# DE INTERNATIONALE ARBEIDSORGANISATIE: HONDERD JAAR

1919-2019

Mr. dr. M.Y.H.G. Erkens
Prof. mr. P.F. van der Heijden

Boomjuridisch

De Internationale Arbeidsorganisatie (ILO) werd opgericht in 1919 vanuit de gedachte dat sociale rechtvaardigheid een voorwaarde is voor duurzame vrede. Op 7 februari 2019 werd in Leiden de honderdste verjaardag van de ILO gevierd. In deze bundel zijn bijdragen opgenomen over het thema van het eeuwfeest, de toekomst van werk en de toekomst van de ILO.

Met een toenemend aantal flexwerkers aan de 'onderkant' van de arbeidsmarkt, voortschrijdende globalisering en het ontstaan van nieuwe vormen van werk – platformarbeid, zelfstandigen zonder personeel (zzp'ers) – staat de toekomst van werk in het middelpunt van de belangstelling. Waar gaat het heen, en belangrijker: waar moet het heen?

De ILO heeft zich als internationale organisatie bewezen. Vrijwel alle landen van de wereld zijn lid, een behoorlijk aantal van de Conventies is geratificeerd. Een van de uitdagingen voor de komende eeuw vormt de verhouding van de ILO met multinationale ondernemingen, die in grensoverschrijdende productieketens ('global supply chains') de dienst uitmaken. Dat geldt, mede tegen die achtergrond, ook voor het toezichtmechanisme van de ILO. Is de tijd rijp voor een 'global social label' of de oprichting van een internationale arbeidsinspectie?

*Yvonne Erkens is universitair hoofddocent, beiden zijn verbonden aan de afdeling Sociaal recht van de Universiteit Leiden.*
*Paul van der Heijden is hoogleraar internationaal arbeidsrecht en voormalig voorzitter van de Committee on Freedom of Association van de ILO.*

ISBN 978-94-6290-674-7
9 789462 906747 >

Boomjuridisch

De Internationale Arbeidsorganisatie: honderd jaar
1919-2019

# De Internationale Arbeidsorganisatie: honderd jaar

1919-2019

Redactie:
Mr. dr. M.Y.H.G. Erkens
Prof. mr. P.F. van der Heijden

Boom juridisch
Den Haag
2019

**VvA-reeks nr. 45**
Het congres ter ere van 100 jaar ILO op 7 februari 2019 in Leiden (zie deel III van deze bundel) is mede georganiseerd en gesponsord door het Ministerie van Sociale Zaken en Werkgelegenheid.

© 2019 Vereniging voor Arbeidsrecht (VvA) | Boom juridisch

*Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.*

*Voor zover het maken van reprografische verveelvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatieen Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichtingpro.nl).*

*No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.*

ISBN 978-94-6290-674-7
eISBN 978-94-6274-537-7

NUR 825
www.boomjuridisch.nl

# Inhoudsopgave


**DEEL I INLEIDING** 9

**De Internationale Arbeidsorganisatie (ILO) honderd jaar** 11
*Paul van der Heijden en Yvonne Erkens*
Inleiding 11
De opening van het feestjaar 13
De ILO in Leiden 14
ILO en regelgeving 15
Toezichtmechanisme ILO 17
Tot slot 18

**DEEL II OPENING VAN HET FEESTJAAR** 21

**1. ILO 100: A Centenary of endeavour and achievement** 23
*Guy Ryder*

**2. Work for a brighter future – Global Commission on the Future of Work (executive summary)** 27
The future of work 27
Seizing the moment: Reinvigorating the social contract 27
A human-centred agenda 28
Taking responsibility 30

**DEEL III ILO 100 IN LEIDEN** 31

**1. A Human-Centred Agenda** 33
*Wouter Koolmees*
Introduction 33
ILO report The future of work 34
Conclusion 36

**2. A Future of Work with Social Justice: the ILO in its second Century** 37
*Guy Ryder*

**3. The ILO Centenary; surviving the future or shaping it?** 43
*Ton Schoenmaeckers*

**4. The ILO must lead the way to the future of work WE want** **47**
*Catelene Passchier*
The ILO's historical mandate 47
Seven considerations on the future of work 48
What workers expect from the ILO Centenary Year 50
The ILO will have to address five critical challenges 51
The ILO must lead the way to the future of work WE want 52

**DEEL IV ILO EN REGELGEVING** **55**

**1. Werk voor een betere toekomst; drie urgente zaken** **57**
*Klara Boonstra*
Studenten in de schoenen van de ILO-wetgever 58
Conclusie 62

**2. Resolution concerning decent work in global supply chains** **63**
Conclusions concerning decent work in global supply chains 63

**DEEL V TOEZICHTMECHANISME ILO** **71**

**1. Supervisiemechanisme van de ILO: crisis overwonnen?** **73**
*Paul F. van der Heijden*
Toppen en dalen 73
Het toezichtmechanisme in kort bestek 74
De crisis in 2012 76
Waar wordt aan gewerkt? 77
Waar wringt de schoen? 78
De interpretatie kwestie 79
Conclusie 79

**2. Uitbreiding van handhavingsmechanismen fundamentele arbeidsrechten** **81**
*Paul F. van der Heijden*
Inleiding 81
De rauwe werkelijkheid: schending in grote getale 82
De juridische werkelijkheid: mooie normen 85
Publiekrechtelijke handhaving: bijten of duwen en trekken 87
Privaatrechtelijke handhaving: in opkomst, maar complex 89
Veel wegen naar Rome, maar geen 'handhavingswijzer' 91
Internationale inspectie? 91
Geraadpleegde literatuur 92

**3. International Labour Organization: Review of ILO – Supervisory mechanism** **95**
I. Introduction, mandate and approach 95
II. Overview, development and procedural aspects of the supervisory mechanisms 100
III. Interrelationship, functioning and effectiveness of the supervisory mechanisms 121
IV. Proposals and suggestions for improvement 133
V. Concluding remarks 139
List of abbreviations 141

# Deel I Inleiding

# De Internationale Arbeidsorganisatie (ILO) honderd jaar

*Paul van der Heijden en Yvonne Erkens**

Op 7 februari 2019 is in het Academiegebouw in Leiden het eeuwfeest van de ILO gevierd met een symposium over de toekomst van werk én van de honderdjarige.

Het eerste deel in deze reeks van de Vereniging voor Arbeidsrecht was in 1987 gewijd aan de ILO, jaren later werd in het 38e deel aandacht besteed aan zijn negentigste verjaardag. De Leidse viering in 2019 van honderd jaar ILO vormt de aanleiding voor deze uitgave, de eerste in de vernieuwde reeks. In deze bundel zijn de inleidingen van die dag opgenomen, gegroepeerd rondom een aantal thema's en voorzien van relevante documenten met aanvullende informatie. De opgenomen teksten zijn in het Nederlands en in het Engels, het symposium was ook tweetalig.

## Inleiding

De ILO is sinds zijn oprichting in 1919 een tripartiet samengestelde internationale organisatie, waarin overheden samenwerken met werkgeversorganisaties en vakbonden. Dat maakt de ILO tot een uniek instituut in de wereld. De ILO heeft vele Conventies en Aanbevelingen het licht doen zien en beschikt over een invloedrijk supervisiesysteem dat toeziet op de implementatie van deze regelgeving in de nationale wetten en praktijken van de lidstaten. In 1969 ontving de ILO de Nobelprijs voor de Vrede.

De ILO heeft zelf een aantal onderwerpen geformuleerd om in het feestjaar 2019 extra aandacht aan te geven, de zogenoemde 'Centenary Initiatives'. Centraal staat het onderwerp 'De toekomst van werk'. In een aantal opzichten lijkt de situatie van nu enigszins op die van 1919. Toen waren er vele arbeiders die onder slechte omstandigheden en met een slechte rechtspositie voor weinig loon moesten werken om hun gezin van eten, drinken en een dak boven hun hoofd te voorzien (zie de bijdrage van Passchier in deze bundel). Ook nu is er een groeiende groep werkers die in precaire omstandigheden in hun onderhoud moeten voorzien. Denk aan flexwerkers aan de 'onderkant' van de arbeidsmarkt en een groot aantal

* P.F. (Paul) van der Heijden is hoogleraar internationaal arbeidsrecht, M.Y.H.G. (Yvonne) Erkens is universitair hoofddocent, beiden verbonden aan de afdeling Sociaal recht van de Universiteit Leiden.

zzp-ers. In veel landen in de wereld hebben globalisering, liberalisering, privatisering en deregulering tot gevolg gehad dat de positie van werkers onder druk is komen te staan. Het vaste arbeidscontract en/of de cao is niet meer automatisch het voertuig voor werkenden om een zeker bestaan mee op te bouwen. Tel daarbij op de wereldwijde neergang van de macht van de vakbonden in getal en invloed, dan is duidelijk dat voor een organisatie als de ILO nog een zware taak is weggelegd. Dat er veel tijd en denkkracht wordt geïnvesteerd in de 'toekomst van werk' is dan ook hard nodig. Over de uitkomsten van het agenderen van dit onderwerp verkeren we nog in het ongewisse. De verwachting is dat op de jaarvergadering van de ILO in juni 2019 een belangrijk document (Resolutie of Declaration) over dit onderwerp zal worden besproken en aangenomen.

Een ander onderwerp dat aandacht krijgt in het kader van 'ILO 100' is de modernisering van de regelgeving en het toezichtsysteem ('The Standards Initiative'). Zie daarover ook de bijdragen van Boonstra en Van der Heijden op het symposium en in deze bundel.

Uiteraard is het zo dat van de 189 Conventies die in de afgelopen honderd jaar tot stand zijn gebracht een heel aantal is verouderd en achterhaald. Dat gegeven is aanleiding voor de ILO om de stofkam door de Conventies te halen en te zien welke zonder meer verouderd zijn en welke, mits 'ge-update', nog een tijd meekunnen. Dat zal vermoedelijk leiden tot een restaantal van ongeveer 85 Conventies die nog waardevol zijn voor de 21e eeuw.

Ook het supervisiesysteem van de ILO is aan onderhoud toe. Het conflict tussen werkgevers en vakbonden dat in 2012 ontstond over het stakingsrecht, zoals wel/niet neergelegd in Conventie 87 en geïnterpreteerd door de Committee of Experts, speelde en speelt hier een grote rol. Wat is precies de rol en het mandaat van de Experts, hoe worden conflicten over de interpretatie van de Conventies behandeld, intern via de bestaande ILO-mechanismen of extern via bijvoorbeeld het Internationale Hof van Justitie in Den Haag? Hoe lang kan men nog doorgaan met het rapportagesysteem dat de lidstaten verplicht te rapporteren over de implementatie van de Conventies en de steeds maar uitdijende werklast die dat meebrengt voor het Bureau van de ILO en het toezicht systeem?

Weer een ander onderwerp dat de ILO aandacht wil geven in het kader van haar eeuwfeest is het 'Enterprise Initiative' om de band met individuele bedrijven aan te halen. De verhouding van de ILO met grote, wereldwijd actieve individuele ondernemingen is complex. De werkgeversgeleding binnen de ILO wordt 'gestuurd' door de IOE, de 'International Organization of Employers' die nationale werkgeversorganisaties, zoals bijvoorbeeld onze VNO-NCW, vertegenwoordigt. Individuele ondernemingen kunnen geen lid zijn van de IOE, er zit dus als het ware een schakel tussen die ondernemingen en de ILO. Ondertussen is naast de ILO een andere VN-organisatie ontstaan, begonnen door Kofi Annan in de jaren '90, onder de naam Global Compact. Daarvan zijn wél grote multinationale ondernemingen als Unilever, Shell, IBM etc. lid. CEO's en andere leidinggevenden van die internationale bedrijven hebben zelf contact met de Global Compact-organisatie in New York.

Zeker in een tijd van globalisering waarin grote multinationals via hun 'supply chains' veel macht hebben, is direct contact met hun voormannen en -vrouwen

van groot belang en dat is nu juist een zwak punt bij de ILO. Alleen al het bestaan van Global Compact, waarvan inmiddels meer dan 10.000 grote ondernemingen lid zijn, bewijst dat.

Een vierde onderwerp is het 'Governance Initiative', waarin wordt bezien of er verbetering mogelijk is in de organisatiestructuur van de ILO. Hierin wordt ook betrokken de follow-up van de implementatie van de 2008 *Declaration on Social Justice for a Fair Globalisation*, een belangrijk document in het kader van de globalisering en de gevolgen daarvan voor de *Decent Work Agenda* van de ILO.

De twee volgende onderwerpen die de ILO voor haar eeuwfeest extra 'in het zonnetje' wil zetten zijn 'Gender Equality', de positie van vrouwen op het werk en de daar nog steeds bestaande ongelijkheden tussen mannen en vrouwen, en de bestrijding van armoede. Dat laatste is ook te vinden in de agenda van de Verenigde Naties tot 2030 – de 'Sustainable Development Goals' (SDG's in het UN-jargon) –, daar genoteerd onder de kop 'End to Poverty'. Onder nummer 8 van de SDG's staat 'Decent Work and Economic Growth' genoemd, waarmee de ILO-agenda een plaats heeft gekregen.

Het laatste onderwerp in dit kader is het 'Green Initiative', dat zich bezig houdt met het klimaatakkoord van Parijs en de betekenis daarvan voor werkgelegenheid en aanverwante onderwerpen.

## De opening van het feestjaar

Op 22 januari 2019 luidde Guy Ryder, de Director-General (DG) van de ILO, het feestjaar van de ILO in met een toespraak in Genève. Daarin noemt de DG de ILO een 'locomotive of social progress' en een 'harbinger (voorbode) of peace'. Vanaf zijn oprichting tot 1944 had de ILO de handen vol aan overleven. De ommekeer kwam in 1944, toen de ILO een dochter van de Verenigde Naties (VN) werd. In de 25 jaren die volgden groeide de ILO uit tot 119 leden. De DG refereert in zijn toespraak aan de Verklaring van Philadelphia, waarin het veelgeciteerde uitgangspunt is opgenomen dat 'labour is not a commodity' (vrij vertaald 'arbeid is geen handelswaar'). Bij het vieren van zijn 75e verjaardag waren er nog eens 50 leden bij gekomen, waardoor de organisatie bijna alle landen van de wereld tot zijn leden mag rekenen. Op de komst van globalisering, liberalisering van handel en de technologische revolutie reageerde de ILO met de *Declaration of Fundamental Principles and Rights at Work* uit 1998 en de *Decent Work Agenda*. Naast de successen zijn er ook uitdagingen te melden, zoals het schijnbaar verlies van de wil en de mogelijkheid tot dialoog. De DG besluit zijn speech daarom enigszins omineus: 'these are the tendencies that need to be resisted, because if they prevail the work of the ILO becomes impossible and its values will fall'.

Op 22 januari 2019 wordt door de DG ook het pièce de résistence van de ILO Centenary gelanceerd: *Work for a brighter future*, het rapport van de Global Commission on the Future of Work, een onafhankelijke commissie onder voorzitterschap van de Zweedse minister-president Löfven en Cyril Ramaphosa, President van Zuid-Afrika.

De commissie noemt als belangrijkste speerpunt voor de toekomst van werk een 'mensgerichte agenda' die het 'sociaal contract' moet verstevigen. Onder sociaal contract wordt het uitgangspunt verstaan dat werkende mensen voor hun bijdrage aan de maatschappij een tegenprestatie verdienen: recht op economische vooruitgang, respect voor hun rechten en bescherming tegen gevaar. De commissie formuleert daartoe tien aandachtspunten, verdeeld over drie 'pillars' of pijlers: het meer dan voorheen investeren in de capaciteiten van mensen, in de instituties van werk (het arbeidscontract, collectieve (arbeids)overeenkomsten en de arbeidsinspectie) en in 'decent and sustainable work', hier vertaald als fatsoenlijk en verantwoord werk. De commissie doet een oproep aan alle belanghebbenden ('stakeholders') eigen verantwoordelijkheid te nemen voor de toekomst van werk. Groot belang hecht de commissie daarbij aan 'social dialogue': uitwisseling tussen overheden, werkgeversorganisaties en vakbonden. Er zijn nieuwe verbanden nodig, zoals die tussen de ILO, de WTO (World Trade Organization) en Bretton Woods instituties (IMF en Wereldbank), die de internationale monetaire en financiële ordening bepalen. De ILO met zijn tripartiete structuur kan volgens de commissie een cruciale rol vervullen bij het in goede banen leiden van nieuwe uitdagingen zoals het inclusief maken van de informeel werk en nieuwe vormen van werk, zoals platformarbeid.

## De ILO in Leiden

De viering in Leiden stond in het teken van reflectie op de toekomst. De sprekers – de DG van de ILO Guy Ryder, de minister van Sociale Zaken en Werkgelegenheid Wouter Koolmees en vertegenwoordigers van werkgevers, werknemers en de wetenschap – geven elk vanuit de eigen achtergrond antwoord op de vraag naar de gewenste rol en agenda van de ILO voor de komende eeuw.

In zijn verjaarswens voor de honderdjarige vraagt Koolmees allereerst aandacht voor het in 1919 revolutionaire idee om als overheid met werkgevers- en werknemersvertegenwoordigers op te trekken om de standaarden van werk te verbeteren. Koolmees benadrukt dat de ILO niet alleen een regelkanon is, maar daadwerkelijk actie onderneemt als ergens in de wereld fundamentele arbeidsrechten met voeten worden getreden.

Koolmees onderschrijft het rapport van de Global Commission on the Future of Work van harte: in een zo snel veranderende wereld is een 'human centred agenda' noodzakelijk. Levenslang leren en verbetering van arbeidsbescherming kunnen enkel tot stand gebracht worden wanneer de 'social dialogue' nieuw leven ingeblazen wordt. Aanhakend bij de Global Commission on the Future of Work stuurt Koolmees aan op modernisering van Occupational Health and Safety Conventions van de ILO, en het toevoegen van 'Health and Safety' aan de acht 'core conventions', geselecteerd in de *Declaration on the Fundamental Principles and Rights at Work*.

DG Ryder benadrukt in zijn Leidse speech dat de honderdste verjaardag voor de ILO geen reden mag zijn op zijn lauweren te gaan rusten. De ILO is gericht op vreedzame sociale evolutie, niet op bescherming van de status quo. Dat levert existentiële vragen op over de toekomst van tripartisme en de houdbaarheid

van de normatieve functie die Franklin D. Roosevelt ooit voor zich zag: de ILO als wereldomspannende bedenker en handhaver van internationale arbeidsstandaarden. Het was te verwachten dat Ryder in Leiden verwijst naar de aanbevelingen in het rapport van de Global Commission. Om die aanbevelingen te kunnen effectueren is het nodig dat landen hun aandeel nemen in het ontwikkelen van nationale strategieën voor de toekomst van werk, met de ILO als brandpunt in het internationale systeem van implementatie.

Ton Schoenmaeckers, secretaris internationale zaken van VNO-NCW, buigt zich over de relevantie van de ILO, toen en nu. Hij constateert als eerste dat de grondgedachte van de ILO – duurzame vrede kan niet zonder sociale rechtvaardigheid – nog steeds springlevend is. Volgens Schoenmaeckers moet de ILO zich vooral richten op de werkelijkheid in de echte wereld. Normen stellen die niet (kunnen) worden gehandhaafd, zijn papieren normen en creëren geen 'level playing field'. Integendeel: ze werken het ontstaan daarvan eerder tegen. Nu het vertrouwen in het bestuur van bedrijven daalt, is het tripartisme van de ILO extra nodig, zij het met een pragmatische invulling. Schoenmaeckers roept het Bureau van de ILO op meer gebruik te maken van de bij bedrijven aanwezige knowhow en pleit voor een systeem van landenrapportages waarbij niet alleen gevaren wordt op de informaties uit de landensurveys.

Catelene Passchier, voorzitter en woordvoerder van de werknemersgeleding binnen de ILO, ziet diverse grote uitdagingen. Zij roept de ILO uitdrukkelijk op nieuwe vormen van werk te adresseren en de nieuwe werkers – volgens Passchier te vergelijken met de dagloners uit het verleden – binnen de werkingssfeer van het ILO regelkader te laten vallen. Ook het ILO supervisiesysteem dient naar haar mening versterkt te worden. Daar is alle reden voor, nu werkgevers en werknemers binnen de Committee on Application of Standards (CAS) in een patstelling terecht zijn gekomen over de uitleg van Convention 87 in relatie tot het recht op staking. De ILO kan alleen een leidende rol spelen bij het bepalen van de toekomst van werk, wanneer de drie geledingen van de ILO constructief samenwerken.

## ILO en regelgeving

Er is al veel geregeld in ILO-verband, al blijft de totstandkoming van Conventies de laatste decennia wat achter. Boonstra is – met haar studenten – op zoek gegaan naar de witte vlekken en ziet voor de ILO een drietal 'stippen op de horizon'. Zowel in de meer als in de minder ontwikkelde landen is er behoefte aan regulering van werving van arbeidskrachten in grensoverschrijdende productieketens, bestaat het probleem van versnipperd werk en is in veel situaties onduidelijk wie de werkgever is en onder welke cao een werkende valt.

Werving van arbeidskrachten in grensoverschrijdende productieketens gaat vaak hand in hand met arbeidsuitbuiting. Daarop zijn meerdere normenkaders van de ILO van toepassing. Het gevolg van het feit dat het rapportagesysteem is geregeld per Conventie, is dat de rapportages over grensoverschrijdende productieketens over meerdere jaren verspreid raken. Hier is dus niet zozeer behoefte aan nieuwe

normen, maar aan een andere organisatie van de landenrapportages. Als rapportages georganiseerd zouden worden rondom een bepaalde problematiek, zou versnippering voorkomen worden en daarmee de effectiviteit worden vergroot.

Een probleem voor een groot deel van de werkenden vormt het feit, dat zij met meerdere banen en baantjes hun inkomen bij elkaar moeten sprokkelen. Waar de ene helft van de wereld te veel werkt, werkt de andere helft te weinig. Boonstra pleit in dat kader voor een recht op een aantal uren werk, dat vastgelegd zou kunnen worden door een protocol bij Verdrag 1.

Tot slot wijst Boonstra op de 'wonderlijke vermenigvuldiging van de werkgever'. Door de opkomst van een gesplitst productiemodel en de 'supply chain', wordt een dienst of product niet langer door één onderneming geproduceerd. Om te voorkomen dat ondernemingen daardoor landen tegen elkaar uit kunnen spelen, moet de ILO de onderneming centraal stellen, waarbij de verantwoordelijkheid voor de arbeidsvoorwaarden in de hele keten gelegd moet worden bij de leidende onderneming.

In het kader van grensoverschrijdende productieketens moet de ILO *Resolution concerning decent work in global supply chains* uit 2016 genoemd worden, die in deze bundel is opgenomen. In die resolutie wordt allereerst de aandacht gevestigd op de positieve effecten van wereldwijde productieketens, die zorgen voor economische groei – met als gevolg daarvan het ontstaan van nieuwe banen en het terugdringen van armoede – en bijdragen aan de transitie van de informele naar de formele economie. Maar wereldomspannende 'supply chains' ondermijnen ook de fundamentele arbeidsrechten, met name het recht op vakverenigingsvrijheid en de vrijheid om collectief te onderhandelen. Vooral in het lagere segment zijn kinderarbeid en gedwongen arbeid een probleem, net als slechte arbeidsomstandigheden en te lange arbeidstijden. Vrouwen die aan de onderkant van de productieketen werken, worden regelmatig geconfronteerd met discriminatie en seksuele intimidatie. Economische ontwikkeling gaat dus niet hand in hand met fatsoenlijk werk.

De zorg voor fundamentele rechten binnen 'supply chains' vormt een probleem. Niet alleen is diffuus waar verantwoordelijkheden liggen, ook de handhaving van regelgeving brengt problemen met zich omdat activiteiten over landsgrenzen – en daarmee over jurisdicties – heen gaan. Regulering door middel van verdragen (internationaal) of wetgeving (nationaal) schiet tekort. Overheden hebben beperkte capaciteit en middelen om de naleving van wet- en regelgeving effectief te controleren en te handhaven. Daarmee heeft de uitbreiding van wereldwijde productieketens gezorgd voor een 'governance gap'.

In de Resolutie bestempelt de ILO zichzelf, vanwege zijn wereldwijde mandaat, deskundigheid en ervaring in de wereld van het werk als eerst aangewezene om samen met zijn leden wereldwijd actie te ondernemen voor waardig werk in 'supply chains'. Daartoe wordt een aantal actiepunten opgesomd. Denk daarbij aan de versterking van de nationale arbeidsinspectie en het geven van prioriteit aan handhaving door overheden en het uitvoeren van 'human rights due diligence' en het afsluiten van collectieve arbeidsovereenkomst en 'international framework agreements' (IFA's) door sociale partners. De ILO stelt zichzelf ten

doel de ratificatie en implementatie van ILO-standaarden, die relevant zijn voor het tot stand brengen van fatsoenlijk werk binnen 'global supply chains', te bevorderen. Daarnaast ziet de ILO voor zichzelf een rol weggelegd in het ondersteunen, aansturen en coördineren van wereldwijde initiatieven gericht op het verbeteren van de arbeid binnen ketens.

## Toezichtmechanisme ILO

Zonder een stevig systeem dat ziet op naleving, blijven de door de ILO gemaakte regels een papieren werkelijkheid. Van der Heijden heeft zich in diverse publicaties over het toezichtsysteem van de ILO uitgelaten. Nationaal in het *Nederlands Juristenblad* (NJB), waarin hij pleit voor een 'global social label', waarbij landen garanderen dat handelsgoederen die in dat land gemaakt zijn, niet in strijd met de fundamentele arbeidsrechten zijn vervaardigd. Dat gaat samen met de gedachte het gesprek aan te gaan over de oprichting van een internationale arbeidsinspectie, die een dergelijke garantie kan controleren.

In ILO-verband heeft hij in het kader van de 'Standards Initiative' op verzoek van de Governing Body van de ILO tezamen met Abdul Koroma (Rechter in het Internationale Hof van Justitie in Den Haag)) een rapport uitgebracht over het toezichtsysteem van de ILO. Volgens Koroma en Van der Heijden is het ILO-systeem er in geslaagd bijna een eeuw lang toezicht te houden op de implementatie van internationale arbeidsnormen. Het systeem functioneert adequaat en voldoet in het algemeen aan zijn doelstelling om de naleving van internationale arbeidsnormen te waarborgen, hoewel schrijvers bepaalde verbeteringen suggereren.[1] Het rapport is in deze bundel opgenomen.

Ook op 7 februari in Leiden gaat Van der Heijden in op het systeem van toezicht en naleving. Hij schetst allereerst de crisis die de werkgevers in 2012 hebben veroorzaakt door in de CAS het mandaat van de experts ter discussie te stellen. Al jaren werd Conventie 87 zo uitgelegd dat daarin een stakingsrecht voor vakbonden moest worden gelezen. In 2012 stelden de werkgevers deze uitleg ter discussie, waardoor de CAS feitelijk buiten spel werd gezet. In 2015 werd over deze kwestie een 'wapenstilstand' tussen werkgevers en bonden in de ILO gesloten: in een gezamenlijke verklaring werd toen uitgesproken dat werkgevers en werknemers over en weer elkaars recht op collectieve actie erkennen. Over de interpretatie van Conventie 87 in verband met het stakingsrecht werd in de verklaring niet gesproken.

Hiervoor is al gewezen op het 'Standards Initiative', de paraplu waaronder sinds een aantal jaren wordt gewerkt aan modernisering van de regelgeving en het toezicht op de implementatie van die regelgeving. Volgens Van der Heijden wringt de schoen op het punt van coherentie en efficiency. De ILO is een organisatie van staten, niet van bedrijven. Nu staten onmachtiger worden en grote, de wereld omvattende bedrijven steeds machtiger, en nu die bedrijven ook hun

1. Zoals betere communicatie en een beter gebruik van technologie, A.G. Koroma & P.F. van der Heijden, *Review of ILO supervisory mechanism*, Governing Body, 326th Session, Geneva, 10-24 March 2016, GB.326/LILS/3/1, nr. 145-147.

verantwoordelijkheid erkennen door maatschappelijk verantwoord te willen ondernemen, is het naar de mening van Van der Heijden een anomalie dat zij niet zelf binnen de ILO kunnen worden betrokken in een gesprek als het om hun gaat.

Volgens Van der Heijden is veel bereikt, maar is er ook nog veel te doen. Voor wat betreft de rechtszekerheid is het van belang dat de geledingen binnen de ILO het met elkaar eens worden over de omgang met artikel 37 van de ILO-Constitutie, dat twee wegen – het Internationale Hof van Justitie in Den Haag en een ad hoc tribunaal in ILO-verband – aangeeft om tot bindende interpretatie van Conventies te komen. De transparantie wordt gediend door commissies samen te voegen, voor de coherentie is het noodzakelijk dat multinationale ondernemingen betrokken kunnen worden in het toezichtsysteem van de ILO en de efficiëntie kan beter door nationale staten vroeger te betrekken bij toezichtkwesties.

## Tot slot

De ILO heeft zich als statenorganisatie bewezen: vrijwel alle landen van de wereld zijn lid, een behoorlijk aantal van de Conventies is geratificeerd. Toch zijn er voor de volgende eeuw nog een heel aantal uitdagingen te noemen.

Een eerste aandachtspunt is de verhouding van de ILO met multinationale ondernemingen. De belangrijkste reden voor het falen van de ILO om zich een positie te verwerven als belangrijke speler op het gebied van de regulering van wereldwijde productieketens is de organisatievorm van de ILO. Staten zijn lid van de ILO, bedrijven niet. De ILO bestaat uit vertegenwoordigers van overheden, werkgeversorganisaties en vakbonden, institutioneel is voor ondernemingen geen plaats. Het succes van het Global Compact van de Verenigde Naties kan voor een deel verklaard worden uit het feit dat bedrijven zich er zelf bij aansluiten en daarmee uit eigen beweging een aantal verplichtingen over zich afroepen. Hiervoor werd gewezen op het 'Enterprise Initiative' van de ILO om de band met individuele bedrijven aan te halen. Een logische volgende stap zou zijn om multinationale ondernemingen binnen de ILO een rol van betekenis te geven.

Een ander wezenlijk punt is de vraag of 'occupational health and safety' onder de fundamentele arbeidsrechten gekwalificeerd kan gaan worden. In 1998 werden in de *Declaration on Fundamental Principles and Rights at Work* vier aandachtsgebieden, corresponderend met acht Conventies, als 'fundamenteel' bestempeld: kinderarbeid, gedwongen arbeid, gelijke behandeling en vrijheid van vakvereniging. Op dat moment werden 'occupational health and safety' daar niet toe gerekend. De Global Commission on the Future of Work doet in haar rapport *The Future of Work* de aanbeveling om ook 'health and safety' als fundamenteel recht te kwalificeren. Het ligt voor de hand dat dit punt hoog op de agenda zal staan van de International Labour Conference (ILC), die in juni 2019 in Genève zal worden gehouden. Als de regels omtrent 'health and safety' als fundamentele rechten gekwalificeerd worden, zal het speciale ILO-toezichtmechanisme voor fundamentele arbeidsrechten ook voor deze rechten gaan gelden en zal de ILO zich moeten inzetten te bewerkstelligen dat de Conventions over 'occupational health and safety' door zoveel mogelijk landen geratificeerd

worden. Dat zou een logische stap zijn, maar tevens een flinke uitdaging vormen voor de komende jaren.[2]

De balans opmakend kan geconcludeerd worden, dat op 7 februari 2019 in Leiden ondanks kritische kanttekeningen vertrouwen in de toekomst van de ILO overheerst.

Ryder roept op te blijven zoeken naar de dialoog. Een constructieve uitwisseling tussen werkgevers- en werknemersvertegenwoordigers is essentieel voor het functioneren van de ILO. Hij vindt op dit punt Passchier en Schoenmaeckers aan zijn zijde. Dat is positief, tripartisme is na een eeuw nog springlevend. Ook de geluiden vanuit de wetenschap zijn kritisch positief. Er moet aandacht blijven voor het systeem van toezicht, waarbij alle geledingen binnen de ILO nieuwe, maar ook weinig gebruikte reeds bestaande vormen van toezicht met welwillendheid tegemoet moeten treden. Knelpunten kunnen opgelost worden door het anders inrichten van rapportageverplichtingen en uitdagingen uit de nieuwe wereld van werk – 'supply chains', platformarbeid – verdienen een prominente plek op de ILO-agenda.

De belangrijkste boodschap van Koolmees is dat Nederland constructief wil blijven meedenken in ILO-verband. Koolmees dringt er op aan dat in de ILC van juni 2019 nieuwe en concrete doelen worden gesteld voor de komende eeuw van de ILO. Aan die nieuwe en concrete doelen is binnen ILO-verband al gewerkt. De 'Centenary Initiatives' vormen een forse agenda, die mede bedoeld is om de oude organisatie weer helemaal up-to-date te brengen en van nieuw elan te voorzien.

Al met al kan met recht worden gezegd dat de ILO een belangrijke internationale organisatie is en blijft, die de waardigheid van de werkende mens als uitgangspunt neemt en die zich inzet om het inzicht te verspreiden dat het leveren van een wereldwijde bijdrage aan fatsoenlijk werk voor iedereen niet kan en mag ontbreken. Al zijn de problemen van de 21e eeuw andere dan die van de 20e eeuw, aan de noodzaak en de urgentie van die inzet is niets veranderd.

2. Zie hierover ook ILaRC 1/2019, Editorial.

# DEEL II Opening van het feestjaar

# 1. ILO 100: A Centenary of endeavour and achievement

*Guy Ryder**

*Openingstoespraak op 22 januari 2019 in Genève.*[1]

*In a speech to open a year of Centenary celebrations, ILO Director-General, Guy Ryder, described the organization as a locomotive of social progress and a harbinger of peace. He also outlined the challenges ahead.*


Ambassadors,
Members of the Global Commission on the Future of Work,
Distinguished Representatives of the Ville et Canton de Genève,
Members of the United Nations family,
My ILO Colleagues,
Ladies and Gentleman,

It is an exceptional honour and a pleasure to welcome everyone of you here this afternoon for this truly historic event: the launching of the Centenary of the International Labour Organization.

---

* Directeur-Generaal van de International Labour Organization (ILO).

1. https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_665184/lang--en/index.htm

Nous sommes très honorés de la présence des Représentants de la Confédération Suisse, notre Etat Hôte, et de la ville et Canton de Genève:

- M. Antonio Hodgers, Président du Conseil d'Etat,
- M. Jean Romain, Président du Grand Conseil,
- M. Sami Kanaan, Maire de Genève,
- Monsieur Jacques Moret, Directeur général de la Ville de Genève
- M. Ivan Pictet, Président de la Fondation pour Genève

Au BIT, nous travaillons et nous vivons entre les Genevoises et les Genevois, nous sommes fiers de cela et nous sommes reconnaissants de l'appui et de l'hospitalité offerts.

For one hundred years now the Governments, Workers, and Employers of the world have come together in this house, moved by the conviction of its founding fathers that universal and lasting peace depends on social justice, and by a common determination to work together for that cause, notably by the adoption and supervision of international labour standards.

What has been described as a wild dream at its origin, has turned out to be something else; a century of endeavour and achievement, during which the ILO has been a locomotive of social progress and a harbinger of peace.

But it has not been a smooth journey. If indeed the arc of history does bend towards justice it has nevertheless taken some detours along the way.

