Not as Simple as it Seems:
The Ilo and the Personal Scope of International Labour Standards

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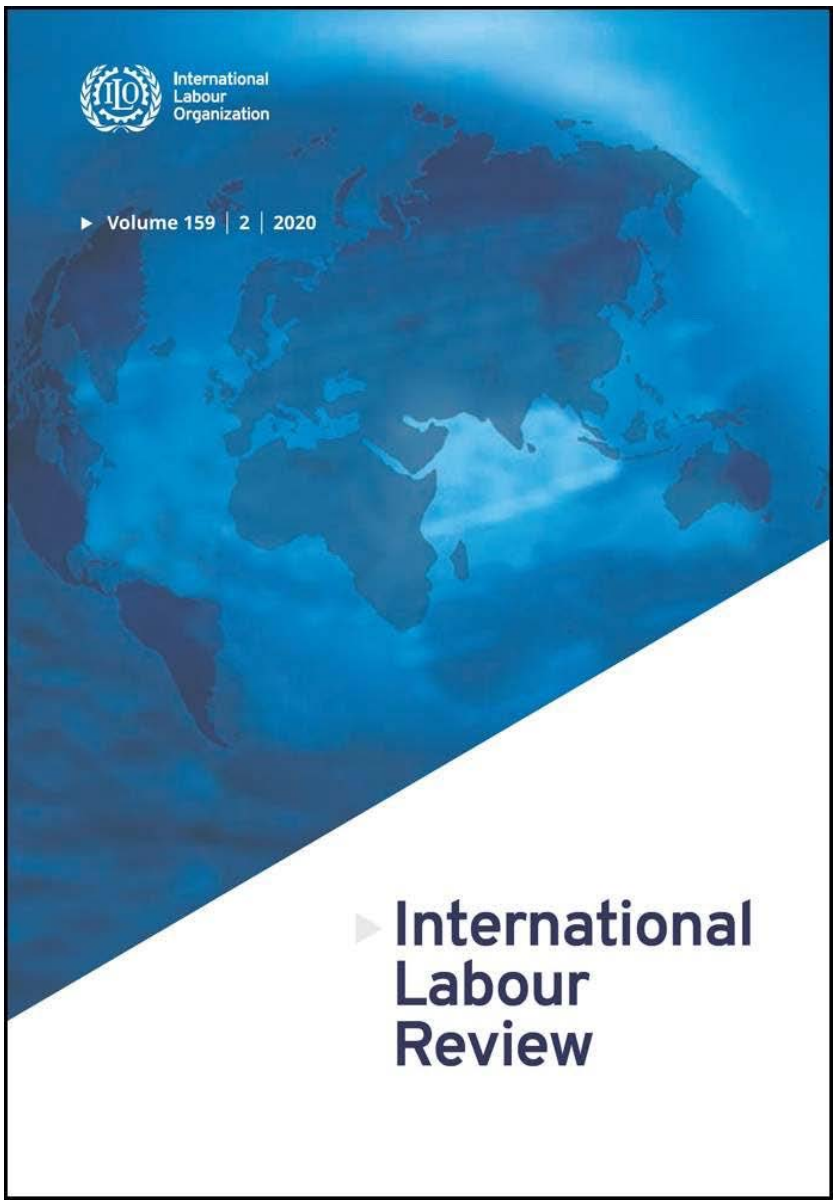

Not as simple as it seems: The ILO and the personal scope of International Labour Standards
Valerio De Stefano*

1. *To whom do the International Labour Standards of the ILO apply? An open question.*

In 2019, the International Labour Organization (ILO) celebrated its Centenary. Established by the Treaty of Versailles in 1919, the ILO became the first specialized agency of the United Nations in 1946, and it is nowadays one of the most important among these agencies.[1] The relevance of the ILO derives first and foremost from its unique structure, being it the sole major international organization based on the principle of tripartism. The main political organs of the ILO are, in fact, composed by representatives of governments, employers' associations and trade unions.[2] These parties, also known as the "constituents" of the ILO ultimately govern the Organisation and, among other things, adopt the normative instruments produced by it. Since 1919, the tripartite constituents have adopted 190 Conventions, which are binding on the ILO Member States after ratification, and more than 200 Recommendations. Compliance with this body of international law is monitored through a complex supervisory mechanism, whose findings – albeit non-binding – are considered particularly authoritative and are apt to greatly influence the decisions of national and international courts.[3]

The 2019 Centenary allowed the Organization itself, its tripartite constituents, the International Labour Office and anyone interested in labour issues to reflect on the role, "mandate" and objectives of the ILO in the years to come. Beside the Centenary, the ILO has long undertaken initiatives to verify the aptness of its regulatory and organisational apparatus to meet the challenges facing the world of work on a global scale. Among these initiatives, it is worth mentioning the so-called Standard review mechanism, whose objective is to review the body of law adopted by the ILO during the century just concluded to identify which International Labour Standards of the ILO (ILS), i.e. the Conventions, Recommendations and Protocols adopted by the Organisation, need to be updated or even abrogated to respond to the changes that have occurred in countries across the world since their approval (ILO 2015).

Beyond a review of the normative content of the ILS, however, a reflection about their personal scope, aimed at identifying who are the workers covered by the standards, is also opportune. As I discuss in the course of this article, in fact, this issue has become particularly controversial in recent years, in the wake of growing tensions around employment status and the coverage of labour protection that are visible in an increasing number of legal systems around the world, and that are epitomised by, but by no means limited to, the growing prevalence of platform work and the attention that it has received from policymakers all around the world (see ILO CEACR, 2020). The personal scope of labour protection has been the subject of extensive analytical research in recent years, focussing both on longstanding trends that predate the emergence of the "platform economy", resulting in an increased

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[1] An in-depth history of the ILO is now in Maul 2019.

