
Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights

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Abstract

The thesis presented by Philip Alston, according to which the ILO 1998 Declaration on Fundamental Principles and Rights at Work may undermine what he calls the 'International Labour Regime' (ILR), lacks a clear and coherent methodological framework. This article thus tries to assess more systematically the concrete impact of the Declaration (a) on the achievement of fundamental rights themselves and (b) on other workers' rights. As regards (a), Alston's claim that the Declaration's reliance on 'principles' rather than on specific provisions of ILO instruments has an undesirable impact on the realization of fundamental workers' rights ignores contrary evidence, particularly: (i) more states have ratified the relevant ILO conventions since the Declaration, and compliance therewith has been improved; (ii) for those states which have still not ratified, the process of dialogue and technical cooperation inherent to the follow-up mechanism has generated some tangible progress – though it is recognized that this mechanism may still be improved in the light of experience. As regards (b), the ILO's capacity to make effective other workers' rights is subject to obvious constraints. However these limitations are inherent to the ILR; they have nothing to do with the Declaration. On the contrary, the Declaration and its follow-up represent an added-value for their promotion, particularly because fundamental rights are enabling rights and their increased application gives greater possibilities for workers all over the world to 'claim' other workers' rights, and because the follow-up to the Declaration provides a model and a precedent for a possible use of Article 19 of the ILO Constitution for the universal promotion of rights dealt with in relevant conventions and recommendations,

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even in the absence of ratification. Some recent developments, in connection with the ‘decent work’ agenda, suggest that this possibility may no longer be a matter for mere speculation.

1 Introduction

The debate concerning international labour standards may have suffered in the past from being a rather sleepy affair restricted to a fairly specialized audience and characterized by a self-congratulatory mood. In this context, Philip Alston’s recent articles: ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’¹ and ‘Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?’² (the latter written jointly with James Heenan) certainly come as a welcome wake-up call.

It is indeed time for the community of international lawyers to realize that there are changes taking place in the ILO’s normative system. And credit must be given to Professor Alston for having at least indirectly contributed in the past to creating the momentum for such changes through his repeated calls for a more imaginative use of the various tools at the ILO’s disposal.³ The disturbing fact is, however, that after encouraging the ILO to make a ‘greater effort to distinguish, within the overall corpus of labour standards, between those that lay down the essential goals of labour and social policy and those that address the means by which to achieve these ends’, and to take a ‘clear ideological position in favour of basic human rights [as] the Organization’s only viable *raison d’être*’,⁴ he now seems to be of the definite opinion that this momentum has taken the ILO’s mechanisms in directions which may undermine rather than strengthen them, resulting in what he calls a ‘transformation’ of the labour rights regime. According to Alston, the 1998 ILO Declaration of Fundamental Principles and Rights at Work and the widespread use of the concept of ‘core labour standards’ (CLS) are central to this ‘watershed’⁵ transformation.⁶

These concerns are expressed in a polemical tone. They reflect some of the author’s favourite themes that go far beyond the ILO’s concerns; indeed the Declaration sometimes seems to serve as a pretext for, if not hostage to, the illustration and defence of these themes. It would seem, in particular, that the Declaration is blotted by two irredeemable original sins: first, it was born with the blessings of an evil godfather (the USA), whose purpose was to find an excuse for its own persistent refusal to

¹ Alston, ‘Core Labour Standards and the Transformation of the International Labour Rights Regime’, 15 *EJIL* (2004) 457 (cited herein as Alston).

² Alston and Heenan, ‘Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?’, 36 *NYU J Int’l. L and Pol* (2004) 101 (cited herein as Alston and Heenan).

³ ‘Post-post-modernism and International Labour Standards: The Quest for a New Complexity’, in W. Sengenberger and D. Campbell (eds.), *International Labour Standards and Economic Interdependence: Essays in Commemoration of the 75th Anniversary of the International Labour Organization and the 50th Anniversary of the Declaration of Philadelphia* (1994), at 95.

⁴ *Ibid.*, at 101–102.

⁵ Alston, *supra* note 1, at 495.

⁶ According to Alston, the resulting ‘regime’ has potentially perilous imperfections such as:

submit to hard multilateral obligations; second, it weakens the case for economic and social rights to claim equal status with civil and political rights.

The author's concerns nevertheless need careful examination. This note leaves aside the wider ideological and polemical aspects and will limit itself to clarifying the meaning of recent developments from an ILO perspective and, more specifically, from the viewpoint of the contribution of these changes to the concrete achievement and realization of the ILO's proclaimed objectives. From this perspective, Alston's analysis calls for two preliminary observations.

First, Alston's analysis is *not comprehensive*. Apart from a few comments on the recent 'decent work'⁷ strategy, Alston focuses on the 1998 Declaration as though nothing else of significance had happened recently. It is true that the Declaration is probably the most significant of the various normative developments that have taken place over the last decade. However, it is not the only one. For example, in 2000, for the first time in its history, the ILO made use of the 'teeth' with which its Constitution had endowed it. This came about through the first application of enforcement measures under Article 33 of the Constitution against Myanmar's persistent violation of its obligations under the Forced Labour Convention, 1930 (No. 29). Furthermore, a revolutionary project⁸ is being developed in the maritime field with the elaboration of an extremely ambitious 'consolidated convention' that will place emphasis on transparency in implementation and enforceability, including with regard to ships flying the flag of non-ratifying countries, in particular through its provisions on flag state certification and the device of port state control⁹. Finally, mention should be made of the 'integrated approach' to standard-related activities, which is being applied to other 'families' of instruments to consolidate segmented standards into a more coherent whole.

Second, Alston's criticisms do not seem to be based on any clear and comprehensive *analytical framework*. The author does claim to base his assessment of the CLS on a set of specific criteria.¹⁰ However, it quickly appears that these criteria are rather one-sided:

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- a. A significant reliance on undefined principles rather than rights;
 - b. A culture of voluntarism when it leads to implementation and enforcement
 - c. An unstructured decentralization of responsibilities; and
 - d. A willingness to accept soft law.

This new 'regime' may lead to a 'race to the bottom' for the international labour rights regime. Consequently, Alston suggests reforms to the current regime on three fronts:

- a. The anchoring of principles in ILO standards;
- b. The reinforcement of the follow-up mechanism;
- c. The extension of the monitoring under the Declaration to include the bilateral and regional mechanisms, which have invoked ILO principles, and the Declaration.

⁷ Report of the Director-General, *Decent Work*, 87th Session, Geneva, June 1999.

⁸ Following up on the ideas contained in the Director-General's 1997 report to the International Labour Conference: 'The ILO, Standard Setting and Globalization', International Labour Conference, 85th Session 1997, available at www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm.

⁹ See ILO, *Consolidated Maritime Labour Convention. Commentary to the Recommended Draft*, PTMC/04/02, Preparatory Technical Maritime Conference, Geneva, 13–24 Sept. 2004.

¹⁰ Alston, *supra* note 1, at 461, 484–490.

they boil down to judging the new regime on the basis of consistency with, and impact upon, the existing International Labour Regime¹¹ (ILR) as understood but not really defined by him. Consistency between the two ‘regimes’ is certainly a relevant angle to which we shall indeed return. But it clearly begs the question of *the basis on which the value of the ILR is itself supposed to be assessed*. While the articles include some remarks on the recognized imperfections in the implementation of the existing supervisory mechanisms, the ‘anachronistic’ assumptions and unclear methodologies of the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the apparatus surrounding it,¹² etc., these comments appear, to paraphrase a famous aphorism, as the tribute that conservatism feels obliged to pay to the need for change. The authors seem indeed satisfied with the existence of detailed instruments covering a whole range of labour rights and to not question the impact of such instruments upon the actual conditions of all those who work across the world. Thus, the question of ratification rates, and indeed the significance of the ratification record from the viewpoint of the assessment of the real situation of workers’ rights,¹³ both of which are central to the debate on the efficacy of the ILR, are practically ignored. The even thornier problem of the relevance of the traditional ILR to the universal achievement of the ‘rights’ for the vast majority of workers who work in the so-called informal economy and do not enjoy the formal status of workers for the purpose of claiming their ‘rights’ under national legislation is hardly addressed.¹⁴

The present comments are based on the assumption that any objective discussion of the impact of the Declaration is impossible unless the same coherent pattern of assessment is applied to both ‘regimes’. In the light of the above remarks, the basis of this coherent pattern of assessment seems fairly obvious: it is the extent to which any regime has the capacity to, and actually does, exercise a verifiable impact on the achievement by members of the specific ILO constitutional objectives.¹⁵ Indeed, the ILO’s first Director and enduring icon Albert Thomas reminded us that ILO standards are not an end in themselves,¹⁶ and this is no less the case for the Declaration. The single question both for standards and the Declaration, ‘hard’ and closed or ‘soft’ and open as they may be, is whether, and to what extent, they make a verifiable contribution to the advancement of the Organization’s objectives in the real world.

¹¹ *Ibid.*, at 490–493. See also Alston and Heenan, *supra* note 2.

