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Facing Up to the Complexities of the ILO's Core Labour Standards Agenda

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Abstract

This article responds to two detailed critiques by Brian Langille and Francis Maupain of an article dealing with the 'transformation of the international labour rights regime' which followed the adoption by the ILO of the 1998 Declaration on Fundamental Principles and Rights at Work. The author argues that the ILO does, in fact, play a central role in the process of defining core labour standards and that its approach is invoked by a wide range of actors seeking legitimacy for their own approaches to such standards, whether in the context of bilateral free trade agreements or of private voluntary initiatives. For these reasons it is important to understand clearly the role played by the ILO, to acknowledge the extent to which the Declaration has become detached from the existing jurisprudence of labour rights, and to seek to ensure that the ILO adopts a more balanced approach which does not unduly privilege a limited range of procedural rights at the expense of equally important substantive social rights. The article concludes by outlining the steps which the ILO ought to take in order to ensure that it remains a relevant and influential actor in efforts to protect the basic rights of workers in the 21st century.

1 Introduction

There is no doubt that the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work[1] marked a watershed for the International Labour Organization. My 2004 article[2] drew attention to two additional elements: (1) that

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1 Adopted by the International Labour Conference, 86th Session, Geneva, June 1998 [hereinafter ILO Declaration], available at http://www.ilo.org/public/english/standards/decl/declaration/index.htm.

2 Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime', 15 *EJIL* (2004) 457 [hereinafter Alston]. Maupain also cites another article written jointly with James Heenan (Alston and Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?', 36 *New York University Journal of International Law and Politics* (2004) 221), but the arguments in that article are subsumed by the more detailed treatment contained in the *EJIL* article. Thus I do not address the latter article in this rejoinder.

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the Declaration provided the occasion for a major transformation of the overall international labour rights regime; and (2) that if this transformation is not to have significant negative consequences in terms of its impact on the rights of workers several flaws in the resulting regime need to be addressed. The identification of these flaws, and of the attendant risks, has brought two very detailed rebuttals of my argument, to which this article is intended as a rejoinder. Those rebuttals assume added importance because of the standing of their authors and the extent to which they express views which reflect the official ILO line. Francis Maupain emphasizes that the views he expresses are his own and in no way commit the ILO, but he remains a senior ILO official; he is the former Legal Adviser, and was the key lawyer within the Office during the drafting of the 1998 Declaration.[3] And while Brian Langille writes as an independent scholar, he is currently based at the ILO's International Institute for Labour Studies and was a close observer in the process of drafting the Declaration.

2 Styles of Scholarship and Modes of Argument

The majority of Langille's critique,[4] and a good deal of that of Maupain,[5] is devoted to disagreement with my modes of argument and style of scholarship. While I will briefly address these issues below, I will focus most of the rejoinder on the issues of substance which are central to the debate.

It is often the case in life that we tend to be most critical of others in relation to those of their weaknesses which most closely mirror our own shortcomings. Brian Langille suggests that my analysis is largely rhetorical, is built upon 'large and dramatic claims', and uses 'quite unrestrained language' (413). He then proceeds to imply that my account is untrue, to note that it is 'wrong at every step of the way' (417), that it involves both romanticization and hallucination, that it is riddled with 'large legal errors' (417), and that it 'ignores . . . the conceptual, normative, and pragmatic' (420) aspects of the issue. The account is said to refuse 'relentlessly' to address the key issues, to use 'legal formalism and blank sociological reporting' (411) in place of argument, to contain analysis that is no more than bizarre and convenient cant, and so on.

In this spirit Langille accuses me of employing various analytical sleights of hand ('tricky, argumentative strategies' such as 'bait and switch', and 'hedging of bets' (412)). Without any self-conscious irony he then proceeds to present my article in its 'pure' form, noting that he has stripped it of the various qualifications, nuances and other caveats which had been carefully inserted precisely to avoid a crass version of the critique being extracted from a complex analysis. Maupain adopts a similar strategy by

[3] He also thanks a range of ILO officials for their 'contributions and comments', including Kari Tapiola, the most senior ILO official currently responsible for overseeing the 1998 Declaration. Mr Tapiola holds the rank of Deputy Director-General of the ILO and is the Executive Director of the ILO's Standards and Fundamental Principles and Rights at Work Sector.