[2] For a detailed examination of the functioning of the ILO, see Novitz 2003.

[3] See Section 3 below.

prominence of non-standard forms of work, and on how these trends reflect on the "tenability" of the employment relationship as the main gateway to labour protection in most jurisdictions of the world (Freedland and Kountouris 2011; Davidov 2015; ILO 2016a).

Against this background, a reflection on the personal scope of the ILS is also crucial, to understand whether they only apply to those workers who are traditionally identified as the primary beneficiaries of labour protection, namely those who perform work in the context of an employment contract or relationship. Indeed, the "twentieth-century" aura surrounding the ILO, its tripartite structure, the central position that industrial work had in the adoption of many standards in the early decades of the Organisation (Teklé 2010, 18-19), could engender the impression that the ILS only concern subordinate or "wage" work, especially in large vertical firms in the manufacturing sector.

If this were true, the Standards would risk appearing increasingly obsolescent in those "industrialised" countries where the vertical firm has long been subject to "fissuring" trends (Weil, 2014) and employment in large factories no longer has the centrality, especially at the social and political level, it once enjoyed.

Of course, even if the personal scope of the ILS were so limited, the Standards would be far from useless, since the employment relationship is nowhere near disappearing in the industrialized world (Aloisi and De Stefano 2020) and is expanding in emerging and developing countries (Deakin, Marshall, and Pinto 2015; ILO 2016a). Inevitably, however, if the ILS were only addressed to employees, their relevance would risk declining more and more in industrialised countries and would be mostly non-existent in those countries where the employment relationship only concerns a small part of the workforce (see Sankaran 2010). There are certainly some Standards that have traditionally been deemed to regulate exclusively subordinate work, such as, for instance, the Termination of Employment Convention, No. 158 (1982).[4]

The question is, however, whether this applies to all ILS. And even if this was true and the Standards always applied only to employees, it would not be the end of the discussion. The second question would be whether the criteria to classify a work arrangement as an employment contract or relationship are entirely left to national legislations or whether there is an international legal definition of "employment contract or relationship" which must be taken into account when determining the personal scope of the Standards.

This article proceeds as follows. Section 2 answers to these two questions by closely looking at the text of several standards and also referring to the *travaux préparatoires* and the opinions of the ILO supervisory bodies. In doing so, it departs from previous valuable analyses of the scope of international labour standards (see, for instance, Creighton and McCrystal 2016), by arguing that this scope should be verified on a case by case for each ILS. Section 3 restates this argument by examining in detail the role of these supervisory bodies in assessing the scope of the fundamental Conventions of the ILO. Section 4 shows how the

[4] The *travaux préparatoires* of Convention No. 158 clearly show that the constituents, when determining the scope of the instrument, only referred to "employed" persons, but see below Section 2. See ILO, *Record of proceedings : International Labour Conference, 68th Session, Geneva, 1982 International Labour Conference* (Geneva: ILO, 1982) 30/3 – 30/4; and ILO, *Record of proceedings : International Labour Conference, 67th Session, Geneva, 1981*.

International Labour Conference (Geneva: ILO, 1981) 33/3 – 33/6. As argued in the text below, a crucial role in understanding the personal scope of the standards is played by the ILO supervisory bodies. No comment from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) results that concern the self-employed. Comments of the CEACR are available at https://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:20010::

need for protection beyond employment status played a crucial role in the negotiation of the most recent ILS adopted by the ILO, the Convention and Recommendation on violence and harassment in the world of work. Section 5 concludes by further analysing how the constituents of the ILO are starting to respond to emerging demands, also within the Organisation, about extending basic labour protection universally, regardless of contractual arrangement and employment status.

2. *Not as simple as it seems: absence of a conclusive international definition of employment contract and the need to look beyond the wording of ILS to determine their scope*

First of all, it is possible to clear the second question raised above: a single, universal and conclusive definition of "employment contract or relationship" and a subsequent international notion of "employee" does not exist with the ILO legal system. Reaching an agreement over a legal definition generally suitable for all the Member States of the Organization would probably be impossible. The enormous differences in terms of legal tradition and economic development that exist among the 187 countries of the ILO make any effort in this direction vain. A partial confirmation of this can arguably be seen in the failure of the negotiations for the adoption of an ILS about "contract labour", a notion aimed at covering forms of "dependent self-employment" and outsourcing, during the 1997 and 1998 sessions of the International Labour Conference (see Casale 2011).

Nor is it possible to find a universal definition of the contract of employment in the Employment Relationship Recommendation, 2006 (No. 198). The objectives of this instrument, as they emerge from its text, are different and more limited. Recommendation No. 198 calls on the ILO Member States to guarantee effective protection "for workers who perform work in the context of an employment relationship" by ensuring, among other things, that national definitions of the contract of employment or the employment relationship are sufficiently broad. To this end, the Recommendation suggests to "consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence". It also calls to "consider the possibility" of adopting "specific indicators" indicating the existence of an "employment relationship". These include "the fact that the work: is carried out according to the instructions and under the control of another party ", that the worker is integrated "in the organisation of the enterprise", that the work "must be carried out personally", "periodic payment of remuneration to the worker", "absence of financial risk for the worker", and several others. This is not an exhaustive list of indicators, nor does the Recommendation in any way suggests that the absence of one of these elements should prevent a particular work arrangement from being considered as one of subordinated employment. The Recommendation, therefore, does not carry an international definition of employment contracts or relationships.

