

THE INTERNATIONAL DIFFUSION OF
FUNDAMENTAL LABOUR STANDARDS:
CONTEMPORARY CONTENT, SCOPE,
SUPERVISION AND PROLIFERATION OF
CORE WORKERS' RIGHTS UNDER PUBLIC,
PRIVATE, BINDING, AND VOLUNTARY
REGULATORY REGIMES

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ABSTRACT

This article analyzes the scope and content of the International Labour Organization's fundamental labour standards and tracks the way in which they are increasingly included and applied in the context of different international instruments with a public, private, binding, or voluntary character. The contemporary proliferation of these standards can lead to improved protection of workers' rights. Nevertheless, the fragmentation and diversification of instruments may also include a risk of incoherent application. Securing fundamental labour standards—the prohibition of child labour, the prohibition of forced labour, non-discrimination and equal treatment, and freedom of association and the right to collective bargaining—is immensely important for vulnerable groups that are affected by the negative effects of economic globalization. This article charts the diversity of instruments and their relation to human rights law. Furthermore, it provides an examination of the different supervisory or enforcement mechanisms attached to these instruments. It argues that the increased diversity of initiatives that contain fundamental labour standards may expand the protective scope of core workers' rights, especially if they are applied consistently and in line with the original ILO standard-setting. This assessment of public international sources such as ILO

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Conventions, UN Human Rights Treaties, free trade agreements, and voluntary guidelines in the context of the business and human rights discourse, as well as private instruments, such as corporate codes of conduct, multi-stakeholder initiatives, and global framework agreements—all of which refer to and apply fundamental labour standards - hopes to contribute to a more coherent understanding of the fundamental labour standards, which is urgently needed if they are to provide effective protection for those worst of in today's global workplace.

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INTRODUCTION, QUESTIONS, AND RELEVANCE

The landscape of international labour standards is more fragmented than ever. Different types of regulatory regimes proclaim and apply basic workers' rights in different ways. This increasing diffusion of labour standards over different sites of normative authority can be beneficial, even essential, for effective protection of workers' rights, but they may also risk inconsistent or incoherent interpretations.¹ Nevertheless, expanded applications of labour standards may also increase their scope and protective potential. Most, if not all, of these normative instruments contain a specific set of central entitlements—the so-called “fundamental” or “core” labour standards.² These fundamental labour standards are derived from norms created by the International Labour Organization (ILO) and have been developed over the past century.³ They cover four areas: (a) the prohibition of child labour; (b) the prohibition of forced labour; (c) non-discrimination and equal treatment, and (d) freedom of association and the right to collective bargaining. These fundamental standards form “an integral part of the United Nations' overall human

1. These risks are well documented. *See, e.g.*, Frank Hendrickx et al., *The Architecture of Global Labour Governance*, 155 INT'L LAB. REV. 339, 352 (2016) (discussing risk of fragmentation and decentralized enforcement as a consequence of proliferation of “international initiatives”); Janice R. Bellace, *Human Rights at Work: The Need for Definitional Coherence in the Global Governance System*, 30 INT'L J. COMP. LAB. L. & INDUS. REL. 175, 192–93 (2014) (providing case study of how international and regional legal regimes can result in conflicting standards); Philip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 470 (2005) (alluding to the risk that labour standards might become “so decentralized as to create a potential free-for-all,” thereby becoming devoid of content); Jordi Agusti-Panareda et al., *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347, 348 (2015) (noting the double-edged nature of proliferating labour standards and the potential to increase fragmentation).

2. Int'l Labour Org. [ILO], *The International Labour Organization's Fundamental Conventions: In Focus Programme on Promoting the Declaration* at 8 (2D ED. 2003), <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/ilodeclarationonfundamentalprinciplesandrightsatwork1998.pdf> [<https://perma.cc/K89L-FJBN>].

3. *The ILO Centenary*, INT'L LABOUR ORG. (Feb. 10, 2019, 10:09 PM) <https://www.ilo.org/100/en/> [<https://perma.cc/6VZQ-KFKG>].

rights framework”⁴ and, like other human rights, highlight pressing societal struggles—here related to employment and occupation.

Supplementing or complementing traditional international law sources with other sites of normative authority is inevitable, justifiable, and even necessary in the current globalizing world, as people, capital, and goods are moving between countries at an unprecedented pace.⁵ A clear understanding of the scope and content of these rights is vital to their effective implementation in an increasing variety of settings.

Fortunately, recent research has exposed the diversity of normative instruments currently in play and the interaction between them.⁶ Most notably, labour protection on the international level has become increasingly dependent upon “hybrid governance forms, combining public and private actors.”⁷ Some authors warn that this increasing proliferation of initiatives fragments and decentralizes monitoring and enforcement, and can give rise to interpretations that may deviate from those associated with the ILO Fundamental

4. Int’l Labour Org. [ILO], *Giving Globalization a Human Face: International Labour Conference, 101st Session, 2012*, ¶ 19, ILO Doc. ILC.101/III/1B (2012) [hereinafter *General Survey 2012*], https://www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174846/lang-en/index.htm [<https://perma.cc/J52Q-374L>].

5. While globalization has brought benefits and opportunities for people worldwide, there are also a number of drawbacks and challenges to face. Income inequality is growing, poverty is widespread and persistent, and workers’ rights, in particular those that are discussed in this Article, are under pressure. See Daniel Auguste, *Income Inequality, Globalization, and the Welfare State: Evidence from 23 Industrial Countries, 1990–2009*, 33 SOC. F. 666, 667 (2018) (showing that some aspects of globalization increase income inequality prior to welfare spending).

6. See, e.g., Beryl ter Haar, *Love, Flirt or Repel: Hybrid Global Governance of the ILO Core Labour Standards*, 2013 EUR. J. SOC. L. 68 (analysing ILO’s major initiatives and their interactions); Hendrickx et al., *supra* note 1 (same); Ruben Zandvliet & Paul van der Heijden, *The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of ‘Privatization’ of International Labour Standards*, in GLOBAL GOVERNANCE OF LABOUR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES 170 (Axel Marx et al. eds., 2015) (providing an empirical analysis of labour protections in a globalizing economy).

7. Hendrickx et al., *supra* note 1, at 348; see also Manfred Weiss, *International Labour Standards: A Complex Public-Private Policy Mix*, 29 INT’L J. COMP. LAB. L. & INDUS. REL. 7, 19 (2013) (discussing how the ILO consists of “only a part of the machinery to set and spread international labour standards” and calling for greater private-public collaboration).

Conventions.⁸ Such inconsistencies may lead to less legal certainty and, ultimately, weaker worker protections if the standards are applied less favourably than ILO norms prescribe. Thus, in order to understand the implications of this diffusion of regulatory regimes, it is necessary to study how these normative instruments relate to each other; a “wider approach needs to be taken, focusing on all regulatory (law-like) forms and their distinguished roles.”⁹

Accordingly, this Article aims to construct a more coherent understanding of the fundamental labour standards by, first, further exposing contemporary understandings of the ILO’s four norms in current labour protection regimes. The Article then builds on this foundation by providing an enhanced and up-to-date picture of the diversity of normative regimes that purport to apply the ILO’s fundamental labour standards. These two objectives are accomplished by explaining the function of each of the ILO norms, and evaluating the different mechanisms available to monitor the application and enforcement of these norms. To this end, this Article discusses the following questions: What is the contemporary content of fundamental labour standards, and how are they embedded in and related to international human rights law? Which modern regulatory instruments include references to these standards? How do these instruments function and how do they attempt to monitor or enforce the implementation and application of fundamental labour standards?

In order to answer these questions, this Article first provides a general but concise overview of the development of fundamental labour standards and explains their functioning and main features, considering their positions in relation to international human rights law. Second, each of the four core standards is assessed in turn, in order to come to an informed understanding of their scope and content in the relevant ILO instruments, considering several recent developments. Third, the frameworks of different international sources that include fundamental labour rights is examined. A selection of these—sometimes overlapping—public, private, binding, and voluntary sources are inspected.¹⁰ Finally, this Article will review the

8. Hendrickx et al., *supra* note 1, at 352.

9. Ter Haar, *supra* note 6, at 71.

10. Public binding sources that are reviewed are ILO Conventions and U.N. Human Rights Treaties, as well as free trade agreements (FTAs). *See infra* Part III.B.1. The most relevant public voluntary sources are the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

diversity of supervisory or enforcement options attached to these sources and instruments. Effective supervision may increase compliance through enforcement or binding dispute settlement mechanisms and through softer approaches such as empowerment and mobilization.¹¹

The increased diffusion of regulatory regimes that proclaim fundamental labour standards has the potential to enforce and expand norms aimed at protecting the world's most vulnerable workers. However, this potential can only be realized if these norms are applied through consistent and transparent procedures and if their scope and content is coherently understood.¹² This Article provides legal commentary on the scope and content of the fundamental labour standards and a clear overview of the different normative sites and related monitoring mechanisms involved. By providing this overview, this study aims to advance contemporary conceptions of the role of fundamental labour standards when those standards are applied across diverse regulatory regimes and thereby hopes to contribute to a more effective implementation of key workers' rights in practice.

(MNE Declaration), the U.N. Guiding Principles on Business and Human Rights (UNGPs), the Organization for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises, and the U.N. Global Compact and the Sustainable Development Goals. *See infra* Part III.B.2. Private voluntary sources under review are unilateral corporate codes of conduct and other CSR instruments such as multi-stakeholder initiatives. *See infra* Part III.C.1. More binding private sources of fundamental labour standards are Global Framework Agreements (GFAs), which “are negotiated on a global level between trade unions and a multinational company” and generally cover “trade union rights, health, safety and environmental practices, and quality of work principles across a company's global operations, regardless of whether those standards exist in an individual country.” *Global Framework Agreements*, INDUS. GLOBAL UNIONS, <http://www.industrialunion.org/issues/pages/global-framework-agreements-gfa> [https://perma.cc/8HJH-7ZRV]. *See infra* Part III.C.2.

11. *See* Alston, *supra* note 1, at 472.

12. *Cf. id.* at 480 (emphasizing that “[t]he ILO needs to reach out and explore the various ways in which its concerns can be mainstreamed into the activities of other international institutional actors” and furthermore that “the focus should be on the large number of initiatives which could greatly enhance the relevance and effectiveness of the international labour rights regime as a whole.”).

I. FUNDAMENTAL LABOUR STANDARDS: DEVELOPMENT AND FEATURES

Since 1919, the ILO has been the primary designer of international labour standards. These standards can take the form of binding conventions or non-binding recommendations to its member states. Currently there are 189 Conventions, divided into “technical,” “fundamental,” and “governance” or “priority” Conventions, depending on their nature and designated status. Some of the technical Conventions may be replaced by newer Conventions about the same subject, but they will still be in force for member states that have not ratified the new Convention.¹³ Furthermore, certain Conventions are designated as “shelved,” which means they are no longer supervised on a regular basis. Specific protocols may amend existing Conventions for member states that ratify the protocol.¹⁴ One of the ILO’s unique features among international organizations is its tripartite composition, by which government, employer, and employee delegates to the International Labour Conference, or the so-called “Parliament of Labour,” adopt labour standards.¹⁵

The ILO was founded as part of the Versailles Peace Treaty in 1919 and the preamble to its constitution famously states the ILO’s key vision, namely that “universal and lasting peace can be established

13. For example, the ILO’s 1957 Indigenous and Tribal Populations Convention is still in force for India, which has not yet ratified the newer 1989 ILO Indigenous and Tribal Peoples Convention. See Int’l Labour Org. [ILO], *Indigenous and Tribal Populations Convention*, Convention No. 107 (1957), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107 [<https://perma.cc/36HS-RD39>]; Int’l Labour Org. [ILO], *Indigenous and Tribal Peoples Convention*, Convention No. 169 (1989), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 [<https://perma.cc/RQ7H-L8EK>].

14. See, e.g., Int’l Labour Org. [ILO], *Protocol of 2014 to the Forced Labour Convention of 1930*, Protocol No. 29 (2014) [hereinafter Protocol No. 29], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029 [<https://perma.cc/F9YR-ATD5>] (adopting a Protocol to update a 1930 convention).

15. *How the ILO Works*, INT’L LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm> [<https://perma.cc/YBH5-DV3E>] (explaining that the Conference is often regarded as an international parliament of labour); see also Int’l Labour Org. [ILO], *Rules of the Game: A Brief Introduction to International Labour Standards* (3rd ed. 2014) [hereinafter ILO, *Rules of the Game*] (providing an overview of the ILO’s work).

only if it is based upon social justice.”¹⁶ Social justice is to be realized by, among other means, the protection of vulnerable groups in (and outside of) the labour market, recognition of the principle of freedom of association, and a general improvement of working conditions.¹⁷

The second major statement of the aims of the ILO came in the Philadelphia Declaration, adopted in 1944.¹⁸ The Wilsonian League of Nations had failed to secure international peace, and a second massive conflict was raging over the world. In view of the unprecedented human suffering caused by the Second World War, delegates to the Twenty-Sixth International Labour Conference considered it a proper moment to reflect on human interaction and to prepare the ILO for its role as the first Specialized Agency in the new world peace organization, the United Nations. The Philadelphia Declaration proclaims several key values that guide ILO action. Four of these deserve special attention and are eloquently phrased in paragraph one, which proclaims the fundamental principles on which the ILO is based:

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.¹⁹

16. Int'l Labour Org. [ILO], *ILO Constitution*, pmbl. (Apr. 1, 1919), https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [<https://perma.cc/EQ4L-SFS5>].

17. *Id.*

18. Int'l Labour Org. [ILO], *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (1944) [hereinafter *Declaration of Philadelphia*], https://ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration [<https://perma.cc/928V-TC3H>].

19. *Id.* ¶ I.

In order to promote respect for these principles and the overarching idea of social justice, the Declaration states that: “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”²⁰ The emphasis on collective and individual freedom, self-determination and democratic decision-making, and equality and non-discrimination form the core of the modern human rights system and therefore—not surprisingly—also lie at the heart of the fundamental labour standards.²¹ Before those are examined in more detail, however, we need to take another step through time and inspect the third, and for our purposes most important, statement of principles of the ILO: the 1998 Declaration on Fundamental Principles and Rights at Work.²²

A. Fundamental Principles and Rights at Work

Adopted following the end of the Cold War, the 1998 Declaration reflects—in addition to the ILO constitution and the Philadelphia Declaration—a third quintessential moment in the history of the ILO and a third major statement of its principles. Urgent action on behalf of the ILO seemed necessary, since “[t]he definitive proof that communism was not economically viable removed the

20. *Id.* ¶ II.

21. These principles are also embodied in The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Together these three documents constitute what is known as the “International Bill of Rights.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; see *Human Rights Explained: Fact sheet 5: The International Bill of Rights*, AUSTRALIAN HUM. RTS. COMMISSION, <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights> [<https://perma.cc/ECE3-5BEM>].

22. Int’l Labour Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (2010) [hereinafter 1998 Declaration], https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf [<https://perma.cc/2GNK-XYRQ>] (adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, with an annex revised 15 June 2010).

countervailing force that had long prompted liberal politicians to pay attention to a labour rights agenda at both the national and international levels.”²³ Moreover, the Declaration—together with the concept of “decent work” and the related decent work agenda that were to be endorsed in the wake of the Declaration—reflects a broader movement to better align labour rights proclaimed by the ILO with other universally recognized human rights. The Declaration acknowledges the principle that “certain basic rights, whether or not they are legislated” are “part of a decent society.”²⁴

After the 1995 World Summit of Social Development in Copenhagen, a core set of specific rights was identified which eventually led to the recognition of eight Fundamental Conventions within four key areas.²⁵ These areas are reflected in the 1998 Declaration and denote its “fundamental principles and rights at work.”²⁶ Article 1 of the Declaration states that all ILO members have endorsed the rights and principles derived from the Constitution and the Philadelphia Declaration, and that they are expressed in the Fundamental Conventions.²⁷ Article 2 is the central provision of the 1998 Declaration, and states that:

all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles

23. Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457, 463 (2004).

24. Amartya Sen, *Work and Rights*, 139 INT’L LAB. REV. 119, 122–23 (2000).

25. These eight Fundamental Conventions are: Int’l Labour Org. [ILO], *Freedom of Association and Protection of the Right to Organise Convention*, Convention No. 87 (July 9, 1948); ILO, *The Right to Organise and Collective Bargaining Convention*, Convention No. 98 (1949); ILO, *The Forced Labour Convention*, Convention No. 29 (1930); ILO, *The Abolition of Forced Labour Convention*, Convention No. 105 (1957); ILO, *The Minimum Age Convention*, Convention No. 138, (1973); ILO, *The Worst Forms of Child Labour Convention*, Convention No. 182 (1999); ILO, *The Equal Remuneration Convention*, Convention No. 100 (1951); ILO, *The Discrimination (Employment and Occupation) Convention*, Convention No. 111 (1958) [hereinafter Fundamental Conventions]. Initially, the list contained seven Fundamental Conventions; Convention No. 182 was added after its adoption in 1999.

26. 1998 Declaration, *supra* note 22, pmbl.

27. *Id.* art. 1.

concerning the fundamental rights which are the subject of those Conventions.²⁸

These four areas of fundamental rights concern:

(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.²⁹

The most innovative element of the Declaration is that ILO members are bound to respect these principles by virtue of their membership. International and labour law scholars extensively debate the effects and coherence of this element, along with the selection of topics of these principles and the designation of specific Fundamental Conventions.³⁰ It is not the purpose of this Article to reflect on the choice of norms, on whether they are sufficient or adequate, or on whether prioritizing these norms is conceptually compatible with a perspective on human rights as indivisible, universal and inalienable. However, a brief overview of the discussion is instructive for a better understanding of the fundamental labour rights under consideration.

Though the 1998 Declaration first received a positive response, Philip Alston provided a critical perspective on its function and content in several publications. His main concern was that the Declaration could allow states and other actors to more easily detach the normative content of the principles from the corresponding rights in the relevant Conventions. Although he argued that “[t]he ILO should insist that the normative content of the Declaration’s principles mirrors that of the

28. *Id.* art. 2.

29. *Id.*

30. Alston, *supra* note 23, at 457–521; Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*, 36 N.Y.U. J. INT’L L. & POL. 221, 264 (2004); Brian Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. OF INT’L L. 409, 409–37 (2005); Francis Maupain, *Revitalization Not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16, No. 3 EUR. J. OF INT’L L. 439–65 (2005); Alston, *supra* note 1, at 467–80.

relevant conventions”³¹ to cope with the “challenges that undermine the realization of labour rights in the 21st century,”³² he regarded the link between the principles and the provisions of the Fundamental Conventions as unclear and incoherent from an international law perspective.³³ Alston feared that governments and employers could easily escape the rules of the Conventions, which would allow them to become “empowered to determine for themselves what the ILO really meant in adopting the standards in question.”³⁴

Furthermore, the selection of the four core standards was, according to Alston, “not based on the consistent application of any coherent or compelling economic, philosophical or legal criteria, but rather reflected a pragmatic political selection of what would be acceptable at the time to the United States and those seeking to salvage something from what was seen as an unsustainably broad array of labour rights.”³⁵ He nevertheless conceded the difficulty of coming up with a principled justification for a different or expanded list of norms that would be better suited for a ‘core list.’³⁶ Others warned that elevating a specific selection of labour rights to the status of ‘fundamental’ would inherently downgrade the importance of ILO instruments that were ‘non-fundamental.’³⁷ Certainly, many other labour rights are important. Most recently, the Global Commission on the Future of Work—under the leadership of the Prime Minister of Sweden and the President of the Republic of South Africa - suggested the recognition of health and safety at work as an additional fundamental principle and right at work in its landmark concluding report “Work for a Brighter Future.”³⁸ Alston concluded that “a façade of labour rights protections is being painstakingly constructed in order

31. Alston, *supra* note 1, at 479.

32. *Id.*

33. Alston, *supra* note 23, at 491. Although Alston also explores the possibility that the principles are reflective of customary international law. *Id.* at 493.

34. *Id.* at 495.

35. *Id.* at 485.

36. *Id.* at 486.

37. *Id.* at 488–89.

38. Work for a brighter future, Global Commission on the Future of Work, Int’l Lab. Office [ILO], at 39 (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf [<https://perma.cc/8HZ8-B4RF>].

to defuse the pressure from those concerned about the erosion of workers' rights as a result of some aspects of globalization."³⁹

Brian Langille and Francis Maupain offered more positive appraisals of the Declaration and its effects. While agreeing with Alston on the current marginalized role of the ILO and the need to improve its standing, Langille perceived the Declaration as an important instrument to connect ILO law with the modern world of work.⁴⁰ He saw the Declaration as

not some Trojan Horse introduced to undermine the ILO, but rather a model aiming to rescue the ILO from its current marginalized status and to cure its internal confusion by demonstrating what an integrated and coherent ILO methodology could and should look like. It makes reform possible and meaningful and not simply evidently necessary. It provides a better way to understand and, as a result, presents a method for revitalizing, standard-setting and monitoring.⁴¹

Maupain, former legal advisor of the ILO, advocated for the Declaration based on its practical effect and conceptual grounding. He gathered practical evidence that supported the positive effects of the Declaration as well as conceptual justifications that assert its coherence. In Maupain's opinion, the Declaration could serve to reduce the 'cafeteria approach' to ILO standards by reducing the freedom of member states to 'cherry-pick' those Conventions they are willing or able to ratify, and thereby potentially leave out the most relevant ones.⁴² While member states are still free to ratify the Conventions that they prefer, they also have a duty to respect, promote and realize the constitutional principles related to freedom of association, forced labour, child labour and non-discrimination. In light of these stronger constitutional obligations for all member states, Maupain argued that "[t]he Declaration is like the 'wisdom tooth' of the Constitution, which

39. *Id.* at 520.

40. Brian Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. OF INT'L L. 409, 437 (2005).

41. *Id.* at 436–37.

