Freedom of Association had examined some 2,000 cases and developed a kind of “established case law” in which the principles and standards contained in the relevant Conventions are explained.<sup>15</sup> There is some dispute as to the authority of these interpretations within the International Labour Organization<sup>16</sup>. Especially since the 1990s the employers’ group insists that solely the International Court of Justice has the competence of interpretation. It is a matter of fact, though, that until now not one single case has been brought before the International Court of Justice. In the event of stubborn refusal on the part of member states to deal constructively with accusations of abusing standards, Article 33 of the ILO Constitution provides that the Governing Body can recommend to the International Labour Conference “such action as it may deem wise and expedient to secure compliance therewith”. This Article was first

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13 Up to the year 2003 Commissions of Inquiry were only appointed on a total of ten occasions: Chile, the Dominican Republic, Haiti, Nicaragua, the Ivory Coast, Liberia, Germany, Greece, Poland and Rumania. For details cf. Böhning, 2003. P. 67.

14 The two cases where neither the International Court of Justice was called upon, nor the recommendations adopted, were on the one hand the Polish Government, against whom in 1982 complaints with regard to non-observance of Convention No. 87 and No. 98 was lodged. This involved the issue of the trade union *Solidarnosc*. The other case is the Federal German Government with respect to Convention No. 111. The Federal German Government neither adopted the ILO ruling, nor did it call up the International Court of Justice.

15 International Labour Office, 1996. Originally this committee was supposed to be a body for prior examination of cases registered at the Fact-Finding and Conciliation Commission on Freedom of Association, see Potobsky, et al., 1996 pp. 99.

16 For more on this see the comments included in the publication to commemorate the 75th anniversary of the ILO. For the employers’ position the spokesperson for the employers in the International Labour Conference Committee for the Application of Standards, Alfred Wisskirchen, pp.65 and for the employees’ position the long-standing member of the Governing Body, Ursula Engelen-Kefer, pp.87 in: Bundesministerium für Arbeit und Sozialordnung/Bundesvereinigung der Deutschen Arbeitgeberverbände/Deutscher Gewerkschaftsbund, 1994.

invoked in the year 2000 in the case of Myanmar/Burma due to ongoing violations of the Convention regarding forced labour.<sup>17</sup>

This description of the structures and procedures within the International Labour Organization illustrates that within the ILO – albeit differently weighted - all three ideal-typical strategies defined in the current Global Governance Debate are provided for: the strategy of administrative dialogue or management, the strategy of quasi-judicial arbitration and the strategy of enforcement by sanctions mechanisms.<sup>18</sup> However, since the 1980s all three strategies are confronted in practice with serious challenges in the wake of new global economic and political structures.

### **3. Problems and answers in face of the challenge of globalization**

Originally the ILO developed its policy of setting international standards in the frame of a membership structure dominated by early-industrialised nations. These countries were characterised by relatively homogenous social structures, domestic economic coherence, strong social lobby groups in the realm of work and (as revealed in the 1930s: not always robust) democratised political institutions. In the course of ILO history the world to which its mandate refers has become more inclusive, more heterogeneous and at the same time more interdependent, but in a highly asymmetrical way. The extent of economic disparity in the international community of states is reflected in the staggered membership contributions paid by the 176 member states to the ILO in 2003. According to the framework prescribed by the United Nations for contributions to be made by member states the ILO receives the prescribed maximum contribution of 22% of its regular budget from the largest contributing state and the prescribed minimum, amounting to just 0.001% from 34 of its member states<sup>19</sup>. But heterogeneity is not simply a question of economic power. It is – much more relevant for the ILO's task – just as much a question of the type of political regime (state)<sup>20</sup> and a question of social structures and modes of production.

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<sup>17</sup> During its 88th session in 2000 the International Labour Conference authorised the Director-General to inform other international organizations and the Economic and Social Council of the UNO about the case and to implement measures to end the continuing practice of forced labour. As it turned out, international credit sanctions proved to be particularly effective.

<sup>18</sup> Cf. Zangl, 2001.

<sup>19</sup> International Labour Office, 2003, p. 2ff.

<sup>20</sup> This also includes the non-functioning states.

