

PART 1

The Nature of International Labour Law

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Title 1: The Instruments

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1.01 The Constitution

1.01.1 The Constitution of the International Labour Organisation (ILO) is the foundation of modern international labour law.

1.01.2 The Constitution is a treaty.¹

1.01.3 Membership by any State of the ILO necessarily involves accession to the Constitution, and ratification of that accession must be communicated and registered.² It then becomes binding on the State. As such, it is in itself to be interpreted in the manner of other multilateral, inter-State treaties.

1.01.4 As a treaty, the Constitution of the ILO creates obligations between Member States *inter se* and between those Members and the ILO as an institution created by the treaty.

¹ Originally created through the Treaty of Versailles in 1919, the Constitution has had an autonomous existence since then. Although itself amended on several occasions, renewed and embellished in 1944, and recognised by the United Nations (UN) after *its* creation – under the Charter of that Organisation and by means of resolutions and agreements – acceptance of the obligations expressed in the ILO Constitution is a *sine qua non* of membership of the ILO. On the origins of the ILO Constitution, see generally, N. Valticos and G. von Potobsky, *International Labour Law*, 2nd revised edition (Denver-Boston: Kluwer, 1995), Introduction, Chs. 1 and 2; H. G. Bartolomei de la Cruz, G. von Potobsky and L. Swepston, *The International Labour Organisation* (Boulder, Colorado: Westview Press, 1995), Ch. 1. The full text of the Constitution is to be found in the ILO publication entitled Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference, December, 1944. ILO, Geneva. 1995.

² With the ILO and the UN. Since 1945, the procedure has been simplified where a State is already a Member State of the UN, but the essential requirements concerning accession, ratification and registration remain unaltered. There are still, however, States which are members of the ILO which are not members of the UN (for example, Switzerland until 2002, when it joined the UN, and San Marino) and others which are members of the UN but not of the ILO. In 1998, the ILO comprised some 178 States as Members.

4 The Instruments

1.01.5 The provisions of the ILO Constitution specify those obligations, which are binding on all Member States in their entirety. Many of these are of no particular relevance for international labour law, as they are concerned with matters related more closely to the governance of the Organisation. Where they do have a bearing on the subject matter of this work, they will be examined as regards the procedures to be followed in relation to the character of ILO instruments, operation of ILO instruments in general through supervisory machinery and the functioning of the structures created by, or responsible to, the Organisation as a whole.

1.01.6 Specific provisions relating to the adoption and supervision of measures comprising the substance of international labour law, as well as to their enforcement nationally and internationally, are dealt with below,³ as are the regulations governing technical rules concerning the internal workings of the relevant ILO machinery.⁴

1.01.7 The Constitution is not an especially lengthy document. It comprises some twenty-two pages (to which must be added the three pages of the *Declaration of Philadelphia* annexed to it in 1944, and forming part of it).⁵

1.01.8 There are, however, a number of features of the ILO Constitution, which are important to note at the outset.

1.01.9 One of these relates to the content of the Constitution, in particular the incorporation into it as part of the binding treaty of the *Declaration of Philadelphia*, which was adopted as an amendment in 1944,⁶ and which elaborated its aims and purposes according to a number of stated principles.

1.01.9.1 The extent to which the aims and purposes contained in the Constitution are binding in law must remain an open question. That the principles guide the nature and activities of the Organisation cannot be in doubt. But all of these principles have not been treated in the same way subsequent to their proclamation, in the sense that they have not been given effect equally.

1.01.10 The importance to be attached to the principles asserted through the incorporation of the Declaration of Philadelphia into the Constitution is of a different order, in that it creates obligations on Member States of the ILO to pursue the aims, purposes and principles enunciated.

³ See the other parts of this title as regards instruments, as well as the other Titles in this Part of Volume I as regards institutional, procedural and supervisory aspects.

⁴ In particular, some aspects of the Standing Orders of the International Labour Conference.