42. Maupain, *supra* note 30, at 444.

was already there but finally pierced through the gum in its maturity.”⁴³

Notably, the number of ratifications of Fundamental Conventions has increased substantially since the Declaration, providing practical evidence favouring the Declaration’s approach. As such, Maupain believed that there may have been a ‘spill-over’ effect, since the Declaration seemed “to have been followed by a certain resurgence of ratification of other Conventions as well (even if it is difficult to establish a causality).”⁴⁴ From this perspective, the Declaration, the Fundamental Conventions, and the other ILO standards should be seen as complementary.⁴⁵ Furthermore, the Declaration may improve the harmonization of labour standards in private initiatives, such as the ones that will be discussed in the following section.⁴⁶

Maupain further maintained that the Declaration’s approach is both morally and functionally coherent. Morally, the approach serves individual autonomy by respecting and promoting non-discrimination and prohibiting child labour and forced labour. Freedom of association and the right to collective bargaining extrapolate this autonomy to the collective level.⁴⁷ Functionally, “the guarantee of these fundamental rights is recognized both as an end in itself and as the means to achieve other rights.”⁴⁸ In this way, respect for the fundamental principles may enable and empower workers “with the tools that are necessary for the conquest of other rights.”⁴⁹ To Maupain, the Declaration has a positive impact on promoting the fundamental and other labour standards of the ILO and is indicative of an approach that “concretely contributes to a new vision whereby all workers’ rights are ‘universal indivisible, and interdependent and inter-related.’”⁵⁰

Most recently, Guy Ryder concluded that “the 1998 Declaration was not only the right response to a specific conjuncture, but a much needed statement of human rights at work and vehicle for their

43. *Id.*
 44. *Id.* at 460.
 45. *Id.* at 463.
 46. *Id.* at 452.
 47. *Id.* at 448.
 48. *Id.* at 449.
 49. *Id.* at 448.
 50. *Id.* at 463.

promotion, and that it has produced lasting benefits.”⁵¹ He refers to the expansive 2018 study of the impact of the Declaration by Kari Tapiola, which argues that the “global recognition and realization of fundamental principles and rights at work” constitute the core of the ILO’s human rights mandate.⁵² We will now turn to this closer alignment between fundamental labour standards and human rights.

B. Decent Work and Human Rights

The concept of “decent work” was developed in the aftermath of the adoption of the 1998 Declaration under Director General Juan Somavia and constitutes both a substantive normative concept and a policy agenda for the ILO. It is an umbrella term that, according to the ILO, should be seen as the totality of aspirations people have in relation to their working lives:

It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.⁵³

The concept was institutionalized formally in the 2008 Social Justice for a Fair Globalization Declaration⁵⁴ and is currently included

51. Guy Ryder, *Foreword to KARI TAPIOLA, INT’L LABOUR ORG., THE TEETH OF THE ILO - THE IMPACT OF THE 1998 ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK*, at III (2018).

52. KARI TAPIOLA, INT’L LABOUR ORG., *THE TEETH OF THE ILO - THE IMPACT OF THE 1998 ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK*, at 111 (2018).

53. *Decent Work*, INT’L LABOUR ORG. [ILO] [hereinafter ILO, *Decent Work*], <https://www.ilo.org/global/topics/decent-work/lang--en/index.htm> [perma.cc/PL2E-TDH4].

54. Int’l Labour Org. [ILO], *Declaration on Social Justice for a Fair Globalization* (June 10, 2008) [hereinafter ILO, *Declaration on Social Justice for a Fair Globalization*], http://www.ilo.org/global/about-the-ilo/mission-and-objectives/WCMS_099766/lang--en/index.htm#Purpose [https://perma.cc/Q7L6-P92H] (“By adopting this text, the governments, employers’ and workers’ organizations of the ILO’s 187 member States commit to enhance the ILO’s capacity to advance these goals through the Decent Work Agenda. The Declaration institutionalizes the

as goal number eight of the 2030 Agenda for Sustainable Development.⁵⁵ Amartya Sen applauds the more universalist approach of the ILO in adopting the 1998 Declaration and the concept of ‘decent work for all.’ He explores four conceptual features of this approach, all of which are indicative of a closer alignment between international labour standards and human rights law.

First, the new approach is inclusive, broad, and universal, and it focuses not only on workers in formal employment relationships, but on all workers, irrespective of whether they are protected by domestic legislation.⁵⁶ The second feature is that decent societies should respect certain basic rights, whether or not they are already enshrined in national legislation and therefore transcend legal recognition.⁵⁷ Third, Sen argues that this new approach “situates conditions of work and employment within a broad economic, political and social framework.”⁵⁸ While the ILO has arguably always been concerned with a contextual approach to labour issues, an added emphasis on the linkages between “economic, political and social actions” further attests to integrating labour rights even more in general human rights discourse. The final feature described by Amartya Sen concerns the increasingly global approach to worker protection that emerges alongside economic globalization.⁵⁹ The role of the nation-state as a mediator in international traffic recedes in favour of a more cosmopolitan concept of workers’ rights. Sen concludes that:

The need for invoking such a global approach has never been stronger than it is now. The economically globalizing world, with all its opportunities as well as problems, calls for a similarly globalized understanding of the priority of decent work and of its manifold demands on economic, political and social

concept of decent work recognized since 1999, placing it at the core of the Organization’s policies to reach its constitutional objectives.”).

55. ILO, *Decent Work*, *supra* note 53.

56. Sen, *supra* note 24, at 120–25. The so-called “informal economy” protects a vast number of workers.

57. *Id.* at 125.

58. *Id.* at 125.

59. *Id.* at 127–28.

arrangements. To recognize this pervasive need is itself a hopeful beginning.”⁶⁰

Maupain takes a comparable view and argues that the approach taken by the 1998 Declaration and the concept of decent work “is an effort to underline the necessary complementarity and interdependence between the various aspects of workers’ protection and rights, which correspond to the ILO’s constitutional objectives.”⁶¹

Similarly, Gillian MacNaughton and Diane Frey convincingly argue that decent work needs to consider the broader human rights dimension. Questions related to decent work therefore need to be “addressed in a holistic human rights framework.”⁶² In terms of supervision, this includes applying new, human-rights-based methods, such as impact assessments, budget analyses, and human rights indicators, alongside the traditional arsenal of litigation, naming and shaming, and publicity campaigns.⁶³

Substantively, the Committee on Economic, Social and Cultural Rights, the body mandated to supervise the International Covenant of Economic Social and Cultural Rights,⁶⁴ describes the concept of decent work in its 2006 General Comment 18 on the Right to Work.⁶⁵ This Article later discusses in depth the Committee,⁶⁶ but for now, it is important to note that the interpretative work of the Committee provides further evidence of increasingly close ties between the ILO and the (other) UN Human Rights bodies. The Committee defines the normative content of decent work as:

[W]ork that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support

60. *Id.* at 128.

61. Maupain, *supra* note 30, at 462.

62. Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AM. U. INT’L L. REV. 441, 468 (2011).

63. *Id.* at 471.

64. Economic and Social Council Res. 1985/17 (May 28, 1985).

65. Comm. on Economic, Social and Cultural Rights (CESCR), General Comment No. 18, ¶ 7, U.N. Doc. E/C.12/GC/18 (Nov. 26, 2005) [hereinafter CESCR Gen. Comment 18].

66. *See* Part III.B.1.

themselves and their families as highlighted in [A]rticle 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.⁶⁷

To further stress the point, the Committee concludes: “The characterization of work as decent presupposes that it respects the fundamental rights of the worker.”⁶⁸

Although this study is concerned with clarifying the concluding part of the normative concept of decent work implied in the Fundamental Conventions, the ILO also applies this concept as a strategic set of policy objectives. This so-called “Decent Work Agenda” consists of four equally important pillars which are institutionalized in the 2008 Declaration on Social Justice for a Fair Globalization:⁶⁹ 1) promoting sustainable employment; 2) developing and enhancing social protection; 3) promoting social dialogue and tripartism; and 4) respecting, promoting, and realizing the fundamental principles and rights at work.⁷⁰ The Decent Work Agenda serves as the “overarching framework for achieving the ILO constitutional mandate,” and the 2008 Social Justice Declaration even constitutionalizes this agenda as “its integrated global strategy to meet the universal aspiration of social justice.”⁷¹ Both as a policy framework and as a substantive concept, the Decent Work Agenda is indicative of a more intimate relationship between labour standards and human rights law.

Human rights could be described as claims to justice that reflect specific societal struggles. In that sense, they “draw their force from the suffering of the past and the injustices of the present” and could be seen as the “utopian element behind legal rights.”⁷² Costas Douzinas has warned against the danger that human rights may lose part of their significance when they become overly ubiquitous: “[W]hen every desire can be turned into a legal right nothing retains the dignity

67. *Id.*

68. *Id.* ¶ 8.

69. ILO, *Declaration on Social Justice for a Fair Globalization*, *supra* note 54, at 9–12.

70. *Id.*

71. MacNaughton & Frey, *supra* note 62, at 449–50.

72. COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS, CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 379–80 (2000).

of right.”⁷³ Connected questions concern which labour rights are to be included in the human rights catalogue and whether labour rights can be seen as human rights at all.⁷⁴ In this light, Janice Bellace recently observed that, except for the most pressing issues, “human rights scholars typically have overlooked how human rights guarantees affect people at work.”⁷⁵ However, this does not apply to the fundamental labour standards under review here, since they are firmly embedded in the “international bill of human rights” and other UN human rights treaties, in addition to the Fundamental Conventions of the ILO.⁷⁶ What is most relevant is the role fundamental labour standards as human rights can play “in providing political incentives for economic security.”⁷⁷ The next section will examine the scope and content of the fundamental standards themselves.

C. Fundamental Labour Standards: Parameters for the Analysis

Together, the 1998 Declaration and the Decent Work Agenda marked a transition towards a more effective configuration between international labour standards and general human rights law. The first designated four key areas and eight corresponding ILO

73. Costas Douzinas, *What Are Human Rights?*, THE GUARDIAN (Mar. 18, 2009), <https://www.theguardian.com/commentisfree/libertycentral/2009/mar/18/human-rights-asylum> [<https://perma.cc/MJ7J-LQF4>].

74. See e.g. Virginia Mantouvalou, *Are Labour Rights Human Rights?*, 3 EUR. LAB. L.J. 151 (2012) (examining three different approaches in examining labour rights as human rights); Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. OF INT’L L. 449 (2010) (analysing the costs and benefits of adopting a human rights framework in addressing labour rights); Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, in LABOUR RIGHTS AS HUMAN RIGHTS 1 (Oxford University Press 2005) (discussing how various institutions have codified labour rights as human rights).

75. Janice R. Bellace, *Labour Rights as the Means for Recognizing Human Rights at Work*, Lecture at Leiden University (Oct. 22, 2018), <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/sociaal-recht/bellace-leiden-lecture-22-oct-2018-.pdf> [<https://perma.cc/9M6W-WPK5>].

76. See *supra* note 21 and accompanying text; such a perspective may be seen as rather positivistic, and an additional instrumental and normative analysis may prove useful, but this is not the place for such an exercise. See Mantouvalou, *supra* note 74, at 152–56 (explaining limitations of the positivistic approach in determining whether labour rights are human rights, particularly when bodies or documents set different priorities).

77. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 246 (Oxford University Press 2001) (1999).

Conventions as of special importance. The latter developed the pivotal concept of decent work.

Since the adoption of these two key documents, the number of ratifications of the Fundamental Conventions has increased substantially since the adoption of the 1998 Declaration, and is now at 91.4% of the possible number of ratifications.⁷⁸ Consequently, the debate about the possible drawbacks of the ‘principles and rights’ approach is less and less relevant as it relates to the obligations of ILO member states. Nevertheless, non-state actors, such as multinational enterprises, financial institutions, private contractors, and other corporations, are not formally bound by the ILO’s international Conventions.⁷⁹ Consequently, it is vital that the fundamental labour standards are understood and applied correctly in instruments of a more private nature, such as “corporate social responsibility” (CSR) codes and multi-stakeholder initiatives, and in non-binding public instruments.⁸⁰ These fundamental labour standards address particularly pressing societal issues related to the world of work; in order for them to work in a variety of different settings, they have to be interpreted coherently. Otherwise, “corporate actors . . . can proclaim their firm commitment to core labour standards but still retain complete flexibility as to the content they attribute to those principles.”⁸¹

The notion of decent work is indicative of a more universalistic approach towards workers’ rights and “the improvement of the ‘conditions of labour,’ whether organized or not, and wherever work might occur, whether in the formal or the informal economy, whether

78. Int’l Labour Org. [ILO], *Introduction to International Labour Standards: Conventions and Recommendations* (2019), <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> [<https://perma.cc/264N-K6R8>]; see also Maupain, *supra* note 30, at 439 (identifying that “more states have ratified the relevant ILO conventions since the Declaration, and compliance therewith has been improved”). For an examination of the interdependent drivers for ratifying the Fundamental Conventions, see Leonardo Baccini & Mathias Koenig-Archibugi, *Why Do States Commit to International Labor Standards?: Interdependent Ratification of Core ILO Conventions, 1948–2009*, 66 *WORLD POL.* 446, 448 (2014).

79. Alston, *supra* note 1, at 476–77.

80. *Id.* at 479–80 (explaining that “[t]he ILO should insist that the normative content of the Declaration’s principles mirrors that of the relevant conventions.”).

81. *Id.* at 470.

at home, in the community or in the voluntary sector.”⁸² This increasingly universal and global approach to workers’ protection—described by Amartya Sen and others—and the designation of a specific set of standards as fundamental facilitated the diffusion of labour standards in a number of other international instruments.⁸³ The next section examines these fundamental labour standards, since they are increasingly included in broader human rights law and other instruments of a public or private nature.

Having explored the development of fundamental labour standards in more detail, the next step is to look at the basic content of the provisions of the Fundamental Conventions, before turning to an examination of the different normative instruments that refer to those specific ‘human rights at work.’

II. CONTENT, SCOPE, AND RELEVANCE OF THE FUNDAMENTAL CONVENTIONS

The eight conventions of the ILO that have been designated as Fundamental Conventions have been adopted, ratified and interpreted over the course of about eighty years, the oldest stemming from 1930 and the newest from 1999. The two conventions dealing with child labour are the Minimum Age Convention, 1973 (No. 138),⁸⁴ and the Worst Forms of Child Labour Convention, 1999 (No. 182).⁸⁵ Forced labour is covered by the Forced Labour Convention, 1930 (No. 29),⁸⁶ and the Abolition of Forced Labour Convention, 1957 (No. 105).⁸⁷ Equal treatment and non-discrimination are the subjects of the Equal Remuneration Convention, 1951 (No. 100),⁸⁸ and the Discrimination

82. Int’l Labour Org. [ILO], *Rep. of the Director-General: Decent Work*, at 4 (1999).

83. *See supra* Part III for an examination of these instruments.

84. *See infra* note 106.

85. *See infra* note 122.

86. Int’l Labour Org. [ILO], C029, *Forced Labour Convention*, Convention No. 29 (1930) [hereinafter Convention No. 29], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 [<https://perma.cc/9NVP-LRX4>].

87. Int’l Labour Org. [ILO], C105, *Abolition of Forced Labour Convention*, Convention No. 105 (1957) [hereinafter Convention No. 105], http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/ILO_C_105.pdf [<https://perma.cc/EJR5-YFHQ>].

88. *See infra* note 168.

(Employment and Occupation) Convention, 1958 (No. 111).⁸⁹ Finally, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),⁹⁰ and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)⁹¹ deal with the protection and exercise of freedom of association. For a proper understanding of what it means when certain instruments refer to fundamental labour standards, the following section will briefly examine the scope and content of these conventions in the context of recent and relevant developments.

A. The Prohibition of Child Labour

The regulation of a minimum age for employment has been on the ILO's agenda since its inception; the organization began as a reaction to the treatment of children during the industrial age and their exploitation for the war effort. In a more recent initiative though, the UN Sustainable Development Goals ambitiously lists as target number 8.7 securing “the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”⁹²

The latest research by the ILO indicates that 152 million children worldwide are engaged in child labour, and about half of them in what is called “the worst forms” of child labour.⁹³ According to the ILO, “64 million girls and 88 million boys are in child labour globally, accounting for almost one in ten of all children worldwide. Nearly half of all those in child labour—73 million children in absolute terms—are in hazardous work that directly endangers their health, safety, and moral development.”⁹⁴ While these numbers are worrisome, it is worth noting that the number of children in employment in 2016—about 218

89. *See infra* note 168.

90. *See infra* note 203.

91. *See infra* note 203.

92. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, ¶ 8.7 (Sept. 25, 2015) [hereinafter 2030 Agenda for Sustainable Development].

93. Int'l Labour Org. [ILO], *Global Estimates of Child Labour: Results and Trends 2012-2016*, at 11 (2017) [hereinafter ILO, *Global Estimates of Child Labour*].

94. *Id.*

million aged between 5 and 17 years—is down a staggering 134 million from the year 2000.⁹⁵

It is also important to distinguish between children engaged in (non-harmful) employment and children involved in child labour or “the worst forms” of child labour. Though the scope of protective provisions differs according to age and type of activity, working hours, and working conditions,⁹⁶ a general definition of child labour is “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”⁹⁷ This includes any work that “is mentally, physically, socially or morally dangerous and harmful to children” and interferes with their education.⁹⁸ Of course, certain forms of work that are neither harmful to the education nor the development of the child are permissible under international law. The aim of these international standards is solely to ensure that “every girl and boy has the opportunity to develop physically and mentally to her or his full potential.”⁹⁹

Economic vulnerability is the primary cause of child labour;¹⁰⁰ extreme poverty is conducive to child labour in all its forms, and lower income countries are more likely to “display the sort of social and economic patterns that are known to result in higher rates of child labour.”¹⁰¹ Various other internal and external factors influence the prevalence and persistence of child labour, such as cultural differences and socio-economic dislocation.¹⁰² Other factors, including the impact of HIV/AIDS—which leaves many parents too weak to work—and limited access to education can also lead to a high incidence of child labour.¹⁰³ The ILO adopted two Fundamental Conventions—both with

95. *Id.*

96. Int'l Labour Org. [ILO], *Resolution Concerning Statistics of Child Labour*, ¶ 7, ICLS-R-[2008-12-0006-6]-En.doc/v3 (Dec. 5, 2008), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_112455.pdf [<http://perma.cc/BXA9-PHKK>].

97. Int'l Labour Org. [ILO], *What is Child Labour*, <https://www.ilo.org/ipecc/facts/lang--en/index.htm> [<https://perma.cc/9MAH-Y8QM>].

98. *Id.*

99. ILO, *The ILO Centenary*, *supra* note 3, at 43.

100. See Int'l Labour Org. [ILO], *World Report on Child Labour: Economic Vulnerability, Social Protection and the Fight Against Child Labour*, at 25 (2013).

101. INT'L LABOUR ORG., *CHILD LABOUR: A TEXTBOOK FOR UNIVERSITY STUDENTS* 84 (2004).

102. *Id.* at 80–81, 92.

103. *Id.* at 90–94.

a very different character and approach—to combat this problem: The Minimum Age Convention C138 (1973) and The Worst Forms of Child Labour Convention C182 (1999). While other conventions dealing with child labour in specific sectors have been adopted over the years, these two particular conventions are part of the Fundamental Conventions; and, together with the UN Convention on the Rights of the Child,¹⁰⁴ they make up the international framework for the protection of children against child labour.¹⁰⁵

1. The Minimum Age Convention C138 (1973)

The Minimum Age Convention, Convention No. 138,¹⁰⁶ and its associated Recommendation No. 146¹⁰⁷ followed a number of more specific conventions on child labour.¹⁰⁸ While this sectoral approach

104. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child].

105. ILO, *Global Estimates of Child Labour*, *supra* note 93, at 16.

106. Int'l Labour Org. [ILO], C138, *Minimum Age Convention*, Convention No. 138, (1973) [hereinafter Convention No. 138], https://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138 [<https://perma.cc/539G-MC4J>].

107. Int'l Labour Org. [ILO], R146, *Minimum Age Recommendation*, Recommendation No. 146 (1973) [hereinafter Recommendation No. 146], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R146 [<https://perma.cc/4W3N-HG77>].

108. See Int'l Labour Org. [ILO], C005, *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment*, Convention No. 5 (1913), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C005 [<https://perma.cc/ZBB4-3HHR>]; Int'l Labour Org. [ILO], C007, *Convention Fixing the Minimum Age for Admission of Children to Employment at Sea*, Convention No. 7 (1920), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C007 [<https://perma.cc/Q7ZS-NANC>]; Int'l Labour Org. [ILO], C010, *Convention Concerning the Age for Admission of Children to Employment in Agriculture*, Convention No. 10 (1921), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C010 [<https://perma.cc/S957-V9K3>]; Int'l Labour Org. [ILO], C033, *Convention Concerning the Age for Admission of Children to Non-Industrial Employment*, Convention No. 33 (1932), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C033 [<https://perma.cc/Y9EY-T8DH>]; Int'l Labour Org. [ILO], C058, *Convention Fixing the Minimum Age for Admission of Children to Employment at Sea (Revised 1936)*, Convention No. 58 (1936), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C058 [<https://perma.cc/HDX8-NVW4>]; Int'l Labour Org. [ILO], C059, *Convention Fixing the Minimum Age for Admission of Children to Industrial*

had certain benefits, it “remained a piecemeal approach to regulating the work of young persons.”¹⁰⁹ Convention No. 138 creates a general but flexible framework for the minimum age of employment, noting that “the time has come to establish a general instrument on the subject, which would gradually replace the existing ones applicable to limited economic sectors, with a view to achieving the total abolition of child labour.”¹¹⁰ The Convention calls on its parties to pursue a national policy to abolish child labour and to progressively raise the minimum age for admission to employment.¹¹¹

In order to achieve its purpose, the Convention divides the relevant norms on minimum age into three categories. The first category is a basic minimum age. The second category is “hazardous work,” and the third is a category designated as “light work.” With respect to the first, basic minimum age, Article 2(1) provides that no one under the specified age “shall be admitted to employment or work in any occupation.”¹¹² Paragraph 3 of the same provision states that this specified age “shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.”¹¹³ Developing countries may sustain a minimum age of 14 years if their “economy and educational facilities are insufficiently developed,”¹¹⁴ although countries exercising this option incur additional reporting obligation to the ILO.¹¹⁵

Employment (Revised 1937), Convention No. 59 (1937), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C059 [<https://perma.cc/UJ2R-TQT5>]; Int'l Labour Org. [ILO], C060, *Convention Concerning the Age for Admission of Children to Non-Industrial Employment (Revised)*, Convention No. 60 (1937), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C060 [<https://perma.cc/S2RN-45EH>]; Int'l Labour Org. [ILO], C112, *Convention Concerning the Minimum Age for Admission to Employment as Fishermen*, Convention No. 112 (1959), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C112 [<https://perma.cc/9CQZ-MT6K>]; Int'l Labour Org. [ILO], C123, *Convention Concerning the Minimum Age for Admission to Employment Underground in Mines*, Convention No. 123 (1965), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C123 [<https://perma.cc/4MY6-R59X>].

109. General Survey 2012, *supra* note 4, ¶ 329.

110. Convention No. 138, *supra* note 106, pmb1.

111. *Id.* art. 1.

112. *Id.* art. 2(1).

113. *Id.* art. 2(3).

114. *Id.* art. 2(4).

115. *Id.* art. 2(5).

