Rosemary Owens AO*

ARE LABOUR RIGHTS HUMAN RIGHTS?

I Opening Remarks

I begin by acknowledging the Kaurna people and their deep, unbroken and ongoing connections to this land on which we gather this evening. I pay my respects to their Elders, past, present and emerging, and to all Australia's First Nations peoples. I am deeply disappointed at the failure of the recent referendum to recognise them and to establish 'the Voice' in the *Constitution*. I pause to reflect that a voice regarding legislative and administrative decisions affecting their interests is their human right: it is enshrined in art 6 of the International Labour Organization's ('ILO') *Convention (No 169) concerning Indigenous and Tribal Peoples In Independent Countries*, 1989;[1] and recognised in arts 18 and 19 of the United Nations' ('UN') *Declaration on the Rights of Indigenous Peoples* in 2007.[2] My firm hope is that we move forward as a nation telling the truth about our history, ensuring social justice for our First Nations people, and recognising their human rights.

This seminar series marks the 140th anniversary of the establishment of a law school at The University of Adelaide. As one of the oldest in the common law world, it is important to celebrate that milestone. Recognising that First Nations people have been gathering in this place to discuss, learn about and practice law for an estimated sixty thousand years provides another important perspective from which to view that history. I thank the Dean, Professor Judith McNamara, for the invitation to participate in this series; and Professors Paul Babie and Matthew Stubbs for their roles in relation to it. I am humbled to be included in the company of the other speakers.

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1 *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*Indigenous and Tribal Peoples Convention*').

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*Declaration on the Rights of Indigenous Peoples*').

I am proud to have been a part of this law school as a student and as a member of its academic staff, and to be able to continue that connection as an Emerita Professor. We stand tall on the shoulders of those who have gone before us. As a student, I was taught by many fine academics and surrounded by many fellow students, who together stimulated my curiosity and nurtured my love of the law. Those academics are too many to name here, but I owe each of them a debt of gratitude. I also had the privilege of working here with many wonderful colleagues. Given my topic, I would like to pay two special tributes. First, I thank my labour law colleagues, Kathleen McEvoy and Professor Andrew Stewart, who taught me as an undergraduate student and later became my colleagues and research collaborators, and from whom I continue to learn so much. Secondly, I thank my feminist colleagues. Fortunately, there were a good number of us when I was a staff member. In particular, I applaud the leadership role taken by Professors Judith Gardam and Ngaire Naffine in establishing Feminist Legal Theory as an undergraduate course (making Adelaide, I think, one of the first law schools in Australia, if not the first, to include it in the curriculum). I have always been committed to equality and social justice, with a particular focus on women's equality, and being steeped in feminist scholarship at the Adelaide Law School gave me a very solid intellectual foundation for working with many others, including in the international sphere, who are also dedicated to it. Finally, I wish to acknowledge my students. Without a doubt, the opportunity to engage with the brightest young minds is one of the greatest privileges of academic life and, as is so often the case, I frequently learnt more from them than they did from me. Associate Professor Laura Grenfell was one such student (and now a distinguished human rights expert). I would also like to thank her for providing some assistance as I prepared this seminar.

II Introduction: Are Labour Rights Human Rights?

It is sometimes said, in both politics and the law, that it is prudent not to ask a question unless you already know the answer! Therefore, let me say from the outset in response to the title of this seminar: 'yes, definitely. Labour rights are human rights!' Nevertheless, I framed the topic as a question because there is not always, more widely, the same clarity or conviction about it — indeed, labour rights and human rights are still seldom spoken about together in the same sentence.

The first sections of this seminar, therefore, consider that issue with a focus on international law. I examine the ILO, its Conventions and Recommendations, as well as its supervisory system, as they are less well known in human rights discourse than their equivalents in the mainstream UN system. To my way of thinking, some of the more interesting questions follow from the fact that labour rights are human rights, and I turn to some of these in the latter part of the seminar. What are the implications, not only for international law but also for a national legal system? If labour law and human rights law are thought of as two separate spheres (as I would say is certainly currently the case in Australia), is it enough for there to be a broad coherence between these two areas of law? At best, perhaps, are they

'complementary and mutually reinforcing'?[3] Or does the separation introduce differences, complexities or inconsistencies, that are damaging and compromise the purpose and the ultimate attainment of the goals of both? And, if that is the case then, ideally, should those differences be removed? In suggesting some answers, I conclude with some thoughts about the implications for legal education.

III Joint Statement on Human Rights (24 February 2023)

Clear recognition within the broad UN system of governance that labour rights are human rights is evidenced by the recent and important Joint Statement by the ILO's Committee of Experts on the Application of Conventions and Recommendations ('CEACR') and the UN Human Rights Treaty Bodies with responsibility for overseeing compliance with relevant UN Conventions ('Joint Statement').[4] The Treaty Bodies that are signatories to the Joint Statement are: the Committee on the Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Rights of the Child; the Committee on Migrant Workers and Members of their Families; the Subcommittee on Prevention of Torture; the Chairperson of the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.

I highlight three points from the Joint Statement. First, it reaffirms the 'common values of universal peace, freedom, equal rights, human dignity, social justice and the rule of law' that underlie the work of all human rights bodies, including the CEACR, at the global level and, importantly, it underscores that they are 'complementary and mutually reinforcing'.[5] Further, it reminds us that 'inequalities within and among countries, [undermine] the exercise of fundamental rights'.[6] Secondly, it recognises that labour rights are human rights and integrating them into economic and legal policies is important for reducing inequalities and creating an environment that is more conducive to equitable and inclusive economic development and, thereby, to realising the UN's ambition that 'no one is left behind'. Thirdly, it emphasises that the UN Human Rights Treaty Bodies and the ILO's supervisory bodies, which include the Committee on the Application of Standards ('CAS'), the Committee on Freedom of Association ('CFA'), and the CEACR, are critical to realising human rights in practice. Reaffirming the role of these bodies, it calls upon stakeholders to maximise efforts to implement their recommendations and

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3 These words replicate those used in the Committee of Experts on the Application of Conventions and Recommendations: *Application of International Labour Standards 2023: Report III Addendum (Part A)*, International Labour Conference, 111th sess (28 February 2023) 3 ('*Addendum to CEACR Labour Standards Report*').

4 See ibid. See generally 'International Labour Standards and Human Rights', *International Labour Organization* (Web Page) <https://www.ilo.org/global/standards/WCMS_839267/lang--en/index.htm>.

5 *Addendum to CEACR Labour Standards Report* (n 3) 3.

6 Ibid.

'join efforts to fully respect, defend, fulfil and promote all human rights, including international labour standards'.[7]

Issued on 24 February 2023, the Joint Statement marked the third anniversary of the *Call to Action for Human Rights* by the UN Secretary-General, Antonio Guterres,[8] emphasising the importance of making human rights central to both the implementation of the 2030 Agenda regarding the UN's Sustainable Development Goals and UN action at all levels (national, regional, and at the UN headquarters). Amongst other things, it also highlighted the aspirations and values set out by the UN Secretary-General in *Our Common Agenda*, the report requested in September 2020 by the UN on its 75th anniversary.[9] On that occasion, the UN committed

> to leave no one behind; to protect our planet; to promote peace and prevent conflict; to abide by international law and ensure justice; to place women and girls at the centre; to build trust; to improve digital cooperation; to upgrade the United Nations; to ensure sustainable financing; to boost partnerships; to listen to and work with youth; and to be prepared.[10]

As Secretary-General Guterres indicated, the aim was to turbocharge global efforts to make real the Agenda for Sustainable Development and the Sustainable Development Goals by 2030.[11] The *Summit for the Future*, to be convened in September 2024, will follow-up *Our Common Agenda*.

