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ILO Convention Practice: Mixed Methods in Norm-Setting for Social Justice

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Publication date

2019

Document Version

Final published version

Published in

ILO100 : law for social justice

[Link to publication](#)

Citation for published version (APA):

Brölmann, C. (2019). ILO Convention Practice: Mixed Methods in Norm-Setting for Social Justice. In G. P. Politakis, T. Kohiyama, & T. Lieby (Eds.), *ILO100 : law for social justice* (pp. 137-147). International Labour Office. https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/law-for-social-justice/WCMS_730958/lang--en/index.htm

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ILO100

LAW^{for}
SOCIAL
JUSTICE

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International Labour Office
Geneva 2019

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First published 2019

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ISBN 978-92-2-134086-7 (print)

ISBN 978-92-2-134087-4 (web PDF)

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Produced by the Publications Production Unit (PRODOC) of the ILO.

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Code: DTP-WEI-SEP

ILO Convention Practice: Mixed Methods in Norm-Setting for Social Justice

Catherine Brölmann

I. Introduction

The ILO centenary is an occasion to take a closer look at the Organization's practice of adopting Conventions for the purpose of international norm-setting. This vignette aims to do so. Naturally, the International Labour Organization stands out for the substance of its work. Still, to zoom in on a formal – and rather technical – facet of the Organization's standard-setting is not *l'art pour l'art*. The ILO Convention mechanism as envisaged in article 19 of its Constitution,¹ is exceptional and can count as a bold design, still today.

The ILO was ahead of its time with a strong executive secretariat and a constitutional mandate to prepare and adopt Conventions in its plenary organ by a two-thirds majority. Together with a number of Recommendations, those Conventions would constitute the steadily expanding International Labour Code aimed at social justice. The Convention mechanism undoubtedly has been helpful in furthering the cause for which the ILO was created, with moreover 'the unique [...] tripartite structure permit[ting] adoption of binding conventions by its non-State members, even against the vote of State representatives'.² This fact remains regardless of the challenges faced by the Organization in a globalized economy – reflected for example in concerns

¹ Adopted in 1919 (15 UNTS 40).

² Barbara K. Woodward, 'International Lawmaking and Civil Society' in C. M. Brölmann and Y. Radi, *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 286, 297.

about the number of ratifications of ILO Conventions.³ A formal perspective on the technique of ILO Convention-making can also leave aside the periodisation of ILO's history that is generally adopted when it comes to the substance of labour law standard-setting.⁴ Through the formal lens we see an intricate mix of contractual and institutional features of norm-setting – to which the title of this contribution refers with the terms 'mixed methods'. That intricacy (and the ensuing possibility of confusion) is illustrated by a contemporary case before the Dutch Courts, which is described in section 2. This chapter then continues to address briefly the contractual and the institutional paradigms (section 3); the place of the ILO Convention system in international treaty practice (section 4); and ends with some observations on the potential of the system (section 5).

II. The 2005 Council of State decision in the Dutch Seamen's Welfare Foundation case

On 5 November 2002, the Dutch Minister of Transport, Public Works, and Water Management adopted a temporary subsidy regulation on seamen's welfare. Based on this, he informed the Rotterdam Seamen's Welfare Foundation, by decision of 17 December 2002, that it would receive no further subsidy as of 1 January 2005. An objection lodged against this decision was rejected by the Minister by decision of 11 August 2003, whereupon the Rotterdam Sailor's Home Foundation and the Dutch Seamen's Welfare Foundation (hereinafter 'Foundation') applied to the District Court of Rotterdam for a review of the decision. The District Court rejected (in relevant part) the application.⁵ The Foundation appealed to the Administrative Jurisdiction Division of the Council of State. The highest instance of Dutch administrative procedure in turn rejected the Foundation's application and confirmed the decision of the District Court.⁶

³ As described, for instance, by Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart 2013).

⁴ <<https://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm>>. See also Maupain (n 3).

⁵ *Dutch Seamen's Welfare Foundation v Minister of Transport, Public Works, and Water Management*, Appeal decision of the District Court of Rotterdam, Nos WET 03/2803 and 04/2071, 12 November 2004.