¹² Alston, *supra* note 1, at 517.

¹³ The fact that at the beginning of the 1980s the ratification record of countries like Franco’s Spain (84 ratifications) or Poland (66 ratifications) was higher than that of the UK (59 ratifications) or Switzerland (30 ratifications in part due to federalism) seems to suggest that the situation of workers’ rights in a particular country cannot be assessed through a purely quantitative reading of its ratifications record. It has to take into account qualitative factors, and in particular the situation as regards fundamental rights.

¹⁴ Workers who can claim the rights and benefits attached to that status under national legislation represent a small fraction of those who actually work. This situation can hardly be ignored on account of the fact that the scope of ILO instruments is not in principle limited to the informal economy workers.

¹⁵ See Maupain, ‘Is the ILO Effective in Upholding Workers’ Rights? Reflections on the Myanmar Experience’, in P. Alston (ed.), *Labour Rights as Human Rights* (forthcoming).

¹⁶ See, e.g., E.J. Phelan, *Yes and Albert Thomas* (1949), at 57.

On this basis the somewhat overlapping concerns expressed by the authors may be regrouped and addressed under two fairly straightforward and complementary questions:

- 1) Has the Declaration strengthened or diluted the protection offered by the ILO as regards fundamental principles and rights at work?
- 2) Is the emphasis upon fundamental rights a boost for, or a break in, the protection of other labour rights?

2 Universalism at the Expense of Specificity? Evidence of the Impact of the Declaration on the Effective Implementation of Fundamental Rights at Work in the World

It is difficult to summarize the author's argument as regards the impact of the CLS on the actual protection of workers' rights. The thread is often broken or lost through fairly lengthy diversions on issues such as the trade and labour debate¹⁷ or the 'quasi-genetic defiance' of successive American administrations to the ILO's philosophy of social progress which, despite their intrinsic interest, are a bit remote from the central argument. This much seems clear however, whatever the ILO's efforts and intentions to improve the impact of its standards, it cannot win. Thus the 'much trumpeted' revolution accomplished by the Declaration is on the one hand belittled and on the other faulted as arbitrarily limited to only some of the constitutional objectives. It is blamed at the same time for being too limited and for representing a major danger of diluting the scope of the protection offered through the new emphasis placed on 'objectives'. The protection offered by regional trade agreements is severely (and in some respects rightly) criticized but the NAFTA model is nevertheless good enough to shame the Declaration for covering only four categories of rights instead of its 11.¹⁸

At the risk of losing some of the subtleties in the argument, a more pedestrian review of the underlying points may help shed some more light on the discussion.

A Significance and Coherence of the Constitutional Innovation

1 Significance of the Innovation: From a 'déjà vu' to Constitutional Creep?

Alston's rather disdainful remark about the 'much trumpeted' novelty of the Declaration deserves some comments. Again, the test to be applied here is not the degree to which the innovation can be regarded as 'revolutionary', but rather the extent to which it is capable of making a difference in practice. It is relevant, however, from that very point of view to understand in what respect and to what extent the

¹⁷ Alston and Heenan, *supra* note 2, at 105.

¹⁸ Alston, *supra* note 1, at 503.

Declaration may have helped to overcome limitations inherent in the Constitution and in the existing supervisory mechanisms.

The Declaration can be described as a decisive departure from what Alain Supiot once described as the ILO's 'cafeteria approach' to workers' rights, i.e. the freedom left to members to pick and choose those conventions which they are prepared to implement through ratification or otherwise. The Declaration thus establishes that, notwithstanding the fact that members are entirely free to ratify conventions or to implement recommendations,¹⁹ they are subject to certain substantive obligations 'to respect, to promote and to realize in good faith and in accordance with the (ILO) Constitution the principles concerning the fundamental rights'²⁰ relating to freedom of association, the elimination of forced labour and abolition of child labour, and the elimination of discrimination. The Declaration is like the 'wisdom tooth' of the Constitution, which was already there but finally pierced through the gum in its maturity.

It is important to realize that the step accomplished does not merely represent a 'quantitative' extension, however significant,²¹ of the Freedom of Association mechanism already established in 1950 to three other rights. True, that mechanism did already provide that all members of the ILO, whether they had ratified or not the relevant conventions could be the subject of a 'complaint' for the non-respect of freedom of association and collective bargaining 'principles'.²²

There are, however, two important 'qualitative' differences. The first is that the extension of the obligation as regards one principle (forced labour) is not based on any explicit reference in the Preamble or the Declaration of Philadelphia, but is derived from the 'values' proclaimed in these texts (in particular dignity and equal opportunity).²³ Second, the legal justification used in 1950 was much narrower and (understandably) more ambiguous²⁴ than the fairly sweeping affirmation of 'an obligation arising from the very fact of membership in the Organization' proclaimed in paragraph 2 of the Declaration. It is thus hardly surprising that in the initial phase of the Declaration the move was described by some of its opponents as a 'constitutional

¹⁹ Designed to ensure respect for the various workers' rights.

²⁰ For the full text see ILO Declaration on Fundamental Principles and Rights at Work and its follow-up, available at www.ilo.org/declaration.

²¹ Especially in the light of the stillborn attempt of the ILO in the 1970s to develop a rather pale cloning of the Freedom of Association mechanism in the field of discrimination.

²² Gravel, Duplessis, and Gernigon, *The Committee on Freedom of Association: Its Impact over 50 Years* (2001), available at <http://www.us.ilo.org/docUploads/CFAANG1%2Epdf>. See also articles by Curtis, Gernigon, Odero, and Travieso in *Les normes internationales du travail: un patrimoine pour l'avenir. Melanges en l'honneur de Nicolas Valticos* (2004).

²³ See Report VII, ILO 1998, at 19.

²⁴ Jenks' legal advice that 'carried the day' in overcoming the South African objection in 1950 (Alston, *supra* note 1, at 481) rested to a large extent on the prerogatives of the International Labour Office under Art. 10 of the Constitution. The explanation according to which respect for freedom of association is an obligation inherent in membership (see, for instance, GB.267/LILS/5, Nov. 1996, referring to n. 107 of the article) is more of an *ex post* rationalization including in document GB.267/LILS/5, Nov 1996 referred to in note 107 of the article).

creep'. One of the elements which contributed to make it acceptable is the parallel recognition of the obligation of the organization to assist its members in the discharge of their obligation. This has very significant consequences as regards the implementation of a 'follow-up mechanism', to which we shall now turn.

The follow-up to the Declaration features an annual review of the situation for states which have not ratified the ILO conventions embodying the principles concerning the fundamental rights identified in the Declaration. This review is based on government reports and possible comments by workers and employers' organizations, and a 'global report' which each year deals with one of the categories of fundamental rights in accordance with a pre-established cycle. The aim of each Global Report is to provide an overall picture of the trends and evolution with respect to the right concerned both in countries which have ratified the relevant conventions, and in those which have not. According to Alston, the follow-up arrangements of the Declaration 'even if superficially convincing'²⁵ remain 'determinedly weak',²⁶ especially as regards the system of annual reporting for states which have not ratified the conventions concerned. This weakness is all the more disappointing in Alston's view because the expectation was that the follow-up would progressively evolve in the direction established by the Committee on Freedom of Association precedent, which, in the wake of similar assurances, 'developed into a deliberate shaming mechanism and thus acted as a quasi-enforcement measure'.²⁷

It is correct to note that, in contrast to the Committee on Freedom of Association (CFA), the follow-up to the Declaration is not complaint-based and one can safely predict that, to Alston's chagrin, it is unlikely to evolve towards the Freedom of Association precedent. But this is no reason to dismiss it or underestimate its potential.

First, it is important to remember that the adoption, as part of the Declaration's follow-up, of a complaint-based system of the CFA type was made impossible for the very reason it is presented as a model by Alston: its rejection is the result of the 'learning experience'²⁸ of governments under that very system, including, as correctly noted by Alston, those from developed industrialized countries under that very system.²⁹

Second, the fact that the follow-up is not and could not be complaint based does not mean that it has a 'weaker' potential. It gives the possibility of dealing with a

²⁵ Alston, *supra* note 1, at 461.

²⁶ *Ibid.*

²⁷ *Ibid.*, at 482.

²⁸ The need to reject any such 'cut and paste' exercise was clearly established following the 1994 report and subsequent documents. The proposal from the Director-General to the ILC to extend the Freedom of Association mechanism to other rights 'rather than to develop a wholly promotional option' (Alston, *supra* note 1, at 465) was opposed by a majority of the constituents. This reaction was in fact fully anticipated by the Director-General. See Hansenne, 'Un garde fou pour la mondialisation', preface to M. Camdessus, *Un garde-fou pour la mondialisation: le BIT dans l'après-guerre froide* (1999).