At the same time the intensity of international and transnational exchange relations has increased in many fields of the economy and life. Due to this, by the mid 90s of the twentieth century the *claim to universal validity* of ILO standards found itself in a paradox situation. On the one hand, global structures and interdependencies call for global regulation. On the other hand, the ILO was far from having realised this claim. Besides the member states of the European Union only a few states had ratified any significant number of ILO Conventions. A stringent self-critical appraisal of the legal bindings arising from Conventions must, given the heterogeneity of the member states, lead to the conclusion that new political strategies are called for in order to fulfil the universal validity claim. The ILO responded to the problematic situation concerning this claim by taking an unparalleled step of far-reaching significance. It determined a clear arrangement of priorities with regard to the adopted Conventions: The *Declaration on Fundamental Principles and Rights at Work and its Follow-up* of 1998 prioritized eight ILO Conventions related to the four principles concerning forced labour, freedom of association, discrimination and child labour. These are the Conventions that are now explicitly designated as core human rights labour norms that are subject to their own individual reporting and promoting mechanism in case of non-ratification by ILO member states. Since the ratification campaign introduced in the mid 1990s by the then Director-General Hansenne the incidence of ratification in this category had increased. Nevertheless, it should be pointed out that at the beginning of the 21<sup>st</sup> century as in the past the member states' particular socio-political circumstances serve either to immensely facilitate or alternatively severely hamper ratification. In the year 2000, for instance, all the then 15 member states of the European Union had ratified all eight core labour standards. Of the 29 OECD members in 2000, though, only 19 countries had ratified these core labour standards, i.e. just one third of all OECD countries. And in the year 2000, of the 175 ILO member states only 63 states had actually ratified all the core labour standards.<sup>21</sup>

In addition to this, in the 1990s the ILO carried out a process of revision of its Conventions and Recommendations. This had been done in the past, but this time it was more radical. As result of this process of revision, at its November 2002 meeting the Governing Body decided that from then on the work of the organization would be based on the 71 Conventions and 73 recommendations that corresponded with the then current status and to promote the implementation of these instruments as priority task. Up to now it has not been possible to obtain

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21 The countries with the lowest ratification quota as of June 2000 were China and Singapore, who had ratified only two of the fundamental Conventions, and die USA, that in the year 2000 had only ratified but one core labour Convention (OECD 2000a). By 2003 China and the USA had ratified three core labour standards.

the majority needed to ratify the change in the constitution that would allow to abrogate obsolete Conventions that have once come into force.<sup>22</sup>

Alongside the problem of the universal validity of ILO standards and connected with it is the *issue of their application* in face of the strongly increased heterogeneity of the international community of states. The ILO has responded to this in three ways, each of which impacts in different ways in the various fields of policy. The main thrust of ILO policy since the end of the 90s is expressed in the vision of *decent work worldwide* and the new *integrated approach* introduced by Juan Somavia, who became Director-General in 1999.<sup>23</sup> This policy – in particular in front of the backdrop of recognised core labour standards throughout the entire UNO system - builds on creating awareness and the art of persuasion, connected with improving the skill-sets (capacity) of local social and administrative actors. Part of this policy is that ILO activities in the fields of standards, technical assistance, as well as research and dissemination, are to be consistently brought together to the benefit of all working people, and not only those in formal employment relationships. The workers in the informal economy, which is increasing all over the world but particularly in Africa and Latin America, did become a focus in the attention of the ILO.

Especially in connection with issues surrounding child labour the ILO has been successful in aiding the national and local political formulation of objectives by means of lending support in obtaining information, statistics, fundamental knowledge as well as material project funding.<sup>24</sup> During the 91<sup>st</sup> session of the International Labour Conference held in 2003 it was additionally decided that priority should also be given to norms besides core labour standards, namely the policy field of industrial safety and health. With the aid of a new normative framework endeavours should be undertaken to lend as much universal normative and factual validity as possible to the development of preventive health promoting work conditions. This is to be achieved by means of providing technical assistance and above all by contributing to local capacity building.

The second answer to the problem of application is to *intensify the involvement of civilian actors* besides the constitutional member groups. This involvement is especially important in the informal economy, where the classical industrial-social associations have no basis, or only

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22 The Federal Republic of Germany, for instance, is of the opinion that the ILO instruments equate to international treaties and that any change brought about by the organization would impinge on the consistency of international law.