[4] Langille, 'Core Labour Rights – The True Story', 16 *EJIL* (2005) 000 [hereinafter Langille].

[5] Maupain, 'Revitalization not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', 16 *EJIL* (2005) 000 [hereinafter Maupain].

focusing not on my analysis as such, but on a 'more pedestrian review', albeit '[a]t the risk of losing some of the subtleties in the argument' (443).

This technique enables Langille to arrive at a summary of my thesis that would make a tabloid journalist blush for its selective cutting and pasting of individual words in order to produce a distorted montage which bears only a passing resemblance to the nuanced set of arguments I sought to make. Maupain, too, contents himself with looking closely at some carefully selected trees rather than at the forest.

In terms of Langille's analysis, one key example will suffice. He observes that my article 'has a view' but, he immediately adds, 'that view is not actually once defended or argued for' (417). He then very helpfully manages to decipher my apparently unstated and unargued view by saying that it is a 'popular one' (417) which he equates with ideologically-driven and wholly unconvincing anti-globalization approaches (none of which is actually cited). This guilt-by-association technique is capped with the observation that '[s]tarting from this perspective, you are pretty much bound to end up with a view . . . much like Alston's' (418). This conclusion is no mean feat, given the assertion that I never once argued for my own supposed view.

Maupain, on the other hand, adopts a consistent technique throughout his critique. Thus he insists many times over on the need to show 'concrete evidence' (three references) or a 'concrete impact' (eight references) in evaluating the impact of the conventions and the Declaration. The problem is that the various sources I invoke – including a range of ILO officials, the ILO's own expert group, several of the key drafters of the Declaration, and others – are all treated as being soft and unconvincing. In contrast, he sees himself as relying upon 'hard evidence', which turns out to consist largely of official ILO statements, reports by the Director-General, and other forms of the standard fare of international organizations. At no point does he suggest that the ILO – an organization which rarely invites any external or independent evaluations of its own performance – should commission any serious impact studies of its work on the Declaration. In this respect the ILO approach stands in marked contrast even with that of the much criticized World Bank and International Monetary Fund, which have at least set up several independent mechanisms with the ability to undertake sustained independent evaluations of the agencies' performances.[6]

Perhaps the major objection identified by both Langille and Maupain is that I failed to write the article that each of them think should have been written. Thus Langille's main concern is that the article 'steadfastly, relentlessly' (3) refused to address the issue which (in his view) is central. Maupain is equally critical but more specific. He objects to the failure to write about issues such as rates of ratification of ILO conventions and the significance of those rates, or about the extent to which the traditional standards approach neglects those working in the informal economy. At the same time he takes issue with 'lengthy diversions on issues such as the trade and labour debate', which he seems to think are 'remote from the central argument' (443). This is especially puzzling given that the rejuvenated debate over labour standards is mainly

[6] See e.g. in relationship to the World Bank, the Operations Evaluation Department and the Inspection Panel, and in relation to the IMF the Independent Evaluation Office.

an outcome of attempts to link the two issues, whether in the WTO and the ILO or in bilateral and regional initiatives. Again, the critique is that certain issues were not addressed in the article. Given the number of articles that I might have written, but did not, one can predict a bright future for this industry!

We turn now to address the principal substantive issues on which Langille, Maupain and I are in disagreement.

3 The Role of the ILO

The role played by the ILO in influencing labour rights policies in various contexts is a matter of contention among the various analyses. I suggested that, under the new regime, the ILO 'remains only nominally at centre stage'.[7] But in Langille's view, the ILO has never been 'at centre stage' in any meaningful sense, and indeed the very idea 'that there is a centre stage and that it is located in Geneva' (422) is a bad one. Although the phrase 'centre stage' is used only once in the article, the ILO has arguably played a central role on the admittedly small, but nonetheless important, stage of defining which rights are to be taken into account in international discussions of labour rights. Indeed my critique would make little sense if the ILO could accurately be depicted as a marginal player whose initiatives will have little, if any, impact on the broader international regime. The list of labour standards reflected in the NAFTA agreement, in the various bilateral free trade agreements, in national formulations such as those incorporated in externally-focused US legislation, and in the work of international organizations in general have all been heavily influenced by the work of the ILO.[8] In this sense the Organization has been at centre stage and the debate that continues today is precisely about whether there will continue to be some multilateral forum such as the ILO in which that debate is centred or whether the process of standard-setting has become so decentralized as to create a potential free-for-all in which corporate actors, for example, can proclaim their firm commitment to core labour standards but still retain complete flexibility as to the content they attribute to those principles. We return to this issue in Section 5 below.