²⁹ In these circumstances it is indeed a small miracle, which obviously has escaped the authors' attention, that the follow-up to the Declaration indirectly managed, notwithstanding these recurrent criticisms, further to consolidate the Freedom of Association complaint-based system. Art. 2 of the Preamble to the Follow-up to the Declaration proclaims that the follow-up 'is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning'.

broader range of specific situations through technical cooperation without depending on a complaint. As previously noted, a distinguishing feature of the Declaration is that it declares that the International Labour Organization itself has an obligation to assist its members in respecting and realizing the fundamental principles and rights, whether or not they have ratified the fundamental conventions, by offering technical cooperation and advisory services. This has direct implications for the functioning of the follow-up. Both annual reviews³⁰ and global reports³¹ provide the basis for determining, together with the countries concerned, the type of assistance needed to overcome the obstacles that hinder the realization of these principles and rights. As a result, a large number of technical cooperation programmes have been launched at the national, sub-regional and regional levels in both ratifying and non-ratifying countries.³² Through these programmes the ILO engages in a sustained dialogue and action with concerned members with the aim of addressing specific problems. This allows for a more in-depth and common understanding of the changes taking place in the structures and dynamics of labour markets and of their implications for the realization of fundamental principles and rights at work. Leaving aside convenient but misleading analogies, no meaningful assessment of the value of the follow-up can thus be made without taking account of the concrete impact made by this new approach, a subject to which we shall return.

B Coherence: An Arbitrary Limitation to Fundamental Rights as Defined?

The author's observation that the CLS category represents 'a relatively small part of the commitments (under the Constitution)'³³ is undoubtedly correct, but it does not justify his claim that this category is 'neither scientific nor deliberate',³⁴ or that it is arbitrarily based on essentially political considerations.³⁵

Pointing to the role of political considerations is not significant news. Such considerations apply equally to all the choices which the International Labour Conference (ILC) has been called upon to make historically for the progressive construction of the 'international labour code'. It will be recalled that because of the then prevailing

³⁰ Further to the recommendation of the Expert-Advisers to the Governing Body in Mar. 2001, the report form used for the preparation of the annual reviews was revised with a view to, *inter alia*, making the questions clearer and more precise. Another goal of the revised forms was to 'facilitate the identification of obstacles to respecting fundamental principles and rights, as well as technical cooperation needs that might address them'. See GB.280/3/1, 280th session, Geneva, Mar. 2001.

³¹ An explicit goal of global reports is to assess the effectiveness of the assistance provided by the ILO in relation to the four categories of principles and rights and to determine, on such assessment, the priorities for the following period in the form of technical co-operation plans.

³² The second 'round' of global reports, which started in 2004 with *Organizing for Social Justice*, the second global report on freedom of association and the effective recognition of the right to collective bargaining, have begun reviewing the nature, scope, and impact of the technical advisory services provided in the framework of the follow-up.

³³ Alston, *supra* note 1, at 483.

³⁴ *Ibid.*, at 485.

³⁵ *Ibid.*

conditions the ILO was unable to adopt any instrument on freedom of association before the Second World War. It only did so in the exceptional circumstances and challenges, correctly identified by Alston, created by the Soviet bloc strategy to sidestep the ILO in favour of the UN Economic and Social Council.³⁶ However, the fact that the choice made in the Declaration has an obvious political dimension does not make it arbitrary from a constitutional point of view nor incoherent from an axiological and substantive point of view.

1 *Legal Consistency*

Again, it must be objectively recognized that the ILO Constitution does not establish any hierarchy among the objectives set forth in its Preamble.³⁷ It does not, however, follow that the emphasis placed on some of the objectives of the Preamble rather than others is legally arbitrary.

First, the object of the Declaration is *not* to establish a hierarchy among constitutional objectives (rights) based on the interpretation of the Constitution. Leaving aside for the moment³⁸ the fact that recognizing the 'special significance' given to the CLS does not in any way imply the 'relegation' of other rights into a second class, it is clear that the purpose of the Declaration was not to provide an authoritative interpretation of the Constitution. Indeed, Report VII to the ILC in 1998 clearly pointed out that the Conference is not competent to give an authoritative interpretation of the Constitution.³⁹

Second, the identification of some constitutional objectives or principles as having specific significance is not new in ILO's rich constitutional practice. Apart from the special procedures in the field of the Freedom of Association mechanism referred to above, two significant precedents may be invoked. The first is provided by the 'workers' clauses' incorporated in Article 41 of the original Constitution,⁴⁰ which stated that 'among the methods and *principles*' that should be applied for regulating labour 'the following seem to the High Contracting Parties to be *of special and urgent importance*' (emphasis added). The second is provided by the Declaration of Philadelphia itself, which in its very first section 'reaffirms' some '*fundamental principles* (emphasis added) on which the Organization is based' and then provides a list which is both selective and a rather far cry in its formulation from the original language of the Constitution.⁴¹

³⁶ *Ibid.*, at 480.

³⁷ Alston's characterization of 'rights' in general and in particular as applied to the ILO Constitution's preamble is faulty. The intent of the preamble appears to be to give shape to the Organization's mandate for social justice by identifying (not exhaustively) areas of legitimate competence. The recognition of rights and corollary duties is left to the provisions of international labour conventions, as well as their subsequent articulation by means of revised conventions and protocols, and elaboration through the supervisory system.

³⁸ See section 2 *infra*.

³⁹ ILC, 86th Session. Report VII. *Consideration of a Possible Declaration of Principles of the International Labour Organization concerning Fundamental Rights and its Appropriate Follow-up Mechanism* (1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vii.htm>. In accordance with Art. 37.1 of the ILO Constitution the ICJ is competent to give an interpretation of this nature.

⁴⁰ Arts. 387-399 of the Treaty of Versailles, subsequently replaced by the Declaration of Philadelphia.

⁴¹ See the Annex to the ILO Constitution, available at <http://www.ilo.org/public/english/about/iloconst.htm>

There is admittedly a difference between these two precedents and the Declaration: it is that certain practical consequences must now flow from the special significance attached to these principles. But it is hard to understand why the 'singling out' of freedom of association from among ILO's constitutional objectives for the purpose of creating a universal minimum obligation should (rightly) be hailed by the authors, whereas its (admittedly limited) extension to a further three areas of rights is almost painted by them as a betrayal of other objectives.

2 *Axiological and Substantive Coherence*

The fact that the Declaration was manifestly the result of a political compromise does not mean that the category lacks any axiological or substantive coherence.

First, there is a sort of common 'Kantian' thread running through their diversity. As pointed out in one of the early documents submitted to the ILO Governing Body in 1994, freedom from forced and child labour as well as non-discrimination relate to the autonomy of the will and freedom of association and collective bargaining are the extrapolation of this autonomy from the individual⁴² to the collective level.⁴³ It points to the fact that the concept of 'social justice' so prominently and elusively spelled out in the ILO Constitution cannot be defined so much in terms of a pre-defined product as in terms of fair processes which are themselves inseparable from its proclaimed values of human dignity, freedom and dialogue.

Beyond this axiological coherence, the fundamental workers' rights category enjoys a 'functional' coherence which relates to their impact on the achievement of other rights and which is indeed essential to answering the question to be dealt with in the second section of these comments. As 'enabling rights' or process rights, they 'empower' workers with the tools that are necessary for the conquest of other rights.⁴⁴ This is clearly reflected in two significant paragraphs in the Preamble to the Declaration.

One is the fifth preambular paragraph:

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely, and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

The last paragraph of the preamble goes on to underline the urgency of reaffirming the immutable nature of the fundamental principles and rights concerned and of promoting their universal application '*in a situation of growing economic interdependence*' (a politically correct way of referring to globalization and the liberalization of markets).

⁴² As is the case for child labour, forced labour, and non-discrimination.

⁴³ As is the case for freedom of association and collective bargaining.

⁴⁴ While it is true that the Declaration rights are enabling rights that provide workers with the tools and processes to enable them to achieve respect for other rights (like health and safety), this does not mean that the Declaration rights involve only obligations of means rather than of result. For example, putting in place systems for collective bargaining in accordance with the Declaration is a means-related step; the actual conclusion and implementation of collective bargaining agreements (CBA) are results. This is even more the case with the rights to freedom from forced labour, employment discrimination, and the worst forms of child labour.

All of the above reasons explain why workers' *safety and health*, whose omission has been finger-pointed by many in addition to our author,⁴⁵ even though it may in the strict sense be regarded as of 'vital' importance, cannot be regarded as 'fundamental' in the sense of enabling rights.

In short, the guarantee of these fundamental rights is recognized both as an end in itself and as the means to achieve other rights. It is significant that Alston, however reluctantly, appears to recognize the coherence of the category from this angle.⁴⁶ But he immediately scorns it as the expression of a 'neo-liberal' vision according to which 'the international community cannot productively worry about specific social outcomes'.⁴⁷ However, as we shall see more in detail below there is no basis in the text of the Declaration itself nor, even more critically, in the existing evidence regarding the impact of the Declaration, to justify such an interpretation.