⁶ Council of State, Decision No. 200410468/1, ECLI:NL:RVS:2005:AU0095, 27 July 2005. See also C. M. Brölmann, 'Casenote on LJN: AU0095, Administrative Jurisdiction

The Seamen's Welfare Foundation had relied on ILO's Seafarers' Welfare Convention, 1987 (No. 163). It could do so, incidentally, because in the constitutional system of the Netherlands, natural and legal persons can directly invoke before domestic judicial institutions (a certain type of) treaty obligations resting on the State. The Foundation argued, ingeniously, that even if the Netherlands had not ratified Convention No. 163, as an ILO member State it could be presumed to have signed the Convention.

This assumption was based on the fact that in the law of treaties framework, ratification by definition must confirm something, that is, an earlier signature. Thus, under article 14 of the Vienna Convention on the Law of Treaties (VCLT),⁷ ratification follows 'signature subject to ratification'. Given that in ILO speak, ILO Conventions require 'ratification', (always within the same VCLT regime) the only legal moment envisaged before that in the ILO mechanism, namely adoption of the Convention by the International Labour Conference,⁸ must be presumed somehow to comprise or immediately to entail also signature on the part the individual States. As the argument went, after adoption of Convention No. 163 by the International Labour Conference, the Netherlands as an ILO member State (even if it had voted against the adoption of the Convention) by necessary implication had become 'signatory' to the Convention. From there, it would follow that the Netherlands had a legal obligation pursuant to article 18 of the VCLT 'to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval'. The Foundation then argued that the Dutch government, by terminating the subsidy for the Foundation, had violated the very object and purpose of Convention No. 163, with ensuing responsibility for breach of an incumbent international obligation.

The Council of State – confirming the decision of the Rotterdam District Court – rejected the claim that the ILO Convention had created obligations for ILO member States prior to ratification. The ILO Constitution did not

Division of the Council of State' in *Oxford Reports on International Law in Domestic Courts* (Oxford UP 2008) <<http://www.oup.com/online/ildc/>>.

⁷ 1155 UNTS 331.

⁸ ILO Constitution, article 19(2).

envisage separate signature of ILO conventions by member States, but only their eventual ‘ratification’, the Council said. In fact, for the Netherlands, after the adoption of the Convention at the International Labour Conference and before a possible ‘ratification’, no treaty obligations such as under article 18 of the VCLT existed; in legal terms, there was only the duty to report periodically as indicated in article 19(5) (e) of the ILO Constitution.

III. Mixing the contractual and the institutional

What the 2005 Council of State’s decision brought out – without articulating it – is that the soundness of the argument really depends on the framework that is applied. In the law of treaties framework, by definition no ‘ratification’ can exist without an object, viz. an earlier signature, that is ‘ratified’ or ‘confirmed’. But in a separate institutional framework, this is different: such an ‘internal’ order may provide for any sequence of legal moments, with any terminology, and any normative effect. In that sense, to designate the fixing of the text as ‘adoption’ is ILO discursive practice and a free terminological choice, rather than a legal act prescribed by article 9 of the VCLT (also termed ‘adoption of the text’). That said, employment of the technical law of treaties term makes it easy to connect the institutional framework to the law of treaties framework and to trace the process of formation and pedigree of the treaty in question to its origin. This is facilitated by the fact that the law of treaties does not put any formal requirements to the collective legal act of ‘adoption’ of the text. On a different note, the drafters of the ILO Constitution may have seen political value in the fact that the chosen term evokes the traditional, sovereign act of treaty-making.

In that respect, the performative power of ‘ratification’ is even stronger. This is the word used in article 19(5) of the ILO Constitution for the individual legal act of the contracting States concluding the treaty-making process. By referring to States’ individual consent to be bound, the Organization connects its sphere of control over the treaty-making process to the sphere of general international/ legal relations. Technically speaking, a term referring to some form of ‘simplified signature’ as the required legal act would have made more sense in the context of the law of treaties – considering that only one individual legal act is envisaged on the part of States. The use of the term ‘ratification’ on the other hand carries a strong suggestion that all *Rechtsmomente* are taken care of by the Organization, while

the individual States only need to confirm. This might be taken as a case of ‘constructive ambiguity’ in the text of the ILO Constitution, or even more than that: Rosenne has pointed out, referring to the ILO’s memorandum filed in the context of the *Reservations to the Genocide Convention case*, that the Organization itself seems to have held the view that ‘a convention [...] so adopted [...] is the equivalent of an instrument already signed by plenipotentiaries but not yet ratified’.⁹