By the time it reached its 25th anniversary, in 1944, perhaps the ILO's greatest achievement was its very survival. The group of 42 founding member States had by then grown only marginally to 49. But by then the Organization had come through the great depression, a dark period of authoritarianism, global conflict, the collapse of the rest of the multilateral system, and exile, to lay the foundations for its future success as the first specialized agency of the United Nations. That 20th anniversary was commemorated not here in our historic home, Geneva, but in our wartime refuge, Montreal. And it was marked by the adoption of the extraordinary Declaration of Philadelphia – as remarkable a statement of visionary intent for a world emerging from cataclysmic conflict as was the ILO Constitution of 1919.

The following 25 years were ones of explosive growth as the ILO's membership increased by nearly two and a half times to 119, as decolonization brought independence and freedom to so many peoples.

The ILO was challenged to meet the needs of the Governments, Employers, and Workers of these new states and did so by developing its technical cooperation programmes into the crucial means of action that they are today. So it was more than casual symbolism when the ILO marked its 50th anniversary by launching the World Employment Programme. This was a true watershed in development policy with its focus on employment, poverty, and basic needs and whose effects can still be felt in the UN's 2030 Sustainable Development Agenda.

It was also in 1969 that the ILO was awarded the Nobel Peace Prize, prestigious recognition of what it had done in its first fifty years, but more than that, powerful encouragement for the next fifty.

And by the time it got to its 75th anniversary, the ILO had added a further fifty five member States – bringing it close to universal membership in a world that was itself standing at the threshold of the era of globalization. By then the confrontation between two ideological and political systems had ended. The crime of apartheid had been defeated with the ILO playing its full part in that victory of humanity. Some foresaw – wrongly – an end to history with the triumph of a universal market economy. But in fact this was the beginning of a challenging new chapter in ILO history as the world sought a social dimension to a phase of globalization driven by liberalization of trade and investment and supercharged by successive technological revolutions. And the ILO delivered with its Declaration of Fundamental Principles and Rights at Work , and then, a year later its decent work agenda – jobs, social protection, tripartism and rights – which today stands at the centre of the world's road map for the future.

Ladies and Gentlemen,

What can we learn from this remarkable history?

Well, most obviously, that it would be a very brave, or perhaps a very foolish person who would venture with confidence a prediction of where the ILO and the world will be 25 years on from now.

But more importantly it demonstrates that the ILO has always had to adapt to new challenges and circumstances and has been able to do so successfully. Had that not been so I doubt we would be celebrating this Centenary.

This was what Director-General David Morse said when he received the Nobel Prize on behalf of the ILO 50 years ago. That every time the ILO had found successful solutions to the social issues of the day, new, often unforeseen issues came up. So the Organization could never rest on its laurels and had constantly to reappraise the world of work, review its own methods, and reinvent itself in order to stay relevant.

And on this day of celebration of the ILO's Centenary we take this message to heart with the launch of the report of the Global Commission on the Future of Work , and begin the process that I trust will lead to the adoption by the ILO Conference in June of a Centenary Declaration.

In these times of transformative change at work, of great uncertainly, and even of a certain disillusionment about the capacity of policy makers to provide credible responses to the global challenges that the future of work poses it is surely more important than ever that the ILO demonstrate once again that capacity for renewal and reinvention.

In the ideas – or rather ideals – formulated 100 years ago, the ILO possesses the moral compass to guide its decisions, and the values by which it must assess all changes in the world of work. The task is to shape the emerging realities of our time into conformity with those values, and not the reverse.

It is by combining the clarity of our principles, unchanging and universal, with flexibility and innovation in the tools we use to achieve them that the ILO will succeed in the future, as it has in the past.

However formidable the challenges ahead may appear they are surely no greater than those that the women and men who went before us in the ILO confronted and overcame. Except, perhaps, in one regard, which comes from the observation that today we appear to be losing the will and capacity for dialogue. It seems more difficult to listen and to weigh honestly the views of the other against one's own, to be tolerant and to reach for compromise rather than the imposition of one's will.

These are tendencies that need to be resisted, because if they prevail the work of the ILO becomes impossible and its values will fall.

And this is why I wish to end by echoing the central message of the report of our Global Commission. That it is urgent for us all – representatives of the Governments, Employers and Workers of our now 187 member States and all of our allies – to rededicate ourselves to reinvigorating the social contract that was and is at the heart of the ILO's mandate. The basic commitment to work together to defend not only our own interests but those of others so that social justice is available to all, with none left behind and all moving forward in this new ILO century.

# 2. Work for a brighter future – Global Commission on the Future of Work (executive summary)

## The future of work

New forces are transforming the world of work. The transitions involved call for decisive action.

Countless opportunities lie ahead to improve the quality of working lives, expand choice, close the gender gap, reverse the damages wreaked by global inequality, and much more. Yet none of this will happen by itself. Without decisive action we will be heading into a world that widens existing inequalities and uncertainties.

Technological advances – artificial intelligence, automation and robotics – will create new jobs, but those who lose their jobs in this transition may be the least equipped to seize the new opportunities. Today's skills will not match the jobs of tomorrow and newly acquired skills may quickly become obsolete. The greening of our economies will create millions of jobs as we adopt sustainable practices and clean technologies but other jobs will disappear as countries scale back their carbon- and resource-intensive industries. Changes in demographics are no less significant. Expanding youth populations in some parts of the world and ageing populations in others may place pressure on labour markets and social security systems, yet in these shifts lie new possibilities to afford care and inclusive, active societies.

We need to seize the opportunities presented by these transformative changes to create a brighter future and deliver economic security, equal opportunity and social justice – and ultimately reinforce the fabric of our societies.

## Seizing the moment: Reinvigorating the social contract

Forging this new path requires committed action on the part of governments as well as employers' and workers' organizations. They need to reinvigorate the social contract that gives working people a just share of economic progress, respect for their rights and protection against risk in return for their continuing contribution to the economy. Social dialogue can play a key role in ensuring the relevance of this contract to managing the changes under way when all the actors in the world of work participate fully, including the many millions of workers who are currently excluded.

## A human-centred agenda

We propose **a human-centred agenda for the future of work** that strengthens the social contract by placing people and the work they do at the centre of economic and social policy and business practice. This agenda consists of three pillars of action, which in combination would drive growth, equity and sustainability for present and future generations:

### 1. Increasing investment in people's capabilities

In enabling people to thrive in a carbon-neutral, digital age, our approach goes beyond human capital to the broader dimensions of development and progress in living standards, including the rights and enabling environment that widen people's opportunities and improve their well-being.

- *A universal entitlement to lifelong learning that enables people to acquire skills and to reskill and upskill*. Lifelong learning encompasses formal and informal learning from early childhood and basic education through to adult learning. Governments, workers and employers, as well as educational institutions, have complementary responsibilities in building an effective and appropriately financed lifelong learning ecosystem.
- *Stepping up investments in the institutions, policies and strategies that will support people through future of work transitions*. Young people will need help in navigating the increasingly difficult school-to-work transition. Older workers will need expanded choices that enable them to remain economically active for as long as they choose and that will create a lifelong active society. All workers will need support through the increasing number of labour market transitions over the course of their lives. Active labour market policies need to become proactive and public employment services need to be expanded.
- *Implementing a transformative and measurable agenda for gender equality*. The world of work begins at home. From parental leave to investment in public care services, policies need to foster the sharing of unpaid care work in the home to create genuine equality of opportunity in the workplace. Strengthening women's voice and leadership, eliminating violence and harassment at work and implementing pay transparency policies are preconditions for gender equality. Specific measures are also needed to address gender equality in the technology-enabled jobs of tomorrow.
- *Providing universal social protection from birth to old age*. The future of work requires a strong and responsive social protection system based on the principles of solidarity and risk sharing, which supports people's needs over the life cycle. This calls for a social protection floor that affords a basic level of protection to everyone in need, complemented by contributory social insurance schemes that provide increased levels of protection.

### 2. Increasing investment in the institutions of work

Our recommendations seek to strengthen and revitalize the institutions of work. From regulations and employment contracts to collective agreements and labour inspection systems, these institutions are the building blocks of just

societies. They forge pathways to formalization, reduce working poverty and secure a future of work with dignity, economic security and equality.

– *Establishing a Universal Labour Guarantee*. All workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers' rights, an 'adequate living wage' (ILO Constitution, 1919), maximum limits on working hours and protection of safety and health at work. Collective agreements or laws and regulations can raise this protection floor. This proposal also allows for safety and health at work to be recognized as a fundamental principle and right at work.
– *Expanding time sovereignty*. Workers need greater autonomy over their working time, while meeting enterprise needs. Harnessing technology to expand choice and achieve a balance between work and personal life can help them realize this goal and address the pressures that come with the blurring of boundaries between working time and private time. It will take continued efforts to implement maximum limits on working time alongside measures to improve productivity, as well as minimum hour guarantees to create real choices for flexibility and control over work schedules.
– *Ensuring collective representation of workers and employers through social dialogue as a public good, actively promoted through public policies*. All workers and employers must enjoy freedom of association and the right to collective bargaining, with the State as the guarantor of those rights. Workers' and employers' organizations must strengthen their representative legitimacy through innovative organizing techniques that reach those who are engaged in the platform economy, including through the use of technology. They must also use their convening power to bring diverse interests to the table.
– *Harnessing and managing technology for decent work*. This means workers and managers negotiating the design of work. It also means adopting a 'human-in-command' approach to artificial intelligence that ensures that the final decisions affecting work are taken by human beings. An international governance system for digital labour platforms should be established to require platforms (and their clients) to respect certain minimum rights and protections. Technological advances also demand regulation of data use and algorithmic accountability in the world of work.

### 3. Increasing investment in decent and sustainable work

We recommend transformative investments, in line with the United Nations 2030 Agenda for Sustainable Development.

– *Incentives to promote investments in key areas for decent and sustainable work*. Such investments will also advance gender equality and can create millions of jobs and new opportunities for micro-, small and medium-sized enterprises. The development of the rural economy, where the future of many of the world's workers lies, should become a priority. Directing investment to high-quality physical and digital infrastructure is necessary to close the divides and support high-value services.
– *Reshaping business incentive structures for longer-term investment approaches and exploring supplementary indicators of human development and well-being*. These actions can include fair fiscal policies, revised corporate accounting standards, enhanced stakeholder representation and changes in reporting practices.

New measures of country progress also need to be developed to account for the distributional dimensions of growth, the value of unpaid work performed in the service of households and communities and the externalities of economic activity, such as environmental degradation.

## Taking responsibility

We call on all stakeholders to take responsibility for building a just and equitable future of work. Urgent action to strengthen the social contract in each country requires increasing investment in people's capabilities and the institutions of work and harnessing opportunities for decent and sustainable work. Countries need to establish national strategies on the future of work through social dialogue between governments and workers' and employers' organizations.

We recommend that all relevant multilateral institutions strengthen their joint work on this agenda. We recommend in particular the establishment of more systemic and substantive working relations between the World Trade Organization (WTO), the Bretton Woods institutions and the ILO. There are strong, complex and crucial links between trade, financial, economic and social policies. The success of the human-centred growth and development agenda we propose depends heavily on coherence across these policy areas.

The ILO has a unique role to play in supporting the delivery of this agenda, guided by its rights-based, normative mandate and in full respect of its tripartite character. The ILO can become a focal point in the international system for social dialogue, guidance and analysis of national future of work strategies as well as for examining how the application of technology can positively affect work design and worker well-being.

We further recommend that particular attention be given to the universality of the ILO mandate. This implies scaling up its activities to include those who have historically remained excluded from social justice and decent work, notably those working in the informal economy. It equally implies innovative action to address the growing diversity of situations in which work is performed, in particular the emerging phenomenon of digitally mediated work in the platform economy. We view a Universal Labour Guarantee as an appropriate tool to deal with these challenges and recommend that the ILO give urgent attention to its implementation.

We see this report as the beginning of a journey. Because the ILO brings together the governments, employers and workers of the world, it is well suited to be a compass and guide for the journey ahead.

# Deel III ILO 100 in Leiden

# 1. A Human-Centred Agenda

*Wouter Koolmees*[*]

## Introduction

During birthday parties, those who have reached a respectable age often look back upon the past, thinking about their wild '20s or roaring '30s. And I think that it is perfectly permissible to do so, when you reach the respectable age of 100. Yet there is 1 problem in this matter. It's that the ILO was not only wild and radical in its '20s and '30s... It has been so from the very start.

That's at least how one of your biggest admirers described it when he addressed the ILO in 1941.

In Franklin Delano Roosevelt's own words:

> 'To many the ILO was a wild dream. Who had ever heard of Governments getting together to raise the standards of labour on an international plane? Wilder still was the idea that the people themselves who were directly affected [...] should have a hand with Government in determining these labour standards.'

It's exactly this radical, wild idea, that has brought us here today, and which brings thousands of delegates to Geneva each year. It's this radical idea that has had a profound impact on our lives. We could well have lived in a world with no minimum working age, no protection for pregnant workers, no weekends and no eight-hour working day. Not a very happy place.

Over the past 100 years, the ILO has adopted almost 200 international labour standards. One by one, these are great accomplishments. But they do not tell us a story. They do not show us how the ILO has impacted the lives of many people. How the ILO in fact can save lives.

Professor Paul van der Heijden, who will speak here later today, once gave a compelling account of a Columbian trade union leader, who spent twelve hours in the plane, on a flight from Bogotá to Geneva.

---

* Minister van Sociale Zaken en Werkgelegenheid (SZW).

With tears in his eyes, this man told the ILO delegates horrific stories about the fate of union leaders in his country. There have been years when more than 200 trade union leaders were murdered in Colombia, simply because of their occupation.

The union leader from Columbia was not an exception. On a regular basis, individuals have shared their personal accounts with the ILO. And with the adoption of progressive regulations, the ILO has helped these people.

It is exactly here where the ILO's impact lies: on individual lives. And it is exactly this that so many people outside this room do not know. They see the ILO like they see any other international organization: A big colossus, far away. You rarely hear about it, and when you do, you think: 'Ah, it doesn't involve me'.

I think that the ILO's challenge for the future lies precisely here. First, shifting the focus to the radical idea with which the ILO once started. It's not about governments, organizations, systems, it's about people. And second, also sharing this idea with people around the world, and showing others how important the ILO has been, and still is.

## ILO report The future of work

Now I am very pleased that this is also a key thread in the ILO report The future of work: A human-centred agenda. To me, this term hits the nail on the head. Not only when it comes to that what we want to accomplish, but also when it comes to those who will need to accomplish this. Let me explain this by elaborating on three examples:
- Life-long learning;
- The need for more protection in the workspace;
- And, third, more generally: our modus operandi of moving forward.

### The need for lifelong learning

Our world is changing rapidly. In order to keep up, people need to develop themselves continuously. For this, a human-centred agenda is needed. We need to invest in human capital and enable people to develop. Only then can workers and companies continue to be sustainable in our labour market. I would therefore urge the three ILO constituents, and that by definition includes of course the Dutch government, to engage in a meaningful discussion, in order to set a global aim, for example in the outcome of the coming ILC.

Let's start this process, but at the same time, let's also listen and learn from each other. Because here lies the biggest challenge, also internationally: How can we motivate and inspire people to learn throughout their lives, when the taste of learning still remains bitter, especially for low-educated workers. In this respect, lifelong learning is also a permanent course for social partners and governments.

Only by sharing best practices, we can learn how to develop a learning culture and stimulate continuous learning.

**Improving protection in the workspace**

A human-centred approach is also needed to improve working conditions of people around the world. I find it quite disturbing, this seeming paradox that when we see the terrible working conditions of people in dirty and unsafe factories, we all agree this is completely unacceptable. Yet at the same time, we all know that these conditions will not stop immediately, because we have not found a solution that we all agree on.

It's as if the system itself is more powerful than we are, as individuals.

In order for the ILO and other organizations to have an impact, we need to shift our focus to a human-centred agenda. I think that we all agree: it's unacceptable to compete on the safety and health of workers! None of us want to do so. So let's find ways to realize the protection that is needed. Where there's a will, there's a way.

One of these ways is the modernisation of the Occupational Safety and Health Conventions that were adopted in the past 100 years, as they are too detailed, and aimed at specific sectors, and do not set a general aim to protect all workers.

At the same time, we should implement instruments at a national level, as circumstances can vary per country. I am open for a discussion about adding a convention regarding the safety and health of workers to be added to the eight existing core conventions of the ILO, agreed upon in de Declaration on the Fundamental Principles and Rights at Work.

**Need for social dialogue**

Lifelong learning and the improvement of working conditions are lofty goals. But the big question that remains, is: how should we reach these goals. The Future of work report serves as a great start.

- It gives an excellent insight into the challenges that lie ahead of us.
- It provides a thorough analysis of current developments on the future of work and social security.
- It gives sound suggestions on how to move forward, but on its own, it will not change the world.

As the report itself states:

*The transitions involved call for decisive action. We need to seize the moment.*

In the report, there is a heavy emphasis on the role of governments. Yet I believe that this emphasis does not quite match the expectations and needs of the world we are currently living in. In many countries, the welfare state – which is a radical new idea and accomplishment of the twentieth century – has evolved into something even more radical: projects of two-way collaboration and participation. Governments around the world cannot accomplish change alone. We need to do this together. Workers, employees, yes individuals.

For this, it is necessary to reinvigorate the social dialogue. The world is rapidly changing and organisations are changing too. New forms of organisations are born every year. Social partners and governments need to be open to these new forms. I also believe that we need to look for supporters of ILO policies in other organisations.

By constructive social dialogue, we can protect workers at a higher level and prevent competition on labour conditions. This is a process of trial and error. As you may know, In the Netherlands, over the past weeks, all parties involved tried to communicate with each other via a very loud call horn... and well, all I can say is: we have tested it for you. Don't try this at home!

## Conclusion

Ladies and gentlemen,

One thing is clear: you cannot respond haltingly to developments that are going full speed ahead. They demand action, and yes, also a political response.
– We need to give individual people certainty in a volatile world.
– We need to give them straws in the wind of change.
– We need a human-centred agenda.

I am looking forward to a discussion preceding the ILC in June. In my opinion, this discussion should acknowledge ILO's great achievements of the past 100 years, and at the same time build on these achievements, by setting new and concrete actions for the ILO in the forthcoming 100 years.

It's our choice to think as wild and free as our predecessors did 100 years ago.

If they were able to construct the inconceivable, then I am sure that we can do it again.

# 2. A Future of Work with Social Justice: the ILO in its second Century

*Guy Ryder*[*]

Dear Minister Koolmees,
Representatives of the Employers' and Workers' organizations,
Ladies and Gentlemen,
Colleagues,
Dear friends,

Thank you for your kind invitation to this Conference. It is a great pleasure to be with you today in the beautiful city of Leiden, a place so full of history and humanist tradition.

It is fitting that our meeting takes place here, at the oldest Dutch university, the Alma Mater of Grotius and many others, including our colleague and ILO friend Professor Paul van der Heijden.

I understand that tomorrow this venerable university will turn 444 years old, for which I extend my congratulations!

With 'only' 100 years, the ILO is entering a new phase of its life yet, such longevity is quite unique in the international system. After all, the ILO remains one of the very few elements of the 1919 treaty of Versailles not to have been disavowed by history. Throughout a Century marked by unprecedented levels of violence and destruction, the ILO has been a locomotive for social progress. Of course, this would not have been possible without the extraordinary commitment of men and women representing governments, employers' and workers' organizations who have devoted their lives and efforts to social justice, dialogue and international cooperation.

In this regard, the Netherlands has played a special role from the beginning as a founding member and constant supporter of the ILO mandate, especially our normative agenda and supervisory system – not to mention the leading role the Netherlands plays in international development cooperation. And above all, as practioner of ILO's methods and values.

---

[*] Directeur-Generaal van de International Labour Organization (ILO).

Ladies and Gentlemen,

Today, the worst thing that could happen to the ILO would be to rest on its laurels and achievements. As former Director-General David Morse noted in accepting the ILO's Nobel Prize in 1969, 'the ILO has never seen, and will never see, its role as that of a defender of the status quo; it will continue to seek to promote social evolution by peaceful means, to identify emerging social needs and problems and threats to social peace (....)'.

This is a message that the ILO has tried to act upon as it reaches its Centenary, by asking some fundamental questions about the future of work and about its own place in it.

Indeed there have been some almost existential issues swirling around the ILO in recent years which, while they have seldom been addressed explicitly in our debates have, nevertheless, provided the context for many of these discussions.

Since our Dutch friends are renowned for the directness of their approach, let me 'go Dutch' for a minute and put some of these existential issues on the table straight away. There are three.

The first issue then, is whether the ILO, the historic consequence of a first industrial revolution, and in many ways marked by that industrial order still makes sense as we confront the, for many post-industrial, realities of a fourth such revolution. Are we trying to impose a 20th Century template on 21st Century realities and finding that they really don't fit?

Secondly, and in this context, and the diverse circumstances of its now 187 member States, is it credible and effective to address key social and labour issues through tripartism – the interaction of governments and employers' and workers' organizations who often face their own challenges of representation.

And thirdly, what about that original 'wild dream', as Franklin D. Roosevelt called it, of the ILO setting international labour standards and supervising their application by this worldwide membership? This normative function has come under considerable pressure over the last decade, at a time when the rule of international law more generally is similarly challenged. I personally have been nervous to talk of a 'crisis' of the ILO's standards activities, but I see that Professor van der Heijden's intervention is about a crisis overcome (albeit with a question mark after it) so maybe I should relax a bit on this. But the question really is: can we carry on with this wild dream?

Ladies and Gentlemen,

You will not be surprised to hear that the Director-General of the ILO will state his confidence in the capacity of our Organization to carry forward its mandate for social justice in today's rapidly changing world of work, a mandate as urgent and as necessary today as it has ever been. This is my conviction. But that confidence needs to be backed up by a serious, hard-headed look at what is happening

in that world of work, a clear understanding of what we want our future of work to be, and then, crucially, the identification of what we – governments, workers, employers and all our allies – intend to do to make it all happen.

Ladies and Gentlemen,

This is what the Global Commission on the Future of Work, whose report was published on 22 January, has strived to help us to do.

It is not my intention to persuade you of the merits of this report and its recommendations. It was an independent body, co-chaired by the Swedish Prime Minister, Stefan Löfven and the President of South Africa, Cyril Ramaphosa. What I want to do is to outline what is in the report, and where it might take us.

Above all, this is a report about and focused on people. It calls for a human-centred agenda that puts people and the work they do at the centre of economic and social policy and business practices. This agenda has three priorities for action:

- First, increasing investment in people's capabilities – so that they can fully take advantage of the real opportunities that the future of work offers.
  - It proposes a universal entitlement to lifelong learning; supporting people through the multiple transitions that they will go through over the course of their working lives.
  - It calls for universal social protection from birth to old age, including a basic social protection floor to everybody in need.
  - And it proposes too a transformative agenda for gender equality.
- The second priority is to increase investment in the institutions of work. The report reminds us, as the ILO constitution does, that 'labour is not a commodity' and it is the institutions that regulate labour markets that prevent it from being treated as such.
  - The Commission proposes the establishment of a Universal Labour Guarantee that ensures that all workers, enjoy certain basic guarantees – their fundamental workers' rights; an 'adequate living wage' (that's in the ILO Constitution of 1919), maximum limits on hours of work, and protection of safety and health at work as a new fundamental right. These are really not new objectives but 100 years from the creation of the ILO they remain a long way from the reality of the working lives of very many millions of our fellow human beings.
  - The report recommends we take advantage of technological developments to afford greater 'time sovereignty' to workers so that they can, through the exercise of choice, exercise a better balance on their work and their private lives. This also means that those working on platforms or in part-time jobs need to make flexible hours a real choice, not one driven by necessity or imposition.
  - The Commission calls on us all to revitalize policies that promote collective bargaining and social dialogue as a public good, something which is good for our societies in general.
  - The report also calls for innovations that use technology in support of decent work and encourages the ILO to establish an innovation lab to make this happen.

- The third priority is to increase investment in decent and sustainable work:
  - By investing in transformative areas of the economy, such as the rural economy, the care economy, the green economy and high-quality physical and digital infrastructure. These have the highest potential payoff in terms of decent and sustainable jobs for the future.
  - We must also reshape incentives to encourage long-term investments in the real economy. This human-centred agenda cannot be accomplished if the overriding incentives for business are directed towards purely short-term financial targets and solely to immediate shareholder expectations.

Finally, and importantly for the ILO, the Global Commission looks at some of the steps needed to implement its recommendations, especially from an institutional point of view. It recommends that countries establish national strategies on the future of work through social dialogue and calls on the ILO to be the focal point in the international system for the implementation of this human-centred agenda.

In a phrase, the challenge is to reinvigorate that social contract that took form in 1919 when Governments, Employers and Workers came together to commit themselves to work together for social justice. In the Netherlands I believe that this contract has been upheld to extraordinary positive effect.

Ladies and Gentlemen,

As you can see, this is an ambitious report.

The Netherlands is the first country this year to hold a tripartite debate since the Global Commission on the Future of Work presented its report. Similar exercises will follow as we build up to the ILO Centenary Conference in Geneva in June.

The Conference aims to adopt an authoritative document – most probably a Declaration, which we all trust will measure up to the importance of the issues we are considering and bear comparison too with past ILO Declarations – notably of course our 'magna carta', the Philadelphia Declaration of 1944.

All Constituents' voices are needed to navigate our work as we face up to the challenges of the world of work in the 21st Century. That is why your discussions here in the Netherlands and in all other member States are so important. This week an intense process of consultations is already taking place in Geneva within and among the three tripartite groups to come up with the main building blocks of a future Declaration.

Ladies and Gentlemen,

In many ways, the times in which we live are no less challenging than those at our founding in 1919, or in 1944 when the supreme test for the ILO was 'simply' to survive. Today, we dare to build a viable project for the Future of Work. That means at least two things: firstly adapting our work to the new challenges that have emerged; secondly, and equally important, addressing our 'unfinished business', those commitments that, for many reasons, were taken a century ago

but have not yet been fully realized. I think in particular of a key provision of the Philadelphia Declaration that commits the ILO 'to examine and consider all international economic and financial policies and measures' in the light of the fundamental objective of social justice.

And indeed our Global Commission invites us to do just this, with specific reference to strengthening the interaction of the ILO with the Bretton Woods Institutions and the World Trade Organization in support of a new human-centred agenda. These can be very sensitive issues – they have generated much heat in the past, and perhaps we need to bring some pragmatism to them now. Perhaps the idea should be, to coin a phrase I learnt in this country 'samen doen wat samen kan'.

So, I look forward to today's discussions to help us forwards. It will be the ILO's member States, and our tripartite constituents who will decide what the future path will look like.

But let me conclude by saying that in the final analysis, it takes outstanding individuals, people with commitment to the objectives of the ILO and the talents to bring them into reach that make a decisive difference. Professor van der Heijden has been one of those people, with an extraordinary record of 15 years as Chair of the ILO's Committee on Freedom of Association. That has meant a lot of lives saved, a lot of lives changed, and it has meant justice served. So Paul, for all of that and so much more thank you very much.

And thank you all for your attention.

# 3. The ILO Centenary; surviving the future or shaping it?

*Ton Schoenmaeckers*[*]

Your Excellency,
Mister Director General,
Ladies and Gentlemen,

I have been in doubt, mr Director General, whether I would do you, being a native speaker of the English language, more courtesy by speaking Dutch than by speaking English. I've even considered speaking ILO language, but that would perhaps not be understood by you, ladies and gentlemen. So English it will be.

There once was a famous Dutch writer whose name many of you may not have even heard of. That's how it goes with famous writers in this country. His name was Godfried Bomans and he wrote an amusing story about a hundred-year-old man. That was very old in those days (the story was written in 1947). When the man was asked what he had done to reach that age, he said 'Nothing much, it's just a matter of patience'. And when he was asked what he would do once he became the oldest, the man replied 'I'll die and give younger people a chance'.

Now, speaking of the hundred-year-old ILO, it's only natural to look back and ask how it became so old. Was it only a matter of patience? Of course, the ILO is not a man but an institution. And institutions will not grow old only by having patience: they will have to remain relevant.

What has always been and is now the relevance of the ILO? I would say that its strategic objectives are now as relevant as ever: promoting rights at work, encouraging decent work opportunities, enhancing social protection and strengthening dialogue on work-related issues. When the Constitution of the ILO was adopted, the circumstances were very different to what they are today. But on the other hand, the underlying vision that lasting universal peace could only be based on social justice is – also from the business perspective – becoming more relevant by the day. We can see that in Venezuela, but also in Europe and the United States, where social justice in particular is at the heart of debates but also of serious threats to social peace. The availability of decent work for all and the establishment of social protection were considered to be key to this aim of social justice. I'm not a scientist and will not engage in a fact-based evaluation of what the ILO

---

* Plaatsvervangend lid van de werkgeversgeleding in de Governing Body van de ILO en secretaris Internationale Sociale Zaken van VNO-NCW en MKB-Nederland.

has achieved in those 100 years. However, I would like to stress that any kind of evaluation or vision for the future has to focus on the impact of ILO work on real people and enterprises in the real world. Why am I emphasising this?

Ladies and gentlemen, many of you are labour lawyers and so am I, although many of my economist colleagues compliment me sometimes for concealing it so well. I have heard people complain about the decreasing number of labour standards that have been set in the recent past. And on the other hand, I see people within the ILO who consider the establishment of new conventions as key to its relevance on certain issues. But let's be practical about this: setting standards that will probably not be ratified is not what we should be doing. Standards are instruments of law and should not be just political symbols. To say: 'Look ladies and gentlemen, this is what we think the world should look like and shame on you if you don't agree or act accordingly'. From time to time, this expression of values is important, especially if it concerns fundamental principles and rights at work. But in general, we should adopt them as legal instruments only if they have a real impact as such. If that is not the case, we should use other means to express and pursue the values we stand for. This is not only a matter of principle. It is also important not to place a legal burden on Member States and businesses that always aim to be compliant with the rules. While others, who don't care, will often not be impacted in any way. Some see binding conventions and treaties as a means of establishing a level playing field. But they not always are. On the contrary, they sometimes harm the level playing field if they are not universally ratified or if there is a lack of enforcement. And in that case they could contribute to informality where we are committed to shifting from informality to formality. That's enough about the type of evaluation based on the production of legal standards.

There is another point of evaluation, which is the process within the ILO itself. Because the ILO incorporates one of the strategic objectives, namely: the dialogue on work-related issues. This dialogue is and will be valuable in itself and at all levels because it can bring together positive forces. But even if it doesn't, it is a better alternative to conflict. I cannot deny that there is an issue with trust in the governance of economies and businesses. The recent financial crisis, issues with individual businesses and a general mistrust in governance and in politics are some of the forces that work to the detriment of constructive social dialogue. And now, globalisation and technological development seem to make the sense of insecurity and mistrust even stronger, precisely among those who are the most vulnerable. We should take that very seriously, and I therefore think we need the ILO and the tripartite process in the ILO, as well as bipartite social dialogue in the EU, more than ever.

But speaking of social dialogue in general, what exactly do we mean? Overall, it is about establishing a good climate for healthy labour relations and sustainable enterprise. Social dialogue within the ILO is based on tripartism. But very successful forms of social dialogue may be bipartite and not aimed at setting standards. On the contrary, when you consider the successful Dutch social dialogue system, you will find it has often had the aim of letting the government get on with its own business and allowing social partners to be in charge of what is primarily their prerogative: governing labour relations.

Ladies and gentlemen, understanding each other's preoccupations and dilemmas, finding practical solutions and not to engaging in ideological debates, have their own merits. But then of course, social partners will have to deliver. That should be our focus. I would like to name just a few examples. The recurring dispute on living wages starts with understanding what it means and the dilemmas it presents between a reasonable income on the one hand and the relationship between productivity, labour costs and employment on the other. We should settle this dispute once and for all by pragmatism and not in an ideological manner. The same goes for disputes on the right to strike, global supply chains and even violence and harassment 'in the world of work', as the majority of the ILO wishes to frame it up till now. And please understand me, I am including the position of employers within the ILO in this call. But to settle this in a workable and pragmatic manner, it is vital to understand how an enterprise works and how to help enterprises to solve the dilemma's put to them by global competition, being part of a supply chain as a buyer and supplier at the same time, working in an environment without a basic legal framework or without enforcement power to account for some kind of level playing field, or doing business as an SME with an overload of bureaucracy and overregulation, etc. For this, it is vital that the ILO office makes more use of the knowledge and the problem-solving power of business. I think there are initiatives to do that, but they should be more widespread in the office and especially among those who prepare discussions in the International Labour Conference (ILC). Everyone can think as an employee, but not everyone can think as an entrepreneur. Particularly in processes in which standards are set, it is important to explore means of preparing reports other than those based only on surveys among Member States. In my experience, this process has occasionally led to false starts in ILC debates to the detriment of the results of those debates.

And to conclude this issue of social dialogue within the ILO, I would like to highlight one of the points made in the Report of the Global Commission on the Future of Work. By the way, my employer colleague from Belgium always urges us to reframe the 'Future of Work' as 'Work in the Future', which might sound less threatening.

The point I want to highlight is that of representation of workers and enterprises by their organisations. I think it is evident that an issue exists and I will not elaborate on that. But we must help each other, unions and businesses alike, to stay relevant and representative because if we don't, it will harm the constituency of the ILO and many other forms of social dialogue.

I would like to conclude by congratulating the ILO on its centenary and Mr Ryder on his leadership in complex times. We as Dutch business and employers have confidence in a future of work based on social justice and consider it to be key to our much-wanted environment for sustainable enterprise. We will take responsibility for shaping that future whenever and wherever we can.

# 4. The ILO must lead the way to the future of work WE want

*Catelene Passchier*[*]

## The ILO's historical mandate

In 1919, in the wake of World War I and the Russian Revolution, a bold and visionary step was taken to establish the ILO with its unique 3-dimensional mandate, the very first universal 'social contract':

a. social justice as a pre-condition for peace and stability,
b. tripartite governance, with shared power between governments, employers and workers, to establish democracy in the world of work, and
c. regulation to ensure a level playing field for protection of workers against the forces of global competition driving down wages and working conditions.

As we see inequality, populism and xenophobia on the rise, many regions torn apart by conflict, and shrinking democratic space, we must ensure that the ILO will be as bold and ambitious entering its second centenary as it was 100 years ago.

In 1944, with the Declaration of Philadelphia, the ILO's central role in the future of the UN system was confirmed.

Let me also remind you of the key principle enshrined in the ILO 1919 Constitution and strengthened in the Philadelphia Declaration, that 'labour is not a commodity': human beings cannot be bought and sold as goods, but deserve a working life in dignity. However, in the real world and the business models of today, we see an enormous increase in commodified labour, leading to insecurity and precarious work, with business reaping the profits but not taking any responsibility for it, leaving vulnerable individuals to fend for themselves. Tackling this issue must be one of the highest priorities for the ILO's work into the next centenary.

---

* Vice-President van de Governing Body van de ILO en voorzitter/woordvoerder van de Workers' Group in de International Labour Organization (ILO).

## Seven considerations on the future of work

1. **The future of work is built on the world of work of today.**

We need a realistic picture of the world of work of today and the current challenges to decent work in order to understand how technical change will impact. The choices we make today to address or neglect these challenges will decide how the future will look like. The report, recently presented by the Future of Work Commission of the ILO, speaks about 'seizing the moment': 'without decisive action we will be sleepwalking into a world that widens inequality, increases uncertainty and reinforces exclusion, with destructive political, social and economic repercussions.'

Therefore, it calls for a 'reinvigorated 'social contract'.

2. **'Old fashioned realities' persist in the world that continue to require so called 'old fashioned' responses.**

When recently on mission in South East Asia, I was confronted with all these millions of workers, including the very young, working excessive hours of work in very unhealthy working environments, sometimes in situations of forced labour and slavery. Here, limits to working hours and strict OSH measures as well as labour inspection, coupled with the most primary recognition of freedom of association and the right to raise your voice, including the right to strike – i.e. to say NO to indecent working conditions – , are still the highest priorities. Technology makes it possible to turn all time into potential working time, while workers are treated as machines that can be turned off and on when needed. Old and new realities exist along one value chain and are part and parcel of modern business models, where indecent working conditions at all levels of the value chain are just another way to increase the profits at the top....

