SHARED RESPONSIBILITY AND THE INTERNATIONAL LABOUR ORGANIZATION

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INTRODUCTION

How should the international labor regime be reformed in order to guarantee all workers around the world minimum labor standards?[1] This is the central question we address in this Article. It has been weighed and discussed by social scientists, legal scholars, and philosophers, who analyze it from various economic, political, and legal perspectives. Yet interestingly, the literature in this field has been, by and large, characterized by a sharp disciplinary divide: on the one hand, labor law scholars typically address the issue of international labor standards from a detailed practical perspective, defining the problems in terms of enforcement, efficacy, or other institutional and procedural obstacles to the effective implementation of existing regulations.[2] In their work, they generally neglect an analysis of the normative aspect of the institutions they discuss. On the other hand, the few

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1. By minimum labor standards, we refer to the worldwide consensus elaborated on in the Article, which can include the four core labor rights recognized by the International Labour Organization (ILO) in addition to some level of minimum wage and health and safety protection. The ILO four core rights include (1) "freedom of association and the effective recognition of the right to collective bargaining"; (2) "elimination of all forms of forced or compulsory labour"; (3) "effective abolishment of child labour"; (4) "elimination of discrimination in respect of employment and occupation." Int'l Labor Conference, 86th Sess., Geneva, Switz., *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up*, June 18, 1998, 37 I.L.M. 1237, 1237-38 (1998) (annex revised June 15, 2010) [hereinafter *ILO Declaration*], *available at* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm.

2. *See, e.g.*, KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 5-6 (2003); CHRISTINE KAUFMAN, GLOBALIZATION AND LABOUR RIGHTS: THE CONFLICT BETWEEN CORE LABOUR RIGHTS AND INTERNATIONAL ECONOMIC LAW 5 (2007); Philip Alston, "*Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); Philip Alston, *Facing up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467, 472 (2005); Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 BERKELEY J. EMP. & LAB. L. 45, 49 (2011); Andreas Bieler, Ingemar Lindberg & Devan Pillay, *The Future of the Global Working Class: An Introduction*, *in* LABOUR AND THE CHALLENGES OF GLOBALIZATION: WHAT PROSPECTS FOR TRANSNATIONAL SOLIDARITY? 1, 1, 10 (Andreas Bieler et al. eds., 2008); Brian A. Langille, *Core Labour Rights – The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 420-21 (2005).

philosophers and political theorists who focus on a philosophical analysis of global labor rights often fail to take into account the practical legal details of international labor law.[3]

In this Article, we seek to bridge this interdisciplinary gap between the philosophical-normative and empirical-legalistic analytical frameworks of international labor standards. More specifically, this Article proposes a new understanding of responsibility to be adopted by the primary international organization that was established in 1919 for the purpose of promoting labor rights on the global level—the International Labour Organization (ILO). The Article also proposes a set of corresponding reforms that will adapt the ILO to the unique challenges it is facing in the twenty-first century. In contrast to earlier legal studies of the ILO, which have focused on questions of its efficacy,[4] institutional structure,[5] or internal politics,[6] the reforms we suggest in this Article are based on a multidisciplinary approach that draws from a philosophical analysis of theories of global justice.

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3. *See, e.g.*, RICHARD W. MILLER, GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER 60-62 (2010); Lea Ypi, *On the Confusion Between Ideal and Non-Ideal in Recent Debates on Global Justice*, 58 POL. STUD. 536, 536-37 (2010); Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, SOC. PHIL. & POL'Y, Jan. 2006, at 102, 119.

4. For a discussion of the efficacy of the ILO's supervisory system, in particular, see, for example, LARS THOMANN, STEPS TO COMPLIANCE WITH INTERNATIONAL LABOUR STANDARDS 62 (2011); Virginia A. Leary, *Lessons from the Experience of the International Labour Organization*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 580, 580-81 (Philip Alston ed., 1992); Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 41 (Lance A. Compa & Stephen F. Diamond eds., 1996); Francis Maupain, *International Labor Organization: Recommendations and Similar Instruments*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMAS IN THE INTERNATIONAL LEGAL SYSTEM 372, 372 (Dinah Shelton ed., 2000); Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, *in* LABOUR RIGHTS AS HUMAN RIGHTS 85, 85 (Philip Alston ed., 2005); Jill Murray, *Taking Social Rights Seriously? Is There a Case for Institutional Reform of the ILO?*, *in* HUMAN RIGHTS AT WORK 359, 359-61 (Colin Fenwick & Tonia Novitz eds., 2010). For a discussion of the efficacy of the ILO from a game theory perspective, see Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 L. & ETHICS OF HUM. RTS. 154, 154 (2009).

5. For criticism of the structure of the ILO norm-generation system, see, for example, Faina Milman-Sivan, *The Virtuous Cycle: A New Paradigm for Democratizing Global Governance Through Deliberation*, 30 COMP. LAB. L. & POL'Y J. 801, 810-19 (2009) (criticizing the current ILO structure's inability to effectively represent diverse interests). For general criticism of the ineffective methods of the ILO, see BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 66 (2005).

6. For criticism regarding the sharp drop in the rate of ratification of ILO conventions, see, for example, Breen Creighton, *The Future of Labour Law: Is There a Role for International Labour Standards?*, *in* THE FUTURE OF LABOUR LAW 258, 264-65 (Catherine Barnard et al. eds., 2004); Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 371-76 (1999); Brian A. Langille, *The ILO and the New Economy: Recent Developments*, 15 INT'L J. COMP. LAB. L. & INDUS. REL. 229, 237-38 (1999); Langille, *supra* note 2, at 409.

Our chief claim is that a very central yet seemingly unnoticed obstacle to the realization of the ILO's goals in the era of globalization stems from the Organization's continued espousal of a *statist* conception of responsibility, which we argue to be outdated and inadequate in the global era. Underlying the ILO's structure and enforcement mechanisms, this statist conception of responsibility holds the nation-state to be the sole or primary agent bearing responsibility toward workers within the member states' jurisdiction.[7] This conception generally focuses on the state as the key actor within the ILO in terms of generating and enforcing international labor standards (ILS), and thus fails to allocate responsibility to states for violations that occur beyond their jurisdiction, or to relevant private bodies for violations. However, recent economic, political, and legal transformations in the global labor market have eroded the nation-state's capability to regulate and enforce a minimum level of labor standards without the cooperation of other states, while at the same time empowering private nonstate actors such as transnational corporations (TNCs).

On this background, we propose and develop in this Article an innovative alternative conception of *shared* responsibility, one that offers both a theoretical model and a practical foundation for reforming the ILO's structure and mechanisms. Under our model, responsibility for remedying the unjust working conditions in the global labor market should be borne by a complex set of agents and institutions that take part in global production. It is our assertion that the ILO should assign legal responsibility for unjust working conditions in the global labor market not only to the states in whose territory violations of labor standards arise, but also to brands and powerful TNCs. Additionally, under certain circumstances, responsibility should be assigned to the states in whose territory these brands or the corporation headquarters reside. While we are aware that these proposals might pose conceptual as well as pragmatic and political difficulties, we show that the "seeds" of these underlying values are already embedded in existing ILO mechanisms and procedures.

Our argument proceeds in four stages. In Part I, we begin by normatively establishing the need to address the structural disadvantages of workers in today's global labor market. This Part draws from recent legal scholarship on the problem of deterritorializing labor law, as well as from

7. For the contention that international organizations should reconsider the state-centric ways in which their norm-generation processes are described, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS xiii (2005). In the context of the ILO, Bercusson and Estlund have recently pointed out that "most international organizations have been formed, and continue to function, largely as treaty-based creatures of states. So the weakness of states has implications, as well, for international organisations . . . ." Brian Bercusson & Cynthia Estlund, *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*, *in* REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS 1, 13 (Brian Bercusson & Cynthia Estlund eds., 2008).

philosophical discussions on global justice, particularly the problem of structural injustice characterizing contemporary global institutions. Both the legalistic and philosophical approaches lead to a similar conclusion: given the reduced ability of individual states to enforce the widely-agreed-upon labor standards in a transformed global labor market, a fundamental structural reform of the international labor regime is required. In taking up this challenge, we point to the question of responsibility as key to such reform, namely: Who should be held responsible for remedying the unjust conditions of workers in the age of globalization?

As shown in Part II, the statist conception of responsibility has underpinned the ILO structure from its very beginning and continues to be strongly embedded in all of its key organizational institutions. This Part analyzes in detail the manifestations of this conception in the ILO's basic structure, its norm-generating procedures, and particularly its supervisory system (including the complaints and reporting procedures). As we argue in Part I, in light of recent global economic developments, the protection of labor rights on the global level mandates a new conception of responsibility, one that takes into account actors beyond the boundaries of the nation-state.

The rest of this Article is, accordingly, devoted to presenting this model of shared responsibility and the institutional arrangements required within the ILO to implement this conception. Part III begins by laying out our alternative conception of responsibility: a *labor connection model of shared responsibility*. This theoretical model is proposed as a regulatory ideal, designed to replace the statist conception of responsibility. Ours is not the first general model of shared responsibility to be proposed in the legal and philosophical literature in recent years. Other examples include those developed by Iris Young[8] and Margot Salomon.[9] Yet in contrast to earlier models, our model offers a unique and more suitable response to the reality of the global labor market faced by international labor regulators and enforcement organizations. Our model is grounded on four principles for allocating responsibility for workers' rights amongst the various actors and institutions that participate in the global labor market, particularly those that participate in global production chains. The four principles include (1) the connectedness principle, that is, participation is shared activity such as production, (2) the capacity principle, which refers to the individual's or the institution's capacity to remedy unjust working conditions, (3) the beneficiary principle, understood in terms of financial profit, and (4) the contribution principle, which takes into account any conduct by individuals or institutions that has causal relevance to the unjust conditions of workers.

8. IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 120-21 (2011); Iris Marion Young, *Responsibility and Global Labor Justice*, 12 J. POL. PHIL. 365, 365-88 (2004); Young, *supra* note 3.

9. MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW 99-100 (2007).

In this Part, we outline and expand on these four principles and demonstrate their application in global labor law.

Lastly, Part IV suggests some practical measures to be taken within the ILO in order to implement the regulatory ideal of the labor connection approach to shared responsibility, addressing in particular the ILO's supervisory system. We begin by identifying the actors that could be considered responsible for remedying unjust labor conditions under the four principles of shared responsibility allocation. We conclude that the ILO should assign legal responsibility for workers' rights to key actors that the supervisory system currently ignores: states that are not the territorial state in which the particular labor rights violation occurs and powerful TNCs that participate in global production chains. The discussion then elaborates on the specific changes necessary in the supervisory procedures and mechanisms in order to enforce labor standards across national borders. We moreover show that the values underlying the shared responsibility model are already present in the ILO's institutional design, in particular in its supervisory system. The advantages and difficulties presented by our proposed reforms are also considered and contended with.

I. GLOBALIZATION, LABOR STANDARDS, AND BACKGROUND INJUSTICE

In recent years, a growing number of economists have recognized that globalization—namely, the international integration of markets and goods that has accelerated since the 1980s—has increased economic insecurity for workers.[10] Economic globalization has enhanced global competition among states over capital and jobs and, consequentially, has generated a "race to the bottom" or "regulatory chill" of labor standards in various sectors, mostly but not exclusively, in developing countries.[11] The liberalization of trade and greater global integration have translated into competitive pressure on individual states and have facilitated the entry of new actors into the global labor market. Such new actors are mainly TNCs, which utilize cheap labor forces, particularly in the developing world, in order to produce products and services that serve mostly members of developed states. Interstate competition over foreign investment and the internationalization of production chains have reduced the will of national governments to

10. DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 86-87 (2011).

11. *See*, Org. for Econ. Co-operation & Dev. [OECD], *International Trade and Core Labour Standards*, *at* 39-42 (Oct. 10, 2000); Robert J. Flanagan, *International Labor Standards and Decent Work: Perspectives from the Developing World*, *in* INTERNATIONAL LABOR STANDARDS 16 (Robert J. Flanagan & William B. Gould IV eds., 2003).

enforce labor regulations.[12] In developed states, hyperglobalization has resulted in greater insecurity for working people and an ever-increasing income gap among workers, as well as between workers and management or investors.[13]

Consequently, in the current global economy, only a minority of the world's working people hold jobs that are well paid, where their fundamental rights are respected, and that ensure them some security in the event of job loss, personal or family illness, or other crises.[14] The dire working conditions in sweatshops, particularly for women and in developing countries, have been described and acknowledged in numerous studies.[15] Many of these production workers are employed under devastating conditions, working unrestricted hours and lacking the most minimum safety and health conditions.[16] Indeed, the scope of the problem is appalling. In 2011, 30% of the world's workforce—more than 910 million workers—earned less than $2 a day, which is defined as the global poverty line, and an estimated 456 million workers (14.8% of the world's workforce) earned less than $1.25 a day, which is defined as the extreme poverty line.[17] In Sub-Saharan Africa and South Asia, around four-fifths of the employed are

12. *See e.g.*, Jagdish Bhagwati, *Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues*, 6 WORLD ECON. 745, 755 (1995). *See generally* RODRIK, *supra* note 10, at 86-87.

13. RODRIK, *supra* note 10, at 86-87.

14. ILO, *Global Employment Trends 2011*, at 21 (2011).

15. For a few examples, see JILL ESBENSHADE, MONITORING SWEATSHOPS: WORKERS, CONSUMERS AND THE GLOBAL APPAREL INDUSTRY 4 (2004); PIETRA RIVOLI, THE TRAVELS OF A T-SHIRT IN THE GLOBAL ECONOMY: AN ECONOMIST EXAMINES THE MARKETS, POWER, AND POLITICS OF WORLD TRADE 89 (2d ed., 2009); THE SWEATSHOP QUANDARY: CORPORATE RESPONSIBILITY ON THE GLOBAL FRONTIER 66-68 (Pamela Varley ed., 1998); Denis G. Arnold, *Working Conditions: Safety and Sweatshops*, *in* THE OXFORD HANDBOOK OF BUSINESS ETHICS 628, 629 (George G. Brenkert & Tom L. Beauchamp eds., 2010); Denis G. Arnold & Norman E. Bowie, *Sweatshops and Respect for Persons*, 13 BUS. ETHICS Q. 221, 231-33 (2003).

16. Further, it is estimated that currently 20.9 million persons are the victims of forced labor worldwide. ILO, *2012 Global Estimate of Forced Labour: Results and Methodology, at 11* (June 1, 2012) [hereinafter *ILO 2012 Global Estimate*], *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/publication/wcms_182004.pdf. As of 2007, the U.N. estimated that about 2.5 million forced labor victims are trafficked. U.N. Global Initiative to Fight Human Trafficking, *Human Trafficking: The Facts* (2007), *available at* http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf (citing a 2007 ILO study); *see also* ILO, *Every Child Counts: New Global Estimates on Child Labour*, at 25-26 (2002) (estimating that 1.2 million children are trafficked worldwide); UNICEF, U.K., *Child Trafficking Information Sheet* (2006) (discussing the nature of child trafficking both in the United Kingdom and worldwide). About 22% of the trafficked victims are used for forced sexual exploitation, and 98% are women. *ILO Global Estimate*, *supra*, at 14.

17. *Global Employment Trends 2011*, *supra* note 14, at 71.

classified as "working poor."[18] The lack of labor standards is most common in—but not limited to—developing regions.[19] The 2008 economic crisis demonstrated that sizeable economic sectors are equally vulnerable to economic shock, further diminishing any hope for the implementation of decent work conditions.[20]

Drawing from recent philosophical theories of global justice, as well as from contemporary legal discussions on the deterritorialization of labor law, in this Part we argue that the structural advantages of workers in the emerging global economy require a fundamental reform of the international labor regime. In what follows we first elaborate on the existing gap between, on the one hand, the exploitive working conditions in today's global labor market and on the other hand, the emerging international consensus regarding the need to protect minimum labor standards. We then present two approaches in current literature that aimed at explaining this gap and proposed ways to minimize it: the empirical-legalistic discussion on the problem of deterritorializing labor law and the normative-philosophical discussion on the theories of background injustice. We conclude this Part by calling for an alternative approach that combines both the legalistic and normative perspectives and pays particular attention to the concept of responsibility as key to addressing the erosion of labor standards despite growing international consensus regarding their content. Our main argument is that the failure to protect labor standards for workers in the global labor market stems from, among other things, the outdated conception of responsibility that underpins the current international labor regime.

A. The Gap

From a philosophical-normative perspective, the abysmal working conditions across the world are generally described as exploitative and unjust. The exploitation of workers in the global labor market can occur on two different levels. First is the *interactional* level, namely, in the

18. *Id.*

19. It is estimated that the majority of workers in the world today work in the informal economy, with most of those workers coming from developing countries. KAUFMAN, *supra* note 2. Within the informal economy, atypical employment includes a wide range of working conditions, from the relatively mild harms of low wages and unsteady job security, to conditions of extreme exploitation, slavery, and abuse. Atypical or nonstandard work is prevalent, although less salient, in developed countries as well. For example, this accounts for 25% of the workforce in the United States. Atypical jobs are usually taken on by the most vulnerable social groups, including migrants, minorities, women, and children. Bieler, Lindberg & Pillay, *supra* note 2, at 1, 10. Women consistently receive lower wages, as they often work in segregated sectors that are generally characterized by low pay, long hours, and oftentimes informal working arrangements. ILO, *Women in Labour Markets: Measuring Progress and Identifying Challenges*, at 5 (2010).

20. *See* World Trade Organization [WTO] & ILO, *Globalization and Informal Jobs in Developing Countries*, at 10 (2009).

interaction among various actors within global chains of production (for example, brands, subcontractors, and workers). On this level, procedural philosophical theories of exploitation consider workers to be exploited by their employers even if they (the workers) voluntarily consent to terms of employment that fail to provide minimum labor conditions. Employment contracts are considered to be exploitative if the workers' ability to bargain and disagree with the terms of the contract was limited during the negotiations phase.[21] This limitation often stems from the asymmetry of power between workers and employers and is common in negotiations that take place on an individual, rather than collective, basis. From this procedural point of view, employment contracts can be regarded as exploitive and, thus, unjust, even if they benefit the workers.

The fact that workers may benefit from their work arrangements, relative to alternative options (for example, unemployment or worse working conditions at other places of employment) does not diminish the exploitive nature of the labor relations. This is because the exploitation arises when the employer takes advantage of a worker's bargaining weakness, given the latter's desperate neediness, especially under the existing economic conditions of developing countries. This exploitation occurs regardless of the benefits the working agreement may yield for the worker, and regardless of the worker's voluntary consent.[22]

Second, exploitation of workers in the global labor market occurs on an *institutional* level, namely, in existing regulations of the global economy that have been determined by global institutions (for example, the International Monetary Fund, World Bank, and World Trade Organization (WTO)) or through intergovernmental agreements. This is particularly the

21. *See* MILLER, *supra* note 3, at 60-62; Chris Meyers, *Wrongful Beneficence: Exploitation and Third World Sweatshops*, 35 J. SOC. PHIL. 319, 319 (2004); *see also infra* note 22 and accompanying text.

22. According to this procedural conception of exploitation, exploitation may occur even if the exploited person benefits as a result of the interaction between the two parties. A common example is that of a man lost in a desert, about to die of thirst, when another man on a camel appears and convinces the thirsty man to lead him to a well in return for life-long servitude in the camel rider's household. Although the thirsty man benefited from the agreement, the camel rider has exploited the thirsty man since he took advantage of the latter's needs, benefiting from his inferior capacity to pursue his interests. *See* MILLER, *supra* note 3, at 66; Meyers, *supra* note 21. For Marxist interpretations of exploitation, see, for example, G.A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFF. 338, 341-42 (1979); John E, Roemer, *Should Marxists be Interested in Exploitation?*, 14 PHIL. & PUB. AFF. 30, 31 (1985). For additional understandings of exploitation in different contexts, see RUTH J. SAMPLE, EXPLOITATION: WHAT IT IS AND WHY IT'S WRONG 11 (2003); ALAN WERTHEIMER, EXPLOITATION (1996); Avner de-Shalit, *Transnational and International Exploitation*, 46 POL. STUD. 693, 698 (1998); Kai Nielsen & Robert Ware, *Introduction: What Exploitation Comes To*, *in* EXPLOITATION (Kai Nielsen & Robert Ware, eds., 1997); Andrew Reeve, *Thomas Hodgskin and John Bray: Free Exchange and Equal Exchange*, *in* MODERN THEORIES OF EXPLOITATION (Andrew Reeves ed., 1987); Jeremy Snyder, *Exploitation and Sweatshop Labor: Perspectives and Issues*, 20 BUS. ETHICS Q. 187, 188 (2010).

case in the manufacturing sector in developing states, where exploitation of workers has been intensified by the processes of economic globalization. The disadvantage of workers in the developing world stems partly from unequal global trade and investment framework agreements between developing and developed countries. One example of such an imbalance in negotiating power is the Uruguay Round, which was administered by the WTO from 1981 to 1994 between developed and developing states. During the negotiations, the former took advantage of the latter's urgent need for access to developed markets.[23] One of the consequences of these agreements is the deepening of the imbalance between the heightened mobility allowed for capital and goods and the restricted mobility of workers caused by immigration rules and other economic and cultural constraints. As economist Prakash Sethi argues, this imbalance between the mobility of capital and that of labor violates standard trade theory, which requires maximum mobility of both to enable equitable distribution of benefits from free trade. In the global economy, he asserts, only TNCs enjoy all of the advantages of moving capital between different sectors and nations in order to maximize their return on investments, whereas workers lack this mobility. Workers cannot migrate easily, if at all, to countries with labor shortages, and consequently, they are prevented from eliminating inefficiencies in the labor market.[24] Such conditions, Sethi claims, "are more characteristic of neo-mercantilism than of truly free markets."[25]

While the exploitative conditions of workers around the world persist on both the institutional and interactional levels, recent decades have seen the emergence of a worldwide consensus regarding the need to legally guarantee some minimal level of labor norms and basic rights for workers. Despite the great variety of welfare and labor regimes that have developed in different modern industrial democracies, [26] there are significant similarities in their labor regulations with regard to minimal work conditions. Indeed, most states currently guarantee comparable basic norms,

23. For a more radical approach to structural exploitation of workers in the capitalist system, see Lea Ypi, *On the Confusion between Ideal and Non Ideal Recent Debates on Global justice*, 58 POL. STUD. 536, 537 (2010).