B The Concrete Impact of the Declaration: Universality at the Expense of Specificity? The Principles versus Rights Debate

While the thread of the argument is often lost for reasons previously noted, its main thrust seems to be that the alleged 'added value' of the Declaration, from the viewpoint of the universal protection of fundamental rights at work, in fact covers a regressive move from the viewpoint of the specificity of the protection offered. The following remarks will address some questionable premises and then try to refocus the debate in terms of the concrete, verifiable impact of the Declaration on the ILO's capacity to achieve its objectives.

1 An Inconclusive/unhelpful Semantic Debate: 'Principles versus Rights'

The shifting of the emphasis from specific obligations to 'principles' and objectives in the Declaration is central to Alston's doubts and criticism concerning the Declaration. There would be much to say about the pages he devotes to the significance and use of the term 'principles' in international law and practice.⁴⁸ But all these

⁴⁵ Alston, *supra* note 1, at 498 and Alston and Heenan, *supra* note 2, at 131.

⁴⁶ Alston, *supra* note 1, at 487.

⁴⁷ *Ibid.*, at 487.

⁴⁸ The very notion of 'principles of international law' implies, at the least, the existence and operation of fundamental rules of international law that guide the application of existing law and that inform the development of international law where no conventional or customary rule otherwise exists (see the writings of Schachter, Mendelsohn, Brownlie, Bin Cheng, etc. - and even the US Restatement of Foreign Relations Law). Principles are not in opposition to rights, as Alston suggests, nor are they limited to obligations. They represent the ultimate objective by which to measure the specific conduct of all concerned. In contrast to Alston's relegation of principles to some 'soft' or marginal status, e.g., the principles of the UN Charter, analogous to those of the ILO Constitution in this instance, have been recognized as sharing attributes of a higher law (relative to specific treaties reflecting principles). See, e.g., Virally, 'The Sources of International Law', in M. Sorensen (ed.), *Manual of Public International Law* (1968). Similarly, Jean Pictet elevates principles to an entirely different function from Alston's understanding of them. He notes that '[i]n international humanitarian law, as in every other juridical sphere, principles are of capital importance. They motivate the whole; they offer solutions to unforeseen cases by extrapolation; they contribute to filling gaps in the law and they assist its future development by indicating the course which should be followed': Pictet, *Humanitarian Law and the Protection of War Victims* (1975) at 28.

passages, while rightly pointing to a fairly obvious lack of consistency, remain largely inconclusive. What is more significant is that Alston's impatience with the 'opaque'⁴⁹ language used in the Declaration to define the link between principles and specific provisions regarding the content of these rights in specific conventions may be due to his insufficient attention to all aspects of the specific ILO context. While he seems to admit that the choice may have been intended to reflect the 'especially elevated status' of these rights, he seems to underestimate the simple, if admittedly parochial, explanation according to which the reference to 'principles', far from being evidence of a contamination by NAFTA,⁵⁰ is consistent with the terminology of both the Declaration of Philadelphia and the former Article 41 of the ILO Constitution (referred to above). He also seems to neglect that the title of the relevant question on the agenda of the ILC in the framework of which the Declaration was discussed, was 'Consideration of a possible *Declaration of principles of the International Labour Organization* concerning fundamental rights and its appropriate follow-up mechanism',⁵¹ which clearly placed the emphasis on the 'meta-constitutional' dimension of the concept of 'principles'. Considered from this perspective, his emphasis⁵² on the lack of a 'precise relationship' between the core labour standards and the detailed conventions appears particularly puzzling. Alston indeed seems to have the story backwards. There is no danger that the principles and their content be liberated from the 'anchor' of the relevant conventions and 'painstakingly constructed jurisprudence' in relation to these rights⁵³ *for the simple reason that they are the anchors*.

All the above is obviously not to say that the concrete 'implementation' of these principles in non-ratifying states need not be consistent with the relevant instruments. But such consistency can hardly be a matter of pre-established definitions or delineation without begging the very question one is trying to solve. While it may be that indicators could usefully be developed to assist in monitoring progress towards 'principles' consistent with the relevant instruments, the key guarantee for such consistency ultimately rests with the role and responsibilities vested in the tripartite constituency. It is difficult in this respect to understand Alston's concern, at least as far as the ILO is concerned, about the risk he sees in what he calls a 'decentralized' process⁵⁴ since the final responsibility for reviewing progress is vested with the tripartite constituency of the International Labour Conference. After all, it is the tripartite constituency at the International Labour Conference that has ultimate responsibility for translating the constitutional principles into specific standards under the Constitution. It would thus seem that it is in the best position to make sure that any guidance given to non-ratifying members through the follow-up is consistent with the provisions of the relevant instruments that they have adopted.

⁴⁹ Alston, *supra* note 1, at 490.

⁵⁰ *Ibid.*, at 479.

⁵¹ 86th Session. Report VII, *supra* note 39 (emphasis added).

⁵² Alston, *supra* note 1, at 490–495.

⁵³ *Ibid.*, at 494.

⁵⁴ *Ibid.*, at 509, 517.

In conclusion, it would be ludicrous to deny that the Declaration is the product of a 'negotiated drafting' that inevitably, and sometimes deliberately, leaves some ambiguities. However, it ultimately appears that both its title and the allegedly 'opaque' language used in paragraph 2 of the Declaration are designed to draw a fairly straightforward distinction between the *existence* of an obligation or a right and its *scope and specific content*. Thus, this paragraph recognizes on the one hand that there are fundamental obligations based on the principles of the Constitution which exist for all members independently of the specific (substantive and procedural) obligations to which countries which have ratified the conventions concerned are subject; and on the other that there are fundamental rights whose specific scope and content have been elaborated in relevant conventions but which exist for all workers even when they cannot claim the benefit of specific provisions of the conventions. And, to conclude, it would seem obvious that without this distinction, the 'revolution' accomplished by the Declaration would have been plain legal non-sense as it would have made ratification simply meaningless.

2 *A Largely Irrelevant Debate on the 'Hijacking' of the Declaration by External Entities for External Purposes*

Alston (and Heenan) devote considerable space to the questionable exploitation made of the Declaration outside the ILO. They argue that the loose use made of the Declaration in regional trade negotiations and in private initiatives shows that the Declaration, despite all ILO's claims to 'complementarity', has had the effect of 'marginalizing' ILS, as in the process the specific standards themselves are ignored.⁵⁵ But it is not at all clear why these external practices should be considered as relevant for the assessment of a Declaration whose objects are limited to the ILO and its members. Moreover, our authors fail to inquire as to how the situation would be different or better without the Declaration, either as regards the enforcement of CLS through trade agreements⁵⁶

⁵⁵ *Ibid.*, at 520 and Alston and Heenan, *supra* note 2, at 114, 120–126.

⁵⁶ The passages concerned refer to unilateral, bilateral, and regional initiatives. They reflect the authors' concerns about a hidden agenda behind the support given by the US to the Declaration. It is clear, however, that some of these initiatives pre-dated the Declaration and that the others would probably have taken place in any case. The analysis of the rights covered and the enforcement mechanisms envisaged in the main existing trade agreements eloquently suggest that their content and scope depend very much on the specific context of each initiative/agreement. Alston's obsession may also lead him to overlook the great diversity of the formulas used, which depend very much on the context and unfairly under-estimate the potentially positive impact that the reference to the Declaration has had on a more coherent approach to these rights. For instance, enforcement mechanisms in most trade agreements resort to negative incentives for deterrence, and to penalties as a last resort. The US–Cambodia Textile Agreement pursues a different approach, based on positive incentives (9% annual increase in applicable quotas), which has proven very effective in bringing about significant improvements in respect of workers' rights, working conditions, and wages. Under this agreement, Cambodia can increase its quotas for textile and apparel exports to the US if it meets its obligations to improve the application of its own legislation and to protect internationally recognized workers' rights in the sector. One key factor for the success of this approach has been the monitoring by the ILO of companies' behaviour through the production and dissemination of relevant information to the public and interested parties. See Polanski, 'Protecting Labour Rights through Trade Agreements: An Analytical Guide', 10 *University of California, Davis* (2004), 13, available at www.ceip.org/pubs. In Latin America a number of free trade agreements

or through private initiatives. The authors may be right not to share the ‘touching faith’ that many have expressed in the possible ‘privatization’ of social progress through such initiatives; but it is certainly disingenuous to blame this trend on the Declaration as if ‘these voluntary codes do precisely what the 1998 Declaration enables them to do’.⁵⁷ Not only does the Declaration not address the question of private initiatives, but the proliferation of ‘standards’ of variable object and content pre-existed the Declaration, and the risks inherent in this proliferation were clearly pointed out by the ILO itself in the first systematic review of the phenomenon, which was carried out in the same year.⁵⁸

3 *A Largely Unwarranted Assumption: Greater Specificity Means Greater Impact*

It is important to realize that Alston’s critical assessment of the Declaration to a very large extent stems from a central assumption: that reference to ‘principles’, in contrast to the tradition of detailed prescriptions which characterize the conventions, will lead the way to and justify protection so decentralized and elastic as to be meaningless.⁵⁹ At first sight, this assumption may seem like plain common sense: the greater specificity in the provisions of a convention offers a greater ability to assess the conformity of national law and thus offers a greater guarantee of progress in the extent that national legislation will, upon ratification, have to incorporate the specific and more progressive provisions of the convention. The problem is, however, that realities are far more complex.