The Joint Statement also followed the call for a Global Coalition for Social Justice from the Director-General of the ILO, Gilbert Houngbo, a week earlier on Social Justice Day, 17 February 2023.[12] Its context, and that of the above UN report, was the impact in recent times of not only the COVID-19 pandemic but also geopolitical turmoil, economic crises and natural disasters. Globally, in 2022, more than 200 million workers were living in extreme poverty and employment growth was slowing.[13] This led Director-General Houngbo to examine 'the stark realities facing the world of work today — the persistent injustice, inequalities and insecurities — on

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7 Ibid.

8 *The Highest Aspiration: A Call to Action for Human Rights — Report of the Secretary-General*, UN Doc A/75/982 (5 August 2021).

9 See ibid.

10 Ibid 57. See also *Draft Resolution — Declaration on the Commemoration of the Seventy-fifth Anniversary of the United Nations*, UN Doc A/75/L.1 (16 September 2020).

11 See 'Our Common Agenda', *United Nations* (Web Page) <https://www.un.org/en/common-agenda>.

12 This proposal had been previously outlined to the Governing Body at the end of 2022: see *Report of the Director-General — First Supplementary Report: A Global Coalition for Social Justice*, Governing Body of the International Labour Organization, 346th sess, ILO Doc GB.346/INS/17/1 (17 October 2022).

13 International Labour Office, *World Employment and Social Outlook: Trends 2023* (Report, 16 January 2023) 12.

which we must now act', and to highlight 'the strategic opportunities that exist, both nationally and internationally, for furthering our human-centred and rights-based approach, including through integrated inter-agency action'.[14] Given the complexity of the challenges facing the world, nothing short of a multi-faceted response was required: 'a Global Coalition with other key actors, including the multilateral system, that works to advance social justice and renew the social contract'.[15]

IV The ILO and Labour Rights as Human Rights: A Brief History

A *The International Labour Organization*

The call for a Global Coalition for Social Justice echoes the sentiment expressed more than a century ago in the *Treaty of Versailles*, which ended the First World War ('WWI') in 1919. Part XIII of the *Treaty of Versailles* established the ILO.[16] Since then, it has been the pre-eminent international institution with oversight of international labour standards. The premise of its *Constitution* is that universal and lasting peace can only be achieved if it is based on social justice and improved working conditions for all.[17]

In December 1946, the ILO became the first of the UN's specialized agencies, pursuant to an agreement between the ILO and the UN.[18] The Protocol governing its entry into force arranged for reciprocal representation of the ILO and the UN in various assemblies and committees.[19] Importantly and uniquely, following the ILO's existing constitutional arrangements, art IX indicated that the General Assembly authorised the ILO

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14 *Advancing Social Justice — Report of the Director-General: Report I(A)*, International Labour Conference, 111th sess, ILO Doc ILC.111/I(A)(Rev.) (2 June 2023) 3.

15 Ibid.

16 See *Treaty of Peace between the Allied and Associated Powers and Germany, and Protocol*, signed 28 June 1919, ATS 1 (entered into force 10 January 1920) pt XIII ('*Treaty of Versailles*').

17 See *Constitution of the International Labour Organization*, contained in *Treaty of Versailles* (n 16) ('*ILO Constitution*'). Currently, the ILO has 187 Member States (cf 193 members of the UN).

18 *Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization*, opened for signature 14 December 1946, 1 UNTS 183 (entered into force 19 December 1946) ('*UN and ILO Protocol*'). The *Charter of the United Nations* sets out the characteristics of specialized agencies that could be brought into a relationship with the United Nations: art 57. The *Charter* also provides that the Economic and Social Council may enter agreements defining the terms of that relationship: art 63.

19 *UN and ILO Protocol* (n 18) art 2.

> to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.[20]

The ILO is distinctive in the UN system, being tripartite in nature: the International Labour Conference ('ILC') (its general assembly) comprises two government representatives and one each from employer organisations and trade unions from every Member State. Likewise, the 56 members of the Governing Body ('GB') of the Labour Office (its executive arm) are made up of representatives in the same proportion (two from government, one from employer organisations and one from trade unions). Two of the ILO's supervisory committees, the CFA and the CAS, are also tripartite.

The ILO was a pioneer in the articulation of international human rights standards. In legal terms, one of the most important responsibilities of the ILC is the adoption of labour standards, with the tripartite structure intended to ensure that the views of the 'social partners' are reflected in the process. Over time, there have been in total 191 conventions and five protocols, which, upon ratification, bind Member States. A further 208 recommendations supplement the conventions and provide further guidance in relation to them, but are not legally binding. There is a process for reviewing, updating and abrogating conventions, and currently a comprehensive 'Standards Review Mechanism' is being undertaken.[21]

The *Treaty of Versailles* identified nine principles of 'special and urgent importance'.[22] The first of these is critical to understanding labour rights as human rights and has remained at the heart of ILO thinking since 1919: 'labour should not be regarded merely as a commodity or article of commerce'.[23] The seventh principle, 'that men and women should receive equal remuneration for work of equal value', is also worthy of mention here because, in 1919, it was ahead of its time and remains so (by way of contrast, the *Universal Declaration of Human Rights* ('*UDHR*')[24] and the *Convention on the Elimination of Discrimination against Women* ('*CEDAW*')[25] refer simply to 'equal pay').

There are some clear differences between the human rights instruments of the ILO and the UN: an obvious one is that the scope of ILO conventions is generally limited

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20 Ibid art 9(2). See *Treaty of Versailles* (n 16) art 423.

21 See generally International Labour Organization, *Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization* (4th ed, 2019).

22 *Treaty of Versailles* (n 16) art 427.

23 Ibid.

24 *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (10 December 1948) ('*UDHR*').

25 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

to the world of work, albeit understood broadly, whereas UN conventions extend more widely. However, most notable is their differing conceptual foundation and articulation of rights, with a social justice or a contextual approach taken by the ILO and a focus on the individual as a rights bearer at the UN.

B *The Declarations of the ILO*

An overview of the ILO's history of labour rights as human rights can be conveniently traced in various declarations of the ILC, issued to mark some of the most significant developments in global history impacting rights.[26] The Preamble to the *ILO Constitution* was revised in 1944 by the *Declaration Concerning the Aims and Purposes of the International Labour Organization* (*Declaration of Philadelphia*), reaffirming the importance of the foundational principles placing work in a broad economic, social and cultural context.[27] In the 1960s and 70s, there were two important human rights declarations. On 8 July 1964, the ILC unanimously adopted a *Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa*.[28] After the democratic election of Nelson Mandela's government, South Africa was readmitted as a member of the ILO and this Declaration was rescinded by Resolution on 22 June 1994.[29] In 1975, the ILC adopted a *Declaration on Equality of Opportunity and Treatment for Women Workers*.[30]

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26 See 'ILO Declarations', *International Labour Organization* (Web Page) <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/organigramme/jur/legal-instruments/WCMS_428589/lang--en/index.htm>.

27 *ILO Constitution* (n 17) annex ('*Declaration concerning the Aims and Purposes of the International Labour Organisation* (*Declaration of Philadelphia*)').

28 *Declaration concerning the Policy of 'Apartheid' of the Republic of South Africa*, International Labour Conference, 48th sess (adopted 8 July 1964). Revisions were incorporated on 18 June 1981, 16 June 1988 and 20 June 1991, see: *Declaration concerning the Policy of Apartheid in South Africa*, International Labour Conference, 67th sess (adopted 18 June 1981); *Declaration concerning Action against Apartheid in South Africa and Namibia*, International Labour Conference, 75th sess (adopted 16 June 1988); *Declaration concerning Action against Apartheid in South Africa*, International Labour Conference, 78th sess (adopted 20 June 1991).

29 *Resolution concerning Post-Apartheid South Africa*, International Labour Conference, 81st sess (adopted June 1994).