24. S. Pratash Sethi, *Corporate Codes of Conduct and the Success of Globalization*, ETHICS & INT'L AFF., Mar. 2002, at 89, 90 .

25. *Id*. at 90-91. According to Sethi,

> [TNCs] use both the fact and threat of capital mobility to extract maximum productivity gains from cheap and abundant labor. The control of overseas markets provides the [TNCs] with monopoly-like power, which they use on local manufacturers to extract the lowest prices possible and thus put extreme downward pressure on local wage rates. Local manufacturers, in their turn, cooperate among themselves by not competing for workers on the basis of higher wages—a situation that is easily maintained because of abundant labor.

Id. at 91.

26. GOSTA ESPING-ANDERSON, THREE WORLDS OF WELFARE CAPITALISM 1 (1990).

such as a weekly day of rest, paid sick leave, paid annual leave, and wage premiums for mandatory overtime.[27] At the international level, recognition of the need to ensure some minimal labor standards is manifested in several key documents of international human rights law.[28] One of the clearest expressions of this global consensus is the ILO 1998 Declaration on Fundamental Principles and Rights of Work, which defined four core basic labor rights: the right to be free of forced or compulsory labor, the right of children not to work, the right to be free of discrimination in employment and occupation, and the right to freedom of expression and collective bargaining.[29] In 2008, the ILO Declaration on Social Justice for Fair Globalization expanded this scope of protection to include three additional strategic objectives to be adopted by the member states: promoting access for all to freely chosen employment; developing measures of social security and labor protection such as basic healthcare (for example, maternity leave), safety regulations at work, and minimum wage; and promoting social dialogue among workers, employers, and the state.[30]

How can this gap between the broad consensus on labor standards on the one hand, and the pitiful labor conditions in the global labor market on the other, be explained? And how can this gap be closed? This puzzle is usually addressed in labor law scholarship in empirical-legalistic terms. Labor law scholars have argued that the transformation of the global labor market, compounded by the state's decreasing capability to regulate and enforce labor standards, has led to a need to deterritorialize labor law.

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27. JODY HEYMANN & ALISON EARLE, RAISING THE GLOBAL FLOOR: DISMANTLING THE MYTH THAT WE CAN'T AFFORD GOOD WORKING CONDITIONS FOR EVERYONE 101-05 (2010). Clearly not all states live up to their international legal commitments, nor do they always enforce existing national labor laws. Nevertheless, the consensus regarding essential labor standards that constitute an acceptable floor for decent working conditions is shared by many societies regardless of their cultural characteristics or their level of economic development. *See id*.

28. *See, e.g*., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, S. Treaty Doc. No. 95-20; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3; *ILO Declaration*, *supra* note 1; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). For the Global Compact, see *About Us: The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Feb. 19, 2013) [hereinafter U.N. GLOBAL COMPACT].

29. *ILO Declaration*, *supra* note 1.

30. Int'l Labour Conf., 97th Sess., *ILO Declaration on Social Justice for a Fair Globalization*, at 9-11 (June 10, 2008) [hereinafter *ILO Declaration on Social Justice*], *available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_099766.pdf*. This Declaration introduced the ILO Decent Work agenda. *Id*. at 1. The legal status of the Declaration is ambiguous and demonstrates varying degrees of states' commitment toward this seeming consensus on labor rights. Some provisions are of a declaratory nature while others have stronger legal implications. *See* Francis Maupain, *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for Fair Globalization*, 20 EUR. J. INT'L L. 823, 833-34 (2009).

Alternatively, recent philosophical scholarship has described the problem of diminished global labor standards in normative terms as the problem of *background injustice*, thus implying a need for comprehensive institutional redesign across the global labor market. Both the empirical-legalistic explanation and the philosophical explanation for this deterioration in standards will be presented in the next two Sections.

B. *The Deterritorialization of Labor Law*

In recent years, a number of labor law scholars have acknowledged a growing inadequacy between the existing system of national and international regulation of labor law and the increasing obstacles to enforcing labor standards in the global labor market. National labor regulations, which have developed gradually since the early days of the industrial revolution, helped balance the inherently asymmetrical relations between employers and employees within the national labor market. Yet the legal and political tools that traditionally guaranteed labor standards in nation-states were territorial in nature, and thus emerge as limited in the global labor context. Traditional labor law, which was developed, by and large, as a domestic project and was generally administered on a territorial basis, seems insufficient for resolving the imbalance between labor and capital in the global labor market, resulting from, among other factors, the internationalization of production chains and the growing number of migrant and offshoring workers.[31]

Transnational corporations exemplify the current inadequacy of legal protection of labor rights globally.[32] Whereas their headquarters are generally based in developed countries, the labor force that produces their products and services is usually located in the developing world. From a legal point of view, TNCs are not connected to the workers who produce their products through employment contracts but, rather, through contractual obligations within the global production chains. Locally, workers in global production chains are often employed indirectly by manpower agencies, contractors, or subcontractors or else are legally considered to be self-employed despite their economic dependence on the supplier. Legally, then, TNCs are not considered "employers" of these workers and, thus, bear no legal responsibility for their labor conditions or well-being.[33]

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31. Guy Mundlak, *De-Territorializing Labor Law*, 3 L. & ETHICS OF HUM. RTS. 1 (2009).

32. Our argument here concerns the constraint on labor law, and we refrain from the more general debate of whether market power has indeed transcended the power of the state more generally. *See, e.g.*, SUSAN STRANGE, THE RETREAT OF THE STATE 29-30 (1996).

33. For example, in the apparel industry, some women are required to produce sections of future assembled clothing in their homes and, thus, are regarded to be self-employed and not employees of the subcontractors who sell the products to the brands. Julie Delahanty, *A Common Thread: Issues for Women Workers in the Garment Sector*, WOMEN IN INFORMAL

The difficulty with deterritorializing labor law relates not only to the global emergence of TNCs; it also involves issues relating to, for example, migrant workers, who, in some cases are not fully protected by national labor law because they are not citizens.[34] However, for the purposes of simplicity in this Article, we will not expand on these and other related issues.

C. *The Problem of Background Injustice*

From a normative point of view, the failure to guarantee workers in the global labor market a minimum of labor standards and to prevent their exploitation on both the interactional and institutional levels constitutes conditions of what John Rawls termed *background injustice*. Background injustice is defined by Rawls as the absence of just rules as well as political and social institutions that constrain people's decisions and actions.[35] In the absence of a "just background," the accumulated results of many separate and fair agreements between individuals can, over the course of time, lead to a situation whereby conditions of free and fair agreements no longer hold.[36] This may be due to social trends and historical contingencies.[37]

Rawls limited the scope of the principles of justice to the state level, namely, to those people who live under the same basic structure. However, in recent, separate publications, Miriam Ronzoni and Arash Abizadeh drew on Rawls's underlying assumptions to derive cosmopolitan conclusions, arguing that the existence of background injustice on the global level mandates the establishment of institutions and rules that correct the unjust reality.[38] According to Ronzoni, if problems of background injustice arise

EMP.: GLOBALIZING & ORGANIZING (May 17, 1999), http://www.nsi-ins.ca/wp-content/uploads/2012/10/1999-A-Common-Thread-Issues-for-Women-Workers-in-the-Garment-Sector.pdf; *Garment Workers*, WOMEN IN INFORMAL EMP.: GLOBALIZING & ORGANIZING, http://wiego.org/informal-economy/occupational-groups/garment-workers (last visited Mar. 26, 2013).

34. The ILO's International Labor Migration Survey showed that in fewer than half the countries surveyed, national legislation provided for any protection against discrimination at work. Kuwait and Saudi Arabia exclude all migrant workers from national social and labor laws. *See* Stephanie Grant, *International Migration and Human Rights* (Pol'y Analysis & Res. Programme of the Global Comm'n on Int'l Migration, Sept. 2005), *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP7.pdf; *see also* Office of the U.N. High Comm'nr for Hum. Rts., *Migration and Development: a Human Rights Approach*, *available at* http://www2.ohchr.org/english/bodies/cmw/docs/HLMigration/MigrationDevelopmentHC%27spaper.pdf (last visited Feb. 19, 2013).

35. JOHN RAWLS, POLITICAL LIBERALISM 265-66 (1993).

36. *Id*.

37. *Id*.

38. Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 PHIL. & PUB. AFF. 318, 329 (2007); Miriam Ronzoni, *The Global Order: A Case of Background Injustice? A Practice-Dependent Account*, 37 PHIL. &

on the global level, we have a duty to alter the global institutional structure in order to end the conditions of injustice.[39] Some of these institutions may be completely new and different from the institutional arrangements that underlie the basic structure of the nation-state, yet they do not necessarily need to create a world-state.[40] Abizadeh reached a concurring conclusion based on his analysis of Rawls's notion of "fair terms of cooperation." According to Abizadeh, when a group of individuals are engaged in a mutually advantageous enterprise, the creation of a basic structure is required to realize just background conditions.[41]

The *background injustice* argument is particularly germane to problems of global labor. In a brief comment, Rawls used the example of labor contracts to support his claim regarding the role of sociopolitical institutions in securing just background conditions.

> [W]hether wage agreements are fair rests, for example, on the nature of the labor market: excess market power must be prevented and fair bargaining power should obtain between employers and employees. But, in addition, fairness depends on the underlying social conditions, such as fair opportunity, extending backward in time and well beyond any limited view.[42]

In a different article, we have argued that the reality of background injustice in the global labor market mandates the implementation of principles of justice in the global sphere.[43] This is so because the unjust nature of the existing regulation of labor on the global level undermines the very aims and justifications that characterize labor law. In other words, considerations of justice require either that new institutions and rules be created or else that existing global institutions be reinforced to correct the unjust conditions of global labor.

D. *A New Conception of Responsibility*

Although it is clear that labor conditions in the age of globalization require a fundamental structural reform of the international labor regime in order to provide workers around the world with some minimal level of labor standards, what is missing in the discussions described above is the idea of responsibility, which is key to ensuring the effective regulation and enforcement of labor standards. In other words, who should be held responsible for remedying unjust working conditions and enforcing labor

PUB. AFF. 229, 230, 245 (2009).

39. Ronzoni, *supra* note 38, at 230, 245.

40. *Id*. at 245.

41. Abizadeh, *supra* note 38, at 329.

42. RAWLS, *supra* note 35, at 267.

43. Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, Global Labor Rights as Duties of Justice 28 (Feb. 2012) (unpublished manuscript) (on file with authors).

rights beyond the borders of the nation-state?

As discussed above, there is already global consensus on the need to ensure a minimum level of labor standards. Yet the nation-state, traditionally the central bearer of responsibility for workers' rights, is no longer adequately equipped for the task in the reality of the global labor market. Until recently, the nation-state was considered the primary agent responsible for legislating and enforcing the labor standards applied within its boundaries. But with the global expansion of production and services, the state's ability (and will) to protect workers' rights on the national level has been undermined. Hence, a new conception of responsibility, one that takes into account actors beyond a nation-state's boundaries, must be developed to address the contemporary difficulties faced by international institutions in applying labor standards globally. Given these obstacles, the question of responsibility is particularly acute.

The reduced ability of individual states to enforce labor standards in the global labor market has created two main challenges for international labor. The first challenge is to develop a new paradigm of shared responsibility that is better suited to the contemporary global economy. By "shared responsibility" we mean that the responsibility to rectify unjust labor conditions does not reside with only one particular actor or institution, but rather is shared by various actors or institutions. Moreover, "shared responsibility" implies that the responsibility to promote labor standards is not limited to the territory of a particular state. In other words, responsibility for a violation of workers' rights in a particular state can be borne by actors or institutions external to that state, or even by other states.[44] In Part III, we put forth our conception of shared responsibility, which is more cosmopolitan in nature than the conception of responsibility guiding the current international labor regime.

The second challenge faced by international labor is to devise institutional arrangements for implementing the shared responsibility conception and allocating responsibility to the various actors in the global labor market so as to guarantee basic labor standards for all workers across the world. In Part IV, we tackle this challenge and propose guidelines for reforms in the supervisory mechanisms of the ILO.[45]

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44. This notion is recognized in the realm of the general protection of human rights. *See, e.g.*, Steve R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001) ("[A] system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights.").

45. To be clear, the guidelines we propose in Part IV for reforming the ILO are not presented as a remedy for all aspects of background injustice in the global labor market. A comprehensive reform addressing the entire spectrum of existing unjust institutions and practices in international labor would require changes on both the institutional and interactional levels. On the institutional level, a comprehensive reform should include the redesign of global institutions, such as the WTO and European Union, and intergovernmental labor agreements. One interesting example of such a reform is the Barry & Reddy proposal for establishing a global linkage between labor standards and trade agreements. CHRISTIAN

First, however, Part II will demonstrate how the ILO's structure and, in particular, its enforcement mechanisms are based on an archaic, statist conception of responsibility that is no longer suited to the global economic and political reality.

II. THE ILO: A STATIST MODEL OF RESPONSIBILITY

An underlying premise of the ILO's norm-generating and monitoring procedures is that the nation-state is the basic unit of deliberation and decision-making. As will be demonstrated below, this is reflected in all of the ILO's key organizational institutions. Under the statist model, legally, states are the key actors responsible for and benefactors of implementing workers' rights. The uniquely daring features of the ILO—the most salient of which are its unique tripartite structure and its original integrative, internationalist economic vision—have done little to alter the dominance of the statist model.

In this Part, following a brief historical introduction, we present the manifestations of the statist model of responsibility in the key ILO operational functions, with a focus on the supervisory mechanism.

A. *The Statist Model: A Historical Perspective*

The ILO was established in 1919 as part of the Treaty of Versailles,[46] and its constitution was drafted when the concept of state sovereignty was the unchallenged premise of international law.[47] Consequently, the statist

BARRY & SANJAY G. REDDY, INTERNATIONAL TRADE AND LABOR STANDARDS: A PROPOSAL FOR LINKAGE, 1, 27–29 (2008). Another proposed institutional reform has been put forth by Margot Salomon, which is discussed in Part III. *See infra* notes 155-160 and accompanying text. On the interactional level, a different approach to ameliorating background injustice in international labor may be prompted by pressure from civil society, as proposed by Fung, O'Rourke, and Sabel, ARCHON FUNG, DARA O'ROURKE & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS? 4 (2001), and by Iris Young, Young, *Responsibility and Global Labor Justice supra* note 8, at 375–82; *infra* notes 161-171 and accompanying text. While we acknowledge that multitiered reform is necessary to effectively address injustices on both the interactional and institutional levels, in this Article, we focus on the application of a new concept of shared responsibility to be implemented within the ILO's existing institutional framework.

46. *Origins and History*, ILO, http://www.ilo.org/global/about-the-ilo/history/lang—en/index.htm (last visited Feb. 19, 2013).

47. The literature on the idea of sovereignty in international law is too vast to review here. For some recent examples of this scholarship, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 32–33 (2d ed. 2006); MARTTI KOSKENNIEMMI, THE POLITICS OF INTERNATIONAL LAW 41 (2011); SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003); Jean L. Cohen, *Sovereignty in the Context of Globalization: A Constitutionalist Pluralist Perspective*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 261 (Samantha Besson & John Tasioulas eds., 2010); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 32 (1995-1996); Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfer*, 49 STAN. J. INT'L L. 371 (2013). For a more historical perspective on

model is predominant in the ILO's structure as a whole, as well as its supervisory system, which is at the heart of the discussion in this Part.

At its inception, the ILO aspired to promote universal values and the harmonization of labor norms across borders. This explicit goal of "universality" was expressed first in the ILO's tripartite structure, under which nongovernmental delegates of employers and employees were granted formal voting power in the organization. Thus, each member state in the ILO was represented by delegates representing three constituents: workers, employers, and government.[48] This enabled the forging of cross-border alliances between workers or between employee organizations.[49] Second, from the outset and through the period between the two world wars, the ILO generally tended to adopt an outlook that underscored common global responsibility for workers by linking international economic policy with social policy. This integrative and internationalist approach[50] had the potential to lead the ILO away from the statist model. It stressed the objective of preventing unfair trade and the "race to the bottom" in lowering labor standards to attract capital, as well as the eventual aspiration to promote social justice and world peace.[51] Indeed, the horrific work conditions of laborers in the period preceding World War I, caused by fierce unregulated economic competition, were understood to be a significant factor in the outbreak of the war.[52] The creation of cross-border unified labor standards via cooperation among states was suggested as an appropriate response to these conditions.[53] The ILO thus did not merely aim to prevent a race to the bottom, but explicitly strived toward enhancing social justice through a race to the top, envisaging a slow rise in labor standards over time.

Yet, these universalist and internationalist ambitions were curtailed from the very start. To begin with, the ILO's structure was limited to representatives of workers, employers, and the government of each state, denying formal representation to groups such as women workers and migrant workers, for example.[54] Furthermore, norm-generation and

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the concept of the sovereign state, see Quentin Skinner, *The Sovereign State: A Genealogy*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 26 (Hent Kalmo & Quentin Skinner eds., 2010).

48. Constitution of the International Labour Organization, art. 7, June 28, 1919, 49 Stat. 2712, 15 U.N.T.S. 35 [hereinafter ILO Constitution].

49. For a recent historic overview, see GERRY RODGERS ET AL., THE ILO AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009 5-6 (2009).

50. *Id*. at 206-09.

51. ELLIOTT & FREEMAN, *supra* note 2, at 93-109.

52. *Id*.

53. *Id*.

54. *See* Abdul-Karim Tikriti, *Tripartism and The International Labour Organisation: A Study of The Legal Concept: Its Origins, Function, and Evolution in the Law Of Nations*, *in* 7 STUDIES IN INTERNATIONAL LAW 337 (1982) (arguing that the true meaning of the tripartite

monitoring procedures continued, to a large extent, to follow the basic statist model, as will be shown below.[55] Moreover, the notion of universality was very narrow, as harmonization of norms was confined to the limited geographical scope of the industrialized states. In its original constitution, the ILO not only refrained from requiring member states to apply or monitor ratified norms beyond their territorial borders, but also exempted industrial states from applying those norms to territories within their control, that is, to "non-metropolitan territories"—their colonies, for example.[56]

The post-World War II period saw an entrenchment of the statist model. The Philadelphia Declaration, produced in 1944 and incorporated in the ILO Constitution, broke from the ILO's previous colonial orientation and, for the first time, declared equal rights for all.[57] The ILO now explicitly tied economic and social development to basic human rights. The focus on human rights generated the now-traditional understanding that states are to be held responsible for enforcing human rights. This coincided with the ILO's gradual shift away from an internationalist economic vision during the same period.[58] The ILO increasingly began to engage in national planning for industrialization, as the "prevailing economic model was concerned with the national economy."[59] In 1946, the ILO became a specialized agency of the United Nations, as a component of the Bretton Woods global order, and embraced the statist logic that underlay the Bretton Woods structure. The prevailing economic model of the time was a blueprint of the welfare state, designed to ensure fair redistribution within state borders.[60] In the postwar years, the Cold War hindered any possibility of departing from statism, as the "East" now also adhered to the notion of the state as supervisor of most aspects of the economic structure.

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principle was defined in terms of Western capitalistic societies, where a clear distinction exists between employers, workers and governments).

55. *See infra* Part II.B.

56. RODGERS ET AL., *supra* note 49, at 42.

57. The Declaration concerning the aims and purposes of the ILO is usually referred to as the Philadelphia Declaration. The declaration now constitutes an annex to the ILO Constitution as amended in 1946. ILO Constitution, *supra* note 48, annex.

58. RODGERS ET AL., *supra* note 49, at 210-11.

59. The promotion of social and labor rights was linked to the national economic scheme for promoting national growth. The principal ILO contribution to the UN International Development Strategy addressed national strategies for employment until the year 1976, when it addressed also proposals for international action. *Id*. at 211.

60. Ethan B. Kapstein, *Workers and the World Economy*, FOREIGN AFF., May-June 1996, at 16, 20. Following WWII, the international community, in particular Western Industrial Countries, gathered in Bretton Woods, New Hampshire, on July 12, 1944, in order to design a new international monitory order. The principle Bretton Woods institutions were the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank). Bretton Woods Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39; Bretton Woods Articles of Agreement of the International Banks for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134.

It was not until the 1990s that the ILO invested in developing policies that addressed cross-border subject matter.[61] The first WTO ministerial meeting in Singapore in 1996, denying the WTO's own responsibility for enacting a social clause,[62] assigned the duty to promote core labor standards to the ILO.[63] The ILO's 1998 Declaration was created partly in response to this challenge, marking its deeper involvement in international social policy.[64] In its comprehensive 2004 Fair Globalization Report, as well as its 2008 Declaration, the ILO recognized the specific need to tackle the challenges of globalization, proposing a mix of measures on the national and international levels.[65] Even these two landmark instruments, however, failed to substantially test the underlying state-based structure of the ILO.[66] Little has changed since in terms of the ILO's governance structure and conception of responsibility. We will show this below, in a brief overview of the ILO's governance structure and its ingrained statist approach. We begin with a description of the tripartite structure and the process of generating and adopting ILS and then elaborate on the supervisory system that ensures ILS compliance.