In the *Seamen’s Welfare case*, the core question was which framework was applicable: the general law of treaties or the ILO institutional framework? Another way to put it, as suggested in the title, is: which ‘method’ of the legal instrumentarium did ILO constituent States use to lay out their Convention mechanism? In a deeper sense, this may be seen as a question as to whether the contractual or the institutional paradigm – the term in this case is not an overstatement – applies. The issue could gain relevance at a practical level because in the context of international organizations the relevant legal actors are both sovereign States and member States. So they are capable in principle to function in both frameworks.

Thus, we may say that the adoption of an ILO convention qualifies as a collective legal act of member States in an institutional organ. In addition, the ILO provides for a rather assertive engagement of the Organization with the national legal order of member States (section 4 below) to follow up on the adoption. This, in any event, entails that the general law of treaties (including the good faith rule enshrined in article 18 VCLT) is not applicable to that institutional stage of the treaty-making process, which incidentally seems quite protracted. This stage was at issue in the case before the Dutch Council of State.

Frequently the ILO convention-making mechanism is conceptualized as a particular sub-category of the law of treaties.¹⁰ However, it seems more sound analytically to recognize that ILO convention practice partly takes

⁹ Shabtai Rosenne, ‘United Nations Treaty Practice’ (1954) 86 *Recueil des cours* 281, 326), referring to the written statement submitted by the Organization in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case* (pleadings 216).

¹⁰ See, for instance, Anne Trebilcock, ‘The International Labour Organization’ in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge UP 2018) 848, 852-862.

place altogether outside the law of treaties, within an institutional law context, and that it only later moves into a general treaty-making framework, with ‘member States’ turning into ‘treaty parties’. In that sense, the process of ILO Convention-making truly operates at the cutting face of the law of treaties and institutional law. This is what makes the ‘system’, as it has also been called, special. International law leaves room for this, through both the general reservation clause of article 5 VCLT,¹¹ and the absence of a common law of international organizations. As Bernstorff has observed, ‘remarkably, Felice Morgenstern’s classic conclusion regarding the state of legality in international organizations by and large still holds true today: as a system of law all this does not amount to very much’.¹² Article 19(5) of the ILO Constitution provides for an exceptional arrangement in a time of dualist doctrine and strong emphasis on State sovereignty.

IV. ILO convention-making as a special practice

Treaty texts adopted in an international organization are to be distinguished from the practice of treaties drawn up under the auspices of an organization or through use of its facilities – a prominent example being the 1998 Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.¹³ When treaty texts are adopted in an international organization, article 5 of the two Vienna Conventions gives precedence to the institutional law of the organization over general international law. To be sure, there are more examples of such adoption practice

¹¹ Article 5 of the VCLT reads: ‘The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization’. In the ILO, article 5 is nicknamed the ‘ILO clause’; Trebilcock (n 10) 855.

¹² J. von Bernstorff, ‘Procedures of Decision-Making and the Role of Law in International Organizations’ (2008) 9 *German Law Journal* 1940, referring to Felice Morgenstern, ‘Legality in International Organizations’ (1976-77) 48 *British Yearbook of International Law* 241. The standard reference work in the field by Henry J. Schermers and Niels M. Blokker, *International Institutional Law* (6th edn, Brill 2018) likewise describes decision-making processes within various international organizations without reference to a general procedural law.

¹³ On the distinction between conventions concluded ‘under the auspices’ of the organization and those concluded ‘within’ the organization, see Paul Reuter, *Institutions internationales* (5th edn, Presses universitaires de France 1967) 10-11.

than only in the ILO. Still, those cases generally concern solely the stage of ‘adoption’ of the treaty in the sense of agreeing on the text – think of the extensive UN treaty practice in the field of human rights¹⁴ – without additional institutional rules for the exhortation of prospective contracting States, and with both signature and ratification remaining as subsequent legal acts on the part of individual States in order for them to become bound.