The second category, “hazardous work,” is regulated by Article 3 of the Convention. When work is considered “by its nature or the circumstances in which it is carried out . . . likely to jeopardise the health, safety or morals of young persons,” the minimum age is 18 years.¹¹⁶ For hazardous work the threshold may be lowered to 16 years, provided that “the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.”¹¹⁷ Additionally, workers’ and employers’ organizations—where those exist—will have to be consulted when lowering the minimum age.¹¹⁸

The final category provided in Convention No. 138 is “light work.” This type of employment is “not likely to be harmful to [children’s] health or development,” and may be permitted for children between 13 and 15 years. Furthermore, “light work” does not “prejudice [children’s] attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.”¹¹⁹ An exception is provided again for developing countries—including the extended reporting obligation—to allow certain types of light work for children between 12 and 14.¹²⁰

Convention 138 has been ratified by 171 member states. Notable exceptions are Canada, United States, Australia, New Zealand, Somalia, Suriname and Iran. Further guidance on what kind of national policy should be devised, specific conditions of employment that should be given special attention, and enforcement provisions are included in Recommendation 146, which accompanies the Convention.¹²¹

2. The Worst Forms of Child Labour Convention C182 (1999)

Whereas Convention 138 is directed at long-term policies to progressively lower the minimum age of employment and implement a

116. *Id.* art. 3(1).

117. *Id.* art. 3(3). This exception does not apply exclusively to developing countries.

118. *Id.*

119. *Id.* art. 7(1).

120. *See id.*, art. 7(4).

121. Recommendation No. 146, *supra* note 107, sec. I, IV, V.

gradual process of change, Convention No. 182 is aimed at the immediate abolition of a specific number of particularly troublesome types of child labour: the so-called “worst forms.” The Convention’s preamble clearly articulates this goal:

Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families
. . . .¹²²

The “emergency-like” nature of Convention No. 182 is further reflected in Article 1, which dictates that ratifying members “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”¹²³

Unlike Convention No. 138, Convention No. 182 does not have a flexible minimum age; Article 2 states that “the term ‘child’ shall apply to all persons under the age of 18.”¹²⁴ No exceptions are allowed, which is quite understandable considering the types of child labour that the Convention covers. Article 3 of Convention 182 describes four groups of the “worst forms” of child labour:

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

122. Int’l Labour Org. [ILO], C182, *Worst Forms of Child Labour Convention*, Convention No. 182, pmb. (1999) [hereinafter Convention No. 182], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_IL O_CODE:C182 [https://perma.cc/K9UE-NLY8]. The preamble further refers to the Declaration on Fundamental Principles and Rights at Work and the Convention on the Rights of the Child. Both of these instruments were created or adopted just before the adoption of C182.

123. *Id.* art. 1.

124. *Id.* art. 2.

- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹²⁵

There is an obvious overlap between these “worst forms” of child labour and more general situations of forced labour which the next section of this Article will cover. Furthermore, the Convention highlights the prohibition of sexual exploitation of children, the use of child soldiers, and the use of children for drug trafficking. Paragraph (d) refers to hazardous work, a concept that was already included in Convention No. 138.¹²⁶ Recommendation No. 190, which accompanies Convention No. 182, provides detailed guidance on what counts as hazardous work. Noteworthy examples include work that exposes children to abuse, work underground or in dangerous places, work with dangerous equipment or substances, and work requiring long or unreasonable hours.¹²⁷

Article 7 of the Convention emphasizes that when implementing its provisions, heightened attention should be given to the importance of free basic education, social integration, children with special risks, and the special situations facing girls.¹²⁸ Section III of R190 provides further guidance on the particular measures that could be taken to prevent and remedy the worst forms of child labour. Convention No. 182 has been ratified by 182 member states at the time of writing this Article, which makes it the most widely ratified Fundamental Convention.¹²⁹

125. *Id.* art. 3.

126. *Id.*

127. Int'l Labour Org. [ILO], R190, *Worst Forms of Child Labour Recommendation*, Recommendation No. 190, ¶ 3 (1999) [hereinafter Recommendation No. 190], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO::P12100_ILO_CODE:R190 [<https://perma.cc/E34V-DG9R>].

128. Convention No. 182, *supra* note 122, art. 7.

129. See Int'l Labour Org. [ILO], *Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)*, <https://www.ilo.org/dyn/normlex/en/f?p=NORM>

Together, Convention Nos. 138 and 182 form the normative framework for protecting children from work that harms their physical and mental development and that interferes with their education. Importantly, these Conventions have nothing to do with limiting the options children ought to have, and they should be implemented in line with each child's individual right to self-determination. In implementing the provisions of the Conventions, actors should take the "best interest of the child" criterion into account, a concept enshrined in the UN Convention on the Rights of the Child and the recent Buenos Aires Declaration.¹³⁰ These two Fundamental Conventions both aim to abolish child labour, but each embodies a different character. Convention No. 138 provides a flexible framework for progressively raising the minimum age for employment, while Convention No. 182 aims to remedy a specific set of particularly problematic situations.¹³¹

B. The Prohibition of Forced Labour

The second fundamental standard concerns the prohibition of forced labour and is codified in the oldest Fundamental Conventions: Convention No. 29 of 1930 and Convention No. 105 of 1957.¹³² An

LEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327 [https://perma.cc/NM86-UV84]; see also Int'l Labour Org. [ILO], *Ratifications*, <https://www.ilo.org/dyn/normlex/en/f?p=1000:10001> [https://perma.cc/G95S-6DTF] (bar graph comparing ratification data for each of the Fundamental Conventions). Notably, the Government of India ratified the two Fundamental Conventions on child labour on June 13, 2017. Press Release, Int'l Labour Org. [ILO], *India Ratifies Both Fundamental ILO Conventions on Child Labour (June 13, 2017)*, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_557295/lang-en/index.htm [https://perma.cc/TQ7H-NGCC].

130. Convention on the Rights of the Child, *supra* note 104, art. 3(1) ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."); Int'l Labour Org. [ILO], *Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment*, §1, ¶¶ i, ii (Nov. 16, 2017), http://www.childlabour2017.org/sites/default/files/declaracion_bs_as-eng.pdf [http://perma.cc/XK5A-EFLE] (adopted at the IV Global Conference on the Sustained Eradication of Child Labour).

131. Besides the adoption of these two Conventions, the ILO's International Programme on the Elimination of Child Labour (IPEC) serves as an important promotional mechanism to combat child labour worldwide. See Int'l Labour Org. [ILO], *About the International Programme on the Elimination of Child Labour (IPEC)*, <https://www.ilo.org/ipecc/programme/lang-en/index.htm> [https://perma.cc/GCZ2-AM44].

132. Convention No. 29, *supra* note 86; Convention No. 105, *supra* note 87.

important protocol to the 1930 Convention, “the Forced Labour Protocol,” was adopted in 2014 to deal with contemporary challenges of forced labour.¹³³

The prohibition of forced labour is one of the oldest topics dealt with by the ILO and is closely related to the prohibition of slavery, a *Ius Cogens* norm under international law.¹³⁴ The 1926 Slavery Convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹³⁵ Forced labour refers to work performed involuntarily and under the menace of a sanction.¹³⁶ Forced labour includes “situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as manipulated debt, retention of identity papers or threats of denunciation to immigration authorities.”¹³⁷ Forced labour is still a pressing and persistent problem in many countries, and is often described as “modern slavery.”

Recent statistics indicate that approximately 40 million people were victims of modern slavery in 2016.¹³⁸ This figure includes 15 million people trapped in forced marriages and 25 million in forced labour.¹³⁹ Seventy-one percent of these 40 million people were women or girls and about 25% were children. Of the 24.9 million people in forced labour situations, 16 million are in the private sector, 4.8 million in forced sexual exploitation and 4.1 million in forced labour imposed

133. Protocol No. 29, *supra* note 14; *see also*, Int’l Labour Org. [ILO], R203, *Forced Labour (Supplementary Measures) Recommendation*, Recommendation No. 203 (2014) [hereinafter Recommendation No. 203], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R203 [https://perma.cc/GLN6-79RH].

134. *Ius Cogens* norms are peremptory norms of (customary) international law for which no derogation is permitted.

135. League of Nations, Slavery Convention, art. 1(1), *opened for signature* Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927).

136. Convention No. 29, *supra* note 86; Convention No. 105, *supra* note 87, art. 2(1).

137. Int’l Labour Org. [ILO], *What is Forced Labour, Modern Slavery and Human Trafficking*, <http://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm> [https://perma.cc/TV9W-FK5H].

138. Int’l Labour Org. [ILO], *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, at 5 (2017), https://www.ilo.org/wcmsp5/groups/public/--dgreports/--dcomm/documents/publication/wcms_575479.pdf [https://perma.cc/VC33-VXKR].

139. *Id.*

by agencies or people under the authority of the state.¹⁴⁰ Of the people trapped in forced labour in the private sector, about half of them are a victim of debt bondage.¹⁴¹ Most instances of forced labour occur in the domestic work, construction, manufacturing, agriculture, and fishing sectors.¹⁴² The majority of people trapped in forced labour suffer from various forms of coercion such as withholding or threatening to withhold wages and threats or acts of physical and sexual violence.¹⁴³ Certain groups such as migrant workers, women, or indigenous peoples are particularly vulnerable to forced labour abuse.

1. The Forced Labour Convention C029 (1930)

The statistics above indicate that a legal instrument against forced labour is still relevant in the present day, even though one was adopted almost 90 years ago. The 1930 Forced Labour Convention, Convention No. 29, has been ratified by 178 member states to date and aims to “suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”¹⁴⁴ Forced labour is defined in Article 2, which states that forced labour means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁴⁵ From this definition, there are three required elements of forced labour: (1) work or service; (2) menace of a penalty and; (3) involuntariness.

Five situations are exempted from the scope of this definition. Consequently, work imposed under these specific circumstances does not constitute forced labour. This is the case for (1) compulsory military service; (2) normal civic obligations such as jury service, compulsory fire service, or the obligation to provide free medical service; (3) prison labour, but only after the conviction by a court and conducted under the supervision of a public authority; (4) work in emergency situations

140. *Id.* at 10.

141. *Id.* The report mentions that “[d]ue to limitations of the data, as detailed in this report, these estimates are considered to be conservative.” *Id.* at 9.

142. *Id.* at 11.

143. *Id.*

144. Convention No. 29, *supra* note 86, art. 1(1).

145. Convention No. 29, *supra* note 86, art. 2(2). See Int’l Labour Org. [ILO], *Fundamental Rights at Work and International Labour Standards*, at 39–44 (2003) [hereinafter ILO, *Fundamental Rights at Work*], https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087424.pdf [https://perma.cc/7R6A-M4AP].

such as war, floods or other types of calamities, and; (5) minor communal services, conducted within the community and for the benefit of the community.¹⁴⁶

Under the 1930 Convention, forced labour is therefore only allowed under very specific circumstances. While Convention No. 29 is still the basis for the generic prohibition of forced labour, it has been complemented by another Convention in 1957 and a Protocol in 2014 to build a framework that is better equipped to deal with contemporary issues involving forced labour.¹⁴⁷

2. The Abolition of Forced Labour Convention C105 (1957)

The second Fundamental Convention dealing with the prohibition of forced labour is Convention No. 105, which, contrary to the more general Convention No. 29, highlights specific categories of forced labour that merit special attention.¹⁴⁸ The ad hoc Committee on Forced Labour, established by the ILO Governing Body and the UN Economic and Social Council, studied the problem of forced labour from 1951 to 1953 and found that various types of forced labour—especially in relation to political views—were widespread.¹⁴⁹ These and subsequent inquiries by the ILO Committee on Forced Labour led to the development of Convention No. 105 in 1957.¹⁵⁰ Moreover, the new Convention was inspired by the 1956 UN Supplementary Slavery

146. *Id.*

147. The Committee of Experts has provided numerous observations and direct requests pertaining to the prohibition of forced labour. See Int'l Labour Org. [ILO], *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)* (2007) [<https://perma.cc/S2TN-XUXD>].

148. Special attention to these specific categories is warranted in light of the large-scale use of forced labour in World War II, Soviet political prisoner camps, as well as “socially relevant activities” in (former) colonies or overseas territories. See Lee Swebston, *Forced and compulsory labour in international human rights law*, at 8 (ILO, Working Paper, 2005).

149. Int'l Labour Conference, 96th session, *Eradication of forced labour*, ¶ 8, ILC96-III(1B)-2007-02-0014-1-En (2007) [hereinafter ILO, *Eradication*], <https://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iii-1b.pdf> [<https://perma.cc/3YMB-J6CR>]; see also Int'l Labour Org. [ILO], *Report of the Committee of Experts on the Application of Conventions and Recommendations* (2008) [hereinafter ILO, *Application of Conventions and Recommendations*].

150. ILO, *Eradication*, *supra* note 149, at ¶ 8; ILO, *Application of Conventions and Recommendations*, *supra* note 149.

Convention,¹⁵¹ which covered debt bondage, serfdom, and child exploitation.¹⁵² The preamble to Convention No. 105 confirms that certain forms of forced labour constitute “a violation of the rights of man referred to in the Charter of the United Nations and enunciated by the Universal Declaration of Human Rights” and must be abolished.¹⁵³ Convention No. 105—currently ratified by 175 member states—does not replace the older Convention No. 29 but should be seen as a complementary instrument with a limited scope of application.¹⁵⁴

The Convention stipulates five specific situations in which forced labour should be suppressed:

(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.¹⁵⁵

Article 2 of the Convention calls for an “immediate and complete abolition” of the specified forms of forced labour.¹⁵⁶

Convention No. 105 thus supplemented Convention No. 29 with a specific set of particularly pressing situations in which forced labour issues arose at the time of its adoption. A third instrument was recently adopted to modernize the normative framework of the two Fundamental Conventions on forced labour: The Forced Labour Protocol of 2014.

151. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957). For an overview of standards concerning forced labour in human rights law, see Swepston, *supra* note 148.

152. NATIONAL RESEARCH COUNCIL, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 138 n.2 (2004).

153. Convention No. 105, *supra* note 87.

154. ILO, *Fundamental Rights at Work*, *supra* note 145, at 45–46.

155. Convention No. 105, *supra* note 87, art. 1.

156. *Id.* art. 2.

3. The Protocol of 2014 to the Forced Labour Convention

In June 2014, the International Labour Conference adopted a new binding protocol to the 1930 Forced Labour Convention, supported by a “[r]ecommendation on supplementary measures for the effective suppression of forced labour.”¹⁵⁷ These instruments aim to provide concrete guidance on combating modern forms of forced labour on three levels: protection, prevention, and compensation.¹⁵⁸

The preamble to Protocol No. 29 explains the need for an adjustment to the normative framework:

[T]he context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination, and noting that there is an increased number of workers who are in forced or compulsory labour in the private economy, that certain sectors of the economy are particularly vulnerable, and that certain groups of workers have a higher risk of becoming victims of forced or compulsory labour, especially migrants.¹⁵⁹

Protocol No. 29 also contains detailed provisions on how to combat forced labour. It includes provisions on education, labour inspection, recruitment, public and private due diligence, remedies, and compensation and legal protection for the victims of forced labour.¹⁶⁰

Recommendation No. 203 provides practical guidance on preventive measures, protective action, remedies, enforcement, and international cooperation.¹⁶¹ The Recommendation offers a range of measures to combat forced labour, such as awareness-raising campaigns, skills-training programs, social security guarantees,

157. See Protocol No. 29, *supra* note 14; Recommendation No. 203, *supra* note 133.

158. 50 FOR FREEDOM (2019), <https://50forfreedom.org/the-protocol/> [<https://perma.cc/EN9D-6D8Z>]. The 50forFreedom campaign promotes ratification of the Protocol by ILO member states.

159. Protocol No. 29, *supra* note 14, pmbl.

160. *Id.* arts. 2–4.

161. Recommendation No. 203, *supra* note 133.

adequate penalties, adequate and accessible complaint mechanisms, compensation schemes, and legal advice.¹⁶² The new Protocol and Recommendation focus specifically on remedies for victims of modern forms of forced labour and provide a wide array of very practical measures to combat modern slavery. The new Protocol and Recommendations along with the two Fundamental Conventions discussed above make up the normative framework on forced labour.

C. Non-discrimination and Equal Treatment

Non-discrimination and equal treatment are prominent themes in international human rights law and are constitutive principles of any democratic system in which the rule of law is respected. Employment discrimination is particularly widespread, and poses large problems both in high and low income countries.¹⁶³ Many, often subtle, types of discrimination occur at work, and are often hard to prove in a court of law.¹⁶⁴ Especially worrisome are those situations in which multiple forms of discrimination are at work; for example, the unequal treatment of female migrant domestic workers from Africa.¹⁶⁵ In such cases, a number of distinct discriminatory grounds are present. Discrimination may be systemic, meaning it is “embedded in social and institutional practices, policies or rules” as “part of the dominant paradigm.”¹⁶⁶ This type of discrimination may, for instance, be a structural part of a company culture in which most management personnel are males.¹⁶⁷ Unjustified or prejudicial treatment of different

162. *Id.* ¶¶ 3–13.

163. See ILO Director-General, Int'l Labour Org., *Equality at Work: The Continuing Challenge*, at ix, (2011) [hereinafter ILO, *Equality at Work*], https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_166583.pdf [<https://perma.cc/HPC8-6UQ8>] (“This Report shows that discrimination continues to be persistent and multifaceted.”).

164. *Id.* at 1 (remarking that “[d]iscrimination in employment and occupation can occur in many different settings and can take many forms.”).

165. *Id.* at ix (further noting that “[d]iscrimination has also become more varied, and discrimination on multiple grounds is becoming the rule rather than the exception.”).

166. Adelle Blackett & Colleen Sheppard, *Collective Bargaining and Equality: Making Connections*, in WOMEN, GENDER AND WORK (VOL. 2): SOCIAL CHOICES AND INEQUALITIES 659–60 (Lansky, Mark; Ghosh, Jayati; Méda, Dominique; Rani, Uma eds., 2017).

167. Another example of systemic discrimination (and forced labour) can be found inherent in the Kafala system of sponsorship used for migrant workers in

categories of people in relation to work persists in a variety of forms; for that reason the ILO has adopted two Fundamental Conventions on the topic.

These conventions have a different scope and character: Convention No. 111 from 1958 covers a general prohibition of discrimination in employment and occupation, while Convention No. 100, adopted in 1951, deals with the narrower topic of equal remuneration.¹⁶⁸

1. The Discrimination (Employment and Occupation) Convention C111 (1958)

Convention No. 111, presently ratified by 175 ILO member states, is a short convention that calls on states to “declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”¹⁶⁹ Article 1 of the Convention defines discrimination as including: “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”¹⁷⁰ This definition has three components: “a

construction work in Qatar. See Int’l Labour Org. [ILO], *Conference Committee on the Application of Standards, Extracts from the Record of Proceedings*, at 6 (2015).

168. Int’l Labour Org. [ILO], *Discrimination (Employment and Occupation)*, Convention No. 111 (1958) [hereinafter Convention No. 111], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 [<https://perma.cc/7RNN-8FHR>]; Int’l Labour Org. [ILO], *Equal Remuneration Convention*, Convention No. 100 (1951) [hereinafter Convention No. 100], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100 [<https://perma.cc/8HKF-NSTV>]. See also Int’l Labour Org. [ILO], *Workers with Family Responsibilities Convention*, Convention No. 156 (1981), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156 [<https://perma.cc/G4H7-T2VM>]. C156 was adopted in the wake of the 1979 U.N. Convention on the Elimination of all Forms of Discrimination Against Women, which stated in its preamble that “a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.” Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, art. 1, 1249 U.N.T.S. 13, pmbl. (entered into force Sept. 3, 1981) [hereinafter CEDAW].

169. Convention No. 111, *supra* note 168, art. 2.

170. *Id.* art. 1(1)a.

factual element (the existence of a distinction, exclusion or preference which constitutes a difference in treatment); a criterion on which the difference in treatment is based; and the objective result of this difference in treatment, namely the nullification or impairment of equality of opportunity or treatment.”¹⁷¹ The terms employment and occupation are meant to include “access to vocational training, access to employment and to particular occupations, and terms and conditions of employment,” and so are not confined to the actual performance of the work.¹⁷²

Seven specific grounds for discrimination are mentioned: Race and colour refers to discrimination against specific ethnic groups, including indigenous peoples. National extraction deals with distinctions based on a “person’s place of birth, ancestry or foreign origin.”¹⁷³ Sex does not deal exclusively with discrimination against women, although this is most often the form sex discrimination takes.¹⁷⁴ The Convention protects against discrimination based on religion, including the expression and manifestation thereof.¹⁷⁵ The ground of social origin refers to class membership or caste systems,¹⁷⁶ and the ground of political opinion aims to protect against discrimination based on political opposition or affiliation.¹⁷⁷

Importantly, Convention No. 111 lays down a minimum framework and additional grounds or measures for protection on the national level which are possible on the basis of Article 1(1)b.¹⁷⁸ Distinctions based on the inherent requirements of a specific and definable job are not regarded as discriminatory.¹⁷⁹ This exception is to be applied restrictively.

Discrimination in the Convention covers both direct and indirect discrimination. Direct discrimination explicitly treats a person or group less favourably. In cases of indirect discrimination, an apparently neutral criterion, measure, or rule has the effect of

171. ILO, *Fundamental Rights at Work*, *supra* note 145, at 60.

172. Convention No. 111, *supra* note 168, at art. 1(3).

173. ILO, *Fundamental Rights at Work*, *supra* note 145, at 61.

174. ILO, *Equality at Work*, *supra* note 163, at 19. (“Women continue to suffer discrimination in almost all aspects of employment, including the jobs they can obtain, their remuneration, benefits and working conditions, and their access to decision-making positions.”).

175. *Id.* at 40.

176. *Id.* at 43.

177. *Id.*

178. Convention No. 111, *supra* note 168, art. 1(1)b.

179. *Id.* at art. 1(2).

adversely impacting one specific group. A clear example is a requirement imposing a minimum height for certain jobs. This facially neutral criterion may put women at a disproportionate disadvantage, because they are generally shorter than men, though the intention to discriminate may not have been present.

The national policy that should be developed according to Article 2 of the Convention is further specified in Article 3. Member states should cooperate with employers' and workers' organisations, enact appropriate legislation and promote educational programmes, repeal any inconsistent regulation, and make sure that policies and their implementation by vocational and placement services are under the control of a national authority.¹⁸⁰

Positive discrimination or affirmative action is also covered by Convention No. 111 in Article 5 which stipulates that: "other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination."¹⁸¹ Such special measures may be necessary to address the specific needs of certain groups or to remedy past injustices. The need for differential treatment to achieve a more equal outcome was described by the Permanent Court of International Justice in its often cited 1935 advisory opinion concerning minority schools in Albania: "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."¹⁸² The European Court of Human Rights added that the prohibition of discrimination—in this case under the European Convention—is also violated "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."¹⁸³

The relatively short Convention No. 111 therefore covers a wide array of situations related to the prohibition of discrimination and equality of opportunity in relation to occupation and employment.

180. *Id.* art. 3.

181. *Id.* art. 5.

