

ACCOMMODATING DIFFERENCES: DISCRIMINATION AND EQUALITY AT WORK IN INTERNATIONAL LABOR LAW

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INTRODUCTION

The aim of this Essay is to analyze the antidiscrimination rules adopted by the International Labour Organization (ILO) in order to evaluate their role in combating inequality at work around the world. Antidiscrimination regulations in international labor law have existed since the end of World War II, many years before the establishment of the European Economic Community that created similar rules for its member states. Therefore, the ILO can be considered a pioneer in establishing legal standards addressing workplace discrimination.

International antidiscrimination rules have different legal forms: conventions, recommendations, and declarations. The variety of sources that regulate workplace equality on the international level and the continuity in the adoption of these regulations confirm that the ILO has always made antidiscrimination a priority.

The understanding that antidiscrimination regulations are a prerequisite to decent working conditions for all workers—employees and the self-employed—was highlighted in the Declaration on Fundamental Principles and Rights at Work, adopted in Geneva in 1998, which introduced the “core labor standards” into international labor law.¹ The Declaration, which will be examined in depth in Part II of this Essay, affirms that one of the four core labor standards at the international level is “the elimination of discrimination in respect of employment and occupation.”²

The Declaration demonstrates that workplace equality is one of the most important issues in international labor law. Therefore, legal instruments provided by the ILO in this field are highly developed relative to those of the European Community. The effectiveness of its rules is what distinguishes European from international law. In fact, the application of European Community law is compulsory for its member states, although this application is usually indirect, especially in the subject of antidiscrimination rules. The European Community usually employs the

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1. Declaration on Fundamental Principles and Rights at Work, Int'l Lab. Org. [ILO], 86th Sess. (June 1998), 37 I.L.M. 1233, 1235, *available at* <http://digbig.com/4qxma> [hereinafter Declaration of Geneva]; GIUSEPPE CASALE, ELEMENTI DI DIRITTO INTERNAZIONALE DEL LAVORO 5 (1999).

2. Declaration of Geneva, *supra* note 1, art. 2(d).

European Directives in this context.

In contrast, the ILO regulations are not obligatory for its associated countries.³ This means that the ILO adopts declarations, conventions, and recommendations but cannot force member states to integrate these regulations into national law. Like other international organizations, the ILO approves rules that must be ratified by each associated country to become domestic law.⁴ However, the ILO enhanced specific instruments to give the broadest possible application to its labor standards.

Another problem of effectiveness is that the ILO labor standards, despite ratification, can remain unapplied because of the varying degrees of development of the associated countries. Originally, the ILO was premised on creating protection for workers in countries with similar levels of economic development, particularly Europe and the United States. However, after World War II and the independency of the 1950s, many developing countries became members of the ILO. In these lesser-developed countries, poor working conditions remain despite ratification of the greater part of international labor standards, including antidiscrimination rules. Therefore, one of the most difficult challenges for the ILO is helping these countries improve their working conditions.⁵ To address this challenge, the ILO developed particular methods concerning antidiscrimination rules and workplace equality.

The analysis of international labor standards in the field of antidiscrimination rules will begin with a general description of the structure and functions of the ILO. This description will explain the ILO's approach on the issue of antidiscrimination and workplace equality. It is important to understand the methods, improved by the ILO, that make international labor standards effective in the domestic law of its member states.

Part II of this Essay will examine the role of the ILO in creating antidiscrimination rules. In this context, particular attention will be paid to different sources of international labor law concerning antidiscrimination and equality at work. These sources include the 1944 Declaration of Philadelphia, the 1951 Equal Remuneration Convention, the 1958 Discrimination Convention, and the 1998 Declaration on Fundamental

3. See ILO CONST., art. 19, §§ 5–6, available at <http://digbig.com/4qxmb> (allowing the appropriate authorities within the member state to decide on whether to ratify the conventions and stipulating that recommendations only need to be brought before the appropriate authorities).

4. EBERE OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOR ORGANISATION 143, 152 (Legal Aspects of International Organization No. 5, 1985).

5. See Luca Nogler, *Le fonti internazionali del lavoro*, in I DIRITTO DEL LAVORO 111 (Franco Carinci ed., 1998).

Principles and Rights at Work. They contain not only the definition of discrimination, which will be examined in depth but also specific mechanisms to combat discrimination and to promote workplace equality in member states. Regarding this last point, the Essay will examine the new frontiers of antidiscrimination law in order to point out the most recent approaches of the ILO in this field. Part III will demonstrate that the actual challenge is not only to provide legal instruments to combat discrimination but also, above all, to guarantee workers' equality of treatment and opportunities, especially to disadvantaged groups.

Part IV addresses the problem of implementation and effectiveness of labor rules adopted at the international level. It will be particularly interesting to analyze the special instruments that the ILO has adopted to encourage its member states to apply international labor standards. The most important instrument is the ILO's monitoring system, which allows efficient dialogue with member states and continuous control of their domestic laws.⁶ This system is controlled by the constitution of the ILO and a particular body, the Committee of Experts on the Application of Conventions and Recommendations.⁷ This body is also important because of its role in the interpretation of international labor standards. For this reason, some scholars assert that this body represents the jurisprudence of the ILO.⁸

The Conclusion is dedicated to the evaluation of international antidiscrimination rules and their application in the individual member states. The antidiscrimination programs of the ILO will also be examined to assess their impact on the domestic law of the developing countries.

I. THE INTERNATIONAL LABOUR ORGANISATION: STRUCTURE AND FUNCTIONS

The Treaty of Versailles concluded World War I in 1919.⁹ During the negotiations of the Treaty, the Commission on International Labour Legislation was created and presented a project for the establishment of the International Labour Organisation.¹⁰ The project became part XIII of the

6. See HÉCTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS* 75–79 (1996) (discussing the functions of the ILO's Committee of Experts on the Application of Conventions and Recommendations).

7. *Id.* at 75.

8. See, e.g., CASALE, *supra* note 1, at 34.

9. Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 189.

10. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 4.

Treaty, and today constitutes the ILO Constitution.¹¹

The ILO Constitution is composed of a preamble, which expresses the aims of the ILO, four chapters dedicated to organizational matters, and an annex, which incorporates the 1944 Declaration of Philadelphia into the constitution. The Declaration is particularly important because it fixes the mission of the ILO. As most scholars agree, this mission is essentially provided by part II(a) of the Declaration, where the International Labour Conference affirms that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”¹² To reach this objective the ILO has to deal not only with labor matters but also with relationships between labor matters and the social, economic, and financial ones.¹³

“The ILO is an intergovernmental body.”¹⁴ In the beginning, the constitution affirmed that member states of the League of Nations were also automatically members of the ILO.¹⁵ Nevertheless, the ILO maintained its autonomy because it could accept states not associated with the League as members, and refuse states that were members of it.¹⁶ In 1945 the ILO Constitution was substantially amended to address the issue of membership. The amendments established that all member states of the United Nations were also members of the ILO.¹⁷ Countries that joined the United Nations later automatically became members of the ILO if they formally agreed to respect the principles contained in the constitution.¹⁸ States that are not members of the United Nations can become members of the ILO if they are admitted by a qualified majority of the International Labour Conference.¹⁹

11. Treaty of Versailles, *supra* note 9, pt. XIII; ILO Const. (providing the Treaty of Versailles as a stand-alone document with the text of the 1944 Declaration of Philadelphia as the Annex); OSIEKE, *supra* note 4, at 5; *see also* BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 3–6 (outlining the historical origins of the ILO and the creation of its constitution).

12. ILO CONST., *supra* note 3, annex pt. II(a); *see also* BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 5 (quoting the ILO Constitution annex part II(a) and declaring it “the most important contribution of the Declaration [of Philadelphia]”).

13. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 5.

14. *Id.*

15. Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. I, art. 387.

16. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 5.

17. ILO CONST., *supra* note 3, art. 1, § 2.

18. *Id.* art. 1, § 3.

19. *Id.* art. 1, § 4; *see* OSIEKE, *supra* note 4, at 18 (examining the acquisition of ILO membership by non-United Nations member states); NICOLAS VALTICOS, DROIT INTERNATIONAL DU TRAVAIL 73 (2d ed. 1983).

With regard to the structure of the ILO, it is important to note that the ILO “is not a supranational entity.”²⁰ This assertion, fundamental to understanding the problem of effectiveness of international labor standards in domestic law, means that the ILO “may not impose obligations on member States,” except regarding matters to which they voluntarily agree.²¹ After the amendments to the 1945 Constitution, the ILO became “a specialized agency ‘associated’ with the United Nations.”²²

In the International Labour Conference, the supreme body of the ILO, each national delegation is composed of two representatives for the government, one for the employers, and one for the workers.²³ The Governing Body is elected by the Conference and is now composed of fifty-six members: twenty-eight represent national governments, fourteen represent employers, and fourteen represent workers.²⁴ Members representing governments are divided into two groups. The first group is comprised of ten members with permanent seats whose countries are considered to be chief industrial countries.²⁵ The second group is comprised of the remaining eighteen members elected by the governmental representatives of the International Labour Conference.²⁶ This group does not include those representatives from countries with permanent seats.²⁷ The members representing employers and workers are chosen by their own groups inside the International Labour Conference.²⁸

As previously noted, the two most important organs of the ILO are the International Labour Conference and the Governing Body. The Conference is principally charged by the constitution to discuss and adopt international labor standards, in particular conventions, recommendations, and sometimes declarations, such as in Philadelphia in 1944 or in Geneva in 1998.²⁹ The Conference also supervises the application of the ratified conventions into the domestic law of member states.³⁰ The Conference meets once a year in order to examine the issues on the agenda prepared by

20. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 6.