B. *The Statist Model and the ILO's Organizational Structure*

1. Tripartism

The ILO is the only international institution to depart from the conventional structure whereby states alone can be accepted as members in

61. RODGERS ET AL., *supra* note 49, at 213-22.

62. The movement to anchor labor and environmental interests in a social clause within the WTO—bursting into public consciousness in the Seattle demonstrations of 1999—was joined by academics, including prominent economist Joseph Stiglitz, for example, who advocated incorporating ILO's concerns into other international economic institutions, such as the IMF and the World Bank. Joseph E. Stiglitz, *Globalization and Development*, *in* TAMING GLOBALIZATION 47, 65 (David Held & Mathias Koenig-Archibugi eds., 2003); *see generally* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 395-463 (2d ed. 1999).

63. For a sample of the literature regarding trade-labor linkage debate see, for example, L. Alan Winters, Commentary, *Trade and Labor Standards: To Link or Not to Link?*, *in* INTERNATIONAL LABOR STANDARDS: HISTORY, THEORY, AND POLICY OPTIONS 309 (Kaushik Basu et al. eds., 2003).

64. *See*, *e.g.*, Bob Hepple, *The WTO as a Mechanism for Labour Regulation*, *in* REGULATING LABOUR IN THE WAKE OF GLOBALIZATION 161, 171 (Brian Bercusson & Cynthia Estlund eds., 2008).

65. *ILO Declaration on Social Justice*, *supra* note 30; ILO Declaration, *supra* note 1; ILO, World Comm'n on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Feb. 2004).

66. Christien Van Den Anker, *Cosmopolitan Justice and the Globalization of Capitalism: The UNDP and ILO Proposals*, 2 GLOBALIZATIONS 254, 262 (2005).

international organizations.[67] Instead, the ILO embraced a distinctive participatory tripartite structure[68] that reflects the importance of consulting with workers and employers in setting economic policy.[69] This basic tripartite structure is replicated in each of the ILO's component bodies, such as, the ILO Conference, as described below, the ILO Governing Body, the executive organ of the ILO, as well as the ILO Office, the secretariat of the ILO.[70] Most of the committees that support the work of the Governing Body and the Office are also tripartite committees, although expert committees also exist.

However, the statist model continues to dominate the ILO's operation, as the participation of non-governmental interests (namely, the interests of employers and employees) is channeled through the state. Take, for example, the structure of the International Labour Conference (the Conference), which is the body that sets the ILO's broad policies, often referred to as the ILO parliament. The Conference is comprised of four representatives from each of the ILO member states, two of whom are governmental delegates and two nongovernmental delegates, representing, respectively, the employers and employees of each of the member states.[71]

67. *See How the ILO Works*, ILO, http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang—en/index.htm (last visited Feb. 13, 2013) (noting its structure "where workers and employers together have an equal voice with governments in its deliberations"). The United Nations is the most salient example of such conventional structure of representation.

68. The advantages of the tripartite system go beyond giving voice to and improving the treatment of the groups represented. They include considerations of efficiency, such as the need to include in the deliberation people with practical experience on the subject, especially regarding technical work process. Due in part to the 1997 Asian crisis, a renewed interest in the tripartite approach to problem-solving in the era of globalization seems to be emerging, based on a rising recognition that a "win-win situation is the ultimate objective of the partners in the workplace." Tayo Fashoyin, *Industrial Relations in Developing Countries*, *in* THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY: THE GENEVA LECTURES 31, 42 (Roger Blanpain & Chris Engels eds., 2001). Such an approach raises the following question: If we concede to enabling representation of groups on the basis of their particular interests, why should we stop there? Would "identity representation" be more appropriate? Exploring the parameters of the scope of the "representation debate" is beyond the scope of this Article, despite the possibility that our conception of the desirable debate may turn on our view of the decision-making process. For a broad discussion of the representation debate with reference to the ILO, see generally Milman-Sivan, *supra* note 5.

69. The ILO also mostly grants equal weight to each of its member states (the Governing Body is a notable exception), regardless of wealth and size. *See* ILO Constitution *supra* note 48, arts. 3(1), 4(1).

70. For further information on the ILO's structure, see *How the ILO Works*, *supra* note 67.

71. ILO Constitution, *supra* note 48, art. 3(1). Although the basic structure of representation recognizes only the need for employee and employer representation as groups, there are some beginnings of recognition in the ILO Constitution regarding the need for representation beyond that limited scheme. Thus, for example, under article 3(2) of the ILO Constitution, two advisers, for each item on the agenda of the meeting, may accompany each delegate; at least one of the advisers should be *a woman* when questions especially affecting *women* are to be deliberated. *Id*. art. 3(2). This is far from satisfactory for advocates of a voice

Although the nongovernmental representatives are appointed by the member states, the ILO Constitution requires that the appointments be decided in conjunction with the industrial organizations, which are the *most representative* of employers and working people in their countries.[72]

Regardless of whether the tripartite structure is, as some assert, "a model for participation in international civil society"[73] or, as others suggest, a significantly limited structure,[74] for our purposes, it remains statist-based: each state nominates representatives of its functional interests—workers and employers—in its territory. In addition, the ILO organizational structure excludes all interests and functional groups beyond workers and employees.[75] Despite its originality and uniqueness, then, the tripartite structure does not, in and of itself, represent a complete divergence from the statist approach.

2. The Norm-Generating Process and ILS

The ILO's adherence to the statist model is exemplified in the ILS-generation process and the nature of those standards.[76] ILO standards—namely, conventions (the primary proclamations of labor standards) and recommendations (nonbinding labor standards)—are formulated to create obligations for member states. States, thus, are the only legal bearers of

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for women in the ILO. We draw attention to this fact only to emphasize the existing, although slim, basis for acceptance of such arguments.

72. *Id*. art. 3(5). "The credentials of the delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two-thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with this article." *Id*. art. 3(9).

73. *See, e.g.*, Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 286 (1997).

74. For example, the literature on the ILO has recognized the limitations of the tripartite system with respect to the representativity of the ILO:

> This early twentieth-century model, based on the then-industrialized world, has developed some gaps. Trade unions have searched for—but not yet found—satisfactory global models for international membership. And nationally based employers' organizations cannot adequately represent huge multinational corporations; nor can they effectively exercise pressure upon them to conform to international labour standards. Indeed, even the concept of national sovereignty is changing with institutions such as the European Union, weakening direct government control over the workplace policies that they are bound to implement.

RODGERS ET AL., *supra* note 49, at 18; *see also* Milman-Sivan, *supra* note 5, at 802–03.

75. Thus, for example, the interests of migrants, religious groups, women, or agricultural workers could all be considered as candidates for receiving independent representation in the ILO. For further discussion, see generally Milman-Sivan, *supra* note 5.

76. For detailed portrayal of the ILO's norm generating process, see *How International Labour Standards are Created*, ILO, http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang—en/index.htm (last visited Feb. 13, 2013).

responsibility for the violations of labor rights as they are the only actors expected to ratify and comply with these standards. In addition, each state retains full discretion whether to ratify and, thereby, be legally bound by the conventions and recommendations produced by the ILO.[77] Further, the ILO adheres to the general understanding that obligations arising from ratified ILO conventions are confined to state borders: "In general the obligations resulting from ratification of an international labour Convention, like all such obligations arising under general international Conventions, are limited to matters arising within the jurisdiction of the party to the Convention upon which the obligation rests."[78]

The ILO norm-generation process is designed to allow considerable participation of governments as well as employers' and workers' organizations, which results in large amounts of national information regarding the conditions that would allow or hinder the ratification and application of the proposed standards.[79] Delegates from employers' and workers' groups are intensely involved, almost on equal footing, at the

77. *See* ILO Constitution, *supra* note 48, art. 19(5)(b). States are, however, bound to submit ILO conventions for the consideration of the national authorities and report to the ILO as to the measures taken to submit conventions and recommendations to the competent national authorities. ILO Constitution, *Id*. art. 19(5)(c). Only the most representative organizations are entitled to receive copies of the information their governments communicated to the Office concerning such measures. ILO, *Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities*, at arts. VIII(a), VIII(b), GB292-10 (2005) *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/questionnaire/wcms_087324.pdf.

78. Comm'n Appointed under Article 26 of the Constitution of the ILO to Examine the Complaint Filed by the Government of Ghana Concerning the Observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105), Rep., para. 720, O.B. XLV(2), Supp. II (Apr. 1962) [hereinafter *Portugal's Report*].

79. At both stages of the discussions at the Conference, employers' and workers' groups may propose texts, make amendments, and consider the ultimate form of the standard. *See* Standing Orders of the International Labour Conference arts. 39(1), 39(6) (adopted on Nov. 21, 1919) [hereinafter Standing Orders of the ILC], *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc-so.htm. The Office sometimes seeks advice from the United Nations and other specialized agencies as to proposed instruments, but the scope for NGO participation remains limited. For the role of NGO's in the ILO, see ILO Constitution, *supra* note 48, art. 12(3), as well as Standing Orders of the ILC, *supra* art. 2(3)(j). For a general explanation on the relations of the ILO with NGOs, see *Relations with NGOs*, ILO, http://www.ilo.org/pardev/civil-society/ngos/index.htm (last visited Mar. 26, 2013). This partly accounts for the relatively greater participation of human rights NGOs in UN activities rather than in the ILO's activities. NGOs may influence ILO work indirectly through the international workers organizations, such as the International Trade Union Confederation (ITUC), which have consultative status with the ILO, or by submitting information informally to the Office. They may further apply to the Director-General to be put on the list of organizations whose objectives are in harmony with the objectives of the ILO. Such inclusion on the list, if authorized, entitles them to be notified of meetings and to apply for special permission to distribute documents in the ILO and to participate in meetings by making oral presentations. *Engaging Civil Society*, ILO, http://www.ilo.org/pardev/civil-society/index.htm#Statutory_0 (last visited Mar. 26, 2013).

different stages of the discussions at the International Labour Conference and can propose texts, make amendments, and deliberate on the ultimate form of the standard. Nevertheless, the statist model prevails in this context as well, as the knowledge and information of the states and of the workers and employers are incorporated through national representatives. During the legislative stage of conventions and recommendations, the member states are required to fill out questionnaires and provide information and comments regarding national law and practice on the issue at hand.[80] Only the most representative organizations of each state are involved and consulted.[81] A similar state-centric approach prevails in the ILO's supervisory system, as will be demonstrated below.

C. *The ILO's Supervisory System: Sanctions and Incentives*

Compliance with ILO standards is supervised through two separate, yet complementary systems, both of which showcase the statist model of responsibility: (1) a regular reporting system, based on the submission of national reports in fixed intervals as to the member state's compliance with its legal obligations;[82] and (2) a procedure for submitting complaints regarding particular violations, open to a wide variety of players.[83] These two systems have diverging logics and features, and while both reflect the

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80. *See* Standing Orders of the ILC, *supra* note 79, art. 39(1).

81. *See* Standing Orders of the ILC, *supra* note 79 arts. 39(1), 39(6); *see also* ILO Governing Body, *The Functioning of Decision-Making Bodies*, GB.289/3/2(Rev.), 289th Sess. (Mar. 2004), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/gb-3-2.pdf.

> In addition to the provisions of the Standing Orders referred to under paragraphs 3 and 4 above, Article 5(1)(a) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) and Paragraph 5(a) of the Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152), provide that consultations of employers' and workers' representatives should be held on government replies to questionnaires concerning items on the agenda of the Conference and government comments on proposed texts to be discussed.

ILO, INT'L LABOUR STANDARDS DEP'T, HANDBOOK OF PROCEDURES RELATING TO INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 7 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_192621.pdf [hereinafter ILO HANDBOOK OF PROCEDURES]. Note that the organizations that can submit comments could include any industrial organization and are not limited to the representative organizations. Workers' and employers' organizations may comment on their government's response or send their comments directly to the Office.

82. ILO Constitution, *supra* note 48, art. 19(5)(e) (obligation to report on ratified conventions), art. 19(6)(d) (obligation to report on unratified conventions), art. 22 (obligation to report on recommendations), art. 23 (obligation of the Director-General to report this information to the Conference).

83. *See id*. arts. 24-26.

statist conception of responsibility, the former follows it more closely. In addition, a novel follow-up procedure supports the implementation of the 1998 Declaration of Fundamental Rights at Work and was further modified and expanded in the 2008 Declaration.[84]

1. The Regular Reporting System

The ILO's statist model is clearly evident in its reporting system in a variety of ways. Only states are obligated to submit reports, and the state is the only legal subject monitored under the procedure. Additionally, the nature of the information that states are required to provide reflects statism. Member states are key players in the monitoring process and are obligated to submit periodic reports on ratified conventions within differing reporting cycles: every five years for "regular" conventions and a shorter reporting cycle for fundamental and governance conventions (until recently, every two years but now every three years).[85] Workers' and employers' associations participate in the process via Article 23(2) of the ILO Constitution, which mandates that all governmental reports be transmitted to the workers' and employers' associations of their national state.[86] These associations, in turn, may submit comments to the state's report, pointing,

84. *See ILO Declaration on Social Justice*, *supra* note 30, art II.

85. Many of the reporting obligations are anchored in Articles 22 and 35 of the ILO Constitution, *see* ILO Constitution, *supra* note 48, arts. 22, 35. On the move to a three-year cycle, see ILO Comm. on Legal Issues and Int'l Labour Standards, *Improvements in the Standards-Related Activities of the ILO*, GB.306/LILS/4(Rev.), 306th Sess. (Nov. 2009). The nature of these reports also varies. The most significant report is the first report, which serves as a baseline for the particular country against which any progress is measured. *Compare Report Forms: First Report Forms*, ILO, http://www.ilo.org/declaration/follow-up/annualreview/Reportforms/lang—en/index.htm (last visited Mar. 26, 2013) *with Report Forms: Country Baseline Updates*, ILO, http://www.ilo.org/declaration/follow-up/annualreview/Reportforms/lang—en/index.htm. Reports on un-ratified conventions under Article 19 are discussed below. *See infra* Part IV. On the significance of the four governance Conventions, relating to tripartism, employment policy, and labour inspection, see *ILO Declaration on Social Justice*, *supra* note 30, where they were designated as "most significant from the viewpoint of governance covering tripartism, employment policy and labour inspection." (the governance Conventions). *Id*. at 14.

> These are: the Labour Inspection Convention, 1947 (No. 81); the Employment Policy Convention, 1964 (No. 122); the Labour Inspection (Agriculture) Convention, 1969 (No. 129); and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). During the 98th Session of the Conference (2009), the governance Conventions, along with the fundamental Conventions, were acknowledged as important elements in a strategy for recovering from the crisis, as indicated in the Global Jobs Pact.

ILO Comm. on Legal Issues and Int'l Labour Standards, *Ratification and Promotion of Fundamental and Governance ILO Conventions*, para. 1, GB.306/LILS/6(& Corr.), 306th Sess. (Nov. 2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_115984.pdf.

86. *See* ILO Constitution, *supra* note 48, art. 23(2).

for example, to discrepancies between law and practice or any other deviation from the state's labor standards obligations.[87] Although allowing these comments can be understood as a move toward shifting responsibility from the state to its functional organizations, such comments are discretionary rather than mandatory. They are also submitted on a national basis: each organization comments on its own government.[88] NGOs may not directly submit information to the Committee of Experts on the Application of Conventions and Recommendations (CEACR or Committee of Experts), the body that is in charge of analyzing these reports. NGOs are, therefore, obliged to cooperate with the employers' and employees' organizations, which can then channel the information gathered by the NGOs.

The statist model is similarly reflected in the nature of the CEACR's work, which can be characterized as *semi-legal*.[89] This legal orientation correlates with the CEACR's composition: twenty prominent apolitical jurists who are expected to act in an objective and neutral manner in their evaluations, a departure from the tripartite structure common to most of the ILO bodies.[90] It should come as no surprise, then, that about two-thirds of the staff involved in the Committee's preparatory work are lawyers.[91]

Further, the legal subject at the center of the Committee's operations is the individual state.[92] Despite the fact that the CEACR does not have the mandate of a judicial body, it nonetheless evaluates the periodical reports and makes its own determination as to the extent to which each individual

87. ILO Constitution, *supra* note 48, art. 24.

88. *See infra* notes 245–247 and accompanying text.

89. The legal character of the CEACR is relevant here insofar as it indicates the use of a statist model. Compare this model with legalism as an approach to compliance, which addresses three dimensions of legalism: (1) the degree of independence of the system; (2) the degree to which the judgment affects the national arena; and (3) the degree to which actors other than the state are able to operate the system. For our purposes here, we will only address the third dimension. For an analysis of the CEACR in light of the full theory of legalism as an approach to compliance, see THOMANN, *supra* note 4, at 104-17.

90. The emphasis on law is almost inevitable as the department that is responsible for preparing the draft CEACR report is almost exclusively staffed by lawyers. *Id*. at 114. This legal focus is also evident in the legal materials the Committee utilizes in addition to the national reports, such as collective agreements and court cases. *See* Miriam Hartlapp, *Two Variations on a Theme: Different Logics of Implementation Management in the EU and the ILO*, EUROPEAN INTEGRATION ONLINE PAPERS 1, 10 (June 14, 2005), *http://eiop.or.at/eiop/texte/2005-007a.htm*.

91. Hartlapp, supra note 90, at 10.

92. The Committee of Experts' mandate is to gather the periodical reports and evaluate the extent to which each state conforms to its legal obligations. It consists of twenty independent persons, from different countries, who qualify as experts in their legal or social fields and purports to maintain independence, impartiality, and objectivity. *See Committee of Experts on the Application of Conventions and Recommendations*, ILO, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/index.htm (last visited Feb. 20, 2013).

state conforms to its legal obligations under the ILS.[93] The CEACR, in its assessment of state compliance, mostly engages in a legal analysis of legal discrepancies, while neglecting violations in practice.[94] This focus on law, rather than on the practical application of the norm, necessarily directs attention to state authorities, as they are the generators of law, rather than to the two partners in the labor relations, employees and employers, who operate on the ground. Accordingly, the CEACR's key products are conclusions and comments, which are directed solely at the individual state under review.[95] There are two types of comments the Committee can issue: observations and direct requests to governments. Direct requests (to be distinguished from the "Direct Contact" procedure described below) are unpublished appeals to the government under review to provide more information or to initiate communication on technical matters. When direct communication fails, or in severe cases of long-lasting noncompliance, the Committee of Experts publishes "Observations" in its annual report.[96] These refer explicitly to individual states, identifying each of the "violating" states name by name. Notices of good practice of states, indicating a sort of "best practices," follow similar lines.[97]

93. After a long-lasting debate as to the CEACR's mandate and the legal nature of its findings, the Committee adopted a pragmatic approach whereby it does not regard its finding as binding judgments. However, such findings are binding unless the state in question requests a different interpretation from the International Court of Justice or a tribunal established for such purpose. Both options have never been used. THOMANN, *supra* note 4, at 109.

94. The questionnaires that are the basis of such information do include some questions on the actual application of labor laws. However, these questions constitute only a small part of the questionnaire. *See e.g.*, ILO Governing Body, *Form for Reports on the Application of Ratified Convention s (Article 22 of the Constitution): Domestic Workers Convention, 2011 (No. 189)*, GB.313/LILS/7/1, 313th Sess. (Mar. 2012), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/metingdocument/wcms_175008.pdf.

95. The Committee of Experts' report also includes a general survey, which will be discussed *infra* Part IV. This is not an exhaustive description of the functions of the Committee. Over the years, the Committee has tried, mostly unsuccessfully, to expand its competence within the supervisory system. Such attempts include, for example, increasing its competence as a judicial body by asserting that its interpretations are binding. *See* Alfred Wisskirchen, *The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience*, 144 INT'L LAB. REV. 253, 273 (2005).

96. *See Committee of Experts on the Application of Conventions and Recommendations*, *supra* note 92. Such Observations may be accompanied by a footnote requesting the government in question to submit full information regarding the case or a request to submit to the Conference a detailed report on the subject at hand before the "regular" report is due. ILO, *The Committee on the Application of Standards of the International Labour Conference: A Dynamic and Impact Built on Decades of Dialogue and Persuasion*, at 20 n.19 (2011) [hereinafter *Committee on the Application of ILS Standards]*, *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_154192.pdf.

97. Cases of good practice acknowledge situations where a country has adopted a unique and notable approach to the application of a convention. A case of good practice may consist of a new approach to achieving or improving compliance with a convention and can

The CEACR's annual report on the application of labor standards and recommendations is submitted for discussion to the Conference Committee, a standing committee that is a tripartite political body appointed by the International Labour Conference.[98] The Conference Committee selects several cases (about twenty-five in total) on which the CEACR has issued observations for further examination.[99] In each case, the Conference Committee requests that a governmental representative of the territorial state where the alleged violation occurred appear before it. This representative may provide further oral or written information and participate in the discussion of the case. The tripartite structure of the Conference Committee suggests that the discussions are of a political nature, in contrast to the more objective, legal deliberations in the work of the CEACR.[100]

The names of the states where particularly harsh violations have allegedly occurred are mentioned in a special paragraph that appears in the Conference Committee's annual report, under the category of "continued failure to implement."[101] The annual report may also add the Conference Committee's recommendations as to how to proceed, including recommendations to redirect the handling of the case to the complaint

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therefore be seen as a potential model for others. The Committee also mentions cases of progress, whether "with satisfaction," which indicates that the case is no longer a concern, or "with interest," indicating smaller steps and actions of progress. *Committee on the Application of ILS Standards*, *supra* note 96, at 25.