⁵ The Standing Orders comprise a further 21 pages. The official texts in the ILO volume cited above also include a further 4 pages containing the formal 20 articles of the agreement with the UN, which, *inter alia*, established the ILO as one of its Specialised Agencies. All texts are given in English and French (others exist in the remaining official languages of the ILO, namely Arabic, Chinese, German, Russian and Spanish). All citations in this work are from the English texts.

⁶ It is annexed to the Constitution as an integral part thereof. As to its origin, see Report No. 1 to the 26th Session of the International Labour Conference, entitled *Future Policy, Programme and Status of the International Labour Organisation* (ILO, Montreal, 1944), as well as the debate thereon at the Session itself.

1.01.11 In some instances these principles have been given further and more detailed expression in specific instruments embodying rules of international labour law.

1.01.12 Thus, the basic content of the rules of international labour law concerning each of them is to be found where such instruments have been adopted, and in any subsequent interpretations thereof by ILO organs charged with responsibility in relation to them.⁷

1.01.13 In one instance, however, concerning Freedom of Association, a special procedure was adopted from 1951 onwards to give effect to the principles relating to that subject.⁸ Both the procedure and the principles, as subsequently elaborated, have come to be accepted as binding on Member States of the ILO, and their constituents, as part of the obligations assumed upon membership of the Organisation.

[1] When a State decides to become a Member of the Organisation, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of Association.⁹

[2] The function of the *International Labour Organisation* in regard to freedom of association and the protection of the individual is to contribute to the effectiveness of the general principles of freedom of association as one of the primary safeguards of peace and social justice.¹⁰

[3] By virtue of its Constitution, the ILO was established in particular to improve working conditions and to promote freedom of association in various countries. Consequently, the matters dealt with in this connection no longer fall within the exclusive sphere of States and the action taken by the organisation for the purpose cannot be considered to be interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to attaining the aims assigned to it.¹¹

[4] Where national laws, including those interpreted by the high courts, violate the principles of freedom of association, the Committee has always considered it within its mandate to examine the laws, provide guidelines and offer the ILO's technical assistance to bring the laws into compliance with the principles of freedom

⁷ Together, these constitute Part II of this Volume. They are the fundamental standards of international labour law. Their place in that context is related to the manner in which their implementation is to be supervised, in terms of the Declaration thereon at the 86th Session of the International Labour Conference in 1998. See **Part II of this Volume**.

⁸ The special circumstances which gave rise to this are dealt with below: see **2.03.9** and **2.04.2**.

⁹ **Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO**, fourth (revised) edition, ILO, Geneva, 1996 (hereafter referred to as **Digest, 1996**; earlier editions are referred to as **Digest, 1985** and **Digest, 1976**), paragraph 10, citing **Digest, 1985**, paragraph 53 (which refers to cases nos. 1126, 1136 and 1137 (Chile) and case no. 1500 (China)).

¹⁰ *Ibid.*, paragraph 1, citing **Digest 1985**, paragraph 23 and case no. 1309 (Chile). Emphasis in the original.

¹¹ *Ibid.*, paragraphs 2 and 3, citing cases nos. 1500 and 1652 (China) and 1590 (Lesotho). Emphasis added.

of association, as set out in the Constitution of the ILO and the applicable Conventions.¹²

1.01.14 The mention just made of the constituents of ILO Member States draws attention to another – perhaps the most – noteworthy aspect of the ILO and its founding treaty. This is the provision made for representation of, and participation in, its organs and activities by two specified categories of non-governmental entities, namely employers and workers (and their organisations). This is among the unique features of the Constitution, giving rise to the *tripartism* which is a pervasive characteristic of the Organisation as a whole and its manner of functioning.¹³ Its importance cannot be over-emphasised, in relation to international labour law, which is among the main products of the processes in which it plays a part.