21. *Id.*

22. *Id.* (noting the agreement of 1946 between the ILO and the Economic and Social Council of the United Nations to regulate the relationship between the two bodies).

23. Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. I, art. 389; ILO CONST., *supra* note 3, art. 3, § 1.

24. ILO CONST., *supra* note 3, art. 7, § 1.

25. *Id.* art. 7, § 2.

26. *Id.*

27. *Id.*

28. *Id.* art. 7, § 4; *see also* Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. I, art. 393 (setting forth the original membership structure for the International Labour Conference).

29. ILO CONST., *supra* note 3, art. 19, § 1.

30. OSIEKE, *supra* note 4, at 81.

the Governing Body.³¹ During its session, the Conference sits in plenary or in committees established to do a preliminary exam of the different issues on the agenda.³² Finally, the Conference discusses and adopts the program and the budget of the ILO.³³

The Governing Body is the executive organ of the ILO and has many tasks. The Governing Body prepares the agenda for the International Labour Conference; selects the Director General of the International Labour Office and supports the Director General in exercising the Director General's responsibilities; draws up the program and the budget of the ILO; and decides and supervises the policy of technical cooperation.³⁴ The Governing Body meets four times a year.³⁵

The International Labour Office, the permanent secretariat of the ILO, is closely related to these two principal governing bodies. It is charged by the constitution to provide technical assistance to the International Labour Conference and to the Governing Body.³⁶ It prepares the documentation for the meetings of both the International Labour Conference and the Governing Body, collects and publishes information on labor and social conditions, and prepares specialized reports to advise the International Labour Conference in adopting conventions and recommendations.³⁷ In addition, the International Labour Office draws up technical reports for the committees of the Conference and gives assistance in labor matters to the member states, their trade unions, and employers' associations.³⁸ The headquarters of the International Labour Office is in Geneva.³⁹

The most significant feature of the ILO's structure is certainly the tripartite composition of its internal bodies. Both the International Labour Conference and the Governing Body have a tripartite structure, which means that representatives of governments, workers, and employers of each member state compose the two organs.⁴⁰

31. *Id.* at 82–83.

32. OSIEKE, *supra* note 4, at 89.

33. VALTICOS, *supra* note 19, at 205.

34. ILO CONST., *supra* note 3, art. 8, § 1; OSIEKE, *supra* note 4, at 102.

35. CASALE, *supra* note 1, at 10–11; VALTICOS, *supra* note 19, at 14.

36. ILO CONST., *supra* note 3, art. 10, § 1.

37. *Id.* art. 10.

38. OSIEKE, *supra* note 4, at 123; *see id.* art. 10, § 2 (discussing how the International Labour Office may “edit and issue, in such languages as the Governing Body may think desirable, publications [that concern] problems of industry and employment of international interest”).

39. OSIEKE, *supra* note 4, at 122–23 (describing the International Labour Office).

40. ILO CONST., *supra* note 3, arts. 3, § 1, art. 7, § 1. *See generally* CASALE, *supra* note 1, at 10–11; VALTICOS, *supra* note 19, at 194.

Most scholars affirm that “[t]ripartism is the real strength of the ILO,” and distinguish it from other international organizations.⁴¹ In fact, tripartism gives particular authority to ILO decisions, because the most important parties in the labor system of each state share in these decisions. However, the ILO remains an intergovernmental organization. Thus, the number of government representatives outnumbers the representatives of workers and employers.⁴² The proportion of representatives from each constituency group has been a source of contention, but the principle of tripartism has never been criticized. Worker and employer representatives provide legitimacy to ILO decisions. This legitimacy is very important, particularly in labor matters.⁴³

There are many other commissions and committees within the ILO that help the ILO do its work. Of particular importance to this Essay are the committees charged with the supervision of compliance with international labor standards in domestic law.

The Declaration of Philadelphia gives the ILO a general objective to pursue not only labor but also social, economic, and financial matters.⁴⁴ Before the adoption of the Declaration of Philadelphia, the Permanent Court of International Justice paved the way for the ILO’s very broad mission. In fact, the court was asked to decide if particular groups of people or specific issues should be excluded from the competence of the ILO.⁴⁵ In each of these cases, concerning for example agricultural workers and self-employed people, “[t]he Court confirmed the ILO’s competence.”⁴⁶

The increase in scope of the ILO’s mission also affected its principal activity: the creation of international labor standards. The ILO was established to deal with the most basic problems in the labor field. After the 1944 Declaration of Philadelphia, the situation progressively changed because the ILO began to deal not only with traditional labor law but also with the newest related challenges including human rights, employment and living conditions, development, and social welfare.⁴⁷ The enlargement of the ILO’s mission is evident in the topic of this Essay. After the Declaration of Philadelphia, the ILO began to consider not only equal pay but also discrimination and workplace equality.

41. See, e.g., BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 10 (arguing that the tripartite structure of the ILO creates strength through the addition of realistic perspectives from multiple nongovernmental organizations).

42. ILO CONST., *supra* note 3, arts. 3, § 1, art. 7, § 1.

43. See OSIEKE, *supra* note 4, at 52–55 (discussing tripartism in the ILO).

44. ILO CONST., *supra* note 3, annex pts. II, III.

45. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 6.

46. See *id.* (describing the early recognition of the ILO’s competence in a wide array of cases).

47. *Id.*

The ILO was established to create internationally recognized labor standards, chiefly through conventions and recommendations.⁴⁸ However, today it is generally recognized that the ILO has acquired two other functions. The first is technical assistance to its member states, and the second is to promote, realize, and disseminate research and studies on labor matters.⁴⁹

The experience of technical assistance began in the 1950s, in the period of the independency that brought the birth of many new states.⁵⁰ These states, which were (and in most cases still are) particularly underdeveloped, progressively became members of the ILO. For this reason, the ILO assumed a new function that consists of helping these developing countries modernize their economic and social situation.⁵¹

Technical and financial assistance, which are the instruments used to pursue this aim, start with a request by the single member state and are later carried out by the ILO in order to help its domestic development programs.⁵² Since the 1950s, technical cooperation has included matters such as “vocational training, employment and development, working conditions and environment, industrial relations, labor legislation, labor administration, social security, . . . and assistance to employers’ organizations.”⁵³ It is particularly important to point out that in the last fifteen years the bodies of the ILO adopted a new approach to technical cooperation: considering it an instrument to promote the implementation of international labor standards in the domestic law of the developing member states concerned.⁵⁴

The degree of implementation of international labor standards into domestic law or the creation of the conditions necessary to progressively guarantee this implementation became the principal criterion considered to provide technical cooperation to a member state.⁵⁵ The link between implementation of international labor standards and technical cooperation is very important because it constitutes a fundamental instrument to improve the effectiveness of international labor law in the most underdeveloped

48. ILO CONST., *supra* note 3, art. 19, § 1.

49. See BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 13–15 (describing the ILO’s contemporary tools used to further its workers’ rights mandate through information gathering, dissemination, and technical assistance with a variety of job-related issues).

50. *Id.* at 13.

51. *Id.*

52. *Id.*

53. *Id.*

54. See *id.* at 14 (expressing how starting in 1992 “the implementation of standards” will become “the essential criterion of ILO technical cooperation”).

55. *Id.*

countries.

Aside from creating international labor standards and providing technical cooperation, the ILO's third important task is to conduct research and author studies regarding labor matters.⁵⁶ This task is essential because the adoption of conventions and recommendations is not possible without in-depth studies concerning national laws and practices of each member state of the ILO.⁵⁷ Moreover, at the ILO level, there is an increasing need for studies and research on labor matters due to the growing number of meetings and programs that require technical support.⁵⁸

While it would be interesting to illustrate the international labor standards' adoption procedure in light of the tasks and bodies of the ILO, such an illustration is far beyond the scope of this Essay. However, some details of this procedure will be examined in the description of the ILO methods that give effectiveness to international labor standards in the domestic law of the member states.

II. THE INTERNATIONAL LABOUR ORGANISATION'S DEVELOPMENT OF ANTIDISCRIMINATION REGULATIONS

As mentioned in the Introduction, the role of the ILO in developing antidiscrimination rules has been significant for many reasons. First, the ILO's interest in antidiscrimination rules was established very early in comparison with other bodies. Second, the ILO's antidiscrimination regulations certainly influenced the European Union (EU) ones. Third, the ILO developed many different ways to regulate this subject.

With respect to this last point, it is important to point out that the constitution of 1919—and in particular its preamble—did not consider the problem of discrimination. The 1944 Declaration of Philadelphia was the first document to address discrimination by affirming the right of every human being to pursue their welfare “irrespective of race, creed or sex.”⁵⁹ This assertion is crucial not only because it constitutes the mission of the ILO, but also because it clearly assigns the ILO the task of combating discrimination and providing workplace equality.