First, the degree of specificity achieved in the text of conventions is variable.⁶⁰ The lack of detailed specificity is in fact a characteristic of several of the fundamental conventions, in particular of those relating to freedom of association and collective

(FTAs) have been signed or are about to be signed. Most countries involved have ratified all or almost all of the ILO’s fundamental conventions, and legal progress has been considerable in these countries, as shown by the related observations and direct requests of the ILO’s Committee of Experts. The FTAs, through the co-operation mechanisms and monitoring systems built into them, may provide a ‘window of opportunity’ for strengthening ILO’s own supervisory work and related advisory services. See Vega, ‘Legal Considerations on Labour Regulations in Free Trade Agreements in the Americas’, *Cuadernos de Integración Andina* No. 8 (2004).

⁵⁷ The sentence could in fact be applied in just the same way to international labour standards to the extent that these standards are applicable only to states and not to non-state actors, which may indeed be one of the fundamental weaknesses of the ‘regime’, to use the author’s fashionable concept. See Alston, *supra* note 1, at 507.

⁵⁸ This being said there is certainly room for action by the ILO. Thus, the 1997 report of the Director-General to the ILC, *supra* note 8, suggested the possibility of an official ‘global social label’ to be established through an International Labour Conference. The 1998 study (‘Overview of Global Developments and Office Activities concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues’, GB.273/WP/SDL/1(Rev.1) 273rd Session, Geneva, Nov. 1998, Working Party on the Social Dimensions of the Liberalization of International Trade) and subsequent documents contained some very tentative suggestions about a possible framework that the ILO could offer for ‘harmonizing’ private initiatives. The necessary tripartite consensus further to explore these ideas was, however, lacking. See Diller, ‘A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives’, 138 *Int Labour Rev* (1999) 99.

⁵⁹ Alston, *supra* note 1, at 518–520.

⁶⁰ And even when the content is fairly specific, it may not necessarily be the most advanced as, for ratification purposes, the tendency is rather to achieve a minimum ‘common denominator’.

bargaining as well as discrimination. Convention No. 87 makes the fundamental point that freedom of association is about the right to form and join trade unions which is absent from many codes of conduct as noted in a quote from ‘Yardsticks for Workers Rights’,⁶¹ but it does not go much beyond that and in particular it does not even explicitly include such essential guarantees as the right to strike. All the ‘specificity’ has, in fact, been developed through the ‘jurisprudence’ of the competent supervisory bodies.

Second, when the specificity, in terms of detailed provisions is too great it tends to become an obstacle to ratification *and thus turns out to be a major impediment to the convention having any concrete impact* on the achievement of the objective – or at least any more concrete impact than an international labour recommendation.⁶²

A third, much less obvious consequence is what may be called the phenomenon of ‘reverse causality’ – i.e. the fact that ratification may often depend on the conformity of the new instrument to existing national legislation rather than the other way around.⁶³ This does not mean that in such a case ratification has no impact on realities, but rather that this impact has to be assessed in terms of an improvement in enforcement and preventing regression rather than progress in the substantive law applicable.

Fourth, the specificity of obligations incurred as a result of ratification can in some cases operate as a paradoxical obstacle to the achievement of the underlying objectives. This is the problem of *outdated instruments* whose specific provisions are no longer considered conducive to the achievement of the objective and may even be considered as counter-productive in a context which has substantially changed as a result of the evolution of technologies or economic conditions or even perceptions.⁶⁴

Conversely, the lack of specific commitments inherent in the Declaration can induce progress towards the achievement of the ‘rights’ that go beyond and are not limited to the provisions of the relevant instruments. Two concrete examples may be provided: one relates to the relatively limited number of grounds of discrimination

⁶¹ Alston, *supra* note 1, at 520, n. 278. See ILO Convention No. 87, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

⁶² This aspect has been well documented for Scandinavian countries as regards ‘technical’ conventions, despite their remarkable record of support for normative action. In the case of fundamental rights this greater specificity admittedly does not necessarily derive from the instrument itself (convention No.29 is one of the few instruments which have very detailed provisions including as regards the transitional period); specificity is largely ‘added on’ through the relevant case law of supervisory organs. The result is, however, the same and is well illustrated by the attitude of the US, whose reluctance to ratify is often due to the case law rather than to the (general) provisions of the instruments concerned, and the ILO’s refusal to accept understandings that would be tantamount to a reservation as regards the applicability of this jurisprudence.

⁶³ See Maupain, ‘International Labour Organization Recommendations and Similar Instruments’ in D. Shelton (ed.), *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (2000), at 372, 383–384.

⁶⁴ The evolution of perceptions is well illustrated by two diametrically opposed examples in the field of non-discrimination: the question of night work of women where the concern for non-discrimination was first interpreted in protective terms and then in terms of their equal treatment relative to men; the question of indigenous and tribal peoples where the (reverse) movement took place from integration to recognition of their right to diversity and protection of their autonomous development.

which are explicitly mentioned in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)⁶⁵ as compared to the range and constantly evolving grounds of discrimination in employment and occupation which the Declaration and its follow-up highlight and address.⁶⁶ As a second example one can think of the new forms of forced labour, such as the forced labour dimensions of trafficking, which for obvious reasons Convention No. 29 could not possibly have foreseen and thus cover.

4 *Insufficient Attention to Empirical and Other Evidence of the Impact on Members*

This question of the concrete impact of the Declaration on the ILO's 'performance' with respect to the protection of the rights covered by it seems central to the debate. Its answer should mainly but not exclusively be based on concrete evidence of the impact of the Declaration on the situation of those ILO members, which have not ratified the relevant conventions. But this is not the approach taken by our authors and the various assertions or suggestions scattered throughout the article seem to ignore the following elements of evidence.

Positive impact on states which have ratified. By definition, the Declaration and its emphasis on principles cannot have any effect on the specific obligations already undertaken by members. But, as already noted, it can encourage them to develop their practice beyond their strict obligations to cover implications of the 'principles' which have not been spelled out in the relevant conventions and 'jurisprudence'. Moreover the new 'method of work', directed at ensuring in practice the respect and realization of the fundamental principles and rights at work, has also had a positive impact for them. In some instances, consistent comments and requests for information by the CEACR have provided the basis for developing country-level initiatives addressing the institutional or policy hurdles underpinning the problems detected by the CEACR.⁶⁷ More generally it has led the ILO to provide advice and assistance to overcome the obstacles to implementation, thus complementing and strengthening

⁶⁵ Convention No. 111 requests ratifying states to combat discrimination in employment and occupation occurring on the basis of race, colour, sex, religion, political opinion, national extraction, and social origin. The Convention also allows governments to take action against discrimination on grounds other than those listed in the Convention, after consultation with representative of employers' and workers' organizations. The CEACR suggested that a Protocol, allowing countries formally to accept additional grounds on which discrimination would be forbidden, would constitute a more effective way of allowing states to broaden the grounds covered by the Convention. But the proposal to include the extension of the grounds of discrimination prohibited in Art. 1 of Convention No. 111 in the 92nd session of the International Labour Conference was not retained by the Governing Body. See <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-2-1.pdf>.

⁶⁶ The first global report on this matter, *Time for Equality at Work* (Mar. 2003, available at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1558), dealt also with various forms of discrimination other than those listed in Convention No. 111. These comprise discrimination on the basis of HIV/AIDS, disability, trade union membership, sexual orientation, nationality, and family responsibilities.

⁶⁷ For instance, the ILO is presently assisting the Government of Brazil in reviewing, streamlining, and standardizing the mission statement and *modus operandi* of the main Federal programme of action against discrimination in employment and occupation to enhance the country's capacity to address racial and gender discrimination.

the ILO's supervisory machinery. This was the case, for example, in Paraguay and Bolivia.⁶⁸

Positive impact on the ratification of fundamental conventions. The claim that the Declaration would deter ratification by giving countries an excuse for not ratifying was the first raised by those who opposed the Declaration as a threat to the traditional ILR. Subsequent developments reflected in the following table have proved this fear to be completely unfounded:⁶⁹

	<i>c. 29</i>	<i>c. 87</i>	<i>c. 98</i>	<i>c. 100</i>	<i>c. 105</i>	<i>c. 111</i>	<i>c. 138</i>	<i>c. 182</i>
2005	164	142	154	161	162	160	135	151
2003	163	142	153	161	161	159	130	145
2000	155	133	147	149	152	145	103	56
1998	146	121	137	136	129	129	46	–
1995	136	113	125	123	114	118	46	–

In the light of these developments another argument has emerged: there is no established causality between the Declaration and the progress of ratifications. However, comments received from countries which have ratified suggest (even if they do not 'prove') that the 'nuisance' attached to the completion of the forms (as indeed the procedures are more onerous) as well as the perception that at least at the beginning there might be more risks of 'finger-pointing' under the follow-up, was sufficient to convince some of them to either opt for, or seriously consider, ratification.⁷⁰ It is true as Alston points out that only half of the world's population of workers have the relevant 'rights' recognized and protected,⁷¹ notwithstanding the follow-up and recent

⁶⁸ In Bolivia, for instance, the Ministries of Labour, of Indigenous Peoples and Orinary Peoples, of Sustainable Development, and the Vice-Ministry of Justice in Dec. 2004 signed an Inter-Ministerial Agreement to establish a National Commission for the Eradication of Forced Labour, responsible for the formulation of national policies in this respect, and to ensure the representation on this Committee of employers' and workers' organizations, civil society, and indigenous peoples.