98. *See* ILO, *Forced Labour and Human Trafficking: Casebook of Court Decisions* 2 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_106143.pdf. The Conference Committee's characteristics and duties are set mainly in Article 7 of the Standing Orders of the Conference. Standing Orders of the ILC, *supra* note 79, art. 7. It is comprised of 200 or more members. *See* Int'l Labour Conference, Committee on the Application of Standards, 99th. Sess., *Information and Reports on the Application of Conventions and Recommendations*, 3, 16 Part I (2010) [hereinafter *ILC Comm. App. Standards Report*], *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-normes/documents/publication/wcms_145220.pdf.

99. *See* Wisskirchen, *supra* note 95, at 281—82. The cases are chosen in a way that represents a balanced selection of issues and geographical areas. The considerations for identifying appropriate cases include the cooperation of the particular state with previous requests for information, the likelihood that a discussion would assist in producing change, the severity of the situation, the occurrence of earlier discussions, and the scope and nature of the violation. In practice, the International Confederation of Free Trade Unions (ICTFU) and World Confederation of Labour propose a list, with the agreement of the employers, and this is presented for the Conference to agree upon. *See id*. As the Conference Committee is a political body, political considerations may also play a part in the selection of the cases to be discussed. THOMANN, *supra* note 4, at 93.

100. *See Committee on the Application of ILS Standards*, *supra* note 96, at 11–12, 19. For a recent example of Conference Committee report see, Int'l Labour Conf., 101st. Sess., Committee on the Application of Standards, *Information and Reports on the Application of Conventions and Recommendations*, at 9-11 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-normes/documents/publication/wcms_190828.pdf.

101. *See Committee on the Application of ILS Standards*, *supra* note 96, at 83, 89.

procedure. The Committee's annual report is submitted to the Conference for discussion and official adoption.[102]

Finally, at different stages of the monitoring process, the ILO supervisory bodies may use the more informal "Direct Contact" procedure,[103] which is also directed specifically at states and generally takes the form of detailed verbal discussions between the ILO representative and relevant government officials.[104] This procedure enables a representative of the ILO Director-General[105] to personally conduct, often in a discreet manner, such meetings and discussions as are necessary to resolve difficulties with individual member states in the application of ILO standards. This is usually done by visiting the member state concerned.[106] Direct Contact has no rigid rules and has been extensively used since the late 1970s.[107]

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102. *See Id*. at 1–3, 105–10.

103. For an updated description of the informal Direct Contact procedure see, ILO HANDBOOK OF PROCEDURES, *supra* note 81, at 54-55.

> This Handbook describes the procedures operating within the International Labour Organization in relation to the adoption and implementation of Conventions and Recommendations. The present edition takes account of the adjustments to the system for the supervision of international labour standards decided on by the Governing Body of the International Labour Office up to its March 2012 session.

Id. at 1. For further details as to the establishment of this procedure in 1968, see *infra* note 107.

104. Direct Contact is mainly used in sufficiently important cases concerning the ratification or the implementation of conventions and recommendations or cases before the CFA. *See* LAMMY BETTEN, INTERNATIONAL LABOUR LAW: SELECTED ISSUES 405-05 (1993). When Direct Contact is conducted, the supervisory bodies suspend the examination of the case. Otherwise, the Conference Committee may select cases for further discussion.

105. This representative is usually an official of the Office, an independent person with expertise on the subject, or a member of the Committee of Experts. *See* HÉCTOR BARTOLOMEI DE LA CRUZ, GERALDO VON POTOBSKY & LEE SWEPSTON, THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 86 (1996).

106. Even in the absence of a full Direct Contact procedure, the Committee of Experts may support a request of the Director-General to send a representative to the country in question in order to help fully understand and resolve a particular issue or problem. *See*, BETTEN, *supra* note 104, at 404-05.

107. The procedure originated in 1967 "with a view to developing dialogue with governments and employers' and workers' organizations in order to overcome difficulties encountered in the application of Conventions." ERIC GRAVEL & CHLOÉ CHARBONNEAU-JOBIN, THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS: ITS DYNAMIC AND IMPACT 16 (2003), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087808.pdf. In 1968, the Committee of Experts set forth the principles of this procedure, and in June 1968, the Conference Committee announced itself in favor of the procedure. It began to function in 1979 on an experimental basis, and in 1972, the Committee of Experts noted that it may be viewed as an established procedure. *See* BETTEN, *supra* note 104, at 405-05.

2. Supervision Procedures Based on Complaints and Representations[108]

At first glance, the complaints procedures seem to be as reflective of the statist model as the regular reporting system they supplement, for they are similarly focused on the state as the sole actor responsible for upholding legal obligations under ratified conventions within its territory.[109] The complaints and representations system allows for several complaints procedures, including a separate procedure relating to freedom of association. Industrial organizations, that is, employers' and employees' groups, can allege that a member state violated a convention it previously ratified by filing a *representation*. In addition, member states can charge another member state with violating its obligations under a ratified convention by filing a *complaint*. In severe and rare cases a full-scale investigation is launched through the Commission of Inquiry or the Fact-Finding and Conciliation Commission on Freedom of Association—the comparable body in cases that involve freedom of association.[110] Article 24 of the ILO Constitution, which governs the representations procedure, one of the procedures within the complaint system, explicitly refers to the failure of a member state to comply with a ratified convention "within its jurisdiction."[111]

108. The complaint procedure is governed by the ILO Constitution, *supra* note 48, arts. 26-34.

109. *See Complaints*, ILO, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/index.htm (last visited Feb. 17, 2013). The tripartite Committee on Freedom of Association bases its jurisdiction on the constitutional guarantee of freedom of association and therefore accepts complaints from trade unions and employer organizations, regardless of whether the state in question has ratified the relevant conventions (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)). *Committee on Freedom of Association*, ILO, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/index.htm (last visited Feb. 17, 2013). Its jurisprudence, set forth in a digest published at regular intervals, is supplemented by the occasional decisions of the Fact-Finding and Conciliation Commission on Freedom of Association and is closely related to that of the Committee of Experts, which also provides a periodic General Survey on freedom of association. *See* ILO, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO 1—3 (5th rev. ed. 2006).

110. *See* DAVID TAJGMAN & KAREN CURTIS, ILO, FREEDOM OF ASSOCIATION: A USER'S GUIDE 57 (2000), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087990.pdf ("[T]he FFCC [Fact-Finding and Conciliation Commission] is rarely used."); Labor Markets: *Core Labor Standards Toolkit – Step 2*, THE WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20224312~menuPK:390633~pagePK:148956~piPK:216618~theSitePK:390615,00.html (last visited Feb. 17, 2013) ("In rare cases, the Governing Body may appoint a Commission of Inquiry to conduct an independent investigation.").

111. ILO Constitution, *supra* note 48, art. 24.

Once a representation—that is, a complaint alleging an ILS violation—has been submitted and deemed receivable,[112] the ILO Governing Body (GB) can establish a tripartite committee of the Governing Body, composed of members of the Governing Body chosen in equal numbers from the government, employers' and workers' groups, to investigate and report on the case.[113] The committee's investigation is focused on revealing any possible responsibility on the part of the territorial state for the alleged wrong, once again underscoring the centrality of the statist model. Its report incorporates the response of the state's government to the accusations, including any recommendations the committee might make to the state. Where the government's response is not deemed satisfactory, the GB is authorized to take various measures against the state.[114] It can publish the original representation and the government's response[115] in an attempt to embarrass and pressure the particular state as the only responsible agent. It can also initiate the complaints procedure under Article 26 of the ILO Constitution.[116] Complaints regarding freedom of association violations are referred to the Committee on Freedom of Association (CFA) and follow approximately the same procedures as the representation procedure and, in appropriate cases, as the Commission of Inquiry.[117] The Committee of

112. Whether a representation is considered receivable depends on certain "procedural" factors, such as whether there is a specific reference to Article 24, whether the case concerns the violation of an instrument that was ratified by the member state against which the representation is made, whether the organization can be determined to be an industrial organization in cases where the complaint originates from a functional organization, and similar procedural requirements. *See* Standing Orders Concerning the Procedure for the Examination of Representations Under Articles 24 and 25 of the Constitution of the International Labour Organization, art 2. (adopted Apr. 8, 1932; modified Nov. 18, 2004) [hereinafter Standing Orders of the Governing Body], *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcm_041899.pdf.

113. *Id*. art. 3.

114. ILO Constitution, *supra* note 48, arts. 25-26; *see also* Standing Orders of the Governing Body, *supra* note 112, arts. 6-9.

115. ILO Constitution, *supra* note 48, art. 25.

116. *Id*. art. 26.

117. Such referrals follow article 3, paragraph 2, of the standing orders. *See* Standing Orders of the Governing Body, *supra* note 112, art. 3(2). The CFA is a fairly independent body as its chairperson is independent and the nine members, despite being chosen from the three constituents, operate in their own personal capacity. While its investigative powers somewhat resemble those of the Commission of Inquiry, its reports, or points of decision, regularly accepted by the GB, have no legal effect in and of themselves. *See Committee on Freedom of Association*, *supra* note 109. This is because neither the CFA nor the CCFF is mentioned in the ILO Constitution. However, they do have de facto influence on the legal understanding of freedom of association, as their decisions are based on more than 2500 cases of legal and factual examinations. THOMANN, *supra* note 4, at 128.

Experts is often put in charge of follow-up on complaints submitted to the CFA.[118]

Yet despite this statist orientation, several features of the representation procedure somewhat diverge from strict statism. For example, the representation procedure allows the involvement of employers' organizations and, in even greater numbers, workers' organizations.[119] Unlike the regular reporting system, where only Conference delegates of the national most-representative workers' and employers' organizations are allowed to comment on states' convention compliance, the right to submit a representation against a state is granted to *any* "industrial organization of employers or workers."[120] This procedure, however, has been used only rarely, a mere 107 times between 1924 and 2004.[121] This can be explained as due to either a lack of awareness of the procedure or the limited impact of its outcome, which consists merely of a report published by an ad-hoc tripartite committee, as opposed to the more severe results of the complaint procedures set forth under Articles 26-34 of the ILO Constitution.[122]

Indeed, under Article 26 of the Constitution, a state may file a complaint alleging that a fellow member state has failed to comply with a convention ratified by both states.[123] The GB may also instigate this procedure, either autonomously or in response to a complaint filed by any ILO delegate.[124] In the most severe and persistent cases, the GB can decide to launch a full-scale investigation by constituting a Commission of Inquiry, a quasi-judicial body[125] that conducts thorough examinations of the law and

118. THOMANN, *supra* note 4, at 127.

119. The representation procedure is anchored in the ILO Constitution, *supra* note 48, arts. 24-25.

120. For article 2(b) of the standing orders and the guidelines to implementing them, see Standing Orders of the Governing Body, *supra* note 112, para. 9.

121. THOMANN, *supra* note 4, at 119.

122. *Id*. at 120-21.

123. ILO Constitution, *supra* note 48, art. 26.

124. *Id*. art. 26(4).

125. The Commission of Inquiry features several indicators of a quasi-judicial body: it is composed of three legal experts acting in their personal capacities; its reports do not have to be approved by the Conference and are directly submitted to the relevant state; and the Director-General publishes automatically all of the Commission's reports. *See id*. arts. 28-29; ILO Governing Body, *Improvements in the standards-related activities of the ILO – Articles 19, 24 and 26 of the Constitution*, at para. 36, GB.288/LILS/1, 288th Sess. (Nov. 2003) GB.277/6, 277th Sess. (Mar. 2000), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/lils-1.pdf (stating that in the absence of any formal rules, the recommendation is to adopt the rules that were accepted by the Governing Body during the examination of the first complaint that gave rise to the constitution of a Commission of Inquiry). The first commission of inquiry had nominated three legal experts as members of the commission of inquiry. *Portugal's Report*, *supra* note 78, para. 11.

the practice at hand.[126] The Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) is the comparable body in cases that involve freedom of association and applies similar procedures.[127]

The legal subject of the Commission of Inquiry's investigation is always the individual state, again manifesting the statist model, which is apparent in other features of the Commission's procedure as well. The Commission report is directed at ascertaining the responsibility of the individual state for the matter at hand and gives detailed recommendations that only the state is obligated to fulfill. The report is based on a substantial investigation, which usually includes visits to the site and witness hearings.[128] The on-site visits, however, require the consent of the state in which the investigation is being conducted.[129] Within three months of the

126. The Commission of Inquiry is not bound by strict procedural regulations, and its members are free to set new rules in accordance with the Constitution and the custom established by previous Commissions. The first Commission of Inquiry in 1962 established this practice, stating that:

> As the Governing Body has not adopted any standing orders concerning the procedure to be followed for the consideration of complaints filed in accordance with article 26 of the Constitution, the Officers of the Governing Body have considered the procedure to be followed in the matter; their recommendations to the Governing Body, which are unanimous, are as follows . . . .

See Portugal's Report, *supra* note 78, at 4.

127. THOMANN, *supra* note 4, at 125.

128. To give an example, the Commission of Inquiry that was established to investigate Nicaragua perceived on-the-spot interviews as particularly important, conducting extensive, on-the-spot interviews. *See* Comm'n of Inquiry Appointed Under Article 26 of the Constitution to Examine the Observance by Nicaragua of 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), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), Rep., at paras. 33, 58, 59, O.B. LXXIV, Series B, Supp. 2 (1991) [hereinafter *Nicaragua's Report*]. The Commission of Inquiry in that case conducted both on-the-spot interviews and interviews conducted in ILO headquarters. *Id*. para. 57. The Myanmar case is another example where the Commission recognized and specifically noted the importance of visiting the country in order to form a direct impression of the situation described in the complaint and acquire personal knowledge of the circumstances described in the mass of documents submitted to them. Comm'n of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Rep., at para78, O.B. LXXXI, Series B, Special Supp. (1996) [hereinafter *Myanmar's Report*]. Note, however, that all the procedures of the Commission are fluid, and their description is based on the procedures adopted so far in a typical case. *See* BARTOLOMEI DE LA CRUZ, VON POTOBSKY & SWEPSTON, *supra* note 105, at 96.

129. For the refusal of Mynamar to allow such visits, see *Myanmar's Report*, *supra* note 128, para. 78.

> Following its Second Session, the Commission considered that it would be desirable to visit Myanmar in order to supplement the information in its possession. The Commission therefore requested the Government, in a letter dated 28 November 1997, to consent to a visit to Myanmar for a period of seven to ten days;

report's release, the state is expected to indicate whether it accepts the recommendations therein; if so, it is left to the state to decide on the specific measures for implementing them.[130] Alternatively, the state can submit a dispute to the International Court of Justice, for a final judgment on the matter.[131]

Under Article 33 of the ILO Constitution, when a member state continuously refuses to implement the recommendations in a Commission of Inquiry report or ICJ decision, the GB can take action to secure compliance.[132] This authority was invoked for the first (and, thus far, only) time in ILO history in 2000, when the GB initiated measures against Myanmar in order to end forced labor in the state.[133] In this context, too, the

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> it expressed the hope that the Government would offer its cooperation and assistance in this respect.

Id. para. 69. With respect to procedures that involve investigations of violations of freedom of association, see ILO, *Special Procedures for the Examination in the International Labour Organization of Complaints Alleging Violations of Freedom of Association—Annex 1*, at para. 67 [hereinafter *Freedom of Association Complaint Procedures*], *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2565060:NO (last visited Feb. 20, 2013), which outlines:

> the current procedure for the examination of complaints alleging infringements of trade union rights, based on the provisions adopted by common consent by the Governing Body of the International Labour Office and the Economic and Social Council of the United Nations in January and February 1950, and also on the decisions taken by the Governing Body at its 117th Session (November 1951), 123rd Session (November 1953), 132nd Session (June 1956), 140th Session (November 1958), 144th Session (March 1960), 175th Session (May 1969), 184th Session (November 1971), 202nd Session (March 1977), 209th Session (May-June 1979) and 283rd Session (March 2002) with respect to the internal procedure for the preliminary examination of complaints, and lastly on certain decisions adopted by the Committee on Freedom of Association itself.

Id. pmbl.

130. *See* ILO Constitution, *supra* note 48, art. 29(2). Even when states accept the recommendations of the Commission of Inquiry, in most cases these recommendations are not implemented fully or in a timely manner. THOMANN, *supra* note 4, at 124.

131. ILO Constitution, *supra* note 48, art. 34(1). There is a debate as to the legal status of a Commission of Inquiry report that was rejected by the relevant state but not referred to the ICJ. *See* THOMANN, *supra* note 4, at 122-23. For our purposes, it suffices to point out the legal power the state has over the legal status of the report.

132. ILO Constitution, *supra* note 48, art. 33. Article 33 of the ILO Constitution could be invoked: "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." *Id*.

133. ILO Governing Body, *Measures, Including Action Under Article 33 of the Constitution of the International Labour Organization, to Secure Compliance by the Government of Myanmar with the Recommendations of the Commission of Inquiry Established to Examine the Observance of the Forced Labour Convention, 1930 (No. 29)*, GB.277/6, 277th Sess. (Mar. 2000), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/gb-6.pdf.

state was the primary entity assigned responsibility for workers' rights, while the multinational corporations that were involved and could have been considered culprits (notably TOTAL)[134] were never officially deemed a party to be investigated. In the face of contradictory evidence as to the corporations' involvement in profiting from the forced labor, the Commission of Inquiry concluded that it could come to no finding on the matter due to its inability to visit Myanmar.[135] It can be assumed that had key private companies been officially considered potential culprits along with the state, more rigorous efforts could have been made to verify the facts.

3. Additional Tools: Technical Assistance and Declaration Follow-Up

As a supplement to its primarily legal activities, since the 1950s the ILO has been developing a promotional approach to the implementation of its standards through *technical assistance* activities.[136] In accordance with its emphasis on development, this technical assistance is provided mainly to raise labor standards in developing countries. During the 1970s, similar goals guided comprehensive missions working to eradicate unemployment in developing countries, alongside scaled-down missions staffed by regional employment teams. There are many who claim that these activities should be expanded, as they reflect the optimal use of the ILO's resources and should, therefore, take priority over its legal activities.[137] The technical assistance programs are strongly grounded on the statist conception in that

134. For a description of TOTAL's involvement in Myanmar, see, for example, Ryan Tiz, *Searching for a Corporate Liability Standard Under the Alien Tort Claims Act in* Doe v. Unocal, 82 OR. L. REV. 559, 562-63 (2003).

135. *Myanmar's Report*, *supra* note 128, para. 452.

> There was evidence before the Commission in the form of secondary statements that forced labor had been used until May 1995 for ground clearance work to provide access to survey teams for the Yadana gas pipeline project in Yebyu township, Tanintharyi Division. In a communication addressed to the Commission, TOTAL stated that it was wrong to claim that the preparatory clearing work could have been undertaken by forced laborers for the purpose of facilitating the access of the project teams. During the years of 1993 and 1994, clearing work had been carried out under the supervision of TOTAL by the Compagnie générale de géophysique (CGG). In view of the contradiction between the facts presented, and since the Commission was denied access to Myanmar to supplement its evidence, no finding on this matter could be made.

Id.

136. These activities were undertaken in the framework of the United Nations Programme of Technical Assistance. Under this programme, the ILO has helped to develop vocational training in developing countries. For a recent historic overview of technical assistance, see RODGERS ET AL., *supra* note 49, at 182-83.

137. Brian Langille, *Imagining Post "Geneva Consensus" Labour Law for Post "Washington Consensus" Development*, 31 COMP. LAB. L. & POL'Y J. 523, 538-39 (2010); *see also*, Langille, *supra* note 2, at 420-42. *But see* Alston, *supra* note 2.

they center mostly on national economic development and progress. In addition, many technical assistance missions focus on the legal aspects of the ILO's goals, providing, for example, assistance with drafting national legislation that complies with ILS and the ratification of ILS.[138] Technical assistance might also take the form of seminars and advisory and direct contact missions.[139]

In addition to the technical assistance initiative, the follow-up procedure supports the implementation of the 1998 Declaration of Fundamental Rights at Work. It has been applied in a manner that emphasizes the goals of ratification of the fundamental conventions through dialogue and technical assistance and of uniting all member states under the regular ILO supervisory system with respect to these instruments. This inclination is mostly evident in the ILO annual reports, the first component of three mechanisms comprising the follow-up system[140] Member-state governments are obligated to submit annual reports detailing steps they have taken to implement any of the eight fundamental conventions, despite having yet to ratify them.[141] Mirroring the regular reporting system, each state submits its report to the national workers' and employees' organizations for comments and observations.[142] Additional comments can be submitted by international organizations such as the International Confederation of Free Trade Unions or the International Organisation of Employers (IOE).[143] An independent

138. THOMANN, *supra* note 4, at 135-136.

139. Seminars are often provided by the International Training Center in Turin, Italy. *See About Us*, INT'L TRAINING CENTER OF THE ILO, *http://www.itcilo.it/en/the-centre/about-us* (last visited Feb. 17, 2013).