Shortly after the Declaration of Philadelphia, the ILO decided to discuss specific measures to address workplace discrimination. The International Labour Conference adopted two different conventions, accompanied by two recommendations. The first convention was dedicated

56. *Id.*

57. *Id.*

58. *Id.*

59. ILO CONST., *supra* note 3, annex pt. II(a).

to equal remuneration, and the second convention was broadly dedicated to discrimination in employment and occupation.⁶⁰

The first convention analyzes one of the main effects of discrimination: unequal remuneration between men and women.⁶¹ In fact, Convention No. 100, the Equal Remuneration Convention, 1951, pursues the specific goal of eliminating this particular form of discrimination, affirming the fundamental principle that every worker—man or woman—has the right to receive an equal remuneration for work of equal value “without discrimination based on sex.”⁶² To guarantee the effectiveness of this principle, member states that ratify the Convention have to promote the necessary changes in “national laws or regulations,” in the “legally established or recognised machinery for wage determination,” and in the “collective agreements between employers['] and workers[']” organizations.⁶³

The Convention’s scope is broad and covers a wide range of workers and types of remuneration received. First, as the Committee of Experts on Application of Conventions and Recommendations (Committee of Experts) stressed, the Convention should be applied to all workers, which means that a member state’s exclusion of some categories would diverge with the Convention’s aim.⁶⁴ Second, the Convention contains a concept of remuneration that is also very general. Remuneration is defined by the Convention to “include[] the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment.”⁶⁵

The Equal Remuneration Convention has been extremely important because of its goals and the high number of ratifications. Its contents are discussed frequently, in particular with reference to the expression of “equal remuneration for . . . work of equal value,” which is particularly difficult to

60. See Constance Thomas, *Information Sources and Measures of International Labor Standards on Employment Discrimination*, 24 COMP. LAB. L. & POL’Y J. 365, 366–67 (2003) (noting that the 1951 ILO Equal Remuneration Convention and the 1958 ILO Discrimination (Employment and Occupation) Convention address discrimination in the workplace).

61. Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, art. 2, 165 U.N.T.S. 303, ILO, 34th Sess. (June 29, 1951) (entered into force May 23, 1953), available at <http://digbig.com/4qxmc> [hereinafter Convention No. 100]; BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 239.

62. Convention No. 100, *supra* note 61, art. 1(b).

63. *Id.* art. 2(a)–(c).

64. Int’l Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, paras. 17, 95 (1988) [hereinafter *Committee of Experts, General Survey, 1988*].

65. Convention No. 100, *supra* note 61, art. 1(a).

define.⁶⁶ In fact, the Convention permits a disparity in remunerations if two jobs are objectively of different values.⁶⁷ Furthermore, the matter of equal remuneration is connected, as this Essay will examine later, with the distinction between direct and indirect discrimination and with the problem of work segregation.⁶⁸

In spite of its broad coverage, the Equal Remuneration Convention concerns only one object of discrimination—remuneration—and only one reason for it—the sex of the worker. However, this Convention had particular importance in the history of the ILO's antidiscrimination law in addition to possibly influencing the drafting of the 1957 Treaty of Rome, which established the Economic European Community.⁶⁹ Article 119 of the Treaty establishes that “[e]ach Member State shall . . . ensure . . . the principle of equal remuneration for equal work as between men and women workers.”⁷⁰

Seven years after the adoption of the Equal Remuneration Convention, the ILO's role in elaborating antidiscrimination rules increased with the decision of the International Labour Conference to discuss a general instrument to combat workplace discrimination. The result of this discussion was the Convention No. 111, the Discrimination (Employment and Occupation) Convention, 1958.⁷¹ To date, this Convention is the most important antidiscrimination tool of the ILO because of its potentially universal coverage with respect to the various forms of discrimination and the reasons for discrimination.⁷²

Before briefly analyzing the contents of the Convention, it is interesting to point out that its preamble refers to that principle of the Declaration of Philadelphia which is considered the mission of the ILO: “that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal

66. *Id.* art. 1(b).

67. *Id.* art. 3.

68. *Id.* art. 1(a); see BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 242–44 (addressing considerations related to direct and indirect discrimination for the receipt of remuneration and distinctions in the workplace between “‘men’s work’ and ‘women’s work’”).

69. Treaty Establishing the European Economic Community, Mar. 25, 1957, *opened for signature* 298 U.N.T.S. 11, available at <http://digbig.com/4qxme> [hereinafter Treaty of Rome].

70. *Id.* art. 119.

71. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, pmbl., 362 U.N.T.S. 31, ILO, 42d Sess. (June 25, 1958) (entered into force June 15, 1960), available at <http://digbig.com/4qxm> [hereinafter Convention No. 111].

72. See Thomas, *supra* note 60, at 367–68 (emphasizing that the Discrimination (Employment and Occupation) Convention, 1958 “covers all discrimination that may affect equality of opportunity and treatment in law and practice”).

opportunity.”⁷³ This is particularly important because it means that the Declaration of Philadelphia constitutes the basis for the ILO’s lawmaking activity on the matter of workplace discrimination.

First, Convention No. 111 provides the definition of discrimination, establishing that this term includes “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁷⁴ In addition to showing the general coverage of the Convention regarding reasons of discrimination, the definition is also flexible. In fact, in article 1, the International Labour Conference introduced a provision that admits the possibility of adapting the coverage of this Convention to new forms of discrimination by embracing the concept that “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.”⁷⁵

After having defined the concept of discrimination with such flexible language, the Convention specifies its exact coverage in relation to the possible objectives of discrimination in article 1, which affirms that the scope of the Convention includes both employment and occupation discrimination.⁷⁶ The International Labour Conference decided to use both these terms to point out that antidiscrimination rules concern the access to employment and the free choice of an occupation. Thus, the Convention applies not only to employees but also to self-employed persons.

Convention No. 111 provides some exceptional cases, which are not to be considered as discrimination. There is a general exception, provided by article 1, which affirms that “[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”⁷⁷ Article 4 of the Convention provides for another exception, establishing that national measures taken to guarantee the security of the member state against individuals who threaten

73. Convention No. 111, *supra* note 71, pmb. (referring to the Declaration of Philadelphia, ILO CONST., *supra* note 3, annex pt. II(a)).

74. *Id.* art. 1.

75. *Id.*

76. *Id.* (defining employment and occupation to include “access to employment and to particular occupations”).

77. *Id.*; see Manuela Tomei, *Discrimination and Equality at Work: A Review of the Concepts*, 142 INT’L LAB. REV. 401, 405–06 (2003) (“Differential treatment motivated by the inherent requirements of a job is accepted as fair and efficient.”).

that security cannot be considered discrimination.⁷⁸

Article 5 provides a further category of exceptions, referring to special measures to protect some groups of workers.⁷⁹ Article 5 points out that measures of this kind, established by other acts of the International Labour Conference, shall not be considered discriminatory.⁸⁰ The Convention also provides flexibility by establishing that individual member states can determine measures to protect particular categories of workers that need this protection for reasons such as sex, age, or disability.⁸¹ These measures of protection shall not be considered discrimination.⁸²

Articles 2 and 3 of the Convention are the most important provisions. They specify the role of each ratifying member state in combating workplace discrimination and in promoting equality of treatment. To reach this goal every associated country has the task of developing a specific national policy.⁸³ The contents of this policy must be consistent with the different measures the Convention requires each member state to carry out.⁸⁴

First, the member state has to promote “the co-operation of employers’ and workers’ organisations and other appropriate bodies” to improve the acceptance and efficacy of that policy.⁸⁵ On the legal level, the member states must approve specific statutes and adopt appropriate educational programs to combat discrimination and, at the same time, repeal legislation and administrative instructions or practices in conflict with that policy.⁸⁶ Finally, states must apply the antidiscrimination “policy in the activities of vocational guidance, vocational training and placement services.”⁸⁷ It is important to point out, in the context of the implementation of this antidiscrimination policy, that the member state has “to indicate in its annual reports on the application of the Convention the action taken . . . and the results secured by such action.”⁸⁸

Convention No. 111 constitutes the ILO’s most significant antidiscrimination standards because of the universal coverage, the strict activities required of ratifying member states, and the high number of

78. Convention No. 111, *supra* note 71, art. 4; BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 270 (quoting *id.*).

79. Convention No. 111, *supra* note 71, art. 5.

80. *Id.*

81. *Id.*

82. *Id.*; BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 272 (quoting *id.*).

83. Convention No. 111, *supra* note 71, art. 2.

84. VALTICOS, *supra* note 19, at 291.

85. Convention No. 111, *supra* note 71, art. 3(a).

86. *Id.* art. 3(b)–(c).

87. *Id.* art. 3(e); BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 274–75 (quoting *id.*).

88. Convention No. 111, *supra* note 71, art. 3(f).

ratifications. Although Convention No. 111 is the most important, it is not the only tool provided by the ILO on this subject. Indeed, the Declaration of Geneva of 1998—an instrument of soft law—is also particularly significant in the matters of antidiscrimination and workplace equality because it introduces “core labor standards.” into the ILO system.⁸⁹

With the Declaration of Geneva, the International Labour Conference affirmed that the ILO is founded on four fundamental principles:

- a. freedom of association and the effective recognition of the right to collective bargaining;
- b. the elimination of all forms of forced or compulsory labour;
- c. the effective abolition of child labour; and
- d. the elimination of discrimination in respect of employment and occupation.⁹⁰

The most important consequence of the incorporation of these antidiscrimination principles into the ILO fundamental rights at work has nothing to do with its contents, which are specifically regulated in Convention No. 111, but is more related to its effectiveness in the domestic law of the individual member states.

Hence, the Declaration of Geneva reaffirms that each state, on becoming a member of the ILO, has to respect the ILO Constitution and its principles, including the Declaration of Philadelphia of 1944.⁹¹ Then—and this is the most significant innovation provided by the Declaration of Geneva—the International Labour Conference establishes that each member state, even if it has not ratified the conventions regulating each fundamental principle, has “to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”⁹² For example, the Declaration of Geneva requires a member state that has not ratified Convention No. 111 to still respect, promote, and realize the antidiscrimination principles provided in the Convention through the simple fact that the state concerned is a member of the ILO.⁹³ This is a very important innovation in the ILO system, which clearly attempts to disseminate to the largest possible extent the labor standard constituting its

89. *See generally* Declaration of Geneva, *supra* note 1.