⁶⁹ The table shows ratifications of Fundamental Conventions up to 14 Feb. 2005.

⁷⁰ In other cases ratification can be clearly traced to the 'dialogue' established in the framework of the follow-up. For instance, further to the Comments of the Expert-Advisers (in 2001 the Expert-Advisers expressed concern about the persistence of prison forced labour in China and asked the Government for more information about efforts made since 2000 to promote the principle of the elimination of forced labour. (See GB.280/3/1, 280th session, Mar. 2001)), the Government of China asked for the ILO's technical assistance in developing a national policy consistent with the principle of the elimination of forced and compulsory labour. Since then there has been continued progress in the dialogue between the ILO and the Government of China. Co-operation has been provided in the priority areas identified by the Government, including familiarizing officials of the Ministry of Labour and the social partners with the content of Conventions Nos. 29 with a view to their ratification.

Bolivia, Ecuador, and Peru between 2000 and 2002 ratified the two Conventions on child labour, further to a series of initiatives promoted by the ILO urging the governments to give practical application to the principle of the effective abolition of child labour. These initiatives ranged from the analysis of the normative and administrative steps required to bring the law and the practice into conformity with the principle to special programmes to combat particular forms of child labour and multi-stakeholders policy workshops.

⁷¹ Alston, *supra* note 1, at 514.

ratifications. This is indeed what the ILO itself deplored in the 2004 Global Report *Organizing for Social Justice*⁷² concerning freedom of association and free collective bargaining. It is difficult, however, to see how the recognized fact that we are still very far from the objective is relevant to the point that progress has been achieved, and to the fact that the two approaches are not mutually exclusive but highly complementary. The plain fact is that there are now more countries which are bound by more 'detailed requirements' spelled out in the relevant convention.⁷³

A positive impact on practice in non-ratifying countries. As indicated above, the follow-up has to be judged not on the basis of any difference from the Freedom of Association mechanism, but on the basis of its own merits and concrete evidence of its impact. The evidence given by Alston is largely based on criticism made by the experts themselves on the quality of the annual reports provided by non-ratifying countries and on a few quotes illustrating the tendency of the experts to practise what the French call the 'langue de bois'. But this is not a substitute for hard evidence. As noted above, the Declaration has helped develop a more 'action-oriented' and 'problem-solving' approach in addressing situations of non-observance of the fundamental principles and rights at work. Annual reviews, global reports and ensuing technical cooperation go beyond pointing to problems or highlighting areas warranting remedial action. They seek also to work out and test, together with member states, possible solutions that may help to put an end to the identified scourges. The developments that have taken place in the field of forced labour since the first global report, *Stopping Forced Labour*,⁷⁴ was discussed by the ILC in 2001 illustrates the point. Up to then, the ILO's work in this field consisted only of the supervision of the application of the relevant conventions in ratifying countries. Since the launch of the follow-up action plan, the ILO has also engaged in in-depth research in an effort to shed light on the old and new manifestations of forced labour in order to build up a sound understanding of the problems to be tackled, and to address them through technical cooperation⁷⁵ with a view to helping countries move towards ratification. Nepal is one recent example. To put an end to forced labour, sound laws and effective enforcement are necessary, but insufficient. Measures to promote awareness of the

⁷² See Report of the Director-General, *Organizing for Social Justice*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 92nd Session, 2004, at 23, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.GLOBALREPORTDETAILS?var_language=EN&var_PublicationsID=2973&var_ReportType=Report.

⁷³ The above may, however, arguably not dispose of the argument that the Declaration, even if it has not deterred ratification, has contributed to removing a source of embarrassment for bad pupils such as the US, whose attitude towards ratification is as indicated above, central to the author's perception. It seems that, from a common sense point of view, the increase in the record of ratification of the fundamental Conventions as a result of the follow-up would, if anything, increase rather than decrease the embarrassment for the group of countries which persists in not ratifying, and in particular the US, which finds itself more and more conspicuously, as numbers shrink, in the company of Myanmar and Oman.

⁷⁴ Available at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.GLOBALREPORTDETAILS?var_language=EN&var_PublicationsID=2055&var_ReportType=Report.

⁷⁵ ILO, *Forced Labour: Time for Action* (Nov. 2003), available at <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD>.

risk of forced labour, along with other prevention strategies for potential victims, as well as the social and economic rehabilitation of freed workers are also needed.⁷⁶

Capacity of the follow-up to correct itself and draw the lessons of experience. The above illustrations obviously do not mean that the follow-up and its impact, as they develop, cannot be improved. It has to be objectively recognized that the follow-up practice like the practice under the supervisory procedures may have in some cases drifted away from their original intent, not necessarily for the better. Thus, two features which were central to the original scheme may have become blurred in practice: one was the idea of establishing a 'base-line' for non-ratifying states that would enable progress assessment through annual reviews; the other was the use of global reports to establish clear – even if modest – priorities for the following four-year cycle against which the impact of the Declaration could be judged (and Alston's criticism more easily rebutted). The tendency in both cases may have caused a more subjective 'donor-oriented' perspective to develop. It should also be kept in mind that the impact of the follow-up to the Declaration is obviously dependent on the resources that are available to carry out the technical assistance programme, and in particular, extra-budgetary resources. While such resources have been fairly abundant for the eradication of child labour, which appeals to popular feelings, this is much less the case for issues like freedom of association and collective bargaining, however instrumental they may be in the positive evolution of other rights.

All this tends to confirm that one should be careful not to throw the Declaration baby out with the water of existing practices in the same way that Alston himself is rightly careful not to throw out the ILR, which he cherishes, with the water of the imperfections in the supervisory practices that he has severely described. This is all the more true in that the follow-up has been in place only for a relatively short period and that it was clearly and specifically established on an experimental basis. The idea was that it could be revisited at some appropriate time (at the earliest after completion of a full 'cycle' of global reports). The expert advisers recently volunteered some possible improvements. There is nothing that would prevent academics from using more positively their critical mind in such endeavour.

5 *The Impact on the Status of Fundamental Rights in International Law*

Alston concludes his analysis of the 'rights and principles' dichotomy with the comment that the 'bottom line is that the Declaration proclaims as "principles" a range of values which had already been recognized as rights exactly 50 years earlier in the Universal Declaration of Human Rights'⁷⁷ as if the Declaration had somehow failed in its claim to enhance the status of the rights in question in international law. The point, however, is that the Declaration never had such a pretence. As previously noted, it does indeed have a rather limited 'inner-directed' ambition. It did not aim in any way to establish the 'fundamental' status in international law of the rights, which are the object of the Declaration. Indeed, Report

⁷⁶ In this respect the forthcoming second Global Report on forced labour entitled 'A Global Alliance against Forced Labour', to be released in May 2005 and discussed at the 93rd Session of the International Law Commission in June 2005.

⁷⁷ Alston, *supra* note 1, at 483.

VII which introduced the draft before the 1998 session of the ILC made this point perfectly clear in a sentence which paraphrases Leibnitz's famous observation about God and the Just '... fundamental rights are not fundamental because the Declaration says so; the Declaration says that they are fundamental because they are'.⁷⁸

This does not say that the Declaration cannot indirectly contribute to strengthening the status of these rights in international law and contribute in particular to consolidate their possible status as customary law, even though the doubts expressed by Alston may appear well taken in this respect. Without entering into such a debate,⁷⁹ which would take us far beyond the limited object of the present comments without much prospect of reaching a conclusive answer, one point of fact deserves to be noted.

It will be recalled that the Declaration, while it was adopted without any formal negative vote, nevertheless had a narrow escape from the quorum requirement.⁸⁰ It is thus significant from the viewpoint of the 'consolidation' of the positive acceptance of the rights in question that even countries which abstained in the vote on the Declaration in the hope of derailing its adoption have accepted to subject themselves to the follow-up procedures.⁸¹

2 The Emphasis upon Fundamental Rights: A Boost for, or a Brake on, the Protection for Other Workers' Rights?

The authors' thesis is that the CLS regime, by focusing attention on certain core labour rights, is a departure from the traditional ILR which was careful not to break away from the equal, though random, attention given to all workers' rights,⁸² and thus it tends to relegate other workers' rights to a 'second class status'.⁸³

The problem with this perception is that it is based neither on the text of the Declaration, nor on any concrete evidence of its detrimental effect on other rights. It is instead based upon a few comments deemed to betray a 'neo-liberal' retreat from the pursuit of other workers' rights;⁸⁴ and upon the subsequent launch of the 'decent work' agenda. Let us briefly consider these various aspects.