182. *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at ¶ 64 (Apr. 6).

183. *Thlimmenos v. Greece*, App. No. 34369/97 (Eur. Ct. H.R. Apr. 6, 2000).

2. The Equal Remuneration Convention C100 (1951)

While Convention No. 111 is general in scope, Convention No. 100 is about one—albeit very important—principle: equal remuneration for men and women for work of equal value.

While this “equal pay” principle is currently widely endorsed, what it actually entails and how it should be applied in practice is often more difficult to grasp. Unequal remuneration is a very persistent, widespread, and systemic problem, and its prevalence in various multi-country studies suggests that it is difficult to overcome.¹⁸⁴ However, the basic normative framework of the Convention, which has been ratified by 173 member states, is quite concise and clear.

Article 1 includes a definition of remuneration, which includes: “the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment,” and further provides that “the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.”¹⁸⁵ Member states are held to “promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.”¹⁸⁶ A specific method for establishing the relative value of different types of work is not included in the Convention but is left to the member states to develop.¹⁸⁷ Article 2 however, does include some guidance on what is expected from member states, in that the equal pay principle may be applied by means of “national laws or regulations,” specific “machinery for wage determination,” and “collective agreements.”¹⁸⁸ While the difference between what men and women earn has been reduced over time, and “virtually every industrialized country has passed laws mandating equal treatment of women in the labour market,” there is still a persistent gender pay gap

184. See ILO, *Equality at Work*, *supra* note 163, at 21, ¶ 84.

185. Convention No. 100, *supra* note 168, art. 1.

186. *Id.* art. 2, ¶ 1.

187. ILO, *Rules of the Game*, *supra* note 15, at 41.

188. Convention No. 100, *supra* note 168, art. 2, ¶ 2. See generally Martin Olez et al., Int’l Labour Org. [ILO], *Equal Pay: An Introductory Guide* (2013), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_216695.pdf [<https://perma.cc/AW6H-U6TG>] (discussing Convention No. 100 in the broader context of equal pay issues).

in almost every state.¹⁸⁹ The size of the gap varies considerably by sector, occupation, region, and nationality and the statistical calculation is complex and subject to (public) debate.¹⁹⁰ In the United States, the gender wage gap also varies widely between white women and women of color.¹⁹¹ The global gender pay gap in 2017 was estimated at 32%, which means that women generally earn 32% less than men for work of equal value.¹⁹² In 2010, the gender pay gap in the European Union was approximately 16.4% and in 2012 in the United States it was approximately 16–19%.¹⁹³

Discrimination in relation to work may occur in a variety of settings and forms. The objective of Fundamental Conventions No. 111 and 100—and the related Recommendations No. 90 and 111¹⁹⁴—is to

189. Int'l Labour Org. [ILO], *Global Wage Report 2016/17: Wage Inequality in the Workplace*, at 30 (2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_537846.pdf [<https://perma.cc/6XRF-4858>] (citing Francine Blau & Lawrence Kahn, *Understanding International Differences in the Gender Pay Gap*, 21 J. LAB. ECON. 106, 107 (2003)).

190. Int'l Labour Organization [ILO], *Global Wage Report 2018/19: What Lies Behind Gender Pay Gaps*, 21 (2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf [<https://perma.cc/MSP6-T2ME>] (“The gender pay gap is a widely used indicator, representing the difference in pay overall between women and men wage employees. Despite their apparent simplicity, estimates of the gender pay gap are often controversial, in part because different estimates for the same country in a given time period may vary substantially.”).

191. See ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POLICY RESEARCH, *THE GENDER WAGE GAP: 2017 EARNINGS DIFFERENCES BY RACE AND ETHNICITY* (Mar. 2018), <https://iwpr.org/publications/gender-wage-gap-2017-race-ethnicity/> [<https://perma.cc/ZV85-VXDH>].

192. WORLD ECONOMIC FORUM, *THE GLOBAL GENDER GAP REPORT 2017* at vii (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf [<https://perma.cc/H98A-QBBF>].

193. EUROPEAN COMM'N, *2017 REPORT ON EQUALITY BETWEEN WOMEN AND MEN IN THE EU* at 20 (2017), https://eeas.europa.eu/sites/eeas/files/2017_report_equality_women_men_in_the_eu_en.pdf [<https://perma.cc/9YJB-P5K7>]; Rakesh Kochhar, *How Pew Research Measured the Gender Pay Gap*, PEW RES. CTR. (Dec. 11, 2013), <http://www.pewresearch.org/fact-tank/2013/12/11/how-pew-research-measured-the-gender-pay-gap/> [<https://perma.cc/69UK-K3JS>].

194. Int'l Labour Org. [ILO], R090, *Equal Remuneration Recommendation*, Recommendation No. 90 (1951), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R090 [<https://perma.cc/JKD2-3HYM>]; Int'l Labour Org. [ILO], R111, *Discrimination (Employment and Occupation) Recommendation*, Recommendation No. 111 (1958),

dismantle barriers to equality in the workplace itself and specifically in relation to remuneration, but also more broadly in relation to access to training and education and policies and practices of hiring.¹⁹⁵

D. Freedom of Association and the Right to Collective Bargaining

Freedom of association is one of the central fundamental rights within international human rights law and labour law systems in particular. It is an enabling right that can facilitate effective and participatory action against forced labour, child labour, and certain forms of discrimination.¹⁹⁶ Legal protection of freedom of association and the right to collective bargaining—as well as a fundamental right to strike—can be seen as “the most fundamental method” of overcoming power imbalances between workers and employers and securing justice at work by ensuring “that a fair contracting process occurs.”¹⁹⁷

These procedural rights are enshrined in different human rights treaties and declarations, and make up the most contested fundamental standards.¹⁹⁸ While it is virtually unthinkable that a modern state, company or institution would claim that it is in favour of child labour, forced labour, or discrimination, overt limitations on the right to freedom of association and collective bargaining are more common. Nevertheless, “almost all national constitutions” contain freedom of association provisions.¹⁹⁹

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_IL O_CODE:R111 [<https://perma.cc/YKC8-M7BV>].

195. Int'l Labour Organization [ILO], *The International Labour Organization's Fundamental Conventions*, *supra* note 2, at 61.

196. General Survey 2012, *supra* note 4, ¶ 49.

197. Langille, *supra* note 40, at 429.

198. The importance of freedom of association in broader human rights law is supported by the fact that there is a U.N. Special Rapporteur on the rights to freedom of peaceful assembly and of association. In 2016, former Rapporteur Maina Kiai's annual report focused exclusively on workers' rights and examined: “the exercise and enjoyment of the rights to freedom of peaceful assembly and of association in the workplace, with a focus on the most marginalized portions of the world's labour force, including global supply chain workers, informal workers, migrant workers, domestic workers and others.” Maina Kiai (Special Rapporteur on the rights to freedom of peaceful assembly and of association), *Rep. of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, at 2, U.N. DOC. A/71/385 (Sept. 14, 2016).

199. General Survey 2012, *supra* note 4, ¶ 8.

This foundational principle for industrial democracy was included in the preamble to the ILO's constitution and in the Philadelphia Declaration, which stated that "freedom of expression and of association are essential to sustained progress."²⁰⁰ Freedom of association and its related rights ensure that workers' voices are heard and considered when decisions are made about work-related matters.²⁰¹ Serious contemporary barriers to free association include prohibitions of trade unions, discrimination against trade union members, interference with and suspension of trade unions and violence, and the imprisonment and even killings of leaders of workers' organizations.²⁰²

Two of the Fundamental Conventions advance the framework for establishing trade unions and employers' organizations without interference and secure the right to bargain collectively about working conditions. Convention No. 87 mostly deals with relations between workers and the government, while Convention No. 98 focuses on effective cooperation between management and labour within a company.²⁰³

200. Declaration of Philadelphia, *supra* note 18, ¶ I(b).

201. Int'l Labour Organization [ILO], *The International Labour Organization's Fundamental Conventions*, *supra* note 2, at 9.

202. ILO, *Rules of the Game*, *supra* note 15, at 28–30.

203. Int'l Labour Org. [ILO], C087, *Freedom of Association and Protection of the Right to Organise Convention*, Convention No. 87 (1948) [hereinafter Convention No. 87], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 [<https://perma.cc/NX2M-DRBW>]; Int'l Labour Org. [ILO], C098, *Right to Organise and Collective Bargaining Convention*, Convention No. 98 (1949) [hereinafter Convention No. 98], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243 [<https://perma.cc/Y4PR-HXTU>]. Other technical Conventions dealing with these subjects include the following: Int'l Labour Org. [ILO], C135, *Workers' Representatives Convention*, Convention No. 135 (1971), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280 [<https://perma.cc/Z79Z-CGSX>]; Int'l Labour Org. [ILO], C141, *Rural Workers' Organisations Convention*, Convention No. 141 (1975), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C141 [<https://perma.cc/C2QK-45JA>]; Int'l Labour Org. [ILO], C151, *Labour Relations (Public Service) Convention*, Convention No. 151 (1978), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312296 [<https://perma.cc/7HD5-CNMW>]; and Int'l Labour Org. [ILO], C154, *Collective Bargaining Convention*, Convention No. 154 (1981) [hereinafter Convention No. 154], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C154:NO [<https://perma.cc/RH7V-H3BR>].

1. The Freedom of Association Convention C087 (1948)

Convention No. 87 was adopted in 1949 and is currently ratified by 155 member states, making it the Fundamental Convention with the lowest number of ratifications.²⁰⁴ The main principle of the Convention is enshrined in Article 2: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”²⁰⁵ This means that trade unions are allowed to make their own rules, and permission from governmental authorities cannot be a prerequisite. This guarantee applies to all workers and employers, including those in the informal sector, migrant workers, subcontracted workers, and the self-employed.²⁰⁶

This principle of non-interference by governmental agencies is further reflected in additional provisions of the Convention. Article 3 stipulates that workers’ and employers’ organizations have the right to draw up their own rules and organize their own administration and activities without interference by the public authorities.²⁰⁷ Moreover, these organizations cannot be dissolved or suspended by the government.²⁰⁸

Under the Convention’s principles, the freedom of association also includes the right to affiliate and associate with other workers’ and employers’ organizations, and the freedom to join federations, confederations, and international organizations.²⁰⁹ In a world that is steadily globalizing, this international dimension of cooperation is increasingly important. Furthermore, the Convention proposes a very broad definition of ‘organisation,’ stating that this includes “any organisation of workers or of employers for furthering and defending

204. However, the vast majority of the ILO’s 187 member states have ratified the Convention. See Int’l Labour Organization [ILO], *Ratifications by Convention, NORMLEX Information System on International Labour Standards*, <https://www.ilo.org/dyn/normlex/en/f?p=1000:12001::NO:::https://perma.cc/AQH7-MA2D>].

205. Convention No. 87, *supra* note 203, art. 2.

206. General Survey 2012, *supra* note 4, ¶ 53. The language of the Convention is sufficiently broad to cover undocumented migrants, for instance.

207. Convention No. 87, *supra* note 203, art. 3.

208. *Id.* art. 4.

209. *Id.* art. 5.

the interests of workers or of employers.”²¹⁰ This provision offers protection against so-called ‘yellow unions,’—workers’ organizations that are not independent because they are controlled by the employer to some extent.

Article 9 contains the only exceptions to the general principle of freedom of association that is enshrined in the Convention. This section allows states to determine the extent to which the Convention applies to the police and armed forces.²¹¹ The ILO’s supervisory bodies interpret this exception narrowly.²¹²

Convention No. 87 proclaims a basic rule: “to protect the autonomy and independence of workers’ and employers’ organizations in relation to the public authorities, both in their establishment and in their functioning and dissolution.”²¹³ Without this type of freedom of association, any exercise of the right to collective bargaining becomes inconceivable.

2. The Collective Bargaining Convention C098 (1949)²¹⁴

Convention No. 98—ratified by 165 ILO member states—is closely related to Convention No. 87 but takes a different angle and focuses on the protection of union members against unfair treatment. It does so with the goal of supporting genuine and fair collective bargaining processes. Collective bargaining was defined in the later Convention No. 154 as:

[A]ll negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for—(a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.²¹⁵

210. *Id.* art. 10.

211. *Id.* art. 9, ¶ 1.

212. General Survey 2012, *supra* note 4, ¶ 54.

213. *Id.* ¶ 55.

214. Convention No. 98, *supra* note 203.

215. Convention No. 154, *supra* note 203, art. 2.

Collective bargaining is essential to redressing the power imbalances between workers and management. It can prevent and mitigate labour disputes, and may facilitate “adaptation to economic, socio-political and technological change.”²¹⁶

Convention No. 98 therefore prohibits acts of anti-union discrimination, especially those that prohibit workers from joining trade unions, and those that lead to the dismissal, transfer or demotion of a worker on the basis of trade union membership or participation in union activities.²¹⁷ Article 2 states that trade unions and employers’ organizations should be protected against acts of interference “by each other or each other’s agents or members in their establishment, functioning or administration,” and especially against “acts which are designed to promote the establishment of workers’ organisations under the domination of employers or employers’ organisations, or to support workers’ organisations by financial or other means, with the object of placing such organisations under the control of employers or employers’ organisations.”²¹⁸

Article 4 calls for the promotion of a process of social dialogue, defined as the “voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”²¹⁹ Collective agreements, in turn, are defined as:

[A]ll agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.²²⁰

216. General Survey 2012, *supra* note 4, ¶ 167.

217. Convention No. 98, *supra* note 203, art. 1.

218. *Id.* at art. 2.

219. *Id.* at art. 4.

220. Int’l Labour Org. [ILO], R091, *Collective Agreements Recommendation*, Recommendation No. 91, ¶ 2(1) (1951), <https://www.ilo.org/dyn/normlex/en/>

Social dialogue is a broad concept and takes place on the international, regional, national, sectoral, and company level. Building and maintaining a fair and strong social dialogue is the very essence of collective bargaining processes; these processes, in turn, lead to just and fair working conditions which are agreeable both to workers and employers. As such, it is “a key instrument to uphold non-discrimination and equality, integrating the world of work with the guarantee of fundamental rights at work for all.”²²¹

The freedom of association and collective bargaining Conventions provide the minimum framework for a functional industrial democracy. While the Conventions do not contain an explicit provision on collective action, the right to strike has been recognized by the Committee of Experts and the Committee on Freedom of Association, other UN bodies and instruments, and many national jurisdictions. While the interpretations of the right to strike have led to discussions within the ILO,²²² it is generally acknowledged that a framework of freedom of association and collective bargaining would become meaningless if workers did not have the option of pressuring employers by means of proportionate collective action. Limitations of the right to strike are possible, for instance in relation to the police, armed forces, certain other public servants, or essential services (such as hospitals, fire departments or water supply).²²³ The right to strike is a central component of the normative framework of freedom of association and collective bargaining and considered by the Committee

f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R091 [https://perma.cc/3D4Y-JQFE].

221. General Survey 2012, *supra* note 4, ¶ 164.

222. See Lee Swepton, *Crisis in the ILO Supervisory System: Dispute Over the Right to Strike*, 29 INT'L J. COMP. LAB. L. & INDUS. REL. 199 (2013).

223. Bernard Gernigon et al., *ILO Principles Concerning the Right to Strike*, 137 INT'L LAB. REV. 4, 450–52 (1998). The Committee on Freedom of Association has elaborated extensively on the concept of essential services. See Int'l Labour Organization [ILO], *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* at ¶ 837 (6th ed., 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf [https://perma.cc/G3WK-UVYF] [ILO, *Compilation of Decisions on Freedom of Association*] (“What is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.”).

on Freedom of Association as “one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.”²²⁴

The preceding section sketches the content of the core labour standards by examining the basic rules and principles of the ILO’s Fundamental Conventions. With the normative structure in place, the next step is to analyse under which other relevant international regulatory regimes these core labour standards are enshrined and applied.

III. DISPERSION AND MONITORING OF FUNDAMENTAL LABOUR STANDARDS UNDER OTHER REGULATORY REGIMES

This section aims to chart the current landscape of international initiatives and instruments that contain references to fundamental labour standards. It examines a selection of some of the most relevant instruments divided into the overlapping categories of public, private, binding, and voluntary regulatory regimes. Some of the instruments contain explicit references to the Fundamental Conventions, some of them mention specific rights covered by them, and some instruments—especially a number of UN human rights treaties—precede the designation of the conventions as ‘fundamental’ but contain references to the rights those ILO conventions aim to secure.

In addition to explaining how the fundamental labour standards are included in these instruments, the following survey will briefly examine the functioning of these instruments, with a focus on the mechanisms by which they observe, supervise, monitor, or even enforce the labour standards. However, before turning towards the alternative institutions and initiatives, the first step is to provide some basic understanding of the multi-layered supervisory system of the ILO itself.

A. Supervision under the ILO System

The ILO’s supervisory mechanism—which contains a number of tripartite features—is unique at the international level.²²⁵ It is a

224. Gernigon et al., *supra* note 223, at 443.

225. See *ILO supervisory system/mechanism*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm> [https://perma.cc/HFS8-9AQE].

complex system and contains several venues to exert pressure on member states to act in compliance with labour standards. The system is not based on hard sanctions and binding decisions but rather on dialogue, recommendations, persuasion, and technical assistance. It contains two main elements: a regular supervisory process and three special procedures.²²⁶

Regular supervision consists of a periodic reporting obligation for states on measures they have taken to give effect to ratified Conventions under Article 22 of the ILO Constitution.²²⁷ These reports are examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR)—which is composed of 20 jurists that conduct a technical analysis—and its findings are presented in the form of an annual report to the International Labour Conference. The CEACR produces two kinds of comments: Observations and Direct Requests. Observations are published in the annual report, while Direct Requests are sent to member states directly. At the ILC, the report of the CEACR is analysed by the Conference Committee on the Application of Standards (CAS), which is a standing body of the ILC mandated to draw up conclusions about a selection of observations from the report. The analysis of the CAS is more politically flavoured and highlights specific issues of particular concern.²²⁸

In addition to this general reporting system there are three specific procedures based on the submission of a complaint. Pursuant

226. See P.F. van Der Heijden & A.G. Koroma, *Review of ILO Supervisory Mechanism* ¶ 3 (Int'l Labour Org. [ILO], Working Paper GB.326/LILS/3/1, 2016); Int'l Labour Org. [ILO], *Decision on The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association*, GB.326/LILS/3/1, ¶¶ 3–5, (Mar. 18, 2016) [hereinafter ILO Freedom of Association Report].

227. Constitution of the International Labour Organisation, art. 22, *opened for signature* Apr. 1, 1919, 15 U.N.T.S. 40 (entered into force Apr. 1, 1919) [hereinafter Constitution of the ILO].

228. ILO Freedom of Association Report, *supra* note 226, ¶¶ 21–23. The CAS proposes a list of about 25 situations that are particularly problematic and urges Governments to comply with their obligations. See Int'l Labour Org. [ILO], 104th Sess., third item on the agenda at ¶ 12 (June 16, 2015), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_375763.pdf [<https://perma.cc/RNM2-2EV9>] (considering 24 individual cases and urging governments to “make every effort to take the measures necessary to fulfil the obligations they had undertaken”). This list is sometimes referred to as the ‘blacklist.’

to Article 24 of the Constitution, workers' and employers' organizations may file a representation to the Governing Body in cases where member states have "failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party."²²⁹ If the representation is admissible, the GB appoints a tripartite committee which examines the complaint and the response of the government.²³⁰ The findings of the Committee may be published if the government's response is not satisfactory.²³¹

The second special procedure, also enshrined in the Constitution, concerns the complaints procedure of Article 26. This (far less frequently used) procedure allows member states to file a complaint against another member state about failure to observe the obligations arising out of ratified Conventions, but only if both member states have ratified that Convention. Additionally, the Governing Body may instigate this procedure on its own behalf. The complaint is examined by a Commission of Inquiry which adopts a report with recommendations. There have only been 12 Commissions of Inquiry to date and the complaints procedure is considered the most severe measure under the ILO system, which is only used when states persistently violate labour standards.²³² The Governing Body may even order "such action as it may deem wise and expedient to secure compliance,"²³³ in addition to the recommendations of the Commission of Inquiry. This has, however, occurred only once in the history of the ILO: in the case of violations of the prohibition of forced labour by Myanmar.²³⁴

229. Constitution of the ILO, *supra* note 227, art. 24.

230. For the admissibility criteria, see Int'l Labour Org. [ILO], *Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization*, at 1–3 (Nov. 18, 2004), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcm_041899.pdf [<https://perma.cc/9C6X-BXFZ>].

231. Constitution of the ILO, *supra* note 227, art. 25.

232. ILO Freedom of Association Report, *supra* note 226, ¶ 27. A 13th Commission of Inquiry will be appointed to examine a complaint against the Bolivarian Republic of Venezuela. Press Release, Int'l Labour Org. [ILO], ILO Governing Body decides to appoint Commission of Inquiry for Venezuela (Mar. 21, 2018), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_622567/lang-en/index.htm [<https://perma.cc/A2KB-JPRR>].

233. Constitution of the ILO, *supra* note 227, art. 33.

234. See Press Release, Int'l Labour Org. [ILO], ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar (Nov. 17,

The third special supervisory option concerns investigations of complaints about violations of freedom of association and related rights by the Committee on Freedom of Association (CFA). This standing committee was created in 1951 and may examine complaints before the CFA by workers' and employers' organizations, even if the country under investigation has not ratified Conventions No. 87 and No. 98.²³⁵ More specifically, the CFA's mandate consists in "determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions."²³⁶ The CFA is a standing committee of the Governing Body and has dealt with over 3,200 cases. In line with the general philosophy of the ILO's supervisory mechanism, the Committee's objective is not "to blame or punish anyone, but rather to engage in a constructive tripartite dialogue to promote respect for trade union rights in law and practice."²³⁷ To this end, the CFA produces recommendations, and its most important interpretations are included in a recently updated compilation, which provides detailed

2000), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007918/lang-en/index.htm [<https://perma.cc/HZ44-F5SY>] (stating that, "under the never-before invoked article 33 of the ILO Constitution allows for a series of measures to take effect on 30 November and calls on Myanmar to 'take concrete actions' to implement the recommendations of a 1998 Commission of Inquiry, which found that resort to forced labour in the country was 'widespread and systematic.'"); Press Release, Int'l Labour Org. [ILO], ILO lifts remaining restrictions on Myanmar (June 18, 2013), http://www.ilo.org/ilc/ILCSessions/102/media-centre/news/WCMS_216355/lang-en/index.htm [<https://perma.cc/L2C3-Y7MR>] (elaborating on the fact that the International Labour Conference only lifted the restrictions on Myanmar in 2013); see also Brian Langille, *The Curious Incident of the ILO, Myanmar and Forced Labour*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 509–22 (Adelle Blackett & Anne Trebilcock eds., 2015) (explaining that "although Article 33 was invoked, there were no real ILO sanctions: even in the case of a politically easy target, a 'pariah' state committing what the Commission of Inquiry regarded as a 'crime against humanity,' the ILO did not ultimately utilize the standard model of law enforcement set out in the ILO Constitution"); Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights: Reflections on the Myanmar Experience*, in LABOUR RIGHTS AS HUMAN RIGHTS (Philip Alston ed., 2005) (using the example of the Myanmar case for a broader investigation of the effectiveness of the ILO supervisory model).