140. *See About the Declaration*, ILO, http://www.ilo.org/declaration/thedeclaration/lang—en/index.htm (last visited Feb. 17, 2013). The two remaining interlinked components of the follow-up mechanisms are the global report and the setting of priorities for technical assistance. The Director-General prepares a report each year on the global situation of one of the four sets of principles and rights during the preceding four-year period. The report analyzes the situation of that principle or right in both ratifying and nonratifying countries, and each of the four core rights at work is covered every four years. The global reports are submitted to the ILO Conference. The Global Report are available on the ILO website at *Global Reports*, ILO, http://www.ilo.org/declaration/follow-up/globalreports/lang—en/index.htm (last visited Feb. 17, 2013).

141. *See About the Declaration*, *supra* note 140. "Concerning ratification of Conventions, although the 1998 Declaration is in principle not an instrument focused on ratification, it does promote ratification by requiring member States to respect, promote and realize the principles and rights contained in the fundamental Conventions." ILO Governing Body, *Review of Annual Reports Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, para. 16, GB.307/3(&Corr.), 307th Sess. (Mar. 2010), *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-relconf/documents/meetingdocument/wcms_123833.pdf.

142. *See ILO Declaration*, *supra* note 1, pt. II(B) para. 1 (referencing Article 23 of the ILO Constitution, which obligates the member states to consult with their employers' and employees' organizations).

143. For an example of a recent observation, see, Int'l Org. of Emp'rs, *General Observation by The International Organisation Of Employers (IOE) Under the 2012 Annual*

panel of experts (the ILO Declaration Experts Advisors) evaluates these reports, and the GB discusses them and provides a summary of the reports and their comments in the Introduction to the Review of Annual Reports.[144] This Review is directed at evaluating the individual performance of each state in furthering conventions they have yet to ratify. The states' respective progress is evaluated against a baseline set individually for each member state.[145] A significant portion of the state's annual report is devoted to information for evaluating the prospects for the ratification of the fundamental conventions and legal instruments to promote the rights afforded therein,[146] despite the ILO's explicit statement that the "the annual review should be the occasion to go beyond descriptions of legislation in order to assess progress."[147]

To sum up, this Part has demonstrated how and in what form the statist model dominates the supervisory system and other key operational functions of the ILO. However, recent global economic, political, and legal developments mandate a new conception of responsibility. By contrast to the state-centered conception of responsibility that, by and large, currently governs international labor law, we argue that a conception of shared responsibly is better suited to contend with the contemporary challenges faced by ILO. In the next Part, we present such an alternative conception of responsibility.

III. SHARED RESPONSIBILITY AND LABOR

When we use the term "shared responsibility," we mean that the responsibility to remedy the unjust conditions suffered by workers anywhere in the world does not necessarily rest with only one particular state or one particular actor, but rather, could be shared by various actors and

Review, ILO, http://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/publication/wcms_098135.pdf (last visited Feb. 17, 2013).

144. THOMANN, *supra* note 4, at 78.

145. "Annual reports are in the form of country baselines. They continue to be in the form of annual reports only in the case of new member states." *Current Compilation of Country Baselines*, ILO, http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines/lang—en/index.htm (last visited Feb. 17, 2013). For the compilation of county baselines, see *id*.

146. The Annex to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, states: "The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration." *ILO Declaration*, *supra* note 1, annex, pt. I, para. 1.

147. ILO Governing Body, *Review of Annual Reports under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work: Introduction by the ILO Declaration Expert-Advisers to the Compilation of Annual Reports*, para. 6, GB.289/4(&Corr. 1 & 2), 289th Sess. (Mar. 2004), *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/gb-4.pdf.

institutions.

Our conception of responsibility corresponds to what David Miller has termed *remedial responsibility*. Miller distinguishes between *remedial* and *outcome* responsibility. The latter determines whether an agent produced an outcome and thus is required to compensate for the damage it caused, whereas the former determines whether an agent bears an obligation to remedy harm not necessarily caused by the agent itself.[148] The two types of responsibility are not completely detached. One of the factors taken into account in allocating remedial responsibility is who bears outcome responsibility.[149] In discussing global justice and labor, remedial responsibility is our main concern, since, as Miller explains, "the idea of remedial responsibility potentially applies whenever we encounter a situation in need of remedy."[150] The starting point of any consideration of remedial responsibility, then, is an unjust state of affairs requiring some kind of correction, which raises the question of whose responsibility it is to make this correction.[151] In the context of labor, when the goal is defined in terms of ensuring a minimum of basic rights and standards, considerations of remedial responsibility focus on the question of who bears the responsibility to ensure workers these basic rights and standards.[152] As described above, many workers in the world today are in desperate need of such a remedy. Their hardship demands a reassessment of who is responsible for this remedy. Our conception of shared responsibility rests on the assumption that in the contemporary global economy this remedial responsibility could be shared by more than one particular actor.

The idea of shared responsibility is increasingly arising in both legal

148. MILLER, *supra* note 3, ch. 4; *see also* Toni Erskine, *Assigning Responsibility to Institutional Moral Agents: The Case of States and Quasi-States*, *in* CAN INSTITUTIONS HAVE RESPONSIBILITIES?: COLLECTIVE MORAL AGENCY AND INTERNATIONAL RELATIONS 1, 85 (Toni Erskine ed., 2003) (making a similar distinction between *prospective* and *retrospective* responsibility). For a different classification of types of responsibility, see DARREL MOELLENDORF, GLOBAL INEQUALITY MATTERS 143 (2009).

149. *See* MILLER, *supra* note 3, at 84-85.

150. DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 98 (2007).

151. Our understanding of remedial responsibility is broader than Miller's. We accept Moellendorf's criticism of Miller, asserting, "Miller focuses on simple interactional problems in which the assignment of costs for remediating an event should be guided by the assumption that before the tort-like events holdings were just. That assumption cannot guide us when the background institutions, which establish holdings, are in question." MOELLENDORF, *supra* note 148, at 146. Thus, for example, the current legal distribution of benefits and burdens between employers and workers should not necessarily be considered a just distribution.

152. Remedial responsibility may be allocated to individuals or to collectives. What types of collectives are capable of acting as moral agents is a question much debated in the philosophical literature. For the purpose of this discussion, we consider entities that may bear collective responsibility those that have the capacity to deliberate morally and to decide collectively on a purposive action. *See* Erskine, *supra* note 148, at 69-74. Such entities may include identity groups such as nations or organized religious groups, as well as institutions such as corporations, political parties, and international institutions.

and philosophical contexts. From a legal perspective, the need to address the new complex economic and social realities by extending the scope of responsibility has been recognized recently in several court decisions at both national and transnational levels of litigation. These decisions have introduced innovative doctrines that rest on a legal understanding of shared responsibility in the areas of tort law, environmental law, and human rights.[153] A growing number of political philosophers and legal scholars are attempting to develop new conceptions of shared responsibility to address problems of background injustice stemming from economic, political, and legal global changes. In what follows, we discuss two such conceptions of shared responsibility, one proposed by Margot Salomon and the other by Iris Young, and analyze their limitations in terms of applicability to the current challenges faced by the ILO. We then propose a new model of shared responsibility that elaborates on the "labor connection model" we developed in a previous article.[154] This conception of shared responsibility offers, in our view, not only a theoretical basis, but also the practical foundation for implementing the idea in the ILO.

A. *Shared Responsibility: An International Approach and a Global Civil Society Approach*

In her book *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Margot Salomon develops a novel conception of shared responsibility among states toward the world's poor in developing countries. Analyzing existing international conventions, particularly the Declaration on the Right to Development, Salomon argues that sustainable progress toward implementing the right to development requires not only that states adopt effective policies, but also elevated levels of international cooperation and shared responsibility among states.[155] In contrast to the existing outdated conceptions of international human rights law, which rest on the assumption that territorial states bear principal responsibility for human rights, Salomon claims that the effective realization of economic and social rights imposes certain responsibilities on states other than the victims' own state and entails that states act collectively and take proactive steps to discharge their shared responsibilities in the global economy.[156] While Salomon recognizes the primary responsibility of

153. *See* OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM, ch. 6 (2004) (regarding the doctrine of "direct liability" introduced by the UK Supreme Court); *see also* SALOMON, *supra* note 9, at 64; Ariel Porat, *Collective Responsibility in Tort Law*, 23 MISHPATIM [LAWS] 311, 322-25 (2004) (regarding the doctrines of "market share liability" and "enterprise liability" in US tort litigation) (Isr.).

154. Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Global Justice, Labor Standards, and Responsibility*, 12 THEORETICAL INQUIRIES L. 117 (2011).

155. SALOMON, supra note 9, at 64-65.

156. *Id*. at 98-101.

developing states for promoting human and social rights within their own territories and remedying the deteriorated social, health, and economic conditions, she argues that this "does not weaken what is essentially a complementary duty of the international community to remedy the violation of minimum essential levels of economic, social and cultural rights."[157] This suggests a need for a reform of the global economic system as a whole. She calls for the implementation of the due diligence standard, where the existence of negative effects proves fault on the part of the states and demonstrates that states should have acted differently or foreseen the outcome of their activities.[158] Moreover, in circumstances where basic human rights have been violated in the global context, states that are the beneficiaries of the global order especially have a shared responsibility, namely, a positive duty, to take action to remedy the violation and prevent its continuation.[159] One of the main justifications for such a duty is that states that benefit from the existing global order have greater capacity to rectify the wrongful state of affairs.[160]

While Salomon has taken an important step forward in demonstrating the need to enhance global cooperation among states to achieve development goals, her analysis centers on the legalities of international relations among states and neglects to take into account actual global economic and social processes that affect the global labor market. These would include the increasing role played by transnational production chains and that of private actors wielding enormous economic power, often greater than that of many countries. By focusing on responsibility shared by states alone, Salomon's conception does not address the particular problem of worker exploitation on the interactional level and thereby fails to assign responsibility to many effective actors with a profound capacity to remedy unjust working conditions—for example, employers and other private actors who are participants in the transnational production chains.

By contrast to Salomon and her legal theory of shared responsibility that addresses interstate relations, Iris Young has proposed a political model of shared responsibility that contends with injustice on the *interactional* level and includes private actors and civil society.[161] She explicitly formulated her model to address existing exploitative working conditions in the global labor market, particularly in sweatshops in the apparel industry. Young's model, termed "the social connection model of responsibility," is

157. *Id*. at 184.

158. *Id*.

159. *Id*. at 192.

160. *Id*. Salomon writes: "However, *if basic rights have already been violated in a global context*, and, for example, people are starving, then the obligation imposed is also positive—that is, every state, to a greater or lesser degree, is under obligation to take action to remedy that violation and prevent its continuation." *Id*. at 192.

161. *See* YOUNG, RESPONSIBILITY FOR JUSTICE, *supra* note 8, at 123-51.

based on the presupposition that all those who take part in what she calls "the social structure" share a moral responsibility to remedy workers' unjust conditions.[162] "Our responsibility derives from belonging together with others in a system of interdependent processes of cooperation and competition through which we seek benefits in the aim to realize projects."[163]

Young's model of shared responsibility is political, rather than legal. It does not seek to identify the particular agents that violated workers' labor rights in a specific case. Instead, it rests on the understanding that harm resulting from structural injustice is a consequence of the actions of millions of agents who contribute, through their participation, to the process that produces unjust outcomes in the apparel industry. These agents include, according to Young, unskilled, immigrant, and potential workers, as well as entrepreneurs, investors in large exporting firms, executives in multinational corporations, factory owners, city governments, consumers, universities, and members of the fashion industry such as designers and fashion journal editors.[164] The responsibility to remedy the structurally unjust working conditions in sweatshops is shared by all these agents. This responsibility can be discharged only through collective action, defined in political terms.[165] In Young's words, "the point is not to blame, punish, or seek redress from those who did [wrong], but rather to enjoin those who participate by their actions in the process of collective action to change" the injustice produced through structures.[166]

According to Young, this responsibility is not shared equally. She suggests four parameters for allocating responsibility based on the actor's position in the social structure:[167] (1) *power*, actual or potential, to influence the unjust process at hand; (2) *privilege*, that is, the level of benefit from the structural injustice; (3) *interest* in the transformation of the structural injustice, which, as she notes, unfortunately tends to coincide with minimal

162. *Id*.; Young, *Responsibility and Global Justice*, *supra* note 3, at 112.

163. Young, *Responsibility and Global Justice*, *supra* note 3, at 119. Social connections are viewed by Young as prior to political institutions both ontologically and morally. Similarly to Locke and other social contract philosophers, as well as more modern theorists like Charles Beitz, see CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 78-79 (1979), and Onora O'Neill, see ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING ch. 4 (1996), Young argues that political institutions arise because people need them to regulate their social connections. According to Young, "the moral status of political institutions arises from the obligations of justice generated by social connection: such institutions are instruments through which these obligations can be discharged." Young, *Responsibility and Global Justice*, *supra* note 3, at 105. In this sense, the nationalist global position "makes prior what is posterior from a moral point of view." *Id*. at 105.

164. *See* Young, *Responsibility and Global Justice*, *supra* note 3, at 112, 113, 116.

165. *Id*. at 123-25.

166. *Id*. at 122.

167. *Id*. at 125-30.

power to effect such a transformation; and (4) *collective ability*, that is, the relative ability to remedy the situation by joining others in taking collective action to change unjust structures.[168] Political collective action can be achieved by pressuring state institutions to change this reality, but the goal can also be attained through global interaction like in the case of the antisweatshop movement.[169]

Young's political conception of shared moral responsibility toward sweatshop workers could justify some practical solutions to the problem of compliance with international labor standards, particularly in the realm of civil society. Moreover, her social connection model is broad enough to encompass additional spheres that are characterized by unjust background conditions in the current global economy, such as the environment, for example. However, the political nature of Young's theory is not compatible with our present goal, namely, to develop a theory of shared responsibility that can guide the practices and procedures of the ILO. Young's model calls for collective political action by millions of agents around the world[170] whereas the conception of shared responsibility required for the ILO should be more legalistically conceived, striving to expand the scope of actors that bear responsibility for a specific violation of labor standards as they are defined under ILO conventions.

Moreover, according to Young, all actors that partake in the social connection bear some responsibility for workers' rights. These include actors, whether agents or institutions, that do not play a role in the chain of production (for example, consumers, municipalities, and fashion designers).[171] However, we argue that greater responsibility to remedy the unjust conditions of workers is borne by actors who partake in the *labor connection*, which is defined either in legal terms of employer-employee relations or in substantial terms, that is, actors who contribute to the production chain and participate in bringing a product to the marketplace (including manufacturers and distributors).[172]

In the next Section, we lay out our conception of shared responsibility, which better fits the realities of international labor and could apply to existing international labor institutions such as the ILO. This conception draws from our model of shared responsibility for international labor, which

168. *Id*.

169. For a more detailed and thorough criticism of Iris Young's approach, see Dahan, Lerner & Milman-Sivan, *supra* note 154, at 449-51.

170. *See* Young, *Responsibility and Global Justice*, *supra* note 3, at 123.

171. *Id*. at 107-11.

172. This is especially true in the case of what has recently been termed "super employers," such as Wal-Mart, which is a prominent example. *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 97-103 (2010).

we have termed the "labor connection model."[173]

B. *The Labor Connection Model and Principles of Shared Responsibility*

Under the proposed labor connection model, responsibility for remedying the unjust conditions of workers in the global era does not rest with one agent or institution, but, rather, is shared, albeit unequally, amongst the various actors in the global labor market. These include actors on the interactional level (for example, employers, private companies, and consumers) and on the institutional level (for example, states and international institutions).[174] On both levels, assigning responsibility for workers' welfare is an intricate and complex task. The responsibility for working conditions is not contingent on conventional legal definitions of employee-employer relations but instead on a set of principles that guide the allocation of responsibility among all the participants in the production chain as well as political institutions that impact the global labor market. In this Section, we outline four such principles drawn heavily from the work of Christian Barry.[175]

1. The Connectedness Principle

The principle of connectedness has special significance in the sphere of labor. Connectedness—that is, the existence of a special relationship between people—creates unique moral obligations. In contrast to obligations toward anonymous others, the obligations that arise from connectedness, also termed "associative duties," carry extra moral weight.[176] Under Christian Barry's definition, the principle of connectedness can be construed in two different ways: first, in terms of shared identity, for example, membership in a community, nation, or tribe; and second, in terms of participating in a joint activity, for example, working in a factory. When this principle is applied in the labor context, the joint activity meaning becomes a key factor in determining how responsibility toward workers is distributed. Labor relations are characterized by an intricate web of mutual responsibilities and rights, in which workers enjoy special protection and status. This unique character is expressed in the legal sphere by treating labor contracts as relational contracts, as distinguished from transactional contracts. A transactional contract is of short duration, describes a precise transaction of money and goods, usually a onetime-only exchange of an easily commoditized good for cash, and includes no element of altruism and

173. Dahan, Lerner & Milman-Sivan, *supra* note 154, at 451-56.

174. MILLER, *supra* note 3, at 62.

175. *Global Justice: Aims, Arrangements, and Responsibilities*, *in* CAN INSTITUTIONS HAVE RESPONSIBILITIES?, *supra* note 148, at 218, 227-31.

176. *See* SAMUEL SCHEFFLER, BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 48-65 (2001).

little or no future cooperation. Parties to relational contracts, in contrast, develop long-term relationships that are based on trust and solidarity and far exceed the terms of the original document.[177]

The expansion of the chain of production beyond state borders and the emergence of new modes of production have led to a new reality, where the traditional legal definition of employer-employee relations can no longer serve as the sole criterion for determining the degree of connectedness between parties. The question of which actors should be regarded as partaking in the joint activity that we have termed "the labor connection" is one of the central dilemmas of global labor today. For example, one may argue that manufacturers, subcontractors, and investors could be considered actors in the labor connection. Some, such as Young, argue that participants in the "joint activity" of sweatshops should include such additional actors as consumers, fashion designers, and local municipalities.[178] While we agree with Young that such actors should bear some degree of responsibility for remedying the unjust labor conditions, their responsibility is of a lesser degree relative to actors that we define as taking part in the *labor connection*. In the labor connection, the actors that we define as part of the 'labor connection' have greater responsibility because of the greater connectedness among them.[179]

Under the principle of connectedness, within the production chain direct employers bear greater responsibility toward workers than the brands. Similarly, in the ILO context, the government in whose jurisdiction the violation occurred bears greater responsibility under the principle of connectedness than the government in whose jurisdiction the brand resides.

The principle of connectedness is also expressed in the Guiding Principles on Business and Human Rights,[180] on which we will elaborate below. According to the Guiding Principles and Ruggie's commentary to the Principles, "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[181] Thus, a home country where the

177. Robert. C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 151 (2005); Ian R. Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431, 432-33 (2000).

178. *See* Young, *Responsibility and Global Labor Justice*, *supra* note 8, at 374–83 (discussing political responsibility as opposed to liability); Young, *Responsibility and Global Justice*, *supra* note 3, at 107, 127.

179. Determining the level of connectedness requires an elaborated theory, which will include criteria for measuring proximities and interconnections between actors both inside and outside the labor chain.

180. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, para. 19, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

181. *Id*. para. 2.

headquarters of the involved company resides has the responsibility to address the company's international activities in terms of treatment of human rights. Regarding corporate responsibility to respect human rights, Ruggie's commentary refers to "adverse human rights impacts [of corporation] . . . either through their own activities or as a result of their business relationships with other parties."[182] According to Ruggie, the core companies are expected not only to refrain from "causing or contributing to adverse human rights impacts through their own activities, and [to] address such impacts when they occur," but also to "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[183] Thus, core companies are responsible for what happens in their affiliate operations, not only when their decisions contributed to the harm suffered by third parties, but also when the companies did not make any such decision and were merely associated with the affiliate companies or contractors that violated human rights.[184]

2. The Capacity Principle

There are various factors that determine the capacity of agents to rectify the unjust conditions of workers. One factor is scope of influence, that is, the number of workers whose labor conditions could be improved by the actions of the given agent or institution.[185] Actors on the interactional level could generally have a lesser scope of influence than powerful actors on the institutional level. A local factory owner who has the capacity to remedy the unjust working conditions of several workers at one textile factory in Indonesia has a smaller scope of influence than an international entity such as the WTO, which could link trade benefits to working conditions in the particular industry and thus has the capacity to ameliorate the conditions of many workers in that industry. Accordingly, as discussed in Part II, the ILO regards its member states to be the primary agents bearing remedial responsibility for the work conditions of each of their citizens.

Capacity can also be measured by the extent of political and economic

182. *Id*. para. 13, cmt.

183. *Id*. para. 13(a)-(b).

184. For a detailed and illuminating analysis of the Guiding Principles approach to this issue, see Radu Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Rights*, *in* THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION 169, 178 (Radu Mares ed., 2012).

185. This use of the term "influence" is different from John Ruggie's use. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, paras. 7-8, 14-15, U.N. Doc. A/HRC/8/16 (May 15, 2008) (by John Ruggie) [hereinafter Ruggie, *Clarifying the Concepts*].

power an actor wields to operate on both the institutional and interactional levels. Actors may be able to influence the rules of global trade or impact the structure of global institutions so as to remedy unjust working conditions around the world. Exemplifying this are the power each of the G8 (now G20) states has to determine the structure and rules of the global economy and the ability of certain select states to determine the rules and policies by which the International Monetary Fund, WTO, or World Bank operate. Strong economies could also impose unilateral sanctions linked to labor standards.[186] In this context, it could be concluded that under the principle of capacity, the world's powerful states bear greater responsibility than the weaker states to remedy unjust work conditions. TNCs should be similarly examined in terms of the leverage they can bring to bear in these forums.