23 Cf. International Labour Office, 1999 as well as International Labour Office, 2001.

24 For more detail cf. Andrea Liese in Senhaas-Knobloch/Dirks/Liese, 2003, pp.39.

very little.<sup>25</sup> For instance, the ILO advocates that self-employed people should join together (as in SEWA, the Indian Association of Selfemployed Women) and also calls for the grouping of small-sized enterprises in their own employers' associations. This policy approach is intended to make use of the advantages accruing from industrial-societal organizations: the mutual definition and articulation of interests, transparency of social practices and the possibility for collective bargaining processes.

Quite a different policy approach – as third response – is currently being prepared in the policy field of international merchant shipping<sup>26</sup>. The setting up of so-called open ships' registers in a number of developing countries that did not link registration with the capacity and political will to implement corresponding commitments to international standards triggered race-to-the-bottom competition with regard to social standards on merchant ships. As a consequence the states (typically European) that had ratified the various maritime Conventions lost their power of control over the working and living conditions on board ships flying flags of convenience, and at the other end of the scale those states that had set up new ships' registers were of no mind to ratify any such Convention. Faced with this situation the ILO decided in the maritime area (which since the beginning of ILO had a special structure of decision making) on the one hand to involve the governments of developing countries more than before in the debate on international social maritime standards and on the other hand *to enforce* observance of maritime Conventions, also on ships flying the flags of countries that had not ratified them. This enforcement mechanism is based on separate agreements between states to exercise controls in their ports. This approach of so-called port state control alongside the ILO-conform flag state control is receiving support, not least due to the repeated incidence of environmental catastrophes caused by shipwrecks on the shores of the industrialised nations.

Besides the problems of universal validity and application attached to international standards the ILO has to cope with yet another challenge arising from globalisation. This is the challenge arising from the *new multiplicity of "standard setting" actors* on the world stage. Large-scale political campaigns on the part of non-governmental organizations against large enterprises have forced the companies to take into account the consequences of their actions on the environment and local people's living conditions, at least to the extent of avoiding damaging campaigns. The tripartite ILO Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises and

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25 Cf. Alter Chen i.a., 2002 as well as Schlyter, 2002.

26 For more detail on this cf. Dirks, 2001 as well as Dirks in Senghaas-Knobloch/Dirks/Liese, pp. 127.

Social Policy, both of which produced in the 1970s, although providing orientation for the content of codes of conduct for multinational concerns, did not imply legal compliance. To what extent multinational enterprises actually did respect their self-made codes of conduct was left above all to non-governmental organizations, citizens' action committees and grass-roots movements to ascertain by way of critical monitoring. Such civilian control instances do not draw their power from state jurisdiction, but rather from the potential market power exercised by consumers. Because of the criticism the multinational enterprises had to face they eventually for their part developed ever-more refined methods of self-surveillance. For example, auditors were engaged, inner-organizational instances were equipped with competences in order to ensure observance of these self-commitments, in the next stage accreditation agencies were brought in to certify that standards were being adhered to. Thus a confused mixture of internal and external controls came into being that are now giving rise to partnerships and networks between economic actors, professional and commercial certifying agencies, as well as non-governmental organizations.<sup>27</sup> In the latest generation of such developments, characterised by actors such as the Council of Economic Priorities Accreditation Agency (renamed to Social Accountability International) or the Fair Labour Association (both created in the USA), trade unions are once again to be seen participating, at least in the supervisory bodies of such non-governmental organizations.

The private standards and schemes of enterprises reveal a low level of orientation towards the ILO core labour standards. Just a very small minority of 18% of existing codes of conduct make any explicit mention of ILO Conventions or UNO declarations.<sup>28</sup> To what extent this will change, as consequence of the fact that both the OECD guidelines, as well as the *ILO-Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* regarding the explicit description of the ILO's eight core labour standards, were revised in 2000, remains to be seen.

Other initiatives declaring their determined intention of gaining respect for workers' rights worldwide rely on labelling approaches, hallmarks of quality, the examination of investment funds and other methods to guarantee social responsibility in the sphere of business.<sup>29</sup> It is an open question as to whether it is possible to build up synergies between competing systems of

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27 For more on this and the following cf. Nadvi/Wältring, 2002.

