ILO Century Project

The ILO's contribution to the development of international human rights law and human security in Sub-Saharan Africa

Ben Chigara
Brunel University, UK

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1. INTRODUCTION

This essay examines the ILO's contribution to the development of international human rights law, focusing especially on the Organization's impact on the effort to protect the dignity inherent in native indigenous Sub-Saharan African workers as human beings. It shows that the way in which the ILO has exercised its subject and object jurisdictions, and prosecuted its standard setting practice has defined the Organisation as the "*spear-force*" of the international human rights movement. The ILO's human rights work has informed and influenced significantly the development of the multilateral,[1] regional[2] and national approaches that now characterise the

* The writer is Research Professor of International Laws and Director of Enterprise and International Affairs, at The Brunel Law School, Brunel University, Uxbridge, United Kingdom. He is grateful to Jose, A.V. and Swepston, L. for their comments on an earlier draft; and to Constance Chigara, Barnabas Chigara and Ben Chigara Jr. for their support.

development and protection of standards and practices for the protection of the dignity inherent in individuals as human beings. The coordination between the ILO and the UN[3] on the one hand, and the ILO and nation states on the other, on matters of human rights of mutual interest is well documented.[4]

In particular, the ILO's pioneering and continuing effort to address social challenges that "threaten conditions of hardship, and privation to large numbers of people so as to threaten or, produce unrest so great that the peace and harmony of the world would be imperilled,"[5] has contributed immeasurably to the development of general international legal standards against such practices as discrimination;[6] and in favour

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[1] See for example Allen, M.J. (1984-85) "UNESCO and the ILO: A tale of two UN Agencies", Notre Dame Journal of Law, Ethics and Public Policy, vol.1 pp.391-419; Levien, L.D. (1971-72) "A structural model for a World Environmental Organization: The ILO Experience", George Washington Law Review, vol. 40 pp.464-75.

[2] See for instance ILO – OAU Agreement on cooperation, 5 International Legal Materials 107 (1966).

[3] The UN and the ILO are currently engaged in a promotional exercise to ensure recognition by states of the right of individuals to decent work as a means to ensure (i) poverty reduction, and (ii) sustainable development. See "ILO hails new UN Declaration on strengthening global efforts to promote Decent Work for poverty reduction and sustainable development", ILO website, available at: http://www.ilo.org/public/english/region/ampro/cinterfor/news/sus_dev.htm (accessed on 19 March 2008). A strong omplimentarity of interest regarding practice on the requirement of equality and non-discrimination exists also between the ILO and the UN Committee on the Elimination of Racial Discrimination (CERD) – see Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966); and regarding the prohibition against child labor, and the worst forms of child labor between the ILO and the African Committee of Experts on the Rights and Welfare of the Child. See also Article 1 of the ILO-OAU Agreement on Cooperation, 5 International Legal Materials 107 (1966).

[4] See also ILO (1973) "Co-ordination of the activities of various international organizations and team work carried out by them", Unif. L. Rev. o.s. 117-20; Gormley, (1967-68) "The use of public opinion and reporting devices to achieve world law: Adoption of ILO practices by the UN", Albany Law Review, vol. 32 No.2 pp.273-302; Blyth-Kubota, F. (1992-93) "Specialised agencies and other United Nations Organs working in the field of human rights", Nordic Journal of International Law, pp.193-95; Allen, M.J. (1984-85) "UNESCO and the ILO: A tale of two UN Agencies", Notre Dame Journal of Law, Ethics and Public Policy, vol.1 pp.391-419.