90. *Id.* para. 2(a)–(d).

91. *Id.* para. 2.

92. *Id.*; *see also* CASALE, *supra* note 1, at 5; BOB HEPPLER, LABOUR LAWS AND GLOBAL TRADE 59 (2005) (“The unique legal character of the Declaration is that obligations are placed on all Member States not by reason of ratification of the named conventions, but ‘from the very fact of membership.’”).

93. Declaration of Geneva, *supra* note 1, para. 2.

mission.

It is interesting to point out that another central aspect of the Declaration of Geneva is its follow-up system.⁹⁴ This system is similar to the monitoring system provided by the constitution, but has some peculiarities. It is voluntary and produces global reports, prepared under the responsibility of the Director General, who is charged with providing a “dynamic global picture” of each category of fundamental rights at work;⁹⁵ Every year the global report concentrates on one of the four principles; each of the four principles will be the subject of the global report every four years.⁹⁶ Thus far, the only global report concerning antidiscrimination rules was adopted in 2003 and is titled *Time for Equality at Work*.⁹⁷

After having examined the sources of antidiscrimination rules at the ILO level, Part III will investigate the evolution of the concept of discrimination in order to analyze the measures that can be taken in international or domestic law to pursue the antidiscrimination policy set forth in Convention No. 111 and reaffirmed by the Declaration of Geneva of 1998.

III. ANTIDISCRIMINATION OR EQUALITY AT WORK? ANTIDISCRIMINATION RULES, AFFIRMATIVE ACTION, AND DIVERSITY MANAGEMENT

Convention No. 111 has a very broad scope with regard to the reasons and objects of discrimination. Over the past fifty years, this general character of the Convention required an intense interpretation, both about the concept of discrimination and the exceptions to the application of Convention No. 111.

This activity of interpretation has been carried out by the bodies of the monitoring system provided by the ILO that will be described in Part IV. The most important body charged with the interpretation of the ILO standards, including discrimination at work, is the Committee of Experts. This body performs this activity of interpretation in its annual Report on the Application of Conventions and Recommendations submitted every year to the session of the International Labour Conference. In that document the Committee of Experts analyzes the progress or regress of each member state in implementing international labor standards and, pursuant to this

94. Declaration of Geneva, *supra* note 1, § 4, annex.

95. *Id.* annex, pt. III, § A, para. 1.

96. *Id.* annex, pt. III, § A, paras. 1–2.

97. ILO, Director-General, *Time for Equality at Work: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 3, delivered to the 91st Session of the International Labour Conference, Report I(B) (Mar. 2003) [hereinafter *Time for Equality at Work*].

analysis, interprets the norms of the ILO conventions to understand if these have been applied correctly in domestic law.⁹⁸ Another important source for a correct interpretation of the international labor standards regarding discrimination is the Global Report of the Director General adopted in 2003 as a follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, titled *Time for Equality at Work*.⁹⁹

One problem with interpretation of the international antidiscrimination regulations concerns the broad definition of discrimination at work, provided by Convention No. 111.¹⁰⁰ This definition gives a very general description of the concept of discrimination in order to guarantee the flexibility of adapting it to the continuous changes of labor relationships and new forms of discrimination. For these reasons the Committee of Experts provided additional interpretation of this concept.

One of the most important of these interpretations was the Committee of Experts' recognition that Convention No. 111's definition of discrimination involves both direct and indirect discrimination, regardless of the definition's silence on this point.¹⁰¹ Furthermore, the presence of intent is not necessary to identify a situation as discriminatory.¹⁰²

Direct discrimination is defined as regulations, laws, and policies that "explicitly exclude or disadvantage workers on the basis of characteristics" such as sex, age, or disability.¹⁰³ Discrimination is indirect where regulations or practices are facially neutral, but in effect negatively impact "a disproportionate number of members of a particular group" of workers.¹⁰⁴ Indirect discrimination may also occur when particular categories of workers receive different treatment compared to other workers.¹⁰⁵ One example of this kind of indirect discrimination concerns part-time work regulations.¹⁰⁶ These regulations, if less favorable than full-time work ones, can result in indirect discrimination against women

98. ROBERTO ADAM, ATTIVITÀ NORMATIVE E DI CONTROLLO DELL'O.I.L. E EVOLUZIONE DELLA COMUNITÀ INTERNAZIONALE 136 (1993); BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 76–77.

99. See generally *Time for Equality at Work*, *supra* note 97, paras. 242–301 (discussing the ILO's international labor standards on discrimination at work).

100. Convention No. 111, *supra* note 71, art. 1.

101. *Committee of Experts, General Survey, 1988*, *supra* note 64, para. 26.

102. *Id.*

103. *Time for Equality at Work*, *supra* note 97, para. 56; see Tomei, *supra* note 77, at 402 (defining direct discrimination as "when rules and practices explicitly exclude or give preference to certain individuals *solely* on the basis of their membership of a particular group" (emphasis added)).

104. *Time for Equality at Work*, *supra* note 97, para. 57; see Tomei, *supra* note 77, at 403 (defining indirect discrimination to be the "norms, procedures and practices that appear to be neutral, but whose application disproportionately affects members of certain groups").

105. *Time for Equality at Work*, *supra* note 97, para. 58.

106. *Id.*

because women represent the majority of part-time workers.¹⁰⁷

Although indirect discrimination is much more difficult to detect than direct discrimination, the appearance of indirect discrimination on an international level has important consequences for ILO policymaking. As noted by the Director General in *Time for Equality at Work*, indirect discrimination shows that the application of equal conditions to each worker can lead to unequal results because the effect of the condition “depend[s] on the life circumstances and personal characteristics of the people concerned.”¹⁰⁸ Furthermore, as some scholars affirm, the appearance of indirect discrimination allows for a critical evaluation of practices and cultures in the workplace that have negative effects on particular groups of workers.¹⁰⁹ The aim of identifying indirect discrimination is to revise the practices that penalize members of those groups of workers because they differ from the idea of “the ‘standard employee.’”¹¹⁰

The concept of indirect discrimination has a third important implication strictly related to the difficulty of detecting it. The use of statistics may clarify whether neutral criteria have the effect of disadvantaging a particular group of workers.¹¹¹ While the use of statistical research in this field requires caution, it can be instrumental for two reasons: (1) it can help detect new forms of indirect discrimination, and (2) it can measure members’ progress or regress in eliminating discrimination.¹¹²

The ILO’s recognition of indirect discrimination also influences the methods provided by the ILO to combat discrimination in general. There is a strict link between this recognition and the evolution of those methods, which aim to build equality at work but are often hardly discussed in the national labor law systems.

Before analyzing those methods, it is important to examine the exceptions to the prohibition of discrimination provided in Convention No. 111 and interpreted by the Committee of Experts. The first of these exceptions concerns distinctions or exclusions based on the inherent requirements of a particular job.¹¹³ The Committee of Experts stated that the interpretation of this exception must be very strict.¹¹⁴ If not, it could excessively limit the degree of protection against discrimination provided

107. *Id.*

108. *Id.* para. 57.

109. Tomei, *supra* note 77, at 404.

110. *Id.*

111. *Id.* at 405.

112. *Id.*

113. Convention No. 111, *supra* note 71, art. 1.

114. *Committee of Experts, General Survey, 1988, supra* note 64, para. 125.

by the Convention.¹¹⁵ To correctly apply this first exception, it is fundamental to rigorously consider the characteristics of the particular job concerned. The Committee of Experts decided against including national regulations or practices that generally excluded certain jobs or occupations from the domestic antidiscrimination measures.¹¹⁶

The Committee of Experts also noted that the second exception to the prohibition of discrimination, concerning the security of state,¹¹⁷ has to be interpreted “*stricto jure*.”¹¹⁸ Hence, a correct interpretation of this exception requires that special measures be taken to protect the security of the state and to impede individual activities that are considered dangerous without penalizing workers based on their membership in a particular group or community.¹¹⁹ Furthermore, exceptional measures taken to protect the security of state cannot involve distinctions or exclusions based on political opinion because this conflicts with the Convention.¹²⁰ The Committee of Experts found this exception allowed workers to “appeal to a competent body” to protest discriminatory national measures taken to guarantee the security of state.¹²¹ The Committee of Experts stated that this competent body has to be “separate from the administrative or governmental authority” in order to ensure its objectivity and independence.¹²²

Regarding the third exception to the prohibition of discrimination, the Committee of Experts, instead of giving an interpretation, offered some examples of “[s]pecial measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference [that] shall not be deemed to be discrimination.”¹²³ These examples, in particular, are intended to protect women, indigenous and tribal populations, and disabled and aged persons.¹²⁴ The Committee of Experts offered Convention No. 156, the Workers with Family Responsibilities Convention, 1981,¹²⁵ which has the objective of promoting equality of opportunity and treatment between workers with familial

115. *Id.*

116. *Id.* para. 127.

117. Convention No. 111, *supra* note 71, art. 4.

118. *Committee of Experts, General Survey, 1988, supra* note 64, para. 134 (italics added).

119. *Id.* para. 135.

120. *Id.*

121. *Committee of Experts, General Survey, 1988, supra* note 64, para. 134 (quoting Convention No. 111, *supra* note 71, art. 4).

122. *Id.* para. 137.

123. Convention No. 111, *supra* note 71, art. 5; *Committee of Experts, General Survey, 1988, supra* note 64, paras. 141–156.

124. *Committee of Experts, General Survey, 1988, supra* note 64, paras. 148–156.