Diversity in the legal terms used in the translations of Recommendation No. 198 into the different official or working languages of the ILO, English, French and Spanish, can also complicate the matter. The English version of the Recommendation is entitled "Employment Relationship Recommendation", thus using a term that usually designates subordinate or wage work in the English language. The French and Spanish titles, instead, are "*Recommendation sur la relation de travail*" and "*Recomendación sobre la relacion de trabajo*" – so, the words "*travail"* and "*trabajo"* are used, which correspond to the generic

term "work" in English, instead of "*emploi"* and "*empleo"*, which, as "employment", are more specifically referred to subordinate work.

Both the *travaux préparatoires* and the text of this Standard, which in English, French and Spanish refers respectively to "employed [workers]", "*travailleurs salariés*" and "*trabajadores asalariados*" and their distinction from self-employed workers, leaves no doubt, however, that the Recommendation only concerns subordinate work when it refers to employment relationships.

This, however, is not necessarily the case every time an ILS uses the term "employment" or "employment relationship". The meaning of these terms, it is the argument of this article, should instead be assessed on a case-by-case basis, by analysing the text and objectives of each Standard, the *travaux préparatoires* and the views of the ILO supervisory bodies.

For example, under Article 1 of Domestic Workers Convention, 2011 (No. 189): "the term "domestic work" means work performed in or for a household or households; b) the term "domestic worker" means any person engaged in domestic work within an employment relationship; c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker".

If we were to derive from letter b) a limitation of the scope of Convention No. 189 to domestic work formally carried out within the framework of an employment contract or relationship, we would dramatically narrow the scope of the Convention by excluding from its protection some of the most vulnerable domestic workers in the world, such as informal or undocumented workers. Of course, in some legal systems also informal workers whose work presents the typical legal features of an employment relationship would be anyhow protected by labour regulations. The same, however, risks not being valid in those systems where the absence of a regular employment contract or relationship, as defined at a national level, sometimes with particular formal requirements, would exclude workers from labour protection or access to justice or administrative remedies in the field of employment.

In the case of domestic work, which is often expressly left out of the scope of application of labour legislation[5] or from the regulatory and administrative competence of labour inspectorates and administrations (ILO 2010a), adopting a narrow interpretation of the term "employment relationship" used by Convention No. 189 risks depriving of protection the domestic workers who need it most. The *travaux préparatoires* confirm that the reference to an employment relationship was only meant to exclude from the scope of the Convention domestic work carried out to earn "pocket money" and not on a professional basis, as a source of livelihood.[6] The Committee of Experts on the Application of the Conventions and Recommendations of the ILO (CEACR), the key body entrusted with the supervision of the application of ILS, has in fact subsequently observed that "regardless of the type of contract held by workers providing domestic services, the definition of domestic worker laid down in

[5] For instance, in China, domestic workers, similarly to the self-employed, are excluded from the list of people employed in a labour relationship regulated by Labour Contract Law and are regulated by the Chinese Civil Code (民法).

[6] The compromise concerning the definition included in Article 1 was reached, as is often the case in case of deadlock during tripartite discussions, by a restricted Working Group of the Standard-setting Committee. The Worker Vice-Chairperson of the Committee, referring to the internal discussion within the Working Group and to the Workers'group's understanding of this definition, specified that "all workers who [perform] domestic work as a as a living [are] understood to be included". No representative of the Governments' or Employers' groups proposed an alternative reading. See ILO 2010b, 12/30-31 para 147.

Article 1 of the Convention excludes only persons who perform domestic work occasionally or sporadically and not on an occupational basis."[7]

The analysis carried out so far makes it possible to answer the first question raised in the first Section, namely whether the ILS always apply only to employees. This answer is negative first of all because, even when the text of a given Standard refers, in the English version, to the employment relationship, the meaning to be given to this expression must be verified on a case-by-case basis according to its complete text and the objectives of the instrument, which can be identified, among other things, by referring to the *travaux préparatoires* and the views of the supervisory bodies of the ILO. Adopting this approach may have material consequences. For instance, by applying it to the exegesis of the Domestic Workers Convention, contrary to previous analyses of this Convention (see Creighton and McCrystal 2016, 722; Albin and Mantovalou 2012, 71; Oelz 2014, 154), it is possible to argue that this instrument also applies to the self-employed or other workers outside the scope of the employment relationship, notwithstanding its literal reference to "an employment relationship" in its text.

There are, indeed, some Conventions that explicitly exclude the self-employed from their scope,[8] but other standards exist that expressly cover them[9] or admit their inclusion in national legislation[10] or which, by the nature of the subject matter dealt with, are also explicitly addressed to them.[11]

An example of the standards that explicitly cover the self-employed is the Rural Workers" Organisations Convention, 1975 (No. 141). Article 2 stipulates that the "rural workers" protected by this instrument include "any person engaged in agriculture, handicrafts or a related occupation in a rural area, *whether as a wage earner or*, subject to the provisions of paragraph 2 of this Article, *as a self-employed person such as a tenant, sharecropper or small owner-occupier"*.[12] The Convention notably refers to persons "engaged" in rural work, using a term wider than "employed", and that leaves no doubt about the broad nature of the work arrangements covered by the instrument. Importantly, this term was already used by a very early ILO Convention on the same matter, adopted in 1921.[13] Notwithstanding the crucial position that industrial work occupied in the adoption of ILS and particularly of early ones (Fenwick and Kalula, 2005; Teklè, 2010), it cannot be neglected that the ILO constituents, already in the earliest days of the ILO, directed some instruments beyond this field; in doing so, moreover, they also took into account that in some sectors the nature of occupations

[7] CEACR – *Ireland*, Direct Request, C.189, published 2018. See Section 3 below, with regard to the nature of the CEACR's opinions.