Further, the capacity of agents or institutions depends on the definition of the desired standards and norms to be implemented. And, moreover, the capacity to implement a standard varies according to the nature of the agent that is responsible for remedying the unjust labor conditions. Compare, for example, the capacity of TNCs and states to eliminate child labor. TNCs could have the ability to enforce health and safety regulations throughout their global production chains; and with regard to child labor standards, their primary and most salient ability is to refrain from employing children in their factories.[187] Yet in certain circumstances, the nonemployment of children in factories might worsen their situation, such as where their only alternative is to work in the informal sector, where conditions might be substantially worse.[188] States, as opposed to TNCs, are generally considered the main agents able to undertake the responsibility of rectifying conditions in these contexts. Under certain conditions, states may have the capacity to adopt comprehensive social and economic policies, such as establishing a comprehensive schooling system and other social services (child allowances, pensions, access to credit, etc.), which would give children access to education and thereby free them from the need to work for subsistence.[189]

Lastly, the relative degree of capacity would be taken into account in determining each actor's responsibility, and in some cases, one actor's capacity will be determined by the capacity of other actors. In certain instances, however, the capacity principle should not be applied in the sense

186. For an overview, see HEPPLE, *supra* note 5, at 89-105.

187. Another option is part-time employment of children, which affords them some income but also frees them to attend school part-time. Debra Satz, *Child Labor: A Normative Perspective*, 17 WORLD BANK ECON. REV. 297, 303-06 (2003).

188. *See id*. at 303.

189. The question of which policies are effective for combating child labor is hotly debated. *See, e.g*., Drusilla K. Brown, Allan V. Deardorff & Robert M. Stern, *Child Labor: Theory, Evidence, and Policy*, *in* INTERNATIONAL LABOR STANDARDS 195, 218, 225-37 (Kaushik Basu et al. eds., 2003)(discussing limits on child labor, improvements in educational infrastructure, financial incentives, etc.).

of a measure of the capacity of each individual actor, but, rather, to take into account the joint capacities of more than one actor. Indeed, there could be cases in which assigning responsibility based on the combined action of two actors, each of whom has less capacity than an individual third actor, could be more effective than assigning responsibility to the actor with the highest level of individual capacity.

3. The Beneficiary Principle

In the context of global labor, benefit primarily refers to economic gain. For example, in the international chain of production, TNCs, more so than subcontractors or managers of local factories in developing states, benefit from production that is carried out under unjust conditions. Prakash Sethi has gathered illuminating data on the earnings of different corporations as compared to workers' pay in developing countries.[190] Corporations such as Nike and Reebok earn a gross profit margin of nearly forty percent. The cost of making a pair of Reebok shoes is thirteen U.S. dollars, with only one dollar paid for labor, while the shoes typically sell for sixty to seventy dollars a pair.[191] In this sense, if responsibility is distributed solely according to the principle of benefit, the TNC has a greater responsibility to remedy the unjust labor conditions than to the subcontractors. Yet economic benefit can be direct and indirect. Whereas TNCs benefit directly from cheap labor under unjust conditions, the governments of developed states, as recipients of taxes paid by the TNCs whose management is located in their territories, can be considered indirect beneficiaries.

Benefit can be understood not only in economic terms but also in political terms. Taking the right of freedom of association as an example, nondemocratic regimes stand to benefit from an un-unionized labor market, since unions may present a threat to their political dominance and authority. Similarly, neoliberal governments treat unions as obstacles to the economic efficiency of the laissez-fair market and regard their actions as interfering with property rights and contractual freedoms. In the context of the ILO, pragmatic considerations would suggest focusing on economic gain, however, and identifying those actors who benefit economically from production under unjust conditions. Economic benefit can serve as a relatively exact measurement of the benefit extracted by each actor. In other words, the more a particular private or public actor benefits from the violation, the greater its responsibility toward the workers.

4. The Contribution Principle

Christian Barry provides a possible application of the principle of contribution. This principle, under his definition, mandates that "agents [be]

190. S. PRAKASH SETHI, SETTING GLOBAL STANDARDS 58-59 (2003).

191. *Id.*

responsible for addressing acute deprivations when they have contributed, or are contributing, to bringing [those situations] about."[192] In the labor context, this translates into agents' responsibility for remedying unjust labor conditions that they are contributing, or have contributed, to bringing about. Barry proposes a detailed and complex methodology for measuring the degree of the contribution of agents or institutions to unjust situations. Following his analysis, by contributing to unjust conditions of workers we mean that the conduct of an agent or institution was causally *relevant* to the unjust situation. In other words, it was a necessary condition in a set of actual antecedent conditions that was sufficient for its occurrence. "A's conduct did not merely allow a causal sequence that had antecedently put B under threat of acute deprivation to play out, but rather *initiated, facilitated or sustained* it."[193]

A complete application of the principle of contribution to unjust work conditions would require a detailed empirical investigation of activities and interactions between actors within the global labor market and their influence on the creation of unjust situations. Thus, for example, where networks of production are involved, the ILO could determine whether brands have pressured the other members of the network to violate the law, either directly or indirectly.

These four principles of shared responsibility could serve as a guideline for allocating responsibility among actors—public or private—for remedying the unjust labor conditions of workers across the globe. One question that has yet to be answered is how much relative weight to give to each of these principles. Scholars are divided on whether greater significance should be given to one of the principles, such as the contribution principle, for example.[194]

This Part presented the four principles for allocating shared responsibility as abstract principles; it must be noted that their concrete application depends on the context in which they are applied.[195] In the following Part, we will outline the way in which these principles can guide reforms within the ILO's supervisory system and facilitate the replacement of the traditional statist conception of responsibility underpinning the ILO with a new conception of shared responsibility.

192. Christian Barry, *Applying the Contribution Principle*, 36 METAPHILOSOPHY 210, 211 (2005).

193. *Id.*

194. Barry, *supra* note 192; MILLER, *supra* note 150, at 81-109.

195. The allocation of shared responsibility depends not only on the circumstances under which labor standards are violated and on the relationship betwee the various actors involved, but also on the nature of the labor standards and policy goals sought.

IV. APPLICATION IN THE FRAMEWORK OF THE ILO

The shared responsibility model presented in the previous Part should be understood as a regulatory ideal in that it is clearly impractical to expect that it could be fully implemented in the near future. At the same time, it could also represent an objective toward which the ILO should aspire. The goal would be to narrow the discrepancy between the actors that should be held morally responsible for providing workers core labor rights and the actual assignment of legal responsibility by the ILO.

Realizing this goal would require significant reforms in the ILO's operation, the specifics of which should be worked out internally. In this Part, we will offer several preliminary suggestions for such reforms, but they will not amount to a complete blueprint for all the necessary changes. Our underlying assumption, as explicated below, is that the ILO already embodies values that are close to the shared responsibility ideal, especially relative to other international organizations. Thus, there is little need to introduce radical changes to its current institutional design. A conscious move toward an ideal of shared responsibility entails political will that is currently not discernible in the ILO.[196] By relying on the institutions and procedures already implanted in the ILO, we hope to offer the necessary inspiration for such a move.

What might the supervisory system look like under the ideal of shared responsibility? Our proposal proceeds in two stages. The first stage is to identify the potential actors that should be considered responsible for remedying unjust labor conditions according to the four principles of shared responsibility just defined in Part III. As we demonstrate, this process leads to the allocation of responsibility for workers' rights among key actors that are overlooked by the existing supervisory systems: (1) states other than the state in whose territory the labor rights are violated and (2) powerful TNCs that participate in global production chains. In the second stage, we elaborate on the particular procedures within the supervisory system that should be reformed for trans-border enforcement of labor standards, both in the framework of the regular reporting procedure and in the special complaints procedure.

A. *Expanding the Scope of Actors Responsible for International Labor Standards*

The ILO identifies two types of violations of labor standards. One type is legislative in nature, which we accordingly term "legal violations," namely, an inadequacy in the legal scheme in a given country. In such cases,

196. *See* Mark Barenberg, *Sustaining Workers' Bargaining Power in an Age of Globalization*, EPI BRIEFING PAPER NO. 246 (Econ. Pol'y Institute, Washington, D.C.), Oct. 9, 2009, at 19, *available at* http://www.epi.org/publication/bp246/; Guy Standing, *The ILO: An Agency for Globalization?*, 39 DEV. & CHANGE 355, 380 (2008).

the territorial state clearly bears responsibility for the violation and its amendment. There is, however, a second type of violation, which we term "practice violations," where workers' rights are violated in practice. In such cases, actors other than the territorial state may bear responsibility for the violation. While the territorial state always bears some degree of responsibility for violations within its borders, the ILO should not automatically assume that other states or private employers are without responsibility. Indeed, in practice violation cases, the ILO should identify and assign legal responsibility to key actors according to procedures that we propose, shortly, as part of the reformed supervisory system.

In addition to identifying the responsible actors, the four principles of responsibility can assist in determining how the responsibility should be allocated among them. The principle of capacity would be applied by the ILO in a way that resembles the operation of the traditional notion of responsibility; however, the application of the other three principles (benefit, connectedness, and contribution) would challenge this conception. In the paradigmatic case of a labor rights violation in a manufacturing factory in a developing country that is part of a production network, where the TNC headquarters are located in a developed country, the following actors could, in principle, be deemed responsible for remedying the unjust labor conditions under the shared responsibility model: (a) the state in whose territory the violation occurred; (b) the direct employer that violated the rights of his or her employees; (c) the brand or TNC; (d) additional actors who partake in the specific labor connection;[197] (e) the state in whose territory the highest level of management (brand) resides; and (f) the workers whose rights were violated, when organized.[198]

Pragmatic considerations seem to imply that the ILO should focus on several main candidates for sharing responsibility. For example, once a supply or distribution chain is identified, the ILO should engage with the most powerful player in the chain.[199] Thus, the ILO could set a guideline whereby for each production chain, it assigns responsibility only to the brand and sets aside other smaller identifiable players.[200] This could be

197. These may be identified either in legal terms of employer-employee relations or in substantial terms, as discussed above—those who participate in the production network.

198. "Indeed, the line that separates those who are included in the "thick labor connection" and thus bear special duties and commitments from those who are part of the broader 'social connection' is not clear-cut. For example, one may debate to what extent fashion designers are part of the apparel industry 'labor connection' and therefore have greater responsibility toward workers' conditions." Dahan, Lerner & Milman-Sivan, *supra* note 154, at 118 n.60. Our theoretical framework could, of course, be further refined and negotiated. In the ILO context, however, pragmatic considerations would have to be weighed as well in drawing the line between actors who are deemed responsible and those who are not.

199. Ruggie, *Clarifying the Concepts*, *supra* note 185, at 5.

200. While this should be a general guideline, under specific circumstances, other actors may be identified as bearers of responsibility for international labor standards, depending on the specific context in which the violation occurred.

rationalized by an underlining assumption that it is usually the brands that will be held responsible under all four principles of responsibility. It is also important to note however, that the shared responsibility model does not "reduce" the responsibility of the territorial state, which would remain the key actor responsible for any violation within its territory. Others could, in appropriate cases, merely share this responsibility.

The shared responsibility model implies assigning responsibility to groups of actors that bear no responsibility for labor standards under the current, statist-oriented supervisory system: first, to state actors other than the territorial state for actions that occur outside of their jurisdiction and, second, to private actors (for example, TNCs). This expansion of the scope of actors that could bear responsibility for labor standards raises a set of practical problems. To begin with, there is the threshold question of whether there would be the political will to implement such reforms. This issue is beyond the scope of this Article; suffice it to say that it has been clearly noted in the past that the ILO suffers from political impasse.[201] Moreover, the ILO would likely encounter legal and conceptual difficulties in implementing this model of responsibility. States would be wary of accepting responsibility for labor rights violations outside their jurisdiction and of attributing responsibility to private bodies. Nevertheless, as the discussion below will illustrate, the path to overcoming these problems is through notions and practices already prevalent in the existing international labor regime.

1. State Responsibility Beyond Territorial Borders

The notion of states taking responsibility for labor standard violations that occur outside their jurisdiction is not unprecedented in the ILO legal scheme. The ILO has incorporated, for example, states' obligations to cooperate across borders in its 1989 Indigenous and Tribal Peoples Convention, which includes the obligation to take appropriate measures, including by means of international agreements, to facilitate economic, social, and other contacts and cooperation between indigenous and tribal peoples across borders.[202] In the past, the ILO has explicitly requested that governments extend their jurisdiction beyond their territorial boundaries to ensure compliance by even those nationals acting abroad.[203] Thus, it seems that the notion of holding states responsible for violations outside their territory should not be dismissed out of hand, bearing in mind, of course,

201. *See supra* note 196.

202. Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 32, June 27, 1989, 28 I.L.M. 1382.

203. Examples are the ILO Convention Concerning the Regulation of Written *Contracts of Employment of Indigenous Workers* art. 19, June 27, 1939, 40 U.N.T.S. 281 (shelved), and ILO, *Recruiting of Indigenous Workers Convention*, 1936, art. 24, C050, 20th Sess. (June 20, 1936) (shelved).

that the capacity principle would preclude assigning responsibility to any state unable to assist workers in a meaningful manner.

Recently, international law scholars have made similar proposals to assign responsibility for rights violations by TNCs to the state where the TNC's management resides (its "home state" or "state of origin").[204] Some have suggested, for example, that the state of origin be held responsible for human rights violations in cases where the corporation involved performs governmental roles—with or without authorization—or when the home state fails to apply the required standard of due diligence toward the acts of the corporation.[205]

Moreover, assigning responsibility to states for violations occurring beyond their territorial jurisdiction has the advantage of helping offset the inequality between developing and developed states that prevails in the ILO. This inequality begins with standard setting. Notwithstanding the formal equality in voting rights, committee membership, and other procedures, decision making in the ILO with respect to standard setting is unequal in several ways. Even at the preliminary stage of replying to preparatory questionnaires, the labor administrations in developing countries do not have sufficient personnel to provide detailed responses.[206] Moreover, at the norm-generation stage, there is great inequality in the capacity of delegates from different member states to analyze the information received in the questionnaires, draft appropriate and timely responses, and benefit from the assistance of advisory staff. In addition, developing countries find that the size of their delegations to the annual Conference is not large enough for them to have an impact on the various committees that formulate standards.[207] Developing countries lack the capacity for independent, professional research and other means of gathering information and thereby influencing the standard-setting process.[208] The current system of

204. Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177, 194-201 (2008).

205. ALEXANDRA GATTO, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS: OBLIGATIONS UNDER EU LAW AND INTERNATIONAL LAW 72 (2011).

206. *See* J.M. Servais, *Flexibility and Rigidity in International Labour Standards*, 125 INT'L LAB. REV. 193, 194 (1986).

207. *Id.*

208. The ILO has considered over the years methods of improving the equality of participation of member states in the standard-setting process. For example, it has considered proposals aimed at providing financial assistance to countries that cannot afford to send large delegations to the Conference and at expanding the preparatory consultation on new instruments at the regional level. *See* Servais, *supra* note 206, at 194-97, 194 n.3 (citing the Int'l Lab. Conf., June 6-26, 1984, *Report of the Director General*, 70th Sess. (1984), and ILO, *Follow-Up of Conference Discussion on International Labour Standards*, at paras. 4-5, 16, Doc. No. GB.228/4/2 (1984)). The obstacles to egalitarian, inclusive participation are enormously compounded by the absence of representation for such groups as migrant workers, informal workers, women, and rural workers. The most vulnerable workers, those whose interests are not spoken for by national workers' organizations, have no voice in the legislative

supervisory mechanisms—whereby the ILO assigns responsibility only to those states on whose territory violations occur—intensifies this inequality between developing and developed states because so many of the violations occur in developing countries.[209] Extending responsibility to states that could assist in remedying these violations—for example, to the states in which the brands reside—would be a more balanced representation of general responsibility for labor conditions. In this respect, our proposed model of shared responsibility conforms better with the complex reality of global economic and political interdependence than the ILO's current statist model of responsibility.

2. Private Actors' Responsibility

Imposing responsibility on private entities could prove to be even more controversial. Indeed, this would have been unheard of in the traditional international law that evolved in the first decades of the twentieth century.[210] In recent years, however, we have been witness to several serious attempts to internationalize the regulation of corporate social responsibility. These efforts have been made by the United Nations in the framework of the Global Compact in 2001. The Global Compact specifies ten principles regarding the responsibilities of transnational companies in the areas of human rights, labor, the environment, and anticorruption.[211] In addition, in 2003, a five-member U.N. Working Group on the working methods and activities of transnational corporations formulated its Norms on the Responsibilities of Transnational Corporation and Other Business Enterprises with Regard to Human Rights.[212] The Norms were approved by the Sub-commission on the Promotion and Protection of Human Rights, but strong opposition from businesses and several states led to the document's

process of ILO standards.

209. *See* David Weissbrodt and Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,* 97 AM. J. INT'L L., 901, 901 (2003). Thus, for example, child labor is most prevalent in Asia, and developing countries are adamant in their opposition to freedom of association. *See*, Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. I. INT'L ECON. L., 61, 74-76 (2001).

210. *See supra* note 47 and accompanying text.

211. U.N. GLOBAL COMPACT, *supra* note 28.

212. *See* Sub-Comm. on the Promotion and Protection of Hum. Rts., Comm. on Hum. Rts., *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Commission*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). For an extensive analysis of the Norms and their importance for the regulation of transnational corporations by international law, see Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms of the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2005).

rejection in 2004 by the Human Rights Council.[213] In 2011, however, the Human Rights Council endorsed The Guiding Principles on Business and Human Rights drafted by John Ruggie, the former U.N. Secretary General's Special Representative on the issue of human rights and transnational corporations.[214] This document, which seeks to guide transnational corporations on their responsibilities for human rights,[215] outlines the duty of the state to protect human rights, corporations' responsibility to respect human rights, and victims' access to remedies. The violation of human rights by TNCs is attributed to the limits of the state to protect human rights due to what has been termed the "governance gap," namely, the declining ability of national governments to follow, regulate, and constrain the activities of corporate actors who have the capacity to move from one jurisdiction to another, alongside the expansive power of multinational corporations and the weakened capabilities of the nation-state in a globalized world.[216] Because of the governance gap, states are unable to act against TNCs that violate human rights, and in some cases unwilling, for fear that such a policy would discourage foreign investment.[217]

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213. For a detailed historical description of the UN's position on transnational corporations, see Deva Surya, *Guiding Principles on Business and Human Rights: Implications for Companies*, 9 EUR. CO. L. 101 (2012).

214. *Guiding Principles*, *supra* note 180; *see* Press Release, U.N. Off. High Comm'nr for Hum. Rts. [UNHCHR], New Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11164 (last visited Feb. 21, 2013).

215. The Human Rights Council established a five-member Working Group for a period of three years to promote the implementation of the Guiding Principles. *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNHCHR, http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx (last visited Feb. 18, 2013).

216. *See* Kate Macdonald, *Re-thinking "Spheres of Responsibility": Business, Human Rights and Institutional Action*, 99 J. BUS. ETHICS 549 (2011).

217. The Guiding Principles rest on three constitutive pillars for protecting human rights. The first pillar is a states' duty to protect against human rights abuses by third parties, including business enterprises. It includes the obligation to ensure that all entities within a state's territory or control comply with human rights norms, which requires taking steps to prevent, investigate, punish, and redress corporate human right abuses. *Guiding Principles*, *supra* note 180, pt. I. The second pillar is the corporate responsibility to respect human rights, independently of the state's ability or willingness to fulfill its duty to protect human rights. *Id*. pt. II. This responsibility supersedes national law that may govern a corporation's conduct in relation to human rights. *Id*. para. 11 cmt. To respect human rights essentially means not to infringe on rights of others. *Id*. It requires that corporations act with due diligence and address adverse impacts on human rights when they do occur. *Id*. para. 17. In the commentary of principle 19 of the GP, Ruggie states,

> Where a business enterprise cause or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact, it should take the necessary steps to cease or prevent the impact. Where a business enterprise

In addition to these mechanisms developed by the United Nations, other voluntary codes and systems have been introduced over the years, one of the most prominent being the OECD Guidelines for Multinational Enterprises, which were adopted by forty-two governments in May 2011.[218] These guidelines cover business ethics on employment, human rights, the environment, information disclosure, combating corruption, and taxation.[219] Signatory states commit to promoting these ethics among multinational corporations operating in or from their territories.

The trend of increasing recognition of corporate responsibility for human rights has not been limited to international soft law guiding principles, but has also found expression in national domestic legal systems. One example is the 2010 adoption of the conflict minerals provision of the Dodd-Frank Wall Street Reform Act.[220] Under this provision, the outcome of years of campaigning against human rights violations in the Democratic Republic of Congo (DRC), companies whose products rely on certain minerals are required to file disclosures of the country of origin of those minerals in their annual reporting to the SEC; where the origin of the minerals is the DRC or unknown, the company will be required to file an additional report explaining what due diligence it has exercised on its supply chain.[221]

International labor law is often regarded as a prime example of a legal

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> contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.

Id. at para. 19, cmt. Corporate responsibility to respect human rights refers to the "adverse human rights impacts" corporations exert either "through their own activities" or as a result of their business relationships with other parties. *Id*. para. 13. "'[B]usiness relationships' are understood to include relationships with business partners, entities in [the corporation's] value chain, and any other non-State or State entity directly linked to its business operations, products, or services." *Id*. para. 13 cmt.. The third pillar is access for victims of human rights violations to judicial and nonjudicial remedies. *Id*. pt. III. While the Guiding Principles are not intended to create binding legal obligations, they can be considered soft law that, over time, can create customary international legal obligations or serve as a basis for treaties.