125. Workers with Family Responsibilities Convention, 1981, Convention No. 156, ILO, 67th Sess. (June 23, 1981) (entered into force Aug. 11, 1983), available at <http://digbig.com/4qxmng>.

responsibilities (essentially women) and those without.¹²⁶

The Committee of Experts finally gave an interpretation of article 5, which allows member states to define additional special measures to protect particular categories of workers.¹²⁷ In order not to be considered discrimination, these measures should have specific characteristics: (1) they must be “justified by the aim of protection and assistance which they are to pursue” and (2) they “must be proportional to the nature and scope of the protection needed or of the pre-existent discrimination.”¹²⁸

Moreover, these measures should be reconsidered periodically to evaluate if they are still useful and necessary.¹²⁹ The Committee of Experts stressed the importance of consultation with workers’ and employers’ organizations to promote nondiscriminatory measures that are in accordance with the aim of Convention No. 111.¹³⁰

If a distinction, exclusion, or preference, based on sex, age, or religion, for example, does not fall under one of these exceptions, it will be considered discriminatory. Although this is generally true, distinctions based on individual merit are permissible. As *Time for Equality at Work* and many scholars have pointed out, distinctions, exclusions, or preferences that are based on individual merit, rather than discriminatory reasons, are valid and legitimate.¹³¹ The problem here lies in the concept of merit itself, which is very difficult to measure and define.¹³² In general, “[t]he concept of merit . . . refers to a relationship between a person’s talents, knowledge and skills and those required for performance of a particular job.”¹³³ Hence, identifying merit concretely is difficult, especially given the lack of an objective means of applying this concept to individual employers. Furthermore, individual “[m]erit” is not an absolute, static concept,” but rather it is dynamic and relative.¹³⁴ Finally, people who occupy positions of power within individual companies often influence the definition of merit.¹³⁵ These people are normally the “standard employee”¹³⁶ and can

126. *Committee of Experts, General Survey, 1988, supra* note 64, para. 145.

127. Convention No. 111, *supra* note 71, art. 5.

128. *Committee of Experts, General Survey, 1988, supra* note 64, para. 147.

129. *Id.*

130. *Id.* para. 147.

131. *Time for Equality at Work, supra* note 97, para. 62; e.g., Tomei, *supra* note 77, at 406.

132. *Time for Equality at Work, supra* note 97, para. 62; Tomei, *supra* note 77, at 406.

133. *Time for Equality at Work, supra* note 97, para. 62.

134. *Id.*; Tomei, *supra* note 77, at 406.

135. Tomei, *supra* note 77, at 406 (citing CATHARINE A. MACKINNON, *Different and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 36 (1987)).

136. *Id.* at 403–04 (noting that the standard employee is based upon a stereotype that disregards differences among individuals).

therefore influence and manipulate the concept of merit with their prejudices.¹³⁷ Antidiscrimination criteria should also be employed to construe the concept of merit.

After having analyzed exceptions to the prohibition of discrimination and the reasons justifying different treatment, it would be interesting to consider the activity of the Committee of Experts in defining the different grounds of discrimination provided by Convention No. 111. Nevertheless, the aim of this Essay requires an investigation into the methods of removing discrimination promoted by the ILO through its standards. The Committee of Experts' work in defining the reasons of discrimination provided in Convention No. 111 was fundamental not only to better delineate them but also to accommodate the evolution and adaptation to the changes in the labor market and labor relationships.¹³⁸

From the contents of Convention No. 111, scholars have identified three models of antidiscrimination practices that are compatible with the international labor standards.¹³⁹ The first two are also recognized as fundamental by the ILO organs that implement them at the national level, in particular by the Committee of Experts. The third model, however, represents the new frontier of antidiscrimination rules and is discussed much more frequently today.

It is obvious to affirm that the methods of promoting equality at work changed with the evolution of the concept of discrimination at the international labor law level as well. The appearance of the concept of indirect discrimination in this context is particularly important because it influenced the measures provided by the ILO and its member states to accommodate differences at work.

The first step of this evolution is represented by the oldest kind of antidiscrimination practice, called "[t]he procedural or individual justice model."¹⁴⁰ This practice aims to eliminate rules based on characteristics irrelevant for the job, but that have discriminatory effects on particular groups of people.¹⁴¹ The removal of these rules ensures all workers the

137. *Time for Equality at Work*, *supra* note 97, para. 62.

138. See BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 259 (discussing how the Committee of Experts has stressed the applicability of the Convention to a worker's current employment, as well as to the provision of access to further employment and training programs that facilitate movement within labor markets).

139. See, e.g., Tomei, *supra* note 77, at 410–15 (setting forth and discussing the three models of equality: (1) "[e]quality as procedural or individual justice;" (2) "[e]quality as social justice;" and (3) "[e]quality as diversity" (citing Christopher McCrudden, *The New Concept of Equality* 13–17 (2003), available at <http://digbig.com/4qwke>)).

140. *Id.* at 410.

141. *Id.*

same treatment, irrespective of their belonging to a specific group or minority. The procedural or individual justice model pursues the goal of equalizing the competitors' starting point, ensuring they receive the same treatment.¹⁴² Eliminating discriminatory rules permits fair competition among all workers without considering their race, sex, age, or disability, therefore guaranteeing their selection for a job based on their merits and capacities.¹⁴³

The inherent limitation of this antidiscrimination model derives from the assumption that all people are equal. In other words, this antidiscrimination model does not consider the existence of particular groups of disadvantaged people at work due to the existence of premarket discrimination.¹⁴⁴ For this reason, the procedural or individual justice model has many important limits because of its inability to promote real change in the existing balance of the labor market and enhance the participation of disadvantaged groups. This model attempts to eliminate direct discrimination¹⁴⁵ but does not provide instruments to face indirect discrimination. This idea of accommodating differences at work has been considered inadequate because its goal is to promote formal, rather than substantive, equality.¹⁴⁶

The appearance of the concept of indirect discrimination induced revision of the instruments to combat this phenomenon and to provide workplace equality at both the international and national level. In particular, two different models of accommodating differences were designed, both based on the consideration of antidiscrimination rules as a tool to endorse substantive equality.¹⁴⁷

The first of these two models—the second in the global list—is called the “social justice model.”¹⁴⁸ This model is premised upon the awareness that the labor market is characterized by the existence of different groups of people: the dominant group and the subordinate (discriminated) one.¹⁴⁹ Effective policies to remove discrimination and provide workplace equality must take into account this situation, consequently reducing and gradually removing inequalities between the two groups.¹⁵⁰ Thus, this method of

142. *Id.* (citing Sandra Fredman, *A Critical Review of the Concept of Equality in UK Anti-Discrimination Law* (University of Cambridge Centre for Public Law, Working Paper No. 3, 1999)).

143. *Id.* at 411.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 411, 413.

149. *Id.* at 411.

150. *Id.*

addressing discrimination considers differences between groups of people more than between individuals.¹⁵¹ The goal is to balance labor market outcomes and to overcome premarket discrimination affecting specific groups of the population. In other words, the social justice model can be useful to eliminate indirect discrimination.

In order for this method to be effective, specific measures need to be adopted that are capable of overcoming discrimination in the workplace. In addition, these measures must account for all factors that could have a role in disadvantaging a particular group of people. Workplace equality can be achieved only if measures are taken to eliminate rules that directly discriminate against people belonging to subordinate groups and to remove the disadvantages that constitute the deepest reasons for the discrimination.¹⁵² Consequently, the same measures must focus on either the workplace or the access of disadvantaged groups' members to education and training, as affirmed in Convention No. 111.

The described measures are collectively termed "affirmative action," which can be defined as "a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality."¹⁵³ Affirmative action, as clearly affirmed by the ILO, is compatible with international labor law.¹⁵⁴ In particular, affirmative action may become a fundamental part of the antidiscrimination policy requested by article 3 of Convention No. 111.

In general, affirmative action involves practices and programs directed to members of subordinate groups who are disadvantaged because of current premarket discrimination.¹⁵⁵ Affirmative action, which is aimed at progressively eliminating discrimination, can be found in measures directed at accelerating the rate of participation of disadvantaged groups' members in "gaining access to jobs, education, training and promotion."¹⁵⁶ More specifically, these practices and programs can have many objectives, depending upon the degree of disadvantage. First, they can identify

151. *Id.*

152. *Id.* at 412.

153. *Time for Equality at Work*, *supra* note 97, para. 197 (quoting U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Prevention of Discrimination: The Concept and Practice of Affirmative Action*, 3, U.N. Doc. E/CN.4/Sub.2/2002/21 (June 17, 2002) (prepared by M. Bossuyt), available at <http://digbig.com/4qwkx>).

154. *See id.* para. 207 (noting the "necessary" nature of "[a]ffirmative action measures . . . to put everyone on an equal footing").

155. Tomei, *supra* note 77, at 412.

156. *Time for Equality at Work*, *supra* note 97, para. 198.

qualified individuals belonging to a subordinate group “in order to give them some advantage.”¹⁵⁷ Second, if the margin of difference between the dominant and the subordinate group is particularly large, affirmative action can give members of the subordinate group a substantial preference over the members of the dominant group.¹⁵⁸ Third, affirmative action can be linked to the aim of reaching a numerical increase in the representation of subordinate groups, including “employment equity plans.”¹⁵⁹ Quota systems directed at allocating a percentage of certain positions for members of subordinate groups can be considered a type of affirmative action.¹⁶⁰

Although the aim of affirmative action is to promote substantive equality, it has been harshly attacked in recent years. Most notably, affirmative action has been criticized as “a form of reverse discrimination” because it promotes preferential treatment for some people, based on personal characteristics like sex, race, and age, that are “irrelevant from the perspective of formal equality.”¹⁶¹ Hence, the promotion of preferential treatment for people belonging to a disadvantaged group can become a privilege capable of discouraging them from improving their skills.¹⁶²

On the other hand, some scholars defend the role of affirmative action in combating discrimination in the workplace, asserting that affirmative action is an instrument “to promote certain highly desirable forms of social change,” rather than to compensate an historical mistake.¹⁶³ The idea that affirmative action generally has a positive impact is also stated by the ILO, which carried out specific research that demonstrated the positive effects of an affirmative action policy on the productivity of enterprises.¹⁶⁴

157. Tomei, *supra* note 77, at 412.

158. *Id.*

159. *Id.*

160. *Time for Equality at Work*, *supra* note 97, para. 198.