30 *Declaration on Equality of Opportunity and Treatment for Women Workers*, International Labour Conference, 60th sess (adopted 25 June 1975). It was further updated by resolutions of the ILC in 1981, 1985, 1991, 2004 and 2009: see *Resolution concerning the Participation of Women in ILO Meeting*, International Labour Conference, 67th sess (adopted 11 June 1981); *Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment*, International Labour Conference, 71st sess (adopted 27 June 1985); *Resolution concerning ILO Action for Women Workers*, International Labour Conference, 78th sess (adopted 25 June 1991); *Resolution concerning the Promotion of Gender Equality, Pay Equity and Maternity Protection*, International Labour Conference, 92nd sess (adopted 15 June 2004); *Resolution concerning Gender Equality at the Heart of Decent Work*, International Labour Conference, 98th sess (adopted 17 June 2009).

In 1998, as part of a strategy to enhance and revitalise compliance with its conventions, the ILO adopted a *Declaration on Fundamental Principles and Rights at Work and its Follow-Up* ('*Fundamental Rights at Work Declaration*').[31] Originally identifying four fundamental principles and rights at work, it was amended in 2022 by the addition of a fifth.[32] This Declaration has been hugely influential: the fundamental principles and rights at work are at the heart of the UN's *Global Compact*; they are often incorporated into international trade agreements; and form part of various 'soft law' instruments, such as the Organisation for Economic Co-operation and Development's *Guidelines for Multinational Enterprises*.[33]

In 2008, the relevance of the principles in the context of 21st century globalisation was restated by the ILO in the *Declaration on Social Justice for a Fair Globalization*, which reaffirmed that 'labour is not a commodity and that poverty anywhere constitutes a danger to prosperity everywhere'.[34] It also recognised the particular significance of fundamental rights in attaining the fundamental objective of social justice. This Declaration, which expressed the aspiration to promote sustained, inclusive and sustainable economic growth, 'full and productive employment and decent work for all',[35] also clearly supported the UN's 17 'Sustainable Development Goals' ('SDGs') set out in the *2030 Agenda for Sustainable Development* which was adopted in September 2015 and came into force at the beginning of 2016.[36] One hundred years after the *Treaty of Versailles*, the ILO issued its *Centenary Declaration for the Future of Work*, again reaffirming its foundational value that 'labour is not a commodity'. It also looked forward and, among other things, committed to a 'world … free from violence and harassment'.[37]

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31 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, International Labour Conference, 86th sess (adopted 18 June 1998). The Follow-Up to the Declaration was also revised in 2010.

32 In 2022, the ILC adopted the *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work*, International Labour Conference, 110th sess (adopted 10 June 2022).

33 See, eg: 'The Ten Principles of the UN Global Compact', *United Nations Global Compact* (Web Page) <https://unglobalcompact.org/what-is-gc/mission/principles>; *Free Trade Agreement*, Australia–United States of America, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 18; *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD, 2023).

34 *ILO Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 97th sess (adopted 10 June 2008). This Declaration was updated following the 2022 *Resolution on the Inclusion of a Safe and Healthy Working Environment*.

35 Ibid.

36 *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015). Note especially to '[e]nd poverty in all its forms everywhere', '[a]chieve gender equality and empower all women and girls' and '[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all': at 14.

37 *ILO Centenary Declaration for the Future of Work*, International Labour Conference, 118th sess (adopted 21 June 2019) 2.

C *ILO Conventions*

While some have critiqued the ILO Declarations as not providing specific guidance,[38] that guidance can generally be found in the conventions underpinning them. For instance, the five fundamental principles and rights at work set out in the *Fundamental Rights at Work Declaration* as amended in 2022 are each underpinned by two Conventions, as well as one Protocol, as follows:

1. Freedom of association and the effective recognition of the right to collective bargaining:
   - *Convention (No 87) concerning Freedom of Association and Protection of the Rights to Organise*, 158 ratifications;[39]
   - *Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, 168 ratifications;[40]
2. The elimination of all forms of compulsory labour:
   - *Convention (No 29) concerning Forced or Compulsory Labour*, 181 ratifications;[41]
   - *Convention (No 105) concerning the Abolition of Forced Labour*, 178 ratifications (2 denounced, Malaysia and Singapore);[42]
   - *Protocol to the Convention (No 29) concerning Forced or Compulsory Labour*, 60 ratifications;[43]
3. The effective abolition of child labour:
   - *Convention (No 138) concerning Minimum Age for Admission to Employment* ('*Minimum Age Convention*'), 176 ratifications;[44]

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38 See, eg, Philip Alston and Jackson Gandour, 'The ILO's Centenary Declaration and Social Justice in the Digital Age' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 565, 586.

39 *Convention (No 87) concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).

40 *Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

41 *Convention (No 29) concerning Forced or Compulsory Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932).

42 *Convention (No 105) concerning the Abolition of Forced Labour*, opened for signature 25 June 1957, 320 UNTS 291 (entered into force 17 January 1959).

43 *Protocol to the Convention (No 29) concerning Forced or Compulsory Labour*, opened for signature 11 June 2014, 3175 UNTS 4 (entered into force 9 November 2016).

44 *Convention (No 138) concerning Minimum Age for Admission to Employment*, opened for signature 26 June 1973, 1015 UNTS 297 (entered into force 19 June 1976).

- *Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 187 ratifications;[45]

4. The elimination of discrimination in employment and occupation:
   - *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* ('*Equal Remuneration Convention*'), 174 ratifications;[46]
   - *Convention (No 111) concerning Discrimination in respect of Employment and Occupation* ('*Discrimination (Employment and Occupation) Convention)*'), 175 ratifications;[47]
5. A safe and healthy working environment:
   - *Convention (No 155) concerning Occupational Safety and Health and the Working Environment*, 79 ratifications;[48]
   - *Convention (No 187) concerning the Promotional Framework for Occupational Safety and Health* ('*Framework for OSH Convention*'), 62 ratifications.[49]

With the exception of those concerning work health and safety, these conventions are widely ratified. As an aside, Australia ratified the *Minimum Age Convention* in 2022, leaving the *Framework for OSH Convention* as the only one of these fundamental Conventions not ratified by it.

The identification of 10 conventions as concerning 'fundamental principles and rights' is not to say that other ILO conventions are not also concerned with human rights. Importantly, ILO standards are linked to one another and operate in a unitary framework making the relationships and implications clear. Thus, one of the advantages of the ILO system is that, in many instances, there are a number of conventions elaborating a particular aspect of a human right and in so doing they both support and strengthen it. An example is the right to equality as it impacts women.[50] The basic statement

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45 *Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

46 *Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, opened for signature 29 June 1951, 165 UNTS 303 (entered into force 23 May 1953) ('*Equal Remuneration Convention*').

47 *Convention (No 111) concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 1(3).

48 *Convention (No 155) concerning Occupational Safety and Health and the Working Environment*, opened for signature 22 June 1981, 1331 UNTS 279 (entered into force 11 August 1983).

49 *Convention (No 187) concerning the Promotional Framework for Occupational Safety and Health*, opened for signature 15 June 2006, 2564 UNTS 291 (entered into force 20 February 2009).

50 See also Committee of Experts on the Application of Conventions and Recommendations, *Achieving Gender Equality at Work: Report III (Part B)*, International Labour Conference, 111th sess (2023) ('*CEACR Gender Equality Report III(B)*').

of the right to be free from discrimination on the basis of sex in 'employment and occupation' including 'access to … training, access to employment … and terms and conditions of employment' is set out in the *Discrimination (Employment and Occupation) Convention*. It is bolstered by various other conventions, including:

- The earlier *Equal Remuneration Convention*, which includes a broad definition of remuneration extending beyond 'pay'[51] and imposes obligations relating to the objective determination of work value,[52] thus tackling the problems arising from the vertical and horizontal segregation by sex of jobs.
- *Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, and its accompanying Recommendation, 1981 (No 165), which applies to 'all branches of economic activity and all categories of workers'.[53] It stresses the equality rights of both men and women workers with family responsibilities and the duty of the state to adopt enabling policies concerning, for example, the provision of community child care and family services, public education regarding the equality of workers with family responsibilities, and their protection against discrimination and termination.
- *Convention (No 183) concerning the Revision of the Maternity Protection Convention* and accompanying Recommendation 2000 (No 191) revises an earlier convention of 1952.[54] In the Preamble, there are references to the *UDHR* (1948), *CEDAW* (1979), *Convention on the Rights of the Child* ('*CRC*') (1989),[55] *Beijing Declaration and Platform for Action* (1995),[56] ILO's *Declaration on the Equality of Opportunity and Treatment for Women Workers* (1975),[57] the *Fundamental Rights at Work Declaration* and other ILO conventions. It establishes a right to a minimum of 14 weeks leave[58] and cash benefits to enable new mothers to support themself and their child 'in proper conditions of health and with a suitable standard of living'.[59]

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51 *Equal Remuneration Convention* (n 46) art 1(a).