[5] See appendix to the ILO Constitution (1919) available at ILO website, http://www.ilo.org/global/About_the_ILO/Origins_and_history/Constitution/lang--en/index.htm#annex (last accessed 30 November 2007)

[6] ILO Discrimination (Employment and Occupation) Convention, 1958, 362 U.N.T.S. 31, entered into force June 15, 1960; UN International Convention on the Elimination of All Forms of Racial Discrimination (1966) 660 UNTS 195; UN Declaration on the Elimination of Discrimination against Women - UN Proclaimed by General Assembly Resolution 2263 (XXII) of 7 November 1967; Convention against Discrimination in Education Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 14 December 1960, entry into force: 22 May 1962, in accordance with article 14; UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/36/684 (1981); See also the report of the UN High Commissioner for Human Rights, 30 September 2002 - on the implementation of and follow-up to the Durban Conference. The Report outlines stakeholders' strategies for the implementation of the outcomes of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in September 2001, A/57/443

of such restorative principles as indigenous rights;[7] and communal integrity standards as self-determination of peoples[8] and minority rights.[9]

The usual writing constraints of space and time restrict the discussion to an examination of development by the ILO of standards for the recognition, promotion and protection of the dignity inherent in native indigenous Sub-Saharan African workers *qua* human beings. In particular, it analyses the effect on the development of international human rights law of the doctrine of voluntary labour that was inaugurated by the Forced Labor Convention (1930)[10] as part of the ILO initiative on the Native Labor Code (NLC). The NLC was developed especially for the regulation of labor relations in the colonies particularly because the colonial powers had rejected in their colonies the application of the emergent ILO code intended for the metropolitan powers.

The major colonial powers of Sub-Saharan Africa included France, which after the Berlin Conference of 1884[11] took control of most of West Africa, and Britain, which took East and Southern Africa. Belgium took control of the vast Congo basin while Germany occupied four colonies, one in each of the realm's regions. Portugal held a small colony in West Africa, and two large ones in Southern Africa.[12]

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[7] See ILO Recruiting of Indigenous Workers Convention, 1936, (shelved); ILO Indigenous and Tribal Populations Convention, 1957, ILO Indigenous and Tribal Peoples Convention, 1989. At its sixty-first plenary session, held in September 2007, the UN General Assembly adopted the Declaration on indigenous peoples. See UN website at http://www.un.org/News/Press/docs/2007/ga10612.doc.htm (last accessed 29 January 2008); For a synopsis of the history of this Declaration, see Errico, S. (2007) "The UN Declaration on the Rights of Indigenous People", available at Asil website http://www.asil.org/insights/2006/08/insights060814.html (last accessed 29 January 2008)

[8] See also the Declaration on the Right to Development adopted by General Assembly Resolution 41/128 of 4 December 1986.