161. Tomei, *supra* note 77, at 412.

162. *Id.* at 413 (citing Glenn C. Loury, Social Exclusion and Ethnic Groups: The Challenge to Economics 32–33 (Apr. 28–30, 1999) (unpublished paper prepared for the Annual World Bank Conference on Development Economics, Washington, D.C., Apr. 28–30, 1999), available at <http://digbig.com/4qxmh>); see also Loury, *supra*, at 32–33 (arguing that affirmative action programs can create disincentives for members of subordinate groups).

163. Ockert Dupper, *In Defence of Affirmative Action in South Africa*, 121 SOUTH AFRICAN L.J. [SALJ] 187, 206 (2004); see also Ockert Dupper, *Remedying the Past or Reshaping the Future?: Justifying Race-Based Affirmative Action in South Africa and the United States*, 21 INT’L J. OF COMP. LAB. L. & INDUS. REL. 89, 91 (2005) (proposing a prospective justification of affirmative action, rather than a retrospective, compensatory justification of affirmative action).

164. *Time for Equality at Work*, *supra* note 97, paras. 203–06. See generally Virginie Pérotin et al., *Equal Opportunities Practices and Enterprise Performance: A Comparative Investigation on Australian and British Data*, 142 INT’L LAB. REV. 471, 494–96 (2003) (concluding on the basis of studies surveying the productivity of businesses under mandatory and permissive workplace antidiscrimination regimes that mandatory antidiscrimination legislation has no “[s]tatistically significant[] negative impact on productivity”).

Much more discussed than the social justice model is the third group of measures for combating discrimination (the second connected with the concept of substantive equality): diversity management. This certainly is the youngest instrument provided in order to combat discrimination at work and can be considered an evolutionary outgrowth of the affirmative action system.¹⁶⁵ Perhaps because of its recency, the ILO's Global Report of 2003 did not take diversity management into account. However, the preparatory documents address it. Regardless, in recent years, important member states of the ILO have adopted measures of diversity management that warrant a brief analysis.

The diversity management model first appeared in the 1970s and 1980s with rights-based movements of women, indigenous people, and gays and lesbians, asking for the "recognition of their right to be different" and for political, social, and economic acceptance of their diversity in all contexts of their life, including work.¹⁶⁶ Regarding the latter, the aim of diversity management measures "is not to suppress difference, through the assimilation of the 'diverse' into majority cultures and behaviours, but to acknowledge diversity as an individual and societal asset and ensure inclusion without assimilation."¹⁶⁷ Hence, this recognition of differences provided by diversity management practices should also improve productivity and efficiency of workers because of its link to a new labor culture "that encourages workforce heterogeneity."¹⁶⁸

Diversity management practices are criticized in many countries because of the problems they can cause. First, diversity management measures are not sufficient to overcome workplace discrimination, particularly in cases where there is great difference between a dominant and a subordinate group of workers. In fact, diversity management practices—even if they originated with rights-based activist groups—concentrate on the abilities of individuals and cannot modify the current dynamics in the relationship between groups. Thus, diversity management measures can contribute toward changing the dominant idea of the standard employee, but they must be accompanied by affirmative action to affect structural discrimination.¹⁶⁹

165. Tomei, *supra* note 77, at 413–14.

166. *Id.*

167. *Id.* at 414.

168. *Id.*

169. See generally Mary Crow, *Achieving Equality of Opportunity?*, in STRATEGIC HUMAN RESOURCING: PRINCIPLES, PERSPECTIVES AND PRACTICES 291, 304–05 (John Leopold et al. eds., 1999) (discussing the implications and effectiveness of diversity management both for improving workplace efficiency and achieving overall equality in the workplace, and concluding that diversity management practices need to be supplemented through political measures intended to bring about greater social and

Second, some scholars have pointed out that diversity management's emphasis on the concept of difference could create a variety of identities within the same group, intensifying the stereotypes that the antidiscrimination law aims to combat.¹⁷⁰ Furthermore, the emergence of new groups of workers who want to affirm their right to be different can generate tensions with preexisting groups in terms of redistribution of resources due to the extension of affirmative action programs to new groups.

In order to resolve these problems, one scholar proposed a variant of the diversity management model, the "transformative agenda."¹⁷¹ This model aims to take into account the positive results of diversity management measures, combining them with practices intended to guarantee progressive equality at work for disadvantaged groups.¹⁷² The goal of this method is to promote equality of treatment without homogenization of the workforce.¹⁷³ To reach this objective, scholars affirm the necessity of a transformative agenda characterized by two different steps.¹⁷⁴ In the first step, the role of labor institutions, laws, and practices is particularly important in order "to accommodate the specific needs of disadvantaged groups and improve their representation across sectors, occupational hierarchies and representative organizations."¹⁷⁵ Having completed the first step should make it easier to achieve the second step, which consists of transforming the workplace culture with the goal of including members of all social groups without assimilating them.¹⁷⁶ This process is obviously very difficult to realize, but it represents the most important challenge for the policies intended to accommodate differences and provide workplace equality today.

employment equality).

170. Tomei, *supra* note 77, at 414–15. See generally Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9, 9–24 (Joshua Cohen et al. eds., 1999) (noting the tension between gender equality and the "multiculturalist commitment to group rights for minority cultures").

171. Tomei, *supra* note 77, at 415.

172. *Id.*; see, e.g., Jill Rubery, *Pay Equity, Minimum Wage and Equality at Work* 1–72 (ILO, Working Paper No. 19, 2003), available at <http://digbig.com/4gfnj> (examining the role of a minimum wage policy in promoting gender equality in the labor market).

173. Tomei, *supra* note 77, at 415.

174. *Id.*

175. *Id.*

176. *Id.*; see also BRIAN BERCUSSON & LINDA DICKENS, 1 DEFINING THE ISSUES: EQUAL OPPORTUNITIES AND COLLECTIVE BARGAINING IN EUROPE 16–17 (1996) (referring to a "'long' agenda" of transforming the "occupational structures, practices, cultures, norms, value systems etc." of "male-centred" organizations to better accommodate women in the workplace).

IV. THE PROBLEM OF THE EFFECTIVENESS OF THE INTERNATIONAL LABOR STANDARDS IN THE ANTIDISCRIMINATION FIELD: THE TASK OF THE JURISPRUDENCE OF THE INTERNATIONAL LABOUR ORGANISATION

After having shortly described the measures taken at the international labor law level to combat discrimination and to promote equality at work, it is now time to face the issue of their effectiveness with particular regard to their implementation in the domestic law systems. This question is very complicated, due to the existence of different ILO tools to guarantee the effectiveness of its labor standards and the different characteristics of domestic law systems that must implement them. This Part will analyze the most important of these instruments provided by the ILO with particular regard to its supervisory system, which constitutes the most typical interpretation and implementation tool of the ILO.

First, it is fundamental to recognize that the constitution of the ILO is the basis for most of the tools contributing to the effectiveness of international labor standards at the domestic level.¹⁷⁷ The constitution contains important norms about this issue, which have been modified and implemented throughout the years.

The key tool for ensuring the deployment of international labor standards into domestic law is the process of ratification of conventions and recommendations, provided by article 19 of the ILO Constitution.¹⁷⁸ This process has a peculiarity relating to similar processes of ratification. By accepting its constitution, member states of the ILO oblige themselves to put forward the convention or the recommendation concerned “before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action,” no later than eighteen months after the closing of the session of the International Labour Conference in which the convention or the recommendation concerned was adopted.¹⁷⁹ “Authority or authorities,” usually refers to the legislative bodies of the member states, in particular, their parliaments.

This process does not give conventions and recommendations immediate effectiveness in domestic law, but assigns them more strength compared to other international treaties because of the existence of an obligation to put forward and to discuss them in the national parliaments. In other words, a national parliament can decide not to ratify the convention

177. See generally Treaty of Versailles, *supra* note 9, pt. XIII; ILO CONST., *supra* note 3.

178. ILO CONST., *supra* note 3, art. 19; see OSIEKE, *supra* note 4, at 152 (explaining the ratification process of conventions in the ILO).

179. Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. II, art. 405; ILO CONST., *supra* note 3, art. 19.

or the recommendation concerned, but it must examine the convention or recommendation before rejecting it.¹⁸⁰

In general, formal ratification concerns only conventions, which become national law with the act of the parliament. The ratification of a convention by the national parliament requires the member state to fulfill two fundamental obligations.¹⁸¹ The first is the application of the convention in domestic law, and the second is the submission to the ILO of the measures taken by the member state to give effect to the ratified convention, enabling the ILO to verify the application itself.¹⁸² This second obligation constitutes the monitoring system of the ILO.