Rather than seeking to address this risk, Maupain prefers to eliminate it by arguing that the Declaration's 'objects [sic] are limited to the ILO and its Members', and notes that 'the Declaration not address the question of private initiatives' (451). He thus takes no account of the fact that, just as many of the Declaration's drafters had hoped, the Declaration is invoked by a wide range of actors seeking to give legitimacy to their own forays into the labour standards arena. This is not to suggest that this development is *per se* problematic. If we accept that the ILO regime on its own does not have what it takes to respond to the challenge of defending workers' rights in the 21st century it is clear that a wide range of corporate and other actors need to be mobilized in that endeavour. But my concern that the standards invoked by these actors need to be

[7] Alston, at 458.

[8] See generally J.-C. Javillier and B. Gernigon (eds), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos* (2004).

anchored somewhere still stands, and the way in which the Declaration and its follow-up procedures are currently operating does little to assuage the concerns in this respect.

Current developments in relation to bilateral free trade agreements (FTAs) provide an illustration. The extent to which the Declaration vindicates or provides a critical dimension of legitimacy to the bilateral standards which the United States is promoting in its FTAs is dismissed by both Langille and Maupain. The latter asserts optimistically that the 'FTAs, through the cooperation mechanisms and monitoring systems built into them, may provide a "window of opportunity" for strengthening ILO's own supervisory work' (451). This is a bold claim indeed, given the current trends that were considered in detail in my article, and have recently been summarized in the following terms:

> [Recent free trade agreements negotiated by the United States] do not contain an enforceable commitment to respect core ILO labor standards . . . . Instead, these FTAs contain only one enforceable labor commitment: to enforce domestic labor laws. These commitments reflect . . . a major regression . . . .[9]

The role played by the US in promoting a soft regime which suited its own interests in escaping from the Convention-based regime while enabling it to act as a champion of labour rights is dismissed out of hand by Langille on the grounds that the US has no need to prove anything to anyone in terms of labour rights. Thus my analysis, said to be motivated by 'contempt' for the US role, is described as an impossibly 'optimistic reading of the current American politics of labour law', and based upon a proposition that is 'about as far off the American political map as you can get' (13). But this is a strangely ahistorical account. In 1998 the Clinton Administration was seeking to reassure the major domestic unions, and especially the AFL-CIO, that it was committed to the promotion of labour standards, especially in countries whose goods were competitive with those of the United States. It also needed to make good on its claim that the best way to improve human and labour rights standards in China was through dialogue and international cooperation rather than through threatening to withhold Most-favoured Nation status from China (President Clinton put an end to that annual debate in 1994). The US had little credibility at home, and even less abroad, given that it had ratified the same pitiful number of core ILO conventions as had Myanmar, which was the subject of ongoing ILO sanctions. The 1998 Declaration changed all of this in one fell swoop and enabled the US to take the moral high ground in international labour issues. Langille's claim that this is far off the US political map is probably closer to the truth today, but it was not the case in 1998.

[9] Hiatt and Greenfield, 'The Importance of Core Labor Rights in World Development', 26 *Michigan J Int'l L* (2004) 39, at 60.

4 The Past and Potential Impact of the ILO

Two important questions arise in this respect. The first concerns the impact actually achieved by the standard-setting and supervisory activities of the *ancien régime*, as Langille calls it. The second relates to the role that the ILO and its labour standards should aspire to play in the future.