235. ILO, *Rules of the Game*, *supra* note 15, at 110.

236. ILO, *Compilation of Decisions on Freedom of Association*, *supra* note 223, at ¶ 9.

237. *Id.* ¶ 5.

guidance on topics such as the right to strike, trade union rights, protection against discrimination, and collective bargaining.²³⁸

Another special feature of the ILO's supervisory system, contained in Article 19(5)(e) of the Constitution, is a reporting obligation for Conventions that have not been ratified.²³⁹ Article 19 is used as the basis for the production of General Surveys, which are reports included in the annual report of the CEACR about specific issues.²⁴⁰ While a number of these General Surveys have dealt with fundamental labour standards, the 2012 General Survey covered the application of all Fundamental Conventions.²⁴¹

Additionally, Article 19 counts as the basis for the special reporting system on the Fundamental Conventions included in the Annex to the Declaration on Fundamental Principles and Rights at Work. This special follow-up procedure, which is complementary to the other supervisory options, requires member states that have not ratified one or more of the Fundamental Conventions to report annually on relevant changes in law and practice.²⁴² The regular reporting interval for ratified Fundamental Conventions (and Governance Conventions) is every three years instead of the normal five years for technical Conventions.²⁴³

238. *Id.*

239. See Constitution of the ILO, *supra* note 227, art. 19(5)(e).

240. See David Tajzman & Karen Curtis, Int'l Labour Org. [ILO], *Freedom of Association: A User's Guide* at 51 (2000).

241. See General Survey 2012, *supra* note 4, ¶ 3.

242. See Int'l Labour Org. [ILO], *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, Annex, Part II, § B (June 18, 1998, rev. June 15, 2010).

243. See Int'l Labour Org. [ILO], *Reporting on ILO Conventions and Recommendations*, p. 2, http://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-port_of_spain/documents/presentation/wcms_574132.pdf [<https://perma.cc/F9XR-NY5R>]. Philip Alston was less than optimistic about the follow-up procedure back in 2004 and conceded that "if an effective and credible monitoring mechanism is the sine qua non for a meaningful Declaration then the verdict must be that it has failed." Furthermore, he argued that "the follow up has contributed to the 'privatization of enforcement', since the ILO is essentially engaged in little more than a paper-shuffling exercise and any enforcement of the Declaration will only be undertaken by private actors, whether corporate or workers' groups." Alston, *supra* note 23, at 512–13. Moreover, Alston explains that "formal legal enforcement, especially in the area of human rights, is a very minor part of the overall regime." Alston, *supra* note 1, at 473.

Additionally, an annual global report that highlights trends and developments in the realizations of the fundamental principles and rights is produced, and also serves as the basis for action plans for technical cooperation.²⁴⁴

Due to the tripartite nature of the supervisory system of the ILO, it is not possible for individuals or groups other than workers' and employers' organizations to directly seek recourse under the special procedures. However, through their representatives, different vulnerable groups may ensure that their voices are heard.²⁴⁵ Another particularity of the supervisory system is that it is possible to simultaneously make use of different supervisory options. An example of where this strategy has been somewhat effective is the case of forced labour and migrant workers working under the Kafala system in Qatar, in which "all of the ILO's interlocking supervisory procedures have been invoked."²⁴⁶

In short, supervision of fundamental labour standards under the ILO mechanism consists of regular and special reporting obligations both for ratifying and non-ratifying members of the organization. Additionally, there are different complaint-based options available for cases when fundamental labour standards have been violated. The ILO's system is generally regarded as a well-developed and effective mechanism to monitor international standards.²⁴⁷

244. See Beryl ter Haar, *supra* note 6, at 80.

245. See, e.g., S. J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes*, 53 STAN. J. INT'L L. 169, 192 (2017) (explaining the way in which indigenous peoples find options to bring their grievances before the ILO's supervisory bodies).

246. Lee Swepston, *Commentary: Concentrated ILO Supervision of Migrant Rights in Qatar*, 1 INT'L LAB. RTS. CASE L. 317, 317 (2015) (on file with the Columbia Human Rights Law Review).

247. See ILO Freedom of Association Report, *supra* note 226, ¶ 1; see also Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J.L. & MED. 479, 514 (1999) ("The ILO was the first intergovernment[al] organization to establish monitoring procedures and has the most highly developed system for the implementation of international standards in the U.N. system [T]he supervisory systems that have developed in a variety of areas, including human rights, owe a great deal to the experience accumulated over the last seventy-five years by the ILO.").

B. Public Sources: Binding and Voluntary

Having examined the ILO's supervisory model, the next step is to examine the different normative sites and instruments that include and aim to secure respect for fundamental labour rights. The following paragraphs will be devoted to reviewing the most relevant public and private sources and their respective supervisory, monitoring or enforcement mechanisms. Public sources of fundamental labour standards—which are discussed next—refer to instruments created by International Governmental Organisations (IGOs) or states, although often private actors do participate in their development in formal or informal ways.²⁴⁸

1. Binding Public Sources

i. United Nations Human Rights Treaties

As discussed above, the fundamental labour standards are firmly rooted in international human rights law. The United Nations and the ILO are closely associated: the ILO became the first specialized agency of the United Nations in 1946. Under the Charter of the United Nations, specialized agencies refer to intergovernmental agencies affiliated with the United Nations. They are, however, separate and autonomous entities that coordinate their work via the Economic and Social Council and other platforms, formal and informal channels, and dialogue.²⁴⁹ Labour standards included in ILO Conventions often also have been included—at similar moments in time—in UN human rights

248. Within the ILO, for example, employers' and workers' organizations have formal decision-making powers for adopting Conventions and Recommendations. See *Conventions and Recommendations*, INT'L LABOUR ORG. <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> [<https://perma.cc/B96Y-3GGQ>] (“Conventions and recommendations are drawn up by representatives of governments, employers and workers and are adopted at the ILO's annual International Labour Conference.”). In the negotiations of many (other) human rights instruments, private actors and stakeholders are intensively consulted during the drafting processes, but states formally adopt the treaties.

249. See *U.N. Funds, Programmes, and Specialized Agencies: Making Sense of the Alphabet Soup*, AMERICAN MODEL UNITED NATIONS, <https://www.amun.org/specialized-agencies/> [<https://perma.cc/9FF8-FC6N>]; ILO Freedom of Association Report, *supra* note 226, Appendix I, ¶ I.

treaties, which further strengthened their legitimacy as fundamental international norms.²⁵⁰

The so-called “international bill of rights” is composed of the Universal Declaration of Human Rights (UDHR)²⁵¹ and both 1966 human rights covenants: the International Covenant on Civil and Political Rights (ICCPR)²⁵² and the International Covenant on Economic Social and Cultural Rights (ICESCR).²⁵³ These three instruments are discussed first, with an emphasis on the ICESCR, since this treaty includes a separate section on labour rights and contains provisions that cover all fundamental labour standards. Afterwards, the references to core labour standards in the other—often more specialized—core UN human rights treaties are examined and their monitoring mechanisms briefly discussed.²⁵⁴

ii. The ICESCR and the International Bill of Rights

The UDHR, the non-binding but nevertheless foundational document for the modern human rights regime, contains among its authoritative principles a number of provisions related to fundamental labour standards. Article 23 contains a “concentrated vision on workers’ rights, based on earlier ILO action and prefiguring much ILO action to come.”²⁵⁵ It includes the right to free choice of employment,

250. The U.N. Conventions do not refer to those rights as “fundamental labour standards” since they most often predate the designation of the Fundamental Conventions as such.

251. UDHR, *supra* note 21.

252. ICCPR, *supra* note 21.

253. ICESCR, *supra* note 21.

254. There are 9 core international human rights instruments: The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination against Women, The Convention on the Rights of the Child, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, The International Convention for the Protection of All Persons from Enforced Disappearance, and The Convention on the Rights of Persons with Disabilities. See *Core International Human Rights Instruments (Treaties) and The Treaty Bodies*, WOMEN WITH DISABILITIES AUSTRALIA (WWDA), <http://wwda.org.au/issues/unhrt/hrcore1/> [<https://perma.cc/Z8H9-U3SQ>].

255. Lee Swepston, *Human Rights at Work: The Universal Declaration and Workers’ Rights 60 Years Later*, WEB J. CURRENT LEGAL ISSUES (2009),

the right to equal pay for equal work and, particularly important for the development of the later ILO Conventions, the right to form and join trade unions.²⁵⁶ Besides this key provision, there are a number of articles that relate to the subjects covered by the Fundamental Conventions, such as the prohibition of slavery in Article 4, a general prohibition of discrimination and a right to equality before the law in Articles 2 and 7, and the right to peaceful assembly and association in Article 20.²⁵⁷

The ICCPR deals with ‘first generation’ or ‘classical’ human rights and therefore includes mostly specific civil and political freedoms from governmental interference. In relation to the fundamental labour rights, the Covenant contains provisions on non-discrimination and equal treatment (Articles 2, 3 and 26), the prohibition of slavery, servitude and forced labour (Article 8), and the right to freedom of association and to form and join trade unions (Article 22). Furthermore, Articles 28 through 45 contain the rules on the supervisory body to the ICCPR: the Human Rights Committee. Over the years, the interpretations of the rights contained in the Covenant by the Human Rights Committee, published as non-binding decisions, have developed into a considerable body of quasi-jurisprudence with quite some authoritative force.²⁵⁸ State parties have regular reporting obligations on the implementation of the Covenant and an inter-state complaint procedure is provided in Article 41.²⁵⁹ Rights of individuals to bring their grievances before the Committee are included in the First Optional Protocol.²⁶⁰

The ICESCR—the twin sister of the ICCPR that deals with “second generation” human rights—contains a separate section on

<http://www.bailii.org/uk/other/journals/WebJCLI/2009/issue1/swepston1.html>
[<https://perma.cc/6NRV-J7E7>].

256. UDHR, *supra* note 21, art. 23.

257. *Id.*, art. 2, 4, 7, 20.

258. The Human Rights Committee receives reports from state parties regarding their compliance with the ICCPR and addresses its concerns and recommendations to the state party in “concluding observations.” See *U.N. Human Rights Committee*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> [<https://perma.cc/P6V6-XTXS>].

259. ICCPR, *supra* note 21, art. 41.

260. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

labour rights.²⁶¹ Economic, social, and cultural rights entail positive obligations for state parties unlike the more negatively formulated ‘freedom rights’ of the ICCPR. The Covenant has been ratified by 166 UN member states and is the only international treaty outside the ILO context that contains a comprehensive catalogue of labour rights “based almost entirely on the experience of the ILO.” The ICESCR, like the ICCPR, has a complaint mechanism for individuals and groups.²⁶²

The ICESCR contains references to all the rights and principles enclosed in the Fundamental Conventions. In relation to the prohibition of forced labour, the Covenant refers to a right to work “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” in Article 6.²⁶³ Article 6, however, should not be understood as an “absolute and unconditional right to obtain employment.”²⁶⁴ Article 7 provides that all workers have the right to “equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”²⁶⁵ The central provision on freedom of association is Article 8, which contains the right to form and join trade unions. This right is “subject only to the rules of the organization concerned,” thereby safeguarding union independence, and provides an explicit recognition of the right to strike, though it has to be exercised “in conformity with the laws of the particular country.”²⁶⁶ Article 10 guarantees children protection, stating that

[c]hildren and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development

261. ICESCR, *supra* note 21, Part III.

262. Eibe Riedel, *Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights*, in *PROTECTING LABOUR RIGHTS AS HUMAN RIGHTS: PRESENT AND FUTURE OF INTERNATIONAL SUPERVISION: PROCEEDINGS OF THE INTERNATIONAL COLLOQUIUM ON THE 80TH ANNIVERSARY OF THE ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, GENEVA, 24-25 NOVEMBER 2006* 4 (George P. Politakis ed., 2007) [hereinafter Riedel].

263. ICESCR, *supra* note 21, art. 6(1).

264. CESCR Gen. Comment 18, *supra* note 65, at ¶ 6.

265. ICESCR, *supra* note 21, art. 7(a)(i).

266. *Id.*, art. 8(1).

should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.²⁶⁷

An essential counterpart of this provision is Article 13, on the right to education, which calls for free and compulsory primary education for everyone.²⁶⁸

Since the 2008 adoption of the Optional Protocol to the ICESCR, the Committee on Economic Social and Cultural Rights (CESCR), is competent to receive individual and group complaints regarding the violation of labour rights included in the Covenant.²⁶⁹ Pursuant to Article 11 of the Optional Protocol, the Committee can consider inquiries on grave or systemic violations of the rights in the Covenant, although state parties may opt out of this procedure. The Optional Protocol is the first international complaint mechanism outside the ILO to provide a procedure for violations of economic, social, and cultural rights, including the labour rights catalogue.²⁷⁰

The CESCR and the ILO CEACR have yearly meetings and closely follow each other's work. The CESCR regularly refers to the ILO's Conventions and recommends that state parties ratify them, and the ILO mechanisms and departments have "regularly provided the CESCR with valuable information on the realization of the core labour rights, as contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work."²⁷¹ Part III of the ICESCR and the rights contained in the Fundamental Conventions are inspired by one another and their respective supervisory bodies cooperate closely.

iii. Fundamental Labour Standards in Other Core Human Rights Treaties

A number of other core human rights treaties contain provisions that cover fundamental labour standards. The Convention on the Rights of the Child includes different provisions that deal with

267. *Id.*, *supra* note 21, art. 10(3).

268. ICESCR, *supra* note 21, art. 13(3).

269. G.A. Res.A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008).

270. Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AMERICAN U. INT'L L. REV. 441, 443 (2011).

271. Riedel, *supra* note 262, at 4–5.

the issue of child labour and forced labour. Article 33 and 34 deal with the use of children in drug trafficking, prostitution, and pornographic performance.²⁷² Article 32 is the central provision on work related rights and covers minimum age, appropriate working time, education, and protection from exploitation.²⁷³

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW) contains a specific provision on forced labour in Article 11, which is similar to ILO provisions on compulsory labour.²⁷⁴ Freedom of association and the right to form trade unions is also protected under the ICMW and is especially important for this often particularly vulnerable group of workers.²⁷⁵ Article 25 provides for equal treatment in employment and occupation for migrant workers and their family members. A general prohibition of discrimination can be found in Article 7.²⁷⁶

The 1979 *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) also refers specifically to the prohibition of discrimination in employment and occupation.²⁷⁷ Article 11 paragraph 1 deals with equal treatment in the context of the right to work, employment opportunities, free choice of profession, equal remuneration, social security and health and safety.²⁷⁸ Paragraph 2 covers discrimination in relation to pregnancy and maternity.²⁷⁹

In the *Convention on the Rights of Persons with Disabilities* (CRPD) discrimination in relation to employment is covered in Article 27—the central provision on work and employment—which also contains rules on trade union rights and a specific prohibition of forced labour.²⁸⁰ Finally, the *International Convention on the Elimination of*

272. Convention on the Rights of the Child, *supra* note 104, art. 33–4.

273. *Id.*, art. 32.

274. International Convention for the Protection of the Rights of All Migrant Workers and Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3, art. 11(2) (entered into force July 1, 2003) [hereinafter ICMW].

275. *Id.*, art. 26.

276. *Id.*, art. 25 and art. 7.

277. General Survey 2012, *supra* note 4, ¶ 29.

278. CEDAW, *supra* note 168, art. 11(1).

279. *Id.*, art. 11(2).

280. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, G.A. Res. 61/106, U.N. GAOR, 61st Sess. Supp. No.49, U.N. Doc. A/RES/61/106 (entered into force May 3, 2008) [hereinafter CRPD]; Optional Protocol to the Convention on the Rights of Persons with Disabilities,

All Forms of Racial Discrimination (ICERD) contains a definition of discrimination modelled after the provisions of Convention No. 111.²⁸¹ The rights to freedom of peaceful assembly and association, to free choice of employment, and to equal pay for equal work are included in Article 5.²⁸²

Supervision of the standards included in these core human rights treaties is left to specific treaty-based bodies, but also more generally to the charter based bodies: the Human Rights Council and its subsidiary bodies, the Advisory Committee, the Universal Periodic Review, the Complaint Procedure, and the Special Procedures.²⁸³ Charter-based supervision is not based on specific binding treaty obligations, but on provisions in the Charter of the United Nations.²⁸⁴ Treaty based bodies have a limited mandate and are attached to specific treaties.²⁸⁵

The CRC is supervised by the Committee on the Rights of the Child which may receive individual complaints—in the form of a communication or inquiry procedure—about states that have ratified its third optional protocol.²⁸⁶ The Committee on Migrant Workers monitors the ICMW and makes recommendations following state reports. Its individual complaint mechanism has not yet entered into force, but an inter-state complaint procedure is enshrined in Article

opened for signature Mar. 30, 2007, G.A.Res. 61/106, U.N. GAOR, 61st Sess. Supp. No.49, U.N. Doc. A/RES/61/106, art. 27(2) (entered into force May 3, 2008).

281. General Survey 2012, *supra* note 4, ¶ 29. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, art. 1, S. Exec. Doc. C, 95-2 (entered into force Jan. 4, 1969) [hereinafter CERD].

282. CERD, *supra* note 281, art. 5(d)(ix). 5(e)(i)—(ii).

283. Charter based bodies derive their legitimacy from the U.N. Charter. *Human Rights Bodies*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [<https://perma.cc/6SQM-WHMJ>].

284. *U.N. Documentation: Human Rights*, DAG HAMMARSKJÖLD LIBRARY, <https://research.un.org/en/docs/humanrights/charter> [<https://perma.cc/8WHW-JFEY>].

285. For an overview of the treaty and charter-based bodies in relation to the ILO supervisory system, see ILO Freedom of Association Report, *supra* note 226, Appendix I, ¶¶ 5–84.

286. G.A. Res. 66/138, Optional Protocol to the Convention on the Rights of the Child, *opened for signature* Dec. 19, 2011, G.A. Res. 66/138, U.N. Doc. A/RES/66/138 (entered into force Apr. 14, 2014).

92.²⁸⁷ The Committee on the Elimination of Discrimination against Women has a functioning individual or group complaint mechanism for states that ratify its optional protocol, which has led to a substantial body of recommendations.²⁸⁸ Under Article 29 of the CEDAW, there is also an inter-state complaints procedure.²⁸⁹ The CRPD is supervised by the Committee on the Rights of Persons with Disabilities, which has a mandate to consider individual complaints provided that states have ratified its optional protocol.²⁹⁰ Finally, the ICERD, supervised by its Committee on the Elimination of Racial Discrimination, establishes three mechanisms for monitoring: the examination of individual complaints, the examination of inter-state complaints, and an early warning procedure.²⁹¹ All of the treaty-based bodies have a regular reporting mechanism and a special rapporteurship to complement their supervisory functions.

UN Human Rights Treaties contain many provisions covering the fundamental labour standards.²⁹² The UN Human Rights Bodies cooperate closely, and this dialogue improves coherence in the interpretation and application of the standards. As a part of the UN framework, the ILO participates in this dialogue. The supervisory mechanisms of the core human rights treaties are similar to the ILO's system, in that they contain non-binding procedures for examining possible violations of fundamental labour standards among other

287. The individual complaint mechanism will become operative when ten States parties have made the necessary declaration under Article 77 of the Convention. *Human Rights Bodies - Complaints Procedures*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> [<https://perma.cc/XL2M-7LS8>].

288. Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* Dec. 10, 1999, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (entered into force Dec. 22, 2000).

289. CEDAW, *supra* note 168, art. 29.

290. Optional Protocol to the Convention on the Rights of Persons with Disabilities, *supra* note 280, art. 1.

291. *Committee on the Elimination of Racial Discrimination*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx> [<https://perma.cc/UM2P-B2E6>].

292. Fundamental labour standards are also included in regional human rights instruments, such as the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights. A survey of these regional instruments falls outside the scope of this study.

rights.²⁹³ They also differ substantially: the ILO's system is more complex and, to a large extent, organized in a tripartite way. The ICESCR contains the most elaborate catalogue of fundamental labour standards outside the ILO Conventions; most human rights treaties, in contrast, refer to one or more fundamental standards and clearly aim to protect specific vulnerable groups of workers.

iv. Free Trade Agreements

Free Trade Agreements (FTAs)²⁹⁴ serve as another important source of fundamental labour standards. FTAs are reciprocal treaties between two or more states about trade. While they are not obvious sources of labour rights—FTAs seek to reduce trade barriers, such as tariffs and quotas—they may include a so-called “social clause,” which is essentially a provision or section on labour rights.²⁹⁵ Many bilateral and multilateral FTAs exist, and different studies have examined the role and effectiveness of labour standards in FTAs.²⁹⁶ The inclusion of fundamental labour standards in FTAs is particularly relevant, since dispute procedures regarding the application of included labour provisions may lead to economic sanctions.²⁹⁷ The next paragraph

293. At the regional level, institutions such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights are mandated to issue binding decisions about violations of their respective treaties.

294. As opposed to preferential, unilateral trade arrangements. *See Regional trade agreements and preferential trade arrangements*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm [<https://perma.cc/9RB5-MKA3>].

295. Jean-Michel Servais, *International Labour Law*, in INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUS. RELATIONS, ¶ 35 (Wolters Kluwer eds., 2017).

296. *See, e.g.*, Francesco Giumelli & Gerda van Roozendaal, *Trade agreements and labour standards clauses: Explaining labour standards developments through a qualitative comparative analysis of US free trade agreements*, 17 GLOBAL SOC. POL'Y 38, 38 (2017) (arguing that “FTAs do not play a determinant role in improving labour standards in signatory states”); Pablo Lazo Grandi, *Trade Agreements and their Relation to Labour Standards: The Current Situation*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., Issue Paper No. 3, 2009, at 1 (examining how trade agreements have led to “pragmatic [labour] solutions” that advance the “international trade agenda”); Cleopatra Doumbia-Henry & Eric Gravel, *Free trade agreements and labour rights: Recent developments*, 145 INT'L LAB. REV. 185, 186 (2006) (discussing “the emergence and growing use of labour clauses in free trade agreements”).

297. Agusti-Panareda et al., *supra* note 1, at 379.

provides a brief introduction to this topic and gives some examples of how labour standards may be included and applied in the framework of (regional) FTAs.