1.01.15 A further feature of the Constitution relates to its rigidity. In other words, restrictions are placed on the ease with which it may be amended. It shares this characteristic with other treaties, which may normally not be altered without a renewed assembly of those States, which adopted them in the first place, unless some other procedure is specified for amendment in the treaty itself.¹⁴

1.01.15.1 An amendment of the ILO Constitution requires not only its adoption by a two-thirds majority of those participating in a vote of the International Labour Conference, but also ratification by two-thirds of the Member States of the Organisation.¹⁵

¹² *Ibid.*, paragraph 8, citing case no. 1590 (Lesotho).

¹³ Legally, its importance as regards this part of the Constitution is the obligation that States are to be represented not only by governments but also by the other constituents, namely representatives of employers and workers from their countries. More detail on the working of the system will also be given in relation to the organs and procedures of the Organisation as regards the creation and implementation of international labour law: see, in general, **Titles 2.02** and **2.03**. See also **2.01.6** and **2.01.7** below for more extensive discussion on various aspects of this feature, as well as on the originality of the concept and its relation to the notion of sovereignty. In reality its significance is to be observed in relation to much of the content of the whole of this Volume, and indeed its influence is to be seen elsewhere throughout this work as regards substantive matters. Some of its ramifications as regards the status of Conventions as components of international labour law are considered below: see **1.02.9ff**.

¹⁴ The full effect of this form of rigidity is mitigated somewhat in relation to bilateral and other multilateral ones by the facility afforded in their cases for the entering of reservations by acceding States concerning matters contained in the treaty by which they wish to assert their right not to be bound. This facility is not available in relation to the ILO Constitution or to the instruments adopted by the ILO.

¹⁵ The requirement of *ratification* is wholly consonant with the notion that the ILO Constitution is a treaty, which can only bind States upon confirmation by their highest authorities. The requirement that amendments be ratified by governments of States is in itself a restriction on the ease of amendment; the additional need for ratification by *two-thirds* of these before they come into operation is rather more than confirmation of the vote by which the amendment was adopted, as the majority required for adoption may not (because of the tripartite nature of the vote) have included as many as that number of governments (or even of that proportion of government delegates).

On top of this, there is the *further limitation* that there must be ratification by at least five Governing Body members of chief industrial importance (see **2.03.2.2** below), a provision rather similar to that which requires the assent of (in that case all) permanent members of the UN Security Council where an amendment to the Charter is involved.

The upshot for the ILO has been that very few amendments have been effected. Of those adopted, but yet to receive the required degree of ratification are those concerning the composition and structure of the

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Edited by Neville Rubin

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[More information](#)**1.02 International Labour Conventions¹⁶**

1.02.1 A principal source of the substantive rules of international labour law is the content of the Conventions adopted by the **International Labour Conference**.

1.02.1.1 There are some 180 such Conventions in existence, adopted at varying intervals since 1919. They deal with a great variety of topics,¹⁷ but are not an exclusive source of the law either as regards the subjects in respect of which they were adopted or within the generic areas of law to which they are related.

1.02.2 Even when adopted, an ILO Convention may not be regarded as the sole repository of law on the matter in hand. This will occur, for instance, when a Recommendation is adopted on the same subject, more often than not at the same session as the corresponding Convention.¹⁸

1.02.3 It is necessary also to bear in mind that Conventions may be (and frequently are) revised or supplemented, whether or not the effect of doing so is that the original instrument is superseded as a result of such subsequent action.¹⁹

1.02.4 It is perhaps as well to recall in addition that the general ambit as much as the specific content of all such instruments are products of particular circumstances that prevail at the time of their adoption.

1.02.4.1 They are, in other words, creatures of (and subject to the limitations arising from) the physical constraints of time, financial resources and energy; the mental horizons emanating from experience, the capacity for realistic anticipation of relevant social needs, nationally and internationally; and, above all, of the exigencies of securing substantial political consensus in the atmosphere of a multilateral, tripartite forum.