The first question is that of past impact. Langille's analysis condemns the old supervisory system as being ineffectual, anachronistic and counter-productive. The reader is left to conclude that it should be abandoned and, in essence, replaced by the Declaration. Although Maupain takes a similar line, he offers some muted praise of past achievements. His bottom line, however, that '[f]rom a common sense point of view it is difficult to see how the Declaration could do anything but improve the situation' (460). My own assessment was, and remains, mixed. The ILO has had a major impact in defining the international labour standards agenda and its supervisory arrangements were effective, within certain limits, for many decades. By the same token, it is clear that the way in which the standards are presented and promoted and the techniques adopted by the supervisory organs have conspicuously failed to adapt to the radical changes in the global economy over the past 15 years or so. That is why I noted that the ILO system is now in crisis.[10] On this, it seems, the three of us are in agreement. Where we differ, however, is in our appraisal of whether the Declaration per se is the way forward. At no stage did I suggest that the maintenance of the status quo is either desirable or even viable.

The second question relates to the vision for the future role of the ILO in relation to labour rights. Here, the positions diverge radically. The nub of our disagreement is reflected in the following passage from Langille:

> The role of the ILO is not to block through some legally binding agreement and legal 'enforcement' mechanism the member states from pursing their individual self interest, but rather to help member states see where their self interest actually lies and to assist them in getting there (420).

Neither element in this proposition, which is the lynchpin of Langille's case (what he calls the 'better view which underwrites my criticisms of Alston' (420)) seems to me to be correct. In relation to the first element, it is something of a parody of the complex and manifold ways in which the old system sought to work to portray its essence as consisting of an effort to use treaties to compel member states to eschew their self-interest. In fact, that system involved a complex set of techniques such as (i) seeking to influence public opinion by giving legitimacy to particular standards of conduct, (ii) empowering domestic labour rights proponents (employees, sympathetic actors within government, progressive employers or other labour market actors, and welfare providers); (iii) providing a firm reference point for courts, government officials, labour inspectors and others when called upon to determine the acceptability of particular practices; (iv) putting pressure on governments to measure up to standards which they themselves had accepted; (v) providing both domestic and international

[10] Alston, at 473.

fora of tripartite composition in which the issues could be debated; (vi) establishing a system in which technical cooperation could be provided by the ILO in situations in which a lack of political will was not the major stumbling block; and (vii) providing a baseline against which bilateral or multilateral promotion of labour rights could be undertaken.

It shows little understanding of how the system once worked to suggest that its essence was the brandishing of 'legally binding agreements' in an effort to 'enforce' rights against the will and self-interest of governments. A much better understanding can be gained from the rapidly growing literature dealing with compliance mechanisms in international law which indicate clearly that formal legal enforcement, especially in the area of human rights, is a very minor part of the overall regime.[11] It is untenable then for Langille to suggest that the 'old' ILO approach consisted of viewing law simply as an "enforcement" mechanism'. Indeed a great deal of writing in the field of social rights has been devoted to the opposite viewpoint, one which emphasizes empowerment and mobilization.[12]

The second element of Langille's proposition, that the real role of the ILO is 'to help member states see where their self-interest actually lies' (420), is equally contestable. If the self-interest of governments truly matched the interests of workers around the world, we would not need an international system to promote respect for standards. They would have no problem ratifying the relevant ILO conventions, since these would express their self interest. This they have not done, of course. And expressing optimism that the Declaration will bring about a reconceptualization of governmental self interest does nothing to address the reasons why labour rights violations are so ubiquitous.

Maupain takes a comparably optimistic approach by arguing that the lack of teeth in the Declaration's follow-up mechanisms is more than compensated for by enabling the ILO to deal 'with a broader range of specific situations through technical cooperation without depending on a complaint' (446). Moreover, he rejoices in the fact that the Declaration actually obliges the ILO to assist governments in relation to the core rights 'by offering technical cooperation and advisory services' (446).

But this emphasis ignores the fact that the ILO has long been in the technical cooperation business (which will always remain under-funded and under-utilized, as experience to date shows), and more importantly overlooks the inconvenient fact

[11] See, e.g. T. Risse, S. Ropp and K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999); Hathaway, 'Do Human Rights Treaties Make a Difference?', 112 *Yale L. J.* (2002) 1935; Goodman and Jinks, 'Measuring the Effects of Human Rights Treaties', 14 *EJIL* (2003) 171; Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 *Int'l Org.* (2000) 217; Heyns and Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23 *Hum. Rts Q.* (2001) 483.