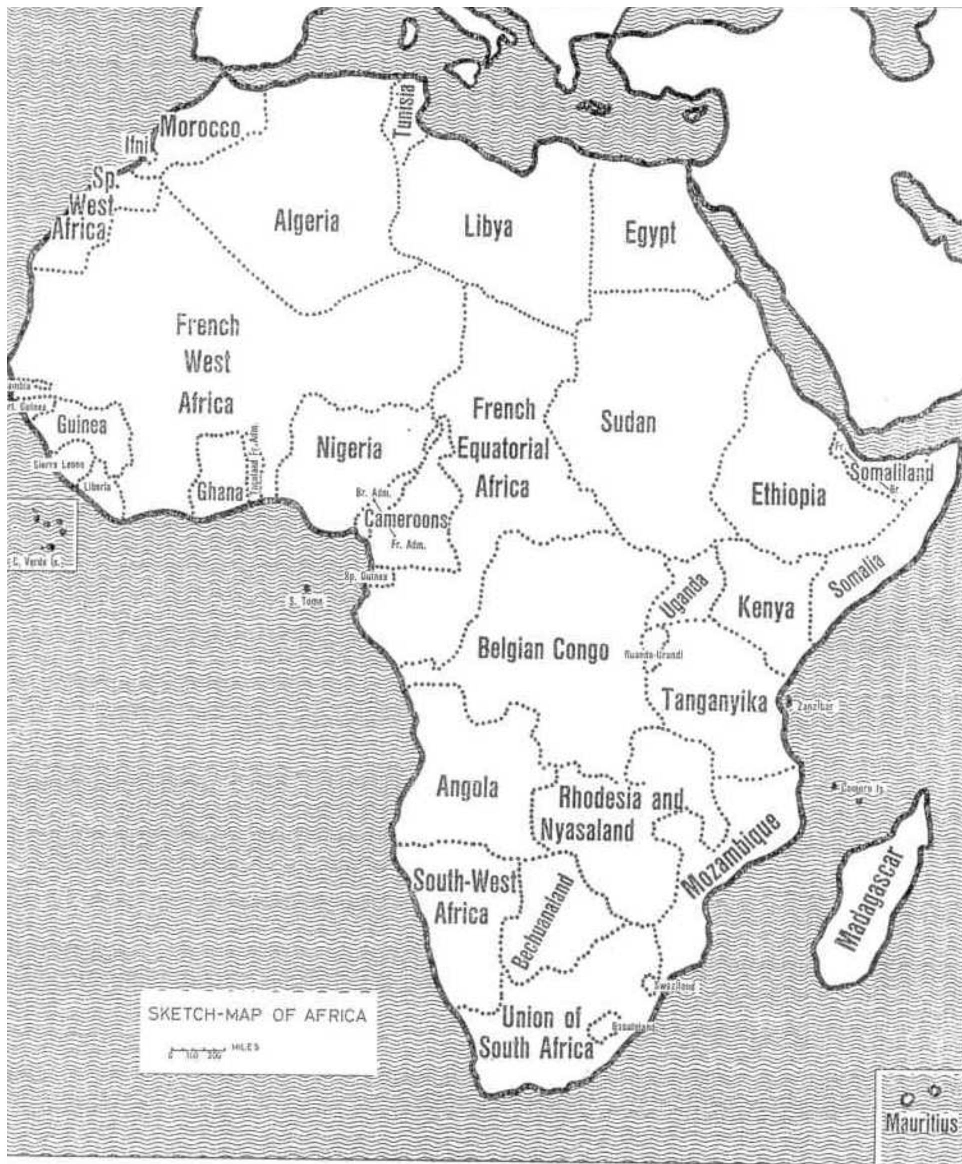
[9] See especially Claudia Saladin (1991-1992) "Self-Determination, Minority Rights and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic", Michigan Journal of International Law Vol.13. pp. 172-217.

[10] 39 UNTS 55.

[11] At this conference, colonial powers agreed spheres of control. See Convention Revising the General Act of Berlin, February 26,1885, and the General Act and Declaration of Brussels, July 2,1890; American Journal of International Law, vol. 15, No. 4, Supplement: Official Documents (Oct., 1921), 314-321.

[12] See Figure 1 below.

Figure 1: Sketch map of Africa, demonstrating the colonial powers' spheres of influence agreed under the terms of the1844 Berlin Conference.[13]



N. B. This sketch-map is not intended to indicate or endorse precise boundaries.

This essay concludes that in spite of the mounting social justice issues attending the end/start of the millennium, the impending 100th anniversary of the ILO is a moment for positive and gratifying reflection for the Nobel Peace Prize winning Organization. The achievements of the ILO to date have led to the development by others of doctrines that have extended the application of labor rights and human rights

[13] See ILO (1958) Africa Labour Survey, Geneva, p.xiv

principles that were first proclaimed in ILO Conventions and Recommendations.[14] They include the Strasbourg based European Court of Human Rights (ECtHR); the Human Rights Committee that supervises the implementation of the Covenant on Civil and Political Rights; the Inter-American Court of Human Rights; and Constitutional Courts of democratic countries.

For instance, the doctrine of positive legal obligations currently under development in the jurisprudence of the ECtHR requires states to ensure that there are adequate criminal law provisions in their domestic law for the prevention or punishment of private actors that commit individuals to forced labor contrary to the Forced Labor Convention (1930) that prohibits coercive labor practices.[15] This obligation can be traced back to Article 25 of C. 29 which explicitly obliges states to ensure against this mischief. By requiring states to take positive legal obligations in order to ensure that private actors are constrained from breaching Convention rights, the emergent doctrine of positive legal obligations challenges the traditional view that civil and political rights require states merely not to interfere with individuals' freedoms.