Social clauses incorporate minimum labour standards in trade agreements in order to prevent unfair competition in the field of labour rights, or the so-called race to the bottom.²⁹⁸ If all states that are part of the agreement uphold a minimum floor of workers' rights, these agreements can prevent "social dumping,"²⁹⁹ correct poor practices, and generally improve the lives of workers by making the process of globalization more fair.³⁰⁰ However, imposing the same standards on states with highly divergent levels of economic development may not always be feasible. Furthermore, some have regarded the introduction of social clauses as veiled protectionism.³⁰¹ Especially interesting in this respect are the discussions in the framework of the World Trade Organization (WTO), where developing countries fiercely opposed social clauses in General Agreement on Tariffs and Trade (GATT)/WTO regulation.³⁰²

298. Servais, *supra* note 295, ¶ 35.

299. Although there is no accepted legal definition, social dumping generally refers to the practice of employers seeking cheaper labour by either employing workers from low wage countries in high wage countries or relocating production to less-regulated countries with lower wages. *See Understanding social dumping in the European Union*, EUR. PARLIAMENT THINK TANK, (Mar. 21, 2017), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BR I\(2017\)599353](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BR I(2017)599353) [<https://perma.cc/V9YN-CQS4>].

300. Dombia-Henry & Gravel, *supra* note 296, at 189. *But see* Giumelli & van Roozendaal, *supra* note 296, at 56 (explaining in their comparative study of 19 US FTAs that "stricter agreement conditions are not correlated with labour standards improvement").

301. Servais, *supra* note 295, ¶ 36.

302. The idea of linking trade and labour in WTO dispute resolution was directly debated at the 1996 Singapore Ministerial Conference, with WTO members ultimately declaring: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them." *A Difficult Issue for Many WTO Member Governments*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm [<http://perma.cc/X99F-N78L>]. The 2001 Doha Declaration reaffirmed that the WTO considers the ILO to be the sole organization responsible for enforcing labour standards. *Id.* ("Labour standards are not subject to any WTO rules or disciplines at present . . . [and] it seems unlikely that the issue will be taken up in any official way at the Doha Ministerial Conference.").

Generally, social clauses in FTAs add value through their binding grievance mechanisms. States are under no obligation to ratify ILO standards, and more importantly, the ILO system has little to no power to impose binding sanctions for violations of labour standards.³⁰³ FTAs, however, often have binding grievance mechanisms, which can serve as a conduit to enforce labour standards through their dispute settlement procedures.³⁰⁴ Social clauses are more and more accepted in FTAs, and they may take the form of separate agreements and various types of clauses with varying scope.³⁰⁵ Generally, all recent bilateral agreements include references to ILO standard setting and the majority of them refer to the 1998 Declaration and its fundamental principles and rights.³⁰⁶ Nevertheless, only about one-fifth of FTAs that include labour provisions refer specifically to ILO Conventions.³⁰⁷ The increase in references to ILO instruments can be seen as “a first step toward greater coherence between trade agreements and the ILO’s labour standards system.”³⁰⁸ However, in order to genuinely implement the fundamental labour standards through FTAs, their dispute resolution systems have to be equipped to apply those norms consistently and accurately.

It is far beyond the scope of this study to review all the different FTAs. As such, a number of examples of fundamental labour standards in some well-known, controversial, and recent regional FTAs are provided to clarify the complexity of implementing fundamental labour rights through FTAs.³⁰⁹

The North American Free Trade Agreement (NAFTA) and its “supplementary labor pact,” the North American Agreement on Labor Cooperation (NAALC) between the US, Canada and Mexico, are often mentioned as the earliest examples of regional FTAs including labour standards.³¹⁰ The NAALC contains a three-tier system for

303. Servais, *supra* note 295, ¶ 45.

304. Doumbia-Henry & Gravel, *supra* note 296, at 192.

305. Lazo Grandi, *supra* note 296, at 33.

306. *Id.* at 34.

307. Agusti-Panareda et al., *supra* note 1, at 355.

308. *Id.* at 379.

309. For a thorough review on ILO standards and different models to address those used in bilateral instruments, see Lazo Grandi, *supra* note 296, at v.

310. See Lance Compa, *From Chile to Vietnam: International Labour Law and Workers’ Rights in International Trade*, in *CRITICAL LEGAL PERSPECTIVES ON GOVERNANCE: LIBER AMICORUM* DAVID M. TRUBEK 150 (Gráinne de Búrca et al. eds., 2013); B.A. HEPPLER, *LABOUR LAWS AND GLOBAL TRADE* 107 (2005) (describing

implementing measures in cases of violations of its labour standards and refers to all four fundamental labour rights.³¹¹ Under the first category in NAALC, an arbitral panel can impose sanctions for a non-resolved pattern of violations of standards related to children and young persons.³¹² Forced labour and non-discrimination matters fall in a second level and may be reviewed by an Evaluation Committee of Experts, which may issue non-binding recommendations.³¹³ The lowest level includes the right to organize, bargain collectively, and the right to strike. Noteworthy—and from a democratic perspective, perhaps undesirable—is the fact that no independent review mechanisms are included for violations of these lower-tier standards.³¹⁴ NAFTA and NAALC do include a sanction mechanism for violations of labour standards, but only for a limited number of them. It does include all four fundamental labour standards, but does not refer to them as such, since the agreements were created before the adoption of the 1998 Declaration.

More recent large regional FTAs—concluded or under negotiation—are the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the Transatlantic Trade and Investment Partnership (TTIP), and the Trans-Pacific Partnership (TPP), which has been replaced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP).

CETA was concluded between the European Union (EU) and Canada on 21 September 2017 and contains a separate chapter on trade and labour.³¹⁵ Article 23.3 contains the substantive labour standards and states that the parties commit to respect, promote, and

the NAALC as the “first-ever trade agreement to make a significant link between trade and labour rights.”). However, the European Union’s predecessor, the European Coal and Steel Community, contained a social clause in its founding treaty in 1951. *See Treaty Establishing the European Coal and Steel Community*, tit. 3, Apr. 18, 1951. This inclusion reflects the reality that European integration, social and economic interests have long been intertwined. Although a discussion of European labour law is beyond the scope of this Article, for more information *see* Servais, *supra* note 295, ¶¶ 39–40.

311. North American Agreement on Labor Cooperation, *opened for signature* Sept. 8, 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

312. *Id.* art. 29; *see also* Alston, *supra* note 23, at 500 (describing various NAALC-based implementation measures).

313. NAALC, *supra* note 311, arts. 23–26; Alston, *supra* note 23, at 500.

314. Alston, *supra* note 23, at 500.

315. Comprehensive Economic and Trade Agreement, Can. EU, Oct. 30, 2016, O.J. (L 11) ch. 23 (entered into force Sep. 21, 2017).

realize protection for the fundamental principles and rights at work. It also lists the four fundamental labour standards. Chapter 23 contains different provisions for monitoring and enforcing these standards. Under CETA, parties may request consultations with the other party under Article 23.9 and may request further discussion in the Committee on Trade and Sustainable Development. If the consultation process is not satisfactory, a Panel of Experts may be convened to examine the matter under Article 23.10. The Panel's final report is to serve as the basis for a mutually agreed solution. If none is found, Article 23.11 provides that the Panel of Experts' procedure can entail binding and enforceable dispute settlement.

The TPP became defunct when the United States withdrew its signature in 2017 and was replaced by the CPTTP, which contains most of the provisions of the TPP. The CPTTP has been signed on March 8, 2018 by thirteen countries in the Pacific region. It incorporates the labour chapter of the TTP by reference. Article 19.1 contains:

the following internationally recognised labour rights:
(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour, a prohibition on the worst forms of child labour and other labour protections for children and minors; (d) the elimination of discrimination in respect of employment and occupation; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.³¹⁶

A Labour Council will consider matters related to labour, and, similar to CETA, the establishment of a Panel may be requested to consider the dispute.³¹⁷ If the process under the Labour Chapter does not lead to a "mutually satisfactory resolution of the matter,"³¹⁸ recourse to the general dispute settlement process under Chapter 28 is available,

316. Trans-Pacific Partnership, Feb. 4, 2016, art. 19.3, (entered into force Dec. 30, 2018).

317. *Id.* art. 19.15, ¶ 9.

318. *Id.* art. 19.15, ¶ 8.

which may lead to “trade sanctions or monetary compensation.”³¹⁹ The CPTTP, just like CETA, contains all fundamental labour standards as well as a review, consultation, and dispute settlement procedure that can lead to binding decisions and sanctions.

Negotiations on the Transatlantic Trade and Investment Partnership between the United States and the EU are frozen under the current U.S. administration, although the process has not been formally stopped. While there is no final text, the EU has proposed including a chapter on trade and sustainable development, which would include elaborate references to the ILO’s fundamental labour standards and references to the Decent Work Agenda and the 2008 ILO Declaration on Social Justice for a Fair Globalisation.³²⁰ Heavy criticism of the proposed Investor State Dispute System (ISDS), whereby individual companies could sue member countries for imposing discriminatory regulation, resulted in a new EU proposal for the establishment of an Investment Court System (ICS).³²¹ In order to improve transparent adjudication, the ICS would consist of publicly appointed judges and would be comprised of an Investment Tribunal and an Appeals Tribunal.³²² If the TTIP is concluded, it is expected that the protection of fundamental labour standards will be well-guarded, since all EU member states have ratified the ILO Core Conventions and the European Commission’s standard approach to trade agreements involves promoting ratification and implementation of the Fundamental Conventions.³²³

In addition to the examples described above, most bilateral, multilateral, or regional FTAs contain references to the fundamental labour standards.³²⁴ Furthermore, they contain diverse monitoring and

319. *Id.* art. 28.20; see *What does the CPTTP mean for labour?*, GOV’T OF CAN., <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/sectors-secteurs/labour-travail.aspx?lang=eng> [https://perma.cc/V2CZ-2XH9].

320. EUR. PARLIAMENT THINK TANK, *TTIP AND LABOUR STANDARDS*, at 38 (2016) [hereinafter *TTIP and Labour Standards Study*].

321. Aneta Tyc, *Workers’ Rights and Transatlantic Trade Relations: The TTIP and Beyond*, 28 *ECON. & LAB. REL. REV.* 113, 123 (2017).

322. EUROPEAN COMM’N, *Factsheet on Investment Protection in TTIP*, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf [https://perma.cc/DN3E-ZFEW].

323. *TTIP and Labour Standards Study*, *supra* note 320, at 7.

324. Furthermore, unilateral procedures such as the Generalized System of Preferences also contain references to the ILO’s Fundamental Conventions; see

dispute settlement mechanisms in cases of alleged violations of the labour standards. This way FTAs may supplement the ILO's 'soft' supervisory system of dialogue and recommendations with a system that can impose 'hard' binding sanctions.³²⁵ For this to happen, coherence among the different conflict settlement procedures and consistent application of the fundamental standards is necessary. The ILO may be well placed to assist in this matter, by providing technical assistance, advice, and even by facilitating the resolution of disputes.³²⁶ While many (especially neo-liberal economists) regard labour standards as "unrealistic or impractical,"³²⁷ economic and social considerations do not have to conflict with each other. As Doumbia-Henry and Gravel remark: "In an environment that promotes democracy and market-oriented economies, as FTAs are intended to do, there is no trade-off between labour rights and development; indeed, they are mutually reinforcing."³²⁸

2. Voluntary Public Sources

A number of instruments, created by international public institutions but of a non-binding, voluntary nature, are particularly relevant to examine in relation to fundamental labour standards. These are instruments that deal with the theme of "business and human rights." The link between the corporate world and human rights is perhaps most evident in the field of labour standards and the "world of work."³²⁹ Additionally, the business and human rights discourse serves as a channel between fundamental labour standards and other human rights norms, facilitating a closer integration of both. Considering that human rights obligations are primarily obligations for nation states, opposition to a binding instrument in this area has been fierce. States exercise legislative authority, possess coercive powers and have the monopoly on violence. They can detain their

Servais, *supra* note 295, ¶¶ 60–61 (for example, the American Generalized System of Preferences statute can reduce the economic advantages America gives to other countries if they do not comply with minimum workers' rights).

325. *Id.* ¶ 59.

326. Agusti-Panareda et al., *supra* note 1, at 371.

327. Alston, *supra* note 23, at 471.

328. Doumbia-Henry & Gravel, *supra* note 296, at 204.

329. Referring to the flagship publication of the ILO, the "World of Work Report," which was replaced in 2015 by a new annual series, the "World Employment and Social Outlook." See *World of Work Report*, INT'L LABOUR ORG. (2019), <https://www.ilo.org/global/research/global-reports/world-of-work/lang--en/index.htm> [<https://perma.cc/9EET-QHJ3>].

citizens and levy taxes on them; they are therefore quite different from multinational enterprises and other non-state actors such as international organizations and NGOs.

Nevertheless, some companies may be very powerful—more powerful than certain states—and may violate workers’ rights and human rights on a large scale. Since the 60s and 70s, a growing awareness and change in public opinion has led to a number of voluntary public standards that aim to regulate corporate behaviour in an international setting. Some relevant standards are inspected in this section: the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the UN Guiding Principles on Business and Human Rights. Furthermore, this section examines two somewhat different tools that deal with fundamental labour rights and *inter alia* corporate actors on a very general level: the UN Global Compact and the UN 2030 Agenda for Sustainable Development.³³⁰ While a binding treaty on “Transnational Corporations and Other Business Enterprises with respect to human rights” is being drafted,³³¹ and on the domestic level there are some hard law initiatives for holding business accountable for labour rights violations throughout their supply-chains,³³² the

330. *Home*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/> [<https://perma.cc/2DGG-CCC3>]; 2030 Agenda for Sustainable Development, *supra* note 92.

331. *Binding Treaty*, BUSINESS & HUMAN RIGHTS RESOURCE CTR., <https://www.business-humanrights.org/en/binding-treaty> [<http://perma.cc/E5WM-736K>]; Mariëtte van Huijstee, *International Law Lags Behind Economic Reality*, CTR. FOR RES. ON MULTINATIONAL CORPS. (SOMO) (May 7, 2018), <https://www.somo.nl/international-law-lags-behind-economic-reality/> [<https://perma.cc/VGC2-3AWZ>].

332. *E.g. The California Transparency in Supply Chains Act*, OFFICE OF THE ATTORNEY GEN., CA DEP’T OF JUSTICE, <https://oag.ca.gov/SB657> [<https://perma.cc/W2S9-B26X>]; BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, FIRST YEAR OF FTSE 100 REPORTS UNDER THE UK MODERN SLAVERY ACT 2015: TOWARDS ELIMINATION? (2017), https://www.antislaverycommissioner.co.uk/media/1189/first-year-of-ftse-100-reports-under-the-uk-modern-slavery-act_towards-elimination.pdf [<https://perma.cc/M27B-FY9W>]. *See also* Cassidy Slater, *How the French are Tackling Modern Slavery*, HUMAN RIGHTS FIRST (Mar. 24, 2017), <https://www.humanrightsfirst.org/blog/how-french-are-tackling-modern-slavery> [<https://perma.cc/AN7V-PNWB>]; *Initiative proposal for the Kuiken Child Labor Duty to Care Act*, DUTCH FIRST CHAMBER OF PARLIAMENT (last updated Apr. 23,

voluntary track is still currently the only way that the international field regulates the human rights responsibilities of corporations.³³³

i. The OECD Guidelines for Multinational Enterprises

The OECD started out in 1961 with the aim of stimulating economic progress and world trade. It currently has 36 member states and includes countries such as Mexico, South Korea, Australia, and Japan. Often called a ‘rich man’s club,’ the OECD focuses on research, cooperation, and policy coordination in order to “improve the economic and social well-being of people around the world,” and claims a commitment to “market economies backed by democratic institutions.”³³⁴

In 1976 the OECD created its “Guidelines for Multinational Enterprises,” which contain recommendations by member states to transnational corporations that operate within or from countries that adhere to the guidelines. The Guidelines contain “non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”³³⁵ They were amended in 2011 to include a chapter on human rights and to bring the Guidelines more in line with the highly relevant UN Guiding Principles on Business and Human Rights (UNGPs), discussed below. Chapter V of the Guidelines deals with “Employment and Industrial Relations,” and the first provision of that chapter includes the four fundamental standards. The Guidelines thus state that enterprises should respect the right to form and join trade

2019), https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken [<https://perma.cc/QXS5-BB54>].

333. See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014); An earlier attempt—the “Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”—was a failure because it sought to establish a binding treaty that proposed basically the same obligations for TNCs as for States. Economic and Social Council, Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).

334. *About the OECD*, ORG. FOR ECON. CO-OPERATION & DEV. (2018), <http://www.oecd.org/about/> [<https://perma.cc/Z3MZ-XHXR>].

335. Org. for Econ. Co-operation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises*, at 3 (2011) [hereinafter OECD Multinational Guidelines].

unions and the right to collective bargaining. They also state that enterprises should contribute to the abolition of child labour and forced labour. Finally, Chapter V states that enterprises should be guided by the “principle of equality of opportunity and treatment in employment,” and should abstain from discrimination against their workers.³³⁶

Besides these explicit and prominent references to the fundamental standards—also included in the detailed commentary that follows the provisions³³⁷—the Guidelines contain a number of other employment related provisions. These cover: facilities and information necessary for collective bargaining; promotion of consultation and cooperation; the application of standards that are “not less favourable” than those observed in the host country; the preferred use of local workers; reasonable notice and consultation in cases of collective dismissals; and abstaining from threats to transfer workers or units during negotiations, or while workers are exercising their right to organise.³³⁸ All of these standards aim to protect and enable workers in developing countries when foreign multinationals invest in their countries. The Guidelines do not set new standards, but instead serve to promote the application of the ILO’s instruments.³³⁹

The supervision of the OECD Guidelines is entrusted to the Investment Committee. Two of the committee’s main objectives include “promoting responsible business conduct world-wide, including in a globalising economy by supporting a multi-stakeholder proactive agenda,” and “promoting understanding, awareness, use, and, where appropriate, adherence to the Committee’s flagship investment instruments and policy tools”—including the Guidelines.³⁴⁰

The innovative part of the Guidelines is that countries adhering to them are obliged to install a National Contact Point (NCP). A NCP is a conflict settlement body stationed at the domestic level. NCPs are mandated to promote adherence to the Guidelines and

336. *Id.* at 35, ¶ 1.

337. *Id.* at 37–39, ¶¶ 47–54.

338. *Id.* at 35–37, ¶¶ 2–7.

339. Beryl ter Haar, *supra* note 6, at 83.

340. Org. for Econ. Co-operation & Dev. [OECD], *Resolution of the Council Revising the Mandate of the Investment Committee*, Res. C(2013)86, Annexe and C/M(2013)17, item 174, b, at A.I.b (ii), (v), <https://oecdgroups.oecd.org/Bodies/ShowBodyView.aspx?BodyID=7232&BodyPID=11628&Lang=en&Book=https://perma.cc/NAY9-M9ND>].

handle so-called “specific instances”—complaints about alleged breaches of the Guidelines.³⁴¹ This mechanism aims to resolve conflicts through mediation and conciliation and has led to a considerable body of ‘quasi-jurisprudence’ on the application of the Guidelines.³⁴² Another vital component of the 2011 version of the Guidelines is the provision stating that enterprises should conduct risk-based due diligence to “identify, prevent and mitigate actual and potential adverse impacts” and “account for how these impacts are addressed.”³⁴³ Importantly, the enterprise should also prevent and mitigate adverse impacts caused by an entity directly linked to the enterprise’s “operations, products or services by a business relationship,”³⁴⁴ and should encourage suppliers, business partners, and subcontractors to apply these same principles of responsible business conduct.³⁴⁵ In this way, the Guidelines—and further OECD guidance³⁴⁶—contain an innovative system for promoting responsible business conduct with respect to *inter alia* fundamental labour standards, which are integrated into broader international law. They play a promotional role by directly calling upon transnational corporations to respect fundamental labour

341. *National Contact Points (NCPs)*, OECD WATCH, <https://www.oecdwatch.org/oecd-guidelines/ncps> [<https://perma.cc/D7FW-9YWQ>].

342. Paul F. van der Heijden, *De ILO en het Nederlandse Arbeidsrecht* [The ILO and Dutch Labour Law], ARBEIDSRECHTELIJKE ANNOTATIES, at (12)1, 3, 14–16, ¶ 9 (2018); see also *Database of Specific Instances*, ORG. FOR ECON. CO-OPERATION & DEV. (2018) <http://mneguidelines.oecd.org/database/> [<https://perma.cc/YNL6-EMBR>].

343. OECD Multinational Guidelines, *supra* note 335, at 20, ¶ 10.

344. *Id.* at 20, ¶ 12.

345. *Id.* at 20, ¶ 13. For a revealing case on the complexities of due diligence requirements in the framework of the OECD Guidelines, see *OECD National Contact Point, South Korea: Initial Assessment by Korean National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises*, Korean NCP KTNCW et al. v Daewoo International et al, 7 July 2015, in 2 INTERNATIONAL LABOR RIGHTS CASE LAW 209, 209–15 (Brill Nijhoff 2016) and Ana Virginia Moreira Gomes, KTNCW et al. v Daewoo International: *A Missed Opportunity*, in 2 INTERNATIONAL LABOR RIGHTS CASE LAW 216, 216–20 (Brill Nijhoff 2016) (accompanying commentary).

346. See e.g., Org. for Econ. Co-operation & Dev. [OECD], OECD Due Diligence Guidance for Responsible Business Conduct (2018); Org. for Econ. Co-operation & Dev. [OECD], OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2017); Org. for Econ. Co-operation & Dev. [OECD], OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2d ed. 2013).

standards, and by directly referring to the ILO Conventions.³⁴⁷ The next voluntary instrument, created in the framework of the ILO, has also been recently updated and is linked to the UNGPs and other international instruments.

ii. The ILO MNE Declaration

Similar to the OECD Guidelines, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the MNE Declaration) was adopted in response to growing international attention in the 60s and 70s toward the conduct of companies in the developing world.³⁴⁸ As is the case with most ILO instruments, the MNE Declaration was adopted through a tripartite process in which governments, employers' organizations, and workers' organizations participated. The Declaration is mainly addressed to enterprises and governments (although it also addresses workers' and employers' organizations) and covers a broad array of issues related to labour standards and social policy.

Many see the MNE Declaration as highly necessary in the context of foreign direct investment, trade, and global supply chains. This is especially true considering the "continued prominent role of multinational enterprises in the process of social and economic globalization,"³⁴⁹ and is based on the principles contained in the ILO's Conventions and the ILO Declaration on Fundamental Principles and Rights at Work. The MNE Declaration provides guidance on how enterprises "can contribute through their operations worldwide to the realization of decent work."³⁵⁰ It was modified quite recently, in March 2017, in light of broader international developments such as the ILO Declaration on Social Justice for a Fair Globalization, the UNGPs, the Sustainable Development Goals, the Paris climate agreement, and the

347. Jean-Marc Thouvenin, *Diffusion and Leveraging of Transnational Labour Norms by the OECD*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 385, 393 (Adelle Blackett & Anne Trebilcock eds., 2015).