⁷⁸ '... the Declaration as such is not aimed at establishing the fundamental character of the rights in question. Their pre-eminence follows from their subject matter and from the fact that they have already been recognized as fundamental both within and outside the ILO...': 86th Session Geneva, June 1998. Report VII, *supra* note 39.

⁷⁹ See, e.g., Daudet, 'Preface', in L. Dubin, *La protection des normes sociales dans les échanges internationaux* (2003).

⁸⁰ As a result of the non-recognition in ILO parliamentary practice of abstentions as 'votes cast'.

⁸¹ These states embraced the Declaration in various ways; they did not passively tolerate it. E.g., Mexico initiated and hosted an ILO workshop on the Declaration and its follow-up for the Subregion (May 2001); the Gulf Cooperation Council and Saudi Arabia welcomed advisory services on freedom of association. These showed that countries began to see the usefulness of the Declaration in helping to overcome problems.

⁸² 'All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' See Vienna Declaration and Programme of Action, para. 5, in the Report of the World Conference on Human Rights: Report of the Secretary General, UN Doc. A/CONF. 157/24 (part I), 13 Oct. 1993.

⁸³ See Alston, *supra* note 1, and Alston and Heenan, *supra* note 2. See also Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work', 17 *Int'l J Comp Lab L & Ind Rels* (2001) 271.

⁸⁴ Alston and Heenan, *supra* note 2, at 126. See also Hepple, 'New Approaches to International Labour Organization', 26 *Indus. LJ* (1997) 353, at 358.

What does the Declaration say? In accordance with accepted principles of interpretation the actual text of the Declaration should be considered as paramount. As we have seen, the Preamble underlines the 'special significance' of these rights in terms of their capacity as enabling rights to equip those concerned with the necessary tools to obtain their 'fair share' of the wealth they have contributed to create. It is clear that this 'fair share' can be claimed both at the individual level (in particular through the prohibition of forced labour and discrimination) and at the global level (through collective bargaining) and collective pressure for the adoption of protective labour legislation. But the improvement in protective national legislation can also be obtained through the incorporation of international labour legislation. In that respect, the universal guarantee of freedom of association and collective bargaining, by giving workers a 'voice', also strengthens their capacity to benefit from other ILO instruments relevant to their situation through pressure for their ratification.⁸⁵

The lack of any factual evidence of a detrimental impact on the attention given to other rights. When describing the essence of the ILR, 'which in the space of only a few years could systematically be superseded',⁸⁶ Alston and Heenan seem to be essentially referring to the ILO's perseverance in building year after year a body of standards that covers the whole range of ILO objectives⁸⁷ loosely (including by the authors) described as the international labour 'code'.⁸⁸

The fact that these instruments now cover the whole range of ILO objectives and workers' rights is no doubt one of the most remarkable achievements to be put to the credit of the ILO.⁸⁹ However, the juxtaposition of instruments covering all possible aspects of workers' rights even if it may be the source of moral and even intellectual satisfaction is, as such, of little comfort to many if not most workers. The gap between this impressive corpus of 'rights' as elaborated in these instruments and the less exciting realities confronting those who work, whether they have the status of employees

⁸⁵ It should be recalled that the logic of the ILO voluntary approach to standards is based to a large extent on the assumption that, through Art. 19 of the ILO Constitution and the obligation to submit international labour conventions to the competent national authority, ratification would have its best chance through the mobilization of those concerned at the national level. But this in turn begs the question whether 'those concerned' have 'a voice' and are ready to use it in that connection. It is hoped that this will increasingly be the case with the Declaration and its impact on the ability for workers and employers to organize collectively.

⁸⁶ Alston and Heenan, *supra* note 2, at 139.

⁸⁷ Alston, *supra* note 1, at 461 and Alston and Heenan, *supra* note 2.

⁸⁸ In fact the International Labour Code does not refer to the 'corpus' of international labour instruments but to the major work undertaken by Jenks to provide a systematic and annotated presentation of the existing instruments. See ILO, *International Labour Code 1951; a Systematic Arrangement of the Conventions and Recommendations Adopted by the International Labour Conference, 1919–1951* (1952).

⁸⁹ Jenks proposed the classification of the ILO conventions into three categories: 'the first group consist of conventions protecting certain basic human rights; the second, of conventions requiring the maintenance of certain key instrumentalities of social policy; and the third, of conventions establishing certain basic labour standards'. This classification is a perfect illustration/confirmation of this universality of coverage. See C. W. Jenks, *Law, Freedom and Welfare* (1963), at 103, cited by B. Langille, 1999, at 238.

or not, obviously reflects the voluntary character of ratification and the ‘self-service approach’ referred to previously.

From a common sense point of view it is difficult to see how the Declaration could do anything but improve the situation. Alston nevertheless argues that because of the emphasis placed on the CLS, it is most unlikely that states will ‘(continue to) devote much attention to their remaining obligations under other ILO treaties which have been deemed to be non-core or non-fundamental’.⁹⁰ It is not clear what ‘remaining obligations’ the author has in mind. But it is unfortunately clear that the enduring decline in ratification rates which has affected the credibility of the ILR⁹¹ as a whole did not start with the Declaration; quite the contrary, the Declaration and the ratification campaign for fundamental conventions seem to have been followed by a certain resurgence of ratification of other conventions as well (even if it is difficult to establish a causality). Even more significantly, as we shall see now, the Declaration and its follow-up opens completely new perspectives as regards the possible revitalization of the ‘remaining obligation’ which all members have under Article 19 of the ILO Constitution.

From a ‘neo-liberal retreat’ to a ‘spill-over’ of the Declaration model to other workers’ rights. Alston finds support for his vision of a ‘neo-liberal’ retreat from the protection of all workers’ rights in some remarks contained in the Report of the Director General to the 1994 session of the International Labour Conference.⁹² It is clear that these comments, which antedate the Declaration, cannot affect what it actually says. Moreover, they do not mean at all what he suggests.⁹³

There is however a much more serious difficulty than this unwarranted and far-reaching interpretation of a fairly isolated statement. It is that, again, Alston gets the story upside down. The Declaration, far from being the expression of a ‘retreat’ from the protection and implementation of other objectives and rights, offers through its follow-up a precedent and a possible model for a broader revitalization of the ILO action for their universal promotion. Even if the Declaration itself was indispensable for proclaiming the ‘special significance’ of fundamental rights for the achievement of

⁹⁰ Alston, *supra* note 1, at 514.

⁹¹ See Creighton, ‘The Future of Labour Law: Is There a Role for International Labour Standards?’, in C. Barnard, S. Deakin, and G. Morris (eds.), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple QC* (2004), at 253, 273.

⁹² *Ibid.*, at 465.

⁹³ According to Alston this report as well as subsequent references to the undesirability of the ‘external imposition of standards’ relating to workers’ conditions (Alston, *supra* note 1, at 487) leads him to the conclusion that, in the view of the Office, the international community ‘cannot productively worry about specific social outcomes’ (*ibid.*). When one reads the reference to the ‘external imposition of standards’ in its context (‘Defending Values, Promoting Change, Social Justice in a Global Economy: an ILO Agenda’, Report of the Director-General (1994), at 58) it becomes clear that what it targets is the trade linkage and the ‘compulsory equalization of social costs’ through a social clause which would allow the international community, instead of the Member State concerned, to decide upon the priorities and content of social protection in each country. It is equally clear that these developments were not at all intended to relieve the pressure on Members to ratify and/or implement ILO instruments. Quite the contrary, as it indeed explicitly raised the question ‘whether the States concerned are taking sufficient measures to examine the possibility of ratifying ILO standards [*sic*]’ (*ibid.*, at 59–80).

other rights with all the necessary solemnity, it would have been perfectly conceivable to develop the follow-up even in the absence of the Declaration.⁹⁴

It was indeed envisaged from the start that the Declaration would emulate a more productive use of the potential inherent in Article 19 of the ILO Constitution than the one used until recently⁹⁵ and that Alston has himself rightly addressed.⁹⁶ What the Declaration clearly illustrates is that there is nothing which prevents the ILO from using this provision to regularly review the 'extent to which effect has been given, or is proposed to be given to the provisions of conventions they have not ratified'⁹⁷ or to recommendations.⁹⁸

It is clear that this sort of monitoring would be impracticable if it was deemed to be applied to each of the 80-odd conventions still deserving active promotion according to the ILO Governing Body. The Declaration precedent and model suggests that this practical impossibility would be removed if the review is applied to a 'family' of instruments rather than to isolated ones. The question which remains, however, is how should such an ambitious scheme be developed short of the sort of broad perspective/justification offered by the Declaration. The answer may be provided by the 'decent work' strategy, to which we shall now turn briefly.