52 Ibid art 3.

53 *Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983) art 2.

54 *Convention (No 183) concerning the Revision of the Maternity Protection Convention*, opened for signature 15 June 2000, 2181 UNTS 253 (entered into force 7 February 2002) ('*Maternity Protection Convention Revision*').

55 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

56 *Report of the Fourth World Conference on Women*, UN Doc A/CONF.177/20/Rev.1 (15 September 1995) ch 1.

57 *Declaration on Equality of Opportunity and Treatment for Women Workers*, International Labour Conference, 60th sess (adopted 25 June 1975).

58 *Maternity Protection Convention Revision* (n 54) art 4.

59 Ibid art 6.

- Some of the early ILO conventions were 'protective' in nature, making what are now generally considered to be inappropriate assumptions regarding women (for example, by prohibiting their access to night work). Nonetheless, the ILO continues to have an important role in identifying some of the most vulnerable workers and spelling out their rights. For example, there are significant conventions on issues in particular economic sectors where women are over-represented and typically low paid and vulnerable to exploitation, such as in nursing and domestic work.[60] Their situation worldwide and the importance of these workers has been increasingly evident with the growth of the care economy, and was brought to the fore dramatically during the COVID-19 pandemic.[61]
- Finally, I highlight *Convention (No 190) concerning the Elimination of Violence and Harassment in the World of Work* ('*Violence and Harassment Convention*'),[62] which Australia recently ratified. At the international level, there has long been condemnation of harassment and violence, especially against women.[63] But the importance of protection against harassment and violence is something that also extends more broadly. In some ILO instruments, there are provisions protective of particular groups, such as indigenous and tribal peoples and domestic workers.[64] However, in 2019 the adoption of the *Violence and Harassment Convention* gave the issue a true human rights focus, requiring ratifying States to put in place measures to protect a broad range of workers against all forms of abuse, harassment and violence. In its Preamble, this Convention notes that

60 See, eg: *Convention (No 149) concerning Employment and Conditions of Work and Life of Nursing Personnel*, opened for signature 21 June 1977, 1141 UNTS 123 (entered into force 11 July 1979) and the accompanying Recommendation (No 157); *Convention (No 189) concerning Decent Work for Domestic Workers*, opened for signature 16 June 2011, 2955 UNTS 407 (entered into force 5 September 2013) ('*Convention concerning Decent Work*') and the accompanying Recommendation (No 201).

61 See Committee of Experts on the Application of Conventions and Recommendations, *Securing Decent Work for Nursing Personnel and Domestic Workers, Key Actors in the Care Economy: Report III (Part B)*, International Labour Conference, 111th sess (2022). The World Health Organization declared 2021 as the International Year of Health and Care Workers.

62 *Convention (No 190) concerning the Elimination of Violence and Harassment in the World of Work*, opened for signature 21 June 2019, 3447 UNTS 1 (entered into force 25 June 2021) ('*Violence and Harassment Convention*').

63 *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993, adopted 23 February 1994). See Committee of Experts on the Application of Conventions and Recommendations, *General Report and Observations Concerning Particular Countries: Report III (Part 1A)*, International Labour Conference, 91st sess (2003) 463. See also *CEACR Gender Equality Report III(B)* (n 50).

64 See: *Indigenous and Tribal Peoples Convention* (n 1) art 20(3)(d); *Convention concerning Decent Work* (n 60) art 5.

'violence and harassment … can constitute a human rights violation or abuse'.[65] The scope of this Convention is comprehensive in relation to both the workers and the situations covered by its protection. The workers protected include: employees as defined by national law and practice; workers irrespective of their contractual status; persons in training, including interns and apprentices; workers whose employment has been terminated; volunteers; jobseekers and job applicants; and individuals exercising the authority, duties or responsibilities of an employer.[66] The protection extends to workers in all sectors, in the formal and informal economies, and in urban and rural settings,[67] and to 'other persons' in the workplace, for instance clients and service providers, who may be victims or authors of harassment or violence.[68] The protection covers broadly violence and harassment 'in the course of, linked with or arising out of work', specifying a wide range of places and situations:

(a) in the workplace, including public and private spaces where they are a place of work;
(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
(c) during work-related trips, travel, training, events or social activities;
(d) through work-related communications, including those enabled by information and communication technologies;
(e) in employer-provided accommodation; and
(f) when commuting to and from work.[69]

Thus, the protection of the instrument extends beyond the traditional workplace to, for instance, cyberspace, which can be an arena for cyberbullying. As in most ILO conventions, the obligations on ratifying states are broad-ranging, requiring measures: to prevent and to deal with violence and harassment at work when it occurs; to develop and adopt policies and strategies to realise the goals of the convention; to adopt effective enforcement and monitoring mechanisms; to provide remedies for individuals impacted; and to set up education programs to broaden compliance.[70]

65 See generally Anne Trebilcock, 'What the New Convention on Violence and Harassment Tells Us about Human Rights and the ILO' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 1031.

66 *Violence and Harassment Convention* (n 62) art 2(1).

67 Ibid arts 2(2), 8.

68 Ibid art 2(1).

69 Ibid art 3.

70 Ibid arts 4–12.

D *The Supervisory System of the ILO:*[71] *Making Human Rights Effective*

At the ILO there is a strong emphasis on effective enforcement. Its supervisory system, overseeing compliance with its conventions, is one of the most sophisticated of the UN systems and includes mandatory reporting systems, complaint mechanisms, fact-finding investigative processes, global peer pressure and both ad hoc and permanent quasi-judicial mechanisms.

The CEACR is the main supervisory body of the ILO, and comprises 20 independent legal experts. First established in 1926 by the GB, the CEACR meets annually and undertakes an impartial and technical analysis of the application of ILO conventions and compliance by Member States with their international obligations.[72]

Matters come to the CEACR in several ways. First, and most commonly, under art 22 of the *ILO Constitution*, which requires Member States to report regularly on their compliance with ratified conventions. This reporting cycle is now every three years for fundamental conventions and six years for others, although it can be disrupted if the CEACR requests an earlier report. Trade unions or businesses may submit comments on these reports. The CEACR may consider other sources of information relating to law and practice, such as reports from other UN treaty bodies as well as authorised government material (legislation, executive orders, court decisions, and reports of government authorities), but nothing else (such as academic writing, reports from journalists etc). In many instances, after considering relevant information, the CEACR addresses a direct request to the Member State, thereby initiating a conversation that continues through the ongoing reporting/supervision process. Although direct requests are available on the ILO website, they are not public in the sense that they are not taken further forward through the ILO's supervisory system. When there is a more serious issue, the CEACR issues an observation, which may request further information or action, or suggest that the Member State seek technical assistance from the International Labour Office which has many regional offices. Cases of progress are also noted.[73] Observations are included in the CEACR's report to the GB, which then goes forward for further consideration and discussion within the ILO's supervisory system and ultimately the ILC.