[8] Home Work Convention, 1996 (No. 177), Article 1.

[9] See, for instance, among Conventions, the Rural Workers" Organisations Convention, 1975 (No. 141), also mentioned below in the text.

[10] See Safety and Health in Construction Convention, 1988 (No. 167), Article 2. Articles 7 and 8 of the Convention also impose on the self-employed a duty to comply with occupational health and safety provisions.

[11] See Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), Article 4.

[12] Paragraph 2 further provides that the Convention applies "only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not (a) permanently employ workers; or (b) employ a substantial number of seasonal workers; or (c) have any land cultivated by sharecroppers or tenants".

[13] Article 1 or the Right of Association (Agriculture) Convention, 1921 (No. 11) stipulates: "Each Member of the International Labour Organisation which ratifies this Convention undertakes to secure to *all those engaged in agriculture* the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of *those engaged in agriculture*".

widely exceeds the scope of the employment relationship.[14] This also should contribute to counter the idea that ILS unvaryingly only concern wage workers.[15]

The textual analysis of the provisions of ILO Conventions and Recommendations concerning employment status is also complicated by the fact that the wording of each Standard is nowadays, in most cases, negotiated individually. Negotiations concerning the adoption of a new Standard are, of course, of a tripartite nature and are also highly "political" as they must accommodate the views and needs of governments and social partners from every region of the world. The terms used to indicate the same phenomenon, therefore, may vary from one Standard to another; conversely a same word could carry different meanings across Standards. This would depend on the choices of the constituents, dictated by political or technical-legal reasons, which reflect the consensus achieved in each tripartite negotiation, often with reference to the single Convention or Recommendation. The need to ensure consistent terminology between the different Standards, therefore, may come second to the need to reach a compromise text.

So far, for instance, I have argued that the expression "employment relationship" may have a different sense across different Standards. Even the word "employment" can have a meaning limited to subordinate or wage employment in an instrument such as the Migration for Employment Convention (Revised), 1949 (No. 97), and a much broader meaning relating to all forms of employment and occupation in the Employment Policy Convention, 1964 (No. 122). Sometimes, instead, different instruments may use various terms to refer to the same contractual status. To refer to self-employment, for instance, the English text of the Standards may use the expressions "self-employed"[16], "person [...] employed [...] on [their] own account",[17] or "independent worker".[18]

An assessment of the personal scope of International Labour Standards, therefore, must be carried out on a case-by-case basis, being careful to avoid hasty conclusions based on the erroneous idea that they always refer only to subordinate employment. The personal scope may vary from instrument to instrument depending on the context, the individual wording and objectives of each Standard. The *travaux préparatoires* and the opinions of the ILO supervisory bodies, therefore, should be regarded as essential references when determining the scope of application of each Standard. This is consistent with the rules concerning the interpretation of treaties under the Vienna Convention on the Law of Treaties, 1969, and with longstanding practice within the ILO.

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[14] The *travaux préparatoires* of Convention No. 11 reflect that the expression "engaged in agriculture" was expressly adopted to extend the scope of the instrument beyond wage employment. One Belgian delegate specified that "during the course of the discussion in the Commission, a member explained that the English translation of "*travail agricole* "was not sufficiently large to include not only wage-earners, but small tenants who did not possess land of their own, and the change in the English text was made in order to include small tenants, or workers who did not possess land of their own". Moreover, an amendment proposed by a Government delegate of Japan to replace the words "engaged in agriculture" with the words "all agricultural workers employed within its territory" to narrow the scope of the Convention was rejected by the International Labour Conference. See ILO 1921, at 143-145.

[15] And indeed the ILO's official *Manual for drafting ILO instruments* (ILO 2006, para 125) expressly provides: "On many occasions, it has been emphasized that, if the subject matter of a given instrument is not limited only to employed workers, or the instrument does not provide for any specific exclusion in respect of one or more categories of workers, then "worker" is understood to cover all workers".

[16] See Safety and Health in Construction Convention, 1988 (No. 167) n. 11 above.

[17] Migration for Employment Convention (Revised), 1949 (No. 97), Article 11.

[18] Home Work Convention, 1996 (No. 177), Article 1.

Pursuant to Article 31 of the Vienna Convention, treaties should be interpreted "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 32 allows recourse to "supplementary means of interpretations", including "the preparatory work of the treaty and the circumstances of its conclusion" to confirm the meaning of a treaty resulting from the application of article 31 or "to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Recourse to the *travaux préparatoires*, therefore, is acceptable to clarify the text of a Standard or to determine its meaning when strict adherence to the text would lead to inadmissible results, taking into account "the objects and purpose" of the Standard. As I argued above, this would be the case, for example, if a narrow interpretation of the term "employment relationship" used by the Domestic Workers Convention, 2011 (No. 189) led to exclude workers outside a formal employment relationship from the scope of this instrument. This would be an insurmountable obstacle to enjoy the protection of this Standard for some of the most vulnerable domestic workers around the world, thereby undermining the purpose of the instrument. An analysis of the *travaux préparatoires* to determine a consequential meaning and avoid a manifestly absurd and unreasonable interpretation of the text of this Convention is, therefore, indispensable.

The same can arguably be said of any other reference to the term "employment" and ´employment relationship" within the body of the International Labour Standards. Firstly, the tripartite nature of the negotiations and the difficulties in finding a consensus among the constituents of the ILO, as discussed above, can have a material impact on the final texts of Standards. Terms in these texts, therefore, could be used ambiguously or chosen as a compromise to reach consensus among delegates of governments and social partners from any part of the world. Sometimes, as shown above, the same terms may designate different phenomena and diverse terms could be used to refer to the same thing across different ILS.