28 Cf. Gould IV, p.44.

29 For just how many such initiatives there are cf. Diller, 1997.

international labour standards, i.e. between classic norms in international law and the new forms of self-commitment of economic actors.<sup>30</sup>

### 3. Résumé

The problem that arises with regard to the participation of social groups in international regulation in the area of labour policy has to do with the multiplicity and discrepancy of social forms of production, institutional structures and state forms. The end of the epochal East-West conflict at the end of the 1990s may have removed the central dividing line between two concepts of international law, and thereby also between totally different concepts of the representation of social interests. However, in most developing countries there remains the structural heterogeneity caused by low development and socio-political factors. This coincides with the expansion of the informal economy, in which by way of definition no role at all is played by the organised collective interests of employers and employees. The tripartite representation of social interests, foreseen in the ILO ever since its foundation, comes up against boundaries where many or sometimes even most working people are not to be found in the formal economy where associations of workers and employers exist, but rather in the informal economy. Additionally, the “bite” of the ILO’s elaborate monitoring system consists of the fact that the states are under obligation to send their reports destined for the International Labour Office to the most representative employers’ and employees’ associations in order that they may be able to add their comments. When the majority of working people are not represented in employers’ and employees’ associations, the efficacy of quasi-legal administrative dialogues between the International Labour Office and national administrations regarding the fulfilment of legal obligations must be called in question, since it presupposes that the states have a functioning inner-societal formulation and articulation of interests capable of critical appraisal of the governmental position in the first place. Only in this way can legal non-conformity or factual non-compliance be brought to the attention of the international forum. True, the International Labour Organization has already been working together with international federations of trades unions and international trade secretariats (ITS) for many years, but these international associations are for their part dependent on the local actors who provide them with information and documentation concerning non-compliance.

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30 For more on this see Swepston 2002, Leary 2002 as well as O’Rourke, 2003.



In view of this challenge the ILO, initially in its field activities, opened itself up to the principle of advocacy on the part of non-governmental organizations that were not oriented to uphold collective interests in the relationship between employers and workers but rather to individual human rights and public interest. This opening is indispensable. It does, though, throw up its own queries as to the legitimacy, accountability and reliability of these non-governmental organizations.<sup>31</sup> For the time being this open approach finds more support in the International Labour Office than in the constitutional societal member groups (workers and employers). The critical inquiries of the trades unions will become all the more pressing the more certain types of co-operation between multinational operating companies and non-governmental organizations develop in which the trades unions play less of a role, or even no role at all. On the other hand there are incidents where precisely the activities of these non-governmental organizations have contributed to the conclusion of a number of international framework agreements between world-works councils and the management of large multinational enterprises.<sup>32</sup> And in the area of child labour, for instance, the ILO in co-operation with UNICEF have often been successful in involving trades unions and non-governmental organizations of the new civilian type in new forms of co-operation. Also in another human rights related field of policy, the struggle against discrimination especially of women, the ILO has been successful in developing foundations for the social formulation and assertion of rights.<sup>33</sup>

The *enforcement of its rules* is generally perceived to be the weakest aspect of the ILO. The degree of institutionalisation of procedures for the enforcement of rules is low. True, with regard to the authorisation of sanctions one can say that the ILO in the shape of Article 33 – as first applied in the case of Myanmar/Burma – does have at its disposal an authorisation<sup>34</sup> to place sanctions on countries that stubbornly refuse to co-operate. The real problem, though, is to be seen in the fact that the empowerment of the Governing Body “to recommend to the conference such action as it may deem wise and expedient to secure compliance therewith” up to now has only been applied on one single occasion. It seems improbable that countries with more political standing and power, against whom complaints have also been lodged with regard to violating the Convention on forced labour, will have to reckon with similar sanctions as those imposed on Myanmar/Burma.

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31 Cf. Atcock 1999. Trubek/Mosher/Rothstein, 2000 present arguments for a new transnationalism on the basis of transnational regimes and transnational networks in which a multiplicity of actors contribute.

32 For more on this see the contribution on worldwide collective agreements by Graham and Bibby in: *Die Welt der Arbeit*, No. 45, December 2002.

33 Cf. International Labour Office, 2000.

34 in connection with a prior rigidly formalised procedure.