3. We must **ensure that technology works for us and not the other way round.**

As the Future of Work Commission's report calls it: a human-in-command approach.

In the slums of Dhaka Bangladesh, where garments are produced for the local and regional markets but also indirectly for export, you can experience what it would mean when the World Bank says that minimum wages should be lowered in order for human beings to be able to compete with robots. This will only increase the downward pressure on the wages and working conditions of those regions of the world, that have plenty of human labour but not enough money to invest in technological modernisation, exacerbating the already existing gaps.

4. **Equal sharing of costs and benefits of technological change and its environmental effects is key, to ensure support for far reaching action on climate change and sustainability.**

The pertinent question is: how are we going to ensure that the potential benefits of technological change are equally shared and that the costs are not dumped on the developing countries?! One African professor in a recent debate on the Future of Work put it like this: will Africa in the future become the burial ground of the dead robots, used and then discarded by the more developed parts of the world.... ?!

5. **Modern technology is also used (and abused…) to do the vanishing trick of the employer-employee relationship**, claiming that in the future everybody will be an autonomous self-employed worker, while at the same time technology is allowing for stronger and long-distance control over production and output than ever. This looks very much like the reality of the mid-19th century, where every individual worker was pressurized to compete with each other without any protective regulation or bargaining power. We have struggled hard for the last 150 years, including in the ILO, to recognise the importance of collective voice and organisation, and protecting those who are in situations of unequal power relations, subordination and dependency.

So, one key issue to address is, how to ensure that responsibility is taken and regulated at the appropriate levels, including when it comes to platform businesses and their workers.

**Business strategies to avoid/evade responsibility for workers:**

a. You are not a worker
   (But instead: a freelancer, self-employed person)
b. You are a worker, but not my worker
   (I.e. somebody else's worker: subcontracting, agency worker, pay roll worker)
c. You are my worker, but only to a limited extent
   (Part time, fixed term, min-max, zero-hours etc.)

In the mid-nineties, the ILO was capable of making a leap forward, with a number of Conventions trying to address the then 'new' forms of work: part time work, temporary agency work, homework and – later – domestic work. In many of these debates, Dutch representatives, often from all three sides, have played an important role, making good use of previous work done at national level. (It would be great if the Dutch once more could play such a role, but this requires that they first sort out their own deadlocks on dealing with the new challenges, such as the rights and securities of self-employed workers, of workers for platforms like Deliveroo and Uber, etc. …)

6. **One important instrument to counter and alleviate the increased insecurity of work and income is, to ensure proper social protection floors**. However, who will pay for them if we do not tax the rich, and especially if we continue to exempt big companies and foreign direct investment from paying taxes, especially in the developing countries?!

7. In all this, there is a strong **gender dimension**. Our societies and workplaces have dramatically changed because of women entering our labour markets.

However, women are not getting their fair share, and their overall still weak position – strongly related to their expected roles as mothers and carers – makes them very vulnerable to the cold winds that may accompany technological change. With the challenges of demographic change an even higher burden will be put on women when it comes to care for the young, but also the sick and the elderly. We must spread this burden more evenly over women and men, and invest in the development of the care economy and the quality of its jobs. But also include it in a 21st century approach to working time, covering both old and new

realities in the world of work (think about: the continued need to protect against excessive hours, the need to deal with work-life balance and worker-driven flexibility, protection against insufficient hours of work such as small part time and zero hour jobs, and the 'right to disconnect' from the 24 hour-digital economy demands…).

Furthermore, new priorities and needs for protection and action emerge with the increasingly female workforce all over the world. In June, we will have the second discussion on a standard about Violence and harassment in the world of work. We need to adopt a Convention and a Recommendation on this pressing issue with a strong gender dimension, and we need high tripartite commitment for this (and we certainly hope that the Netherlands government – still hesitant about supporting a binding Convention – will overcome its internal discussions about it in time …).

## What workers expect from the ILO Centenary Year

As trade unions, we want to be ambitious, as the world may be a good place for some, but it is a worrying place for the many….

The Future of Work report is a good start and we need to pursue a thorough reflection on it in the upcoming months, as it will be the basis for our discussions at the ILC this year on the possible adoption of a Centenary Declaration.

**ILO Future of Work Commission report, January 2019**
**Work for a brighter future**

*3 pillars, 10 recommendations:*

I. Increasing investment in people's capacities
   1. Universal entitlement lifelong learning
   2. Investment in future of work transitions
   3. A transformative agenda on gender equality
   4. Universal social protection from birth to old age
II. Increasing investment in the institutions of work
   5. Universal labour guarantee
   6. Time sovereignty
   7. Collective representation through social dialogue
   8. Harnessing technology for decent work
III. Increasing investment in decent and sustainable work
   9. Investments in key areas
   10. Reshaping business incentive structures

We expect the ILO constituents at this year's ILC to commit themselves to a bold and ambitious agenda for the ILO, to be laid down in a high-level declaration that provides a roadmap for its implementation. This declaration must build on the ILO's 100 year's proud history, and must address some serious issues that are strong concerns of workers everywhere, such as the insecurity of jobs and income, rising inequalities, increasing corporate power and 21st century global

super-monopolies (the 'big five')[1] dictating the form and direction of economic development, the attacks to workers' and trade union rights, and climate change and its impact on the world of work. This indeed requires a 'social contract for the 21st century'. And I can fully agree here with the central message of the speech by Minister Koolmees, telling us that this social contract will need to focus on 'providing certainty in a changing world'.

## The ILO will have to address five critical challenges

In our view, the ILO will have to address urgently a number of critical challenges, to ensure its continued relevance and impact in the upcoming decades.

1. **Don't give up on standards**, but provide answers: it is more important than ever to stop the race to the bottom, and find new ways to regulate labour conditions in a globalising and digitalising world: business and profit making is less than ever limited by borders! Therefore, we must bring about standards on global supply chains and due diligence, further develop cross border social dialogue, and reflect on how to develop ILO standards with a truly transnational impact. (It can be done! example: Maritime Labour Convention, and global collectively agreed wage setting in the maritime sector!).

2. **Address the erosion of the employment relationship** as a matter of the utmost urgency! The concept of the employment relationship, on which most national and international standards are based, in the last 100 years developed to protect the most vulnerable groups of workers, is now abused to exclude them. Therefore, the ILO must integrate platform workers, 'task-rabbits', and other so-called 'new forms of work' (which are not so different from the day-labourers of the past) in its policies and standards, to ensure that its notion of a 'worker' remains as inclusive as it was meant to be. And this must include also the right to organise, regardless of employment status (i.e. including for self-employed workers and workers in the informal economy)! The so called 'Universal Labour Guarantee' proposed by the Future of Work Commission is a very interesting and important contribution to the discussion which must be seriously explored by the ILO and its constituents in the upcoming discussion on a Centenary Declaration.

3. **Safeguard and strengthen the supervisory system**: monitoring and enforcement of standards, effective complaint procedures, and standard-setting to address new challenges, are a unique and essential feature of the ILO. On the workers' side, we find it extremely problematic that employers on the one hand challenge 50 years of jurisprudence (CFA etc.) on Convention 87 in relation to the right to strike, and on the other hand block every step to solve this matter, for instance by putting it before the ICJ (in our view the most appropriate way to deal with fundamental issues of interpretation, as foreseen by the ILO constitution in article 37,1. Although we have made steps forward with the so called 'Standards

1. The biggest five tech companies of this moment: Apple, Alphabet, Microsoft, Facebook and Amazon.

Initiative' (a package of actions on strengthening the supervisory system), and have agreed with employers and governments to have a consultative conversation later this year on the possibility of an ILO-Tribunal (which is the other option under the ILO constitution, article 37,2), this is not at all a safe space yet....

4. **Strengthen social dialogue and collective representation**, as strong and indispensable building blocks of democracy in the workplace and the world of work at large. Freedom of Association is the single most violated fundamental right in the ILO! And collective bargaining rights are still denied to millions of workers. These are, in ILO language, 'enabling rights', i.e. necessary pre-conditions to ensure that other labour rights and decent working conditions can be realised. Therefore, promoting a legal enabling environment at national level, with Member States ratifying and applying core Conventions 87 and 98 must be high on the ILO's agenda. Furthermore, we must develop the transnational dimensions of industrial relations, to deal with the cross border challenges of globalising business and capital.

5. **Safeguard the ILO's unique role and contribution to the multilateral system in the context of UN reform**.

Also here, it is good to go back to the Philadelphia declaration and consider what is needed to realise its mandate, placing the ILO at the centre of a global multilateral system to achieve social justice.[2]

## The ILO must lead the way to the future of work WE want

This is a debate on the future of work WE want. This is about becoming the drivers for a change that should be human-driven and planet oriented. About recognizing the value of work as potentially bringing value, dignity and influence to those selling their labour, and social justice and stability to their economies and societies. About recognizing also, that we cannot deal with the challenges of today's globalising world, in which business and technology do not know borders anymore, with just national approaches. It is of crucial importance to get it right, when it comes to the parameters, conditions and regulatory environment to ensure beneficial instead of disastrous outcomes.

The ILO must seize this opportunity and show the key role it can play in the necessary global governance structures, including cross border social dialogue and transnational forms of regulation, to accompany this change. It can only play this role, when its tripartite constituents allow it to do so. This requires enlightened and forward looking business, looking beyond short term interests to the importance of long term sustainability. Be aware that it were enlightened business

2. All national and international policies and measures, in particular those of an economic and financial character, should be judged in light of their contribution to allow for people's material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity; it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective.

leaders who, together with unions, at the end of the 19th century started to cooperate on improving living and working conditions of workers, in the long term interests of sustainable business! But it also requires governments to be courageous, and sometimes go out of their comfort zone and national and regional perspectives, to support a strong role for the ILO in tackling the challenges.

To conclude: a world in turmoil requires leadership. This is what the ILO can and must offer for the 21st century, as much as it did so in 1919, with social justice as its guiding principle and primary goal, to ensure lasting peace and stability.

# Deel IV ILO en regelgeving

# 1. Werk voor een betere toekomst; drie urgente zaken

*Klara Boonstra*[*]

Wat een eer om vandaag te mogen spreken over de juridische geliefde die mij al mijn hele carrière begeleidt. Bij lange na geen honderd jaar natuurlijk, maar toch al wel dertig! In april 1989 begon ik aan mijn proefschrift over de vrijheid van vakvereniging en het recht op collectie onderhandelen,[1] en de wijze waarop Nederland, ondanks – of misschien wel dankzij – onze bijna perfect harmonieuze arbeidsverhoudingen, toch juist dat recht gedurende de jaren van de centraal geleide loonpolitiek te sterk beperkte. In dat licht wil ik ook graag mijn promotor Max Rood memoreren, hij leidde de Nederlandse delegatie naar de Conferentie in Genève, ik mocht mee en hij stelde me daardoor in staat om feitelijk te onderzoeken en ondervinden hoe het er daar aan toeging.

Dat kwam later van pas, toen ik naast mijn academische werk van 2008 tot 2016 als jurist in dienst van de FNV, bij de ILO-rapportages betrokken raakte en ook weer een aantal keer naar Genève afreisde om voor de kant van de vakbond te onderhandelen over de inhoud van verdragen. Onder meer raakte ik zo betrokken bij de totstandkoming van het Protocol bij het verdrag over dwangarbeid (Forced Labour) in 2014, waarover zo meer.

Vanaf het moment dat ik les ging geven in arbeidsrecht, vanaf 1994 bij de UvA tot de dag van vandaag aan de VU, heb ik ook geprobeerd de studenten te overtuigen van het belang van de ILO, van de mensenrechten in het arbeidsrecht. En het moet me van het hart: dat was niet steeds heel makkelijk.

Dat ligt niet aan de ILO-verdragen en andere instrumenten. De meeste Nederlandse studenten zijn weliswaar geneigd om het arbeidsrecht enigszins als vanzelfsprekend te beschouwen, maar als je ze vraagt zich te verplaatsen in het lot van werkenden in andere landen, dan snappen ze best waarom op tal van terreinen internationaal arbeidsrecht noodzakelijk is. Bovendien, in de laatste jaren is het er met de doorgeschoten flexibele arbeid in Nederland voor veel van hen ook niet beter op geworden. Waar we er voorheen vaak vanuit konden gaan dat het Nederlandse arbeidsrecht waarschijnlijk wel op het peil van de ILO-standaarden was, is dat voor veel werknemers hier nu niet meer automatisch het geval.

---

* Hoogleraar internationaal arbeidsrecht aan de Vrije Universiteit en directeur van de Wiardi Beckman Stichting (WBS).

1. Klara Boonstra, The ILO and the Netherlands; different views concerning government influence on the relationship between workers and employers, NJCM, 1996.

Het belang dat studenten hechten aan de mensenrechten is ook groot. Het vak dat ze bij me volgen gaat over schending ervan in de supply-chain van multinationale ondernemingen. Ze kiezen iets uit dat ze zelf bezitten of gebruiken, hun smartphone, kledingstuk of chocoladepasta, en zoeken dan uit of er sprake is van schending van één van de vier *core labour standards* van de ILO en passen er vervolgens verschillende juridische systemen op toe. Dat vinden ze niet alleen leuk om te doen, ze komen er ook achter dat ze als consument zelf onderdeel van het probleem, en misschien ook wel de oplossing zijn.

Het ligt dus niet aan de normen zelf, die zijn indrukwekkend genoeg. Maar de studenten zijn vaak teleurgesteld als ik vertel dat er uiteindelijk op niet-naleving van de verdragen door Staten of op werkplekken geen harde sanctie staat. Dat we eigenlijk alleen de *mobilisation of shame* hebben. We gaan in de lessen diep in op het toezichtmechanisme. En ze zien dan ook wel in dat het een ingenieuze constructie is om de vakbonden en werkgeversorganisaties de overheidsrapporten te laten becommentariëren. Omdat ze gewend zijn aan het poldermodel kijken ze daar bovendien minder van op, dan hun medestudenten uit andere landen.

Als ik ze aan de hand van een aantal voorbeelden laat zien dat de wetgever zich regelmatig laat sturen of inspireren door ILO-verdragen willen ze ook wel toegeven dat er sprake is van soms belangrijke doorwerking en beïnvloeding. Maar uiteindelijk blijft toch het gevoel dat de gebrekkige afdwingbaarheid van de normen ervoor zorgt dat ze na mijn lessen waarschijnlijk niet meer heel veel met de ILO-verdragen gaan doen, als ze zich later als jurist zich op de arbeidsmarkt gaan begeven.

## Studenten in de schoenen van de ILO-wetgever

Een paar weken geleden heb ik mijn studenten gevraagd wat zij urgente actuele problemen op de arbeidsmarkt vinden, die zich lenen voor regeling in het internationale arbeidsrecht. Ze kregen de opdracht om drie onderwerpen te kiezen op verschillende terreinen: mensenrechten op de internationale arbeidsmarkt; het individuele arbeidsrecht; en de arbeidsverhoudingen. Ik heb ze gevraagd: als jij nou een stip op de horizon zou kunnen zetten, waarvan jij vindt dat de ILO erop af moet varen, waar zet je die dan? En heb je ook een idee hoe je daar moet komen? Daarbij hebben we zowel naar nationale als naar internationale problemen gekeken. Vervolgens hebben we met elkaar zitten puzzelen over de vraag of we in het systeem veranderingen, of eigenlijk beter gezegd aanvullingen zouden kunnen aanbrengen om het meer impact te geven.

Diverse onderwerpen passeerden de revue, maar uiteindelijk bleven de volgende drie over:

1. Werving van arbeidskrachten in de grensoverschrijdende productieketens.
2. Het probleem van versnipperd werk en te weinig uren, waardoor geen leefbaar inkomen kan worden verdiend.
3. Onduidelijkheid over wie de werkgever is en onder welke cao een werkende valt.

Toen we de onderwerpen bestudeerden bleek overigens iets dat ik bijzonder vind. De problematiek komt eigenlijk voor in alle landen, zowel de ontwikkelings- als de ontwikkelde landen. Omdat de problematiek zo '*interconnected*' is, kunnen de oplossingen dat misschien ook wel zijn!

## 1. Werving van arbeidskrachten in de grensoverschrijdende productieketens

Dwangarbeid is een van de onderwerpen van de vier kernverdragen van de ILO en het kost niet veel moeite om mensen van de ernst van het probleem te overtuigen. In Nederland is het een onderwerp dat in het strafrecht is gesanctioneerd en waar de politie en het Openbaar Ministerie, vaak samen met de arbeidsinspectie, actief mee bezig zijn. In het strafrecht is arbeidsuitbuiting overigens ondergebracht in het artikel over mensenhandel. Daarmee zijn we niet onverdeeld gelukkig, omdat dat een van de zwaarste delicten van het strafrecht is, dat daarom ook moeilijk is te bewijzen. We zouden liever een apart artikel over arbeidsuitbuiting hebben, zodat ook lichtere gevallen makkelijker zouden kunnen worden bestraft. Maar daar gaat het vandaag niet over!

De afgelopen jaren zijn een paar ernstige zaken van arbeidsuitbuiting in de media gekomen, waar Nederland op verschillende manieren bij betrokken was. Allereerst de zaak van de Filipijnse vrachtwagenchauffeurs die met Slowaakse werkvergunningen, voor een door een Limburgs bedrijf opgerichte postbusfirma in Nederland ritten reden.[1] De chauffeurs woonden min of meer in hun vrachtwagen en omgerekend verdienden ze ongeveer 86 eurocent per uur. Hun arbeidsomstandigheden waren erbarmelijk en ze hadden ook nog 6000 euro aan een arbeidsbemiddelaar moeten betalen om hier te werken.

De tweede zaak speelt niet hier in Nederland maar in Polen. Daar werkten, en werken nog steeds, Noord-Koreaanse dwangarbeiders op Poolse scheepswerven aan Nederlandse schepen, ook weer onder erbarmelijke omstandigheden en vrijwel zonder loon.[2]

Over elk van deze zaken is makkelijk een lezing of college te vullen en er zijn er nog veel meer. Mijn studenten hebben zaken in kaart gebracht over garnalenvissers in Thailand en cacaoplantages in Ivoorkust. Maar waar ik vandaag de aandacht op wil richten is dat er verschillende clusters van ILO-verdragen samenkomen in deze zaken. Bijvoorbeeld dwangarbeid, migratie, (verboden) arbeidsbemiddeling en arbeidsomstandigheden.

Toen we in 2014 tijdens de International Labour Conference spraken over het protocol bij het uit 1929 stammende verdrag over Forced Labour, waren we ons aan werknemerszijde bewust van die *interconnectedness*, die samenhang tussen verschillende verdragen die in één casus speelden. Misschien is dat in de andere

1. https://nos.nl/artikel/2111703-limburgs-transportbedrijf-buit-filipijnse-chauffeurs-uit.html
2. https://www.asser.nl/DoingBusinessRight/Blog/post/accountability-for-the-exploitation-of-north-korean-workers-in-the-shipbuilding-industry-through-dutch-criminal-law-by-imke-b-l-h-van-gardingen

geledingen van de conferentie, de overheden en de werkgevers, ook wel het geval geweest. In mijn groep, die van de werknemers, dreigde ook wel eens een beetje frictie te ontstaan. De '*Nordics*' uit Europa wilden de problematiek van de EU-detachering in het verdrag, waar de mensen uit het Zuiden bijna verzuchtten: 'als dat onze problemen waren, dan hadden we geen problemen'.

Zo'n veelomvattend probleem is voor de ILO echt lastig. Een clubje studenten uit Leiden heeft op aangeven van de FNV de casus van de vrachtwagenchauffeurs in kaart gebracht en constateerde dat er zeven rechtsgebieden bij komen spelen.

Dat geldt natuurlijk ook voor de ILO-activiteit op dit terrein. De rapportage over de verschillende aspecten van de zaak is apart voor elk verdrag. Dat betekent vanwege de rapportagecyclus dat rapporteren over dwangarbeid in het ene jaar moet plaatsvinden, over migrerende werknemers het volgende en over recruitment het derde jaar. De arbeidsomstandigheden komen misschien in het vierde jaar aan de orde en daarna begint de *reporting circle* weer opnieuw te lopen.

Het zou een goed idee zijn om dat soort processen meer vanuit de problematiek te organiseren en te proberen daar de lidstaten op aan te spreken. Zo zou ook veel meer kennis kunnen worden ontwikkeld over de samenhang in de problematiek en misschien ook wel in de bestrijding ervan. We zouden een voorbeeld kunnen nemen aan de *EU Enforcement directive*, die ook zo'n procesmatig karakter heeft. Misschien valt zelfs wel een *Convention on the enforcement of ILO conventions* te bedenken!

**2. Het probleem van versnipperd werk en te weinig uren, waardoor geen leefbaar inkomen kan worden verdiend**

Ik heb wel eens gehoord dat in bijna alle landen de arbeidswetgeving is begonnen met het regelen van de werktijd, vaak de achturige werkdag. In elk geval geldt dat voor de ILO. Dat is ook niet zo gek want het is niet ingewikkeld: overal waar je op de wereld bent, bestaat de week uit 168 uren. Dat maakt uniformiteit makkelijk, anders dan bij andere arbeidsvoorwaarden of -omstandigheden, zoals bijvoorbeeld de lonen.

Die achturige werkdag in de gemiddeld 40-urige werkweek is nog steeds een prachtig uitgangspunt. Maar het perspectief is gewijzigd. In een van de mooie rapporten over *The Future of Work*, dat door de ILO in het kader van dit jubileumjaar is uitgebracht, staat het klip en klaar.[3] De ene helft van de werkenden op de wereld werkt veel te veel uren, terwijl de andere helft een structureel tekort heeft aan uren werk. En in het verlengde daarvan natuurlijk aan inkomen.

Dit spreekt ook mijn studenten in Nederland zeer aan omdat zij vaak ook op onzekere arbeidscontracten werken. Ik vraag me wel eens af hoe we de arbeidsmarkt voor de volgende generatie achterlaten. Ze moeten niet alleen het aantal

3. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_649907.pdf

uren dat ze werken bij elkaar sprokkelen, het sociale zekerheidssysteem geeft ook veel minder bescherming dan voorheen als terugval, als de inkomsten niet gehaald kunnen worden.

Wij kwamen dus op een nieuw pleidooi voor de achturige werkdag. Maar dan als een minimumrecht op arbeidsuren. Het hoeft misschien geen acht, maar misschien zes uren te zijn, het gaat om het principe! Verdrag 1 moet een protocol krijgen voor de hedendaagse problematiek. Een 21ste-eeuwse update, net zoals we dat bij verdrag 29 over dwangarbeid hebben gedaan. Het recht op werk, een aantal uren werk, moet daarbij centraal staan.

### 3. Onduidelijkheid over wie de werkgever is en onder welke cao een werkende valt

Ruim twintig jaar geleden in 1997, gebeurde iets dramatisch tijdens de conferentie in Genève. Op de agenda stond voor de tweede ronde het onderwerp '*contract labour*'.[4] Een instrument dat een verdrag moest worden haalde slechts de status van een aanbeveling. Dat ging over het, toen nog, in elk geval in het Westen, betrekkelijk nieuwe probleem dat arbeidsrelaties door er een andere juridische kwalificatie aan te geven, niet onder het arbeidsrecht vielen. Dat verschijnsel is in de loop der jaren natuurlijk alleen nog maar erger geworden. Het mislukken van dat verdrag ruim twintig jaar geleden, gaf ons toen al te denken en te vrezen.

Onze, dat wil zeggen de meeste arbeidsrechtdeskundigen, manier om die '*misqualification*' te tackelen was gericht op het steeds weer benadrukken dat het om schijnconstructies ging en dat de piketpaaltjes van het werknemersbegrip steeds breder moesten worden neergezet. We zochten onze oplossing aan de beschrijving van de werknemerskant van de arbeidsrelatie. Ook de wetgever ging er in Nederland op die manier mee aan de gang, door bijvoorbeeld rechtsvermoedens in het Burgerlijk Wetboek op te nemen. Soms lukte dat en haalden we vervolgens ons gelijk bij rechters, maar we kunnen zeker niet opgelucht ademhalen en zeggen dat die beweging is gestopt.

Het probleem is namelijk niet zozeer aan de kant van het werknemersbegrip gebleven. Wat we hebben gezien in die afgelopen twintig jaar is dat juist de kant van de werkgever enorm is veranderd. Catelene Passchier spreekt daar ook over deze middag. Zij noemt het 'de verdwijnende werkgever', ik heb het in een artikel 'de wonderbaarlijke vermeerdering van de werkgever' en 'onthecht werkgeverschap' genoemd.[5]

Waar ondernemingen voorheen verschillende kernactiviteiten en ondersteunende activiteiten herbergden en alle werkzaamheden door eigen werknemers lieten

---

4. Boonstra Klara, Roth Esther, Contract labour en de arbeidsovereenkomst, in: *SMA* 1998, vol. 4, pp. 160-167.
5. https://www.wbs.nl/publicaties/de-wonderbaarlijke-vermenigvuldiging-van-het-werkgeverschap

uitvoeren, is een 'gesplitst' (*'fissured'*)[6] productiemodel gemeengoed geworden. Een dienst of product wordt niet langer door één onderneming, maar door een netwerk van ondernemingen geproduceerd. Die ontwikkeling is zowel nationaal als mondiaal en strekt zich uit over vrijwel elke economische activiteit. De gehanteerde splitsingsmethodes, zoals uitbesteding, aanbesteding, (onder)aanneming en meerpartijen-arbeidscontracten, leiden tot het uiteenspelen en onderlinge concurrentie van werkenden. Vakbonden, die de belangen van alle werkenden willen behartigen, zijn op deze manier onder grote druk komen te staan.

De ontwikkeling is ideologisch sterk neoliberaal gekleurd en wordt in veel landen juist gefaciliteerd door aanpassingen in het arbeidsrecht, een gebrekkige handhaving van het fiscaal recht door de overheid en perverse prikkels van schuldenfinanciering bij overnames. Ondernemingen met grensoverschrijdende productieketens spelen landen tegen elkaar uit.

Daarom moeten we, dat wil zeggen de ILO, de focus verleggen naar een verdrag dat de onderneming centraal stelt die in de vorm van een netwerk met andere ondernemingen een dienst of product levert. We moeten de arbeidsbescherming net zo globaliseren als de productieketens. In plaats van splitsen moet worden gewerkt aan hechten.[7] Het motto daarbij moet zijn: wie bepaalt betaalt. Dat wil zeggen dat de leidende onderneming verantwoordelijk gesteld moet worden voor de arbeidsvoorwaarden in de hele keten. Als zij die niet zelf wil dragen, moet ze belast worden, zodat de kosten van de arbeidsbescherming toch zijn gedekt. Uiteraard moet worden verzekerd dat de baten bij de betreffende werkenden terechtkomen.

## Conclusie

Zomaar drie onderwerpen die ook nog eens '*inter-related*' zijn, op de toch al drukke agenda van de ILO. Ze vergen nog zeer veel nadere uitwerking en dat zal heus nog veel problemen oproepen. Maar ze zijn urgent, komen niet uit de lucht vallen en er valt al veel over te lezen in de rapporten over de *Future of Work*.

Het zijn politiek thema's en ik snap natuurlijk best dat dat ingewikkeld is in Genève. Maar het zijn ook thema's die mensen heel direct raken en op elk niveau door iedereen vanuit de eigen situatie kunnen worden begrepen. In het globale poldermodel dat de ILO toch eigenlijk is, betekent dat dat het onderwerpen met draagvlak zijn.

---

6. Weil David, *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it*, Harvard University Press, Cambridge, MA, 2014.
7. Een begin is gemaakt in de ILO Resolution concerning Decent Work in global supply chains.

# 2. Resolution concerning decent work in global supply chains*

The General Conference of the International Labour Organization, having met at Geneva in its 105th Session, 2016,
Having undertaken a general discussion on the basis of Report IV, *Decent work in global supply chains*,

1. Adopts the following conclusions, and
2. Invites the Governing Body of the International Labour Office to:
   (a) give due consideration to them in planning future work; and
   (b) request the Director-General to take them into account when preparing future programme and budget proposals and to give effect to them, to the extent possible, when implementing the Programme and Budget for the 2016-17 biennium.

## Conclusions concerning decent work in global supply chains

### Opportunities and challenges for the realization of decent work and inclusive development emerging from global supply chains

1. Global supply chains are complex, diverse and fragmented. Across textile, clothing, retail, footwear, automotive, food and agriculture, seafood, fisheries, electronics, construction, tourism and hospitality, horticulture, transport and other sectors, global supply chains have increased, facilitated by technological development. They have contributed to economic growth, job creation, poverty reduction and entrepreneurship and can contribute to a transition from the informal to the formal economy. They can be an engine of development by promoting technology transfer, adopting new production practices and moving into higher value-added activities, which would enhance skills development, productivity and competitiveness.
2. The positive impact of global supply chains on job creation is important in view of demographic changes in terms of aging, population growth and the increase of women's participation in the labour market. Across the world, millions of young women and men are looking for opportunities to enter the labour market. Participation in global supply chains increases their chances of getting

* Aangenomen op 10 juni 2016; https://www.ilo.org/ilc/ILCSessions/105/texts-adopted/WCMS_497555/lang--en/index.htm

a foothold in the world of formal work, doing well for themselves and their families, and succeeding in life.

3. At the same time, failures at all levels within global supply chains have contributed to decent work deficits for working conditions such as in the areas of occupational safety and health, wages, working time, and which impact on the employment relationship and the protections it can offer. Such failures have also contributed to the undermining of labour rights, particularly freedom of association and collective bargaining. Informality, non-standard forms of employment and the use of intermediaries are common. The presence of child labour and forced labour in some global supply chains is acute in the lower segments of the chain. Migrant workers and homeworkers are found in many global supply chains and may face various forms of discrimination and limited or no legal protection.

4. In many sectors, women represent a large share of the workforce in global supply chains. They are disproportionately represented in low-wage jobs in the lower tiers of the supply chain and are too often subject to discrimination, sexual harassment and other forms of workplace violence. In addition, they lack access to social protection measures in general, and maternity protection in particular, and their career opportunities are limited.

5. Export processing zones (EPZs) are not uniform and have very different characteristics. Decent work deficits are pronounced in a significant number of EPZs linked to global supply chains. Fundamental principles and rights at work and decent work should apply to all territories, including EPZs. With the aim to attract investment and to create jobs, EPZs are often characterized by exemptions from labour laws and taxes, and restrictions on trade union activities and collective bargaining. Long working hours, forced overtime and pay discrimination are common practices in EPZs.

6. Governments may have limited capacity and resources to effectively monitor and enforce compliance with laws and regulations. The expansion of global supply chains across borders has exacerbated these governance gaps.

7. With its mandate, experience and expertise in the world of work, its normative approach to development and its tripartite structure, the ILO is uniquely positioned to address governance gaps in global supply chains so that they can fulfil their potential as ladders for development.

**Interventions that have been put in place to ensure that economic development and decent work go hand in hand**

8. A wide range of policies, strategies, actions and programmes have been put in place by the Office, ILO constituents and other stakeholders to ensure that economic development and decent work in global supply chains, including respect for international labour standards, go hand in hand. All of these have been designed and implemented at the workplace, national, sectoral, regional and international levels. Despite this wide range of interventions, decent work deficits and governance gaps continue to exist and these challenges must be addressed.

9. Many member States have taken action to diminish governance gaps by strengthening national labour administration and labour inspection systems. Member States have also worked through other international and multilateral

organizations and regional groups, and by integrating labour provisions, including core labour standards, in trade agreements, in public procurement and through technical cooperation programmes. Other interventions include legislation on responsibility down the chain, sometimes providing for cross-border regulation of supply chains. At the same time, not all member States have been able to cope effectively with the rapid transformation brought about by their participation in the global economy.

10. Private compliance initiatives have been launched by individual companies and industry-wide and multi-stakeholder groups. These have focused on a wide array of issues, and utilized different strategies such as auditing, best practice sharing, complaints mechanisms, peer learning, guidance and capacity building. Business has a responsibility to respect labour rights in their operations as laid out in the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), and governments have the duty to implement and enforce national laws and regulations. Efforts of other stakeholders to promote workplace compliance can support, but not replace, the effectiveness and efficiency of public governance systems.

11. Social partners have engaged in cross-border social dialogue and negotiated international framework agreements, a Freedom of Association Protocol and a binding Accord. They have also developed industry-wide bargaining, sectoral standards, tools and guidance. There is scope to further enhance the effectiveness and impact of these tools, for example through non-judicial grievance mechanisms, and to raise awareness of these industrial relations mechanisms.

12. In several of these initiatives, the ILO has played an important role within its mandate by providing support, policy advice, and technical cooperation activities.

**Appropriate governance systems and measures by governments and the social partners to achieve coherence between economic outcomes and decent work in global supply chains**

13. The UN Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (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; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached. The General Assembly resolution through which the UN Guiding Principles were adopted in 2011 underscored that while the State has the duty to enforce legislation, business enterprises are required to comply with it. It highlights that weak national institutions, legislation and implementation hamper maximizing the benefits of globalization and that further action is required to bridge governance gaps at the sectoral, national, regional and international levels. Actions should include capacity building of all actors in order to better manage decent work challenges in global supply chains. The UN Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, location, ownership and structure.

14. Due to its global mandate, expertise and experience in the world of work, the ILO, in collaboration with its Members, is best placed to lead global action

for decent work in global supply chains. The establishment of the 'Vision Zero Fund', initiated in 2015 by the G7 in cooperation with the ILO to foster occupational safety and health in production countries, is one example in the recent past. To this effect the ILO should strengthen its capacity as the global centre of excellence to facilitate, having regard to all relevant available evidence, the development and implementation of well-informed coherent policies and strategies and build the capacity of constituents.

*Role for governments, business and social partners*

15. States have the duty to adopt, implement and enforce national laws and regulations, and to ensure that the fundamental principles and rights at work and ratified international labour Conventions protect and are applied to all workers, taking into account other international labour standards. Governments, business and social partners have complementary but different responsibilities in promoting decent work in global supply chains. Business has a responsibility to respect human and labour rights in their supply chains, consistent with the UN Guiding Principles, and to comply with national law wherever they do business. Policy coherence, collaboration and coordination are required at the global, regional, sectoral and national levels.

16. Governments should:

(a) Strengthen labour administration and labour inspection systems in order to ensure full compliance with laws and regulations and access to appropriate and effective remedy and complaints mechanisms. The responsibility for law enforcement lies with governments, taking into account that employers, workers and their organizations have an important role to play in promoting and ensuring compliance.

(b) Actively promote social dialogue and fundamental principles and rights at work, including freedom of association and the right to collective bargaining for all workers, regardless of their employment status, including in EPZs.

(c) Use public procurement to promote fundamental principles and rights at work, taking into account the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), as this can have an important effect on workers' rights and working conditions along global supply chains.

(d) Where appropriate, require enterprises owned or controlled by the State to implement due diligence procedures and to promote decent work in all their operations in their supply chains.

(e) Create an enabling environment to help enterprises strengthen their contribution to sustainability and decent work throughout their business operations, help them to identify sector-specific risks and implement due diligence procedures in their management systems. Governments should also clearly communicate on what they expect from enterprises with respect to responsible business conduct and could consider whether further measures, including regulation, are needed if these expectations are not met.

(f) Stimulate transparency and encourage, and, where appropriate, require, by various means, that enterprises report on due diligence within their supply chains to communicate how they address their human rights impacts.