[12] See, e.g., Alston and Bhuta, 'Human Rights and Public Goods: Education as a Fundamental Right in India', in P. Alston and M. Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (forthcoming 2005).

that the lack of advice from the ILO is rarely the reason why violations of labour rights occur. As recently noted by the UN High Commissioner for Human Rights:

> No amount of policy analysis or marshalling of resources will suffice where Governments lack the commitment to reform or to redress a pattern of abuse. . . .
> Whatever the specific problem – inertia, apathy or hostility to the human rights prescription itself – the clear task of the United Nations is to remind Governments of their obligations. . . . [13]

This is not to say that technical cooperation will not be useful in some instances, but its greater potential availability under the Declaration system is a poor basis indeed upon which to defend the fact that the Declaration's other implementation mechanisms are so diluted.

5 Lack of Definable Content for the Principles

One of the major criticisms that the article makes relates to the 'lack of any definable content for the relevant principles'. In support it cited Edward Potter, one of the key players in the Declaration process, as regularly asserting that the principles are '[d]ivorced of all the specific legal provisions of the Conventions', an ILO group of Expert-Advisers observing in relation to the Declaration that while '[m]ost countries assert general respect for the principle' of freedom of association, closer inspection reveals 'that there are so many exceptions that these rapidly empty the principle of its full potential', and a report by a group favouring voluntary industry codes noting that '[s]ome code-of-conduct standards . . . call for 'freedom of association' in general terms without specifying the right to form and join trade unions, even though [that right] is explicitly at the heart of the international standard.[14] Maupain's response is twofold. The first is semantic and simply dodges the question. He observes that:

> 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 rights *for the simple reason that they are the anchors* (446, emphasis in original).

The second is to argue that 'the key guarantee for such consistency rests with the role and responsibilities vested in the tripartite constituency' (450). He assumes that the oversight role of the tripartite partners exercised through the International Labour Conference will ensure no weakening of the emphasis upon standards. Langille also sings the praises of the ILO's 'tripartite methodologies' (436) in shaping the future. But in practice the weakening of the tripartite system is one of the most fundamental challenges confronting the future of the ILO. Neither the employers' or workers' organizations have been especially active in the follow-up to the Declaration, thus clearly indicating their scepticism about the procedure and undermining any suggestion that tripartism will ensure the effectiveness of the Declaration in

[13] The OHCHR Plan of Action: Protection and Empowerment, Geneva, Office of the United Nations High Commissioner For Human Rights, May 2005, paras 28–29, available at http://www.ohchr.org/english/planaction.pdf.

[14] Alston, at 518–520.

upholding respect for labour rights. In the same vein Bob Hepple concludes a recent analysis of the problems of tripartism by noting that the 'contradiction between the principles of universality and tripartism is likely to become acute' in the future work of the ILO.[15] As trade union membership weakens in most countries, as dominant corporations such as Wal-Mart actively oppose unionization,[16] and as more and more workers find themselves outside labour relations frameworks which might once have protected them, it seems a tad optimistic to argue that the future of labour rights lies in tripartism.

6 Rights versus Standards

One of the recurring differences is my reliance upon an established and widely accepted concept of human rights as reflected in international law, and Langille's reliance upon the tools and perspectives of domestic labour law. None of this is surprising since, in this respect at least, we are both working out of the fields in which our respective expertise lies. Langille is neither an international nor a constitutional lawyer and I am not a labour lawyer. This difference becomes problematic when Langille's analysis rests upon the application of a domestic labour law framework, and the terminology and assumptions which underpin it, to an analysis which is grounded in international law concepts and norms. Thus, in order to rebut the analysis of the distinction between rights and principles in the international legal context – the only one that is relevant for the purposes of my analysis of the impact of the 1998 Declaration on the *international* labour rights regime – Langille resorts to the Ontario Labour Relations Act and its relationship to Canadian Constitutional Law. This is both unhelpful and misleading. It leads Langille to argue that there are two types of rights that are relevant in the labour standards domain. They are human/constitutional rights and legal rights. The characteristics of human/constitutional rights are not described but they are contrasted with legal rights which are said to be 'detailed, legal, statutory, enforceable' (422). This leads him to analogize the Declaration to a constitution which stands aloof from all of the messy detail needed to give effect to the rights. He does not, however, face up to the key points at which this analogy breaks down and which were central to the criticisms identified in the article.