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71 See generally: International Labour Organization, *Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Convention and Recommendations* (International Labour Office, 2019) ('*Monitoring Compliance with International Labour Standards*'); International Labour Organization, *The Committee on the Application of Standards of the International Labour Conference: A Dynamic and Impact Built on Decades of Dialogue and Persuasion* (International Labour Office, 2011) ('*Committee on the Application of Standards of the International Labour Conference*').

72 For a complete statement of the 'Mandate' of the Committee of Experts on the Application of Conventions and Recommendations see, eg, Committee of Experts on the Application of Conventions and Recommendations, *Application of International Labour Standards 2023: Report III (Part A)*, International Labour Conference, 111th sess (2023) [33] ('*CEACR 2023 Report III(A)*').

73 See also *Monitoring Compliance with International Standards* (n 71).

Secondly, matters may come to the CEACR following complaints procedures. Unlike under other UN conventions, within the ILO system representations cannot be made by individuals but only by other Member States, trade unions or employer representative bodies, whom individuals may approach. Some matters arise under arts 24 and 25 of the *ILO Constitution*, following a representation made to the GB by an industrial association of either workers or employers against a Member State that, in its view, has failed to comply with a ratified convention. In such cases, the first step is for the GB to establish a three-member tripartite committee to prepare a report and, depending on the response it receives, the GB may request the CEACR to supervise any on-going issues as a follow-up. Representations regarding freedom of association usually go to the tripartite CFA, which is another arm of the ILO's supervisory system and meets three times a year.

There is also a procedure under arts 26–34 of the *ILO Constitution* for dealing with complaints regarding non-compliance made by another Member State, which has ratified the same convention, or a delegate to the ILC or the GB on its own motion. In the case of persistent and serious violations, a commission of inquiry comprising three independent persons is set up to investigate the matter and make recommendations. To date, there have been 15 reports in total by commissions of inquiry.[74] Depending on the response of the Member State, a range of actions may be taken as a follow-up to a commission of inquiry, including ongoing supervision by the CEACR. In instances where there is little or no co-operation by a Member State in addressing the recommendations of a commission of inquiry, the consequences can be serious and may include the imposition of sanctions.[75]

Finally, in its annual General Survey, the CEACR also considers the application of specified conventions, whether or not ratified, and recommendations. The topic for each general survey is selected by the GB, which devises a questionnaire to all ILO Member States designed to provide a comprehensive picture of law and practice in relation to the selected instruments, regardless of their ratification status.[76] Completed questionnaires then form the foundation of the general survey.

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74 See 'Complaints/Commissions of Inquiry (Art 26)', *International Labour Organization* (Web Page) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50011:0::NO::P50011_ARTICLE_NO:26>.

75 In 2000, for example, art 33 was invoked by the ILC for the first time: see 'International Labour Conference adopts Resolution targeting Forced Labour in Myanmar (Burma)', *International Labour Organization* (Web Page, 14 June 2000) <https://www.ilo.org/resource/news/international-labour-conference-adopts-resolution-targeting-forced-labour>. This arose from an art 26 complaint against Myanmar in relation to forced labour: see International Labour Organization, *Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No 29)* (2 July 1998).

76 This reporting is mandated under the *ILO Constitution* (n 17) arts 19.5(e), 19.6(d). For the General Surveys: see 'General Surveys', *International Labour Organization* (Web Page) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm>.

The deliberations of the CEACR are reported each year to the GB in two parts: Part A, containing a general report (Part I) and the observations regarding compliance by counties with their international obligations (Part II); and Part B containing the general survey. From the GB, the CEACR's report goes to the ILC for discussion at its annual conference. In the first place it is considered by the CAS, a tripartite standing committee of the ILC. The CAS selects a limited number (approximately 40) of observations for a more focused discussion, and governments of the selected cases are requested to respond with any further relevant information. The CAS draws up conclusions, for instance recommending specific action to be taken by the Member State or suggesting it request the ILO for technical assistance. The ILC in plenary session discusses and adopts the report of the CAS.[77]

E *Challenges in the ILO's Supervisory System*

In summary, the ILO has a very sophisticated supervisory system and it is one that is, generally, highly effective. The ILO's extensive network of regional and country offices worldwide is an important element of this supervision, contrasting as it does with the more limited presence of such offices emanating from the Office of the High Commissioner for Human Rights.[78]

This is not to say that the ILO's supervisory system does not face challenges. Ultimately, the international system, like all legal systems, depends on goodwill, trust and respect. In this context, I highlight two examples of the challenges evident in recent times. The first is drawn from Afghanistan. In its 2023 report, the CEACR formulated a very strongly worded observation, noting with 'deep concern' the situation of women and girls there in relation to obligations under the *Convention concerning Discrimination in Respect of Employment and Occupation*.[79] It also noted the numerous reports and findings of the Security Council on the violation of rights in Afghanistan. The CAS also noted the situation with 'deep concern' and further 'deeply deplored' the discrimination against women, and it included a special paragraph dealing with Afghanistan in its report.[80] However, the situation in Afghanistan is complicated because the Taliban, which is in de facto control of much of the country, is not recognised internationally as its lawful government.

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77 On the work of the Committee on the Application of Standards: see *Committee on the Application of Standards of the International Labour Conference* (n 71).

78 Vitit Muntarbhorn, 'Labour Rights, Human Rights and Challenges of Connectivity' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 531, 536.

79 *CEACR 2023 Report III(A)* (n 72) 570–2; *Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

80 See *Report of the Committee on the Application of Standards: Part One: General Report*, International Labour Conference, 111th sess, ILO Doc ILC.111/Record No. 4A/P.I (16 June 2023) 45; *Report of the Committee on the Application of Standards: Part Two: Discussion on the General Survey and on the Situation Concerning Particular Countries*, International Labour Conference, 111th sess, ILO Doc ILC.111/Record No. 4B/P.II (17 July 2023) 70–84 ('*CAS Report: Part Two*').

In the CAS discussions, the Afghan government representative had agreed that there is a 'gender apartheid' in the country, but emphasised the work being done to achieve a political settlement and suggested that the CEACR and the CAS defer consideration of this issue.[81] In contrast to this, the Afghan worker representative had advocated 'practical and serious measures' to address the problem.[82] There were also contributions endorsing the call by the CEACR including from: Sweden (speaking for the European Union and with whom candidate and EFTA countries also aligned themselves); the United Kingdom (also on behalf of Australia, Canada, and the United States); Switzerland; and Japan. However, there were no comments from Africa, Arabic or Muslim countries. In summary, as several (including the government representatives) noted, the real threat to the whole international system was the takeover of the country by a group that does not believe in this Convention.[83]

The second challenge that I mention here has been referred to as the 'right to strike crisis' at the ILO.[84] Since the 1950s, the CEACR has treated the *Convention concerning Freedom of Association and Protection of the Right to Organise* ('*Convention No 87*') as protecting the right to strike, although the Convention does not expressly refer to it.[85] The right to strike is, of course, also recognised explicitly in the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[86] Despite its long history as a recognised right at the ILO, in 2012, when the CEACR report came to the tripartite CAS, the employer group refused to deal with this issue and the supervisory system came to a halt.[87] The stance of the employers questioned the competence of the CEACR to 'interpret' conventions, and thereby effectively questioned the supervisory system in general, indeed almost all of the operations of the ILO.[88] In the view of some commentators, the crisis arose

81 *CAS Report: Part Two* (n 80) 70–1.

82 Ibid 74–5.

83 Ibid 75–83.

84 See: Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers Group's 2012 Challenge to the Right to Strike' (2013) 42(4) *Industrial Law Journal* 338; Francis Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10(1) *International Organizations Law Review* 117; Lee Swepston, 'Crisis in the ILO Supervisory System: Dispute over the Right to Strike' (2013) 29(2) *International Journal of Comparative Labor Law and Industrial Relations* 199.

85 *Convention (No 87) Concerning Freedom of Association and Protection of the Right to Organise*, opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950) ('*Convention No 87*').

86 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8 ('*ICESCR*').