(g) Fight corruption, including by protection of whistle-blowers.

(h) Consider to include fundamental principles and rights at work in trade agreements, taking into account that the violation of fundamental principles and

rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.

(i) Set out clearly the expectation that all business enterprises domiciled in their territory and/ or jurisdiction respect human rights throughout their operations, and the fundamental principles and rights at work for all workers, including migrant workers, homeworkers, workers in non-standard forms of employment and workers in EPZs.

(j) Implement measures to improve working conditions for all workers, including in global supply chains, in the areas of wages, working time and occupational safety and health, and ensure that non-standard forms of employment meet the legitimate needs of workers and employers and are not used to undermine labour rights and decent work. Such measures should go hand in hand with increasing productivity.

(k) Target specific measures at small and medium-sized enterprises (SMEs), including cooperatives and other entities of the social economy, to increase their productivity and promote decent work, including opportunities to formalize, further develop, upgrade and advance to higher segments of the supply chains, in line with the 2007 Conclusions concerning the promotion of sustainable enterprises and the 2015 Conclusions concerning small and medium-sized enterprises and decent and productive employment creation.

(l) In order to suppress forced or compulsory labour, provide guidance and support to employers and businesses to take effective measures to identify, prevent, mitigate and account for how they address the risks of forced or compulsory labour in their operations or in products, services or operations to which they may be directly linked, in line with the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105) and the Protocol of 2014 to the Forced Labour Convention, 1930.

(m) Implement policies to facilitate the transition from the informal to the formal economy in line with Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), thus increasing the tax base for governments, fair competition among enterprises and decent work opportunities for workers.

(n) Cooperate through regional bodies to harmonize laws and practices and/or improve policy coherence among countries, in order to ensure decent work in global supply chains.

17. In line with the autonomy of social partners, the social partners should jointly promote decent work and fundamental principles and rights at work for all workers, including in global supply chains, through sectoral initiatives, collective agreements, cross-border social dialogue and international framework agreements, where appropriate. Particular attention should be paid to the rights to freedom of association and collective bargaining, especially for vulnerable groups of workers in global supply chains.

18. In line with the UN Guiding Principles, business enterprises should carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally. Business enterprises should establish

operational-level grievance mechanisms for workers impacted by their operations in line with the UN Guiding Principles.

19. Employers' organizations should provide practical guidance to implement due diligence into operational management systems and build capacity thereon. Special attention should be paid to SMEs, which need support in order to meet their responsibilities.

20. Workers' organizations should provide information and support to workers, in particular regarding the respect of workers' rights and improvements in working conditions. Workers' organizations should also negotiate enforceable agreements with multinational enterprises and involve workers' representatives in monitoring their implementation.

21. Governments and social partners should also stimulate multi-stakeholder initiatives to promote decent work in global supply chains that can support, but not replace, the effectiveness and efficiency of public governance systems.

*ILO action*

22. Based on the ILO Declaration of Philadelphia (1944), the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), the ILO Declaration on Social Justice for a Fair Globalization (2008), the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), and all relevant international labour standards, including the fundamental Conventions, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Protocol of 2014 to the Forced Labour Convention, 1930, the Labour Inspection Convention, 1947 (No. 81), the Work in Fishing Convention, 2007 (No. 188), the Maritime Labour Convention, 2006, the Employment Service Convention, 1948 (No. 88), the Minimum Wage Fixing Convention, 1970 (No. 131), the Home Work Convention, 1996 (No. 177), the Maternity Protection Convention, 2000 (No. 183), the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), the Employment Relationship Recommendation, 2006 (No. 198), the Private Employment Agencies Convention, 1997 (No. 181), the Occupational Safety and Health Convention, 1981 (No. 155), the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), the Conclusions concerning Labour Administration and Labour Inspection adopted by the International Labour Conference at its 100th Session (2011), the Conclusions concerning small and medium-sized enterprises and decent and productive employment creation adopted by the International Labour Conference at its 104th Session (2015), as well as the Conclusions concerning the promotion of sustainable enterprises adopted by the International Labour Conference at its 96th Session (2007), the recently launched Future of Work Initiative, and the inclusion of decent work in the 2030 Agenda for Sustainable Development, the ILO should develop a programme of action to address decent work in global supply chains through a comprehensive and coordinated framework. Decent Work Country Programmes and the Global Jobs Pact can be used as national policy frameworks to address deficits and gaps in global supply chains. In order to implement a timely and dynamic programme of action, a senior-level point of contact should lead this effort.

23. Under the programme of action, the ILO should:

(a) Promote the ratification and implementation of the ILO standards relevant to decent work in global supply chains.

(b) Strengthen capacity building and provide technical assistance to member States on labour administration and inspection systems. These actions should also ensure that workers have access to legal remedies, including in EPZs. The ILO should continue to support efforts by governments to improve the rule of law and facilitate the transition from the informal to the formal economy, establishing independent and effective judicial systems, improving implementation and enforcement of national law, and building the capacity of all enterprises to comply with national law.

(c) Promote effective national and cross-border social dialogue, thereby respecting the autonomy of the social partners. When social partners decide to negotiate international framework agreements, the ILO could support and facilitate the process, on joint request, and assist in the follow-up process, including monitoring, mediation and dispute settlement where appropriate. Furthermore, the ILO should undertake research on the effectiveness and impact of cross-border social dialogue.

(d) Assess the impact and scalability of, and where necessary, adapt and scale up development cooperation programmes, such as Better Work and Sustaining Competitive and Responsible Enterprises (SCORE), and develop sectoral and other approaches to address decent work challenges in global supply chains.

(e) Provide leadership and use the ILO's convening power and unique added value to drive policy coherence among all multilateral initiatives and processes related to decent work in global supply chains. It should work in partnership with international organizations and forums such as UN organizations, the Organisation for Economic Co-operation and Development (OECD), G7 and G20 and international trade and financial institutions, and take into account international frameworks such as the UN Guiding Principles, as well as other reference instruments such as the OECD Guidelines for Multinational Enterprises. The ILO should, taking into account the function and the geographical scope of OECD National Contact Points (NCPs), upon request, provide expertise to the NCPs on social and labour standards. Within the review process of the MNE Declaration, it should consider the setting up of mechanisms to address disputes.

(f) Strengthen its capacity to give guidance to enterprises on the application of labour standards within their supply chains and make information available on specific country situations, laws and regulations, including on the implementation of labour rights due diligence in coherence with already existing international frameworks. Many of these frameworks help enterprises to foster decent work. They should be better known and promoted in a coherent way.

(g) Consider adopting an action plan to promote decent work and protection of fundamental principles and rights at work for workers in EPZs, that follows up on the current discussion as well as previous discussions held in the ILO on this subject, such as the Tripartite Meeting of Export Processing Zone-Operating Countries (Geneva, 1998) and the Governing Body's discussion at its 286th Session (March 2003) on Employment and social policy in respect of export processing zones.

(h) Take a proactive role in generating and making accessible reliable data on decent work in global supply chains, in cooperation with all relevant organizations and forums, to create synergies in statistics and research. Moreover, it should build capacity at the national level to support the efforts of constituents to generate their data.
(i) Carry out further research and analysis to better understand how supply chains work in practice, how they vary by industry, and what their impact is on decent work and fundamental rights. It should also perform an assessment of the many strategies and programmes, both internal to the Organization and by external actors, promoting decent work in global supply chains. The ILO could compile a compendium on good practices in global supply chains, and become a knowledge centre to provide guidance and advice to stakeholders inside and outside the Organization and build the capacity of constituents.

24. The MNE Declaration is the ILO framework supported by all tripartite constituents that aims to maximize positive impacts of multinational enterprises and resolve possible negative impacts. It states roles and responsibilities for governments (home and host), multinational enterprises, and workers' and employers' organizations to that effect and brings these actors together to solve decent work challenges and identify opportunities for inclusive growth. The review process of the MNE Declaration text and interpretation procedure decided by the Governing Body should take into account the outcomes of this discussion of the International Labour Conference.

25. There is concern that current ILO standards may not be fit for purpose to achieve decent work in global supply chains. Therefore, the ILO should review this issue and convene, as soon as appropriate, by decision of the Governing Body, a technical tripartite meeting or a meeting of experts to:

(a) Assess the failures which lead to decent work deficits in global supply chains.
(b) Identify the salient challenges of governance to achieving decent work in global supply chains.
(c) Consider what guidance, programmes, measures, initiatives or standards are needed to promote decent work and/or facilitate reducing decent work deficits in global supply chains.

# Deel V Toezichtmechanisme ILO

# 1. Supervisiemechanisme van de ILO: crisis overwonnen?*

*Paul F. van der Heijden***

## Toppen en dalen

Iedere organisatie die 100 jaar oud is geworden heeft in de loop van haar bestaan glorieuze en moeilijke jaren gekend. Er is glans van trots en er zijn littekens van hard vallen en weer opstaan.

Zo is het ook met de ILO. Een hoogtepunt van glans was in de vorige eeuw, in 1969, het verkrijgen van de Nobelprijs voor de Vrede. Een schitterende veer op de toen al niet meer zo jonge hoed. In de 21e eeuw is zo'n hoogtepunt van wereldwijde erkenning nog niet aan de orde geweest. De wereldomspannende multilaterale organisatie heeft het, net als de vergelijkbare zusters IMF en Wereldbank niet gemakkelijk in tijden van nationalisme, protectionisme, patriotisme en populisme. Ook de wereldwijde afkalving van de macht en het getal van de vakbonden helpt niet mee aan de versterking van de positie van de ILO. En het voeren van de sociale dialoog is er in het huidige klimaat van polarisatie, dat eerder denkt aan 'zenden aan' dan aan 'luisteren naar' de ander, niet gemakkelijker op geworden. Dat is te betreuren, juist omdat in tijden van grote sociale ongelijkheid en onzekerheid over de toekomst van werk en bestaanszekerheid een organisatie die zich wereldwijd inzet voor sociale rechtvaardigheid broodnodig is.

Alle hens aan dek dus om de ILO weer een krachtige organisatie te laten zijn.

Een belangrijk onderdeel van het werk van de ILO is het supervisiemechanisme, dat in de wereld geroemd wordt om zijn invloed, in vergelijking met de andere VN of internationale monitoring systemen.

Toezien op en monitoren van de juiste implementatie en toepassing van de afgesproken regels in de praktijk is van het grootste belang. Zoals we weten is papier geduldig, alles komt aan op de uitvoering in de praktijk.

Vanaf het begin van haar bestaan heeft de ILO veel belang gehecht aan een efficiënt en goed werkend toezichtsysteem. Helaas is door interne onenigheid binnen de ILO zelf, met name door verschillen van inzicht tussen werkgevers en

---

* Deze bijdrage is gebaseerd op deze eerdere publicaties: De ILO struikelend op weg naar de 100, in: *TRA* 2017/36, pp. 3-9 en De ILO en het Nederlandse arbeidsrecht, in: *Arbeidsrechtelijke Annotaties*, 2018/1, pp. 3-17.

** Hoogleraar Internationaal Arbeidsrecht aan de Universiteit Leiden en van 2002 tot 2018 onafhankelijk Voorzitter van de ILO Committee on Freedom of Association.

vakbonden, gedurende de laatste zeven jaar een forse crisis in dit systeem ontstaan. Er wordt nu hard gewerkt aan een oplossing, maar de eerlijkheid gebiedt te zeggen dat het vinden ervan moeizaam gaat en veel tijd kost.

Waar zitten de problemen en aan welke oplossingen wordt gedacht?

## Het toezichtmechanisme in kort bestek

Het toezichtmechanisme van de ILO is gebaseerd op de dialoog met landen die hun verplichtingen niet of niet helemaal nakomen. Harde sancties als bijvoorbeeld boycot of handelsverboden zijn er niet, behalve uiteindelijk uitzetting uit de organisatie.

Op basis van de dialoog zijn als *uitgangspunten voor het toezicht* in de 21e eeuw te formuleren: *transparantie, efficiëntie, coherentie en rechtszekerheid.*

Wordt daaraan voldaan?

Om deze vraag te kunnen beantwoorden moeten we ons verdiepen in het toezichtsysteem zelf.

Het *toezichtmechanisme* van de ILO is in *vijf categorieën* in te delen.

Ik begin met een schot voor de boeg.

Als je het geheel van de procedures overziet is de eerste neiging te zeggen: kan dat niet eenvoudiger, transparanter en efficiënter? Er zijn wel veel Commissies betrokken in het spel.

Kun je bijvoorbeeld niet één Commissie maken die klachten over schendingen van vrijheid van vakvereniging en collectief onderhandelen (Conventie 87 en 98) én klachten over schendingen van andere geratificeerde Conventies behandelt? Zo'n Commissie zou bijvoorbeeld twee 'kamers' kunnen hebben: één voor schending van Conventie 87/98 en één voor schending van de andere Conventies.

Laten we nu door de verschillende categorieën heen 'lopen' om te zien waar het knelt.

*De eerste categorie*, metaforisch aan te duiden als de hoofdweg, is een jaarlijks assessment van de rapportage van de lidstaten over geratificeerde Conventies. Die rapportage wordt in november van ieder jaar aan een technische analyse onderworpen door een onafhankelijke Commissie van Experts.

Dat zijn onafhankelijke juristen, gespecialiseerd in internationaal (arbeids) recht, doorgaans hoogleraren en rechters, benoemd door de Governing Body.

Het mandaat van de Experts staat ieder jaar uitgeschreven aan het begin van haar rapportage. De Experts maken een onafhankelijke en technische analyse van de rapportages van de lidstaten betreffende de toepassing van de Conventies , zowel wat betreft het recht, als in de praktijk van die lidstaten. De opinies en aanbevelingen van de Experts zijn niet juridisch bindend, maar geven wel richtlijnen aan de lidstaten hoe te handelen om hun regels en/of praktijk in te richten overeenkomstig de verplichtingen die voortvloeien uit de Conventies.

Het rapport van de Experts wordt ieder jaar in februari gepubliceerd. In juni vindt de jaarlijkse International Labour Conference (ILC) plaats, waar een vaste,

uiteraard tripartite, Commissie het rapport van de Experts bespreekt en analyseert, de Committee on the Application of Standards (CAS). Tijdens de CAS-vergadering wordt een lijst van doorgaan 25 lidstaten opgesteld en per land behandeld, waarvan de Experts hebben opgemerkt dat daar grote problemen zijn met de implementatie en/of praktijk van de geratificeerde Conventies. De conclusies van de CAS over deze lidstaten worden aan de ILC gepresenteerd en door deze geaccordeerd. Deze jaarlijkse 'ronde' is de kern van het toezichtsysteem en houdt de vinger aan de pols van de praktijk in de lidstaten. Dit systeem is grotendeels vastgelegd in de Constitutie van de ILO.

*De tweede categorie*, laten we zeggen de bijzondere weg, bestaat uit twee bijzondere procedures. Die procedures staan beschreven in de artikelen 24 en 26 van de Constitutie van de ILO.

Eerst de procedure als beschreven in artikel 24.

Hier krijgen vakbonden en werkgeversorganisaties het recht om een specifieke klacht in te dienen tegen een lidstaat die de verplichtingen voortvloeiend uit een geratificeerde Conventie niet, niet goed of niet helemaal nakomt.

Indien zo'n klacht ontvankelijk wordt verklaard, wordt een ad hoc commissie gevormd met drie leden, één uit de overheidsgroep, één uit de werknemersgroep en één uit de werkgeversgroep. Die Commissie komt na behandeling van de kwestie tot aanbevelingen aan de 'beklaagde' lidstaat.

Sinds 1924 zijn in totaal ongeveer 170 art-24-procedures afgehandeld door de ILO. De laatste 20 jaar ongeveer 5 zaken per jaar. In 2016 is door de FNV ook een klacht tegen Nederland ingediend en behandeld , die (onder meer) ging over de sterkte van de arbeidsinspectie in Nederland in het verband van de door Nederland geratificeerde Conventie 81.

De andere bijzondere procedure staat beschreven in artikel 26 van de Constitutie.

Hier hebben lidstaten het recht een andere lidstaat te confronteren met aanhoudende niet-nakoming van verplichtingen. Er wordt een Onderzoekscommissie ingesteld, die aanbevelingen doet aan de Governing Body.

Deze art-26-procedure wordt als de zwaarste gezien in het toezicht 'arsenaal'.

Sinds 1919 zijn in totaal slechts 12 art-26-procedures afgehandeld. De laatste 20 jaar onder meer tegen Myanmar, Zimbabwe en Venezuela, en laatstelijk bijna tegen Qatar, over de veiligheid op bouwplaatsen in verband met het wereldkampioenschap voetbal in 2022. Die procedure tegen Qatar was ingezet, maar niet doorgezet omdat er, onder druk van de dreiging met een art-26-procedure een akkoord met Qatar kwam over de aanhangige kwestie.

*De derde categorie* is een aparte procedure, laten we zeggen een speciale weg, helemaal gericht op de vrijheid van organisatie en collectief onderhandelen. Deze weg wordt veel gebruikt. Hier kunnen vakbonden en werkgeversorganisaties een concrete klacht indienen over niet-nakoming in een lidstaat van de principes van de vrijheid van organisatie en collectief onderhandelen. Deze vrijheden zijn cruciaal voor het bestaan van vakbonden en werkgeversorganisaties, en daarmee ook voor het bestaan van de ILO. De principes zijn neergelegd en uitgewerkt in de Conventies 87 en 98. Deze procedure is niet neergelegd in de Constitutie, maar in de praktijk gegroeid. De klachten worden behandeld in de vaste Committee on Freedom of Association (CFA) die drie keer per jaar bijeenkomt. Het mandaat

van de CFA is om te bepalen of een bepaalde nationale wetgeving of praktijk in overeenstemming is met de beginselen van vrijheid van organisatie en collectief onderhandelen zoals neergelegd in de Conventies 87 en 98. De CFA is tripartiete samengesteld uit de drie groepen die de ILO vormen.

Ze heeft 18 leden en een onafhankelijke voorzitter. Ze behandelt de ingekomen zaken en doet aanbevelingen aan de lidstaten waar de klacht speelt, die via de Governing Body aan het betreffende land worden doorgegeven. Sinds de start van de CFA in 1952 zijn zo'n 3300 klachten behandeld.

*De vierde categorie* is het interpretatiemechanisme van artikel 37 van de Constitutie.

Hier gaat het om de vraag naar de uitleg/interpretatie van de Conventies.

Er worden twee mogelijkheden gegeven: een 'advisory opinion' vragen en krijgen van het Internationaal Hof van Justitie in Den Haag of het bindend oordeel vragen aan een onafhankelijk ad hoc Tribunaal, samengesteld door de ILO.

*De vijfde categorie* is de Follow Up-procedure van de Declaration on Fundamental Principles and Rights at Work 1998. Deze procedure leidt ertoe dat ieder jaar op de ILC een van de fundamentele arbeidsrechten aan de hand van een landenrapport onder de loep wordt genomen en aanbevelingen voor verbeteringen worden gedaan aan landen waar dat nodig is gebleken.

## De crisis in 2012

Tijdens de ILC van 2012 hebben de werkgevers in de CAS een majeure crisis veroorzaakt, die tot de dag van vandaag repercussies heeft.

De werkgevers stelden principieel de kwestie aan de orde over het mandaat van de experts en over de interpretatie van de Conventies. Aanleiding was de interpretatie door de experts van Conventie 87 met betrekking tot het stakingsrecht. Al vele jaren werd C 87 zo uitgelegd dat daarin een stakingsrecht voor vakbonden moest worden gelezen (uiteraard met bepaalde grenzen). Die uitleg werd tot 2012 ook overgenomen door de CAS en de ILC en door de CFA. Het recht om te staken staat niet zo letterlijk in de Conventie.

Door de stellingname van de werkgevers werd in feite het hele supervisiesysteem van de ILO van binnenuit ter discussie gesteld. De CAS heeft in 2012 als gevolg van deze actie haar werk niet kunnen afmaken.

Sindsdien zijn vele formele en informele vergaderingen in de ILO aan dit onderwerp gewijd, terwijl de sfeer van onderling vertrouwen in de sociale dialoog danig was verstoord. In 2015 is ten slotte een soort wapenstilstand gesloten.

In een gezamenlijke verklaring werd toen uitgesproken dat werkgevers en werknemers over en weer elkaars recht op collectieve actie erkennen. Over de interpretatie van Conventie 87 in het verband van het stakingsrecht wordt in de verklaring niet gesproken.

Dikwijls is uiteraard de vraag gesteld waarom de werkgevers het nodig vonden om op deze wijze het internationaal dikwijls geroemde ILO-supervisiemechanisme zo fundamenteel aan te vallen en daarmee te verzwakken. Misschien ligt het antwoord in de vraag besloten. De interpretatie van de ILO-Conventies door de experts vonden steeds meer hun weg in andere internationale gremia en in de

nationale rechtbanken en hoogste rechterlijke colleges. Kortom, wellicht werd in de ogen van de werkgevers de supervisie van de ILO te invloedrijk?

## Waar wordt aan gewerkt?

Sinds een aantal jaren wordt in de ILO onder de titel 'Standards Initiative' gewerkt aan de modernisering van zowel de regelgeving (Conventies) als van het toezicht op de implementatie van die regelgeving. De bedoeling ervan is om de relevantie van de regelgeving te verbeteren en de tripartite consensus over een gezaghebbend supervisiemechanisme te versterken.

Het is niet de bedoeling van deze exercitie om voor wat betreft het supervisiemechanisme grote systematische wijzigingen door te voeren, die tot een wijziging van de Constitutie nopen.

Voor wat betreft het toezicht zijn in dit kader in de GB van november 2018 enkele besluiten genomen, die hier vermeld dienen te worden.

Met betrekking tot de art-24-procedure is besloten een vrijwillige nationale procedure in te lassen, als zowel de klager als de beklaagde regering daarmee instemt. De daarmee gemoeide tijd mag maximaal zes maanden duren. De behandeling van de zaak in Genève wordt gedurende die tijd opgeschort.

In de tripartite Commissie die de zaak onderzoekt mogen wat betreft het lid afkomstig uit de overheidsgeleding alleen vertegenwoordigers van landen in aanmerking komen die zelf de Conventie(s) waar het over gaat ook hebben geratificeerd. De GB moet regelmatig op de hoogte worden gehouden van de effecten die aanbevelingen aan de beklaagde lidstaat hebben gehad.

Verder is besloten de rapportageverplichtingen van de lidstaten te stroomlijnen en zo eenvoudig mogelijk te maken via digitaal in te vullen vragenlijsten.

Voorts is een aantal andere verbeteringen in het systeem doorverwezen naar de GB-vergadering van maart 2019, waaronder het maken van een toegankelijke gids voor gebruikers van het toezichtsysteem, waarbij ook gedacht wordt aan het uitschrijven van de procedure die gevolgd wordt bij een art-26-klacht.

Het inlassen van een mogelijkheid om in geval van een art-24-klacht de aangekaarte problematiek eerst nationaal te onderzoeken en mogelijk tot een oplossing te brengen, geeft het belang aan die aan de nationale context wordt gegeven.

In de CFA is dit issue van de zaak eerst terugleggen in de nationale omgeving, in iets ander verband, ook eerder aan de orde geweest. Dat was een gevolg van de vele zaken die bij de CFA werden aangebracht tegen Columbia. In dat land is een aantal jaren geleden met medewerking van de ILO een regeling afgesproken dat klagers die overwegen een klacht bij de CFA in te dienen eerst een nationaal opgezet mechanisme doorlopen (CETCOIT), en pas als dat niets heeft opgeleverd 'door' kunnen naar Genève.

## Waar wringt de schoen?

In ieder geval *op het punt van de coherentie en efficiency*.

Een van de kwesties die om aandacht vraagt is mijnentwege het ontbreken van interactie tussen de verschillende systemen die hetzelfde doel nastreven.

Laat ik een voorbeeld geven.

Enige tijd geleden werd bij de CFA een klacht ingediend tegen Zuid-Korea vanwege vakbondsvijandig gedrag bij de multinational Samsung en zijn supply chain. In het kader van de behandeling van zo'n klacht is er volgens de huidige procedures geen enkele mogelijkheid voor de CFA om zelf in contact te treden met Samsung. De hele gedachtewisseling over de klacht loopt via het ministerie van arbeid van Korea, die gevraagd wordt contact erover op te nemen met de Koreaanse werkgeversorganisatie, die weer gevraagd wordt contact te zoeken met Samsung. Een heel lange omweg.

Korea is ook lid van de OECD, die in haar Guidelines voor Multinationale Ondernemingen (MNO's) vakbondsvrijheid en onderhandelingsvrijheid bepleit. Als de vakbonden een klacht zouden indien bij de NCP in Seoul over dezelfde problematiek wordt Samsung wel direct aan tafel uitgenodigd, hetgeen natuurlijk ook voor de hand ligt.

Ook zou het nog kunnen zijn dat Samsung een Code of Conduct heeft waarin het bedrijf belooft zich als maatschappelijk verantwoordelijk bedrijf te zullen opstellen.

Duidelijk is dat *MNO's* op basis van het door hen onderschreven concept van Maatschappelijk Verantwoord Ondernemen (MVO) *samen met de staten een gedeelde verantwoordelijkheid* hebben voor de verwezenlijking van de fundamentele arbeidsrechten.

De reden waarom een bedrijf in de ILO geen gesprekspartner kan zijn is uiteraard duidelijk: de ILO is een organisatie van staten, niet van bedrijven. Maar nu staten steeds onmachtiger worden in de geglobaliseerde economische wereld en grote, de wereld via supply chains omvattende, bedrijven steeds machtiger en dat ook erkennen door maatschappelijk verantwoord te willen ondernemen, is het een anomalie dat zij niet zelf binnen de ILO kunnen worden betrokken in het gesprek als dat direct over hen gaat.

Zo'n gesprek lukt wel af en toe op incidentele basis, zoals bijvoorbeeld de coördinerende rol laat zien die de ILO succesvol oppakte bij het grote industriële ongeluk in de textielindustrie in Bangladesh, dat aan ruim 1100 mensen het leven kostte. Daar werden onder leiding van de ILO gesprekken gevoerd en afspraken gemaakt met vele MNO's, zoals H&M, C&A, Primark en anderen, die wereldwijd actief zijn in de textielbranche.

Zou wat incidenteel blijkt te kunnen niet ook structureel mogelijk zijn?

## De interpretatie kwestie

In de laatste vergadering van de CAS, die van juni 2018, stelde de woordvoerder van de werkgevers het volgende:

> 'De werkgevers benadrukken het feit dat in het rapport van de experts 33 van de 49 observaties inzake Conventie 87 met het stakingsrecht te maken hebben. De werkgevers willen genoteerd zien dat zij de interpretatie door de experts van Conventie 87 inzake het stakingsrecht niet delen en benadrukken met kracht hun dissenting opinion in deze.'

Hiermee werd nog eens duidelijk dat de in 2012 uitgebroken crisis nog niet is opgelost, als het om de interpretatie van Conventies gaat. Want een door artikel 37 ILO Constitutie voorziene gang naar het Internationale Hof van Justitie in Den Haag of de instelling van een Tribunaal over deze kwestie heeft – tot heden – ook niet de instemming van de werkgeversgeleding in de ILO.

## Conclusie

De ILO heeft in de afgelopen 100 jaar een robuust maar ook complex supervisiemechanisme opgebouwd en uitgebouwd, dat veelal succesvol heeft gewerkt.

In 2012 is het systeem vanuit de werkgeversgeleding in een crisis gebracht. Die crisis is nog niet geheel overwonnen. Er is sinds 2012 wel enige voortgang gemaakt in het project Revisie van het supervisiemechanisme, maar de voortgang is moeizaam en langzaam. Door de crisis is een sfeer van wantrouwen ontstaan en het kost tijd om weer dichter tot elkaar te komen.

De algemene eisen die aan het supervisiesysteem door de ILO worden gesteld zijn de volgende: transparantie, efficiëntie, coherentie en rechtszekerheid. Aan al deze eisen moet nog hard worden gewerkt in de komende jaren.

Voor wat betreft de *rechtszekerheid* is van belang dat de geledingen in de ILO het met elkaar eens worden over een handelwijze en de omgang met artikel 37 van de Constitutie dat twee wegen aangeeft om tot een bindende interpretatie van Conventies te komen. De weg naar het Internationale Hof van Justitie in Den Haag dan wel een ad hoc Tribunaal, waarvan de leden door de ILO zelf worden benoemd. De huidige situatie die een groot en belangrijk verschil van interpretatie laat zien over het stakingsrecht in het verband van Conventie 87 is onwenselijk en de ILO onwaardig. Het moet mogelijk zijn hierover een bindende beslissing te verkrijgen.

De *transparantie* kan beter door bijvoorbeeld met minder Cie's te werken. Denkbaar is om de commissies CFA en art-24-Commissies samen te voegen, zodat er ook een vaste art-24-Commissie is en deze niet iedere keer ad hoc bij elkaar moet worden gezocht.

Wat betreft de *coherentie* is het noodzakelijk dat de relatie met andere systemen binnen en buiten de VN wordt verbeterd, en moeten MNO's betrokken kunnen worden in het toezichtsysteem van de ILO. De inmiddels brede erkenning door MNO's van hun maatschappelijke verantwoordelijkheid moet ook gevolgen krijgen in een internationale organisatie als de ILO die 'werk' als kerndomein heeft.

Ten slotte kan de *efficiëntie* beter door bijvoorbeeld nationale staten vroeg te betrekken bij een toezichtkwestie zoals nu is besloten bij de klachtenprocedure van artikel 24.

Er is veel bereikt, en er is nog veel te doen.

# 2. Uitbreiding van handhavingsmechanismen fundamentele arbeidsrechten

## Is meer ook beter?*

*Paul F. van der Heijden***

**In een groot aantal internationale verdragen zijn fundamentele arbeidsrechten vastgelegd zoals het recht op vrije vorming van vakorganisaties, het verbod op kinder- en dwangarbeid alsmede het recht op een veilige arbeidsplaats. Handhaving van deze rechten vindt plaats via publiek- en privaatrechtelijke toezichtprocedures, die overigens met de globalisering van de economie een toenemende diversiteit vertonen. Publiekrechtelijke organisaties spelen weliswaar een grote rol in de totstandkoming van normen, verdragen en verklaringen maar beschikken over onvoldoende bevoegdheden om er op toe te zien dat die normen daadwerkelijk worden nageleefd. Global governance van sterke internationale organisaties zou tegenspel moeten bieden aan de grote internationale spelers in industrie en handel. Want ondanks alle verdragen en vrijwillige codes in het kader van Maatschappelijk Verantwoord Ondernemen worden er dagelijks schendingen van internationale arbeidsnormen gemeld en halen grote misstanden regelmatig het nieuws. Wordt het niet tijd voor een internationale controle op de arbeidsrechten in de handel en een daaraan gekoppeld global social label onder ILO-regie?**

### Inleiding

Het recht op *vrije vorming van vakorganisaties*, op *collectief onderhandelen* en op *collectieve actie*, het verbod op *kinderarbeid*, op *dwangarbeid* en op *discriminatie* op de werkplek, en het recht op een *veilige arbeidsplaats*, dat zijn de fundamentele arbeidsrechten. Deze rechten zijn vastgelegd in internationale verdragen van de VN, de ILO, de EU en nog andere internationale organisaties. En in veel landen ook in nationale wetgeving.

---

* Eerder geplaatst als artikel in NJB 2014, afl. 12, pp. 768-775.

** Prof. mr. P.F. van der Heijden is hoogleraar Internationaal Arbeidsrecht aan de Universiteit Leiden, voorzitter van de ILO Committee on Freedom of Association, en medewerker van dit blad. Student assistent Daan van Thiel was behulpzaam bij het vergaren van bronnen.

De weg van het vastleggen van een recht op papier naar de implementatie en realisatie ervan in de praktijk van alledag is een lange, en kent vele hindernissen.

Voor de handhaving van deze rechten zijn inmiddels verschillende internationale handhavingsmechanismen ontwikkeld: publiek- en privaatrechtelijke. Vanouds zijn er de publiekrechtelijke internationale toezichtprocedures van bijvoorbeeld de ILO en de VN, waarbij staten partij zijn.

Maar er ontstaan de laatste jaren vele andere mechanismen. In (bilaterale en/of regionale)vrijhandelsverdragen komen steeds meer sociale clausules voor, waarvan de naleving wordt gecontroleerd. De tamelijk recente VN Richtlijnen voor Handel en Mensenrechten worden via nationale actieplannen en de VN Raad voor de Mensenrechten levend gemaakt en gehandhaafd.

Met de snelle opkomst van Maatschappelijk Verantwoord Ondernemen (MVO) wordt ook privaatrechtelijke handhaving steeds belangrijker. Die krijgt gestalte via vrijwillige ondertekening van internationale gedragscodes door, veelal grote, bedrijven of bedrijfsbranches. Handelen in strijd met de code kan onrechtmatig zijn wegens schending van de zorgplicht. Ook is er meer aandacht voor International Framework Agreements, contracten tussen internationale vakbonden en bedrijven, waarin handhavingsmechanismen zijn opgenomen.

Meldingen over schending van de fundamentele arbeidsnormen zijn aan de orde van de dag. Grote industriële ongelukken in de textielbranche, in de mijnen, dwangarbeid in privé huishoudens en elders, kinderarbeid in alle soorten en maten, discriminatie wegens ras of seksuele voorkeur, het is niet moeilijk er vele voorbeelden en statistieken van te vinden, in Nederland, in Europa, in de wereld.

De handhavingsprocedures en -mechanismen nemen sterk toe in getal, waardoor de onoverzichtelijkheid eveneens toeneemt. Maar wordt zo ook de kans op succesvolle implementatie en naleving van de fundamentele rechten groter? Vele wegen leiden naar Rome, maar de kans op verdwalen wordt wel steeds groter, waardoor (heel) late aankomst dreigt. Wordt het in de globale economie tijd voor een internationale inspectie voor de fundamentele arbeidsrechten?

## De rauwe werkelijkheid: schending in grote getale

Er zij vele rapportages van schending van fundamentele arbeidsrechten in de wereld beschikbaar. Grote getallen vallen daarbij op.

Volgens de ILO (met 185 lidstaten), die op dit terrein al jaren actief is, is *kinderarbeid* dagelijks voelbaar voor ruim 167 miljoen kinderen van vijf tot zeventien jaar. De grootste groep daarvan bestaat uit kinderen van vijf tot elf jaar, zo'n 73 miljoen. In de categorie twaalf tot veertien jaar zijn er 47 miljoen, net als in de categorie van vijftien tot zeventien. Bij die laatste groep gaat het dan alleen om kinderen die gevaarlijk werk doen of andere vormen van 'hazardous work'. De meeste kinderarbeid komt voor in Sub-Sahara Afrika en in Azië, maar ook in Latijns Amerika en het Midden Oosten is het verschijnsel duidelijk aanwezig.[1]

Ook is duidelijk dat de aantallen teruglopen. De ILO heeft rond de eeuwwisseling een speciaal en intensief programma opgezet ter bestrijding van kinder-

1. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf

arbeid onder de naam IPEC, International Program for the Elimination of Childlabour. Veel rijke landen, waaronder Nederland, hebben hieraan financieel bijgedragen. Het programma is niet zonder resultaat gebleken. Maar ook andere organisaties als bijvoorbeeld UNICEF hebben zich hiervoor ingezet. Werden in 2008 nog 215 miljoen kinderen geteld, die volgens de ILO normen niet mogen werken, in 2012 waren dat er de bovengenoemde 167 miljoen, een forse terugloop dus. Het probleem is bekend: in veel gevallen betekent stoppen met kinderarbeid het wegvallen van letterlijk broodnodig inkomen, waar dan nog bij komt dat naar school gaan er niet in zit, omdat die er niet zijn.