The first is that he is actually talking not about the distinction between constitutional and legal rights, which need have no necessary relationship to one another (we have a legal right to park our cars in designated streets, but this has nothing directly to do with any constitutional right). In cases in which the two forms of right are directly related, the secondary (in this case statutory) norms build upon and give content to the primary (constitutional) norms. While a relevant statute can be repealed,

[15] B. Hepple, *Labour Laws and Global Trade* (2005), at 54.

[16] Meyerson, 'Wal-Mart Loves Unions (In China)', *Washington Post*, 1 Dec. 2004, at A25 ('Up to now America's largest employer has opposed every effort of its employees to form a union. Wal-Mart doesn't recognize unions. . . . ').

this does not prevent certain of its elements from having gained constitutional recognition as essential components of the right.

The international human rights regime operates in a comparable way. A statement contained in, for example, Article 5 of the Universal Declaration of Human Rights, that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' is not left to every national context to be given content, as Langille's approach would suggest. If it were, we would have very little reason to think that it would restrain the vast majority of governments from doing as they wish. Now he might well respond that this is indeed the case and that governments are able to get away with gross and persistent violations of the broadly stated prohibition on torture and comparable behaviour. But this misses the point that the Universal Declaration's torture prohibition has been given important content by virtue of a wide range of subsequent interpretative instruments. These may well have widely divergent formal legal status, but they nonetheless shape the domestic obligations of states under international law, provide the benchmark against which public opinion will evaluate governmental conduct, and provide a basis upon which multilateral or bilateral responses to torture can be justified.

To the extent that the 1998 Declaration is treated as a freestanding statement of 'principles' and is detached from the various international sources which give it content, this system breaks down. I pointed to a number of ways in which a process of detachment has begun to take place, including a succession of unequivocal statements by one of the Declaration's principal architects and proponents, and a tendency on the part of the ILO in its various reports to play down the linkage between the 'principles' and the normative *acquis*. Although Langille does not say so explicitly, this trend does not trouble him for two reasons. One is that he considers the old system which produced the *acquis* to be anachronistic, a position about which he makes no bones in his reply. The other is his conviction that there is 'a basic "grammar" of the right [to freedom of association] . . . a core set of restrictions and entitlements that any account of this right must respect' (422). But he provides no account of where this core comes from, other than to offer the example that the killing of large numbers of trade unionists would clearly be unacceptable.

The second point at which his analogy between the domestic and international systems breaks down is that, at the national level, the task of defining the content of the vaguely worded constitutional right (to freedom of association, for example) will be spelled out in domestic legislation and interpreted by domestic courts. Under the Declaration, the task of giving content to the bald assertion that there is a 'principle' of freedom of association which should be respected, remains unallocated.

In so far as we are dealing with a government which has ratified a relevant international treaty or has adopted detailed domestic legislation consistent with international standards, we can reasonably expect that the content given to the 'principle' will be consistent with the internationally accepted content of the norm. But the problem is twofold. First, many governments have either not ratified the relevant international conventions or not adopted legislation reflective of their norms. Second, and more importantly, the major future significance of the 'principles' contained in

the 1998 Declaration will be on non-state actors such as corporations, international development or financial agencies, and private contractors. These actors are in no way bound by the formal international norms and are highly unlikely to adopt an interpretation of the 'principle' of the right to freedom of association which is anywhere near as broad. Indeed the ILO itself reported in 2003 that 300 separate corporate social responsibility initiatives that it had surveyed 'contain relatively few references to the fundamental international labour standards', and that some even contain language 'that could be interpreted as undermining' those standards.[17]