87 See *Report of the Committee on the Application of Standards*, International Labour Conference, 101st sess, PR No 19/Pt I (13 June 2012) [134]–[226].

88 See Thomas Lieby, 'The Interpretation of International Labour Conventions and the Principle of "Systemic Integrations": The Way Forward for an ILO Tribunal' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 923.

simply because the ILO's supervisory system was so effective and its decisions were frequently cited by national courts.[89]

For several years following, there was 'political' agreement between the social partners, enabling the supervisory process to continue, and the ILO also set up the standards review mechanism.[90] However, the period continued to be marked by on-going 'skirmishes' and 'stand-off', the ramifications of which continued to overshadow the international labour system. This prompted discussions about the possibilities of a legal solution.

One option was the establishment of an internal tribunal at the ILO under art 37(2) of the *ILO Constitution*. The advantage of an internal tribunal was that it could lead to a more expeditious settlement. However, difficult questions also arose both as to the role and impact of any new in-house tribunal. Thomas Leiby articulated two of the most important:

> The first question that comes to mind concerns the implications of a new tribunal on the international legal system. The second, undeniably more sensitive in the ILO context, is the extent to which that tribunal will take into account rules of international law shaped outside the ILO's 'world parliament of labour'.[91]

He went on to argue that, for the sake of coherence and legal certainty, any ILO in-house tribunal must consider other rules of international law, noting that they too are enmeshed with the impact in domestic courts.[92] The importance of coherence at the international level is clearly paramount, and is something that has been recognised by the International Law Commission,[93] and by both the UN[94] and the ILO.

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89 See Laurence R Helfer 'Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 257.

90 International Labour Office, *The Standards Initiative: Follow-Up to the 2012 ILC Committee on the Application of Standards*, 322nd sess, Agenda Item 5, ILO Doc GB.322/INS/5(Add.3) (16 October 2014) [5], [49]. See also International Labour Office, *The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association*, 236th sess, Agenda Item 3, ILO Doc GB.326/LILS/3/1 (29 February 2016).

91 Leiby (n 88) 931.

92 Ibid 948. See also Eric Gravel and Chloe Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamic and Impact* (International Labour Office, 2003).

93 See, eg, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006).

94 In the UN human rights system there is no mechanism to formally review the normative output of the UN treaty bodies, although the ICJ has had occasion to interpret human rights conventions. In 2009, the UN General Assembly and the High Commissioner

The *ILO Constitution* also makes clear that, even if such an internal tribunal were to be established, any of its decisions would not be final. A clear hierarchy exists with the International Court of Justice ('ICJ') at the pinnacle. Having raised the question of 'interpretation' of the conventions, the other possibility was to seek an 'advisory opinion' from the ICJ under art 37 of the *ILO Constitution*.[95] Although an 'advisory opinion' is formally non-binding, it has always been understood as having decisive effect.[96]

Post Script: Since this seminar, there has been a very important development. In November 2023, two special sessions of the GB were convened as provided for in art 7.8 of the *ILO Constitution* to consider the way forward in relation to the right to strike issue. At these meetings there was support for the request by 36 governments and the Workers Group to seek a legal solution to the crisis and refer the dispute over the right to strike and *Convention No 87* to the ICJ for an advisory opinion. An alternative pathway put forward by the employers — advocating a political solution by placing the issue of the right to strike on the agenda of the next International Labour Conference and, ultimately, adopting a protocol on the topic — was not supported.[97] The advisory opinion ultimately handed down by the ICJ will be not only very important for the ILO, but also for international human rights law more generally.

V The UN System of Human Rights including Rights at Work

Understanding that labour rights are human rights and the role of the ILO in relation to them involves a recognition that, at the international level, there is more than

for Human Rights launched a process aimed at 'strengthening and streamlining' the treaty body system: see *Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System*, GA Res 68/268, UN Doc A/RES/68/268 (9 April 2014, adopted 21 April 2014). A review was concluded in 2020 with a report presented to the President of the General Assembly: see *Report of the Co-Facilitators on the Process of the Consideration on the Process of the Consideration of the State of the UN Human Rights Treaty Body System*, UN Doc A/75/601 (17 November 2020). For an overview of developments since the adoption of GA Res 68/268, see 'Treaty Body Strengthening: Treaty Bodies', *Office of the High Commissioner for Human Rights* (Web Page) <https://www.ohchr.org/en/treaty-bodies/treaty-body-strengthening>.

95 See *ILO Constitution* (n 17) art 37.

96 Ibid art 37(2).

97 For further information about these meetings, see: '349th bis (Special) Session of the Governing Body', *International Labour Organization* (Web Page, 10 November 2023) <https://www.ilo.org/ongoing-and-forthcoming-meetings-and-events/ilo-governing-body/governing-body-sessions/349th-bis-special-session-governing-body>; '349th ter (Special) Session of the Governing Body', *International Labour Organization* (Web Page, 11 November 2023) <https://www.ilo.org/ongoing-and-forthcoming-meetings-and-events/ilo-governing-body/governing-body-sessions/349th-ter-special-session-governing-body>.

one arena of labour rights as human rights because the conventions of the UN also clearly extend to work. As well as some rights specifically expressed as relating to work, such as 'the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment' enshrined in the *UDHR*[98] and various aspects of the 'right to just and favourable conditions of work' and the right to join trade unions recognised in *ICESCR*,[99] there are also a number of other international conventions recognising, for instance, the right to be free of discrimination or the rights of children, and migrants and members of their families, which seek to provide protection that is more comprehensive than, but also necessarily extends to, the world of work.

And yet over time the treaty bodies monitoring those UN conventions have had comparatively little to say on matters related to work. More than a decade ago Sarah Joseph noted that the general UN system had not played a very significant role in relation to human rights at work.[100] As she observed, internationally, labour rights have been largely left to the ILO with the contribution of the main UN bodies to their development being 'modest'.[101] Citing Bob Hepple, she mused that the explanation for this might be found in the different historical origins of the ILO and UN: 'It is perhaps because international labour rights movements started earlier than other human rights movements that labour rights tend to have been separated, and arguably even marginalised, within the mainstream human rights bodies at the global level.'[102]

In recent times, this situation has provoked wider discussion. Making similar observations, Virginia Brás Gomes has emphasised the duty of the UN treaty bodies to deal with these matters:

> Treaty bodies, therefore, have a mandate to interpret and monitor the right to work and rights at work in their respective treaties even running the risk of duplicating recommendations in their Concluding Observations, as States parties to the different treaties often claim.[103]

98 *UDHR* (n 24) art 23.

99 *ICESCR* (n 86) arts 7, 8.

100 Sarah Joseph, 'UN Covenants and Labour Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Bloomsbury, 2010) 331, 331.

101 Ibid 331.

102 Ibid 331–3. See also Bob Hepple, *Labour Laws and Global Trade* (Bloomsbury, 2005) 21–3.

103 Virginia Brás Gomes, 'Right to Work and Rights at Work: Is there a Role for the Human Rights Treaty Bodies?' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: Law for Social Justice* (International Labour Organization, 2019) 485, 486.