Het vergt een lange adem om hier verdere voortgang te maken. De ILO Verdragen met betrekking tot kinderarbeid (nr. 138 en nr. 182) zijn door respectievelijk 166 en 178 lidstaten geratificeerd.

Wat betreft *dwangarbeid* (ILO Verdragen 29 en 105 ) schat de ILO dat in 2012 ongeveer twintig miljoen mensen wereldwijd slachtoffer zijn. Het gaat hier niet alleen om dwangarbeid opgelegd door een staat, maar ook die in de private sfeer voor bijvoorbeeld seksuele- of arbeidsexploitatie. De laatste categorie is de grootste, met 90% van het totaal. Gedwongen arbeidsexploitatie komt vooral voor in de landbouw, de bouw, huishoudelijk werk of fabriekswerk.

Gemeten naar het aantal slachtoffers van dwangarbeid per 1000 inwoners staan Centraal en Zuid-Oost Europa boven aan de lijst, gevolgd door Afrika en het Midden Oosten. Kijkt men evenwel naar de absolute getallen dan scoort Azië met 56% van het totaal (= 11,7 miljoen) het hoogst, gevolgd door Afrika met 3,7 miljoen en Latijns Amerika met 1,8 miljoen.[2]

Bij dwangarbeid is dikwijls sprake van grensoverschrijdende migratie dan wel interne migratie. Het laatste wil zeggen dat het slachtoffer nog wel in eigen land is, maar niet in eigen woonplaats. Het betreft hier bijna de helft van het totaal. ILO Verdragen 29 en 105 zijn door respectievelijk 177 en 174 lidstaten geratificeerd.

*Discriminatie* op de werkvloer (ILO Verdragen 100 en 111) is evenzeer een hardnekkig verschijnsel, maar ook zeer complex in zijn verschijningsvormen. Het is moeilijk in cijfers weer te geven, nu het sterk cultuur en religieus gebonden is, en scherpe definities ontbreken. Ook het onderscheid tussen directe en indirecte discriminatie maakt tellen moeizaam, omdat bij de laatste vorm de omstandigheden van het geval gewaardeerd moeten worden. Discriminatie van vrouwen, van minderheden, van migranten, van homoseksuelen en transgenders, van moslims of juist van christenen, van arbeidsgehandicapten of van aidspatienten, of van ouderen, het komt voor in alle continenten.

Discriminatie van vrouwen in termen van kansen op werk en inkomen is bijvoorbeeld in Azië een groot probleem. Twee derde van alle vrouwen in Zuid-Azië krijgt geen loon voor verrichte werkzaamheden. Ook speelt daar het kastesysteem, dat meebrengt dat bepaalde groepen bepaald werk helemaal niet mogen doen.[3]

---

2. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf
3. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_89_en.pdf

In Europa speelt nog steeds het probleem dat vrouwen minder verdienen dan mannen voor vergelijkbaar werk. In het Verenigd Koninkrijk toonde een rapport van de Equal Opportunities Commission dat elk jaar 30 000 vrouwen hun baan verliezen vanwege zwangerschap. Ook een bekend Europees discriminatie probleem betreft de behandeling van de Roma, ongeveer 10 miljoen mensen.[4]

In de Amerika's blijft discriminatie op grond van ras, ondanks veel maatregelen en beleid, een hardnekkig probleem.[5]

ILO Verdragen 100 en 111 zijn door respectievelijk 171 en 172 lidstaten geratificeerd.

De *vakbondsvrijheid* en het recht op collectief onderhandelen (ILO Verdragen 87 en 98). Ook hier is het niet goed doenlijk heel concrete cijfers van schending van de regels te geven. Afgaande op de gevallen van schending die bij de ILO Commissie voor Verenigingsvrijheid worden gemeld liggen de Amerika's op kop met 61% van de gemelde gevallen, gevolgd door Azië met 15%, Europa met 13% en Afrika met 11%. Vertekening loert hier, als altijd bij getallen, al snel om de hoek. Er is bijvoorbeeld nog nooit een klacht uit China genoteerd, terwijl daar pluriformiteit van vakorganisaties geheel ontbreekt en veel problemen op dit gebied spelen. De Commissie heeft op dit moment ongeveer 180 meldingen van schending uit de hele wereld in behandeling.[6]

ILO Verdragen 87 en 98 zijn door respectievelijk 152 en 163 landen geratificeerd.

Ten slotte de *veiligheid en gezondheid* op de arbeidsplaats. Dit onderwerp is niet opgenomen in de Verklaring over fundamentele arbeidsrechten van de ILO uit 1998. De ILO kent maar liefst 21 Verdragen over dit onderwerp, waaronder technische, zoals die welke alleen betrekking heeft op asbest. Het was destijds, en tot op heden, niet haalbaar een algemeen en samenvattend Verdrag over veiligheid op het werk te maken, waarnaar in de Verklaring kon worden verwezen. Het onderwerp wordt wel altijd in één adem genoemd met de andere fundamentele arbeidsrechten en is in veel internationale teksten terug te vinden.

Het grote ongeluk in april 2013 in de kledingfabriek aan Rana Plaza in de hoofdstad van Bangladesh, dat ruim 1100 medewerkers het leven kostte, kreeg mondiaal veel aandacht. Het was in de industriële geschiedenis sinds de 19e eeuw een van de grootste en zwaarste ongelukken. Veel grote kledingbedrijven in Europa en de VS zijn afnemers van de fabrieken in Bangladesh. De kledingindustrie is groot en belangrijk in dat land. Na de instorting van de fabrieksgebouwen met de fatale gevolgen kwam snel internationaal overleg tot stand dat leidde tot een overeenkomst tussen de ILO, de grote afnemers in de wereld van de kleding, de regering in Bangladesh, en andere geïnteresseerde regeringen, zoals die van Nederland. Onder voorzitterschap van de ILO werkt een werkgroep aan concrete maatregelen die voor betere veiligheid moeten zorgen.

---

4. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_90_en.pdf
5. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_91_en.pdf
6. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf

Ook elders in de wereld zijn schrijnende voorbeelden te vinden van onveilige en ongezonde werkplaatsen. Berucht zijn de kobaltwinning in de Congo, en de kolenmijnen in China en Latijns Amerika. Volgens een rapport van de ILO uit 2013 sterven ieder jaar ruim 2 miljoen mensen aan arbeidsgerelateerde ziekten, en 321.000 direct als gevolg van een ongeluk op het werk.[7]

Soms wordt zelfs in Nederland onder slechte omstandigheden gewerkt, zoals blijkt uit de berichtgeving over de champignonteelt in Limburg. Ook de werk- en woonomstandigheden van arbeidsmigranten in de glastuinbouw in het Westland zijn niet altijd optimaal.

## De juridische werkelijkheid: mooie normen

De normen die betrekking hebben op fundamentele arbeidsrechten zijn allen terug te voeren op internationale verdragen en verklaringen. De ILO heeft een belangrijke rol gespeeld in de verwoording en implementatie van de normen wereldwijd. In de *Verklaring over fundamentele beginselen en rechten op de werkplaats* uit 1998 werd een aantal fundamentele rechten gedestilleerd uit de ILO-Constitutie en reeds bestaande Verdragen. Deze Verdragen staan hierboven vermeld met de ratificatie-aantallen erbij, die hoog zijn. Gemiddeld zo'n 160 ratificaties, terwijl de ILO 185 lidstaten telt. Na 1998 is de ILO een ratificatieactie begonnen die dit mooie resultaat heeft opgeleverd. Daarbij moet wel worden aangetekend dat sommige dichtbevolkte landen als China, India en de VS veel van deze Verdragen niet hebben geratificeerd.

Maar deze beginselen en rechten zijn zo fundamenteel dat ook landen die de betreffende Verdragen niet hebben geratificeerd op grond van hun lidmaatschap van de ILO wel verplicht zijn ze te respecteren, de naleving ervan te bevorderen en te realiseren. De Verklaring uit 1998 kent een follow-up mechanisme, waar ook de landen die niet hebben geratificeerd, aan meedoen.

De fundamentele rechten waar het om gaat, zijn zo 'basic' dat ze in ook in tal van andere internationale en nationale wetteksten te vinden zijn.

In het *EU Handvest van fundamentele rechten* bijvoorbeeld, dat in 2009 van kracht is geworden. En dat op zijn beurt, voor wat betreft de sociale rechten, weer is gebaseerd op het *Europees Sociaal Handvest* dat in het kader van de Raad van Europa is opgesteld en vanaf 1963 rechtskracht heeft. Ook in het *VN Verdrag met betrekking tot burger- en politieke rechten, als in dat omtrent sociale, economische en culturele rechten* zijn bepalingen met betrekking tot de fundamentele arbeidsrechten te vinden. In het reguliere internationaal publiekrecht is er voldoende juridische basis voor deze rechten dus.

Daarenboven zijn de fundamentele arbeidsrechten ook terug te vinden in andere juridisch relevante teksten. Denk bijvoorbeeld aan de *OESO Richtlijnen voor multinationale ondernemingen*, waarin deze rechten zijn opgenomen. Ook valt te denken aan de *VN Richtlijnen voor handel en mensenrechten*, zoals die zijn opgesteld aan de hand van adviezen van prof. Ruggie (om die reden ook wel het *Ruggie-kader* genoemd). Hier bevinden we ons in het wat juridische kracht betreft wat vagere gebied van de Richtlijnen van internationale publiekrechtelijke

7. http://ilo.ch/global/topics/safety-and-health-at-work/lang--en/index.htm

organisaties, ook wel 'soft law' genoemd. Deze Richtlijnen worden dikwijls door grote multinationale ondernemingen vrijwillig, al dan niet onder druk van aandeelhouders en/of vakbonden, uitdrukkelijk onderschreven, zodat ze er ook op kunnen worden 'aangesproken'. Over wat dat precies betekent, zie de paragraaf 'Privaatrechtelijke handhaving: in opkomst, maar complex'.

Behalve Codes afkomstig van internationale organisaties zijn er ook die worden opgesteld door 'het veld', bijvoorbeeld door brancheorganisaties in de kledingindustrie, voedselindustrie enz. Tenslotte maken grote ondernemingen ook zelf Codes, zoals bijvoorbeeld Unilever en Nike.

Het opstellen of onderschrijven van deze Codes komt voort uit het opkomende fenomeen van het *Maatschappelijk Verantwoord Ondernemen* (MVO), waarin aandacht van het bedrijfsleven gevraagd wordt voor fundamentele zaken als het fatsoenlijk omgaan met de omgeving en het milieu, en met medewerkers. Ook wel kernachtig weergegeven als aandacht voor '*people, planet and profit*'. Meer en meer bedrijven onderschrijven de hierachter liggende gedachten en zijn bereid (al dan niet uit P(ublic)R(elations) overwegingen) er aandacht aan te geven, codes door anderen opgesteld te onderschrijven of zelf codes op te stellen.

Een andere vindplaats van deze rechten zijn de *Vrijhandelsverdragen* die over de hele wereld voortdurend worden gesloten. Hierin gaat het uiteraard om de bevordering van vrije handel tussen de verdragspartijen, maar 'nebenbei' wordt ook dikwijls verwezen naar de fundamentele arbeidsrechten van de ILO en/of andere organisaties. Het kan gaan om regionale vrijhandelsverdragen, zoals bijvoorbeeld het NAFTA Verdrag tussen Canada, de VS en Mexico, maar ook om bilaterale verdragen als bijvoorbeeld tussen de EU en Canada of de EU en Zuid-Korea. De EU is betrokken bij ongeveer 25 van zulke Vrijhandelsverdragen.

Volgens een recent (2013) rapport van de ILO komt in zeker 58 van zulke Vrijhandelsverdragen een bepaling over fundamentele arbeidsrechten voor.[8] Dat is opmerkelijk, omdat een heftige discussie over het gebruik van 'social clauses' in vrijhandelsverdragen in de negentiger jaren van de vorige eeuw het gebruik ervan minimaliseerde. Veel ontwikkelingslanden zagen er toen protectionisme in van de rijke(re) landen, nu de eersten nu eenmaal niet in staat waren op korte termijn aan de gestelde eisen te voldoen. De rijke landen hadden er immers ook zo'n honderd jaar over gedaan om op hun huidige niveau te komen. Door aan hen te hoge eisen te stellen, beschermen de rijkere landen hun eigen handel, was de opvatting, die tot gevolg had dat niet veel handelsverdragen sociale clausules bevatten. Dat lijkt nu een keer te hebben gekregen.

Ook wordt er wel gewerkt met het Algemeen Preferentieel Stelsel (APS) waarbij ontwikkelingslanden bepaalde handelsvoordelen krijgen, maar wel onder bepaalde voorwaarden die ook op fundamentele arbeidsrechten betrekking kunnen hebben.

Weer een andere vindplaats van de fundamentele arbeidsrechten zijn de Internationale Raamwerkovereenkomsten (naar internationaal gebruik afgekort als IFA, *International Framework Agreement*). Dit zijn overeenkomsten tussen wereldwijd of regionaal opererende vakorganisaties met grote bedrijven. Het zijn 'een soort' cao's met betrekking tot fundamentele arbeidsrechten. Een voorbeeld

8. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_228965.pdf

van een dergelijk contract is dat gesloten tussen de bananenproducent Chiquita en COLSIBA, een federatie van 42 vakbonden opererend in zeven landen, die ongeveer 45 000 arbeiders in de bananenindustrie bereiken (Atleson e.a., p. 723).

## Publiekrechtelijke handhaving: bijten of duwen en trekken

De publiekrechtelijke internationale instellingen als de VN, de ILO, en de Raad van Europa hebben *geen 'tanden', als het op handhaving aankomt*. De VN beschikt wel over een legermacht, maar die wordt niet ingezet om fundamentele arbeidsrechten te handhaven. Ze beschikken ook niet over een internationale arbeidsinspectie, die in de lidstaten bevoegdheden kan uitoefenen ter handhaving van de in verdragen geproclameerde arbeidsrechten.

Wel kennen de internationale organisaties *toezichtmechanismen*, om zoveel mogelijk de naleving van de in de verdragen vastgelegde normen te bevorderen. De ILO bijvoorbeeld heeft dan wel geen 'tanden' maar wel 'handen en voeten' om de lidstaten vooruit te duwen of te trekken in de goede richting. Net als de VN en de Raad van Europa kent de ILO het mechanisme dat de lidstaten regelmatig moeten rapporteren over de implementatie van de geratificeerde verdragen in hun land, welke rapportages worden beoordeeld door een *Commissie van Deskundigen*. Vakbonden en werkgeversorganisaties kunnen ook hun kritiek op (het ontbreken van de juiste) implementatie van de geratificeerde verdragen bij de deskundigen neerleggen, zodat dit commentaar wordt 'meegenomen' in het oordeel.

Die beoordelingen worden vervolgens door het besturend orgaan van de organisatie besproken en vastgesteld, hetgeen tot 'huiswerk' voor lidstaten kan leiden. Daarover moet dan wederom worden gerapporteerd enz. Een doorgaans tijdrovende en lange weg, die niettemin dikwijls tot resultaat leidt. Met name de ILO, die al ruim 90 jaar ervaring met dit mechanisme heeft, en tripartiet is samengesteld, zodat belangrijke stakeholders (werkgevers- en werknemersorganisaties) bij de overheden aan tafel zitten, heeft een bewezen 'trackrecord' hier. Dikwijls wordt in een reeks van jaren met veel geduld een land dat niet (helemaal) voldoet aan verdragsverplichtingen 'up to standards' gebracht.

De ILO is er niet op uit om met geheven vingertje de wereld door te trekken, maar wel om waar dat mogelijk is hulp aan te bieden die tot het gewenste resultaat bijdraagt. Soms wordt bij geheel onwillige lidstaten de diplomatieke en politieke druk opgevoerd, teneinde de gevraagde medewerking 'een duwtje' te geven.

Behalve *verplichte rapportage en deskundigenoordelen* kent de ILO ook een bijzondere klachtprocedure voor schendingen van organisatievrijheid, de Commissie voor organisatievrijheid (*Committee on Freedom of Association*, CFA). Vrijheid van organisatie voor werknemers in vakbonden en voor werkgevers in werkgeversverbanden, en het onderhandelen over collectieve arbeidsvoorwaarden worden als zo cruciaal voor de ILO gezien, dat over schending van de verplichting bij de CFA kan worden geklaagd, ook als een lidstaat de betreffende verdragen niet heeft geratificeerd. De CFA behandelt zo'n 100 à 120 klachten per jaar. Op iedere vergadering van de Bestuursraad van de ILO wordt het vlak daarvoor opgemaakte rapport van de CFA behandeld en vastgesteld. Het rapport, dat dan ook openbaar is, bevat aanbevelingen van de ILO aan de lidstaten waar proble-

men met de organisatievrijheid zijn geconstateerd. Dat kunnen problemen en/of schendingen zijn omdat de nationale wetgeving niet conform de internationale verplichtingen is opgesteld, maar kan ook het praktisch gedrag van of in ondernemingen betreffen. Die ondernemingen zijn nooit direct partij bij de ILO procedures, dat zijn alleen de lidstaten.

Er zijn tal van voorbeelden te geven waaruit blijkt dat lidstaten na kortere of langere tijd de aanbevelingen van de ILO uitvoeren. Dat wordt uiteraard ook door de ILO gevolgd.

Er zijn ook voorbeelden dat de aanbevelingen niet worden opgevolgd, of pas na heel lange tijd, zoals bijvoorbeeld in Birma/Myanmar, waar het 35 jaar duurde. In een aantal gevallen is een verandering van regime nodig om de aanbevelingen uitgevoerd te krijgen. Wel houdt de ILO in zo'n periode de druk op de ketel door de betreffende lidstaat voortdurend aan te spreken en 'lastig te vallen' op de geconstateerde gebreken.

De ILO kent geen mechanisme, waar individuen een klacht kunnen indienen, of andere NGO's dan vakbonden of werkgeversorganisaties. Deze laatsten kunnen zich wel tot de Commissie van Deskundigen wenden om hun oordeel over de niet-nakoming van geratificeerde verdragen in een bepaald land over te brengen. Dat zal dan worden 'meegenomen' in het rapport van de Commissie.

In Europa is er langs de weg van de *Raad van Europa* wel een klachtmechanisme dat voorziet in klachtrecht voor individuen, het *Europese Hof voor de Rechten van de Mens (EHRM)*. Klachten die kunnen worden gebaseerd op het Europees Verdrag voor de Rechten van de Mens, bijvoorbeeld over vakbondsvrijheid (vrijheid van vereniging) worden hier behandeld. Zie bijvoorbeeld de uitspraak van het EHRM tegen Turkije in de *Demir*-zaak[9] uit 2009. Hier ging het om vakbondsvrijheid en het recht op collectief onderhandelen voor ambtenaren in Turkije (artikel 11 EVRM).

Zaken over fundamentele arbeidsrechten kunnen ook bij het *Europese Hof van Justitie* van de EU belanden, zoals de bij vakbonden beruchte *Laval*-[10] en *Viking-zaak*[11] inzake het stakingsrecht aantonen. Schending van het EU Handvest inzake de fundamentele rechten kan duidelijk ook betrekking op arbeidsrechten hebben, en dan is er een toegang voor individuen en rechtspersonen bij het Hof, nadat de nationale rechtsgang is doorlopen. Ook kunnen de nationale rechters er prejudiciële vragen voorleggen. Zowel uitspraken van het EHRM als die van het EU Hof van Justitie zijn uiteraard echte juridische oordelen die executeerbaar zijn.

Hiermee hebben ze duidelijk een ander karakter dan de quasi-juridische toezichtprocedures van ILO en VN. Bij de gerechtshoven is wel sprake van tanden bij de handhaving.

De VN kent voor de verdragen inzake politieke en burgerrechten en voor die inzake economische, sociale en culturele rechten rapportageverplichtingen en beoordelingsmechanismen. De laatsten lopen dikwijls langs een Commissie van Deskundigen. Ook hier is geen toegang voor individuen.

---

9. Demir and Baykara vs Turkey – 34503/97 (2008) ECHR 1345.
10. Laval und Partneri Ltd vs. Svenska Byggnadsarbetareförbundet and Others (case nr. C-341/05) (2007) ECR I-11767.
11. International Transport Workers Federationvs. Viking Line (case nr. C-438/05) (2006) ECR I-10779.

Inzake de Richtlijnen voor Handel en Mensenrechten speelt de *Mensenrechtenraad van de VN* een rol bij de handhaving. Hier kunnen individuen wel klagen, maar alleen over systematische schending, niet over individuele gevallen.

De *OESO* heeft weer een andere variant gekozen voor de handhaving van de rechten die in de Richtlijnen voor multinationale ondernemingen staan vermeld. Zoals boven vermeld zijn daarin ook de fundamentele arbeidsrechten opgenomen. Zij heeft het mechanisme van de *National Contact Points (NCP)*. In Nederland is zo'n NCP ondergebracht bij het Ministerie van Buitenlandse Zaken. Een NCP heeft twee taken:

1. het bevorderen van de nakoming van de richtlijnen door de bedrijven die eronder vallen, en
2. het behandelen van meldingen en klachten over schending van de richtlijnen. Deze meldingen en klachten kunnen worden ingediend door personen, NGO's, bedrijven, overheden enz. Voor de laatste werkzaamheid bestaat het NCP uit een viertal onafhankelijke deskundigen, die via dialoog en mediatie proberen te komen tot een oplossing voor de gemelde problemen. Via de jaarverslagen van de NCP's kan men zien welke kwesties er in een jaar zijn gemeld. Veel meer daarover komt men overigens niet te weten. Over wat er na een melding bij een NCP gebeurt, worden tijdens de loop van het onderzoek of de mediatie geen gegevens verstrekt. Er zijn wel voorbeelden van geslaagde 'optredens' van NCP's in het verband van de arbeidsrechten (Atleson e.a. p. 261 e.v.). De Amerikaanse dochter *Brylane* van de Franse moedermaatschappij in luxe-artikelen Pineaut, Printemps, en Redoute (PPR) maakte zich schuldig aan anti-vakbondsactiviteiten. Het management wilde niet met vakbonden praten, en het personeel dat zich bij vakbonden wilde aansluiten werd bedreigd. Vakbonden meldden dit aan de NCP's in de VS en Frankrijk. Na een tijdje touwtrekken is er via de NCP's een overeenkomst bereikt tussen bonden en bedrijf die ertoe heeft geleid dat bij Brylane de vakbondsvrijheid werd gerespecteerd.

Ook via *Vrijhandelsverdragen* is handhaving van fundamentele arbeidsrechten mogelijk, maar niet eenvoudig. In de jaren negentig van de vorig eeuw zijn op basis van het NAFTA Verdrag bijvoorbeeld zaken aanhangig gemaakt door Amerikaanse vakbonden over het ontbreken van vakbondsvrijheid in Mexico. Bij de vestigingen van General Electric and Honeywell werden werknemers ontslagen omdat zij actief waren voor vakbonden. Als gevolg van het aanbrengen van deze zaak, met naam en toenaam van het bedrijf in kwestie, kregen de Mexicaanse managers van hun Amerikaanse superieuren opdracht de ontslagen ongedaan te maken (Atleson e.a., p. 287).

## Privaatrechtelijke handhaving: in opkomst, maar complex

Op bedrijven rust de plicht om niet te handelen in strijd met de *elementaire beginselen van behoorlijk ondernemerschap*. In Nederland valt in dit verband te wijzen op artikel 8 en 15 van Boek 2 BW, waarin rechtspersonen worden verplicht zich te gedragen conform wet, statuten, en de redelijkheid en billijkheid. Belanghebbenden kunnen handelingen in strijd met deze bepalingen bij de rechter ter vernietiging voordragen. Via het enquêterecht kunnen vakbonden

en/of aandeelhouders een onderzoek doen instellen door de Ondernemingskamer, en, afhankelijk van de uitkomst ervan, maatregelen vorderen.

Via het leerstuk van de *onrechtmatige daad*, artikel 6:162 BW, zijn bedrijven ook aansprakelijk te stellen voor maatschappelijk onbetamelijk gedrag. Anders gezegd: bedrijven hebben hier een zorgplicht. In zijn oratie uit 2008 (Onderneming en mensenrechten) schetst C. van Dam wat de zorgplicht inhoudt: mogelijke impact van handelen of nalaten op MVO-rechten, de vereiste wetenschap daarvan, voldoende voorzorgsmaatregelen, de rol van bij de onderneming betrokken derden en de mate waarin de onzorgvuldigheid bijdraagt aan de schade.

De VS kennen bovenop de aansprakelijkheid van 'nationals' nog de *Alien Tort Claims Act* (ACTA), daterend uit 1789 met het oog op piraterij, maar in de jaren zeventig van de vorige eeuw met succes uit de mottenballen gehaald door de mensenrechtenbeweging. De Curaçao'se scheepvaartmaatschappij werd met deze wet gedreigd, toen bij haar dwangarbeid werd geconstateerd: Cubaanse arbeiders werden er aan het werk gezet om een schuld van Cuba aan het bedrijf af te lossen. De arbeiders kregen geen loon. Onder dreiging van een procedure voor een Amerikaanse rechtbank in Miami werd de zaak geschikt, nadat eerst het US Supreme Court klager ontvankelijk had verkaard.[12]

Als bedrijven zelf (zoals bijvoorbeeld Unilever, Levi's, Nike, Reebok, Walmart, enz.), of in branche-verband (de elektronicabranche bijvoorbeeld), gedragscodes hebben opgesteld worden *verwachtingen gewekt* over het gedrag, dat daarmee in overeenstemming moet zijn. Handelen in strijd met die verwachting kan ook een onrechtmatige daad opleveren. Hiervoor werd het pad geëffend in de zaak *Kasky vs. Nike*.[13] Nike had een beleid bekend gemaakt om geen kinderarbeid te tolereren in de keten van toeleverende bedrijven. Kasky was van oordeel dat Nike toch gebruik maakte van toeleveranciers waar kinderarbeid plaatsvond en begon een rechtszaak tegen Nike op grond van misleiding. Toen het federale Supreme Court in de VS had besloten de zaak in behandeling te nemen, was Nike bereid tot een schikking.

Dit klinkt allemaal tamelijk voor de hand liggend, maar is in de praktijk complex gebleken. Vragen over aansprakelijkheidsverdeling tussen moeder- en dochterbedrijven, vragen over aansprakelijkheid voor gedrag van bedrijven in de toeleveringsketen, vragen van internationaal privaatrecht over de plaats waar geprocedeerd moet worden en welk recht van toepassing is, doemen voortdurend op. En de antwoorden liggen vaak niet voor de hand, of vragen lange tijd voordat rechters zich er in verschillende instanties over hebben uitgelaten.

Een andere privaatrechtelijke invalshoek is die van de IFA's, zoals hierboven opgemerkt, contracten tussen internationaal opererende vakbonden en bedrijven. Van deze contracten zijn er inmiddels ruim 100 gesloten (Muller e.a.).

Als we ervan uitgaan dat er zo'n 60 000 transnationale ondernemingen zijn in de wereld, met ongeveer 870 000 dochterondernemingen, en er zijn ruim 100 IFA's dan is wel duidelijk dat er nog een wereld is te winnen.

De meeste IFA's bevatten de fundamentele arbeidsrechten als geformuleerd door de ILO. Ze bevatten ook monitoring en conflict oplossingsprocedures.

12. http://www.latinamericanstudies.org/human-rights/curacao-lawsuit.htm
13. Nike Inc. vs. Kasky – 539 U.S. 654 (2003).

Dikwijls worden bepalingen opgenomen die bedrijven verplichten tot rapportage over de naleving in het jaarverslag. Uiteraard is er ook aandacht voor ketenaansprakelijkheid.

Het al dan niet sluiten van een IFA gebeurt op vrijwillige basis en het gegeven dat de meesten van de thans bestaande contracten in Europa zijn gesloten, geeft aan dat voor deze contracten vermoedelijk niet een snelle wereldwijde dekking is te vinden. Ook de capaciteit van de vakbonden is niet toereikend om dit te doen, laat staan om toe te zien op de nakoming ervan.

Een studie naar het effect van de hierboven vermelde IFA gesloten door *Chiquita* meldt positieve resultaten, maar ook dat de bekendheid ermee niet groot is en mede daardoor de impact kleiner dan nodig (Atleson e.a., p. 723). Een studie uit 2005 over het verschijnsel geeft na analyse van ongeveer 100 IFA's aan dat het een veelbelovend instrument kan zijn, maar tegelijk dat daarvoor nog veel moet gebeuren (Drouin: Cambridge University 2005).

## Veel wegen naar Rome, maar geen 'handhavingswijzer'

Uit de feitelijke gegevens in bovenstaande paragrafen blijkt dat er veel schendingen van fundamentele arbeidsrechten voorkomen in de wereld. Tevens is vastgesteld dat het aan normen op dit vlak niet ontbreekt. Wereldwijd en per regio (Europa, Azië, Amerika, enz.) gelden arbeidsnormen, die er niet om liegen. De realisatie ervan kan ook niet in een paar jaar geschieden. Het vergt tijd, aandacht, goede wil en veel doorzettingsvermogen om voortgang te maken.

Uit bovenstaande valt duidelijk op te maken dat vele wegen en paadjes worden bewandeld om tot handhaving van fundamentele arbeidsrechten te komen.

Naast de al langer bestaande handhavingsmechanismen van de wereldwijde internationale organisaties als VN en ILO, ontstaan meer en meer andere methoden, aangejaagd vanuit het ideaal van internationaal MVO. Behalve internationaal publiekrecht komt internationaal en nationaal privaatrecht meer en meer in de belangstelling te staan. Ook worden combinaties gemaakt. Er worden resultaten geboekt, maar er worden nog veel schendingen gerapporteerd.

Het vinden van de juiste strategie om de verschillende paden te bewandelen is niet eenvoudig. De handhavingsmechanismen zijn niet altijd voor belanghebbenden begaanbaar. Individuen hebben er vaak geen directe ingang. Maar ook voor vakbonden is het dikwijls niet eenvoudig een keus te maken. Er bestaat niet zoiets als een internationale '*arbeidsrechten handhavingswijzer*' of 'app', die aangeeft waar je met wat voor probleem het beste terecht kunt.

Veel procedures zijn niet erg transparant, zoals bijvoorbeeld die bij de NCP's van de OESO. Veel procedures duren lang tot zeer lang en vragen veel mankracht en bijbehorende kosten. Het is dus vallen en opstaan, opgewekt voort door de klei.

## Internationale inspectie?

Het is al vaak vastgesteld en het heet globalisering of mondialisering van de economie. Kapitaal begeeft zich vrij, gemakkelijk en snel over de wereld. Grote ondernemingen opereren wereldwijd met vele vestigingen en dochtermaatschappijen,

met gebruikmaking van nationale toeleveranciers. Bedrijven zijn internationaal op zoek gegaan naar plaatsen waar arbeid goedkoop is. Men produceert waar arbeid goedkoop is en de kosten laag zijn, verkoopt in landen waar het inkomen van de consument en de prijzen goed zijn, en laat de winst vallen in landen waar de belasting laag is.

De internationalisering van het bedrijfsleven en de handel hebben nog geen sterke tegenspeler gekregen in de vorm van internationale organisaties ('global governance') die hier sterk tegenspel kunnen bieden en voldoende dwingend en markt-corrigerend kunnen optreden. Ook de vakorganisaties kunnen hier onvoldoende krachtig tegenspel bieden, hoezeer het ook geprobeerd wordt. De zelfregulering van bedrijven via gedragscodes is onvoldoende wijd verspreid en geeft vooralsnog onvoldoende resultaat om het daarbij te laten.

De ILO heeft geen tanden waarmee ze kan bijten en probeert met overtuiging en technische hulp te doen wat het binnen de beperkte mogelijkheden kan. Het wordt wellicht tijd een oud idee voor *internationale inspectie* hier weer eens op te poetsen en nu te gaan realiseren. Bij internationale handel hoort internationale controle, ook als gaat het om arbeidsrechten. Hierboven zagen we, in de tweede paragraaf, hoezeer en op hoe grote schaal deze rechten dagelijks overal in de wereld worden geschonden.

Het betreft de gedachte van de voormalige Directeur- Generaal van de ILO (1989-1999), Michel Hansenne, om onder ILO-regie te komen tot een '*global social label*', waarbij landen garanderen dat handelsgoederen die in dat land gemaakt zijn, niet in strijd met de fundamentele arbeidsrechten zijn vervaardigd. Onverbrekelijk hiermee verbonden zal ook een *internationale inspectie* moeten worden opgezet, die steekproeven kan nemen in de wereld om te controleren of fundamentele arbeidsrechten worden geschonden. Het gaat op de markt altijd om macht en tegenmacht. Die tegenmacht is op het gebied van de fundamentele arbeidsrechten wel aanwezig, maar te divers en versplinterd om snel en efficiënt de schendingen van deze rechten te verhelpen. Een internationale inspectie is politiek vermoedelijk niet haalbaar, maar wel nodig. Een goede discussie erover is een mooi begin van later politiek handelen.

## Geraadpleegde literatuur


J. Atleson, L. Compa, K. Rittich, C.W. Sharpe and M.S. Weiss, *International Labor Law, cases and materials on workers rights in the global economy*, Thomson West, 2008.

A. Eijsbouts, F. Kristen, J. de Jongh, A. Schild en L. Timmerman, '*Maatschappelijk Verantwoord Ondernemen*', preadviezen Nederlandse Juristenvereniging, 2010.

G. van Roozendaal, Trade Unions and Global Governance, the debate on a social clause, 2004.

G. van Roozendaal, *Social Challenges to Trade*, (diss. Amsterdam, UVA), 2001.

T. Muller, H.W. Platzer, St. Rub, *International Framework Agreements, Opportunities and Limitations of a new tool of global trade union policy*' Friedrich Ebert Stiftung, Briefing papers, no. 8/2008.

K. Boonstra, Decent Work en globalisering, in: *De waarde(n) van het arbeidsrecht, liber amicorum prof. Mr. Paul F. van der Heijden*, Den Haag: Sdu 2013.

K. Boonstra, Negentig jaar Internationale Arbeidsorganisatie, negentig jaar roeien tegen de stroom in?, in: *Negentig jaar Internationale Arbeidsorganisatie*, Reeks Vereniging Arbeidsrecht, nr. 38, 2010.

F. Maupin, *The future of the ILO in the global economy*, Hart Publishing 2013.

F. Dorssemont, K. Lorcher, I.Schomann, ed., *The European Convention on Human Rights and the Employment Relation*, Hart Publishing 2013.

A. Sobczak, Legal Dimensions of International Framework Agreements in the field of Corporate Social Responsibility, *Relations Industrielles/Industrial Relations*, 2007 vol. 62, nr 3.

Veel bronnenmateriaal is, na enig zoeken, te vinden op www.ilo.org.