218. OECD, *OECD Guidelines for Multinational Enterprises* 3 (2011) [hereinafter *OECD Guidelines*], *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf; *see* Connie De-La Vega, Amol Mehra & Alexandra Wong, *Holding Business Accountable for Human Rights Violations*, HUMAN RIGHTS (Friedrich Ebert Stiftung Int'l Pol'y Analysis, Berlin, Ger.), July 2011, *available at* http://library.fes.de/pdf-files/iez/08264.pdf.

219. OECD GUIDELINES, *supra* note 218.

220. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010).

221. *Id*. For a discussion of this example and recent developments in the realm of corporate responsibility, see Mark Taylor, *Defining Compliance: Why Recent Developments in Law and Policy Should Matter to the Corporate Accountability Movement*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE, http://accountabilityroundtable.org/analysis-and-updates/defining-compliance-why-recent-developments-in-law-and-policy-should-matter-to-the-corporate-accountability-movement (last visited Feb. 18, 2013).

regime that imposes legal and moral responsibilities on corporations.[222] This is expressed, for example, in the manner in which some ILO conventions are worded, placing direct duties on corporations.[223] The ILO adopted this approach mainly through the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy Declaration (the MNE Declaration).[224] The MNE Declaration sets forth principles to which governments, employers, workers' organizations, and multinational enterprises are expected to voluntarily adhere in the fields of employment, training, work and life conditions, and industrial relations.[225] It reflects agreement among the tripartite constituents of the ILO that "although ILO standards are intended to apply to governments, the principles underlying these instruments can be applied to business as well."[226] The MNE Declaration thus represents an initial starting point for a more stringent scheme for assigning responsibility to private bodies. Similarly to our proposed reform, the MNE Declaration has universal application, namely that companies do not have to sign or otherwise formally commit to the Declaration before their actions can be subject to scrutiny.[227] The voluntary nature of the MNE Declaration and its supervisory mechanisms has been only partially successful at best.[228] Accordingly, the ILO recently decided to

222. Ratner, *supra* note 44, at 443, 478-79 ("This global recognition that the rights of employees create duties for corporations represent a stepping stone to an acceptance by states that their rights of the citizenry can create other duties for corporations.").

223. *See, e.g.*, Convention Concerning Occupational Safety and Health and the Working Environment, art. 16.1, June 22, 1981, 1331 U.N.T.S. 279.

224. ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (3d ed. 2001).

225. The MNE Declaration further encourages all relevant actors to respect national laws and regulations, to "give due consideration to local practices," development priorities, and social aims of host countries, and to respect international obligations including international standards concerning human and labor rights. *Id.* at 3-4.

226. ILO, THE ILO MNES DECLARATION: WHAT'S IN IT FOR WORKERS? 4 (2011), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_152797.pdf.

227. For criticism of the assumption that corporate social responsibility should be applied voluntarily, see, for example, Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995).

228. The MNE Declaration is monitored by a periodic survey. The Office invites governments to answer a detailed questionnaire on the effects of the instrument in their countries. About a third of the member states and their national most-representative employers' and workers' organizations provide partial information. In the 2000-2003 survey, only sixty-two states responded. The responses received are analyzed and examined by the Governing Body, and recommendations for action based on the findings are adopted by a decision of the ILO Governing Body. An Ad Hoc Committee to reconsider the follow up mechanisms of the MNE Declaration concluded that: "the follow-up mechanism in the form of a periodic survey had not

been viewed as a success in terms of becoming an operative tool. . . ." ILO Governing Body, Report of the Tripartite Ad Hoc Working Group on the Follow-up Mechanism of the MNE

bolster its supervision of the operations of multinational enterprises.[229]

Proponents of strengthening corporate social responsibility and holding multinational enterprises more accountable have long argued that corporate social responsibility codes should be transformed into legally binding standards and that corporations could participate in protecting human rights.[230] The OECD's experience with its own voluntary guidelines exemplifies this potential: its complaints procedure has on several occasions led to the successful resolution of human rights disputes through voluntary deliberation with the involved.[231] The once widely-prevalent resistance to linking human rights with MNE business practices has become a thing of the past, with the increase in codes of conduct such as the OECD guidelines and the U.N. Global Compact.[232] In sum, the allocation of responsibility to new actors in a manner that is more in line with the global labor market is a novel idea, yet relies on notions and practices already prevalent in the international labor law regime, including ILO arrangements.

B. *The ILO's Supervisory System: Proposals for Reform*

We now proceed to some initial concrete proposals for legal reforms that would enable the incorporation of private bodies and nonterritorial states into the ILO's existing governance framework—its reporting system and complaints procedures. We begin by pointing to the existing features that already lay the groundwork for the implementation of the shared responsibility model. We then offer specific proposals for reforming the two

Declaration, app. at para. 7, GB.313/POL/9(Rev.), 313th Sess. (Mar. 2004), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_173721.pdf.

229. In November 2009, the Governing Body decided to further concentrate the work of the Office on the operations of multinational enterprises and their conformity with the principles of the MNE Declaration. The Governing Body, moreover, decided that following completion of this exercise, it would review its 1979 decision to report periodically on the effect given to the MNE Declaration, in the light of the experience gained. More recently, the Subcommittee on Multinational Enterprises submitted a supplement to the update of strategic priorities, outlining specific examples on initiatives to promote the MNE Declarations. *See* Sub-Comm. on Multinational Enterprise, Governing Body, *Update on Strategic Priorities for 2010-11: Supplement*, GB.310/MNE/2, 310th Sess. (Mar. 2011).

230. *See, e.g.*, Stephen K. Pursey, *The Trade Union View on the Implementation of Codes of Conduct*, *in* LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 277 (Norbert Horn ed., 1980).

231. An example of such a complaint that was resolved to the satisfaction of all parties involved is the 2005 complaint against Global Solutions Limited (Australia) Pty Ltd (GSL). The complaint alleged that the company had breached the Human Rights and Consumer Interest Provisions of the OECD Guidelines. The agreed mediation resulted in agreement as to ways to keep operations within the framework of human rights. *See* COLLEEN FREEMAN, CORNELIA HEYDENREICH & SERENA LILLYWHITE, OECD WATCH, GUIDE FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES' COMPLAINT PROCEDURE: LESSONS FROM PAST NGOS COMPLAINTS 23 (2006), *available at* http://germanwatch.org/tw/oecd-gui06.pdf.

232. *See* Compa & Hinchliffe-Darricarrère, *supra* note 227, at 667.

systems, each in turn, toward the implementation of the model in the ILO.

1. The Reporting System

Incorporating shared responsibility into the ILO's reporting system would entail a radical change in how the Committee of Experts operates. Such a reform would be advanced by two general measures with respect to the ILO's supervisory process. First, the ILO would have to further harmonize compliance with its core standards (or even with some other basic minimum of standards) among its member states. This would require authorizing the Organization to intensify supervision of its core standards regardless of whether a member state has ratified the relevant standards, thus narrowing states' discretion regarding which standards legally bind them to some agreed-upon minimum. Second, the shared responsibility model would entail expanding and deepening the involvement of workers' and employees' organizations in the supervisory process. This enhanced participation could require modification of the type of information requested of the states in their ILO annual reports.

Traces of these two approaches can already be detected in the current reporting system and the Committee of Experts' mode of operation. These initial manifestations of the shared responsibility model seem to indicate that reform is imminent in the direction that we suggest. We begin, then, by examining the features of the reporting system that already exhibit aspects of shared responsibility, followed by a discussion of our proposed reforms.

a. The Reporting System: Initial Signs of a Shared Responsibility Model

Elements of the ILO reporting system reflect a push toward harmonization of the Organization's norms among its member states that shifts away from the statist model in several respects. One such element is a unique reporting requirement whereby member states are required to report on the degree of their compliance with obligations set forth in conventions they have yet to ratify. This reporting requirement departs from the international law principle that states have absolute discretion in determining the standards that bind them. The authority to impose such a legal obligation, rather extraordinary in the international legal system,[233] derives from Article 19 of the ILO Constitution, which empowers the ILO to monitor unratified conventions and recommendations.[234] This authority can be understood as undermining states' sovereignty for the purpose of

233. Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, L. & CONTEMP. PROBS., Winter 2008, at 193, 195. The extent to which this authority is exceptional is part of a long-standing debate over whether the nature of ILO conventions resembles treaties or legal regulations. *See, e.g.*, Maupain, *supra* note 30.

234. *See* ILO Constitution, *supra* note 48, art. 19(7)iv.

contending with problems of interstate cooperation and coordination, and thus in line with the model of shared responsibility.[235]

This deviation from the principle of state sovereignty is manifested in the reporting system in two central exceptions to the general rule that states are legally bound only by standards they have ratified.[236] The first exceptional procedure is the General Survey.[237] Every year, the GB chooses an issue on which all member states are obligated to report, whether or not they have ratified the conventions that address the subject matter at hand. In their reports, the states are called upon to elaborate on current practice in their jurisdiction regarding the issue at hand and on the obstacles to ratification of the conventions. The General Survey creates a worldwide overview of the issue, which is published in the General Survey as a part of the Committee of Experts' annual report.

Secondly, the ILO reporting duties impose certain procedures on member states' internal ratification process that may indicate movement toward the greater harmonization of norms.[238] Under the ILO Constitution, member states must submit any new instrument adopted by the International Labor Conference to their relevant national political bodies for serious consideration of ratification and/or implementation of the standards set forth within.[239] The states have one year[240] to report that this duty has been met and that the convention was brought before the competent legislative

235. *See generally* Helfer, *supra* note 233.

236. There are in fact three exceptions, the third being the procedures for monitoring the 1998 declaration. *See infra* notes 249–255 and accompanying text.

237. The General Survey is an "[e]xamination of law and practice in a particular subject area," of all member States, regardless of their ratification of the conventions that address subject at hand, published in Report III (Part 1B) of the Committee of Experts on the Application of Conventions and Recommendations. All the general surveys conducted from 1985 are available at General Surveys Since 1985, ILO, http://www.ilo.org/global/standards/information-resources-and-publications/WCMS_164145/index.htm (last visited Feb. 18, 2013).

238. Until about 1990, this obligation was complied with at a rate of about 80%. However, this rate has since dropped sharply, partly in relation to the new members in the ILO. *See* THOMANN, *supra* note 4, at 76. However, this procedure has pressured at least some countries to seriously consider ratification. *See* Helfer, *supra* note 233, at 201.

239. ILO, *Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities*, at 4, GB.292/10, 292d Sess. (Mar. 1, 2005), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/questionnaire/wcms_087324.pdf; Comm. on Legal Issues and International Labor Standards, Governing Body, *Possible Improvements in the Standards Related Activities of the ILO: Proposals Regarding Submission to the Competent Authorities and the Representation Procedure*, at 3, GB292/LILS/1(Rev.), 291st Sess. (Mar. 2005), [hereinafter *Possible Improvements*], *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/lils-1.pdf.

240. In extenuating circumstances, member states could extend this period to a maximum of eighteen months. ILO Constitution, *supra* note 48, art. 19(5)(b), (6)(b).

authority for approval.[241] In addition, if the national legislature has refused to ratify, the states are required to justify this refusal and indicate whether the state intends to use alternative means for implementing the relevant labor standards.[242] This is an extraordinary and unprecedented procedure, for states are requested to submit to their legislature legal instruments that were not necessarily endorsed by their own relevant authorities (it is even plausible that a state could have voted against the adoption of the instrument by the ILO).[243] This reporting obligation, which raised legal difficulties when first introduced,[244] represents a further shift away from full and complete state sovereignty, toward the international harmonization of norms and a departure, as such, from the statist model.

Several aspects of the reporting system also embody the aspiration to expand the scope of actors involved in the supervisory system. There is explicit deviation from the statist model in Article 23 (II) of the ILO Constitution, which requires all governmental reports to be communicated to the national representative organizations, which in turn make their own observations as to the factual situation on the ground.[245] Moreover, the ILO has recently deepened the involvement of its functional organizations in its reporting system by assigning greater weight to their reports. In 2006, the Governing Body established guidelines for the proper treatment of comments received from employers' and workers' organizations concerning the application of a ratified convention in a nonreporting year. These guidelines are aimed at ensuring that the Committee of Experts will be able to address serious violations of legal obligations, even in nonreporting years. They provide that the Committee may request states to report outside their regular cycle when employers' or workers' organizations have directed its attention, via their comments, to severe violations of a ratified convention. In fact, in 2009, the Governing Body extended the reporting cycle on the fundamental and governing conventions from two to three years,[246] thereby

241. *Id*. art. 19(5)(c), 6(c).

242. *Id*. art. 19(5)(e), 6(d).

243. At its inception this procedure was described as innovative and bold. *See* INT'L LABOUR OFFICE, INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 268-69 (1931) [hereinafter THE FIRST DECADE]. The submission of the instrument, however, does not mean that it should be recommended: "The obligation to submit the instruments does not imply any obligation to propose the ratification of Conventions or to accept the Recommendations." *Possible Improvements*, *supra* note 239, pt. III(b).

244. See THE FIRST DECADE, *supra* note 243, at 270-71.

245. *See* ILO Constitution, *supra* note 48, art. 23(2).

246. Int'l Lab. Conf., 99th Sess., *Report of the Committee of Experts on the Application of Conventions and Recommendations*, para. 77, (2010), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123424.pdf.

> The Committee recalls that at its 77th Session (November-December 2006), it gave guidance to the Office as to the procedure to be followed in determining the

enhancing the significance of comments provided by the functional organizations on nonreporting years, which now would most likely inform a larger percentage of the Committee's work.[247]

Certain elements of the functioning of both the CEACR and Conference Committee can be described as conforming to the shared responsibility model. The Conference Committee, which receives the CEACR's comments and reports, conducts comprehensive deliberations regarding these reports, which reflect elements of the shared responsibility model in that they engage all relevant parties. The determination of the Conference Committee to conduct broadly inclusive deliberations is consistent with the shared responsibility model and its emphasis on remedial responsibility and rectifying violations. Problem solving is best served by an inclusive process, since when the key actors that bear responsibility for a particular situation are present, they not only can be "named and shamed," but, more importantly, can assist in making progress toward remedying the situation. Currently, however, the deliberations of the Conference Committee do not materialize their potential fully, and amount to a naming-and-shaming process.

Moreover, since 2005, the Conference Committee has stressed the link between technical assistance and the standards-related activities of the supervisory bodies, in a manner that is aligned with the notion of shared responsibility. Thus, for example, the supervisory system will highlight cases where technical assistance will be particularly helpful in ensuring compliance with labor standards.[248] This promotional focus follows an implicit understanding that individual states should not always be held fully responsible for their failure to comply and in fact are in need of external help to act in accordance with their legal obligations.

Lastly, beyond the regular reporting system, the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work was designed to complement the ILO's supervisory procedures in a strictly promotional manner.[249] Put differently, the follow-up was intended as a

> treatment of comments received from employers and workers organizations concerning the application of a ratified Convention in a nonreporting year. This year, the Committee examined this procedure in light of the decision of the Governing Body at its 306th Session (November 2009) to extend the cycle for the submission of reports from two to three years for the fundamental and governance Conventions.

Id.

247. There has been a recent rise in the number of reports by trade and employers' organizations, as evidenced in the 2010 Committee of Experts' report. In 2010, "the Committee received 705 comments (compared to 630 in the preceding year), 115 (compared to 57 in the preceding year) of which were communicated by employers' organizations and 590 (compared to 573 in the preceding year) by workers' organizations." *Id*. at para. 72.

248. *Committee on the Application of ILS Standards*, *supra* note 96, at 27-29.

249. *See ILO Declaration*, *supra* note 1.

means of identifying ways to assist governments in applying the core rights regardless of the ratification of core conventions. This departure from the requirement for state ratification in order to monitor the implementation of norms demonstrates a move toward a more universal and transnational model of responsibility. Similarly, the 2008 Declaration has several features that are aligned with the notion of shared responsibility. It is the first declaration to emphasize the role of both private and governmental entities in promoting and achieving the decent work agenda[250] and thus may be interpreted as implicitly encouraging assigning responsibility to private entities as well as governmental ones. In addition, it has bolstered the four core rights, establishing for the first time their position as a precondition for economic development[251] and, thus, their universal status. It is also unique in its proactive rather than reactive and corrective focus.[252]

Initial signs of shared responsibility values can also be found in the Implementation Plan of the 2008 Declaration. First, the Implementation Plan calls for revisions in the reporting system that would allow for the collection of more detailed data regarding labor rights violations.[253] Second, it calls for the creation of a partnership with nonstate entities, such as multinational enterprises and global trade union networks.[254] Third, it establishes tools for assessing the implementation of labor standards, such as those constituting Decent Work.[255]

b. The Reporting System: Proposed Reforms Toward a Shared Responsibility Model

How can the ILO progress beyond these initial stages toward a more comprehensive model of shared responsibility? Most significantly, the CEACR should expand the scope of actors to which it assigns responsibility.

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250. The role of multinational enterprises is recognized in the Preamble, as the ILO acknowledges the role of these enterprises in the interdependent economy and calls for developing new partnerships with them. In Part II A (v) of the text of the 2008 Declaration, this call is even more concrete. *ILO Declaration on Social Justice*, *supra* note 30, at pt. II(A)(v).

251. *See* Maupain, *supra* note 30, at 842.

252. *See id*. at 834-35.

253. See, for example, the emphasis on research, information collection and sharing in, Steering Grp. on the Follow-up to the Declaration (2008), Governing Body, *Declaration on Social Justice for a Fair Globalization: Preliminary Implementation Plan*, paras. 32–36, GB.303/SG/DECL/2, 303rd Sess. (Nov. 2008) [hereinafter *2008 Implementation Plan*], *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_099851.pdf.

254. *See id*. para. 30.

255. The Plan proposes a pilot project in four countries as part of the incremental application of the labor standards, mainstreaming decent work. *Id*. paras. 30, 33.

Namely, when it detects practical labor rights violations, it should no longer assume automatically that the sole actor responsible for the violation is the state in whose territory the violation occurred. Rather, it should weigh assigning responsibility to other states as well as to private bodies, by applying the four principles of responsibility allocation[256] and making an initial assessment of each actor's degree of responsibility. Where states other than the territorial state are involved, the assessment of their responsibility could proceed through regular procedures, such as direct contact or observations, while analogous procedures could be instituted to assist the CEACR in making a final assessment regarding private bodies.

In addition, the CEACR should expand the information it gathers by revising its questionnaires to request information that goes significantly beyond a description of the state's legal reality and instead (or also) provides a picture of actual labor rights protection. For practical reasons, such a reform to the Committee's reporting procedures should be embarked on with caution, as there has been a general decline in the rate of reports being submitted[257] and expanding the scope of required information could exacerbate the problem. It is our view, however, that it is paramount that the Committee receive a more comprehensive description of the actual labor rights conditions in the member states. The ILO should thus consider allowing the CEACR to receive reports directly from civic organizations and workers' unions that are not necessarily the most representative organizations.[258] After concluding its assessment, the Committee could summarize its initial findings in a report to the Conference Committee, similarly to current practice.

Naturally, such a change to the operation of the CEACR would yield parallel modifications to the functioning of the Conference Committee, as they would have to address new actors, such as TNCs. The proceedings of the Conference Committee should address directly all the actors identified by the CEACR in every particular case. The Conference Committee's considerations for choosing cases for discussion and follow-up should thus be transformed accordingly. Some amendments to its discussion procedures will be indispensable, particularly in cases where one of the actors is a private body. As noted, for such cases, the ILO could contemplate developing parallel proceedings to those currently applied to states. For example, observations, when warranted, could also be published with regard to private entities, as in the case of states. Allowing observations against TNCs or other private employers would incentivize workers' organizations

256. *See supra* Part III.

257. THOMANN, *supra* note 4, at 69. Despite the general declining trend, the rate of reports received is rather decent compared with other international organizations. *Id*.

258. Again, the ability of the CEACR to examine such information should be considered. This suggestion should be implemented incrementally, as civil society often lacks the accountability mechanisms needed to ensure the accuracy of the information.

and civic organizations to include relevant information about violations that targets particular employers.

In addition, one expected outcome of the application of the shared responsibility model would be that industrialized states would presumably shoulder more responsibility than they currently do, particularly as origin states. Such a development would impact the operation of the Conference Committee in terms of how it chooses cases for discussion and follow-up by the supervisory system. The Conference Committee currently compiles a list of about twenty-five cases that seem to be rather randomly chosen. This observation is not based on the cases left off of the list, but because those that do make the list are selected based on geographic distribution and other considerations. This has been in an effort to include more cases relating to violations in industrialized countries.[259] The shared responsibility model would reduce the need to arbitrarily choose industrialized countries, as these countries would, under the new model, bear more responsibility for violations in which they are involved.

2. The Complaints System

a. The Complaints System: Initial Signs of a Shared Responsibility Model

The ILO complaints process, like its reporting system, reflects the two objectives described above: first, the need to broaden the legal consequences of violating core standards regardless of whether the particular state has ratified them; and second, the aspiration to expand and deepen the participation of nonstate actors in the ILO's supervisory process. In so doing, this system, too, incorporates the beginnings of a shared responsibility model.

The need to broaden the legal consequences of violating core standards is advanced in the framework of the ILO's freedom of association norm. This is manifested in the exceptional procedure that provides that allegations of an infringement of freedom of association can be filed against states that have not ratified the relevant convention. This procedure was introduced in the 1950s and underscored at the time the unique nature of freedom of association as enshrined in the ILO Constitution and as a customary norm.[260]

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259. THOMANN, *supra* note 4, at 92.