With the *Follow-up to the Declaration on Fundamental Principles and Rights at Work* the ILO is treading a new path for the fulfilment of law that no longer relies on sanctions and superordinate instances of execution. The first four annual reports on the global situation regarding the application of the four fundamental principles at work (forced labour, freedom of association, child labour, discrimination) have on the one hand made use of the observations supplied by the supervisory mechanisms to focus attention on the global situation with regard to the application of standards. On the other hand they have systemised the obstacles against implementing the core labour standards mentioned therein, as well as depicting the multifaceted activities of consultation, technical co-operation and the research and lobbying work and discussing how they help to countermand the various ways of violating the core labour Conventions.<sup>35</sup>

The problem of enforcing rules is obviously not to be separated from the specific characteristics of the entire area of labour and social policy or its individual fields. When the International Labour Organization was founded at the beginning of the twentieth century an alliance was entered into between political calls for social justice and economic interests for a regulation of international competition. Following World War II the ILO held on to the function as regulator of international social and labour protection and became a special UN agency. The task of promoting economic exchange and international trade, though, was initially assumed outside the UNO by setting up GATT. GATT and its successor organization, the WTO (World Trade Organization) now within the UNO, organise the expansion and intensification of world trade within the frame of reciprocity and breaking down barriers to trade among its member states and increasingly opening up their borders. The rules pertaining to the expansion and intensification of world trade refer to “border regimes”, i.e. the manner in which states organise economic exchange at their borders of entry. Indirectly they also effect the modes of production behind the state borders. In contrast to this, setting up international standards in the sphere of work entails observing rules that have a “direct influence” on internal politics, cultural and social practices that shape the inner-societal organization of labour.<sup>36</sup> This difference between rules for the international exchange of goods and services on the one hand, and rules for the national working and living conditions on the other has once again come in for political scrutiny as consequence of the globalisation process towards the end of the twentieth century.

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35 Cf. International Labour Office 2000a, 2001a, 2002a and 2003a.

36 On the difference between border regimes and regimes of direct influence cf. Zürn, 2002.

In view of the increasing interdependencies in a world economy characterised by new state and non-state actors, global supply chains and dying economic sectors in the industrialised countries, trades unions in the West and some western governments have begun to call for free international economic exchange to be made dependent on the observance of certain internationally valid standards in the national labour and living conditions (so-called social clauses).<sup>37</sup> At the beginning of the 1990s the Director-General of the International Labour Office also tried to initiate a debate on this line of policy. However, he came up against stiff resistance and the reproach of protectionism, especially from the governments of Asian states with emerging economies as well as from the group of employers, and as a consequence he turned to setting priorities on basic rights at work (core labour standards), as well as three further paramount areas of standards (tripartite consultation, work inspections and employment policy).<sup>38</sup> The policy changes prompted by the ILO since that time are based on the diagnosis that a conditioned world trade can only to a limited extent contribute towards an improvement in the working and living conditions in developing countries. Of central importance in this respect are the specifics of the various (occupational) *working activities* and *economic branches*.

*Working activities* distinguish themselves with respect to their visibility in public, their legality and their character determined by technology and qualification profiles. In this connection the task that falls to states is especially that of guarantors of fundamental rights at work. This applies in particular to the multifaceted forms of forced labour, discrimination and child labour.<sup>39</sup> The experience with child labour shows that children's living conditions are not necessarily improved when they are excluded from the formal economy in the absence of additional measures. The experience also shows that unilateral threats of trade sanctions or consumer boycotts can move the local employers' associations and multinational companies to initiate their own efforts to abolish child labour. *Economic branches* are characterised by their degree of functionality and reciprocity requirements, as well as by the extent and structure of global business activity. The stronger the requirements of functionality and reciprocity are pronounced in the frame of global business activities, the greater the probability that an alliance of interests between the social partners might arise, for example concerning mandatory

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<sup>37</sup> For a summary see Scherrer et al. 1998.

<sup>38</sup> Cf. International Labour Office, 1997.

<sup>39</sup> The increasing incidence of human traffic as the globalisation-typical form of forced labour requires the governments of the countries of origin and the addressee nations to agree to a common legal practice, but also to the implementation of laws, not infrequently hampered by low visibility and the illegality of forced labour.

maximum working time and minimum qualifications of workers.<sup>40</sup> Where the universal validity of certain minimum standards, for instance the prohibition of coercive labour relations and employment in dangerous working situations, is not supported by sector-typical, technical-functional requirements, political public opinion on rights and social values becomes crucial, be it world public or local public, or both. When the public combines with market power, for example in pronounced internationalised branches with final consumers, like the garment industry, there is a chance of arriving at a redefinition of well understood economic interests on the part of the local actors as well as of official policy.