In the case of the ILO, it is the dominant role of the ILO institutional framework after adoption of the text that makes a difference, as it extends the authority of the Organization during the treaty-making process. The rules of classic treaty-making seem subsumed in the rules of the Organization and quite a bit of institutional pressure is envisaged; these are the ‘persuasive tools’ mentioned by Maupain.¹⁵ Alvarez aptly points to the ‘maximum use of the iterative benefits conferred by international organization’.¹⁶ The ILO’s implicit claim of authority over the entire process of treaty-making short of the States’ final consent to be bound (section 3 above) in that sense would be fair. A renowned element in the mechanism is the stipulation in article 19(5)(b) of the ILO Constitution that the adopted Convention, without additional signature by the States, within 18 months be submitted by the government to the competent national legislative body. Article 19(5)(d) goes on to state that ‘if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General’, which means that acceptance of the Convention by an internal organ of a State essentially entails an obligation for the State to ratify. Rousseau in the 1950s,¹⁷ and later also Reuter¹⁸ pointed with great reserve to such ‘notification’ by the Minister for Foreign Affairs to the Organization taking the place of deposit or even ratification itself. Otherwise, the direct address to the national legislature was considered far-reaching and was, for example, the reason for the French government not to join the ILO régime until 1926.

¹⁴ Visible in the collection of *Multilateral Treaties Deposited with the Secretary-General* <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en>.

¹⁵ Maupain (n 3).

¹⁶ José Alvarez, *International Organizations as Law-Makers* (Oxford UP 2005) 345. The actual mechanism of ILO treaty-making with ‘strings attached’ is described at 331-337.

¹⁷ Charles Rousseau, *Droit international public* (Recueil Sirey 1953) 39.

¹⁸ Paul Reuter, *Introduction to the Law of Treaties* (Pinter Publishers 1989) 11.

There are other examples of ‘persuasive tools’ of the ILO that can only exist in a somewhat centralized, institutional setting, such as the Declaration on Fundamental Principles and Rights at Work¹⁹ in which the International Labour Conference reaffirmed – without opposition – the obligation of all ILO Members to adhere to the principles underlying the ILO’s eight ‘fundamental Conventions’. Thus, an institutional obligation was upheld for member States, even if they had not ratified the fundamental Conventions, to respect, promote and realize the principles concerning these fundamental rights (article 2). Their recognition moreover confirms the status of the Conventions embodying them as core labour standards. Otherwise, the treaty practice of the ILO has several idiosyncracies²⁰ in comparison to the general treaty practice. The mechanism as set out in article 19(5), however, stands out.

Wilfred Jenks, whose functionalist outlook has been mentioned by other authors,²¹ had called the treaty-making process within the ILO a ‘valuable rationalisation’ of the traditionally ‘cumbersome’ procedure for conclusion and entry into force of treaties, but acknowledged it had had ‘relatively little effect on the practice of the League of Nations’.²² A marked exception was the 1928 General Act for the Pacific Settlement of International Disputes²³ which was ‘adopted’ in a conclusive manner similar to the ILO procedure.²⁴ Adoption of the Act by the Assembly was preceded by authentication by means of the sole signature of the Secretary-General and the President of the Assembly. No further signature subject to ratification on the part of States was needed, only the final expression of consent to be bound.

In the early days of the United Nations, Jenks famously expressed the hope that the power of the ECOSOC enshrined in article 62(3) of the UN Charter to ‘prepare draft conventions [...] within its competence’ would be

¹⁹ Adopted by the International Labour Conference at its 86th Session in June 1998 (Annex revised on 15 June 2010).

²⁰ Trebilcock (n 10).

²¹ Guy Fiti Sinclair, ‘The Original Sin (and Salvation) of Functionalism’ (2016) 26 *European Journal of International Law* 965, 968. Cf C Wilfred Jenks, *The common law of mankind* (Praeger 1958) 105.

²² C Wilfred Jenks, ‘Some Constitutional Problems of International Organizations’ (1945) 22 *British Yearbook for International Law* 11, 48.

²³ 93 LNTS 343.

²⁴ Reuter (n 18) 43.