260. Nicolas Valticus, *Once More about the ILO System of Supervision*, *in* 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS 106 (Niels Blokker & Sam Muller eds., 1994). The ILO Constitution is the legal basis for this understanding of the norm. The Preamble to the 1998 Declaration explicitly 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

Yet the ratification status of freedom of association conventions is not without significance. In allegations of a severe violation by a member state that has ratified the relevant conventions, the Governing Body can refer the matter to the FFCC[261] to investigate the claim.[262] In contrast, when the alleged violation is by a nonratifying state, the state's participation in the inquiry is voluntary, for its explicit consent is necessary for the matter to be referred to the FFCC.[263]

The second objective—the need to include nonstate actors in the supervisory process—already finds expression in the representations procedure. Indeed, *any* industrial organization (usually workers' organizations) can submit a representation, regardless of the organization's size or national affiliation or whether it is a local, national, or international organization.[264] The only requirement for qualifying as a complainant is that the GB determines it to be an "industrial organization." In order to prevent any manipulation of the definition by the national state involved, the ILO specifically provides that in determining an organization's eligibility, the Governing Body is not bound by definitions endorsed by the national authorities of the state where the organization resides, but rather should make an objective evaluation according to its own rules.[265] The principle of inclusive participation is further served by allowing international organizations that have affiliates with a direct interest in the alleged violation to serve as complainants.[266] This rather inclusive procedure opens up the possibility of representations being submitted by regional organizations, such as the Latin American Central of Workers (CLAT) and the Latin American Federation of Trade Workers (FETRALCOS),[267] and

Conventions.

ILO Declaration, *supra* note 1, para. 2.

261. *See Freedom of Association Complaint Procedures*, *supra* note 129, para. 3. The FFCC is composed of nine independent persons, who work in panels of three, similarly to the composition of the Commission of Inquiry. *See id*. para. 7.

262. For the legal basis for inception of FFCC, see *id*. paras. 1-2.

263. NICOLAS VALTICOS & GERALDO VON POTOBSKY, INTERNATIONAL LABOUR LAW 297 (Kluwer Law & Taxation Publishers, 2d ed. 1995).

264. *See Freedom of Association Complaint Procedures*, *supra* note 129, paras. 31–35; *Representations*, ILO, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang—en/index.htm (last visited Feb. 18, 2013).

265. *See Freedom of Association Complaint Procedures*, *supra* note 129, paras. 32-35.

266. *Id*. para. 31.

267. These organizations cooperated and alleged together a nonobservance by Venezuela of the ILO Employment Policy Convention, 1964. The Latin American Central of Workers (CLAT) had also filed representations alone, for example, submitting in 1997 a representation alleging nonobservance by Uruguay of the ILO Occupational Safety and Health Convention, 1981, and, in 1996, a representation alleging nonobservance by Costa Rica of the ILO Employment Policy Convention, 1964. In 1995, it filed a representation alleging nonobservance by Peru of the ILO Social Security (Minimum Standards) Convention, 1952, and a representation alleging nonobservance by Paraguay of the ILO Minimum Wage-Fixing

international organizations, such as the International Confederation of Free Trade Unions, which has in fact filed several representations.

A further indication of the acceptance of the shared responsibility model is that it is possible for several organizations to coordinate and file a joint representation.[268] In addition, industrial organizations are not restricted to submitting representations only regarding violations that have occurred in their own states, but rather regarding violations in any state; they can even submit representations regarding several states in conjunction, something that has already been done in practice.[269] Thus, for example, the

Machinery Convention, 1928. It also filed a representation alleging nonobservance by Nicaragua of the ILO Protection of Wages Convention, 1949, the ILO Social Policy (Basic Aims and Standards) Convention, 1962, and the ILO Employment Policy Convention, 1964. *Representations (Art. 24)*, ILO, *http://www.ilo.org/dyn/normlex/en/f?p=1000:50010:0::NO::P50010_ARTICLE_NO:24* (last visited Feb. 18, 2013).

268. The World Federation of Trade Unions, for example, has participated significantly in the ILO's supervisory systems. For example, it filed a representation in 1976 alleging nonobservance of the ILO Discrimination (Employment and Occupation) Convention, 1958, by the Federal Republic of Germany, Italy, the Netherlands, and Denmark; in 1978, it alleged nonobservance of the ILO Discrimination (Employment and Occupation) Convention, 1958, by Czechoslovakia (CGT); in 1979, it alleged nonobservance by the Federal Republic of Germany of the ILO Discrimination (Employment and Occupation) Convention, 1958, *id*.; in 1984, it again alleged failure by the Federal Republic of Germany to implement the ILO Discrimination (Employment and Occupation) Convention, 1958, a complaint that resulted in a GB decision, in application of article 10 of the Standing Orders for the examination of representations, to refer the matter to a commission of inquiry. *See* Comm'n of Inquiry Appointed Under Article 26 of the Constitution of the ILO to Examine the Observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany, Rep., O.B. LXX, Series B, Supp. 1 (1987). In 1991, the Confederation alleged nonobservance by Yugoslavia of the ILO Discrimination (Employment and Occupation) Convention, 1958; in 1994, it alleged nonobservance by Myanmar of the ILO Forced Labour Convention, 1930; in 1996, it alleged nonobservance by France of the ILO Labour Inspection Convention, 1947, and the ILO Social Policy (Non-Metropolitan Territories) Convention, 1947. In 1983 and 1993, the International Confederation of Free Trade Unions joined the Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO) to file representations alleging nonobservance by Sweden of the ILO Employment Injury Benefits Convention, 1964. *Representations (Art. 24)*, *supra* note 267.

269. The two cases in which an organization filed a representation against several countries involved international transportation: in 1975, the Swedish Dockworkers' Union filed a representation against France, the Netherlands, and Poland alleging nonobservance by all three of the Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27); in 1996, the Association of Danish Sa Employees in the Air Transportation Business filed a representation against Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom for the nonobservance of the Employment Policy Convention, 1964. *Representations (Art. 24)*, *supra* note 267. In addition, among the cases that were not withdrawn or deemed nonreceivable, several cases involved an industrial organization that filed representations against a state in whose territory it does not reside. Thus, for example, in 1991, the Federation of Egyptian F12Trade Unions filed a representation against Iraq alleging nonobservance of the Protection of Wages Convention, 1949 (No. 95), the Abolition of Forced

representation procedure allows for a Turkish workers' union to allege a violation by the Dutch government toward Turkish workers who worked in the Netherlands. These features of the representation procedure, which usually go unnoticed, enable the ILO to address labor rights violations that occur in the framework of cross-border economic activity. It seems no coincidence that recent years have witnessed an increase in the submission of representations.[270]

In sum, then, much in the same way as the reporting system, the complaints system exhibits distinct signs of a shift toward a shared responsibility model. The implications of this shift, we will show below, can be extended to other mechanisms of the ILO standard supervisory system.

b. The Complaints System: Proposed Reforms Toward a Shared Responsibility Model

Incorporating TNCs and nonterritorial states into the ILO complaints system as potential subjects of investigation would require adapting the Commission of Inquiry's procedures and, for cases of freedom of association, those of the ad hoc committee.[271] To fully integrate the shared responsibility model, where a state has not yet ratified core conventions, the ILO would need to waive the requirement of state consent currently necessary before the FFCC may initiate an investigation, as is the case with the CFA procedure.[272] The CFA's current mandate to investigate cases without the involved states' consent, even if they have not ratified the relevant conventions, should be extended to the other three core rights—the right to be free of forced labor, the right to equality at work, and the right to be free of child labor—a move that has been advocated by Bob Hepple, for example.[273] From a practical perspective, the CFA's and FFCC's existing

Labour Convention, 1957 (No. 105), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equality of Treatment (Social Security) Convention, 1962 (No. 118). In 1990, the National Confederation of Workers of Senegal filed a representation against Mauritania alleging nonobservance by Mauritania of International Labour Conventions Nos. 95, 102, 111, 118 and 122; in 2006, the Confederation of Turkish Trade Unions (TURK-IS) filed a representation against the Netherlands alleging nonobservance by the Netherlands of the Equality of Treatment (Social Security) Convention, 1962 (No. 118). In 1998, the General Confederation of Labour of Argentina (CGT) filed a representation against Spain alleging nonobservance by Spain of the Migration for Employment Convention (Revised), 1949 (No. 97), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Employment Policy Convention, 1964 (No. 122). *Id*.

270. VALTICOS & POTOBSKY, *supra* note 263, at 108 (discussing how the representation procedure evolved in more recent years).

271. *See supra* Part II.

272. *See supra* Part II.

273. Bob Hepple, *Does Law Matter? The Future of Binding Norms*, *in* PROTECTING LABOUR RIGHTS AS HUMAN RIGHTS: PRESENT AND FUTURE OF INTERNATIONAL SUPERVISION: PROCEEDINGS OF THE INTERNATIONAL COLLOQUIUM ON THE 80TH

procedures, with the necessary modifications, could serve as a model in adapting the representations procedure and could also inform new Commission of Inquiry procedures for initiating investigations regardless of ratification status. In fact, the representations procedure already borrowed procedural rules from the ILO legislative bodies that supervise the freedom of association norm.[274] Past experience suggests that a lack of political will can be expected, however.[275] The failure of the ILO to make use of the ad-hoc procedure instituted in 1973 that allows investigations of violations of the equality norm regardless of convention ratification status suggests that the ILO continues to lack the resolve to implement the required reforms.[276]

A possible starting point for procedural reforms to further deepen the participation of nonstate actors is the existing multiple party complaints procedure.[277] This procedure, too, however, should be modified to allow the initiation of a complaint regardless of ratification status. One concern that could arise, of course, is the possibility of abuse of the procedure. How can the ILO ensure that the ability to file a complaint against a nonterritorial state will not be abused or lead to a sharp increase of politically motivated complaints against states that are not significantly involved in labor rights violations? A possible solution to this problem could be found in the current mandates of the ILO supervisory bodies. These bodies have been accorded discretion as to whether to receive or reject complaints.[278] Similar discretion could be applied to determine the preliminary question of the responsibility

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ANNIVERSARY OF THE ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 221, 229 (George P. Politakis ed., 2007), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087817.pdf.

274. See the GB's decision to accept the procedural rules that apply to cases of freedom of association as guidelines that would assist in resolving disputes as to procedural quandaries that relate to the procedure of representations under Article 24. *See Possible Improvements*, *supra*, note 239.

275. THOMANN, *supra* note 4, at 132.

276. *Id*. at 131-32.

277. Examples are the complaints submitted concerning the observance by the Dominican Republic and Haiti of the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), 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), made by several workers' delegates at the 67th Session of the Conference. Comm'n of Inquiry Appointed Under Article 26 of the Constitution of the ILO to Examine the Observance of Certain International Labour Conventions by the Dominican Republic and Haiti with Respect to the Employment of Haitian Workers on the Sugar Plantations of the Dominican Republic, Rep., O.B. LXVI, Series B Special Supp. (1983).

278. The CFA, for example, may reject a complaint on several bases, including that the complaining organization does not fall under any of the appropriate categories described above, or that the case has already been decided and could also reopen a previous case. *See Freedom of Association Complaint Procedures*, *supra* note 129, para. 38. Other bodies have also adopted rules of receivability. See, for example the receivability of representations, discussed above, *supra* note 112.

of nonterritorial states according to the four principles of shared responsibility. The supervisory bodies also have ample experience dealing with complex matters. The CFA, for example, requires that all complaints be submitted in writing with evidence to support the allegations made therein.[279] It is required to determine complicated preliminary questions, such as whether the industrial organization that submitted the complaint was qualified to do so. Accordingly, the CFA is authorized to determine whether the complainant has a "direct interest" in the case; in cases of complainants where the international organizations lack consultative status with the ILO, the CFA must determine whether the national affiliates of the particular organization are directly affected by the allegations.[280] Similar initial rules of receivability could be instituted to determine whether nonterritorial states in question are prima facie appropriate parties for investigation. The Commission of Inquiry has also routinely applied its authority to request information from nonterritorial states that were not directly under investigation.[281]

The Commission of Inquiry has also had experience with investigating allegations made against private bodies, even though such bodies have never been official subjects of investigation. When the Commission has found a corporation to be "of a special position" with regard to the case, it has not hesitated to investigate it. Thus, for example, in investigating a complaint filed by Ghana against Portugal claiming a violation of the 1957 Abolition of Forced Labour Convention (No. 105), the Commission of Inquiry communicated with and investigated allegations against concerned corporations.[282] In this case, the Witwatersrand Native Labour Association Ltd. was involved in recruiting workers from Mozambique to work in mines in South Africa and thus was called upon by the Commission "to send a duly accredited representative to give evidence at its second session concerning the conditions of recruitment and employment of the labour concerned."[283] Further, the complainants had pointed to particular private enterprises in their allegations: the Diamond Company of Angola was accused of employing a quarter of its workers under forced labor, while the Benguela Railway Company was accused of being partly maintained by forced labor, as were various other European-owned plantations.[284] The Commission of Inquiry established appropriate procedures for investigating the companies, which cooperated with the investigation.[285] The companies

279. *See Freedom of Association Complaint Procedures*, *supra* note 129, para. 40.

280. *Id*. para. 31.

281. Such authority is anchored in the ILO Constitution, *supra* note 48, art. 27.

282. Portugal's Report, *supra* note 78, paras. 25, 720.

283. *Id*. para. 25.

284. *Id*. para. 23.

285. The general managers of the private companies concerned were invited and gave evidence before the commission, as can be evidenced by the list of witnesses, see *id*. paras.

provided information and sent representatives to the Commission's sessions to present relevant statements.[286] In the case of most of the companies deemed relevant to the investigation, the Commission also visited the work sites and met and interviewed workers.[287] This is one instance of actual ILO experience that exemplifies the Organization's ability to develop procedures for investigating private entities as well as nonterritorial states.

Implementing the shared responsibility model would also require that all actors deemed responsible for labor rights violations be subject to the ILO's sanction scheme, including private bodies and nonterritorial states in the appropriate circumstances. The wording of Article 33 of the ILO Constitution, which sets forth the most severe sanctions the Organization can impose, does not necessarily preclude the ILO from making such reforms. The article provides that the GB may recommend to the International Labour Conference "such action as it may deem wise and expedient to secure compliance."[288] There is nothing in this wording that rules out sanctions against private bodies or sanctioning several countries in tandem.[289] On the one occasion that the ILO did invoke Article 33, in its 2000 resolution regarding Myanmar, it allowed the member states discretion as to the nature of the measures to be taken against Myanmar.[290] Moreover, as the Myanmar experience demonstrates, a more centralized approach, where the particular steps members states should take against the responsible actors are specified, is called for, rather than leaving it to the states' discretion.[291]

CONCLUSION

In this Article, we have argued that the ILO should assign legal

43-44.

286. *Id*.

287. *Id*. paras. 61-62, 64-77.

288. ILO Constitution, *supra* note 48, art. 33.

289. The wording of Article 33 was amended in 1946, with the particular reference to economic sanctions deleted. In addition, the authority to recommend sanctions was transferred from the independent Commission of Inquiry to the political GB. Economic sanctions, however, are not ruled out as such. *See* Francis Maupain, *The Settlement of Disputes within the International Labour Office*, 2 J. INT'L ECON. L. 273, 284 (1999). Similarly, one could argue that the wording of the article does not preclude sanctions against private bodies.

290. The 2000 resolution regarding Myanmar called upon the member states to review "the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry." THOMANN, *supra* note 4, at 85.

291. Only the European Union and the United States have imposed economic sanctions against Myanmar, and these were mostly offset by the increased economic activities with countries such as China and Thailand, who opposed the imposition of sanctions on Myanmar. *Id*. at 87-90.

responsibility to remedy the unjust conditions of workers in the global labor market not only to states in whose territory the labor rights violations occurred. Rather, additional actors, both public and private, should also share in the legal responsibility for remedying these conditions. Two such actors in particular are generally viewed as dominant in the global economy: first, states in whose jurisdiction the particular violation transpired (for example, states in which the brand or TNCs management resides) and, second, powerful transnational corporations.

The central claim of our Article draws on a detailed analysis of ILO internal mechanisms and structures, as well as a normative examination of the principles of justice that should be applied in international labor law. Taking an innovative interdisciplinary approach, which combines normative-philosophical and empirical-legalistic perspectives on international labor standards, this Article has outlined a proposed reform of the ILO, particularly its supervisory structure.

As demonstrated, the current ILO structure and procedures rest on an outdated statist conception of responsibility for the protection of workers' rights in the global labor market, under which nation-states are the sole actors held responsible for enforcing a minimal level of labor standards within their territory. This statist model of responsibility has been embedded in the ILO's operational functions and tripartite structure from its earliest days, among other things, evident in its norm-generating procedures and, in particular, the supervisory system, including its complaints and reporting procedures. Due to a variety of economic, legal, and political developments in the global era, including the emergence of transnational production chains, liberalization of trade, and the increased flow of migrant workers, the global competition between states over capital and jobs has dramatically intensified and the state's ability to protect labor rights within its territory diminished. International labor law scholars, recognizing the inadequacy of the existing national and international labor law systems for contending with the emerging difficulties of enforcing labor standards in the global labor market, have called for a deterritorialization of labor law. At the same time, political philosophers have underscored the exploitive and unjust nature of existing labor relations in the global labor market and argue for the creation of new institutions and rules to correct these injustices.

Although the new global conditions and normative considerations of global justice could, indeed, mandate a new set of institutional arrangements, in this Article, we have focused on possible reforms to the ILO as the central international institution explicitly striving to establish and guarantee international labor standards. We have shown that the nation-state, which traditionally bears the primary responsibility for worker's rights, is no longer suited to the task of generating and enforcing labor standards by itself in the reality of the global market. Accordingly, the crux of our argument is that the ILO should broaden the scope of actors held responsible for upholding labor rights beyond the state in whose territory

labor rights are violated.

Under our proposed conception of shared responsibility for labor rights, responsibility for remedying the unjust conditions of workers across the globe is shared amongst various actors and institutions. We presented four principles of responsibility allocation that should aid in determining which additional actors should be held responsible for rectifying these conditions: (1) the connectedness principle; (2) the capacity principle; (3) the beneficiary principle; and (4) the contribution principle.

There is no simple algorithm for ranking the weight of each of the principles in determining responsibility for the unjust state of affairs. For example, it is clear that in order to assign an agent responsibility for rectifying an unjust situation, the agent must have the capacity to realize that responsibility. In line with the notion that "ought" is implied by "is," the principle of capacity is a necessary precondition for assigning responsibility. There are others who assign special added weight to the principle of contribution relative to the other principles,[292] given its particular significance in the legal context. In this Article, however, we espoused no particular ordering of the principles,[293] for we believe such an a priori ranking to be impossible. Determining the relative weight of the four principles is a practical task, contingent on the actual circumstances under consideration and the role of the different agents connected to those circumstances. In the context of responsibility for remedying unjust labor conditions in the global labor market, allocating responsibility using the principles and determining their relative weight is a task to be borne by the specific relevant ILO bodies we discussed. This should rest on detailed empirical investigations and practical judgments that consider the best way to sustain minimum labor standards.

As we demonstrated, the ILO bodies already have both the inherent capacity and experience necessary for performing this daunting task, and we suggested specific reforms to the Organization's supervisory structure to further facilitate this. These reforms, we showed, could be most effectively implemented by building on the early foundations of the shared responsibility model already existing in the ILO's reporting and complaints systems.

Accordingly, we outlined proposals for reforming particular procedures in these two systems. Our proposed principles for responsibility allocation led us to conclude that additional actors can potentially be held responsible for protecting labor rights, in addition to the territorial state where the violation occurred, particularly the state within whose territory the highest level of management (brand) resides and private actors such as powerful

292. *See* Barry, *supra* note 192, at 36.

293. We recognize the additional work that is essential for aligning a conception of responsibility that is not purely based on the principle of contribution with the normative conception of responsibility. Such discussion, however, is beyond the scope of this Article.

transnational corporations.

The inclusion of additional public and private actors as bearers of responsibility for labor rights violations would likely be met with conceptual objections as well as political resistance. However, as this Article illustrated, this proposed expansion would not be inconsistent with the ILO's legal scheme. Moreover, since implementing our shared responsibility model in its entirety is clearly infeasible, it is intended as more of a regulatory ideal. Indeed, full and comprehensive implementation would likely necessitate reform to the entire ILO operational and institutional structure, including its tripartite structure and its norm-generation procedures, and not just its supervisory system. Our model could thus represent an aspiration: toward decreasing the inconsistency between the actors that are morally responsible for ensuring core labor rights for workers and those actors who shoulder the legal responsibility to do so under the ILO's current approach. And finally, the proposed model of shared responsibility for remedying the dire conditions of workers around the world could serve not only as a regulatory ideal and the basis for reform in the ILO. Indeed, it is our hope that it can inspire other international and transnational institutions that promote cross-border labor standards, such as the Free Trade Area of the Americas and the European Union.[294]

We acknowledge that additional conceptual and empirical study is necessary, for example, with regard to the relative weight to be assigned to each of the principles of responsibility allocation. Further practical considerations should be taken into account in order to counter the political pressure that will likely be brought to bear by powerful private actors such as TNCs. Nevertheless, we maintain that our proposal for a new conception of shared responsibility based on the labor connection model is both morally justified and ultimately practically plausible. Such a novel approach is critical today in order to overcome the gap between the global consensus over the right of workers everywhere to a minimum level of labor standards, on the one hand, and the limited ability of both national and transnational institutions to regulate and enforce that right in present times.

294. In general, the need to replace a statist, or state-centric, approach to international institutions is recognized by various scholars. *See, e.g.*, ALVAREZ, *supra* note 7.