# 3. International Labour Organization: Review of ILO – Supervisory mechanism*

*A.G. Koroma en P.F. van der Heijden*

*Dit rapport is gemaakt door de toenmalige voorzitters van respectievelijk de Committee of Experts (CEACR) en de Committee on Freedom of Association (CFA) van de ILO, A.G. Koroma en P.F. van der Heijden, op verzoek van de Governing Body van de ILO. Zij zijn bij het opstellen van het rapport ondersteund door Dr Bas Rombouts en Manuella Appiah LLM.*

## I. Introduction, mandate and approach

### (a) The ILO supervisory system

**1.** The supervisory mechanism of the ILO is widely viewed as being unique at the international level. Since its creation in 1919, the ILO has been mandated to adopt international labour standards. These may take the form of either binding Conventions or non-binding Recommendations, which provide guidance on the implementation of Conventions. The special nature of the labour standards is derived from the direct involvement of the social partners in ILO standard-setting activities. This method of work in practice of the ILO used in the adoption of binding treaties is a distinguishing democratic and participatory feature among international organizations.
**2.** The promotion of the ratification and application of labour standards as well as their accountable supervision is a fundamental means of achieving the Organization's objectives and principles of promoting decent work and social justice which can be found, inter alia, in the 1919 Constitution, the 1944 Declaration of Philadelphia, the 1998 Declaration on Fundamental Principles and

* In deze uitgave is alleen de hoofdtekst opgenomen, zonder de inleidende teksten en appendices. Het volledige rapport is te raadplegen via: https://www.ilo.org/gb/GBSessions/GB326/lils/WCMS_456451/lang--en/index.htm

Rights at Work and its Follow-up and the 2008 ILO Declaration on Social Justice for a Fair Globalization.[1]

**3.** Articles 19 and 22 of the Constitution provide for a number of obligations for member States when the International Labour Conference (ILC) adopts international labour standards, including the obligation to report periodically on the measures taken to give effect to the provisions of ratified and unratified Conventions and Recommendations.[2] The ILO's supervisory system by which the Organization examines the standards-related obligations of member States derived from ratified Conventions is complex and has evolved over the years. Supervision takes place within the framework of: (1) a regular process; and (2) a number of special supervisory procedures. The regular system of supervision concerns the reporting duty of member States under article 22 of the Constitution to inform the ILO on the measures taken to give effect to ratified Conventions. Under article 23 of the Constitution a summary of these reports is presented to the ILC at its yearly session. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards (CAS) play a pivotal role in this regular supervisory process.

**4.** Special supervisory procedures are based on the submission of a representation or complaint and are enshrined in articles 24, 25 and 26 of the Constitution. Article 24 grants industrial associations of workers or employers the right to present a representation to the Governing Body about a possible failure to respect obligations derived from ratified Conventions by a member State. By virtue of article 26, a member State may lodge a complaint against another member State for not complying with a Convention, provided that both have ratified the said Convention. This procedure may also be invoked by a Conference delegate or by the Governing Body on its own motion. Moreover, since 1951, a special procedure for complaints concerning violations related to the principles of freedom of association exists by which such complaints are referred to the Committee on Freedom of Association (CFA).

**5.** The ILO's supervisory machinery is generally regarded as capable of relieving national tensions and building consensus about work-related issues by strengthening tripartism at the domestic level and providing technical assis-

---

1. Constitution of the International Labour Organization, 1919, Annex: Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) 1944; ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998; ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its 97th Session, Geneva, 10 June 2008; also see: N. Valticos: 'Once more about the ILO system of supervision: In what respect is it still a model?', in N. Blokker and S. Muller (ed.): 'Towards more effective supervision by international organizations', in *Essays in Honour of Henry G. Schermers*, Vol. I, 1994.
2. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, p. 1.

tance in a spirit of constructive dialogue.[3] 3 Nevertheless, this comprehensive system, perceived in light of an increasingly dynamic global economy, calls for a continuous examination and evaluation of its effectiveness and functioning. This report contributes to that process.

### (b) Governing Body request

**6.** The present report was requested by the ILO Governing Body. At its 323rd Session in March 2015, the Governing Body invited us to jointly prepare a report, to be presented to the 326th Session of the Governing Body (March 2016) on the functioning of the ILO supervisory mechanisms. The Governing Body requested: 'the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association'.[4] In drafting this report we took into consideration input received from the ILO's tripartite constituents.

### (c) Developments leading to the report

**7.** Following discussions in the CAS in 2012, the Employers' group put forward a number of objections to certain observations made by the CEACR in its 2012 General Survey concerning the right to strike.[5] Apart from the substantive norm in question, the controversy related to the supervisory procedures and the mandate of the CEACR.[6] Concerns were expressed over the role of the CEACR with regard to the interpretation of Conventions and the Committee's relation to the other supervisory procedures and mechanisms, primarily the CAS and the CFA.[7] A clarification of the role of the Committee of Experts in relation to its mandate was requested. Ultimately the 2012 CAS was unable to adopt its list of individual cases for the first time since this aspect of supervision was created in 1927.[8]

---

3. K. Tapiola: 'The ILO system of regular supervision of the application of Conventions and Recommendations: A lasting paradigm', 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*, p. 26.
4. GB.323/INS/5, para. 1(5)(b).
5. ILO: *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), ILC, 101st Session, Geneva, 2012.
6. ILO: *Provisional Record* No. 19(Rev.), Part One, ILC, 101st Session, Geneva, 2012, Committee on the Application of Standards at the Conference, extracts from the *Record of Proceedings*, ILC, 101st Session, 2012. See especially paras 144–236. Also see F. Maupain: 'The ILO Regular Supervisory System: A model in crisis?', in *International Organizations Law Review*, Vol. 10, Issue 1, 2013, pp. 117–165.
7. ILO: *Provisional Record* No. 19(Rev.), Part One, op. cit., paras 147–149.
8. L. Swepston: 'Crisis in the ILO supervisory system: Dispute over the right to strike', in *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 29, No. 2, 2013, pp. 199–218.

This generated renewed discussion about the functioning of the Committee of Experts in particular and the supervisory mechanism as a whole.

**8.** The CEACR has recently undertaken further examination of its working methods. While the consideration of its working methods has been an ongoing process since its establishment, a special subcommittee on working methods was set up in 2001 which discussed the functioning of the CEACR on several occasions.[9] The subcommittee reviews the methods of work with the aim of enhancing the CEACR's effectiveness and efficiency, by endeavouring to streamline the content of its report and improving the organization of its work with a view to increasing it in terms of transparency and quality.[10]

**9.** As regards the relationship between the CAS and the CEACR, the 2015 report of the Committee of Experts noted that a transparent and continuous dialogue between the CAS and the CEACR proved invaluable for ensuring a proper and balanced functioning of the ILO standards system. The CAS and the CEACR can be regarded as distinct but inextricably linked as their activities are mutually dependent. Moreover, the tripartite constituents reiterated their full support for the ILO supervisory system and their commitment to finding a fair and sustainable solution to the current issues.[11] In 2014, the Committee of Experts included a statement of its mandate in its report:

> The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods

9. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, p. 7.
10. ibid., p. 8.
11. ibid., p. 9.

built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.[12]

**10.** The Committee noted that the statement of its mandate, which was reiterated in its 2015 report, was welcomed by the Governing Body and has the support of the tripartite constituents.[13] It reiterated that the functioning and existence of the Committee were: 'anchored in tripartism, and that its mandate had been determined by the International Labour Conference and the Governing Body. Tripartite consensus on the ILO supervisory system was therefore an important parameter for the work of the Committee which, although an independent body, did not function in an autonomous manner.'[14]

**11.** The Committee restated that it will continue to strictly abide by its mandate and core principles of independence, objectivity and impartiality. Furthermore, it stated that regular examinations will be conducted on the means of improving its methods of work, and reaffirmed its willingness to contribute to resolving the current challenges to the supervisory system and to the enhancement of the functioning and impact of the ILO's supervisory mechanism as a whole.[15]

**12.** Similarly, the CFA undertakes efforts to improve its working methods on a regular basis.[16] The CFA's composition is renewed every three years and the Committee discusses questions related to its impact, visibility and working methods in separate sessions.[17] The present report is an exposition of these continuing efforts to assess and strengthen the supervisory procedures.

### (d) Approach and structure

**13.** This review covers three main areas related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association: the functioning, interrelationship and possible improvements to the existing supervisory system.

**14.** The functioning of the system will be analysed by examining the development of the regular and special procedures, as well as their legal basis. Furthermore, their operation in practice, effectiveness and impact will be discussed.

---

12. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 103rd Session, Geneva, 2014, para. 31.
13. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, p. 10, para. 24.
14. ibid.
15. ibid., p. 10, paras 25–26.
16. ILO: 371st Report of the Committee on Freedom of Association, Governing Body, 320th Session, Geneva, 13–27 Mar. 2014, GB.320/INS/12, para. 14. Also see ILO: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth (revised) edition, Geneva, 2006, Annex I: Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, pp. 231–243.
17. GB.320/INS/12, para. 14.

The current challenges, criticisms and concerns of the system will be scrutinized.

**15.** The interrelationship between the ILO supervisory bodies will be critically addressed. Complementarity, balance and symmetry of the different procedures will be discussed and possible gaps in coverage or, inversely, areas of overlap will be identified.

**16.** Finally, suggestions and proposals on how to improve the ILO supervisory system will be discussed. In order to arrive at these suggestions, an assessment of the workings of the various procedures and their primary objectives as well as a clear understanding of the constitutional framework is necessary.

**17.** The report is structured as follows: Part II of this report examines the architecture and development of the supervisory system in order to get a clear picture of the existing procedures in the supervisory landscape. Part III outlines the practice of the different supervisory bodies; their interrelationship, impact and effectiveness to come to an informed understanding of similarities and differences of the supervisory mechanisms and to identify possible gaps or overlapping competences. Part IV reviews the shortcomings of the current system and evaluates suggested improvements to the supervisory system. Part V will conclude the report with a concise overview of the authors' main findings. Appendix I will discuss other monitoring or supervisory systems outside the ILO system to assess which lessons could be learned from – primarily – the UN Charter- and Treaty- based human rights bodies. Appendix II includes further statistical data on the supervisory procedures.

## II. Overview, development and procedural aspects of the supervisory mechanisms

**18.** This section will explain the structure of the supervisory mechanisms and the developments that shaped them into their contemporary forms. In order to set the stage for a more elaborate examination of the evolution and particulars of the different procedures and bodies a concise overview of the present system is first provided. Secondly, a more thorough analysis of the different procedures including their genesis and key features will be presented.

### (a) The regular and special supervisory procedures: A short introduction

**19.** The ILO regularly examines the application of labour standards in its member States in order to ensure that the ratified Conventions are duly implemented at the domestic level. Furthermore, the Organization points out areas in which these standards could be applied more judiciously and offers technical assistance and support for social dialogue. The regular system of supervision works as follows: once a member State ratifies an ILO Convention it is obliged to report on a regular basis on the measures it has taken towards its implementation. Every three years governments are to submit reports on the steps taken in law and practice to apply the eight fundamental and the four governance – or priority – Conventions. For other Conventions the reporting obligation is once in every five

years (except for shelved Conventions).[18] However, governments may be urged to send report at shorter intervals when required. Article 23 of the Constitution requires governments to send copies of their reports to the national social partners. The national and international social partners may also provide the ILO with comments on the application of labour standards.

**20.** The Committee of Experts is the body primarily responsible for conducting the technical examination of the compliance of member States with provisions of ratified Conventions.[19] The CEACR was set up in 1926 and is presently composed of 20 eminent jurists from different geographical regions, representing different legal systems and cultures. They are appointed by the Governing Body and the Conference for a term of three years.

**21.** Being a technical body, the CEACR produces two kinds of comments: observations and direct requests. Observations are comments on fundamental questions raised by the application of a particular Convention by a member State and are published in the Committee's flagship publication; its annual report.[20] Direct requests relate to more technical questions or requests for additional information that are communicated directly to the governments concerned.

**22.** The annual report of the CEACR consists of three separate parts. The first part is a General Report, which contains comments and remarks about the degree to which member States respect their obligations derived from article 22 of the ILO Constitution. Part II includes the observations on the application of the international labour standards and Part III concerns a General Survey of one or more specific themes selected by the Governing Body.[21]

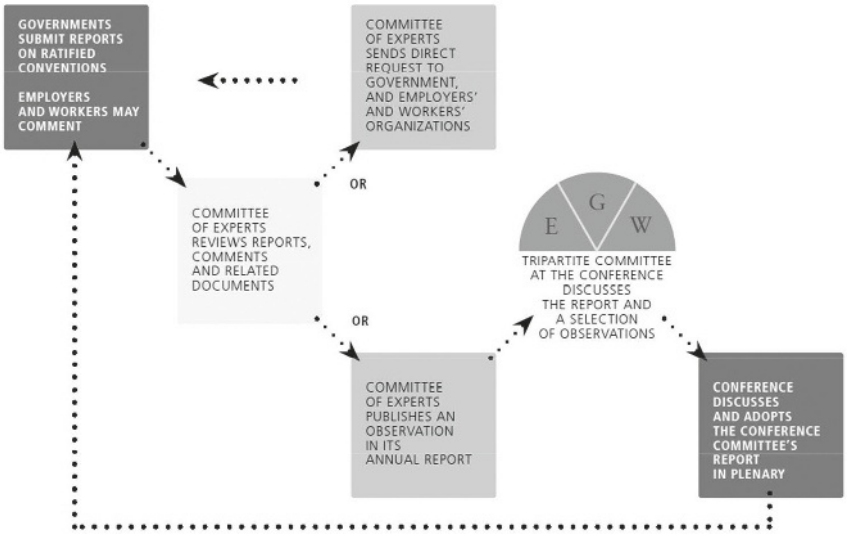
**23.** The annual report of the Committee of Experts is submitted to the plenary session of the Conference in June each year, where it is examined by the CAS. The CAS is an ILC tripartite standing committee composed of Government, Employer and Worker representatives. The CAS analyses the CEACR report and selects a number of observations for discussion. Governments referred to in these comments are invited to respond to the CAS and provide further details about the matters at hand. The CAS draws up conclusions in which it recommends governments to take specific measures to remedy a problem or to ask the ILO for technical assistance.[22] In the General Report of the CAS certain situations of particular concern are highlighted in special paragraphs.[23]

**24.** Comprised in a simple diagram, the regular system of supervision can be presented as follows:

---

18. ILO: Rules of the Game: A brief introduction to international labour standards (revised edition 2014), p. 102.
19. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, p. 2.
20. ILO: Handbook of procedures relating to international labour Conventions and Recommendations, International Labour Standards Department, Rev. 2012, p. 34.
21. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, op. cit., p. 2.
22. ILO: *Provisional Record* No. 14(Rev.), Part One, Report of the Committee on the Application of Standards, ILC, 104th Session, Geneva, 2015, paras 8–23.
23. ILO: *Rules of the Game*, op. cit., p. 103.

**Figure 1. The regular supervisory process**[24]




**25.** Unlike the regular system of supervision, the three special supervisory procedures are based on the submission of a complaint or representation. The article 24 representations procedure, the complaints procedure under article 26 of the Constitution and the special procedure concerning complaints regarding freedom of association will be briefly introduced below.

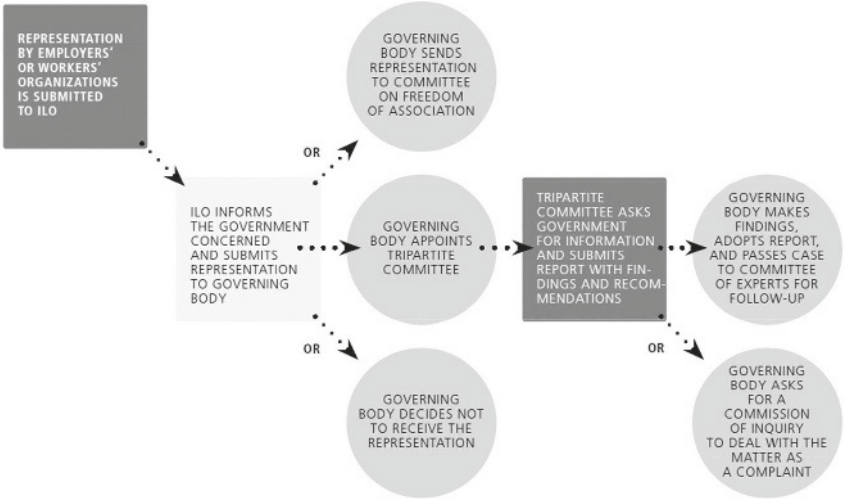
*Article 24 representations*

**26.** The representations procedure is enshrined in articles 24 and 25 of the ILO Constitution. These provisions grant an industrial organization of employers or workers the right to present a representation to the Governing Body against any member State which, in its view, 'has failed to secure in any respect the effective observance of any Convention to which it is a party'.[25] The Governing Body may appoint a three-member tripartite committee – if the representation is admissible – to examine it on its merits and the government's response thereto.[26] When representations deal with possible violations of the principles contained in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the matter is usually referred to the CFA, which will be examined below. The CFA – after requesting the government for further information – subsequently submits a report to the Governing Body in which it states the legal and practical aspects of the case, examines the information submitted and concludes with certain recommendations. If the response of the government is deemed not satisfactory, the Governing Body may choose to publish the representation and the government's response. The case may be referred to the

24. ibid.
25. ibid., p. 106.
26. ILO: Handbook of procedures relating to international labour Conventions and Recommendations, op. cit., p. 49.

CEACR for follow up, or dealt with as a complaint, in which case the Governing Body asks for a Commission of Inquiry to be set up. Individuals or other groups are not allowed to submit a representation directly to the Governing Body.

**Figure 2. The representations procedure**[27]




*Article 26 complaints*

**27.** The second special procedure, the complaints procedure, is provided for in articles 26–34 of the ILO Constitution. Complaints may be filed against a member State for not complying with a ratified Convention by another member State which has ratified that same Convention, a delegate to the ILC or the Governing Body in its own capacity.[28] When a complaint is received, the Governing Body may set up a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out an investigation of the complaint in which it ascertains all the facts and issues recommendations on measures to be taken to address the complaint.[29] The Commission of Inquiry is the most severe investigative procedure available and is usually set up when a State persistently and seriously violates international labour standards.[30] Up to this date there have been 12 such Commissions established (see figure 4 in Appendix II).

**28.** When a State refuses to adhere to the recommendations of the Commission, the Governing Body can take action under article 33 of the Constitution, which provides as follows:

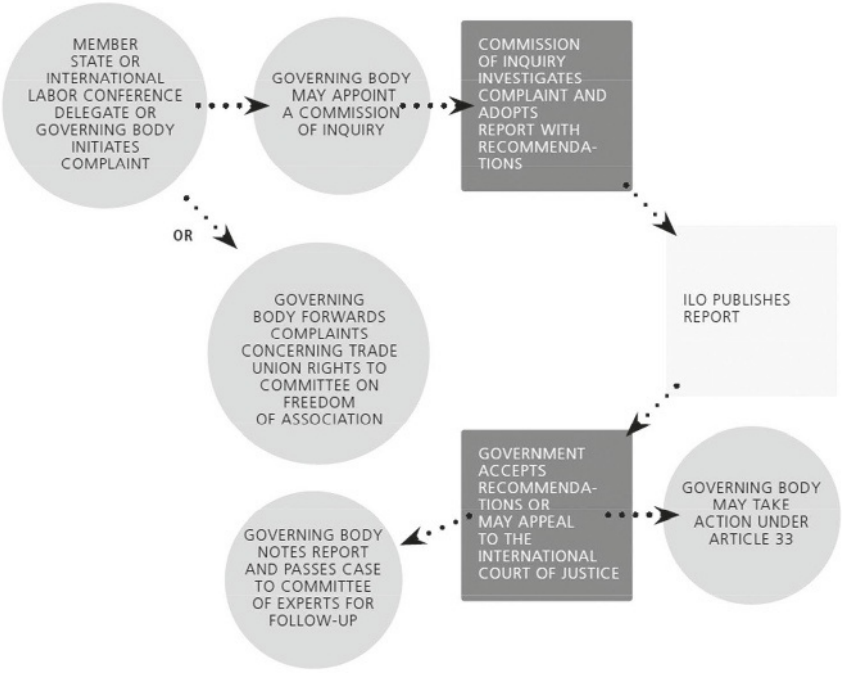
> In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be,

27. ILO: *Rules of the Game*, op. cit.
28. ibid., p. 108.
29. ILO: Handbook of procedures relating to international labour Conventions and Recommendations, op. cit., paras 82–84.
30. ILO: *Rules of the Game*, op. cit., p. 108.

the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

**29.** Article 33 has only been invoked once, in 2000, when the Governing Body requested the ILC to take measures against the widespread and systematic use of forced labour in Myanmar.

**Figure 3. The complaints procedure**[31]




*The complaints procedure before the Committee on Freedom of Association*

**30.** The third special supervisory mechanism concerns the procedure before the CFA. Following the establishment of the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) in 1950, the CFA was set up in 1951 for the purpose of examining complaints about violations of the principles of freedom of association laid down in Conventions Nos 87 and 98. Paragraph 14 of the special procedures for examining complaints alleging violations of freedom of association states that: 'The mandate of the Committee 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.'[32] The mandate has been regularly approved by the Governing Body, including in 2009 when it was included in the Compendium of rules of

31. ibid., p. 109.
32. Paragraph 14 of the special procedures for examining complaints alleging violations of freedom of association. Also see ILO: *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition, Geneva, 2006, para. 6.

Governing Body committees.[33] Formally, the responsibility of the CFA is to consider, with a view to making recommendations to the Governing Body, whether a case is worthy of examination by the Governing Body or possible referral to the FFCC.[34] The Committee may examine complaints whether or not the country concerned has ratified the relevant Conventions. These complaints may be lodged by employers' and workers' organizations against a member State. The CFA is a Governing Body committee and is composed of an independent chairperson and three members and three deputies from each of the three groups: Governments, Employers and Workers, all acting in their personal capacity. Its function is not to form general conclusions concerning trade unions' and/or employers' situations in particular countries on the basis of vague general statements, but to evaluate specific allegations about the principles of freedom of association.[35] The main objective of the CFA procedure is not to criticize certain governments, but rather to engage in a constructive tripartite dialogue to promote respect for trade unions' and employers' associations' rights in law and practice.[36]

**31.** In order for a case to be receivable by the CFA, certain requirements must be met. The complaint should clearly state that its intent is to lodge a complaint to the CFA, it must come from an employers' or workers' organization, the complaint has to be in writing and it has to be signed by a representative of a body entitled to make a complaint.[37] Non- governmental organizations (NGOs) with consultative status with the ILO are also entitled to file complaints.[38] Substantively, the allegations in the complaints should not be purely political in character, should be clearly stated and fully supported by evidence. There is no requirement of exhaustion of domestic remedies although the CFA takes into account the fact that a matter may be pending before the national courts.[39]

**32.** If the CFA decides to receive a case it subsequently requests a response from the government concerned. After the response is examined, the Committee analyses the case and draws up recommendations on how the specific situa-

---

33. GB.306/LILS/1, para. 8; GB.306/10/1(Rev.), para. 4.
34. D. Tajgman and K. Curtis: Freedom of Association: A user's guide – Standards, principles and procedures of the International Labour Organization (Geneva, ILO, 2000), p. 58.
35. ILO: Freedom of Association: Digest and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth (revised) edition, Geneva, 2006, Annex, para. 16.
36. Freedom of Association: *Digest and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition, Geneva, 2006, para. 4. The legitimacy and authority of the supervisory mechanism is based on stability and consistency of its decisions. This is the reason behind the adoption of a Conference resolution in 1970 which called for the establishment of the CFA *Digest*, see: Resolution concerning trade union rights and their relation to civil liberties, adopted on 25 June 1970, ILC, 54th Session, Geneva, 1970, para. 11.
37. D. Tajgman and K. Curtis, op. cit., pp. 58–59. Also see paragraphs 31 and 40–42 of the special procedures for examining complaints alleging violations of freedom of association.
38. Non-governmental international organizations having general consultative status with the ILO are: International Co-operative Alliance, International Organisation of Employers, International Trade Union Confederation, Organization of African Trade Union Unity, Business Africa and World Federation of Trade Unions.
39. ibid., pp. 60–61. See paragraphs 28–30 of the special procedures for examining complaints alleging violations of freedom of association.

tion could be remedied.[40] 40 If a violation of freedom of association principles is found, governments are requested to report on the implementation of those adopted recommendations. In cases where the member State under scrutiny has ratified the relevant Convention, the technical legal aspects of the case may be referred to the Committee of Experts.

**33.** Once the CFA has examined a case it sends its report to the Governing Body for adoption. The CFA may indicate in its conclusions and recommendations that the case calls for no further examination; include interim conclusions and recommendations; and may ask to be kept informed of certain developments or make definitive conclusions and recommendations.[41] At various stages in the procedure, the CFA may issue urgent appeals or send other special communications to the government concerned. Moreover, direct contacts – whereby a representative of the Director-General is sent to the country concerned to ascertain the facts of a case – may be established during or after the examination process.[42] These missions are meant to discuss the issue directly with government representatives and the social partners. The Committee convenes three times a year including in the week before the Governing Body meeting takes place. The CFA has examined over 3,100 cases since its creation.[43]

**Figure 4. The freedom of association procedure**[44]


**34.** Under article 19 of the Constitution, member States are required to report at regular intervals, at the request of the Governing Body, on the position of its law and practice with regard to the extent to which effect is given, or proposed to be given, to any of the provisions of unratified Conventions. The goal of this obligation is to keep track of developments in all countries, whether or not they have ratified Conventions. Article 19 is the basis for the annual in-depth General Survey by the CEACR. These Surveys – on a subject chosen by the Governing Body – are established mainly on the basis of information and reports received from member States, and employers' and workers' organizations. Furthermore,

40. ILO: *Rules of the Game*, op. cit., p. 110.
41. D. Tajgman and K. Curtis, op. cit., p. 66.
42. ibid., p. 64.
43. Also see E. Gravel, I. Duplessis and B. Gernigon: *The Committee on Freedom of Association: Its impact over 50 years* (Geneva, ILO, 2001).
44. ILO: *Rules of the Game*, op. cit., p. 111.

a special follow-up reporting procedure has been implemented with the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work, whereby member States are required to report annually on any changes which may have taken place in their law and practice with regard to unratified fundamental Conventions.[45] Article 19 reports may identify obstacles in the way of ratification or may point out areas in which assistance may be required.[46]

*Technical assistance*

**35.** The ILO, in supporting the supervisory bodies, is also mandated to provide technical assistance whereby ILO officials or other experts help countries to address problems in legislation and practice in order to bring them into conformity with ratified instruments.[47] Different types of assistance are available. These range from facilitation of social dialogue or dispute resolution processes, legal advisory services – including the analysis of, and advice on, legal drafts and the provision of an informal opinion of the International Labour Office (the Office) on certain legal matters – to direct contacts, tripartite missions or ILO advisory visits.[48] Whether the Office provides such assistance depends on the political will in a country to resolve the issues, matters of budget and the specificity of the request.[49] Technical assistance is an important component of effective supervision of international labour standards.

**(b) Establishment and development of the supervisory mechanisms**

**36.** This section examines the historical development of the supervisory system in order to set the stage for a more elaborate analysis of the contemporary status of the supervisory bodies and procedures in the following paragraphs. First, a more expansive and general description of the creation and development of the mandate and functioning of the CEACR and the CAS – the regular system of supervision – will be provided. Subsequently, the development of the special procedures – the CFA, representations and complaint procedures – will be briefly visited in separate sections.

*Development of the CAS and the CEACR*

**37.** The CAS and the CEACR were established to carry out their supervisory responsibilities under the concept of 'mutual supervision' which emerged from the work leading to the development of the ILO in 1919.[50] This concept is based

45. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998, Annex, Part II, section B.
46. D. Tajgman and K. Curtis, op. cit., p. 52.
47. http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/tech nical-assistance-and-training/lang--en/index.htm.
48. D. Tajgman and K. Curtis, op. cit., p. 73.
49. ibid.
50. Informal tripartite consultations (19–20 February 2013): Follow-up to matters arising out of the report of the Committee on the Application of Standards of the 101st Session (June 2012) of the International Labour Conference, Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations, paras 7–9. (Henceforth: Information paper on the history and development of the mandate of the CEACR (19–20 February 2013)).

on the precept that unfair competition between countries would be prevented if ILO Members would all be bound by the same ratified Conventions. Furthermore, the Commission on International Labour Legislation, which drafted the Labour Chapter in the Treaty of Versailles, emphasized that the supervisory procedures were 'carefully devised in order to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a Convention'.[51] The supervisory machinery was therefore based on persuasion and deliberation, rather than on sanctions or other types of measures. Article 22 of the Constitution provides the basis for the regular system of 'mutual supervision'.[52] It provides as follows:

> *Article 22*
> **Annual reports on ratified Conventions**
> Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

**38.** This constitutional context provided the means for information exchange between Members while the (special) representation and complaints procedures – originally Articles 409 and 411 of Part XIII of the Treaty of Versailles – could potentially be used in cases where Members failed to give effect to the provisions of ratified Conventions.[53] Originally, the Director-General's summary of the reports was to serve as a basis for further action, but in practice this did not happen. Therefore, the CEACR and the CAS provided the only effective means for supervising the implementation of ratified Conventions since their inception.

1926–39

**39.** In 1926, the ILC set up the CAS and requested the Governing Body to appoint a Committee, the current CEACR, whose functions would be defined in the report of the Committee on the examination of annual reports under Article 408 of the Treaty of Versailles.[54] The Committee indicated that the CEACR would have no juridical capacity or interpretative authority. The role of the CEACR was, in the Committee's view, to take notice of inadequate reports, to call attention to diverging interpretations of Conventions and to present a technical report to the Director, who would communicate this report to the Conference.[55]

**40.** The CEACR received 180 reports for its First Session of which 70 gave rise to 'observations'. The CAS noted that the CEACR report in 1928 had rendered use-

51. ILO: *Official Bulletin*, Vol. 1, April 1919–August 1920, pp. 265–266.
52. Originally Article 408 of Part XIII of the Treaty of Versailles, 1919.
53. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 8.
54. ibid., para. 10.
55. ILO: *Record of Proceedings*, Appendix V, Report of the Committee on Article 408, ILC, Eighth Session, 1926, pp. 405–406. The current Director-General was simply called 'Director' in the early days of the Organization.

ful results and the Governing Body decided to appoint the CEACR for another year and tacitly renewed its mandate annually.[56]

**41.** In this first period – between 1926 and 1939 – the CEACR was initially composed of eight members, but this grew to 13 in 1939. The workload also increased, from 180 reports in 1928 to 600 in 1939. The CEACR methods of work evolved through interaction with the Governing Body and the CAS. The CEACR also commenced with addressing member States' governments directly, thereby gradually establishing a dialogue with those governments.[57]

**42.** As regards the relationship between the CAS and the CEACR in this first period, the deliberations in the CAS focused on matters of principle arising out of the report of the CEACR, while an independent examination was still possible for reports that were received too late to be examined by the CEACR. While the CEACR's main task was therefore to examine the reports from member States, the procedures in the CAS developed around the opportunities given to member States to submit certain explanations orally or in writing.[58]

**43.** In 1939, the CAS commented on this double examination process in its report and stated – in order to urge member States to submit their reports in a timely manner – that this system placed member States on a footing of equality in respect of the supervision of the application of ratified Conventions. It added that the examination of reports by the CEACR and the CAS differed in certain respects: the CEACR consisted of independent experts whose examination is generally limited to a scrutiny of the documents provided by governments while the CAS is a tripartite organ, made up of representatives of governments, workers and employers, who are in a better position to go beyond questions of conformity and as far as practicable, verify the day-to-day practical application of the Conventions in question.[59] The CAS explained that in this system of mutual supervision and review '… the preparatory work carried out by the Experts plays an important and essential part'.[60]

1944–61

**44.** A second period in the development of the CEACR and the CAS, from 1944 to about 1961, witnessed an expansion of the supervisory role of the committees.[61] In the period following the Second World War, the ILO reviewed its standard-setting system through an analysis of the functioning of the supervisory machinery.[62] During the 26th Session of the Conference, it was discussed – on the basis of a preparatory report – that although the system offered a rather reliable impression of the extent to which national laws were in conformity with labour standards, it did not provide a clear picture of the extent to which those

56. ILO: Minutes of the 30th Session of the Governing Body, Jan. 1926, p. 56.
57. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 16.
58. ibid., para. 19.
59. ILO: *Record of Proceedings*, Appendix V, ILC, 25th Session, 1939, p. 414.
60. ibid.
61. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), paras 21–41.
62. ibid, para. 21.

laws were effectively applied.[63] This led to a broadening of the terms of reference of the CAS and the CEACR in light of the 1946 constitutional amendment in which the system of information and reports to be supplied by member States was expanded.[64]

**45.** More specifically, the constitutional amendments entailed important changes to articles 19 and 22 and concerned the obligation to report on measures taken to submit newly adopted instruments to the competent national authorities, the obligation to submit information on unratified Conventions and Recommendations at the request of the Governing Body and the obligation to communicate reports to representative workers' and employers' organizations.[65]

**46.** Due to the increasing workload, the membership of the CEACR grew to 17 and its sessions were lengthened to an average of one-and-a-half weeks. Dialogue between governments was further enhanced during this period and the first references to 'technical assistance' were made.[66]

**47.** The CAS emphasized that 'double examination' was essential to the functioning of the supervisory system and repeatedly supported calls for strengthening the CEACR. Furthermore, the CEACR and the CAS focused on ensuring that governments fulfilled their new obligation to provide representative organizations of employers and workers with copies of their reports. In 1953, the CEACR took notice of the first comments made by workers' organizations.[67]

**48.** From the mid-1950s, the Governing Body stopped its practice of commenting on the report of the CEACR and confined itself to taking note of it. In 1950, the CEACR examined its first reports on unratified Conventions, based on the 1946 constitutional amendment and a 1948 decision of the Governing Body.[68] Examination of the unratified Conventions was strengthened during the 1950s and in 1955, the Governing Body approved a proposal that the CEACR should undertake, in addition to a technical examination on the application of Conventions, a study on general matters, such as positions of the application of certain Conventions and Recommendations by all governments. These examinations, presently known as 'General Surveys', were established with a view to reinforcing the work of the CAS and intended to cover Conventions and Recommendations selected under article 19 of the Constitution. Since 1956, the CAS has consistently discussed the General Surveys produced by the CEACR.[69] In 1950

---

63. ILO: *Future, policy, programme and status of the ILO*, Report I, ILC, 26th Session, 1944, pp. 95–96 and 99–100.
64. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), paras 26–29.
65. ILO: Improvements in the standards-related activities of the ILO: Initial implementation of the interim plan of action to enhance the impact of the standards system, Geneva, Mar. 2008, GB.301/LILS/6(Rev.), para. 46.
66. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), paras 32–34.
67. ibid., para. 37.
68. Informal tripartite consultations on the follow-up to the discussions of the Conference Committee on the Application of Standards (19 September 2012), *The ILO supervisory system: A factual and historical information note*, paras 51–54.
69. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 41.

and 1951, a special procedure on freedom of association was established. This process will be described later on in a separate section.

1962–89

**49.** A third period in the development of the supervisory system, from 1962 to 1989 is characterized by further diversification of the supervisory model.[70] The ILO began to focus more on the assistance it could provide to its new Members in light of its expanded membership resulting from the attainments of independence of many new territories. Tripartism was strengthened by the increased participation of employers' and workers' organizations, the adoption of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and the rise of the international trade union movement.[71]

**50.** Although the mandate of the CEACR did not alter, its functions were further developed and the impartiality of the supervisory bodies was reinforced. The ILO collaborated with other international mechanisms in supervising the application of common standards. The CEACR examined reports on the European Code of Social Security and certain reports from States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) until the Committee on Economic, Social and Cultural Rights (CESCR) was established in 1985.[72]

**51.** The competence and functioning of the CEACR was frequently discussed in this period. Concerns were voiced over the absence of formal rules of procedure and the role of the CEACR as a disguised judicial body.[73] A majority of the tripartite parties disagreed and considered that the CEACR had functioned well without any formal rules of procedure.[74] They 'expressed their faith in the impartiality, objectivity and integrity of the Committee of Experts, a quasi-judicial body whose professional competence was beyond question. … Objectivity could not be guaranteed by rules of procedure but depended upon the personal qualities of the members of the Committee.'[75]

**52.** In 1979, the CEACR reached its current level of 20 experts and the issue of the geographical representation of the experts took on greater importance.[76] As regards the Committee's working methods, a number of developments took place. In 1963, the CEACR indicated – supported by the CAS – that it reviewed the practical application of ratified Conventions and their incorporation into

---

70. ibid., paras 42–62.
71. ibid., para. 42–43.
72. ibid., para. 47.
73. ibid., paras 48–49. Also see para. 50. In 1983, in a memorandum, socialist countries considered that the composition, criteria and methods of the supervisory bodies did not reflect the membership of the Organization and the present-day conditions. ILO procedures, in their view, were being misused for political purposes to direct criticism at socialist and developing countries.
74. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 49.
75. ILO: *Record of Proceedings*, Appendix V, ILC, 47th Session, 1963, para. 10.
76. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 51.

domestic law.[77] A year later, the CEACR started to record cases of progress in its report and in 1968 the direct contacts procedure was introduced.[78]

**53.** From 1970, the CEACR began giving special attention to the obligation for Members, under article 23 of the Constitution, to communicate reports and further information to the representative employers' and workers' organizations, by which greater participation of workers and employers was to be promoted.[79] In 1973, the CEACR noted that the number of comments had increased from seven during the previous year to 30 in the present one. Most comments were submitted together with the governments' reports, while some had been sent directly to the Organization.[80] The submission of comments became established practice during this period and their number steadily increased to 149 in 1985.