The *travaux préparatoires* of ILO Standards, therefore, are crucial to ascertain how consensus over a certain term was reached and thus to determine its meaning taking care of the context, object and purpose of a given Standard. This was also specified during the negotiations of the Vienna Convention by a representative of the ILO intervening as an observer. He highlighted how recourse to the *travaux préparatoires* had always had a more prominent role within the ILO, compared to Article 32 of the Vienna Convention. This would have had to be taken into account, when it came to the interpretation of ILS, also in application of Article 5 of the Vienna Convention, whereby the Convention applies to any treaties adopted within international organizations "without prejudice to any relevant rules of the organization" (ILO 2015, 19; see also Trebilcock 2018). According to the International Labour Office, "such specific rules may include not only written rules but also unwritten practices and procedures of an organization" (ILO 2015, 19). This argument seems to be convincing, due to the peculiarity of the tripartite nature of ILS adoption and the governance of the Organisation, and the complexity of its supervisory mechanism.

Assigning importance to the *travaux préparatoires* does not mean, of course, that the opinion of the constituents at the time an instrument was passed should indissolubly bind its application for good. It may well be that the evolution of labour markets renders opportune a reading of the ILS that embraces forms of work that did not exist when an instrument was approved, if this is in accordance with the "spirit" of this instrument. The ILO supervisory bodies and interpreters could, therefore, see it opportune to adopt such a reading, particularly

as – as argued below – the ILO constituents open towards a more universal application of ILO standards. But it is anyway already essential not to let the wording of an instrument referring to "employment" or the "employment relationship" lead towards an understanding of the instrument that excludes *a priori* workers outside the formal scope of the employment relationship without making sure that the constituents had originally and positively meant to exclude these workers.

In addition to this, the interpretation of terms such as "employment" and "employment relationship" requires supplementary special care. Their meaning, in fact, may vary significantly across ILS but also across national legislations, together with the procedural or administrative rules concerning the classification of a work arrangement as one of subordinate employment. For this reason, the analysis carried out by the ILO supervisory bodies is arguably particularly authoritative, even if – as discussed in the next section – not binding, in this respect. This analysis, in fact, examines the specificities of each national legislation, as they emerge from national reports, complaints o representations, and the observations of governments and social partners in a given country or region. These elements are thus weighted against the text, the objects and purpose, or, borrowing an expression frequently used by these bodies, the "spirit" of each ILS. In doing so, it may also occur that the question of employment status is not considered relevant, when the instrument in question is "universal", such as the ones examined in Section 3 below.

The supervisory bodies, therefore, have always played a crucial and undisputed role in assessing the personal scope of ILS, a practice that could correspond to the "relevant rules of the organization" whose value is acknowledged by Article 5 of the Vienna Convention.[19] The next Section will now focus on how the supervisory bodies acted in this respect, with regard to the application of the fundamental Conventions of the ILO.

3. *The exegetic role of the ILO supervisory bodies and the universality of the ILO fundamental Conventions*

As mentioned above, the supervisory bodies of the ILO have always offered a vital contribution in clarifying the personal scope of application of the ILS. Before delving into this issue, however, it is essential to briefly discuss the nature of the pronouncements of these bodies. The structure and functioning of the ILO supervisory mechanism is a particularly complex matter that has recently been summarised by an official report jointly written by the Chairpersons of two of the most important bodies constituting this mechanism, the CEACR and the Committee on Freedom of Association (CFA) (ILO 2016c).[20] This document, which also discusses the interrelationships between the different bodies and components of the system, was prepared after several years in which the role of the supervisory bodies had been the subject of heated tripartite discussions within the ILO. At the core of these discussions was the nature of the exegetic activities that the supervisory bodies carry out in discharging their mandate, since, under Article 37 of the ILO Constitution, the only binding interpretations of ILO Conventions may be given by the International Court of Justice, which nonetheless has been referred to about a Standard only once in the history of the ILO, or by the never established Tribunal mentioned in the same Article 37. Specifically, the nature of

[19] More in general on the influence of the opinions of the ILO supervisory bodies on court" decisions concerning the ILS see De Vries 2007 and Beaudonnet 2020.

[20] The two Chairpersons pro tempore were A.G. Koroma for the CEACR and P.F. van der Heijden for the CFA. Sebastian Rombouts of Tilburg University gave a crucial contribution to the drafting.

the opinions expressed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) was a fundamental matter of contention (see Bellace 2014; Swepton 2013). One of the elements that contributed to calming the dispute was the decision to include at the beginning of the annual report of the observations expressed by the CEACR a disclaimer about the nature of its opinions. In the 2020 report, this disclaimer read:

> The Committee of Experts on the Application of Conventions and Recommendations is an independent body […]. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized […]. This has been reflected in the incorporation of the Committee"s opinions and recommendations in national legislation, international instruments and court decisions (ILO CEACR 2020, 11).

And, indeed, paramount court rulings have taken into account the opinions of the CEACR and other supervisory bodies, including the CFA. These opinions, for instance, played a fundamental role in the landmark judgement of the European Court of Human Rights *Demir and Baykara v Turkey*, [21] about freedom of association and the right to bargain collectively, which particularly relied on the opinions of the ILO bodies about the scope of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) as it concerns civil servants (Ebert and Oelz 2012). At the national level, the decision of the Canadian Supreme Court *Dunmore v. Ontario (Attorney General)* [22] is prominent example of a ruling about the scope of collective rights which payed heed to the works of the ILO committees (see Beaudonnet 2020 for additional examples).