Concerning the first obligation, the application of the ratified convention in domestic law, it is important to distinguish between programmatic or promotional conventions and self-executing ones.¹⁸³ In fact, many international labor standards established by the ILO in its conventions do not constitute, even if ratified, rights that individuals can directly exercise before national authorities. A large number of ILO conventions aim to create general objectives and action plans that must be implemented by national governments with different instruments over time. The role of the ILO monitoring system is more important when a convention is programmatic or promotional than when a convention is self-executing. This is due to the necessity of supervising progression or regression of each member state in order to reach the goals established by the individual convention concerned.

Antidiscrimination conventions, in particular Convention No. 111, are considered programmatic or promotional conventions because the elimination of discrimination and the promotion of workplace equality are goals that can be reached only progressively and through the application of many different tools. This circumstance, accompanied by the large number of ratifications of Convention No. 111 among the ILO member states, helps explain the difficulty the ILO supervising bodies face in providing interpretation and verifying implementation of the international antidiscrimination standards.

While the interpretation activities conducted by the ILO monitoring bodies were analyzed with particular emphasis on discrimination in Part III, the focus of this Part will be on the role of those bodies in evaluating of the degree of implementation of international antidiscrimination standards in the domestic law system. This role is important because the monitoring

180. CASALE, *supra* note 1, at 143.

181. OSIEKE, *supra* note 4, at 161.

182. *Id.*

183. CASALE, *supra* note 1, at 154.

bodies of the ILO provide such authoritative interpretations and evaluations that they can be considered quasi-judicial bodies.¹⁸⁴ This opinion is certainly supported by the fact that the few cases in which the International Court of Justice—the body charged by article 37 of the ILO Constitution to interpret international labor standards¹⁸⁵—has intervened were concentrated at the beginning of the ILO's history.

The constitution establishes the ILO monitoring system, which is based on the fair cooperation between the member states and the ILO. As established by article 22 of the constitution:

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.¹⁸⁶

Furthermore, article 19 of the constitution requires each member state to report on the measures taken in the matters related to conventions that the member state did not ratify.¹⁸⁷

On the basis of this global reporting activity, the ILO exercises its monitoring tasks through two different bodies: the Committee of Experts and the Conference Committee on Application of Conventions and Recommendations (Conference Committee).¹⁸⁸

The first, and most important, of the two bodies—the Committee of Experts—was created in 1926 and is composed of twenty members representing the different regions of the world, chosen among experts in labor and social matters at the international level.¹⁸⁹ Over time, the Committee of Experts and its evaluations have gained a particular authoritativeness for two concurrent reasons: (1) the highly qualified nature of its members and (2) the members' neutrality in elaborating evaluations guaranteed by the fact that the members are chosen by the Governing Body on the proposal of the Director General of the International Labour Office,

184. *Id.* at 34.

185. ILO CONST., *supra* note 3, art. 37.

186. ILO CONST., *supra* note 3, art. 22; Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. II, art. 408.

187. ILO CONST., *supra* note 3, art. 19; *see also* BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 70 (noting the requirement of a member state to report back to the ILO on the application of the convention or recommendation regardless of whether it has been ratified by the member state). *Contra* Treaty of Versailles, *supra* note 9, pt. XIII, § I, ch. II, art. 405 (placing no further obligation upon a member state that failed to ratify a convention).

188. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 70, 81.

189. ADAM, *supra* note 98, at 143; BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 75.

rather than elected by national governments.¹⁹⁰

The Committee of Experts prepares its annual report by assessing each member state's annual report presented to the ILO as required by articles 22 and 19 of the constitution, in which national laws and practices are analyzed for compliance with the international labor standards.¹⁹¹ This activity is particularly important to the programmatic or promotional conventions for which the Committee of Experts evaluates the progression or regression of the member state in reaching the general objectives of the convention concerned.¹⁹² It is important to note that the evaluation activity is strictly tied to the interpretation activity because the Committee of Experts cannot evaluate without interpreting the international labor standards; particularly in cases in which general rules or general clauses are contained.

The second significant body concerning the monitoring activity of the ILO is the Conference Committee.¹⁹³ This body is established every year by the International Labour Conference and has a tripartite character, with participation from representatives of governments, workers, and employers.¹⁹⁴ The duties of the Conference Committee are twofold. First the Conference Committee examines the Committee of Experts annual report in its entirety.¹⁹⁵ Second, the Conference Committee addresses the specific, problematic instances of domestic law that failed to comply with international labor standards, as listed by the Committee of Experts.¹⁹⁶ Relating to these specific instances, the Conference Committee asks the governments concerned about the reasons for noncompliance.¹⁹⁷ The governments may respond and communicate the measures taken to promote the application of the ratified Conventions.¹⁹⁸ After having received the answers of the governments and having discussed them, the Conference Committee prepares a report that lists the countries that did not fulfill the international labor standards.¹⁹⁹ The report is then submitted to the International Labour Conference, which discusses and adopts it.²⁰⁰ While it is clear that the Conference Committee is not a court, it is also clear that the listing of a noncompliant member state certainly represents a political

190. CASALE, *supra* note 1, at 159.

191. BARTOLOMEI DE LA CRUZ ET AL., *supra* note 6, at 76–77.

192. *Id.*

193. *Id.* at 81.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 82.

198. *Id.*

199. *Id.* at 83.

200. *Id.* at 83–84.

sanction. This is particularly severe because the report is also approved by the International Labour Conference.

Related to the ILO monitoring system, which is considered traditional because it has performed its fundamental role since 1926, is the voluntary follow-up procedure established by the 1998 Declaration of Geneva. This procedure is another instrument to supervise member states' compliance with the international labor standards. However, this procedure does not concern all ILO conventions, but only those conventions addressing the four fundamental rights that were the subject of the Declaration of Geneva, including the combating of antidiscrimination and promotion of workplace equality.²⁰¹

The most significant characteristic of this follow-up procedure is that it considers the progress or regress of all ILO member states with regard to those four matters, even if they have not ratified the conventions that regulate them.²⁰² The reason for this particularity is that those four matters are regarded as the constitutional principles of the ILO, which are implemented by every member state as a condition of their participation in the ILO.²⁰³

As said in Part III, the product of the follow-up procedure is a global report, issued by the Director General of the International Labour Office.²⁰⁴ This report is based on the reporting activity of the member states, to be carried out regardless of whether the member state has ratified the international labor standards concerned.²⁰⁵ The global report concentrates on one of the four core labor standards each year, which means that each core labor standard becomes the object of the report every four years.²⁰⁶ The global report provides an opportunity for the ILO to illustrate the current situation and the efforts that the member states take to apply the fundamental principles of the ILO. In 2003 the first global report concerning antidiscrimination rules, *Time for Equality at Work*, was issued.²⁰⁷ In the report, the Director General describes the phenomenon of workplace discrimination as a global phenomenon.²⁰⁸ The report analyzes

201. HEPPLE, *supra* note 92, at 60; *see also* Declaration of Geneva, *supra* note 1, § 2(a)–(d), annex, pt. II, § B, pt. III, § A (setting forth the four fundamental rights that are the subject of the Declaration, which includes “the elimination of discrimination in respect of employment and occupation” and describing the follow-up procedure using reports concerning “fundamental Conventions”).

202. Declaration of Geneva, *supra* note 1, annex, pt. II, § B, para. 1.

203. *Id.* § 2.

204. *Id.* annex, pt. III.

205. *Id.* annex, pt. III, § B.

206. *Id.* annex, pt. III, § A.

207. *Time for Equality at Work*, *supra* note 97.

208. *See id.* paras. 1, 8 (mentioning how workplace discrimination occurs throughout the world).

the international antidiscrimination standards, discusses measures taken by the member states to fulfill them, and focuses on the possible policies member states may implement. These policies, provided by the ILO itself or by the member states and their social partners, carry out the difficult task of eliminating discrimination at work and providing equality of treatment.²⁰⁹

The global report is submitted to the International Labour Conference, which discusses and adopts it.²¹⁰ Then, it will be a task of the Governing Body “to draw conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period.”²¹¹

The described mechanisms basically represent the monitoring system of the ILO. This is completed by a complaints procedure, provided by articles 26–34 of the ILO Constitution, which is very complicated and beyond the scope of this Essay.²¹² Nevertheless, it is important to point out that related to this constitutional procedure, the ILO developed ad hoc complaints procedures concerning antidiscrimination rules. In 1973, the Discrimination in Employment Procedure was created in order to enable the Director General of the International Labour Office “to undertake special studies on issues of discrimination in employment.”²¹³ This procedure applies to all countries, regardless of whether they have ratified the relevant international labor standard.²¹⁴ Member states or employers’ and workers’ organizations may initiate this procedure.²¹⁵ However, the procedure is infrequently used (only twice) because the government concerned must agree to the general survey before it can be carried out.²¹⁶

CONCLUSION

As previously noted, the most important problem for the ILO consists, increasingly, of guaranteeing the application of international labor standards in the domestic law of its member states. This problem is particularly

209. See generally *id.* at ix–xiv (discussing the need to combat discrimination in the workplace, “the work of the ILO and of the social partners,” and promoting equality at work).

210. Declaration of Geneva, *supra* note 1, annex, pt. III, § B, para. 2.

211. *Id.*

212. ILO CONST., *supra* note 3, arts. 26–34; see OSIEKE, *supra* note 4, at 221–34 (describing the complaints procedure).

213. Cesare P.R. Romano, *The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements* 18–19 (Int’l Inst. for Applied Sys. Analysis, Working Papers Series No. ER-96-1, 1996).

214. *Id.* at 19.

215. *Id.*

216. *Id.*

complicated with regard to the implementation of the core labor standards, provided by the Declaration of Geneva of 1998, and the inclusion of antidiscrimination and workplace equality rules, because of their programmatic character and the necessity of a progressive application in national law.