With rights relating to work found in various UN treaties and ILO conventions, she bemoaned the fact that UN treaty bodies themselves work, for the most part, in silos:[104]

> Human rights treaty bodies have a triple role to play — monitoring, standard-setting and considering individual communications related to specific treaties. In these areas, some synergies exist (too few, in my opinion) amongst the treaty bodies themselves, [and importantly] with other human rights mechanisms as well as with UN agencies and specialized bodies.[105]

Gomes concluded that rather than the limited coordination between the UN treaty bodies themselves and other UN agencies, such as ILO, there should be, in her view, a 'mutually reinforcing relationship'.[106]

The fact that there is a 'duplication' in international instruments of some human rights at work may have potential benefits. Vitit Muntarbhorn has identified a variety of productive relationships between human rights conventions of the UN and ILO.[107] These include:

1. Complementarity, for example where the detail of the ILO's *Minimum Age Convention (No 138*) can support provisions in the *CRC*;
2. Gap filling, for instance the ILO has a *Convention (No 169) concerning Indigenous and Tribal Peoples Convention in Independent Countries* that among other things advocates both consultation and participation rights in programs of concern to them, which is binding upon ratification, whereas there is otherwise only the non-binding UN General Assembly Resolution *Declaration on the Rights of Indigenous Peoples*;[108] and
3. Clarification, strengthening and invigoration where the rights in one instrument are express but implied in another, such the right to strike which is explicit in the *ICESCR* but implicit in ILO *Convention No 87.*

Gomes also picks up on these points and notes the way that the Committee on Economic, Social and Cultural Rights has relied on ILO Conventions, for example in its General Comment 23, to strengthen its concluding statements, and likewise the fact that UN conventions on discrimination can also influence the ILO convention.[109]

In their conclusions, both Gomes and Muntarbhorn stress that the test of any human rights system is the extent to which it makes a difference in people's lives. Working in silos can often frustrate that goal, whereas integration is more likely to deliver

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104 Ibid 501.

105 Ibid 487.

106 Ibid 487.

107 Muntarbhorn (n 78) 532–5.

108 *Declaration on the Rights of Indigenous Peoples* (n 2).

109 Gomes (n 103) 495. See also *CEACR Gender Equality Report III(B)* (n 50) 51–3.

improvements in efficiency and thereby ultimately benefit rights holders on the ground.[110] Both are also agreed that the benefits of an integrated or holistic approach are needed, not only at the international level but also at national levels. In the words of Gomes:

> The one fundamental requirement that is still not complied with is the mainstreaming of human rights across all public policies. The implementation of coherent and effective cross-cutting public policies remains weak and fragmented. The holistic approach at national level — that brings together systematically the recommendations of a human rights treaty body and of the ILO, or any other specialised agency with a human rights mandate, for that matter — needs to be under permanent scrutiny in order to be strengthened.[111]

Muntarbhorn agrees: 'if catchphrases are needed, there is the call for the "whole-of-the-UN" approach, "whole of Government" approach and "whole of society" approach as a test of connectivity in terms of implementation.'[112]

Given those observations, it is worth noting that at the international level there are an increasing number of examples of a willingness to adopt a more integrated approach. The recent joint statement noted at the outset of this seminar is a particularly important one.[113]

VI Labour Rights and Human Rights in Australia: Complexity and Coherence?

In light of the pressures for greater integration at the international level, it is interesting to consider the complex situation concerning human rights in Australia especially in relation to rights at work.

In Australia, there are many different provisions dealing with labour rights in many different statutes — be they labour statutes, anti-discrimination statutes, work health and safety statutes — some of which are also replicated at both federal and state level. In addition, many other legal instruments — awards and enterprise agreements being two of the most important — also impact labour rights.

There can be no doubt that complexity can have huge disadvantages: there are impacts in a very immediate and practical sense arising from the different approaches in the statutes and other legal instruments for citizens, litigants, legal advisers, trade unions, industrial advocates, commercial and charitable businesses, human resource professionals, judges, commissioners and tribunal members, government agencies,

110 See: Gomes (n 103) 501; Muntarbhorn (n 78) 573.

111 See Gomes (n 103) 501.

112 Muntarbhorn (n 78) 573.

113 See *Addendum to CEACR Labour Standards Report* (n 3).

all of which can result in confusion, inefficiency, increased costs and more. In the result, that can mean rights are not protected.

Are there any advantages arising from this complexity? Arguably in such a system there are sometimes new ways of looking at things, resulting in the introduction of more effective ways to attain policy objectives.[114] However, because so often the disadvantages seem to outweigh the advantages, there has also been discussion from time to time about how best to eliminate some of the complexity. In 2010, there was an initial proposal for the harmonisation of anti-discrimination law to 'remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user friendly'.[115] Although it was agreed in the aftermath of the 2010 discussions that there were lots of good reasons to harmonise anti-discrimination laws,[116] in the end that never eventuated.[117] Instead, the resulting new *Australian Human Rights Framework* ('*Framework*') focused on the provision of information and education, although the Parliamentary Joint Committee on Human Rights was also established to report on the compatibility of proposed Australian legislation with Australia's international human rights obligations.[118] The then government intended that there be a review of the *Framework* in 2014, but nothing was done.[119]

In 2023, the issue came back onto the policy agenda. Earlier that year, in March, the Attorney-General requested the Parliamentary Joint Committee on Human Rights to

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114 The 'adverse action' provisions in the *Fair Work Act 2009* (Cth) ('*FW Act*') deal with 'discrimination' issues differently from anti-discrimination legislation: at ss 340–5.

115 Attorney-General's Department, *Australia's Human Rights Framework* (April 2010) 9.

116 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) comment at xii that

> [a]nti-discrimination law in Australia still lacks coherence. … The single reform — simply stated but the most enormously challenging to do — of harmonising provisions, most notably exceptions, would significantly reduce the size of this book. Throughout the book we repeatedly observe on the often irrational, and always confusing, variations in legislation, from one jurisdiction to another and even within the same jurisdiction.

See also Anne Hewitt, 'Can a Theoretical Consideration of Australia's Anti-Discrimination Laws Inform Law Reform?' (2013) 41(1) *Federal Law Review* 35.

117 The Gillard Labor Government released an exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) aimed at simplifying the various anti-discrimination statutes, harmonising them and proposing various changes (for example, expanding the list of 'protected attributes' and simplifying the legislative concept of what it is 'to discriminate'). However, only more limited amendments were made: see *Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

118 See: Attorney-General's Department (n 115); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

119 Attorney-General's Department (n 115) 3.

conduct a review of the *Framework* launched in 2010.[120] On International Women's Day on 8 March 2023 the Australian Human Rights Commission ('AHRC') launched its proposed model for a national Human Rights Act for Australia in its 'Free and Equal: Position Paper: A Human Rights Act for Australia'. Its proposed statute would include reference to 28 rights, to be interpreted broadly in light of what it refers to as the six core treaties ratified by Australia, along with the *UN Declaration on the Rights of Indigenous Peoples*.[121] Noting that Australia, with no statutory, let alone constitutional, bill of rights, is an outlier when it comes to the legal protection of human rights,[122] the AHRC proposes comprehensive legislation, far wider in scope than anti-discrimination issues and that would provide remedies for breaches.[123] As I understand it, the proposed legislation would impose obligations on federal policy and decision makers, on parliament and courts — that is, it would be limited to the formal public sphere. Complaints by individuals where there is an alleged breach would be made to the AHRC, with conciliation as the first approach but access to a court for determination where there is no agreed outcome.[124] Remedies could be, for example, injunction or compensation.[125]

Without going into any detailed discussion on the merits of this proposal, I note the limited frame of reference and focus of the AHRC in relation to human rights. Clearly, the AHRC is not thinking of labour rights as human rights, or ILO conventions as embodying human rights. What does that mean for its aspiration that the proposed legislative scheme is 'comprehensive' in relation to human rights? Will it alone deal with human rights at work? And what does it mean to suggest that any dispute settlement system would be appropriately focused around the mechanisms of the AHRC? What about the roles of the Fair Work Commission, the Fair Work Ombudsman, not to mention the bodies overseeing compliance with work, health and safety regimes, and more besides?

120 See Mark Dreyfus, 'Review into Australia's Human Rights Framework' (Media Release, 22 March 2023).

121 The core treaties identified are the following: *ICESCR* (n 86); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), and the rights taken from the *Declaration on the Rights of Indigenous Peoples* (n 2). See Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022).