An all-embracing review of the work of the ILO supervisory bodies regarding all the International Labour Standards is not possible in a single article. To examine the most relevant issues that have emerged in recent years regarding the personal scope of the Standards, it is, however, essential to focus on the scope of the ILO fundamental Convention. These are, of course, the eight Conventions enshrining the so-called Fundamental Principles and Rights at Work (FPRW). In 1998, the International Labour Conference, the tripartite "legislative" assembly of the ILO, adopted the Declaration on Fundamental Principles and Rights at Work. According to the Declaration, all Member States of the ILO "even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership in the Organization" 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, namely: (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".

Fundamental Principles and Rights at Work, as reaffirmed both in the 1998 Declaration and in the subsequent 2008 Declaration on Social Justice for Fair Globalization, are "universal" in

[21] (2009) 48 EHRR 54.
[22] [2001] 3 SCR 1016.

character and apply to any ILO Member State, even when that State has not ratified the relevant fundamental Conventions, and to any worker, regardless of the type of contract and employment status. The ILO supervisory bodies have reiterated the universal character of the principles and rights enshrined in the fundamental Conventions on a large number of occasions. Indeed, the activity of these bodies has brought to light a large number of cases where the national legislations or practices excluded some categories of workers from the legal scope or the meaningful exercise of FPRW. Among the workers whose protection had to be reaffirmed by the supervisory bodies, when commenting on domestic regulations or practices that were at odds with the universal application of FPRW, there are temporary workers, temporary agency workers, workers of contractors, casual workers, domestic workers, and informal workers (see ILO 2016a, 208-217).

At first glance it would seem obvious that all these workers enjoy FPRW. Reference to informal workers as a homogenous category may also seem misleading. This kind of statements, however, is unquestionably influenced by the activity carried out by the supervisory bodies in practice. The comments of these bodies are primarily aimed at assessing whether the individual Member States respect the content and the "spirit" of the Conventions when adopting or applying national regulation.

Therefore, the terminology they use often follows that used in documents (reports, complaints, etc.) sent to them by governments or national employers' and workers's organization; this terminology may vary from country to country even when referring to similar phenomena. The CEACR, for example, has referred in English to persons engaged in contracts for services as "self-employed workers"[23] or "own-account workers"[24] or discussed trade unions' reports referring to self-employment as "contract labour".[25] In doing so, it reiterated multiple times that the collective labour rights enshrined in the fundamental Conventions also apply to these workers while dealing with concrete situations where national laws and practices impeded self-employed workers to exercise these rights or were excluded from their scope. Secondly, the supervisory bodies often follow a functional approach aimed at providing an unequivocal and, as far as possible, expeditious response to the issues they examine. For this reason, when the universal nature of the Standard to be applied so permits, these bodies confirm the applicability of the relevant rights and principles to the workers in question without specific regard to their employment status. It is frequent, therefore, that the Committees refer to "informal workers" without distinguishing between those who should be theoretically classified as employees and the self-employed, although they are expressly aware that the "informal economy" encompasses both phenomena.[26]

For instance, commenting on ILO Convention No. 138, which sets the minimum age for access to any form of "employment or work in any occupation", the CEACR has repeatedly stressed that the minimum age should be set with reference to any form of work, including

[23] ILO CEACR – *Central African Republic*, Direct Request, C.87, published in 2018.
[24] ILO CEACR – *Bolivia*, Observation, C.87, published in 2010.
[25] ILO CEACR – *Netherlands*, Observation, C.98, published in 2011.
[26] See ILO CEACR 2012, 21, where the Committee observes: "The term "informal economy" comprises all economic activities that are – in law or practice – not covered or insufficiently covered by formal arrangements. This term takes account of the considerable diversity of workers and economic units, in different sectors of the economy and across rural and urban contexts that are particularly vulnerable and insecure, that experience severe decent work deficits and that often remain trapped in poverty and low productivity. The informal economy includes wage workers and own-account workers, contributing family members and those moving from one situation to another, as well as some of those who are engaged in new flexible work arrangements and who find themselves at the periphery of the core enterprise or at the lowest end of the production chain."

self-employment and work in the "informal economy",[27] stressing that far too often Member States do not fully include these work arrangements in their domestic policies against child labour (ILO CEACR 2012, 153). This situation is even more serious when children are involved in the "worst forms of child labour" identified by the Worst Forms of Child Labour Convention, 1999 (No. 182), such as hazardous work. The CEACR recalled that it has observed "cases where the legislation is not comprehensive enough to protect all children from becoming engaged in work that is dangerous to their health, safety and morals. This is particularly true for self-employed children or children working in the informal economy, as national legislation often fails to cover children properly who perform hazardous work outside a labour relationship or contract" (ILO CEACR 2012, 234).

The instruments on forced labour are also universal in nature. The Forced Labour Convention, 1930 (No. 29) defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The CEACR reiterated that the definition includes " all types of work, service and employment, regardless of the industry or sector within which it is found, including the informal sector" (ILO CEACR 2012, 111).

Anti-discrimination Conventions also apply universally and include self-employment and the informal economy. The CEACR also recalled that, during the negotiation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the proposal to exclude self-employed workers from the protection afforded by the instrument was rejected twice (ILO CEACR 2012, 307-308). The *travaux préparatoires* and the text of the Equal Remuneration Convention, 1951 (No. 100), which refers in English to "all workers", also confirm that this instrument does not allow any exclusion from its scope (ILO CEACR 2012, 275-276).