1990–2012

**54.** The review of standards-related activities broadened in recent decades in order to take the context of globalization better into account. Between 1994 and 2005, the Governing Body and the Conference discussed virtually all aspects of the ILO standards system.[81] Discussions – about the core values and goals of the Organization – similar to those in the early years of the Organization and the years prior to the Second World War led to the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization in 2008.[82]

**55.** The CEACR's terms of reference were not adjusted during this period, but the Governing Body did attribute a role to the Committee in cases where representations declared admissible related to facts and allegations similar to those of an earlier representation.[83] The membership of the CEACR remained unchanged at 20 experts, but a 15-year limit for all members was established by the experts themselves in 2002. In 1996, the dates of the CEACR's sessions were moved from February–March to November–December.

**56.** In 2001, the CEACR established a subcommittee on its working methods and these methods were discussed in plenary during the CEACR's sessions in 2005 and 2006. The reviews were prompted by discussions in the Governing Body as well as the desire to effectively address the workload of the Committee. The number of comments also increased to over 1,000.[84]

---

77. ILO: *Record of Proceedings*, Appendix V, op. cit., para. 5.
78. *Information paper on the history and development of the mandate of the CEACR (19–20 February 2013)*, paras 54–55. During direct contact missions, ILO officials meet government officials to discuss problems in the application of standards with the aim of finding solutions. Different formalities for conducting such missions are possible, for example on the spot, direct contact, high-level, and high-level tripartite missions.
79. ibid., para. 56.
80. ibid., para. 58.
81. ILO: For a comprehensive overview of the standards-related activities from 1994–2004, see: *Improvements in the standards-related activities of the ILO: A progress report*, Geneva, Mar. 2005, GB.292/LILS/7.
82. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 64.
83. ibid., para. 65.
84. ibid., paras 69–71.

**57.** While this last period witnessed greater coordination and interaction between the CEACR and the CAS, it was also marked by divergences concerning the role of the CEACR in relation to matters of interpretation and the division between the functions of the respective committees.[85] These discussions, mainly held in 1994, forebode the 2012 problems and substantively covered similar ground. The Governing Body began to address the work of the CEACR more frequently during this period, especially due to the new reporting procedure under the Social Justice Declaration, the streamlining of the regular reporting procedure and the more rapid renewal of the CEACR membership.[86]

*The special procedure on freedom of association*

**58.** While the CEACR and the CAS have been in operation almost from the creation of the ILO, another important component of the supervisory system developed from 1950 onward. Following the adoption of Conventions Nos 87 and 98, the ILO with the support of the Economic and Social Council of the United Nations (ECOSOC) created a special procedure for the examination of allegations concerning the violation of trade union rights.[87]

**59.** A new supervisory body was created, the FFCC, and it was agreed that allegations regarding violations of trade union rights would be forwarded by ECOSOC to the Governing Body. The new process was meant to ensure facilities for impartial and authoritative investigations of questions of fact raised by allegations of infringements of trade unions' and employers' associations' rights.[88]

**60.** Since the principle of freedom of association was enshrined in the Constitution and the Declaration of Philadelphia and in light of its importance for the tripartite model of the Organization, these allegations could be made against all member States, irrespective of whether they had ratified the relevant Conventions. However, without the consent of the government concerned, no allegations could be submitted to the Commission. These new procedures were not meant to replace the existing constitutional representations and complaints procedures.[89]

**61.** In 1951, the CFA was created by the Governing Body. Originally, examination of complaints by the CFA was intended to determine whether the allegation warranted further examination by the Governing Body and to secure the consent of the government concerned should referral to the FFCC be justified. Examination by the CFA did not require such consent and the CFA quickly became the main platform for examining allegations of violations of freedom of association.[90] This occurred for a number of reasons, mainly because of the difficulty to obtain consent from the government under consideration and the formal nature of the procedure before the FFCC. Moreover, important developments in the procedure of the CFA contributed to a broadening of the examination of complaints by this Committee over time.

---

85. ibid., paras 72–74.
86. ibid., para. 74.
87. GB.301/LILS/6(Rev.), para. 47.
88. ibid.
89. Informal tripartite consultations on the follow-up to the discussions of the Conference Committee on the Application of Standards (19 September 2012), *The ILO supervisory system: A factual and historical information note*, para. 68.
90. GB.301/LILS/6(Rev.), para. 48.

**62.** Such procedural changes and the Committee's mandate were discussed at different moments.[91] At its session in 1952, the Committee considered it desirable to establish a simpler and more expeditious procedure to deal with complaints that were not sufficiently substantiated.[92] In its ninth report, the Committee proposed a number of changes to the procedure related to the presentation of complaints, governments' replies, hearings of the parties and the form of the Committee's recommendations.[93] In 1958, the Committee formulated additional improvements aimed at strengthening its impartiality, preventing abuse of its procedures and making a distinction between urgent and less urgent cases.[94] In 1969, another set of proposals dealing with complainants, receivability and measures to speed up the procedure were formulated.[95] In 1977, two proposals concerning contacts with governments and the direct contacts procedure were adopted to increase the impact of the CFA.[96] In 1979, the Governing Body adopted a number of proposals by the Committee regarding hearing the parties, direct contacts missions, relations with complainants and governments, and improving efficiency.[97]

**63.** The CFA procedure has been adapted and enhanced regularly since its creation. As was discussed, the CFA has presently examined over 3,100 complaints while the FFCC has reviewed six cases.[98]

*Article 24 representations and article 26 complaints*

**64.** The functioning of the representations procedure, governed by articles 24 and 25, and the complaints procedure, governed by articles 26–29 and 30–34 of the Constitution, has been discussed by the Governing Body on various occasions.[99] Over the years the increase in the use of these procedures has called attention to their efficiency, specificity and coherence among the other supervisory mechanisms. A number of adjustments have been introduced over time.

**65.** Articles 409 and 410 of the Treaty of Versailles contained the original procedure for representations. The submission of the first representations in 1924 and 1931 raised a number of practical issues about the procedure. To safeguard both the rights of industrial associations and the freedom to act of the Governing

---

91. CFA: *Examination of complaints alleging infringements of trade union rights*, Document on Procedure, Mar. 2002; Sixth Report of the Committee on Freedom of Association reproduced in the Seventh Report of the International Labour Organization to the United Nations, Appendix V, Reports of the Governing Body Committee on Freedom of Association, para. 25. Also see: GB.306/10/1(Rev.), para. 4.
92. Sixth Report of the Committee on Freedom of Association reproduced in the Seventh Report of the International Labour Organization to the United Nations, Appendix V, Reports of the Governing Body Committee on Freedom of Association, para. 24.
93. CFA: Document on Procedure, op. cit., paras 7–13.
94. ILO: *Official Bulletin*, Vol. XLIII, 1960, No. 3, 29th Report of the Committee on Freedom of Association, paras 8–12.
95. CFA: Document on Procedure, op. cit., para. 21.
96. ibid., para. 29.
97. ibid., paras 32–39.
98. Informal tripartite consultations on the follow-up to the discussions of the Conference Committee on the Application of Standards (19 September 2012), *The ILO supervisory system: A factual and historical information note*, para. 69.
99. For both procedures, see GB.288/LILS/1; for specific debates on the representations procedure, see GB.271/LILS/3; GB.273/LILS/1; GB.277/LILS/1; and GB.291/LILS/1.

Body, Standing Orders were adopted in 1932.[100] These provided for the instalment of a tripartite committee to examine each representation. Initially, the tripartite committee's mandate covered both the receivability and the substance of the representations, but this was later changed so that the Governing Body would decide on matters of admissibility.[101] The Standing Orders for the examination of representations were last amended in 2004.[102]

**66.** The complaints procedure was initially regulated in Articles 411–420 of the Treaty of Versailles, limiting the right to file a complaint only to a member State and providing for tripartite panels to examine the complaint.[103] The procedure was amended substantially in 1946 with the adoption of articles 26–34 of the Constitution. As explained above, a complaint may be filed against a member State for not complying with a ratified Convention by another member State, provided that it has ratified the same Convention.[104] The Governing Body may use the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference. Subsequently, a Commission of Inquiry may be set up by the Governing Body to examine the complaint, although this happens only occasionally.[105] Furthermore, the reference to measures of an economic character was replaced by a provision under which the Governing Body can recommend to the Conference such measures it deems 'wise and expedient' to bring about compliance with the Convention concerned.[106]

**67.** From the 1960s, supervision of the application of ratified Conventions, which had been carried out before that time largely through the regular supervisory process, began to see the more frequent use of complaints and representations. In 1961, the first complaint was lodged leading to the first Commission of Inquiry.[107] The diversification of the use of the supervisory procedures after the 1960s also demonstrated the complementarity of the system.[108]

**68.** Thus, some of the concerns raised during that period have come to the forefront again in recent times – particularly those regarding the effects of the special procedures on the regular procedure, the overlapping of procedures and the increasing workload – in all parts of the supervisory system. It is against this background that it has been suggested that improvement of coherence and the effectiveness of the supervisory system needs to address the balance and interrelationship of the different supervisory components.[109] The following section

---

100. The ILO supervisory system: A factual and historical information note, op. cit., para. 62.
101. ibid., para. 64.
102. GB.288/LILS/1, para. 20.
103. The ILO supervisory system: A factual and historical information note, op. cit., para. 65.
104. Article 26(4) of the Constitution grants similar complaint rights to the Governing Body or a delegate to the International Labour Conference.
105. Improvements in the standards-related activities of the ILO – articles 19, 24 and 26 of the Constitution, GB.288/LILS/1, para. 33.
106. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 27.
107. GB.301/LILS/6(Rev.), para. 51. Also see: *Information paper on the history and development of the mandate of the CEACR (19–20 February 2013)*, para. 9: '... the preference was to focus on the review of annual reports, so as to render recourse to the other constitutional procedures (representations and complaints) unnecessary'.
108. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 44.
109. GB.301/LILS/6(Rev.), op. cit., paras 39–79.

will explain the contemporary status of the different parts of the supervisory system in order to provide a clear picture of its current procedural aspects.

### (c) Procedural aspects and contemporary supervisory architecture

**69.** The different supervisory procedures serve a common purpose: the effective observance of international labour standards, particularly in relation to ratified Conventions, taking into account the extent to which Members have given effect to the provisions of the Conventions. The different links that exist between the supervisory mechanisms therefore operate in respect of obligations freely assumed by the Organization's member States through the ratification of Conventions.[110]

**70.** The following section sets out the procedures of the different supervisory mechanisms in one comprehensive table.[111] 111 The different sections – placed in the left column – discuss: (a) the constitutional or other legal basis; (b) procedure; (c) nature and mandate; (d) composition; (e) information considered; (f) the status of the reports; and (g) the outcomes for each respective supervisory procedure or body. This table offers a concise, comparative and comprehensive overview of the supervisory system as a whole. Subsequent paragraphs will focus on the interrelationship of the different supervisory procedures.

**71.** These tables illustrate the different procedures of the supervisory system while also indicating the similarities and differences between them. With this general overview of the supervisory architecture in place, the following section will proceed to analyse the interrelationship between, and coherence of, the different procedures as well as the interactions that occur among the bodies in practice.

110. GB.301/LILS/6(Rev.), op. cit., para. 57.

111. This table is similar to the one that can be found in document GB.301/LILS/6(Rev.), para. 54.

| | Regular supervisory procedure | Special supervisory procedures | | |
|---|---|---|---|---|
| | **Reports on the application of ratified Conventions** | **Representations alleging non-observance of ratified Conventions** | **Complaints alleging non-observance of ratified Conventions** | **Complaints alleging violations of freedom of association** |
| **Constitutional basis** | Articles 22 and 23 | Articles 22 and 23 | Articles 26–29 and 31–34 | Principle of freedom of association embodied in the Preamble of the Constitution and the Declaration of Philadelphia |
| **Other legal basis** | (i) Conference resolution of 1926;<br>(ii) article 7 of the Conference Standing Orders;<br>(iii) decisions of the Governing Body;<br>(iv) decisions by the supervisory bodies concerning their methods of work and procedure. | Standing Orders concerning the representation procedure adopted by the Governing Body (last modified at its 291st Session, November 2004). | Governing Body has left the determination of the procedure to the competent supervisory body. No rules of procedure explicitly set out but developed and evolved in practice. | (i) Provisions adopted by common consent by the Governing Body and ECOSOC in January and February 1950;<br>(ii) decisions taken by the Governing Body;<br>(iii) decisions adopted by the supervisory bodies themselves.<br>(Also see: Compendium of rules applicable to the Governing Body of the International Labour Office, ILO, Geneva, 2011.) |
| **Initiation of the procedure** | Obligation of Members to provide reports (article 22) on the measures taken to give effect to ratified Conventions, in accordance with the report form and the reporting cycle determined by the Governing Body (and comments submitted by employers' and workers' organizations under article 23).<br>In 2015, 2,336 reports (under articles 22 and 35 of the ILO Constitution) were requested from governments on the application of Conventions ratified by member States. The Committee of Experts has received 1,628 reports. This figure corresponds to 69.7 per cent of the reports requested. | Representation made by an industrial association of employers or workers alleging failure by a Member to secure effective observance of a ratified Convention. 168 representations have been submitted to date. | Complaint by a Member alleging failure by another Member to secure effective observance of any Convention which both have ratified.<br>The Governing Body also may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.<br>30 complaints have been submitted to date. | (i) Initiation of the procedure:<br>Complaints lodged with the Office against an ILO Member, either directly or through the UN, either by organizations of workers or employers or by governments. Complaints may be entertained whether or not the country concerned has ratified the freedom of association Conventions;<br>(ii) Initiation of the procedure – Specific conditions:<br>Fact-Finding and Conciliation Commission (FFCC):<br>– Complaints may be lodged against a Member of the UN which is not a Member of the ILO;<br>– Complaints which the Governing Body, or the Conference acting on the report of its Credentials Committee or ECOSOC, considers it appropriate to refer to the FFCC;<br>– In principle, no complaint may be referred to the Commission without the consent of the government concerned;<br>Committee on Freedom of Association (CFA):<br>– Referrals proposed unanimously by the Credentials Committee of the Conference and decided upon by the Conference, concerning an objection as to the composition of a delegation to the Conference. |

| | Regular supervisory procedure | | Special supervisory procedures | | | |
|---|---|---|---|---|---|---|
| | **Reports on the application of ratified Conventions** | | **Representations alleging non-observance of ratified Conventions** | **Complaints alleging non-observance of ratified Conventions** | **Complaints alleging violations of freedom of association** | |
| **Competent supervisory bodies** | Committee of Experts on the Application of Conventions and Recommendations (CEACR)<br>(1926 Conference resolution) | Conference Committee on the Application of Standards (CAS)<br>(1926 Conference resolution) | Tripartite committees of the Governing Body (Standing Orders concerning the procedure for the examination of representations) | Commissions of Inquiry and Governing Body (including through high-level missions) (article 26(3)) | CFA<br>(Governing Body decision of 1951, 117th Session) | FFCC<br>(1950 decisions of the Governing Body (110th Session) and of ECOSOC accepting the services of the ILO and the FFCC on behalf of the UN) |
| **Nature and mandate** | *Standing body*<br>To examine annual reports (article 22) on measures taken to give effect to ratified Conventions.<br>To make a report that is submitted by the Director-General to the Governing Body and the Conference (Governing Body decision, 103rd Session, 1947). | *Standing Committee of the Conference*<br>To consider measures taken by Members to give effect to ratified Conventions.<br>To submit a report to the Conference (article 7 of the Conference Standing Orders). | *Ad hoc tripartite body of the Governing Body*<br>To examine a representation deemed receivable by the Governing Body.<br>To submit a report to the Governing Body setting out conclusions and recommendations on the merits of the case (article 3(1) and article 6 of the Standing Orders). | *Ad hoc body*<br>To fully consider a complaint referred to it by the Governing Body.<br>To prepare a report embodying findings on all questions of fact and containing recommendations as to the steps to be taken and a time frame within which this should occur (article 28 of the Constitution).<br>12 complaints have been examined by a Commission of Inquiry thus far. | *Standing tripartite body of the Governing Body*<br>To examine allegations of violations of freedom of association so as to determine whether any given legislation or practice complies with the principles of freedom of association and collective bargaining.<br>To report to the Governing Body (Governing Body decision of 1951; Digest, para. 6).<br>Until July 2015, 3,126 complaints have been examined by the CFA. | *Standing body*<br>To examine allegations of violations of freedom of association.<br>To ascertain the facts, as a fact-finding body.<br>Authorized to discuss situations with the government concerned with a view to securing the adjustment of difficulties by agreement.<br>To report to the Governing Body (Governing Body decision of 1950).<br>Six complaints examined by the FFCC. |
| **Competent supervisory bodies** | CEACR | CAS | Tripartite committees | Commissions of Inquiry | CFA | FFCC |

| | Regular supervisory procedure | | Special supervisory procedures | | | |
|---|---|---|---|---|---|---|
| | Reports on the application of ratified Conventions | | Representations alleging non-observance of ratified Conventions | Complaints alleging non-observance of ratified Conventions | Complaints alleging violations of freedom of association | |
| **Composition** | Members are appointed by the Governing Body, upon the proposal of the Director-General in their personal capacity. Members are appointed in view of their legal expertise, impartiality and independence. | Government, Employer and Worker members of the Committee form part of national delegations to the Conference. | Members of the Governing Body chosen in equal numbers from the Government, Employers' and Workers' groups (i.e. one per group). | Members appointed by the Governing Body in their personal capacity upon the proposal of the Director-General. Persons chosen for their impartiality, integrity and standing. | Members of the Governing Body representing in equal proportion the Government, Employers' and Workers' groups (i.e. six per group). Each member participates in a personal capacity.<br>Chaired by an independent person. | Members appointed by the Governing Body for their personal qualifications and independence upon the proposal of the Director-General.<br>Governing Body has authorized members of the Commission to have the work undertaken by panels of no less than three and no more than five members. |
| **Competent supervisory bodies** | CEACR | CAS | Tripartite committees | Commissions of Inquiry | CFA | FFCC |
| **Information considered** | Written information on the application in law and practice of ratified Conventions including:<br>(i) article 22 reports;<br>(ii) article 23 comments submitted by employers' and workers' organizations;<br>(iii) other information, such as relevant legislation or mission reports. | (i) Written information on the application in law and practice of ratified Conventions, including: (i) report of the CEACR;<br>(ii) information supplied by governments.<br>Oral information concerning the case under discussion supplied by the government concerned and by members of the Committee. | Written information supplied by the parties.<br>The hearing of the parties could be possible. | Written and oral information. The Commissions of Inquiry can take all necessary steps to obtain full and objective information on questions at issue, in addition to information supplied by the parties (e.g. information supplied by other Members, the hearing of the parties and witnesses, visits by the Commission to the country). | Complaints and observations thereon by the government. Any additional information requested by the Committee and supplied by the parties, generally in writing. The hearing of the parties is possible, as decided in appropriate instances by the CFA, although such cases are rare. On the other hand, at various stages in the procedure, an ILO representative may be sent to the country concerned. | In order to ascertain facts, the Commission is free to hear evidence from all concerned (e.g. information from third parties, hearing of the parties and witnesses, visits to the country). Any discussions 'with a view to securing the adjustment of difficulties by agreement' have to be held with the government concerned. |

| | Regular supervisory procedure | | Special supervisory procedures | | | |
|---|---|---|---|---|---|---|
| | Reports on the application of ratified Conventions | | Representations alleging non-observance of ratified Conventions | Complaints alleging non-observance of ratified Conventions | Complaints alleging violations of freedom of association | |
| **Status of the report** | Governing Body takes note of the report and transmits it to the Conference.<br>The report is published. | Plenary of the Conference discusses and approves the report.<br>The report is published. | Report includes conclusions and recommendations of the tripartite committee. Governing Body discusses and approves the report in a private sitting. | Report communicated by the Director-General to the parties concerned and to the Governing Body, which takes note of it.<br>Report published in the ILO *Official Bulletin*, under article 29 of the Constitution. | Report submitted to the Governing Body for discussion and approval.<br>Report published in the ILO *Official Bulletin*. | Report communicated by the Director-General to the Governing Body, which takes note of it.<br>Report published in the ILO *Official Bulletin*. |
| **Competent supervisory bodies** | CEACR | CAS | Tripartite committees | Commissions of Inquiry | CFA | FFCC |
| **Outcome** | Individual comments by the CEACR as part of an ongoing dialogue on the application in law and practice of ratified Conventions and, where appropriate, expressions of 'satisfaction' and 'interest'.<br>Conclusions on individual cases by Conference Committee.<br>Technical assistance provided by the Office at the request of the government in the light of these comments. | | Governing Body's decisions on the representation notified to the parties by the Office, including decision to publish the representation and the reply of the government, in accordance with article 25.<br>Possible follow-up by the CEACR. | Governments concerned must inform the Director-General within three months whether or not they accept the recommendations and, if not, whether they propose referral of the complaint to the International Court of Justice.<br>Governing Body may recommend action by the Conference in case of failure to give effect to the recommendations (article 33). Possible follow-up by the CEACR. | Possible recommendations to the Governing Body:<br>(i) no further examination required;<br>(ii) anomalies to be drawn to the government's attention; government may be invited to take remedial steps and state the follow-up action taken;<br>(iii) attempt to secure government's consent to referral to the FFCC;<br>(iv) CEACR's attention drawn to legislative aspects if Conventions ratified. | The Governing Body may decide on arrangements to follow up the matters examined by the Commission, whether the complaint concerns an ILO Member or a UN Member which is not a Member of the ILO. |

## III. Interrelationship, functioning and effectiveness of the supervisory mechanisms

**72.** The system as a whole has a number of features that generate links and interactions between the different components. Apart from their common purpose, the different components – in a tripartite organization – involve the participation of employers' and workers' organizations in addition to governments. They can contribute to the work of the CEACR by sending comments and by initiating action through the submission of a representation under article 24, a complaint under article 26 (through a delegate to the Conference) or a complaint to the CFA.[112]

**73.** The representatives of these organizations participate directly in the work of different supervisory bodies and the Governing Body, which has a central role in relation to the operation of the supervisory procedures. The Governing Body's specific functions in this respect include the approval of report forms on ratified Conventions and the consideration of representations and complaints.

**74.** Furthermore, the Governing Body decides upon the mandates of certain supervisory bodies (although not in relation to the CAS and Commissions of Inquiry), appoints the members of most of these bodies and receives the reports of the supervisory bodies, either to note or to approve them.[113] The Governing Body takes the difference between its role and those of the specific other entities into consideration when exercising these functions.[114]

**75.** As indicated in the tables above, the supervisory procedures have many other similarities. In relation to the tools they possess these include: submission of written information, direct contact missions, follow-up arrangements and various publicity measures.[115] Some supervisory bodies have additional, similar characteristics in relation to their composition, nature and procedures.

**76.** The complementarity of the system, which has been emphasized by the Governing Body and Conference on each occasion the institutional framework was supplemented or enhanced, means that examination under one procedure does not hinder the initiation of another procedure on the same issue.[116] The resulting coordination, dialogue and coherence between the different supervisory entities has created a number of links. These will be discussed in the following section.

### (a) Interrelationship and coherence

**77.** For the sake of coherence and effectiveness of the system as a whole, relationships exist between the different supervisory bodies, both in principle and in practice.

**78.** Such interactions can be found in three areas: first, the referral of matters to the relevant body; second, the suspension or closure of a procedure when another is initiated; and third, as regards the examination by other supervisory

---

112. GB.301/LILS/6(Rev.), para. 58.
113. ibid., para. 59.
114. ibid.
115. ibid., para. 61.
116. ibid., para. 63.

bodies – in particular the CEACR – of the follow-up and effect given to specific recommendations of supervisory bodies.[117]

**79.** In the context of a representation, the Governing Body may decide to refer the matter to a tripartite committee if it deems the representation admissible. The Governing Body may also decide to refer aspects of the case that relate to trade union and employers' rights to the CFA.[118] This possibility was introduced in 1980 in accordance with articles 24 and 25 of the Constitution and, to date, 16 of these referrals have been made. Furthermore, the Governing Body may postpone the appointment of a tripartite committee if the CEACR is still in the process of examining a follow-up to a similar previous recommendation.[119] Regarding an article 26 complaint related to freedom of association that is already pending before the CFA, the Governing Body may seek the CFA's recommendation as to whether the complaint should be referred to a Commission of Inquiry, or whether the examination remains with the CFA.[120]

**80.** Examination of a case by the CEACR and subsequently by the CAS may be suspended in the event of a representation or complaint in relation to the same case.[121] When the Governing Body has decided on the outcome, the CEACR's subsequent examination may include monitoring the follow-up to the recommendations of the body which examined the representation or complaint. In cases involving representations or complaints where certain aspects of the case are referred to the CFA, examination of the legislative issues by the CEACR is not suspended.[122]

**81.** In relation to the follow-up and effect given to the recommendations of the supervisory bodies, governments are required to indicate which measures are taken. Following the reporting obligations derived from article 22 of the Constitution, the CEACR is the body entrusted with examining the follow-up to the recommendations made by tripartite committees (article 24) and Commissions of Inquiry (article 26). As regards representations, this practice was acknowledged during the revision of the Standing Orders concerning representations in 2004.[123] In relation to recommendations by a Commission of Inquiry, this practice has been followed since the first such Commission was established.[124]

**82.** The procedure of the CFA provides for the examination of the effect given to its recommendations.[125] Under these rules, the examination of the legislative aspects of the recommendation adopted by the Governing Body is referred to

---

117. GB.301/LILS/6(Rev.), para. 64.
118. ILO: Handbook of procedures relating to international labour Conventions and Recommendations, op. cit., para. 81.
119. GB.301/LILS/6(Rev.), para. 66.
120. ibid., para. 68.
121. ibid., para. 69.
122. ILO: Handbook of procedures relating to international labour Conventions and Recommendations, op. cit., para. 69.
123. GB.301/LILS/6(Rev.), para. 72; Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation, adopted by the Governing Body at its 57th Session (8 April 1932), modified at its 82nd Session (5 February 1938), 212th Session (7 March 1980) and 291st Session (18 November 2004), Article 3(3).
124. GB.301/LILS/6(Rev.), para. 73.
125. ILO: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth (revised) edition, Geneva, 2006, Appendix I, paras 70–74.

the CEACR if member States have ratified one or more Conventions on freedom of association.[126] Such a referral does not prevent the CFA from examining the follow-up given to its recommendations, especially in relation to cases involving urgent issues.

**83.** In 2008, the Office was requested to conduct a study on the dynamics of the supervisory system, from a substantive and practical standpoint, based on the examination of a number of cases. Seven cases were examined in which the following issues were discussed: the roles of the supervisory bodies at the various stages, the extent to which there has been duplication of work and how the interaction between the procedures occurred in practice.[127] A number of insights regarding the dynamics of interaction in practice can be drawn from this study.

**84.** The main findings derived from the case studies indicated that: the pattern of interactions is multifaceted and dependent on a number of factors, among which the actions, approach and role of the constituents and the Governing Body are most influential. Furthermore, the various supervisory bodies often become involved at different times, in no predetermined order.[128]

**85.** As mentioned, the main interactions can be found between the regular supervisory procedure through the CEACR and the special procedures. The CAS may also discuss certain specific cases of the CEACR's General Report. Interactions are heavily influenced by the choices that constituents make regarding the procedure under which they would like to see matters examined.[129]

**86.** It has been suggested that the coordination of the response by the supervisory system largely falls under the responsibility of the Governing Body.[130] Its central role in the interactions is set out in the Constitution and in the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution.[131]

**87.** A key feature of the supervisory machinery is its pragmatic functioning. Interactions are possible in different ways depending on the issues in question and the choices made by the constituents. This is also possible because the Constitution does not provide for explicit standardized links between the procedures, and does not prescribe a specific fixed order for the consideration by the different supervisory bodies.[132]

**88.** As stated above, the distinctive nature of each procedure has often been highlighted by the Governing Body and the Conference. The consequences of the assertion that none of the procedures can operate as the substitute for the other are twofold. First, the examination of issues under one procedure is not an impediment for an examination under another. Secondly, matters can be raised directly under any of the supervisory procedures, provided that the admissibility

---

126. GB.301/LILS/6(Rev.), para. 75.
127. GB.303/LILS/4/2, paras 4–5.
128. ibid., para. 6.
129. ibid., para. 9.
130. ibid., para. 10.
131. ILO: Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation, adopted by the Governing Body at its 57th Session (8 April 1932), modified at its 82nd Session (5 February 1938), 212th Session (7 March 1980), and 291st Session (18 November 2004), Article 3(1) and Article 7. Also see: GB.303/LILS/4/2.
132. GB.303/LILS/4/2, para. 13.

criteria have been met.[133] This way, constituents can make full use of their freedom to choose which procedure suits their concerns best.[134] The case studies examined in 2008 indicate that although there are some simultaneous interactions, most interactions occur in sequence.[135]

**89.** The same study investigated the issue of whether the complementarity of procedures may lead to duplication. The fact that all supervisory processes pursue the common goal of effective observance of international labour standards creates the need for coordination and coherence between the implementation and examination of the various procedures. Conflicting views within the supervisory system may undermine its impact, although in practice there do not seem to be problems in this respect.[136] At the same time this complementarity may lead to some elements of duplication, since the different supervisory mechanisms may reconsider the same issues.

**90.** Some duplication in the information provided is therefore sometimes inevitable.[137] Also, in relation to the follow-up, a degree of duplication may be present, for instance when the CEACR and the CFA, under different mandates, examine the same matters. The CAS may also decide to examine the same issues. The responsibility for the coordination and management of the interactions lies with the Conference and Governing Body, whose roles in overseeing the processes should prevent excessive overlap.[138] 138 Complementarity of the different procedures may create venues for exerting additional pressure on governments to remedy certain violations of labour standards. The mechanisms do not call for different ways to comply and typically reinforce each other.

**91.** When considering the extent to which the interactions may enhance the functioning of the supervisory system a number of remarks can be made. Interactions may provide a more thorough examination of national labour laws, policies and practices by creating different perspectives. Different opportunities of dialogue and monitoring may also lead to better, more comprehensive and accurate information and evaluation of a specific situation. Different combinations of procedures can have the benefit that the system is able to respond to a variety of situations and changing circumstances.[139]

**92.** The effective functioning of the supervisory system as a whole is based on the links and interaction between its different elements. The constituents, Governing Body, the Conference and the Office play a key role in ensuring the balance and coherence of the different procedures.[140] In this connection, it is remarkable that between the chairpersons of the CEACR and the CFA there is formally very little interaction. Furthermore, tripartism is central to an effective functioning of the interactions between the supervisory bodies and to preventing unnecessary duplication. Interactions may occur in the context of referral, suspension of procedures and follow-up. The functioning of the supervisory system is com-

133. ibid., para. 14.
134. ibid., para. 15.
135. ibid., para. 17.
136. ibid., paras 25–26.
137. ibid., para. 27.
138. See case studies examined in GB.303/LILS/4/2.
139. ibid., paras 32–36.
140. GB.303/LILS/4/2, para. 39.

plex and has evolved substantially over the years since its establishment in 1919. Pragmatism and the need to adapt to changing social circumstances have influenced these developments. Coherent and well-informed interaction between the different supervisory procedures is essential to a properly functioning system of monitoring international labour standards.

**(b) Functioning, impact and effectiveness**

**93.** To provide an overview of data related to the effectiveness and impact of the supervisory system the special procedures under articles 24 and 26 will first be discussed. Subsequently, the standing committees (CEACR, CAS and CFA) will be discussed in more detail. Three substantial studies into the effectiveness and impact of these standing committees have been produced since the turn of the century. These studies all contain an elaborate analysis of cases of progress.[141]

*Article 24 representations*

**94.** The procedure under article 24 of the ILO Constitution grants industrial associations of employers or workers the right to file a representation that any of the Members of the Organization has failed to secure effective observance of any Convention within its jurisdiction. Since 1924, there have been 168 received representations. The number of yearly representations has increased since the 1980s, although the number has exceeded ten only three times: in 1994 (13 received), 1996 (11 received) and 2014 (13 received). In respect of the regional distribution, Europe has been involved in 71, the Americas in 63, Asia in 11, Africa in ten and the Arab States in five representation procedures. The average duration of representation procedures since 1990 has been approximately 20 months. Although it was expected that the end of the Cold War would bring about an enormous increase in the number of representations, this did not happen in fact.[142]

*Article 26 complaints*

**95.** Article 26 complaints procedures, by which a member State – or a delegate to the ILC – may file a complaint of non-observance of a Convention against another member State provided that they have both ratified that same Convention, have been fewer. Since 1961, a total of 30 complaints have been received and only 12 Commissions of Inquiry have been established until today. There has been no substantial increase in the setting up of Commissions of Inquiry since the 1960s, when use of the complaints procedure became more accepted practice.[143]

---

141. ILO: The Committee on Freedom of Association: Its impact over 50 years (Geneva, 2001, second edition 2002); E. Gravel and C. Charbonneau-Jobin: The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact (Geneva, 2003); The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion (Geneva, 2011).
142. For an overview of the number of article 24 representations received by year, region and by type of Convention covered, see figures 1–3 in Appendix II [niet opgenomen in deze uitgave; het gehele document inclusief appendices is te raadplegen via: https://www.ilo.org/gb/GBSessions/GB326/lils/WCMS_456451/lang--en/index.htm].
143. Although there are four complaints procedures pending presently.