The significance and impact of the 'decent work' strategy for the interdependent pursuit of all workers' rights. Alston sees the concept of 'decent work'⁹⁹ introduced by the new Director-General Juan Somavía on his appointment in 1999 as further evidence of a marginalization of the normative workers' rights approach in an effort to move away from the tension on the trade and labour standards issue.¹⁰⁰

While the concept may lend itself to different interpretations,¹⁰¹ it is progressively becoming clearer that by underlining the need to see workers' protection as a whole this concept can in fact help to bridge the gap inherent in the 'self-service approach'

⁹⁴ This is, in fact, explicitly stated in Report VII, *supra* note 39.

⁹⁵ See Maupain, *supra* note 63, at 385–386.

⁹⁶ Alston, *supra* note 3.

⁹⁷ ILO Constitution, Art. 19(5)(e).

⁹⁸ *Ibid.*, Art. 19(6)(d).

⁹⁹ 'The goal of decent work . . . It is about your job and future prospects; about your working conditions; about balancing work and family life, putting your kids through school or getting them out of child labour. It is about gender equality, equal recognition, and enabling women to make choices and take control of their lives. It is about your personal abilities to compete in the market place, keep up with new technological skills and remain healthy. It is about developing your entrepreneurial skills, about receiving a fair share of the wealth that you have helped to create and not being discriminated against; it is about having a voice in your workplace and your community. In the most extreme situations it is about moving from subsistence to existence. For many, it is the primary route out of poverty. For many more, it is about realizing personal aspirations in their daily existence and about solidarity with others. And everywhere, and for everybody, decent work is about securing human dignity.

But to bridge reality and aspiration, we need to start by confronting the global decent work deficit. It is expressed in the absence of sufficient employment opportunities, inadequate social protection, the denial of rights at work and shortcomings in social dialogue. It is a measure of the gap between the world that we work in and the hopes that people have for a better life': 89th Session, Report 1(A), Report of the Director-General, *Reducing the Decent Work Deficit - a Global Challenge* (June 2001).

¹⁰⁰ Alston, *supra* note 1, at 488–489.

¹⁰¹ The concept of 'decent work' is flexible. The 1998 Declaration is the 'floor' of decent work. However, there is no ceiling.

to standards by recognizing and promoting their interdependence. It indeed tends to apply to workers' rights the model applying to human rights, which were recognized in Vienna to be 'universal, indivisible, interdependent and interrelated'. The paradox is that Alston, while hailing that model, does not seem to realize that the ILR 'juxtaposition' of instruments previously mentioned, is a far cry from the said model. It has little to contribute to promote the interdependence and synergies between the instruments and the various objectives they are designed to implement.¹⁰²

This inherent limitation in the ILS regime is all the more serious in the present context of globalization, where it becomes more apparent than ever before that the various social objectives may not naturally or spontaneously coincide. Take employment as an example. It is obviously part of the ILO mandate to legislate on the priority that should be recognized in national policies of the employment objective, as it did with the Employment Policy Convention, 1964 (No.122). But to be really helpful the ILO should also be in a position to provide practical guidance and assistance to members about how to reconcile this objective¹⁰³ with their other objectives regarding the quality of employment and the conditions of freedom and dignity in which such employment has to be achieved.

This is precisely the added value that the concept of 'decent work' can bring. It is an effort to underline the necessary complementarity and interdependence between the various aspects of workers' protection and rights, which correspond to ILO's constitutional objectives. And it is important to emphasize that this concept, contrary to Alston's fear, is by no means antagonistic, i.e., to normative action, quite the contrary. It is interesting to note that at about the same time as Alston published his second piece the Director-General presented a report to the International Labour Conference containing his views and proposals on the report of the World Commission on the Social Dimension of Globalization.¹⁰⁴ He suggested that in due course some clarification as regards the normative foundation of the Decent Work

¹⁰² This is a question that the 2001 report tried to address, but it is not reflected in the author's comments on it. 'The relationship between normative action and decent work is, however, by no means one-way traffic. The notion of decent work may also represent a new frontier for normative action. Let me explain. At first sight, the methods of normative action do not seem well adapted to the Decent Work Agenda. Decent work is universal in concept and its components are interdependent; by contrast, normative action is voluntary and necessarily fragmented in practice, as it seeks to break down the general objectives of the Constitution into a certain number of specific problems to which it offers concrete solutions through Conventions and Recommendations. So the existing normative methods cannot ensure parallel and coherent progress on all the fronts of decent work. Neither can they guarantee the universal application of any of the specific standards across countries and sectors; the effectiveness of standards in the informal economy, in particular, is often questioned. Recent developments have shown, however, that there are ways by which normative action can address these apparent limitations': see Report 1(A), *supra* note 98.

¹⁰³ As some commentators, like Mainwaring, pointed out years ago, this is in a way so obvious an objective that it is hard to imagine a government that could be faulted for its deliberate refusal to implement it. See J. Mainwaring, *The International Labour Organization – A Canadian View* (1986).

¹⁰⁴ See Report of the Director General, *The World Commission on the Social Dimension of Globalization. A Fair Globalization - the Role of the ILO*, International Labour Conference, 92nd session, 2004.

concept might be called for. The Governing Body has just started¹⁰⁵ to examine what if any follow-up could be given to this idea. All this clearly shows an awareness that the task is not completed and that the special regime for fundamental rights and principles, while it represents a necessary and even essential step, cannot provide the whole answer to the challenge faced by the ILR regime as a result of the globalization of the economy.

3 Conclusion

Alston is careful to 'anticipate' criticisms,¹⁰⁶ which in different ways certainly did not require too much guesswork on his part. However, this anticipation of the criticisms serves to confirm the fundamental problems inherent in his analysis. Notwithstanding any clever sophistry, which would have us believe that because the Declaration is (arbitrarily) limited to some rights it represents a weakening of the others, facts vindicate a more common sense assessment of the Declaration.¹⁰⁷ Not only has the Declaration had a positive impact on the ILO's capacity to protect fundamental workers' rights (although this impact could admittedly be even greater), but also this strengthening of the CLS is not affecting the ILO's capacity to promote other workers' rights. It is rather part and parcel of a new approach which tries to overcome the limitations of the 'self service' (or 'cafeteria') approach to the protection of labour rights and concretely contributes to a new vision whereby all workers' rights are 'universal indivisible, and interdependent and inter-related', to use again Alston's favourite quote from the 1993 Vienna Declaration on Human Rights. In short, the complementarity between the two 'regimes' which has been the ILO's motto, but is put in doubt by the authors, not only appears to be fully confirmed by the facts as far as the ILO is concerned but is also likely to be carried even further in the years to come.

The above analysis naturally leads to some reflections on the possible role of academics in upgrading the internal debates within international organizations. As already pointed out in the introduction, their interest and criticisms are intrinsically healthy and should be welcome. Their role can be irreplaceable in developing a 'paradigm' that will help the organization to shape and strengthen its future, as illustrated by Georges Scelle before the Second World War. As Alston himself has done in the past, it may also be of decisive importance in shaking it out of sclerosis or any tendency to indulge in self-congratulation on account of any past or present splendour. There are indeed some interesting avenues sketched out in his article that could be the object of further academic contemplation, for instance, his suggestion to more clearly articulate the parameters of these principles.

¹⁰⁵ GB.291/WP/SDG/1, 291st Session, Nov. 2004, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/sdg-1.pdf>.

¹⁰⁶ Alston, *supra* note 1, at 513–518.

¹⁰⁷ In this respect see Maupain, 'La "Valeur-Ajoutée" de la Déclaration Relative aux Principes et Droits Fondamentaux au Travail pour la Coherence et l'Efficacité de L'Action Normative de L'OIT', in I. Daugareilh (ed.), *Mondialisation, Travail* (2005), at 1.

This role can also be essential in challenging the organization to remain faithful to its objectives and values. But they must guard against two pitfalls in this respect. The first is to substitute his/her own interpretation of these values to that of the constituents; or to blame the constituents for not scrupulously abiding by his/her vision of what these values and the defence of their interests is deemed to command. In the case of an organization like the ILO where the beneficiaries are directly represented, and are normally in the best position to understand and defend these values,¹⁰⁸ it may indeed come as a surprise for them to find out from our distinguished professors that they had it all wrong!

The second is to use fidelity to values, objectives and traditions as a mere excuse for maintaining the status quo. The boldest rejection of such an attitude in the field of normative action came from its most unimpeachable defender Albert Thomas. He once declared to the Conference that he could not feel satisfied sitting 'in endless contemplation' of provisions that were considered 'ideally fair' but remained unapplied.¹⁰⁹ Perhaps he would have liked the Declaration.

¹⁰⁸ Even though it may recognize that the post-Cold War period has eroded the workers' capacity to defend their interests both within and outside the ILO.

¹⁰⁹ Thomas, 'Débat sur le rapport du Directeur général', ILC, 10th session, 1927, at 67 and 249.

Annex