1.02.4.2 It has thus occurred not infrequently that the subject matter of a particular instrument relates only to one industry, sometimes to one aspect of one branch of

Governing Body itself; and even that, adopted in 1964, providing for the expulsion of a State practising racial discrimination. The exclusion of non-governmental delegates from the process of ratification of constitutional amendments has its parallel as regards the similar rules concerning ILO Conventions, with the interesting consequence – as decided by the Permanent Court of International Justice – that reservations to these on the part of States cannot be entertained at all, since it cannot ever have been they alone that adopted them. See **1.02.17.5** below.

¹⁶ The Constitution does not use this term with the extended prefatory words in version given here, referring only to “Conventions” (and, of course, “Recommendations”: on which see **Title 1.03** below as to their general character and import). The substantive elements are dealt with throughout, under their appropriate Titles, in **Part 2 of this Volume** and the remainder of the work). The phrase “international labour” has been inserted here for emphasis, as to their origin and their subject matter, as well as to them as components of international labour law which is here viewed as an aspect of international law.

¹⁷ The titles of these topics are provided in the Table(s) of Contents for this volume and the remainder of this work. As already explained, they have been classified under a number of headings, each heading grouping together instruments of a similar or related character; another, but not identical, classification has been established in the ILO secretariat by the Department of International Labour Standards.

¹⁸ The relationship between the content of such instruments and the manner in which they are given effect will be considered below (see **Titles 3 and 4**).

¹⁹ **Titles 3.01 to 3.05** on the origin and adoption of instruments.

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one industry. It may be years, even decades, before a similar instrument is adopted on a parallel matter in relation to another area of endeavour; indeed, the reversion to the topic may not have occurred at all, or if it did, may have been made to happen in another context.²⁰

1.02.5 At least as significant in relation to the overall effect of international labour Conventions is the variety of ways in which the precise meaning and effect of provisions in all ILO instruments (including Conventions) are authoritatively interpreted by bodies empowered to comment on the ways in which they have been, or are being, observed.²¹

1.02.5.1 Looked at *formally* in terms of the **ILO Constitution**,²² only the International Court of Justice may pronounce on any question or dispute relating to the interpretation of a Convention. This provision has in effect become not so much a dead letter as an opportunity of last resort, virtually never used and nowadays not seriously regarded as the main source of commentary.²³

1.02.5.2 Such commentary is, in practice however, mainly to be found in the Reports of the *Committee of Experts on the Application of Conventions and Recommendations (CEACR)* and of the tripartite **Governing Body Committee on Freedom of Association (CFA)**.²⁴ In practice, it is also often to be found in less weighty, but more frequent, advice given by way of technical assistance through the secretariat of the ILO, the International Labour Office.²⁵

1.02.6 Much of what has been said above concerning interpretation of and commentary on the instruments is designed to qualify the extent to which excessive regard is had to international labour Conventions as the *exclusive* source of obligations in international labour law. It should not, however, be taken to detract in any way from their role as a *principal* component thereof. It would indeed be true to say that most governments, and many commentators on the subject, regard it as *the major*, if not actually the only, such component.

1.02.6.1 Clearly, from what has already been said – and perhaps controversially – this is not the view taken here.

²⁰ It is probably true to say, however, that a larger number of matters of general (or *more* general, less industry-specific) concern have been the subject of ILO instruments in the last quarter of the twentieth century than in the two which preceded.

²¹ For example the **International Labour Conference** (via resolutions or the approval of reports from subsidiary bodies), the Governing Body (likewise, in its decisions), special reports of Commissions and the like – but above all through the pronouncements made under the Supervisory procedures, whether advisory or adversary in nature. See **Title 4.00** below.

²² Article 37.1.

²³ A slightly less elevated, but rarely used, alternative is the opportunity for a request by a State for an official interpretation which, if provided, would be published in the *Official Bulletin* of the Organisation.

²⁴ See **Title 4.00**.

²⁵ Hence the inclusion of **Title 2.05** below, which has relevance in this regard in addition to being intended to give a somewhat more extensive than usual account of the functioning structures of the ILO secretariat.