The Freedom of Association and Protection of the Right to Organize Convention, 1947 (No. 87) applies to workers and employers "without distinction whatsoever". The personal scope of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) coincides almost perfectly with that of Convention 87.[28] As noted above, the CEACR has stressed on several occasions that, with the only exceptions allowed under these Conventions, collective labour rights pertain to all workers, including the self-employed. In this field, the CFA also is of paramount importance within the ILO supervisory system. This Committee is a tripartite body which addresses complaints regarding freedom of association matters, regardless of whether a given Member State has ratified the relevant ILS protecting collective labour rights. According to the CFA, "the criterion for determining the persons covered by" the right to establish and join organizations of one's choosing "is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize" (ILO CFA 2018, 70). Both for this Committee and the CEACR, self-employed workers also enjoy the right to bargain collectively (ILO CFA 2018, 240; ILO CEACR 2012, 85).

[27] The CEACR frequently treats self-employment conjunctly with the informal economy because Member States often fail to include both self-employed children and children in the informal economy in the scope of their policies against child labour. See, for instance, CEACR – *Afghanistan*, Observation, C.138, published in 2018; CEACR – *Bolivia*, Observation, C.138, published in 2018; CEACR – *Botsawana*, Direct Request, C.138, published in 2018.

[28] Conventions No. 87 and 98 leave the collective rights of workers in the armed force and the police to national laws or regulations. Convention No. 98., moreover, "does not deal with the position of public servants engaged in the administration of the State".

The personal scope of this latter right has explicitly been scrutinized the ILO supervisory bodies in recent years, regarding cases where the Court of Justice of the EU and other EU institutions had applied competition law in ways that could hurdle the effective access of self-employed workers to the right to collective bargaining. In one occasion, the CEACR reiterated its position on the matter referring expressly to the CJEU's judgment in *FNV Kunsten*.[29] This case had originated in the Netherlands, where some self-employed orchestra players had been denied the right to bargain collectively by the national antitrust authority. Even if it observed that traditional collective bargaining mechanisms "may not be adapted to the specific circumstances and conditions in which the self-employed work", the CEACR called on the Dutch Government and social partners "to identify the appropriate adjustments to be introduced to [those] mechanisms to facilitate their application" to the self-employed. [30]
In a different case, the Government of Ireland had renounced to extend immunity from antitrust legislation to specific categories of vulnerable self-employed workers due to opposition from the European Commission (De Stefano and Aloisi 2018). After being treated by the CEACR,[31] which had restated its position on the right of self-employed workers to collective bargaining, the case was also examined by the Committee on the Application of Standards.
This Committee is a tripartite body that discusses each year, among other things, the cases of the most significant violations of ILO standards across the world. Some of the employers' representatives in the Committee questioned the application of Convention No. 98 to self-employed workers. This is because Article 4 of the Convention only refers to "terms and conditions of employment" when establishing the right to bargain collectively (ILO 2016c, II/105). Arguably, however, this is one of those cases where the term "employment" cannot be interpreted restrictively as designating work performed in the context of an employment contract or relationship. In light of what has been discussed so far, it seems evident that this term ought to be interpreted in a broad sense, as a synonym for "occupation".
Article 1 of Convention No. 98, for example, prohibits making a worker's "employment" subject to the condition that they shall not join a union or shall relinquish trade union membership. A restrictive interpretation of the term "employment" in this context would directly affect not only the right to collective bargaining but also the right to organize in itself. Moreover, as pointed out above, a formalistic reading of this term would have particularly negative consequences on the possibility of full access to collective rights for some of the most vulnerable workers, such as informal or undocumented workers who, in many countries, may find it impossible to establish the existence of a formal employment relationship. The *travaux préparatoires* of Convention No. 98, moreover, do not report any discussion about excluding the self-employed from the scope of the Convention. The employer's delegates, instead, only expressed concerns as to the differentiation in scope between the "universal character" of Convention No. 87 and the somehow contradictory exclusion of the civil servants under Convention No. 98 (ILO 1951, 473). Following a restrictive approach would also have contradicted the decades-long work of the other supervisory bodies in this area. The Committee on the Application of Standards, in fact, decided following the position of the CEACR (ILO 2016c, II/107). By adopting the approach advanced at Section 2 above to identify the scope of ILS, therefore, self-employed workers unquestionably fall into the scope

[29] It is the judgment in the Case 413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411. See CEACR – *Netherlands*, Observation, C.98, published in 2018.
[30] Ibid. See also CEACR – *Netherlands*, n. 26 above.
[31] CEACR – *Ireland*, Observation, C.98, published in 2016

of Convention No. 98. This is obviously a very sensitive issue that poses, among other things, delicate problems of contrast between various supranational and international sources of law (for a discussion, see Countouris and De Stefano forthcoming) and that will probably be the subject of new pronouncements in the coming years.

4. National frictions on employment status, non-standard work and ILS negotiations: the recent instruments on violence and harassment in the world of work

Covering all workers, including the self-employed, within the scope of basic labour protections is an issue debated far beyond the supervisory bodies. Indeed, it has recently occupied both tripartite constituents and independent bodies within the ILO.[32] This is not surprising. On the one hand, in fact, the increasing active participation of developing countries in the negotiation and adoption of ILS (Chigara 2007) contributes to paying particular heed to those workers that, despite falling outside the scope of the standard employment relationship, are in need of protection, such as informal workers, who represent the vast majority of workers in some developing countries (Teklè 2010). On the other hand, increasing uncertainties about the scope of the employment relationship and the coverage of labour protection have been a major concerns all around the world in recent years, as they have been exacerbated by widespread phenomena of employment misclassification, for instance in the so-called platform economy, and fissuring of workplaces (ILO 2016a).