The average duration of an article 26 complaint before a Commission of Inquiry is about 19 months.[144]

**96.** One third of the complaints filed under article 26 relate exclusively or primarily to the application of fundamental Conventions. Especially the application of fundamental Conventions dealing with freedom of association leads to more interactions between the different complaint-based mechanisms (articles 24, 26 and the CFA procedure).[145]

*The Committee of Experts on the Application of Conventions and Recommendations (CEACR)*

**97.** In relation to the regular system of supervision, the Committee of Experts is one of the two bodies responsible for monitoring the application of labour standards. Different studies into its effectiveness and impact have been published.[146] The following section will provide a brief overview of the impact of the work of the Committee and its report.[147]

**98.** Since 1926, the number of Conventions as well as the membership of the Organization has grown substantially, which has led to an enormous increase in the number of reports the CEACR has to examine each year. Similarly, the number of observations and direct requests has been on the rise.[148]

**99.** A 2003 study on the impact of the CEACR's work focused on the composition and functioning of the Committee and on an analysis of a number of 'cases of progress'.[149] Discussing the details of these cases is beyond the scope of this report, but the general conclusions will be discussed. The study conducted an examination of cases that dealt with core Conventions and the work of the Experts over the past few decades.[150] Since 1964, the CEACR has listed the cases in which governments have made changes in law or practice as a result of the comments of the Committee. In practice, the Committee identifies such cases by noting 'with satisfaction' the effect that a government has given to its previous comments. Since 2000, the Committee also uses the terminology 'with interest' to indicate certain measures taken by governments in response to its observations and requests.[151]

---

144. For a complete overview of statistics concerning articles 24 and 26 procedures until 2015, see Appendix II.
145. GB.303/LILS/4/2, 2008, para. 12.
146. G.P. Politakis (ed.): 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; E. Gravel and C. Charbonneau-Jobin: The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact (Geneva, ILO, 2003).
147. The following paragraphs are largely based on E. Gravel and C. Charbonneau-Jobin: *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact* (Geneva, ILO, 2003), since this study covers the impact of the CEACR over the years since 1977.
148. G.P. Politakis (ed.), op. cit., pp. 289–290. The table in Annex II clearly illustrates this development in respect of the number of member States, ratifications of Conventions, number of experts, and observations and direct requests.
149. E. Gravel and C. Charbonneau-Jobin, op. cit.
150. ibid., p. 2.
151. ibid., p. 23.

**100.** While the increase in the number of 'progress cases' is understandable in light of the increase in ratifications, it is also caused by receptiveness of member States in implementing the Committee's observations more fully.[152] The impact of the Committee's work cannot be measured solely in light of 'cases of progress' and an indirect or a priori impact of the Experts' work is certainly an important factor to take into account. Nevertheless, monitoring these cases is useful for assessing the impact of the Committee and the supervisory system as a whole.[153]

**101.** The cases investigated show a variety of measures that have been implemented by member States. Positive developments were detected, for example in relation to recognition of trade unions, protection against anti-union discrimination, trade union pluralism and independence, trade union resources, free collective agreements, inclusion of civil servants, forced labour and forms of serfdom, freedom of expression, prison labour, equal treatment and remuneration, sex-based discrimination, works council procedures, equal opportunities legislation, indirect discrimination, child and youth labour, and so forth. The numerous examples of cases of progress underline the importance of the work of the CAS and the CEACR.[154]

**102.** Approximately 3,000 of these cases of progress have been noted since 1964. Noteworthy recent examples are the 2013 adoption of Samoa's labour legislation in order to prohibit children under 18 years of age from working with dangerous machinery or under working conditions likely to be injurious to their physical and moral health.[155] Furthermore, Ukraine adopted a law on equal rights and opportunities for women and men in 2006 and Lebanon adopted legislation in 2012 on the prohibition of employment for minors under 18 in types of work that harm their safety, health, limit their education or constitute one of the worst forms of child labour.[156]

**103.** The CEACR has shown considerable effectiveness over the years and it is suggested that the ILO supervisory mechanism is among the most advanced in the international system.[157] Contrary to the critique that international legal monitoring bodies often receive, the CEACR has demonstrated that supervision has real, practical and tangible effects in domestic jurisdictions. The credibility and impact of the Committee of Experts can be explained by several factors. Important factors are the independence and high qualifications of the Experts. Furthermore, technical examinations are balanced with comprehensive examinations by representative bodies composed of government, worker and employer representatives. This increases the coherence of the system as a

---

152. ibid., p. 24.
153. Nevertheless, proper, de facto, implementation of legal changes remains an important concern.
154. For the full overview of cases of progress, see: E. Gravel and C. Charbonneau-Jobin, op. cit., pp. 29–71.
155. ILO: *Rules of the Game*, op. cit., p. 104.
156. ibid.
157. E. Gravel and C. Charbonneau-Jobin, op. cit., p. 75. However, besides positive remarks, concerns were also raised by the tripartite constituents in recent years. See, for example, Report of the Committee on the Application of Standards, *Provisional Record* 14(Rev.), ILC, 104th Session, Geneva, 2015, paras 38–39, and Report of the Committee on the Application of Standards, *Provisional Record* No. 13, Part One, ILC, 103rd Session, Geneva, 2014, paras 58 and 69.

whole.[158] Moreover, effectiveness of the Committee is enhanced by its capacity to adapt to new developments and realities, for instance, through rethinking its working methods.[159] Improving the working methods is a continuous priority of the CEACR.

*The Conference Committee on the Application of Standards (CAS)*

**104.** The CAS makes an examination of compliance with standards-related obligations on the basis of the report of the CEACR each year. The procedure of the CAS offers the representatives of governments, employers and workers an opportunity to jointly examine the manner in which member States comply with their obligations derived from Conventions and Recommendations.[160] The CAS is thus responsible for determining the extent to which international labour standards are given effect and reporting about this to the Conference. This mandate is derived from article 23 of the Constitution and the Standing Orders of the ILC.[161]

**105.** Regarding its functioning, the CAS prepares a list of cases based on the observations in the report of the Committee of Experts in respect of situations in which further government information would seem desirable.[162] Subsequently, the Conference Committee examines approximately 25 cases and submits its report on those cases to the Conference for plenary discussion.[163] The CEACR may use 'single footnotes' to observations in its report, by which it indicates that a government should send an earlier report than is required under the reporting cycle or it may use a 'double footnote' which means that the government is requested to send detailed information to the Committee of Experts and the CAS.[164] The CAS report is published in the *Record of Proceedings* of the Conference.

**106.** The CAS normally begins its work with a brief general discussion after which the General Survey of the CEACR is discussed. Subsequently, the observations of the Experts are discussed and cases of serious failure to report are identified (so-called automatic cases). The Workers' and Employers' groups draft a list of individual cases which are selected by reference to the following criteria: (a) the nature of the comments of the CEACR and the existence of a 'footnote'; (b) the quality and scope of response provided by the government; (c) the seriousness and persistence of shortcomings in the application of the Convention; (d) the urgency of a specific situation; (e) comments received from employers' and workers' organizations; (f) the nature of a specific situation; (g) previous discussions and conclusions by the CAS; (h) the likelihood that discussing the case will have impact; (i) balance between fundamental, governance and technical Conventions; (j) geographical balance; and (k) balance between

158. E. Gravel and C. Charbonneau-Jobin, op. cit., p. 76.
159. ibid.
160. ILO: The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion (Geneva, 2011), p. 1.
161. ibid.
162. ibid., p. 2.
163. ibid.
164. Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 102nd Session, Geneva, 2013, para. 68.

developed and developing countries.[165] After consultations with the Reporter and Vice-Chairpersons, the conclusions may be proposed by the Chairperson to the CAS for adoption.[166]

**107.** In 2011, an extensive study into the impact of the CAS was published in which the diversity, depth, permanence and progressive nature of the impact of the work carried out by the CAS in combination with the other ILO supervisory bodies was assessed. In the study, different cases of progress and cases of serious failure to respect constitutional reporting obligations are examined as well as the general functioning and working methods of the CAS. The study also addressed the formal procedures of the ILO supervisory bodies that draw attention to such 'progress cases' as well as the more informal impact of ILO supervision.[167]

**108.** While it is outside the scope of this report to discuss in depth the identified 'progress cases', the most important insights from the 2011 study will be examined. The emphasis in the analysis was on the effect from repetition of individual examinations, the content of the discussions and the force of the conclusions of the CAS versus a particular member State.[168] The fact that a State may be included on the list of individual cases can certainly have a positive effect on compliance. The repetition of cases, on the other hand, does not seem to have a determinative effect in this respect according to the 2011 impact report.[169]

**109.** It is therefore important to assess the impact of the CAS in the context of other means used by the Organization to persuade member States towards compliance. The complementarity of the work of the different supervisory bodies in combination with targeted technical assistance missions (practical advice) is key in promoting compliance. With this framework in mind, the 2011 analysis covers cases of progress over the past 20 years related to a selection of countries.[170] It covers a quantitative evaluation of cases of serious failure by member States to meet their constitutional reporting obligations, an analysis of cases of progress in complying with those obligations and a discussion of the relevant elements that need to be discussed to assess the impact of the CAS.[171]

**110.** The main conclusions of the study indicate that it is impossible to separate the work of the CAS from that of the Committee of Experts, in cooperation with the Office and other ILO supervisory bodies. The impact of such joint action is also dependent upon the activities and expertise present 'in the field' through technical assistance, support, training, Decent Work Country Programmes and technical cooperation with other international organizations.[172]

---

165. In this respect, see for a detailed and recent explanation of the manner in which the work of the CAS is carried out: Report of the Committee on the Application of Standards, *Provisional Record* No. 14(Rev.), Part One, 104th Session, Geneva, 2015, Annex I, C.App./D.1.
166. ILO: The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion (Geneva, 2011), p. 21.
167. ibid., p. 23.
168. ibid., p. 26.
169. ibid.
170. ibid., p. 30.
171. ibid., p. 103.
172. ibid., pp. 139–142.

**111.** The CAS constitutes an invaluable component of the ILO's supervisory mechanism to promote compliance with, and effective implementation of, international labour standards.[173] The work of the CAS is especially meaningful when it operates in synergy with the other bodies and procedures within the ILO system.[174] Although the CAS has a commendable record of promoting adherence to international labour standards, it is also necessary to keep improving its working methods and cooperation with other supervisory bodies.[175]

*The Committee on Freedom of Association*

**112.** While the FFCC has examined only six complaints in total (1966: Japan; 1966: Greece; 1975: Chile; 1975: Lesotho; 1981: United States; 1992: South Africa), the CFA has been presented with over 3,100 cases since its establishment in 1951. With regard to the geographical distribution of those cases, 49 per cent concern Latin American countries, 21 per cent European countries, 12 per cent Asian, another 12 per cent African States and only 6 per cent concern States in North America. In recent years – from 1995 onwards – even a larger percentage of the cases (57 per cent) originated in Latin America.[176] The CFA examines around 120 cases each year. The following table shows the distribution of cases before the CFA from its establishment in 1951 to 2015.

| **Region** | **No. of cases** |
|---|---|
| Africa | 383 |
| Asia | 388 |
| Europe | 645 |
| Latin America | 1 527 |
| North America | 183 |
| **Total** | **3 126** |

**113.** In light of the 50th anniversary of the CFA in 2001, the Organization published a study on the manner in which the Committee carries out its supervisory role through an examination of the historical background and functions as well as an empirical study into its impact and effectiveness through a number of case studies. The study highlights that the value and significance of international labour standards depend on their impact and that the desire for practical implementation has been the drive that has led to the development of the different supervisory systems, including the CFA.[177] The goal of the impact study is to show the CFA's influence on the effect that is given to ILO principles in the field of freedom of association.

**114.** The CFA has to date succeeded in adopting all its recommendations by consensus, which helps ensure proper weight to its decisions while at the same time safeguarding the balance between the interests defended by the Government, Employer and Worker members. This methodology furthermore helps to gain

173. ibid., p. 145.
174. ibid.
175. ibid., p. 146.
176. See figures 7–13 in Appendix II.
177. ILO: The Committee on Freedom of Association: Its impact over 50 years (Geneva, second edition 2002), p. 1.

broad support in the Governing Body.[178] The overall purpose of the procedure is the observance of freedom of association in law and practice, and this system implies a certain complementarity between the competences of the various supervisory mechanisms.[179] As mentioned, cases in which the country concerned has ratified one or more Conventions on freedom of association, legislative aspects are referred to the CEACR, while in other cases the CFA may periodically examine follow-up to its recommendations in cooperation with the Director-General.[180]

**115.** The 2001 impact study analyses the impact and effectiveness of the CFA's procedure by examining a number of cases of progress.[181] The impact is assessed on the basis of such cases since 1971, from which year the progress has been systematically recorded. A case of progress in this analysis means that following the filing of a complaint with the Committee and its subsequent recommendations, changes have been made in law or practice in the country concerned with a view to bringing them more into conformity with the principles of freedom of association as developed by the ILO.[182]

**116.** Although it is beyond the scope of this report to go into the empirical analysis, the main findings of the 2001 study will be briefly discussed. The cases of progress examined by the ILO demonstrated clearly the effectiveness of the CFA system in many fields related to the exercise of freedom of association. The Committee has ensured that trade unionists are able to enjoy the legal safeguards of States in which the rule of law is respected. Additionally, the CFA has caused the release of imprisoned trade unionists or the reduction of their disproportional sentences in a significant number of cases.[183] It has secured application of the right to establish and join organizations, the right to elect representatives of those organizations as well as the freedom to formulate their rules, programmes and administrative systems.[184]

**117.** Furthermore, the CFA has managed to achieve re-registration of banned or dissolved worker organizations and has remedied acts of anti-trade union discrimination. Emphasizing the need for expeditious, impartial and objective procedures for workers considered victims of such discriminatory practices has been a continuous effort. Moreover, the CFA has watched over the exercise of the right to free collective bargaining and protection of the right to strike.[185]

**118.** A salient example of the CFA's impact concerns the case of Dita Indah Sari, an Indonesian labour activist who was detained because of her trade union activities in 1996.[186] Continuing pressure by the CFA and the international community led to her release and the release of other detained union members. In the years since, Indonesia has taken significant steps to improve protection of trade union rights and has ratified all eight fundamental Conventions.[187] This case is

---

178. ibid., pp. 11–12.
179. ibid., p. 12.
180. ibid.
181. ibid.
182. ibid., p. 22. See pp. 21–25 for a detailed description of the methodology used.
183. ILO: The Committee on Freedom of Association, op. cit., p. 65.
184. ibid.
185. ibid., pp. 65–66.
186. ILO: *Rules of the Game*, op. cit., p. 111.
187. Notwithstanding existing problems in relation to the protection of freedom of association.

not unique: in the last few decades, several hundred trade unionists worldwide were released from prison after the CFA examined their cases and drafted recommendations to the governments concerned.[188]

**119.** The 2011 report of the CFA illustrated a substantial increase in the number of cases of progress in the first decade of the new millennium.[189] According to the CFA, the assessment of the Committee's influence on the ground demonstrates a substantially increased impact for the Committee's conclusions and recommendations.[190] One of the reasons for this increased impact is the CFA's formulation of consensual conclusions and recommendations that are aimed at providing practicable solutions that ensure harmonious and sustainable environments for the exercise of freedom of association.[191] Furthermore, a number of complaints have been resolved at the national level with the assistance of preliminary on-the-spot missions and direct contacts missions.[192]

**120.** The Committee carries out a review of its working methods on a regular basis in which it assesses its procedures, visibility and impact.[193] While the increase in cases of progress is significant, the CFA remains concerned about countries which have not responded to its urgent appeals or have otherwise failed to comply with its requests.[194] In such cases of persistent failure to respond to complaints, the Committee has called upon its Chairperson to meet directly with Government representatives, offered the Office's assistance and has sent missions to collect information.[195] Another important effect of the CFA's work is that compliance with the principles of freedom of association, which apply to all member States of the ILO, paves the way for ratification of the freedom of association Conventions.[196]

**121.** The accomplishments of the CFA are also attributable to the joint action of the ILO's supervisory bodies, particularly its cooperation with the CEACR and the CAS.[197] The action of the technical bodies, whose members are selected in view of their expertise and independence, is balanced against the activities of representative bodies that group together delegates of governments, workers and employers. Additionally, the success of the CFA lies in the underlying philosophy of the system of its complaints procedures; this is based more on persuasion than repression, and more on dialogue and cooperation than on blame and judgments.[198] In summary, the methods used by the CFA have the ability

---

188. ILO: *Rules of the Game*, op. cit., p. 111.
189. GB.311/4/1, 2011.
190. ibid., para. 18.
191. ibid., para. 19.
192. ibid., para. 17.
193. ILO: *371st Report of the Committee on Freedom of Association*, Governing Body, 320th Session, Geneva, 13–17 Mar. 2014, GB.320/INS/12, para. 14.
194. ibid., para. 15.
195. ibid., para. 16.
196. ibid., para. 15 and 1998 ILO Declaration on Fundamental Principles and Rights at Work, para. 2, 'Declares 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 concerning the fundamental rights which are the subject of those Conventions... .'
197. ILO: The Committee on Freedom of Association: Its impact over 50 years, op. cit., p. 66.
198. ibid., p. 67.

to address, debate and resolve specific social problems bound to arise within a globalizing economy.[199]

### (c) Concluding remarks

**122.** The historical development of the ILO and its supervisory system attests to the value of international labour standards as tools to promote social justice and decent work on the ground. With the Constitution as its basis, the ILO has developed a series of mechanisms and procedures that are all intended to increase effectiveness in the field of standards. The Committee of Experts and the CAS – the principal actors in the regular supervisory procedures – together with special procedures in the framework of the CFA, article 24 representations and article 26 complaints, are responsible for effective compliance with Conventions and Recommendations. It is the general coherence of, and cooperation between, these supervisory elements – in different possible combinations – that makes the system effective.

**123.** Furthermore, technical assistance and advice is an indispensable additional supervisory component. Close collaboration between the supervisory bodies, the Office, including people in the field in offering technical assistance in the form of training, legal advice, tripartite workshops and technical support, increases the impact of the supervisory system.[200]

**124.** Different impact studies that focused on cases of progress indicate the diverse positive effects of this system in domestic law and practice. However, for reasons of effectiveness and accountability, the supervisory system as a whole needs to be continuously reviewed if it is to be able to respond to changing socio-economic needs. This ability to respond and react to societal and economic developments has been the strength of the system since its inception.

## IV. Proposals and suggestions for improvement

**125.** As discussed above, it is inherent to any supervisory system – including the ILO's – that it must be reviewed and enhanced on a continuous basis with a view to improving its coherence and effectiveness. The following paragraphs will discuss three key areas in which improvements could be made. They will specify potential areas of concern and make suggestions on how to deal with those. These – sometimes interconnected – issues are grouped under (a) transparency, visibility and coherence; (b) mandates and the interpretation of Conventions; and (c) workload, efficiency and effectiveness.

### (a) Issues of transparency, visibility and coherence

**126.** Complexity is perceived as one of the main features of the existing supervisory mechanism. As discussed above, different procedures may be used in different combinations in order to promote compliance with international labour

199. ibid., p. 68.
200. ibid., p. 140.

standards. While the diversity of the system is also a major strength, a point of concern is whether such a varied system may lead to overlap between, or a duplication of, procedures. A related concern is that there may be too many different committees involved in the system which may have negative effects on the transparency and effectiveness of the procedures for those involved. Extra efforts should be made to make the system more user-friendly and clear.[201]

**127.** To improve the collaboration between the different supervisory bodies, an annual meeting between the chairpersons of the different committees – CAS, CEACR and CFA – could be held. During this meeting, an exchange of information, views about current cases, issues of coordination, possible overlap and general ideas on supervision could be discussed. This meeting could take place during the ILC in June and could lead to more effective and coherent supervision, as well as to the prevention of unnecessary duplication. A complementary option could be that the Chairperson of the CFA releases a yearly report to the CAS in which the main trends would be addressed and the most difficult cases pointed out, for instance serious and urgent cases, long-standing cases without progress or cases sent to the CEACR for legislative aspects. Such a report may also lead to increased transparency and coordination between the supervisory bodies.

**128.** Another area of attention is the relationship between the CAS and the CEACR. The application of international labour standards can only be effective if these two committees, which are at the heart of the ILO's supervisory mechanism, continue to advance their solid relationship of cooperation and shared responsibility.[202] The ongoing dialogue between the CAS and the CEACR has an important impact on the methods of work of the CEACR and constitutes an essential component of the supervisory system.[203] Efforts towards a more constructive relationship between the CAS and the CEACR should be continued and strengthened to improve effectiveness.[204] The Committee of Experts emphasized in its 2015 report that the current institutional context offers opportunities for a forward-looking approach to the relationship between both Committees.[205] The dual system of regular supervision composed of a technical examination by the

---

201. K. Tapiola: 'The ILO system of regular supervision of the application of Conventions and Recommendations: A lasting paradigm', 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*, p. 29.
202. Statement of the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations, Judge Abdul G. Koroma, ILC, 104th Session, Geneva, June 2015 (C.App./D.4).
203. *Provisional Record* No. 14(Rev.), Report of the Committee on the Application of Standards, Part One, General Report, ILC, 104th Session, Geneva, June 2015, para. 52.
204. An interesting idea may be to also include 'cases of progress' on the CAS list in order for it to have a positive component as well. Some have argued for different, more accessible criteria for the adoption of the list in the CAS.
205. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, para. 23.

CEACR followed by a comprehensive political analysis by the CAS is unique at the international level.[206]

**129.** Transparency and visibility of the ILO's supervisory work could also be enhanced through adopting an inclusive approach tailored to the needs of the various constituencies. Addressing the interests of unorganized groups of workers, for instance the large number of workers in the informal economy, is an important objective for the ILO in view of promoting universal minimum standards and should be further examined.[207]

**130.** Another way to improve the visibility of the ILO's work is by optimizing the ILO's data systems (for example NORMLEX). This can be done through an electronic system that provides a simple and concise overview of member States' implementation of ILO standards, and in which a 'country dashboard' provides statistical and graphical information about the progress towards ratification of Conventions. Such a system could improve visibility of the implementation efforts by States. All other relevant data would also be easily accessible through this system. The better use of modern technology to streamline and simplify the reporting procedures could also strengthen transparency and effectiveness. This way the impact and relevance of the supervisory system, among all its Members, could be improved and it could lead to an increased awareness of the content of international labour standards for national employers' and workers' organizations.

### (b) Supervisory mandates and the interpretation of Conventions

**131.** While the terms of reference for the present report confine its scope to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association, it is necessary to discuss the mandates of the supervisory bodies in light of the question of interpretation, since this question is inextricably tied up with the discussions surrounding the present supervisory mechanism review. The mandate of the CEACR has been explained and accepted by the tripartite constituents since it was included in the 2014 report of the Committee of Experts.[208] This reiteration of the Committee's mandate 'to determine the legal scope, content and meaning of the provisions of Conventions' has reduced part of the tensions in respect of the functioning of the supervisory system.[209]

132. Although the Constitution of the ILO forms the basis for the mandate of the CFA, over the years that mandate has developed in practice namely to determine 'whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant

---

206. A similar system was introduced at the regional level in the framework of the European Social Charter in which the Committee of Independent Experts examines government reports. Its conclusions are submitted to the Governmental Committee which reports to the Committee of Ministers.
207. See, for example, the recent report: *The transition from the informal to the formal economy*, Report V(1), ILC, 104th Session, Geneva, 2015.
208. This mandate was reproduced in full in paragraph 9 of this report.
209. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, para. 29

Conventions'.[210] Although concerns have been expressed about this mandate, it is generally acknowledged that some degree of interpretation is necessary in order for the CEACR to conduct its examination of reports, and for the CFA to investigate and examine complaints. The Experts conduct a technical analysis of provisions of Conventions and Recommendations, while the CFA refers to the principles of freedom of association. As mentioned, legislative aspects of CFA cases are referred to the CEACR.

**133.** International governmental organizations are based on democratic decision-making, the rule of law and the separation of powers into – different types of – legislative, executive and judicial bodies. Within the ILO, the legal interpretation of Conventions is the prerogative of the International Court of Justice (ICJ). Questions or disputes about the interpretation of Conventions or the Constitution are to be submitted to the ICJ on the basis of article 37(1) of the Constitution. A viable approach could be to emphasize the role of the ICJ as the authoritative body for interpretation and promote the procedure in article 37(1).

**134.** There is an additional possibility under article 37(2). Under this provision, the Governing Body may create a tribunal for the 'expeditious determination of any dispute or question relating to the interpretation of a Convention'. The creation of such an 'ILO Tribunal' to deal with matters of interpretation may be considered when trying to furthercommas added. the debate concerning the roles and mandates of the supervisory bodies.[211] Such a tribunal would not be a novelty in the international arena; for example the International Tribunal on the Law of the Sea and the Appellate Body of the World Trade Organization operate in parallel with the ICJ and deal with interpretive issues.[212]

**135.** The constitutional option of creating an 'in-house' mechanism for the interpretation of Conventions was adopted in 1946 in order to introduce greater flexibility under the Constitution by providing an additional authoritative mechanism and in order to ensure uniformity of interpretation.[213] Such uniformity implies that the decisions should be binding and apply to all ILO member States, that all Members should be informed of decisions and have the possibility to make observations before the Conference, and that coordination with the ICJ is necessary.[214] Informal discussions in 2010 identified three paramount considerations when reflecting on the creation of an article 37(2) mechanism: (1) it needs to contribute to strengthening the standards system, including the supervisory system; (2) it needs to strengthen tripartite contribution to the interpretation of Conventions; and (3) the integrity of the ILO supervisory system has to be preserved.[215]

---

210. ILO: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth (revised) edition, Geneva, 2006, para. 6.
211. Information paper on the history and development of the mandate of the CEACR (19–20 February 2013), para. 116.
212. ibid.
213. Informal exploratory paper prepared by the International Labour Standards Department and the Office of the Legal Adviser, Interpretation of international labour Conventions: Follow-up to the informal tripartite consultations held in February–March 2010, para. 5. See Appendix 1: 'Overview of the considerations and discussions in 1945 and 1946 relating to the introduction of article 37, paragraph 2, into the ILO Constitution'.
214. ibid., para. 5.
215. ibid., para. 10.

**136.** Such a tribunal should be easily accessible to constituents and should adhere strictly to the rules laid down in article 37(2). The Governing Body may make and submit rules – to be approved by the Conference – providing for the appointment of the tribunal. The Governing Body is responsible for the referral of any dispute or question related to the interpretation of a Convention to the tribunal and the decision of the tribunal would have a binding effect.[216] Related to the composition, it is of vital importance to ensure the independence of the tribunal, secure the quality of adjudicators and further specify the binding effects of the decisions.[217] Moreover, the conditions for a possible appeal to the ICJ should be examined and specified.[218] This possible innovation would have to be integrated in the existing machinery, in which the ILO supervisory system plays a central role.[219] This option could have the additional benefit of being composed of specialists in the field of (interpretation of) international labour law.

### (c) Workload, efficiency and effectiveness

**137.** The existence of the supervisory system has led to an increase in the workload of the different bodies. With the increase of membership and the number of ratified Conventions, the workload, especially for the CEACR, has increased over time, while the number of Experts and time available has not increased proportionally.[220] This means that an important area of attention is streamlining and improving the capacity of the supervisory bodies. At the same time, constituents should be encouraged to respond as quickly as possible to the requests of the supervisory bodies. The effectiveness of the supervisory bodies in practice must continue to engage the attention of the constituents.

**138.** The Committee of Experts continues its efforts to streamline the content of its report and improve its method of work. The subcommittee on working methods is examining – on an ongoing basis – the opportunities for enhancing the CEACR's effectiveness and efficiency.[221] Efforts are directed towards improving the visibility of the Committee's work, which could not only facilitate more efficient work in the CAS, but also help the tripartite constituents – in particular governments – to better understand and identify the Committee's requests. This could lead to greater implementation of, and compliance with, international labour standards.[222] Furthermore, the CEACR should be encouraged to

---

216. ibid.
217. In this context, it may be useful to take note of the advanced codes of ethics and guidelines for members who serve on treaty bodies that were developed within the framework of the UN Human Rights bodies. See: United Nations, HRI/MC/2012, Addis Ababa Guidelines on the independence and impartiality of members of the human rights treaty bodies, Advance unedited version, June 2012.
218. Informal exploratory paper prepared by the International Labour Standards Department and the Office of the Legal Adviser, Interpretation of international labour Conventions: Follow-up to the informal tripartite consultations held in February–March 2010, para. 24.
219. ibid., para. 43.
220. Although currently the CEACR is again operating at its full capacity of 20 members.
221. ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Third item on the agenda: Information and reports on the application of Conventions and Recommendations, Report III (Part 1A), ILC, 104th Session, Geneva, 2015, para. 8.
222. ibid., para. 9.

improve its organization and method of work as highlighted in the report of its subcommittee on the streamlining of treatment of certain reports.[223] It has been suggested that a longer meeting period of the Experts or 'split sessions' could be envisaged in this respect. Moreover, further improvements of the structure and clarity of the comments could also be beneficial. Improving the coherence and visibility of the Experts' work, without losing substance, is an iterative process.

**139.** Additionally, it has been suggested to enhance the efficiency of the CAS proceedings by: (a) displaying the names of those registered to speak on a screen in the CAS room; (b) creating the option for CAS members to make amendments to the *Record of Proceedings* online; and (c) providing better access to computers and printing facilities to better facilitate the drafting of conclusions.

**140.** With regard to the CFA, it has been suggested that it would be useful if the Members could receive the working documents at an earlier time. Another option to increase its effectiveness may be to introduce the possibility of consolidating complaints from the same country, if they allege similar violations. An automatic follow-up mechanism at the national level could also contribute to a more effective implementation of the Committee's recommendations.

**141.** Another important way to improve the effectiveness and to relieve pressure on the ILO's supervisory mechanisms is to search for (non-judicial) dispute settlement options at the national level – that have the confidence of the parties – and precede recourse to the ILO system. One example of such a national solution is the CETCOIT system (Comité Especial de Tratamiento de Conflictos ante la OIT) in Colombia that functions as a voluntary tripartite conflict settlement procedure for conflicts related to freedom of association and collective bargaining. Parties can use this voluntary tripartite conflict settlement procedure prior to considering filing a possible complaint to the CFA as well as for following-up on cases examined by the CFA.[224]

**142.** Concerning such national procedures it is essential that these mechanisms are both independent and effective. Furthermore, setting up such a mechanism requires a context of respect for the rule of law and a sufficient degree of political will to succeed. Otherwise, the risks involved for parties (for example small unions) that allege violations of labour standards would be too great. An important question that needs to be answered in this respect is how to establish a fair threshold for the admissibility of cases before the supervisory bodies.[225] Admissibility criteria must not have the effect of excluding options for, for example, small unions. On the other hand, systems for filtering out unsubstantiated cases may relieve some pressure on the supervisory system. Additionally, the Standards Review Mechanism could provide further advice on the selection of Conventions that are out of date and on which regular reporting is no longer required.

**143.** As the continuing process of globalization may contribute to dwindling employment protection and subsequently to an increasing need for universal minimum standards, more attention for non-ratifying Members could improve

---

223. ibid., para. 10.

224. A similar committee has been installed in Guatemala.

225. For the receivability criteria of representations, see article 2 of the Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organisation.

the impact and effectiveness of international labour standards. A point of critique that is often mentioned is that only countries that ratify a large number of Conventions are scrutinized by the supervisory machinery. Efforts towards ratification of, and compliance with, established minimum norms and principles are, and should be, high on the agenda of the ILO. Technical assistance and advice should play a major role in the promotion of ratification and implementation of Conventions. Follow-up mechanisms under article 19 of the Constitution, such as in the framework of the 1998 Declaration on Fundamental Principles and Rights at Work, need to be promoted.

**144.** More coordination between the formal supervisory procedures and the more informal means of supervision, like technical assistance, direct contacts missions or tripartite meetings could also help improve the effectiveness of the implementation of international labour standards. Especially in the area of follow-up to recommendations in the framework of the special procedures, such a combination could prove fruitful in, for instance, working out a time-bound plan in respect of implementing requested measures. Setting deadlines could help to incrementally promote compliance. Improved coordination between the Office in Geneva and the regional offices concerning supervisory matters also needs to be further encouraged. Another option to consider in this respect is the possibility of interim measures, meant to remedy particularly urgent situations. Such procedures are well known in the framework of different UN Human Rights Bodies.[226] But also in relation to the regular reporting process, further cooperation between the Committee of Experts and local advisers, and reliance on information and knowledge of specialized field staff in specific situations, could create a better 'feedback loop' that will lead to a more efficient system. Improved coordination between technical assistance, support, Decent Work Country Programmes, training and programmes by other international organizations as well as better coordination between the Committees – through their chairpersons – could also add to the effectiveness of the supervisory system as a whole.

## V. Concluding remarks

**145.** Efforts towards improving the supervisory machinery of the ILO must be made on a continuous basis in order for the Organization to be able to adapt to changing social and economic dynamics. The ILO system has managed to do this remarkably well for almost a century of monitoring the implementation of international labour standards. Changes to the system have occurred over time, in a gradual manner. The ILO's system of supervision – with its tripartite structure – is complex, advanced and unique. Improving this system requires well-thought out adaptations that would streamline the current procedural and practical framework in order to make it more comprehensible and coherent.

**146.** The supervisory system functions adequately and generally meets its objective of ensuring compliance with international labour standards, cognizant of

226. See Annex I for the different procedural options in respect of interim measures, early-warning mechanisms or urgent interventions in the UN human rights system.

different national realities and legal systems. Its different procedures and bodies facilitate countries to adhere to their obligations and have complementary functions that create tailor-made solutions to labour- related conflicts and promote implementation of Conventions and Recommendations. The independence, expertise, objectivity and personal authority of the members of the supervisory bodies are essential for the success of the supervisory mechanism.[227]

**147.** Nevertheless, certain specific improvements are suggested, mainly in paragraphs 127, 130, 133, 134, 138, 139, 140, 141, 142 and 144 of this report. These improvements include, for example: better communication about the functioning of the complex supervisory system, which is needed to improve its transparency and accessibility; a better use of technology, for instance by further digitalization of the reporting system; and better use of technical assistance, which is essential to enhance the impact of the supervisory mechanisms. Furthermore an improved balance between obligations of ratifying and non-ratifying member States could be achieved. Moreover, coordination between the supervisory bodies and between their chairpersons could be enhanced. Different options for tackling questions about the interpretation of Conventions are available under the Constitution. Finally, independent and impartial national conflict settlement procedures that precede recourse to the ILO bodies could relieve some of the pressure on the system.

**148.** The different supervisory procedures serve a common purpose, the effective observance of international labour standards, particularly in relation to ratified Conventions. The existing connections between the supervisory mechanisms therefore operate in respect of obligations freely assumed by the Organization's member States through the ratification of Conventions. The combination of reporting and complaints, obligations regarding ratified and unratified instruments, options for technical assistance and on-site missions, and the mixture of technical and political scrutiny gives coherence to the ILO's system of supervision and ensures its effectiveness.[228] However, continuous evaluation, review and, where necessary, making adaptations, are required for ensuring sustained compliance with international labour standards and promoting social justice.

---

227. C.W. Jenks: 'The International Protection of Trade Union Rights', in E. Luard (ed.): *The International Protection of Human Rights*, 1967, pp. 210–224.

228. Cf. N. Valticos: 'Once more about the ILO system of supervision: In what respect is it still a model?', in N. Blokker and S. Muller: 'Towards more effective supervision by international organizations', in *Essays in Honour of Henry G. Schermers*, Vol. I, 1994, p. 112.

## List of abbreviations

| | |
|---|---|
| CAS | Conference Committee on the Application of Standards |
| CAT | Committee Against Torture |
| CCPR | United Nations Human Rights Committee |
| CEACR | Committee of Experts on the Application of Conventions and Recommendations |
| CED | Committee on Enforced Disappearances |
| CEDAW | Committee on the Elimination of Discrimination against Women |
| CERD | Committee on the Elimination of Racial Discrimination |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CETCOIT | Comité Especial de Tratamiento de Conflictos ante la OIT |
| CFA | Committee on Freedom of Association |
| CMW | Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on Migrant Workers) |
| CRC | Convention on the Rights of the Child |
| CRPD | Committee on the Rights of Persons with Disabilities |
| ECOSOC | United Nations Economic and Social Council |
| FFCC | Fact-Finding and Conciliation Commission on Freedom of Association |
| HRC | Human Rights Council |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ILC | International Labour Conference |
| ILO | International Labour Organization |
| NORMLEX | Information System on International Labour Standards |
| NPM | National Preventive Mechanism |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| OPCAT | Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| SPT | Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment |
| UPR | Universal Periodic Review |