In general, the implementation of international labor standards was affected by two different but concurrent phenomena: (1) the nature of the ILO systems ensuring the application of conventions and recommendations and (2) the increase in the number of ILO member states during the decolonization period.

Concerning the first phenomenon, it is clear that the formal ratification of international labor standards by a member state is not sufficient to ensure their practical implementation, especially for programmatic standards. Furthermore, not even the monitoring system of the ILO is able to achieve this goal because of the difficulty in sanctioning the noncompliance of member states. Thus, the reporting activity of the ILO, the most important instrument of international labor standards' implementation provided by the Committee of Experts and the Conference Committee, can achieve only sanctions of a political nature. Moreover, the complaint procedure provided by articles 26–34 of the constitution, which foresee the existence of legally binding sanctions, has failed to yield significant results. A complaint was discussed before the International Court of Justice only once in ILO history, which is a signal that member states and the ILO itself do not consider sanctions the correct way to enforce international labor standards.²¹⁷

A final weakness of the ILO monitoring system, with important consequences to the efficacy of its standards, is the voluntary nature of the reporting system. Without the cooperation and honesty of each member state in preparing reports about ratified and nonratified conventions, the fundamental activity of both the Committee of Experts and the Conference Committee cannot be properly carried out. In other words, it is highly probable that a government breaching the norms of a convention is not going to be particularly collaborative and fair in reporting their noncompliance with the convention.

The second phenomenon, the increase of ILO members following decolonization, resulted in the coexistence of developed and developing countries within the ILO; countries with very different labor markets and working conditions. Until decolonization the ILO was characterized by a membership of countries with similar economies and development status.

217. See HEPPLE, *supra* note 92, at 49–50, 55 (noting that “[t]he crucial reason why Article 33 has been invoked on only one occasion . . . is the general hostility to trade sanctions as a means of enforcing [international labor standards]”).

The internal balance of the ILO was greatly modified by the new membership of many developing countries since the 1950s. In order to understand the impact of this change, it is sufficient to note that in 1946 the ILO had 52 member states, in 1958 there were 80 member states, and in 2003 there were 177 member states.²¹⁸ This increase of ILO membership had significant consequences to both the techniques of adopting international labor standards and their implementation into domestic laws. This is due to the conditions of underdevelopment that characterized, and still characterize, in many cases, the newly associated countries and their difficulty to practically apply the ratified conventions.

One consequence of the ILO's increased membership was a great increase of flexibility in setting international labor standards with the inclusion of flexible provisions within many conventions.²¹⁹ One example of a flexible provision allows member states not to apply a part of the convention concerned; another permits the adoption of standards that are lower than those provided by the convention itself.²²⁰

This evolution—accompanied by the adoption of standards that are more generic than in the past because of the need to apply them in countries with different economic and labor market structures—was criticized within the ILO itself. This criticism came, in particular, from the representatives of some governments who doubted the efficacy of rules that were too flexible. These representatives suggested, maybe provokingly, that in the future the ILO promulgate regional labor standards that are better able to respond to the needs of the different regions of the world, rather than global standards.²²¹

The practical difficulties created by increased membership in the ILO have affected the ILO's adoption of international labor standards. Thus, the number of conventions adopted has declined progressively since the 1950s.²²² Regarding the ratification process, there was an approximately twenty percent increase in ratifications in the decade ending 2004 over the previous decade.²²³ Nevertheless, it is important to point out that “three-fifths of ILO Member States ha[d] ratified fewer than one-quarter of ILO conventions . . . and more than one-fifth [of Member States] ha[d] ratified fewer than 20 conventions” through September 2004.²²⁴

218. *Id.* at 34.

219. *Id.*

220. ADAM, *supra* note 98, at 63.

221. CASALE, *supra* note 1, at 23.

222. HEPPLE, *supra* note 92, at 35.

223. *Id.*

224. *Id.*

The reason for the increase of ratifications may be the result of the Declaration of Geneva of 1998, which set forth the core labor standards, and generally had a very positive impact on the ILO and its activities. Thus, the Declaration produced a strong increase of ratifications involving the core labor standards. One example is Convention No. 111, which had been ratified by approximately ninety percent of ILO member states by the end of 2003.²²⁵

Nevertheless, the formal ratification of a convention is an important start, but ratification is not a guarantee that the convention's provisions are going to be applied in practice. In this sense, the increase in ILO membership certainly produced significant changes within the ILO due to the need to adapt its role to the new situation. As previously noted, the original mission of the ILO essentially consisted of producing international labor standards, in particular through conventions and recommendations. Although this is still one of the most important tasks for the ILO, the ILO was charged with a second task after the enlargement of its membership: technical cooperation. The performance of this function has increased steadily over the years, especially because technical cooperation provides a softer alternative for promoting international labor standards in developing countries than a sanctions system. In other words, when addressing the difficulties that arise when associated countries do not respect the norms provided by ratified conventions, the ILO opted for the development of technical cooperation to help them adapt their laws to the international labor standards, rather than impose sanctions upon them.

With particular regard to antidiscrimination rules, the technical cooperation between the ILO and developing member states has concentrated on a particular program addressing discrimination based on sex. This program, begun in 1999 and called the ILO Action Plan on Gender Mainstreaming for Gender Equality (Action Plan), is based on five main objectives: "strengthen institutional arrangements; introduce accountability and monitoring mechanisms; allocate adequate resources for gender mainstreaming; improve and increase staff's competence on gender; and improve the balance between women and men among staff at all levels."²²⁶ As these objectives clearly show, the program is characterized by an affirmative action policy, aimed at increasing the presence of women in the labor market. On this point, the ILO also provided specific

225. *Id.* at 43.

226. ILO, Gender: Equality Between Men and Women, <http://digbig.com/4qxmK> (last visited Feb. 22, 2006); *see also* ILO, ILO Action Plan on Gender Equality and Gender Mainstreaming, <http://digbig.com/4qxmm> (last visited Feb. 22, 2006) (setting forth the five key features of the Action Plan).

instruments in order to monitor the progress made by member states in applying antidiscrimination rules. In particular, the ILO identified three different indicators of this progress: (1) supervision of the performance of each single member state in ratifying ILO antidiscrimination labor standards and in applying them; (2) measuring member states' introduction of positive modifications into national legislation and of policies aimed at improving equality of treatment between men and women at work; and (3) assessing women's participation in ILO events and governing institutions.²²⁷

The Action Plan is coordinated by a specific institution, the Bureau for Gender Equality, which is part of the International Labour Office.²²⁸ Its functions are typical of technical cooperation: it advises the member states about antidiscrimination measures and operates as a link between different organs of the ILO on equality matters.²²⁹ Furthermore, the Bureau is also directed to coordinate many special projects pursued within the Action Plan in different member states, especially developing member states.²³⁰

Similar to the specific technical cooperation on the matter of equality of treatment between women and men provided by the Action Plan, other antidiscrimination measures have been discussed in the global report *Time for Equality at Work*.²³¹ Although this document does not provide specific plans to implement antidiscrimination rules, it does identify strategies to reach the goal of workplace equality. These strategies are a subset of technical cooperation and involve three instruments. First, the ILO should advise developing member states on antidiscrimination through dissemination of information and best practices of the more advanced member states.²³² Second, particular attention should be focused on the areas and matters in which *Time for Equality at Work* pointed out "important needs or gaps."²³³ Third, the ILO should help its member states and their employers' and workers' organizations address the different aspects of discrimination.²³⁴ In order to adapt these strategies to the related international labor standards, these three strategies must be accompanied by a strengthening of the traditional ILO activity of providing technical assistance to member states that wish to modify their legislation. On this

227. ILO, Gender: Equality Between Men and Women, *supra* note 227.

228. *Id.*

229. *Id.*

230. *Id.*

231. See *Time for Equality at Work*, *supra* note 97, paras. 349–67 (proposing strategies to eliminate discrimination in the workplace).

232. *Id.* para. 352.

233. *Id.*

234. *Id.*

point, *Time for Equality at Work* affirms that this activity has to be improved by involving not only the legislative power but also administrative and judicial actors that play important roles in promoting the efficacy of international labor standards.²³⁵

As the described measures of technical cooperation clearly show, the ILO tries to fill the gap of effectiveness of its norms with instruments aimed at promoting compliance. Thus, the Committee of Experts pointed out the positive results of this technique in recent years, underlining the progress made by many developing countries in implementing international labor standards, including antidiscrimination rules. Nevertheless, it is clear that this technique can have good results only with cooperative and fair member states. With uncooperative members, the problem of efficacy of international labor standards remains relevant. For this reason, some scholars propose a global reform of the ILO institution, with particular regard to the complaints procedures in order to create an international court with specific competence on labor matters deriving from the same complaint procedure, but having legally binding power of decision.²³⁶ This kind of reform could make the international labor standards more effective; it could also cause a problem. Member states could be afraid of a stricter system, causing a sharp decrease in ratifications, or worse, the denunciation of already ratified conventions. On this point it should be remembered that the augmentation in ratifications of fundamental conventions was favored in recent years by the adoption of the Declaration of Geneva, an instrument of soft law, accompanied by a voluntary follow-up procedure.

235. *Id.* para. 364.

236. See Paul O'Higgins, *The Interaction of the ILO, the Council of Europe and European Union Labour Standards*, in *SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 55, 68–69, (Bob Hepple ed., 2002) (discussing the historical interactions between the ILO and regional European organizations, and arguing for the creation of a body that can oversee and enforce the implementation of ILO standards).