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International Labour Conventions

9

1.02.7 *A more traditional view would have it that, because it is international labour Conventions alone that are capable of ratification by governments, it is in their content alone that international labour law is to be found.*

1.02.7.1 *Normal in international dealings and attractive to governments as this approach might be, it is by no means clear that it is applicable to the singular character of the ILO and its instruments. It would seem to result from the conflating of a number of factors and the ignoring of others – especially those that are unique in the nature of the ILO itself and to those of its instruments embraced within this category of law as a whole.*

1.02.7.2 *In particular, it does not take into account sufficiently the element of tripartism – its role in formulating and its impact on the creation of the instruments. This is often perceived as a diminution of the sovereignty of governments. That is true, to the extent envisaged (and prescribed) in the Constitution; yet such diminution is also be seen as the extension of the cession of sovereignty due by any State as it enters into relations within the international community.²⁶*

1.02.8 *What is special about the extension in the case of the ILO is the permanent element of creative tension that is built in to process and law within its specified domain.*

1.0.8.1 *Thus, to address the conflation first: there would seem to be a somewhat precipitate running together of the basic doctrine of sovereignty, which is the prerogative of governments, with that of their role in ratifying Conventions. In other words, it seems to be assumed that ratification of an ILO Convention as a sovereign act of a Government (acting in the name of a State) is complete in itself as the basis for its validity and its enforceability. Neither in reality nor in law is this necessarily the case.*

1.02.9 *It must be recalled that the Conventions do not owe their existence to ratification: they come about through adoption at the International Labour Conference by a two-thirds majority which cannot, by its very nature, be constituted through the votes of government delegates alone.²⁷*

1.02.10 *It is true that all Conventions contain a provision to the effect that they will not come into force until a period has elapsed²⁸ following receipt and registration of a minimum number of ratifications.²⁹ But once that number has been reached, and duly registered, they do come into force.*

²⁶ Acknowledged as an essential constituent of all international law since first enunciated classically by Grotius in *De Jure Belli ac Pacis: Libri Tres* and his enthusiastic followers from the time of the creation of the League of Nations (and, of course, the ILO) like T. J. Lawrence in his *Principles of International Law* (1924).

²⁷ This, of course, is the real significance of the tripartite element in the ILO's structure so far as instruments are concerned. Of importance here is not only the voting procedure on the adoption of the instruments but also that in the Committees, which formulate their specific content. See, generally, **Title 3**, and in particular **3.04** thereunder.

²⁸ Normally, one year.

²⁹ Normally, two – although a few Conventions provide for a larger number. The virtual certainty of their enforceability thus adds, in any realistic assessment, to the point being made here.

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1.02.11 But even before that, of course, they create certain obligations in relation to the requirement that the instruments be communicated by the ILO to governments, and on governments that they be submitted for ratification or other action to the appropriate³⁰ authorities within a Member State.

1.02.12 That, once ratified – as provided both in the **Constitution** and in the Conventions themselves – they becoming binding on any State which has ratified them is the most obvious and explicit of the obligations assumed by the States, which choose to follow the option to do, so which is thus provided to them.

[1] All governments are obliged to respect fully the commitments undertaken by ratification of ILO Conventions.³¹

1.02.13 But once they are in force, the Conventions are, at very least, binding on the ILO itself as an institution, on its secretariat, and so far as its expert and advisory organs are concerned.

1.02.14 In other words, the entry into force of a Convention through receipt of the minimum number of ratifications has the effect of rendering it not just part of, but also applicable in, international labour law.

1.02.15 So established, as has been argued elsewhere,³² they are situated so as to become more widely observed (whether through further ratification or other forms of practical application) and thus not only a potential, but an actual, component of customary international law.

1.02.15.1 In those States whose law permits (even, in some cases, insists on) the application of customary international law as an integral – sometimes, an over-riding³³ – component of municipal law, the provisions of the principal international labour law instruments may become applicable in those jurisdictions *irrespective of ratification by the such a State*.