Universal validity and the effective application of international labour and social standards have thus be a reasonable chance under two different preconditions: firstly, when certain social standards can be combined with functional requirements that constitute the core of an economic activity. To navigate a ship, for instance, it is undeniably necessary to have a knowledge of navigation. To what extent, though, these necessary technical qualifications can be linked with fundamental rights at work and particular standards of social security, conditions of employment and health on board ship is a political question that has to be addressed, one that is currently on the ILO agenda in the maritime area. Secondly, the universal validity of certain labour and social standards can be achieved by setting priorities for international and social standards in accordance with a consensualised ethically imperative exigency that corresponds with the current status of moral awareness in world opinion and additionally is able to rest on the consensualized redefinition of previously divergent national interests. One can argue, for example, about the contribution of formal school education in comparison to daily life activities when it comes to the problem of good education of children. Yet, the utilisation of children in forced labour relations is used nowhere openly as an argument for maintaining competitive economic advantage. Only when we are successful in making hidden coercive labour relation visible will it be possible to search for ways and means for its abolition and to look for qualified education.

The characteristics of different issues of international labour and social policy thus have an influence on the circumstances under which international standards can lay claim to universal validity and how they can be implemented. The characteristics co-determine which constellations of actors are necessary in order to successfully raise international standards in certain

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<sup>40</sup> Such requirement norms, though, require states to engage in administrative activities for the organization of certain restrictions. Prohibition norms also present a particular challenge for a government's will and capability to intervene when the restrictions are imposed on culturally, socially and economically anchored social practices, as in some cases of forced labour and child labour.

fields of policy to universal validity. If a change is to be brought about in national and local social practices that are connected with traditional, socio-economic and cultural self-ascription, then this change must above all be set in motion from below, locally – by means of the power of persuasion, appropriate state legislation, changed definition of interests and identity, as well as material support for those affected and for the state supervision of labour. This is the case-type with regard to ILO efforts towards the abolition of forced labour, child labour, freedom of association and discrimination at the workplace. In contrast, it may well be possible to arrive at minimum standards for conditions of work and employment in a globalized branch of the economy and in a global labour market “from the top”. This can be achieved provided the most important actors in the spheres of government and business, as well as the trades unions, can come to an agreement on which standards are indispensable for the growth of the economic branch in question and that procedures are found to check that these standards are observed at all interfaces of the economic exchange. This is the case-type with regard to the ILO approach in the maritime field.

The ILO is engaged in an area of policy that to a great extent involves everyday social practices embedded in social norms and legal norms. An effective regulation of international minimum standards in this area of policy has to find ways to transmit legal commitments at the international level through to the level of everyday local activity. Such a task is not easily comprehended within the logic of a conflict model, i.e. that determines the justification discourse of International Relations, but also political disputes in national and international arenas. It is based on the assumption that the states are in a situation in which non-observance of an international rule results in the defecting state gaining an advantage at the expense of the other actors. By way of contrast, the ILO’s new *integrated approach* is aimed at turning the ILO Conventions into universally valid points of reference by virtue of their legitimacy (due to the specific membership structure) and authority, based on persuasion and supported by technical co-operation. Persuasion is to be supported by means of a constantly improving and consensualised knowledge base. A big part of this is to underscore the advantages accruing to economic development and societal cohesion by observing international labour standards. A relatively new technical approach to ILO-standards is to place a greater focus on framework conventions by virtue of which the obligation is to policy targets rather than precise rules. Technical assistance and technical co-operation build on the appropriation and translation of the international insights and standards in the respective national capacities, customs and values. This ILO policy approach is based on a co-operation model. The generation of knowledge relating to problem analysis, the consequences of policies and best practices depends on

the broad involvement of social actors, to whom besides the constitutional societal member groups of the ILO increasingly non-governmental organizations of a new advocate type also belong. The ILO is dependent both on the political will as well as the administrative capacity of governments for the conclusive and effective implementation of its international labour standards. Therefore the ILO is in search of partners – national and international, local and regional, as well as among newly emerging groups of actors in the world of business. Realistically, the ILO is aware of the specific obligatory character of *social* norms and yet builds on the obligation of *legal* norms.<sup>41</sup>

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41 For a discussion on the relationship of these standards cf. Oeter, 2001.

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