All these issues played a pivotal role in the adoption of the 2019 Convention and a Recommendation on the elimination of violence and harassment in the world of work. The discussion of these Standards, which had initiated before the International Labour Conference in 2018,[33] proved to be particularly complicated. One of the main issues to be resolved was the scope of the new instruments. The Employers' group proposed to adopt a definition under which the term "worker" would "cover all workers as defined in national law and practice and should include those in the formal and informal economy, whether in urban or rural areas". The proposal, however, was not adopted. Other delegates, both governmental and from the Workers" group, noted that national laws and practices are often too restrictive and that all workers should have been protected "irrespective of contractual status". Delegates from developing countries especially stressed on this point, with the governments of African Member States particularly insisting to ensure that the text of the Standards would have global coverage in their legal systems. Speaking on behalf of all African governments, the Government of Uganda expressly "stressed that the definition of "worker" would vary across and within jurisdictions. Given that the proposed instrument was intended for global application, protections needed to be applied irrespective of contractual status" (the quoted text is from ILO 2018, 39-47, para. 285-375).

After lengthy negotiations, the final text of the Convention protects "workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer". The instrument also expressly covers "all sectors, whether

[32] See also Section 5 below.

[33] The adoption of International Labour Standards normally takes place during two successive sessions of the International Labour Conference. The discussion of the Standards about violence and harassment began in the 2018 session and ended in the 2019 session.

private or public, both in the formal and informal economy, and whether in urban or rural areas". It is a practically universal scope of application, which depends closely on the purpose of the instrument, aimed at combating violence and harassment at work in all areas, even before the conclusion of any contract of employment as well as after its termination.
Both the debate and the final text of the Convention show that the scope of the International Labour Standards is, nowadays, a central issue, also to take due account of the great variety of forms of work existing in industrialised and developing countries. Beside workers in the informal economy, the *travaux préparatoires* of the ILS on violence and harassment clearly show the preoccupation of several delegates that these instruments do not leave outside their scope "new types of work and platforms" and subjects such as the "dependent self-employed workers", workers in "zero-hour contracts", "those working online in virtual workplaces", and "self-employed home-based workers" (ILO 2018, 39-47, para. 285-375).
Frictions on the personal scope of ILS at the ILO level, thus, should not be seen in isolation – they are the symptom of a global contention regarding the application of labour regulation. As businesses such as food-delivery and ride-hailing platforms spread worldwide, for instance, litigation about the employment status of platform workers also follows suit and occupies courts in all continents of the world (De Stefano et al., forthcoming). This has inevitable repercussions within the ILO, as countries of any level of development experience these phenomena, which add to broader disputes concerning the employment status of casual and precarious workers, traditionally present in developing countries and on the rise in industrialised ones (De Stefano 2016). Predictably, therefore, the personal scope of labour protection was also one of the crucial preoccupations in the work of the ILO Global Commission on the Future of Work, an independent commission of 27 experts from the political, trade union, employer and academic world, which included *ex officio* also the Director General of the International Labour Office, the Chairperson of the Governing Body and authoritative members of the Employers' and Workers' groups of the ILO.[34]

5. Conclusions: History in the making. The ILO and the "Future of Work" beyond employment

The mandate of the Commission was to carry out a global analysis concerning the most important trends that the world of work will face in the going forward and issue non-binding proposals to the ILO constituents as to how face challenges and seize opportunities stemming from these trends. Among these proposals, there is also the adoption of a Universal Labour Guarantee (ULG). The ULG would include the Fundamental Principles and Rights at Work of the ILO, which would be expanded to embrace occupational health and safety and, in addition, the guarantee of "limits on hours of work" and "adequate living wages". The Commission proposed that the ULG should apply to all workers" regardless of their contractual arrangement or employment status", and thus also to self-employed workers (ILO Global Commission on the Future of Work 2019, 38-39).
This was a tangible turning point. The mere fact that a body of experts gathered by the ILO from the most diverse sectors and all continents suggested the adoption of such a comprehensive set of universal basic labour rights was a historical event. Not only was the universal scope of FPRW reaffirmed, and the inclusion of a new field of protection advanced

[34] These latter, as any other member of the Global Commission, participated in a personal capacity and not as representatives of their groups.

within this framework – the Commission also proposed to make socio-economic rights such as wage protection and working time limits apply regardless of employment status.

The tripartite constituents of the ILO have started to follow up on the Commission's proposals when adopting their Centenary Declaration for the Future of Work in June 2019. The Declaration does not expressly mention the ULG. However, after confirming the "continued relevance of the employment relationship as a means of providing certainty and legal protection to workers", it stated that "All workers should enjoy adequate protection […] taking into account: (i) respect for their fundamental rights; (ii) an adequate minimum wage, statutory or negotiated; (iii) maximum limits on working time; and (iv) safety and health at work". The text, which has been negotiated at length, indeed represents a compromise. On the one hand, it does not expressly state that these safeguards should be applied regardless of "contractual arrangement or employment status", as suggested by the Global Commission on the Future of Work. On the other hand, the reference to "all workers" and the association of socio-economic rights to fundamental rights that, as discussed, are already broadly considered within the ILO as also applicable to self-employment, makes it clear that the tripartite constituents have intended to look beyond the employment relationship as to the personal scope of essential labour protections. The Declaration, therefore, represents only the beginning of a process of redefinition and expansion of this personal scope, whose fashion and pace, when it comes to ILS, will be dictated by the tripartite constituents of the ILO.

Whatever they decide in the years to come, at the turn of its Centenary it is however clear that the ILO must profoundly reflect upon the personal scope of labour protection in the world of work. Since this is going to be, as it seems, increasingly varied and complex, achieving the founding principle of the ILO enshrined in the Declaration of Philadelphia, "labour is not a commodity", and reaching more and more workers without diluting existing protections will be one of the main challenges at national and international level. The proposal of the Universal Labour Guarantee and the text of the Centenary Declaration for the Future of Work are certainly a step in this direction.

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