The author recommends the strengthening of (i) ILO technical assistance initiatives, and (ii) the Organization's information gathering and processing enterprise, in order to ensure the highest possible quality in the advice given to states on matters relating to social justice issues that have the potential, if badly managed, to result in conditions of hardship, and privation to large numbers of people so as to threaten or produce unrest so great that the peace and harmony of the world might be imperilled. Quality advice gives the best chance that matter will be addressed efficiently. Corrupt advice lessens the chances of success.

[14] See Siliadin v France, 45 ILM 962 (2006); *Lovelace case,* Communication No. 24/1977: Canada. 30/07/81. CCPR/C/13/D/24/1977; *Iversen v Norway,* The Times, March 13, 1964; (1468/62) CD12, 80 discussed in detail below.

[15] *Siliadin v France,* ibid. para. 65.

2. THE ALL INCLUSIVE LEGAL COMPETENCIES OF THE ILO

Constitutionally, the Philadelphia Declaration concerning the aims and purposes of the ILO (1944)[16] radically transformed the legal competencies of the ILO that had been enumerated in Part XIII, Section 1 of the Peace Treaty of Versailles (1919)[17] by extending their scope from workers, to *people everywhere*. This development served to emphasise the urgency in the mission to overcome social injustice and social conditions that evidenced such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled.[18]

The *subject* and *object* jurisdictions of the ILO[19] marked it out first and foremost as a human rights organization except by name. Its purpose, namely, to unite governments, employers and workers so that they might act together to promote social justice through standard setting (tripartism)[20] immediately set it apart as a champion for social justice. Miller[21] has helpfully defined social justice as a people centred idea that encapsulates distributive justice, by which is meant " the fair distribution of benefits among the members of various associations".[22]

Liberal conceptions of social justice link the idea to the notion of "enlightenment," which privileges above all else reasonableness and justice.[23] They rely on an organic perspective of society that regards the individual as a core element. Consequently, to flourish society requires the cooperation of all its elements. In this sense, social justice is the barometric test for the presence of the institutional arrangements that are a

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[16] (1944). See appendix to the ILO Constitution (1919) available @ ILO website, http://www.ilo.org/global/About_the_ILO/Origins_and_history/Constitution/lang--en/index.htm#annex (visited 30 November 2007)
[17] See Primary Documents on The war to end all wars website available @ http://www.firstworldwar.com/source/versailles.htm (visited 30 November 2007)
[18] Preamble, supra. n.3.
[19] Supra.
[20] See also Vincent-Daviss, D. (1982-1983) "Human Rights Law: A research guide to the literature – Part III: The International Labor Organization and human rights" New York University Journal of International Law and Policy p. 211; Waugh, D.A. (1982) "The ILO and human rights", Comparative Labor Law Vol. 5 p.186; Gormley, W.P. (1968) "The use of public opinion and reporting devices to achieve world law: Adoption of ILO practices by the UN", Albany Law Review vol. 32 No. 2 p.273. Employers and employees representatives from each member state party participate in the ILO Conference decision-making process on an equal footing though not in equal numbers with national governments.
[21] Miller, D. (1999) Principles of Social Justice, Harvard University Press, Massachussetts.
[22] Ibid. p.2
[23] Ibid. p. 4.

precondition for each person to have the possibility to contribute fully to social well-being.[24]

In general, social justice premises social progresses on a healthy integration of social agents that privileges the value of the sum of the “interdependent parts, with an institutional structure that affects the prospects of each individual member and that is capable of deliberate reform by an agency such as the state in the name of fairness”. [25] The ILO dynamic of tripartism is Miller compliant in that it seeks to ensure that stakeholders themselves collectively determine the standards for the recognition, promotion and protection of the dignity inherent in individuals *qua* human beings. Bearing in mind the international legal system’s much complained about uniqueness in that it lacks law-enforcing agents similar to the police force that is common to domestic legal systems,[26] tripartism engenders that all-important state cooperation that ensures the viability of international institutions.