7 The 'Neo-liberal' Range of Principles Selected

The Declaration's privileging of a limited range of process rights and its neglect of substantive norms such as those relating to safety and health, minimum wages, and reasonable conditions of work has been criticized by a great many commentators.[18] Langille and Maupain, however, go to considerable lengths to defend this selectivity and, in doing so, more or less confirm the critique put forward. Maupain, for all his recitation of ILO documents, confirms his view that 'safety and health . . . cannot be regarded as "fundamental" in the sense of enabling rights' (449) such as those recognized in the Declaration. Langille makes more of an effort to criticize the distinction between process and substantive rights. In a passage deserving of a prize for mixing metaphors he calls this way of thinking 'a policy apartheid, a dialogue of the deaf, "two solitudes", and [thus] a power struggle is inevitable (because there is no common ground for discussion)' (432). In fact, it is all a 'misplaced concern' (432) and, after a page or so of quotations from Amartya Sen, he concludes that Sen's way of thinking simply 'dissolves' the 'familiar and popular set of views' (433).[19] This is not the place to engage in a debate over Sen's complex approach, but it should be noted that Sen concludes his book by stressing that we must not lose sight of the fact that freedom involves 'considerations of processes as well as substantive opportunities'.[20] In marked contrast, Langille invokes Sen to justify the proposition – more worthy of Hayek than Sen – that the main challenge 'has always been, and is, to unleash the power of individuals themselves to pursue their own freedom' (434).

In international human rights law, the interdependence of the two sets of rights – social and political, to use the shorthand terms – is axiomatic. Acceptance of the vital importance of individual liberty and empowerment does not, however, lead to the conclusion that the other half of the equation will be addressed automatically if freedom is secured. Indeed, for those who do not share the liberal faith of Langille and Maupain, the major challenge is precisely to find ways of ensuring that respect for the

[17] Information Note on Corporate Social Responsibility and International Labour Standards, ¶ 6, ILO Doc. GB.286/WP/SDG/4(Rev.) (2003), available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/sdg-4.pdf [hereinafter Information Note].

[18] See Maupain, at n. 44.

[19] As with the earlier reference to such 'popular' views, no proponent is cited.

[20] A. Sen, *Development as Freedom* (1999), at 298.

process rights with which those authors content themselves can be supplemented by respect for substantive social rights.

8 The Way Forward

Despite the forceful nature of Langille's and Maupain's denunciations of the article, there is significant agreement upon the fact that the Declaration has a potentially important role, that the old supervisory system cannot continue to function in its traditional or current form, and that more creative institutional and other arrangements are required. The irony is that those who have criticized the article for failing to spell out a clear vision for the future have equally failed to do so themselves. Instead of offering any sort of blueprint they seem content to embrace the Declaration, warts and all, as though it alone holds the key to the future.

Langille's approach contrasts significantly with his own earlier writings in which he noted that the Declaration was a mixed bag. Although it constituted an achievement, he warned that it was 'not devoid of possible pitfalls'.[21] He rejected as 'certainly too simplistic' to argue that the Declaration constituted, for the ILO, 'a moment of renewal and reaffirmation',[22] and regretted the 'disturbing' fact that it had failed to address the problem 'that talk of protectionism and comparative advantage can be used as a smokescreen and justification for violating core labour rights'. He concluded that it was important in several respects, even though 'the link between core human rights and legal enforceability, or even market incentives, remains elusive'.[23]

Six years later, with many of the more optimistic scenarios for the Declaration having proved to be unwarranted, and in response to an article which is critical of the Declaration, Langille has discarded all such nuances in favour of unqualified enthusiasm. Thus, in the space of a single concluding paragraph, the Declaration becomes 'a model aiming to rescue the ILO', 'makes reform possible and meaningful', 'provides a better way to understand . . . standard setting and monitoring', 'connects ILO . . . with the . . . real world', 'makes sense of the [ILO] constitution', 'provides a compelling answer to the obviously relevant question of why [the ILO's] members should support and pay for it', and gives us 'an institution which both believes in and acts upon our best understanding' of the major challenges facing the world (436–437).

But the reality, as I sought to emphasize in my article, is that the jury is still out on the Declaration. The need for a range of reforms to accompany it is clear, as is the need for many of what Langille saw in 1999 as its 'possible pitfalls' to be addressed systematically and realistically.

Maupain concludes by cautioning any outsider who would criticize the policy approaches of his employer that the ILO itself is best placed to 'understand and defend' (464) the values of the Organization. The implication is that once a government or an

[21] Langille, 'The ILO and the New Economy: Recent Developments', 15 *Int'l J. Comp. Lab. L & Ind. Rels.* (1999) 229, at 231.