348. Int'l Labour Organization [ILO], *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2017) [hereinafter ILO MNE Declaration].

349. *Id.* at v.

350. *What Is The ILO MNE Declaration?*, INT'L LABOUR ORG., http://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm [https://perma.cc/QL7R-MDVF].

(revised) OECD Guidelines.³⁵¹ As a result, the latest version of the Declaration is firmly embedded in the broader international regulatory context, and is modernized to include issues that may arise in global supply chains and in relation to the due diligence requirements of the UNGPs.³⁵² Furthermore, the revisions include issues related to grievance mechanisms and access to remedies, the transition from the informal to the formal economy, and concerns surrounding social security and wages.³⁵³

A central theme in the Declaration is the protection of fundamental labour standards. The Declaration reiterates the importance of the fundamental principles and rights at work and states that “[a]ll parties should contribute to the realization” of those.³⁵⁴ Each of the fundamental labour standards is covered in the MNE Declaration in a separate section and includes instructions for governments and enterprises. While the obligations of the state are very similar, if not identical, to those included in the Fundamental Conventions, the instructions devised for enterprises are more distinctive.

Governments are required to “take effective measures to prevent and eliminate forced labour, to provide to victims protection and access to appropriate and effective remedies”³⁵⁵ and should “provide guidance and support to employers and enterprises.”³⁵⁶ Enterprises, in their turn, should “take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations.”³⁵⁷ Similar provisions are included regarding the prohibition of child labour, where enterprises should: “respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour in their operations and should take immediate

351. ILO MNE Declaration, *supra* note 348, at 1.

352. *Id.* ¶ 10.

353. Int’l Labour Org. [ILO], Bureau for Workers’ Activities, *The ILO MNE Declaration: What’s in it for Workers?*, at 4 (2017) [hereinafter ILO MNE Declaration: What’s in it for Workers?].

354. ILO MNE Declaration, *supra* note 348, ¶ 9.

355. *Id.* ¶ 23.

356. *Id.* ¶ 24.

357. *Id.* ¶ 25.

and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour.”³⁵⁸

With respect to equal opportunity and treatment, governments should pursue policies to eliminate discrimination in employment and should promote the principle of equal remuneration for men and women for work of equal value.³⁵⁹ Enterprises should be guided by the principle of non-discrimination throughout their operations (without prejudice to certain affirmative action policies) and should therefore “make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels.”³⁶⁰

The rules laid down in Convention Nos. 87 and 98 are also contained in the MNE Declaration, in sections on freedom of association and the right to organize and bargain collectively.³⁶¹ Additionally, the Declaration stipulates that governments should ensure that incentives to attract foreign investment do not impede the right to freedom of association.³⁶² Enterprises should support representative employers’ organizations where appropriate, facilitate collective bargaining, and refrain from threats to transfer the undertaking.³⁶³

Besides topics that relate to fundamental labour standards, the MNE Declaration deals with employment promotion; social and employment security; wages, benefits and conditions of work; safety and health; consultation and access to remedies.³⁶⁴ To monitor the follow up of the MNE Declaration, the ILO used national reports and surveys.³⁶⁵

The ILO MNE Declaration of 2017 is much more detailed when it comes to labour rights and social policy, compared to the OECD Guidelines. It remains the only global instrument in the field of business and human rights that is adopted through tripartite decision-making.³⁶⁶ It contains detailed guidance for enterprises on how to

358. *Id.* ¶¶ 27.

359. *Id.* ¶¶ 28–29.

360. *Id.* ¶ 30.

361. *Id.* ¶¶ 48–63.

362. *Id.* ¶ 52.

363. *Id.* ¶¶ 50, 57, 59.

364. *See generally* ILO MNE Declaration, *supra* note 348.

365. Hendrickx et al., *supra* note 1, at 346.

366. ILO MNE Declaration: What’s in it for Workers?, *supra* note 353, at 9.

respect fundamental labour standards and encourages them to incorporate those standards in their regular business policies.³⁶⁷

However, its role is often seen as rather limited, since it lacks an effective supervisory mechanism—although it encourages the establishment of national focal points, a system somewhat comparable to the NCP's in the context of the OECD Guidelines³⁶⁸—and since its language lacks clarity.³⁶⁹ The most important instrument in the field of business and human rights—and one that is celebrated for its conciseness and clarity—is the framework of the UN Guiding Principles on Business and Human Rights.

iii. The UN Guiding Principles on Business and Human Rights

The 2011 adoption of the UN Guiding Principles on Business and Human Rights was considered a breakthrough in the field of assigning responsibilities to corporations in relation to human rights.³⁷⁰ Earlier attempts at creating a binding instrument had failed, and although negotiations on a binding instrument are currently taking place, the UNGPs remain the most widely supported (and certainly the most practical) framework. The UNGPs include the 'Protect, Respect, and Remedy Framework' finalized by John Ruggie after three years of extensive research in 2008.³⁷¹ The three elements of this framework are enshrined in the three main pillars of the UNGPs:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

367. Beryl ter Haar, *supra* note 6, at 82–83.

368. See ILO MNE Declaration, *supra* note 348, Annex II.1.b.

369. Paul F. van der Heijden, *supra* note 342, at 3–17, ¶ 9.

370. See Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, HR/PUB/11/04, (2011) [hereinafter U.N. Guiding Principles].

371. See Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008) [hereinafter Protect, Respect and Remedy].

- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.³⁷²

By means of this framework, the UNGPs clarify the duties and responsibilities of both states and corporate actors in dealing with human rights risks related to business activities.³⁷³ The innovative character of the UNGPs is that instead of providing a new normative framework, it elaborates—in a clear, concise, and workable manner—on the application of existing human rights standards.³⁷⁴ They consist of 31 principles, divided into ‘foundational’ and ‘operational’ categories, each followed by a short commentary that contains further guidance on their application.

The state’s duty to protect human rights abuses by corporations should be fulfilled by taking “[a]ppropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”³⁷⁵ The corporate duty to respect human rights includes the duty to “[a]void causing or contributing to adverse human rights impacts through their own activities...” but also the duty to “[p]revent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”³⁷⁶ Both states and non-state actors should establish effective grievance mechanisms (judicial and non-judicial) under the regime of the third pillar.³⁷⁷ Effectiveness of the non-judicial mechanisms is regarded as guaranteed if they are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.³⁷⁸

As mentioned, the UNGPs do not refer to specific rights obligations for enterprises, since:

372. U.N. Guiding Principles, *supra* note 370, at 1.
 373. Study on Implementation of the U.N. Guiding Principles on Business and Human Rights, Eur. Parl. Doc. EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/09, at 12 (2017).
 374. *Id.* at 13.
 375. U.N. Guiding Principles, *supra* note 370, at 3.
 376. *Id.* at 14.
 377. *Id.* at 27–35.
 378. *Id.* at 33–34.

[B]usiness can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that may turn out to be significant in a particular instance, thereby providing misleading guidance. At the same time, as economic actors, companies have unique responsibilities. If those responsibilities are entangled with State obligations, it makes it difficult if not impossible to tell who is responsible for what in practice.³⁷⁹

Nevertheless, the fundamental labour standards are explicitly mentioned in the UNGPs, which is remarkable but also understandable considering the intimate relation between workers' rights and business. The normative framework of the UNGPs is mentioned in Principle 12 and its following commentary:

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises.³⁸⁰

Foundational Principle 15 and operational Principles 16-24 provide detail the way in which corporations should observe and implement the UNGPs. Business enterprises should commit publicly to the principles in their policies and should implement processes to “[e]nable the remediation of any adverse human rights impacts they

379. Protect, Respect and Remedy, *supra* note 371, ¶ 6.

380. U.N. Guiding Principles, *supra* note 370, at 13–14.

cause or to which they contribute.”³⁸¹ The most progressive feature of the UNGPs is the requirement that companies should conduct a human rights due diligence process to “identify, prevent, mitigate and account for how they address their impacts on human rights.”³⁸² Both the OECD Guidelines and the ILO MNE Declaration have been amended accordingly to include this due diligence process in their structure. This process—which should be ongoing instead of a one-time activity—should also cover adverse impacts that are not caused directly by enterprises’ own activities, but are linked to their operations, products, or services.³⁸³

The UNGPs are a widely supported framework that requires corporate actors to investigate and remedy possible violations of fundamental labour standards in their own business and in their supply chains. The UNGPs’ plain and simple language makes them relatively easy to comprehend and apply, and corporations and states increasingly used them to implement ‘national action plans.’³⁸⁴ Regional entities such as the EU and the Organization of American States also undertake concrete measures to implement the UNGPs.³⁸⁵ In this way, the Guiding Principles are an important tool to monitor and protect fundamental labour standards internationally. Nevertheless, much is still unclear about how to effectively implement the UNGPs’ due diligence requirements with regard to labour standards into corporate structures.³⁸⁶ According to Anne Trebilcock, it is doubtful that “due diligence alone will effect significant change” if the challenges of creating operational procedures that align with human rights and ILO standards are not overcome.³⁸⁷ Two related

381. *Id.* at 15–16.

382. *Id.*

383. U.N. Guiding Principles, *supra* note 370, at 17–18. Also see the practical guidance on the implementation of a human rights due diligence process: HR/PUB/12/02, *The Corporate Responsibility to Protect Human Rights, An Interpretive Guide*, United Nations, New York and Geneva, 2012. OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*.

384. Study of the European Union Directorate-General for External Policies, *supra* note 373, at 20.

385. *Id.* at 15.

386. Anne Trebilcock, *Due Diligence on Labour Issues – Opportunities and Limits of the U.N. Guiding Principles on Business and Human Rights* 107, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* (Adelle Blackett & Anne Trebilcock eds.) (2015).

387. *Id.* at 107.

initiatives will be briefly examined in the following paragraphs: The UN Global Compact (UNGC) and the 2030 Agenda for Sustainable Development, better known as ‘the Sustainable Development Goals’.

iv. The UN Global Compact

The UN Global Compact—an initiative by former UN Secretary General Kofi Annan—was launched in 2000 as a leadership platform for the development, implementation, and disclosure of sustainable business practices and policies. It is a “call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.”³⁸⁸ Originally developed with an eye on the Millennium Development Goals, the UNGC is currently focused on the Sustainable Development Goals (SDGs), discussed next. UNGC participants are executives from large companies around the world; presently, 9,830 companies from 161 countries take part.³⁸⁹ The mission of the Compact is to support companies to “[d]o business responsibly by aligning their strategies and operations with ten Principles on human rights, labour, environment and anti-corruption” and to “[t]ake strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals, with an emphasis on collaboration and innovation.”³⁹⁰ The Global Compact aims to be the “translator” of the SDGs for business worldwide by focusing on translating best practices, impact, and progress into sustainable business action.³⁹¹ Participating companies must write an annual Communication on Progress (COP), which is a public disclosure to stakeholders. Failure to do so may result in a change of status or even expulsion from the Compact.³⁹² To date, Compact participants have published over 57,000 reports on the application of its principles.

388. *Who We Are*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/what-is-gc> [https://perma.cc/W99H-957B].

389. *Global Goals in Action*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/> [https://perma.cc/2DGG-CCC3].

390. *Our Mission*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/what-is-gc/mission> [https://perma.cc/T44Q-QDDT].

391. *Our Global Strategy*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/what-is-gc/strategy> [https://perma.cc/PPE9-4KYN].

392. For a list of expelled participants, see *Delisted Participants*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/participation/report/cop/create-and-submit/expelled> [https://perma.cc/M9B4-PU6M].

The ten principles to which the Compact adheres are derived from the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. The Compact's Principles 3 to 6 echo the ILO's terminology:

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.³⁹³

The Global Compact is a platform for the United Nations to engage effectively with some of the more progressive global businesses and also a way for international organizations to engage in dialogue with leading companies. Participants can engage in different activities such as trainings, meetings and workshops, webinars, and networking.³⁹⁴ While the fundamental labour standards are a central part of its principles, the Compact does not offer any additional guidance on how to apply and implement them. Through its network approach to promoting best practices on application of its principles and its close connection to the SDGs it can serve as a conduit for the dissemination of fundamental labour standards. The overarching framework of the Sustainable Development Goals will be the last initiative discussed in this section.

v. The 2030 Agenda for Sustainable Development

On September 25, 2015, the UN General Assembly adopted a resolution titled "Transforming our world: the 2030 Agenda for Sustainable Development."³⁹⁵ This ambitious document includes a global plan of action for people, planet, and prosperity, and builds on

393. *The Ten Principles of the U.N. Global Compact*, U.N. GLOBAL COMPACT (Feb. 17, 2019), <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/UZ9K-WT3M>].

394. Beryl ter Haar, *supra* note 6, at 85.

395. 2030 Agenda for Sustainable Development, *supra* note 92.

the Millennium Development Goals by proposing seventeen Sustainable Development Goals and 169 accompanying targets that should be achieved over the next fifteen years. These goals form a coherent whole and “balance the three dimensions of sustainable development: the economic, social and environmental.”³⁹⁶ The SDGs have universal application and do not just address governments or other public institutions but rather everyone, in order to “mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind.”³⁹⁷ Nevertheless, while all stakeholders, “governments, civil society, the private sector, and others, are expected to contribute to the realisation of the new agenda,”³⁹⁸ governments are expected to establish the necessary infrastructure to follow-up and review the implementation of the SDGs.³⁹⁹ Building and strengthening global partnerships and resources to effectively address these issues is essential to the SDGs’ purpose.⁴⁰⁰ The private sector is considered a major driver to solving these challenges in line with the UNPG and ILO’s international standards.⁴⁰¹

A number of the SDGs are relevant to workers’ rights and employment. Goal (1), “No poverty,” relates to paid work, as does Goal (2), “Zero hunger.”⁴⁰² Goals (3) and (4) on health and good quality education also have a clear link to the world of work. Furthermore, Goal (5) and (10) on reducing inequality relate directly to the fundamental standards on non-discrimination enshrined in

396. 2030 Agenda for Sustainable Development, *supra* note 92, at pmb1.

397. *The Sustainable Development Agenda*, U.N. SUSTAINABLE DEV. GOALS (Feb. 17, 2019) <https://www.un.org/sustainabledevelopment/development-agenda/> [<https://perma.cc/P8PT-HBTW>].

398. *Id.*

399. *Id.*

400. *See* 2030 Agenda for Sustainable Development, *supra* note 92, ¶ 62; *see also* G.A. Res. 69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), annex (July 27, 2015) (outlining policies and actions for revitalizing the global partnership for sustainable development).

401. 2030 Agenda for Sustainable Development, *supra* note 92, ¶ 67.

402. In this light, the close cooperation between the Secretary General of the ILO and the U.N. High Commissioner on Human Rights in achieving target 1.3 on implementing social protection worldwide is noteworthy. Press Release, ILO, Expand social protection to the 4 billion excluded (Oct. 25, 2018), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_647931/lang--en/index.htm [<https://perma.cc/W43F-S6HU>].

Conventions No. 100 and No. 111. However, the most relevant of the SDGs in relation to the ILO and fundamental labour standards is Goal (8), which aims to “[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.”⁴⁰³

In relation to Goal (8), a number of progressive targets cover important sections of the fundamental standards. Target 8.5 aims to achieve “full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value” by 2030, and Target 8.6 aims to substantially reduce youth unemployment by 2020.⁴⁰⁴

Target 8.7 calls for the immediate eradication of forced labour, human trafficking, and modern slavery.⁴⁰⁵ Furthermore, it contains the ambitious objective to “secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”⁴⁰⁶ Target 8.8 contains a general objective to protect labour rights and occupational health and safety, and specifically mentions female migrant workers as a particularly vulnerable group.⁴⁰⁷ The SDGs contain no specific target on the protection of freedom of association, although this is covered by the general goal of protecting labour rights in accordance with the standard-setting of the ILO.⁴⁰⁸

The SDGs contain an all-encompassing agenda for a sustainable future and are to serve as a catalyst for change. The fundamental labour standards have an important role in that sustainable future. In particular, the concrete and advanced targets on non-discrimination, forced labour, and child labour could lead to major improvements in these areas, taking into account the track record of their predecessors, the MDGs.

Each of the instruments reviewed here, instruments for ascribing responsibility to corporate actors for violations of fundamental labour standards, have been subject to criticism. Their voluntary nature and the lack of strong enforcement mechanisms

403. 2030 Agenda for Sustainable Development, *supra* note 92, at 14.

404. *Id.* at 19.

405. *Id.* at 20.

406. *Id.* at 20.

407. *Id.* at 20.

408. *Id.* at 20, 29.

mean that compliance is largely based on goodwill, peer pressure, and persuasion.

Nevertheless, there are also grounds for optimism. Transnational corporations are increasingly making use of international public guidance when their cross-boundary activities may impact labour standards. The OECD Guidelines system of National Contact Points provides a valuable source of information for companies on how to implement the guidelines and conduct due diligence. While the ILO MNE Declaration is not used as often, it does contain a comprehensive catalogue of labour rights and social policy objectives for corporations and states. The UN Global Compact is a valuable platform for building a network of progressive corporations but does not itself offer much concrete guidance on the implementation of the fundamental labour standards. The SDGs are not specifically addressed to corporations, but to everyone. Nevertheless, they contain ambitious targets for addressing child labour, forced labour, and inequalities.

Finally, the UNGPs are the most widely supported instrument for responsible business activities. They provide clear operational principles as well as a practical system of corporate due diligence and reporting. The UNGPs system has recently been incorporated in the ILO MNE Declaration and is also part of the OECD Guidelines. Such further integration is an important step towards generating a more coherent application of the standards in play and will make it easier for corporations to understand what is expected from them in terms of assessing and addressing the impact their action has on fundamental labour standards.

C. Private Sources: Voluntary and Binding

The last category of sources of fundamental labour standards includes instruments that are devised and implemented almost entirely by actors in the private sector. These instruments relate to what is often called “corporate social responsibility” (CSR). First, this section provides a survey of the development and content of voluntary codes of conduct, including a brief discussion of the concept of multi-stakeholder initiatives. These partnerships may also provide an effective way to safeguard core workers’ rights. Second, this section discusses global or international framework agreements (GFAs or IFAs), which have a more binding character and focus specifically on the protection of fundamental labour rights. These instruments have the potential to significantly increase the application of the ILO’s

fundamental standards. As Manfred Weiss forcefully argues, the ILO's machinery "needs to be complemented by the activities of private actors. Of the utmost importance in this context are the codes of conduct of MNEs, and even more important the IFAs concluded between MNEs and the GUF."⁴⁰⁹

1. Voluntary Private Sources

i. Codes of Conduct and Other CSR Instruments

Corporate codes of conduct function as ethical or semi-legal guidelines for (transnational) corporations. While the first of these codes were developed in the 1980s,⁴¹⁰ the 1990s and the early new millennium witnessed a substantial increase in their prevalence.⁴¹¹ The development of these codes resulted directly from the emergence of the concept of CSR. CSR is generally understood as the idea that sustainable business conduct should be about people (social concerns), planet (environmental concerns), and profit. Notably, the 2030 Agenda for Sustainable Development uses the term 'prosperity' instead of profit, which may be a more suitable description.⁴¹²

409. Weiss, *supra* note 7, at 19.

410. See Ingebjörg Darsow, *Implementation of Ethics Codes in Germany: The Wal-Mart Case*, IUSLABOR (2005), <https://www.upf.edu/documents/3885005/3888709/DarsowGermany.pdf/17405cfa-0f4e-494f-8839-d2252be6123b> [https://perma.cc/529X-YX4B] ("Worldwide interest in corporate conduct was initially awakened in the 1980s by scandals in the U.S. defense industry and on Wall Street. . . . Since then companies have viewed business ethics as a way of promoting self-regulation and deterring government intervention and regulatory action.").

411. Marcus Taylor, *Race you to the Bottom . . . and Back Again? The Uneven Development of Labour Codes of Conduct*, 16 NEW POL. ECON. 445, 448 (2011) ("Multinational corporations began to first embrace codes of conduct in the early 1990s as a reactive attempt to defuse the escalating attention of anti-sweatshop movements that sought to name and shame corporations owing to the prevalence of poor labour conditions and poverty-level wages across many supply chains.").

412. The ILO defines CSR as "a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law." Lou Tessier, *Corporate Social Responsibility and Social Protection*, ILO: SOCIAL PROTECTION (Dec. 6, 2015), <http://www.social-protection.org/gimi/ShowTheme.action?id=3445> [https://perma.cc/ZYD5-59YP].

Corporate codes of conduct have the potential to evolve into international corporate commitments that complement national law. Corporate codes may fill the gap between the level of protection afforded by labour standards in the host state and what the company sees—or is persuaded to see—as an acceptable level of protection.⁴¹³ The ILO states that, “[w]hile these codes are no substitute for binding international instruments, they play an important role in spreading the principles contained in international labour standards.”⁴¹⁴

Corporate codes not only establish labour standards, but also address environmental issues, human rights, ethical conduct guidance, good governance, and the rule of law. Transnational companies also use other tools for promoting CSR, including specific management standards, human rights and environmental risk assessments, supply chain monitoring systems, and stakeholder engagement processes.⁴¹⁵

The underlying motives for adopting these codes have been the topic of heated debate. While some may perceive corporate codes as an attempt to disarm a race to the bottom by providing “higher” labour standards at the company level, companies adopted the ‘first wave’ of these codes in the 1990s in reaction to the naming and shaming activities by activist movements highlighting exploitation, poverty level wages, and environmental destruction. Corporate codes provided “insulation against bad publicity.”⁴¹⁶ As such, they aimed to “force consumers to acknowledge wide ranging social considerations in their consumption decisions.”⁴¹⁷

Corporate codes may also be used in competition with other companies as a way to claim the moral high ground. In this sense, their purpose may also be to gain an increase in market share. As such, they can be and are used as a marketing tool.⁴¹⁸ A second wave of codes developed in the new millennium, this time as a more proactive

413. Zandvliet & van der Heijden, *supra* note 6, at 176.

414. Int'l Labour Org. [ILO], *How International Labour Standards Are Used*, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> [https://perma.cc/53YZ-F4K4].

415. See, e.g., *Sustainability Strategy Tools*, THE CSR GROUP, <http://www.thecsrgroup.com/index.php/tools-products/tools> [https://perma.cc/6WGT-7STD] (providing a tool for companies to “conduct a self-assessment of their sustainability and CSR performance”).