In hindsight, the ILO mandate to facilitate the establishment of international peace and security through the promotion of state recognition and protection of the dignity that is inherent in workers as human beings must have favoured more than anyone else, the politically disenfranchised native indigenous peoples of colonial territories of Africa, Asia and South America because few hardships compare to the indignities that accompany the nightmare of conquest or occupation by another group of people, particularly when such occupation is characterised by apartheid and practices similar to it as was more often the case than not in colonial Africa.[27] Thus, to be credible and to gain legitimacy the emergent ILO code had to be demonstrably universal in its values and application, particularly during the inter-war period. But this was vehemently opposed by the colonial powers.

With fierce opposition from Albert Thomas - the ILO Director General - colonial powers had persistently argued during the negotiations for the Forced Labor Convention (1930), that compulsory and forced labor was a necessary, benevolent,

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[24] Ibid.
[25] Ibid.
[26] See Dixon, M. (6th edn 2007) Textbook on International Law, Oxford University Press, p.6
[27] See Judd, D. (1996) Empire: The British Imperial Experience, From 1765 to the Present, Fontana Press, London.

educational and civilizing experience for the "primitive native" populations of Africa who lacked appreciation of the "inherent virtues" of European working habits.[28] They argued among other things that native indigenous Africans:

1) Had very few needs compared to Europeans. Therefore, if they were paid for their labor, they would work half as much.[29]
2) Work for a definite sum of money and the sooner they earned it the sooner they would quit work. Therefore, increased wages only served to shorten their period of employment.[30]

Nonetheless, by Article 22, the Peace Treaty of 1919[31] had obligated colonial powers to observe the principle of "sacred trust of civilization" by which they were required to ensure the well-being and development of colonized peoples. Further, by Article 23[32] states were required to ensure fair and humane conditions of labor for men, women and children.

But the Declaration of Philadelphia (1944) led to a distinction between two types of indigenous workers, namely, indigenous workers in dependent or non-metropolitan territories on the one hand, and aboriginal indigenous populations in independent countries on the other.[33] This distinction resulted in different expectations for the different categories. The Committee of Experts on Social Policy in Non-Metropolitan Territories (1945) was charged with responsibility for the former group while the Committee of Experts on Indigenous Labor (1946) was tasked with the examination of issues affecting the latter group. The former Committee's fifth and final session was held in December 1957.

The Committee of Experts on Indigenous Labor (1946) had favoured the policy of assimilating indigenous groups into the mainstream by affording them the same legal

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[28] See also D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.481.
[29] See Goudal, J. (1939) "Agricultural Development and Indigenous Labor in the French Colonies of tropical Africa", International Labor Review vol.40 p.217.
[30] Ibid.
[31] Supra. n.1.
[32] Ibid.
[33] See also "First Session of ILO Committee of Experts on Indigenous Labor", International Labor Review, (1951) 64 p.61.

protections available under national law. This integrationist approach which appears to have marked all the thinking behind the new UN system – including the ILO – kin the immediate post-War years, has now yielded to an approach far more respectful of the rights of indigenous peoples to continue to exist, and that respects their dignity and human rights as groups.[34] The latter favours the legal acknowledgment, recognition, promotion and protection of indigenous people's domains and their traditional and cultural preferences alongside those of other social groups.[35]

Nevertheless, in the thinking of the time, in Sub-Saharan Africa, Portuguese colonies evidenced the most advanced application of the practice of *assimilado*, by which indigenous people only attained certain civil and political rights to the extent that the political system adjudged them to have both aspired to, and achieved "the Portuguese way of life" in rejection of their own culture.

> Those Africans and *mestiços* (*q.v.*) considered by the colonial authorities to have met certain formal standards indicating that they had successfully absorbed (assimilated) the Portuguese language and culture. Individuals legally assigned to the status of *assimilado* assumed (in principle) the privileges and obligations of Portuguese citizens and escaped the burdens, e.g., that of forced labor, imposed on most Africans (*indígenas*--*q.v.*). The status of *assimilado* and its legal implications were formally abolished in 1961.[36]

The policy of privileging of European culture over native culture has been widely practised. In Portuguese colonies, the authorities subordinated the legal entitlements of potential native indigenous claimants to sufficient proof that they had adopted Portuguese culture normally at the expense of their own. These attitudes were embodied in international law in the ILO Indigenous and Tribal Populations Convention, 1957 (No. 107), ratified by Portugal on 22 November 1960. This convention was revised by ILO C.169 in 1989, as the international community including the ILO began to dissociate themselves formally from the error of earlier assimilationist policies.