[22] *Ibid.*, at 232.

[23] *Ibid.*, at 257.

international organization has spoken, there is no further role for scholarly scrutiny or accountability since the representatives of the majority have made the best possible decision.[24] In fact, however, it is precisely the role of the scholar to evaluate the policies put forward by the officials of the ILO against the normative framework agreed to by the member states and to call them to account when their choices are clearly found wanting.

The bottom line is that the ILO's traditional system of promoting respect for labour rights is in crisis. The 1998 Declaration was conceived as a way out of that crisis, but has a range of shortcomings which neither Langille nor Maupain addresses openly. The challenge for the future is to devise a regime which builds upon some of the strengths of the *ancien régime*, transcends its not inconsiderable failings, maximizes the potential contribution of the Declaration, ensures that its principles are clearly rooted in existing international legal standards, reaches out to new actors including corporations and those promulgating private codes of conduct, and brings those groups into a creative but principled relationship with the ILO.

The agenda is not so terribly complex. It should include the following elements, none of which Maupain or Langille address in their haste to embrace the Declaration as the answer to the challenges that undermine the realization of labour rights in the 21st century.

- The ILO should insist that the normative content of the Declaration's principles mirrors that of the relevant conventions. This move could be undertaken relatively easily but it would involve standing up for the validity of the standards regime rather than playing a game of vagueness and ambivalence.
- The ILO should undertake some serious empirical research into the impact of the Declaration[25] and into the ways in which it has been invoked and used by private and other initiatives. Given its resources and its expertise it could do far better to produce some serious and probing analysis based on actual practice rather than churning out reports that repeat the party line or analyses that insist that the Declaration has no relevance to the brave new world of private initiatives.
- There is a crying need for an independent group of experts to evaluate the effectiveness of what the ILO is doing, both in the name of the *ancien régime* and of the 1998 Declaration, and to make recommendations for the future. There is considerable irony in the fact that the WTO has managed to do precisely that,[26] while the ILO continues to appoint carefully chosen, in-house groups to come up with self-reinforcing, but not especially convincing, analyses of the issues. The system

[24] Fortunately Ernst Haas did not accept such advice and instead produced a path-breaking, but critical, study of the ILO in particular, and of international organizations in general, in his work *Beyond the Nation State: Functionalism and International Organization* (1974).

[25] See a similar plea in relation to the WTO: S. Charnovitz, 'The (Neglected) Employment Dimension of the World Trade Organization', in V. Leary and D. Warner (eds), *Social Issues, Globalization and International Institutions: Labour Rights and the EU, ILO, OECD and WTO*, (forthcoming 2005).

[26] See The Future of the WTO: Addressing the Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (2004).

overseen by the Committee of Experts is in dire need of major reform, but tinkering remains the order of the day.

- The Declaration's follow-up mechanisms need to develop. The role played by the Expert-Advisers, in particular, could be strengthened considerably. There is a need for country-specific critiques to emerge from their work, on the basis of systematic, comparative analyses.
- The ILO could easily devise additional means by which to focus on the state of *substantive* labour rights in the world rather than confining itself to detailed reporting on the selected *process* rights privileged by the Declaration.
- The ILO needs to bring together its work on the ineffectiveness of private codes of conduct and that on the Declaration in order to identify the steps that need to be taken to achieve the sort of synergy that might breathe new life into labour rights. This could include new and creative approaches by which the diverse and heterogeneous actors who have been empowered by the Declaration might be brought into a constructive relationship with the ILO and its supervisory system.
- The ILO needs to reach out and explore the various ways in which its concerns can be mainstreamed into the activities of other international institutional actors. It needs to engage more forcefully with those actors by acknowledging what they are doing, making specific proposals as to how labour rights can be promoted through their work, and being prepared to publish reports which are critical of the ways in which other actors downgrade or neglect labour rights.

In brief, there is little to be gained by simply extolling the virtues of the 1998 Declaration. Instead the focus should be on the large number of initiatives which could greatly enhance the relevance and effectiveness of the international labour rights regime as a whole, including the Declaration, such as those suggested above.