1.02.16 The narrower view, which sees ratification as the only means whereby such obligations at international (labour) law can be created would seem to arise from the failure to pay due attention to the *singularity* of the ILO, essentially its tripartite character, in relation to its procedure for the adoption of instruments.

1.02.17 A related aspect of the matter may be the assumption that ratification of a treaty is the only means of creating an obligation which is binding in law internationally. That this is generally the case as regards law created by treaty is widely accepted.

³⁰ I.e. by providing the substantive matter in respect of which an obligation is created under **the Constitution (Articles 19 and 22)**. The term used in **Article 19(5) of the ILO Constitution** is “authorities within whose competence the matter lies” – the standard shorthand for which is, “the competent authorities”, a term used in many (if not all) of the Conventions themselves.

³¹ **Digest, 1996**, paragraph 11, citing case no. 1304 (Costa Rica).

³² See N. Rubin, “International Labour Law and the Law in the New South Africa”, inaugural lecture delivered at the University of Cape Town, 25 March, 1998; Cape Town, UCT Press, 1998; also in *South African Law Journal*, Vol. 115, Part IV, pp. 685–709.

³³ *Ibid.* See, for example, the Constitution of the Republic of South Africa, Act No. 108 of 1996, Chapter 14, especially sections 232 and 233.

But that, too, is to gloss over the distinction between treaties as they are ordinarily adopted and those established under the rules embodied in the ILO Constitution.

1.02.17.1 The difference, as has been pointed out by one learned authority,³⁴ is that other treaties come into being through agreement among plenipotentiary representatives of States/governments, a majority of whom may vote to accept them, but

1.02.17.1.1 who cannot impose their will on those who disagree with a treaty as a whole or to specific aspects of its content; and

1.02.17.1.2 cannot even bind their own governments, and therefore require positive confirmation of assent through ratification.

1.02.17.2 In the case of the ILO, it is in the first place *not government representatives alone who vote to adopt the instruments, but also at least some representatives of employers or workers (or, more commonly, both)*.³⁵

1.02.17.3 Secondly, upon adoption by this means, *the authenticated text becomes an instrument of the ILO with an independent existence of its own* by virtue of the signatures of the President and the Secretary-General of the International Labour Conference, and on that basis must be communicated to governments for further action under the **ILO Constitution**.³⁶

1.02.17.4 Thirdly, *governments that may have voted against adoption are bound by the ILO Constitution to take action on the measure in exactly the same way as those, which may have voted to secure its adoption*.³⁷

1.02.17.4.1 That obligation³⁸ does not involve the need to ratify the Convention – to insist in this way on acceptance would be an imposition clearly not envisaged in the Constitution; but neither does it absolve any government from any further attention to the matter, nor afford it an opportunity to avoid attention under the ILO's supervisory procedures should ratification not take place.

1.02.17.5 A fourth element, already noted, can here be seen as a further consequence of the ILO's tripartite machinery: *the specific denial of the capacity of any government to enter a reservation concerning a Convention, as a whole or in part*.

1.02.18 *Seen thus, ILO Conventions are not treaties in the ordinary sense of the term. It is for that reason that some doubt has been expressed as to whether the term*

³⁴ D. W. Bowett, *The Law of International Institutions*, 4th edition (London, 1982).

³⁵ The nature of tripartite representation is such that government delegates cannot on their own constitute a sufficient majority to secure adoption; there must, mathematically, be a combination, which includes elements of at least two of the three categories. In practice, the majority required has always included some representatives of all three.

³⁶ An inchoate one, it would seem, until the required minimum of ratifications has been registered.

³⁷ Such is the nature of the ILO's tripartite representative structure, that the adoption of an instrument could not take place without the affirmative vote of at least a minority of governments. In practice, it is inconceivable that one could be adopted without the support of a majority of them. None has.

³⁸ In terms of **Article 19(5)**, to submit the instrument for the attention of the "competent authorities", whose consent may (but need not) be sought, for the purpose of committing it to obligations established under **the Constitution** in relation to the substantive content of the Convention. See **Title 3.08** below.