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[34] See also Gordon, S. (2006-2007) "Indigenous rights in modern international law from a critical third world perspective", American Indian Law Review vol. 31 p.401; Swepston, L. (1990) "A new step in the international Law on indigenous and tribal peoples: ILO Convention No. 169 of 1989", Oklahoma City University Law Review vol. 15 N0.3 p.677; Parrish, A.L. (2006-2007) "Changing territoriality, fading sovereignty, and the development of indigenous rights", American Indian law Review vol. 31 p.291.

[35] See "The "Second Session of the ILO Committee of Experts on Indigenous Labor", International Labor Review, (1954) 70 p.418. See also Mabo and others v State of Queensland, Australian Law Reports, 107 (1992) p.1.

[36] See Country profile website (Mozambique and Angola) also available @ http://www.country-data.com/frd/cs/angola/ao_glos.html (visited 18 December 2007)

Attitudes began to change as exemplified by a series of judicial decisions. In the *Lovelace Case*,[37] a 32-year-old *Maliseet* Indian woman living in Canada challenged section 12 (1) (b) of the Indian Act by which she was legally deemed to have forfeited her rights and status as an Indian upon her marriage to a non-Indian on 23 May 1970. She had been born and registered as a *Maliseet* Indian. She argued *inter-alia* that the Act was discriminatory on the grounds of sex contrary to articles 2 (1), 3, 23 (1) and (4), 26 and 27 of the International Covenant on Civil and Political Rights (1966)[38] (ICCPR) because an Indian man who married a non-Indian woman was not stripped of his Indian status.

The Human Rights Committee - the treaty-body that supervises state compliance with the ICCPR, found in her favour. The Committee held that the Indian Act breached her Convention rights *and that the particular right being denied was the right to enjoy her culture within her community*.[39] The Canadian government responded by amending the *Indian Act* to bring it in harmony with the ICCPR. Thus, cultural rights that are exercisable not only in isolation, but in community with others, including the right to speak and or learn in one's native language[40] are now deemed to be critical to the protection of the dignity that is inherent in individuals *qua* human beings.

Consequently, it is arguable that long before the adoption of the Universal Declaration of Human Rights (1948),[41] the ILO had begun to identify critical issues to do with the recognition, promotion and protection of the dignity inherent in individuals *qua* human beings, and to develop norms and standards for their protection. The areas covered included protection of the human dignity inherent in native men and women as workers, and in children simply as human beings. This fact is extensively

[37] Communication No. 24/1977: Canada. 30/07/81. CCPR/C/13/D/24/1977
[38] 999UNTS 171.
[39] Emphasis added.
[40] See also *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 which has been cited and relied upon in a number of later decisions including *Ali (FC) (Respondent) v. Headteacher and Governors of Lord Grey School* (Appellants) [2006] UKHL 14; *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, In later decisions the reasoning in that case has been followed but elaborated.
[41] G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

documented, principally in ILO Conventions and Recommendations[42] and in the *travaux preparatoires* of ILO proceedings.