416. Taylor, *supra* note 411, at 448.

417. *Id.*

418. *Id.* at 449.

attempt to build brand reputation and claim a new market share by proclaiming ethical positions that reflect emerging consumer values.⁴¹⁹ Apart from promising a race back from the bottom, corporate codes also have become part of the competition strategy between multinational enterprises.⁴²⁰

Codes of conduct come in many forms and may differ considerably in their scope of application.⁴²¹ While the ILO's core standards have not been at the center of corporate code development,⁴²² in recent years there has been an increase in explicit references to fundamental labour standards in corporate codes.⁴²³ The ways in which the fundamental standards are incorporated, however, differ substantially.⁴²⁴ While inclusion of the ILO's standards and principles

419. *Id.* Examples include “fair trade chocolate,” “sustainable timber,” and “free range eggs.”

420. *Id.*

421. Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (U.N. Res. Inst. for Soc. Dev, Tech., Bus. and Soc'y Programme Paper, No. 2, Apr. 2001).

422. Alston, *supra* note 23, at 507.

423. Zandvliet & van der Heijden, *supra* note 6, at 177 (comparing a number of studies in the framework of the OECD, the UN, and the ILO).

424. See John G. Ruggie, *Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey* (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 28, 2006) (surveying the extent to which “human rights [are] gaining recognition in the corporate arena”). A thorough examination is beyond the scope of this study, but some examples are noted here: *Respect for Human Rights (For the ILO Core Labor Standards)*, MITSUBISHI, <https://www.mitsubishicorp.com/sg/en/about/philosophy/human-right.html> [<https://perma.cc/RC5H-YXH6>] (stating that Mitsubishi “supports all international norms and codes regarding human rights” including the ILO's labour standards); *The Nike Code of Conduct*, NIKE, https://sustainability-nike.s3.amazonaws.com/wp-content/uploads/2018/05/14214943/Nike_Code_of_Conduct_2017_English.pdf [<https://perma.cc/TC43-ZQEL>] (specifying the minimum labour standards Nike expects every facility to meet); *Supplier Code of Conduct*, PRIMARK, <https://m.primark.com/en/our-ethics/code-of-conduct> [<https://perma.cc/G9TU-JSR3>] (providing that the company's Ethical Trade and Environmental Sustainability Team audits every factory to ensure that international labour standards are met); *Labor Rights Chart*, ADIDAS, https://www.adidas-group.com/media/filer_public/2013/07/31/adidas_group_labour_rights_charta_may_2011_en.pdf (on file with the Columbia Human Rights Law Review) (explaining that Adidas policies are “consistent with core labour principles” of the ILO); *Sustainability Policy Framework*, RABOBANK, <https://www.rabobank.com/en/images/sustainability-policy-framework.pdf> [<https://perma.cc/YFS4-SNME>] (describing the company's sustainability standards).

is recommendable, Alston warns that the voluntary nature of these codes makes it easy for corporations to “attribute whatever content they choose to the principle, without any particular regard to ILO standards.”⁴²⁵ Much criticism arose out of the fact that corporate management unilaterally established codes of conduct addressing labour issues throughout their supply chains. In response to this, multi-stakeholder initiatives were developed—such as the Worker Rights Consortium, the Fair Wear Foundation, and the Ethical Trading Initiative—in which third parties monitor compliance with the standards.⁴²⁶

The model of these multi-stakeholder platforms⁴²⁷ contains three components: a standard-setting body, the formulation of clear standards—in the case of labour rights, usually those of the ILO—and a procedure for measuring the standards.⁴²⁸ The International Organization for Standardization (ISO) is a non-governmental organization that creates a wide variety of voluntary standards for industry to “support innovation and provide solutions to global challenges.”⁴²⁹ ISO has signed a memorandum with the ILO to ensure that social responsibility standards created by the ISO comply with ILO standards.⁴³⁰

Another recent and innovative development concerns the Dutch International Responsible Business Conduct Agreements (IRBC Agreements). These are sectoral CSR partnerships between businesses, the government, trade unions, and NGOs that aim to improve circumstances in a number of risk areas—including the environment, labour, and human rights—and that seek to provide solutions to problems in transnational business that corporations are

425. Alston, *supra* note 23, at 508.

426. Axel Marx & Jan Wouters, *Redesigning Enforcement in Private Labour Regulation: Will It Work*, 155 INT'L LAB. REV. 435, 438 (2016).

427. Other more general and well-known multi-stakeholder initiatives are developed in the framework of sustainable commodity use. Examples include the Forest Stewardship Council (FSC), the Round Table on Sustainable Palm Oil (RSPO), and the International Committee on Mining and Metals (ICMM).

428. Marx & Wouters, *supra* note 426, at 439.

429. *About ISO*, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> [<https://perma.cc/GB54-BXUM>].

430. Int'l Labour Org. [ILO], *International Organization for Standardization (ISO)*, https://www.ilo.org/empent/Informationresources/WCMS_101255/lang-en/index.htm [<https://perma.cc/99D4-UQAU>].

unable to solve on their own.⁴³¹ Presently, there are agreements that cover the garments and textile sector, banking, the gold sector, and sustainable forestry, among others. Other agreements are still being negotiated. All of the IRBC Agreements use the ILO's fundamental standards as a key point of reference and include a risk-based due diligence system based on the OECD Guidelines and the UNGPs.⁴³²

Corporate codes, as well as multi-stakeholder or other NGO initiatives, usually include complaint mechanisms. While the integration of public standards with private forms of labour governance is generally seen as positive, in their recent study Marx and Wouters conclude that there is "currently little evidence to support or dismiss the claim that complaint mechanisms contribute to effective enforcement" of labour standards.⁴³³ They argue that there may be conflicting interests at stake for private standard-setting institutions: "On the one hand, they want to expand their market share and certify an increasing number of organizations. On the other hand, they need to appease long-standing supporters, often activist NGOs, in order to gain and hold legitimacy."⁴³⁴

Private instruments are not without their weaknesses. These instruments are largely voluntary in nature, rely heavily on self-regulation, and frequently lack effective and transparent monitoring mechanisms.⁴³⁵ This may lead to the conclusion that corporate codes are "largely ineffective when standing alone."⁴³⁶ However, these codes may yet prove effective in the transnational context: the incorporation of fundamental labour standards may open up new avenues for monitoring corporate compliance in transnational relationships.⁴³⁷ The development of these corporate codes and other private initiatives has been influenced by NGOs, trade unions, consumers, international organizations, governments, and peer pressure. Accordingly,

431. *IRBC Agreements: Agreements on International Responsible Business Conduct*, DUTCH SOC. AND ECON. COUNCIL (SER), https://www.imvoconvenanten.nl/?sc_lang=en [<https://perma.cc/G5QG-QHFM>].

432. *How is an agreement concluded?*, DUTCH SOC. AND ECON. COUNCIL (SER), https://www.imvoconvenanten.nl/why/methods?sc_lang=en [<https://perma.cc/3KML-25YF>].

433. Marx & Wouters, *supra* note 426, at 453.

434. *Id.* at 452.

435. Hendrickx et al., *supra* note 1, at 346–47.

436. James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 U. PA. J. INT'L L. 1, 70 (2017).

437. *Id.*

contemporary instruments tend to include more complete and specific references to fundamental labour standards. This privatization of public norms may assist in implementing fundamental labour standards in regions where the public rule of law is underdeveloped, and the impact and effects of the standards are best measured in private settings.⁴³⁸

Cooperation between private and public regulators, including the ILO, may help to persuade unwilling governments to comply with fundamental labour rights.⁴³⁹ In this way, private instruments may enable more effective national public regulation based on the international standards, thus extending their impact beyond the company or sectoral level. To this end, private instruments must embody a coherent understanding of labour norms and implement a clear and transparent complaints or grievance mechanism.⁴⁴⁰

2. Binding Private Sources

i. Global Framework Agreements

Global Framework Agreement (GFA) or International Framework Agreement (IFA), an instrument created by the private sector, deserves special attention. The special nature of this instrument stems from the fact that it is a product of transnational collective bargaining, and as such is legitimized by an ‘industrially democratic’ process. They are binding for the parties involved and virtually all GFAs have the four fundamental labour standards at their core.

GFAs are instruments negotiated between a transnational corporation and a Global Union Federation (GUF) with regard to labour standards in order to establish “an ongoing relationship between the parties and ensure that the company respects the same

438. ISABELLE SCHÖMANN ET AL., CODES OF CONDUCT AND INTERNATIONAL FRAMEWORK AGREEMENTS: NEW FORMS OF GOVERNANCE AT COMPANY LEVEL 41 (Eur. Found. for the Improvement of Living and Working Conditions ed., 2008).

439. Brudney, *supra* note 436, at 69.

440. For early guidance on how to effectively implement corporate codes of conduct that include labour standards, see Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 688, 674–685 (1995).

standards in all the countries where it operates.”⁴⁴¹ IndustriALL, one of the largest GUFs, defines Global Framework Agreements as “negotiated on a global level between trade unions and a multinational company. They put in place the very best standards of trade union rights, health, safety and environmental practices, and quality of work principles across a company’s global operations, regardless of whether those standards exist in an individual country.”⁴⁴² IndustriALL’s Guidelines for GFAs include the requirement that: “A Global Framework Agreement must explicitly include references and recognition of the rights reflected by the ILO in its Conventions and jurisprudence, as well as the rights included in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.”⁴⁴³

GFAs “have developed over the past two decades in response to economic globalization,” which calls for the need to build industrial relations that transcend the national and regional sphere and that pervade the global supply-chains of transnational corporations.⁴⁴⁴ About 120 GFAs have been concluded by the five major GUFs; they all refer to the core labour standards and most of them contain clauses on applicability to the supply-chains of transnational corporations.⁴⁴⁵ Additionally, many GFAs refer to the UN Universal Declaration on Human Rights, the UNGPs, the UN Global Compact, the ILO MNE Declaration, and the OECD Guidelines for Multinational Enterprises.⁴⁴⁶ Most of the GFAs refer explicitly to all Fundamental Conventions and many of them refer to other ILO Conventions and Recommendations such as the Workers’ Representatives Convention,

441. Int’l Labour Org. [ILO], *International Framework Agreements: a global tool for supporting rights at work* (Jan. 31, 2007), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_080723/lang--en/index.htm [https://perma.cc/AQ8N-2YNE].

442. *Global Framework Agreements*, INDUSTRIALL UNION, <http://admin.industriall-union.org/issues/confronting-global-capital/global-framework-agreements> [https://perma.cc/484F-J24W].

443. INDUSTRIALL GLOBAL UNION’S GUIDELINES FOR GLOBAL FRAMEWORK AGREEMENTS (GFAS), http://admin.industriall-union.org/sites/default/files/uploads/documents/GFAs/industriall_gfa_guidelines_final_version_exco_12-2014_english.pdf [https://perma.cc/4TR5-ZJ5Q].

444. Felix Hadwiger, *Global framework agreements, Achieving decent work in global supply chains*, 7 INT’L J. OF LAB. RES. 75, 77 (2015).

445. The five big GUFs are: IndustriALL, the Building and Wood Workers’ International (BWI), UNI Global Union, the International Union of Food Workers (IUF), and the International Federation of Journalists (IFJ). *Id.* at 17–18.

446. *Id.* at 18–19.

1971 (No. 135) and the Occupational Safety and Health Convention, 1981 (No. 155).⁴⁴⁷ Besides fundamental labour rights, GFAs typically include provisions on decent wages, working time, occupational safety and health, training, and information and consultation. The majority of GFAs are concluded with transnational corporations that have their headquarters in Europe.⁴⁴⁸

GFAs serve a similar purpose to other CSR instruments: they aim to hold transnational corporations accountable for conducting their business activities in a responsible manner and to show civil society, consumers and governments that corporations are “willing to do business in a way that is not only legal but also ethical, while making a useful contribution to society.”⁴⁴⁹

Companies that typically engage in the negotiation of GFAs are those with well-developed employee and industrial dialogue cultures, such as Danone or Volkswagen, or companies whose products are sensitive to public pressure, such as IKEA, H&M or Chiquita.

While GFAs share certain characteristics with regular collective agreements, they are not intended to replace, compete, or conflict with those sectoral or company level collective agreements concluded at the national level; instead they are meant to complement those.⁴⁵⁰ They do not contain detailed terms and conditions of employment, but rather propose a framework for the relations between the company, workers, and their representatives.⁴⁵¹

As regards monitoring, compliance and follow-up, most GFAs contain a notification requirement for suppliers, (sub)contractors, employees, and local trade unions. Furthermore, most suppliers and (sub)contractors are encouraged to comply with the GFA, although their obligatory character may differ substantially.⁴⁵² Monitoring of the

447. *Id.* at 20–21.

448. *Id.* at 28.

449. Hendrickx et al., *supra* note 1, at 347.

450. Weiss, *supra* note 7, at 18.

451. *Id.* at 17.

452. *See, e.g.*, International Framework Agreement between Siemens Ag, the Central Works Council of Siemens Ag, the IG Metall - IndustriALL Global Union, art. 2.9 (July 25, 2012) http://www.industrialunion.org/sites/default/files/uploads/documents/GFAs/Siemens/ilo_vereinbarung_englisch_11062012_final_20140407.pdf [https://perma.cc/YE4V-LRAY] (“The principles of this agreement are reflected in the Siemens Code of Conduct for Suppliers. Thus Siemens also actively endeavours to have these principles incorporated into the business policy of its suppliers. Siemens regards the application of these principles . . . as a positive

follow-up is usually in the hands of a committee or in some cases a works council which undertakes an annual review. In cases of disputes, most GFAs contain a complaint procedure, which may include mediation or arbitration.⁴⁵³

However, no hard sanctions are provided in the agreements, which means that there are limited options for the parties to enforce the GFA. The Global Union Federation may issue a public warning, raise awareness or, as a last resort, terminate the contract.⁴⁵⁴ Transnational corporations may terminate contracts with their suppliers when they do not live up to fundamental labour standards and further provisions of the GFA. GFAs are contracts, which means that they have binding effect for the contracting parties. There is however no uniform international private law governing transnational contracts and there are still numerous questions about their legal effects and enforceability.⁴⁵⁵ Some agreements explicitly designate the applicable law while other exclude third party beneficiaries.⁴⁵⁶

prerequisite for mutual business relationships.”). *See also* Hadwiger, *supra* note 444, at 24 (“The largest group of GFAs – 46 per cent – include an obligation for the MNE to inform its suppliers and subcontractors of the related parts of the GFA and to encourage adherence. . . . However, in many situations it will be difficult to verify whether the MNE has exercised its “influence” or all possibilities to “promote” the application of the GFA by the suppliers or subcontractors.”).

453. *See, e.g.*, Agreement Between Skanska and the International Federation of Building and Woodworkers (IFBWW) 2 (Feb. 8, 2001), http://ec.europa.eu/employment_social/empl_portal/transnational_agreements/Skanska_FrameworkAgreement_EN.pdf [<https://perma.cc/84H4-A8NM>] (“If agreement regarding interpretations and applications of this agreement cannot be reached in the application group, the issue will be referred to an arbitration board comprising two members and an independent chairman. Skanska AB and the IFBWW will each appoint one member, and the chairman will be appointed through mutual agreement. Arbitration board rulings are binding for both parties. The original Swedish version of this agreement will apply in all parts to all interpretations of the agreement.”).

454. Hadwiger, *supra* note 444, at 25.

455. Weiss, *supra* note 7, at 18.

456. *See, e.g.*, Committing Together For Sustainable Growth and Development: Global Framework Agreement on Social, Societal and Environmental Responsibility Between the Renault Group, the Renault Group Works' Council - IndustriALL Global Union ch. 7 (July 2, 2013), http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Renault/GFA2013/global_framework_agreement_-_english_version.docx [<https://perma.cc/53M5-34TQ>] (“This agreement is subject to French law; it takes effect as of the day of its signature for an unspecified duration, and is applicable to the entire Renault Group . . .”). *See*

The increase in GFAs may lead to a greater democratic legitimacy of corporate conduct and a stronger voice for workers' representatives in transnational industrial relations. Other instruments such as the UNGPs and the ILO MNE Declaration could help to improve the implementation of GFAs along the supply chains of multinational corporations and may provide further guidance on risk management and dispute resolution.⁴⁵⁷ Their effectiveness is not yet guaranteed and successful implementation of the agreements will remain dependent on the follow-up mechanisms that they provide.⁴⁵⁸

In sum, the surveyed private international sources of fundamental labour standards are related to responsible business conduct and CSR and can roughly be divided into voluntary codes of conduct, other non-binding initiatives, and binding Global Framework Agreements. This distinction fades to some extent when considering that corporate codes may be used to hold companies accountable and the fact that GFAs are, strictly speaking, contracts, but their legal applicability and enforceability is still unclear. Furthermore, although "GFAs have laid the foundation for institutionalizing global labour relations by establishing an arena and formulating the 'rules of the game'", their implementation remains highly problematic.⁴⁵⁹

Generally speaking, GFAs do include stronger compliance mechanisms and are the product of collective bargaining. Multi-stakeholder initiatives also depart from a unilateral approach and include different actors in the review process. This way, private initiatives are important contributors to the diffusion and implementation of fundamental labour standards. Effective implementation and monitoring are key to ensuring that these initiatives are not merely corporate window-dressing or forms of strategic marketing but actually promote the ILO's core normative framework.

also Joint Declaration on Human Rights and Working Conditions in the BMW Group at 2.4 (Dec. 13, 2010) https://www.bmwgroup.com/content/dam/bmw-group-websites/bmwgroup_com/responsibility/downloads/en/2010/BV171_Joint_Declaration_on_Human_Rights_and_Working_Conditions_in_the_BMW_Group_2010.pdf [<https://perma.cc/DUK8-GH7H>] ("This joint declaration becomes effective on the date when it is signed. It may not form the basis for any individual claims or claims by third parties.").

457. Hadwiger, *supra* note 444, at 39–40, 56–57.

458. Hendrickx et al., *supra* note 1, at 347.

459. Michael Fichter & Jamie K McCallum, *Implementing Global Framework Agreements: The Limits of Social Partnership*, 15 GLOBAL NETWORKS (SUPPLEMENTAL ISSUE) S65, S81 (2015).

CONCLUDING REMARKS: PROLIFERATION OF FUNDAMENTAL NORMS
AND DIVERSIFICATION OF MONITORING

By charting the regulatory regimes that currently proclaim and apply fundamental labour standards on the international level, analysing the scope and content of those standards as they are included in the relevant ILO Conventions and broader human rights law, and reviewing critiques of the application, supervision, and monitoring mechanisms in place in this diverse collection of sources, this Article attempts to contribute to a more advanced and more coherent understanding of the application of fundamental labour standards in the contemporary global economy. The increased diversity of instruments that contain these standards may expand the protective scope of core workers' rights, especially if they are applied consistently and in line with the original ILO standard-setting.

The four fundamental labour standards—the prohibition of child labour, the prohibition of forced labour, non-discrimination and equal treatment, and the right to freedom of association and collective bargaining—reflect persistent and widespread societal problems, sometimes exacerbated by the negative effects of economic globalization. The standards are enshrined in eight corresponding Fundamental Conventions of the ILO, and similar rights are included in a variety of public international human rights instruments. Furthermore, they are referenced in a number of voluntary guidelines and private instruments that aim to regulate responsible corporate behaviour in a transnational setting. While the fundamental labour standards are certainly not the only important labour-related rights, they provide a basic catalogue, a perspective, and a solid core of workers' rights. This core is increasingly incorporated in different instruments and increasingly embedded in a broader framework of employment-related norms.

The ILO's fundamental standards and other human rights instruments are gradually becoming closer aligned. These fundamental standards are deeply rooted in human rights law. The universalistic outlook of the concept of decent work and the increasing number of references to the ILO's Fundamental Conventions further attest to the increasingly global approach to the protection of "workers' rights" in the broadest sense.

The necessary affiliations between human rights, labour standards, and business in the globalizing economy are clearly visible in a number of instruments that deal with the responsibilities of

transnational corporations in respect of fundamental labour standards. Public guidelines on business and human rights and corporate codes of conduct, private sector multi-stakeholder initiatives, and other CSR instruments contain numerous references and provisions on fundamental labour standards. Their functioning, and in particular the way in which they monitor or possibly enforce labour provisions, differs substantially. Lack of transparency and inconsistent application of these standards can be a major obstacle for their effective application.

Therefore, it is essential that the actors responsible for applying the different instruments that aim to secure fundamental labour standards have a coherent understanding of those standards and acquire the capacity to implement them. The ILO can play an important role by offering advice and technical assistance for the clarification, implementation, and supervision of its fundamental standards in the context of these alternative instruments. The broader United Nations could also be more involved in this global dialogue, and the treaty bodies' interpretations should be in sync with the views of the ILO supervisory bodies in order to arrive at a coherent consensus on the content and scope of the fundamental standards. Recent developments on "business and human rights" in the framework of the UN Guiding Principles on Business and Human Rights, the OECD Guidelines, and the ILO MNE Declaration are indicative of how an integrated approach, in which the private sector takes responsibility for human and labour rights along its entire supply chain, could be designed. Moreover, the business and human rights discourse serves as a conduit for the closer integration of labour rights and other human rights in a corporate approach to combat the disadvantages of globalization.

Currently, international monitoring and enforcement of fundamental labour standards under the ILO Conventions and UN Human Rights Treaties consists of mechanisms that issue non-binding interpretations and recommendations. However, we have seen that alternative mechanisms such as dispute settlement procedures in FTAs and arbitration or complaint mechanisms in GFAs may lead to more binding decisions. While CSR instruments have been criticized for their voluntary nature, certain instruments, such as multi-stakeholder initiatives, are broadly supported and have systems for independent monitoring of workers' rights.

Nevertheless, the fragmentation and diversification of monitoring and compliance mechanisms—in private, voluntary, public,

and binding sources of fundamental labour standards—could lead to an unintended reconfiguration of the normative landscape by deviating from the ILO's understanding. A consequential lack of both legal certainty and clarity may in turn decrease the effectiveness of workers' rights protections. While criticism of many of these instruments has been fierce, taken together, the different instruments contribute to a wider dissemination of fundamental labour rights and protection of workers and their family members on a wider scale.

More explicit references to the Fundamental Conventions themselves could increase the awareness and knowledge of these standards. Furthermore, a more enhanced application and implementation of the fundamental labour standards could be achieved by closer cooperation between private and public organizations. Streamlining dispute settlement procedures (for instance, by taking the due diligence mechanism of the UNGPs as a model) could create more consistent applications of standards and would make it easier to look to other actors and instruments for guidance.

These are merely some tentative suggestions for improvement, and much more research is needed. In particular, research on the application of the fundamental labour standards in the context of the different instruments and their relation to each other is vital to the continued development of these standards.

Fundamental labour standards are presently the most widely adopted and supported core of norms for workers around the globe. While they could be more effective, and are not currently sufficient to tackle all workers' rights issues, they do provide a solid vantage and rallying point for the protection of vulnerable groups inside and outside the labour market. This Article details the web of normative regimes that currently exist at the international level to protect basic workers' rights. By doing so, it hopes to contribute to a more coherent understanding of the fundamental labour standards and provide suggestions for more effective protection for those worst off in today's global workplace.