‘used with imagination and vigour’ for the benefit of ‘a far-reaching rationalisation of the technique of the multipartite instrument’.²⁵ But that did not happen. Extension of the ILO system to the United Nations, so that ‘adoption’ in the plenary organ would be followed immediately by ratification by the States, had been proposed but expressly rejected at the San Francisco Conference.²⁶

Otherwise, methods similar to the ILO procedure were used sparingly – examples being the 1946 Convention on the Privileges and Immunities of the United Nations²⁷ and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.²⁸ These treaties – where the ‘intention’ to further pursue the treaty process implied by signature subject to ratification or a similar *Rechtsmoment* was perhaps taken for granted – were ‘adopted’ and ‘approved’, respectively, by the UN General Assembly and subsequently envisaged a single legal act on the part of States – ‘accession’ or ‘succession’ – as the immediate expression of consent to be bound. When States nonetheless would insist to communicate their accession ‘subject to ratification’, this was interpreted by the Secretary-General as a ‘declaration of intention’.²⁹

At the time of creation of the ILO also the new Health Organization had been fitted with a procedure for the adoption of treaties by a two-thirds majority in the plenary organ, with the difference that conventions then would be transmitted to governments through the Council of the League, where again the unanimity rule prevailed.³⁰ In the UN era, some specialized agencies by way of exception took on elements of the ILO system, such as the World Health Organization (WHO)³¹ and the United Nations Educational, Scientific and Cultural Organization (UNESCO).³²

²⁵ Jenks (n 22) 48.

²⁶ Documents of the United Nations Conference on International Organization (1945) vol IX, 79-81.

²⁷ 1 UNTS 15; 90 UNTS 327.

²⁸ 33 UNTS 261 et seq.

²⁹ See the 1959 Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements (ST/LEG/7) para 48.

³⁰ Resolution of 10 December 1920 (LoN Sp.Sup. Jan. 1921) 18. Part of the procedure was later enshrined in articles 19 and 20 of the WHO Constitution.

³¹ WHO Constitution, articles 19 and 20, 14 UNTS 186.

³² UNESCO Constitution, article IV(B), 4 UNTS 275.

V. The potential of mixed methods

This chapter designates the ILO mechanism for convention-making as a case of ‘mixed methods’, referring to the combination of institutional and contractual lawmaking, intricate to the point that it could escape the eye. It is an exceptional design – laid out three decades before the Advisory Opinion in the 1949 *Reparation for Injuries case*,³³ in which the independence of international organizations came to the fore as an intellectually and doctrinally hard fought conceptualization. The ILO was the first (and in this form still the only) organization with such an arrangement, created at a time in which shortcuts for ‘sovereign moments’ in norm-setting processes were far from self-evident. It shows how the pursuit of social justice in the world of labour could create support for a legal arrangement that would have been politically unfeasible in other areas.

The legal phenomenon of mixed methods (and ‘paradigms’) in ILO convention practice has been somewhat underexplored and undertheorized. However, as the previous sections have sought to demonstrate the distinction between an institutional and a contractual framework is relevant – if only for stakeholders to establish obligations, responsibilities, legal remedies.

It is worth recalling that the mix of treaty context and institutional context as a juridical phenomenon is distinct from developments under the header of ‘informal lawmaking’ or ‘soft law’. The ILO convention mechanism is special also in that it conjoins two components of ‘hard law’. Combining this with the tripartite set-up that is famously part of its institutional architecture, the ILO manages to include non-State actors in the international standard-setting process while staying within the parameters of formal international norm-creation – a formalness that was paramount 100 years ago, but that also carries weight today.

Many commentators have called for institutional reforms that would enable the ILO to meet the challenges of the 21st century. Indeed, also when it comes to ILO Conventions and the objective of maximum effect (‘coverage’) among member States, there is no need to wait for doctrinal innovations in the law of treaties. Considering the ILO convention mechanism it seems

³³ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, 174.*

clear that flexibility and room for reform will be found in the strong institutional component of the treaty-making process. Moreover, it has been said that the decline of organized labour in the contemporary globalized, neoliberal environment has weakened the Organization's social-corporatist structure and posed a strain on the tripartite mechanism; this reportedly has made the ILO look for engagement also with non-labour NGOs and business groups. Here too the exceptional institutional space for participation of non-State actors in the standard-setting mechanism seems to have room for development, precisely if stakeholders wish to stick to the formal-legal framework.