122 Australian Human Rights Commission (n 121) 7.

123 Ibid 268.

124 Ibid 275, 277.

125 Ibid 275.

In whichever way our policy makers choose to resolve these issues, I suspect it is at least clear that we will continue to have several areas of law that deal with human rights at work. Is this a problem? I would argue that it is not, although clearly it is desirable to try to minimise confusion for citizens and others alike and is highly desirable for there to be a broad coherence in that respect between different regulatory regimes.[126]

There are distinct and important advantages in retaining provisions in labour statutes that address human rights issues. If we compare the regulatory scheme of the *Fair Work Act 2009* (Cth) and that of the various anti-discrimination regimes, we can see that the former has the capacity to address and introduce the kinds of structural reforms that are so often needed to deliver real equality. The provisions regarding equal pay, low paid bargaining reforms etc, pay secrecy provisions, provisions for seeking flexible work arrangements, are not the kind of provisions or reforms that would be possible through the AHRC approach. Likewise, the problems of harassment and violence may well be dealt with in a regulatory scheme akin to what we already know as discrimination law, but the inclusion of provisions regarding those matters in awards and agreements, or the application of a work, health and safety approach are more likely to lead to real and systemic change. Human rights are not simply the rights of individuals who can be treated as isolated beings: rather individuals exist, and must be enabled to flourish, in economic, social, political and cultural contexts.

In conclusion: to my way of thinking, there can be a productive interaction between different regulatory schemes dealing with labour rights as human rights. However, the one thing that is necessary to all is the understanding of and commitment to the idea that labour rights are human rights — that is the high road to decent work, social justice and a better, and ultimately more peaceful, future for all.

VII Concluding Thoughts on Legal Education and Labour Rights as Human Rights

I wish to conclude with some thoughts on legal education in Australia, which appears to me to be perpetuating the separation of labour rights and human rights.

Looking at courses on 'International Human Rights Law', it is as if labour rights and the system of international labour law do not exist. Therese MacDermott lamented more than 25 years ago, that the law of work has been for the most part ignored by mainstream public international law and human rights law.[127] There are, of course,

126 There is a small internal effort at coherence in the *FW Act* (n 114) s 351(2)(a).

127 See Therese MacDermott, 'Labour Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 194.

many scholarly works now noting that labour rights are human rights.[128] However, most major human rights textbooks still reveal an almost total lack of concern with labour rights. To take one example: many of the chapters in one of the major texts, *International Human Rights Law*,[129] proceed as if human rights law only commenced after the Second World War ('WWII'):

> Prior to the 1940s there was no real conception within international law of the idea that one state had a right to interfere in the sovereign affairs of another state as regards how it treated its own citizens. International law was virtually a blank canvas as far as the protection of human rights was concerned. We say this from the perspective of a basic definition of human rights as the rights owing to human beings by nature of their humanity.[130]

While conceding that the League of Nations was 'the key international organization established after WWI with the principal objective of maintaining peace and stability in the world' and noting the 1926 *International Convention on the Abolition of Slavery and the Slave Trade* and the recognition of the importance of the protection of minorities, Ed Bates clearly thinks international human rights arrived post WWII.[131] Even granted that a different conceptual framework may have dominated thinking about rights prior to WWII, this is an astonishing view.

In her chapter in the same text, Christine Chinkin lists the principal UN human rights treaties and then goes on to comment:

> The most important of the common features shared by the treaties of the UN human rights system is the establishment of specialist committees ('treaty bodies') in accordance with their terms. Each committee, whose members serve in their personal capacity, monitors implementation of the relevant treaty and their work has been central to the development of human rights law. No account of the sources of human rights law at the global level is complete without taking the work of the treaty bodies into account.

128 See, eg: Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, 2002); Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005); Janice Bellace and Beryl ter Haar (eds), *Research Book on Labour, Business and Human Rights Law* (Edward Elgar, 2019); Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart, 2010).

129 See Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018).

130 See Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) 3, 11.

131 Ibid 11–16.

However, she then adds: 'There are many other multilateral treaties that include human rights obligations but which do not have such monitoring mechanisms.'[132] To a labour lawyer, that comment is also astonishing in its failure to reference the ILO's conventions and its sophisticated supervisory system.

When it comes to textbooks for courses focused on domestic law there also is often a disconnect from international law. Textbooks for discrimination law courses often pay only scant attention to the UN human rights instruments that underpin the major anti-discrimination statutes of our domestic law, and even less attention is given to international labour law, even when the adverse action provisions in Australian labour legislation are acknowledged and discussed.[133] When we examine labour law texts, we see a parallel failure to include reference to the major UN human rights instruments that concern work. Even more surprisingly, there is also often a failure in labour law texts to consider the international system of labour rights.[134] At most, there is sometimes an isolated chapter addressing such matters, mainly focussed on the ILO, its conventions and supervisory system. Only rarely are considerations of labour rights as human rights integrated throughout.[135]

Of course, objections may be raised that the above comments do not recognise the constraints of the real world: 'there is already a bewildering array of material for law teachers and students to wrap their head around, and you cannot possibly teach everything in every course, nor can you include everything in every textbook!' So I would like to reframe these thoughts on legal education as it relates to labour rights as human rights to make the following points:

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132 Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) 63, 67.

133 See, eg, Rees, Rice and Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (n 116) where the last chapter deals with '[d]iscrimination in the *Fair Work Act*'. See also Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An ntroduction* (Cambridge University Press, 2017) which devotes limited attention to the *FW Act* (n 114).

134 See, eg, Andrew Stewart, *Stewart's Guide to Employment La*w (Federation Press, 6th ed, 2018) makes limited reference to the ILO and its conventions.

135 Cf WB Creighton, WJ Ford and RJ Mitchell, *Labour Law: Text and Materials* (Lawbook, 1983) was a groundbreaking book with various references to ILO conventions. Rosemary Owens and Joellen Riley, *The Law of Work* (Oxford University Press, 2007) (and with Jill Murray in its second edition in 2011) made a more concerted effort to mainstream some of the themes related to labour rights as human rights that had been peripheral in earlier texts. Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) contained a separate chapter on 'International Labour Standards and Australian Labour Law', but thereafter the discussion was somewhat variable perhaps according to the interests of the various participating authors. See also, Joellen Riley Munton, *Labour Law: An Introduction to the Law of Work* (Oxford University Press, 2021) ch 1.

- Our university system of legal education should be underpinned by a whole range of values: encouraging and fostering curiosity, extending the boundaries of knowledge, developing a rigorous analytical and critical approach, developing innovative and new ways of solving problems, and understanding the nature of the legal system, including its role and function in its social, economic, political and cultural contexts. There is no place in a good university, in a good law school, for a 'trade school' approach to legal education.
- A positivist approach to the law, and to our learning and teaching of it, is in this context futile — there is no point in trying to master every detail of every law when you are a student at university (the time for that, if it comes at all, is later in the contexts of policy development, advice to clients, court work). Rather it is the big picture, the big questions that should be the concern at university law schools. Our focus should always be expanding, bringing together the areas not traditionally thought of as intersecting (labour law and education, labour law and human rights law) because that will assist in understanding more clearly both the possibilities for, and limitations of, law — delivering a better world for all.
- If we think of labour law as human rights law, then we must necessarily also realise that we cannot simply teach some limited version of employment law as labour law. Labour rights as human rights mean we must extend our horizons: beyond employment, to all the other types of work and the workers who are often ignored — the interns, the gig workers, the volunteers, the franchisors and franchisees, and so on. We must also extend the scope of our thinking beyond the formal economy, to the informal economy. And so on. Such thinking can only help to contribute to solving the issues we are more likely to face (as policy makers, solicitors or barristers, tribunal decision makers, judges, or in other roles) in the future.
- For us as scholars of human rights law and labour law, this work is already well begun — but these points I hope also remind us that good university teachers are also always good researchers, for it is through research, by definition, that we expand our horizons.

To conclude: as I watch on from the sidelines and see this law school reach the end of its 140-year life as part of The University of Adelaide and begin a very new chapter as two universities merge to become a new 'Adelaide University', I hope that its new law school will take forward some of the best aspects of the past to build an even better one in the future. I wish it well.