Examples include conventions dealing with personal integrity[43] rights such as the Night Work (Women) Convention (1919); Minimum Age (Industry) Convention (1919); Inspection of Emigrants Convention (1926); Forced Labor Convention (1930); Maintenance of Migrants' Pension Rights Convention (1935); Recruiting of Indigenous Workers Convention (1936); Penal Sanctions (Indigenous Workers Convention (1939); Migration and Employment Convention (1939); Contracts of Employment (Indigenous Workers) Convention (1947); and the Indigenous and Tribal Populations Conventions (1957 and 1989); Freedom of Association and Protection of the right to Organize Convention (1948); Right to Organize and Collective Bargaining Convention (1949) and the Indigenous and Tribal peoples Convention (1989). This is because one of the ILO's original central purposes has been and continues to be to facilitate the extension of human rights. A one time officer of the ILO writes that although the ILO is most frequently associated only with rights pertaining strictly to labor issues, it nevertheless addresses a much wider spectrum of human rights.[44]

However, it is the UN Universal Declaration of Human Rights (UDHR) (1948) that is habitually regarded as the most significant embodiment of human rights standards, and as "showing signs of having achieved the status of holy writ within the human rights movement … and … as the spiritual parent of the human rights documents."[45] But through its standard setting practice, the ILO had already begun to codify the social purposes of economic development in much the same way as the UN

[42] For a description of the distinction between Conventions and Recommendations of the ILO, see Vincent-Daviss, D. (1982-1983) "Human Rights Law: A research guide to the literature – Part III: The International Labor Organization and human rights", New York University Journal of International Law and Policy, p.231.
[43] See Thoms, O.N.T. and Ron, J. (2007) "Do Human Rights Violations Cause Internal Conflict?" Human Rights Quarterly Vol. 29 No.3 p.684-5.
[44] Waugh, D.A. (1982) "The ILO and human rights", Comparative Labor Review Vol.5 p.186.
[45] See Mutua, M. (2007) "Standard setting in Human Rights: Critique and Prognosis", Human Rights Quarterly Vol 29 No.3 p554. He writes that "There appears to be consensus within the UN and among states, academics, and human rights advocates that the UDHR is the most significant embodiment of human rights standards. It has been described as See also Teitel, R. (1997) "Human Rights in Theory", Fordham Law Review Vol. 66 pp.301-17; Glendon, M.A. (1998) "Knowing the UDHR", Notre Dame Law Review Vol. 73 p.1153.

Millennium Development Goals (2000)[46] and the World Commission on the Social Dimension of Globalization (2004)[47] have more recently attempted - well before the appearance of the UDHR.

A number of NLC conventions promulgated up to 1949 collectively evidence the development of:

> [A] series of basic principles to which all policies designed to apply to non-metroplitan (colonial) territories should conform and prescribe standards and indicate lines of policy on such matters as improvement of standards of living, remuneration of workers and related questions, problems of migrant workers, non discrimination, education and training of workers.[48]

But from the outset, the ILO recognised a basic fact, namely, that the peculiar circumstances in which the majority of the world's population exists requires constant re-examination, re-evaluation and consequently, the redefinition of the purposes of economic development and prosperity because of the Organization's commitment to the view that: mankind can create the conditions necessary for the fulfilment of the essential needs of each human being. …. … and that each human being has a right to such fulfilment.[49] But the ILO had to overcome colonial powers' strong resentment of the idea of offering colonial labour the same legal protections that they were rolling out to metropolitan labour.

For the ILO, the social conditions attendant upon the native African immigrant worker required urgent attention. For instance, a Report of the Government of the British Protectorate of Nyasaland on labor recruitment and native welfare (1936)[50] revealed extreme hardships experienced by Nyasaland natives migrating to Southern Rhodesia, the Union of South Africa and East Africa for work. The Report estimated that more than 25 percent of the adult population of Nyasaland was abroad. However, they lacked the legal protection that properly controlled recruiting affords because by prohibiting recruitment, the Nyasaland government had failed to make the export of

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[46] See UN Millennium Declaration, 18 Sept 2000, A/RES/55/2

[47] Available at ILO website, http://www.ilo.org/public/english/wcsdg/index1.htm (visited 2 December 2007)

[48] ILO (1959) "The ILO and Africa", International Labor Review p.91.

[49] Waugh, D.A. (1982) "The ILO and human rights", Comparative Labor Review Vol.5 p.187.

[50] Nyasaland Protectorate: Report of the Committee Appointed by His Excellency the Governor to Enquire into Emigrant Labor (1935) Zomba, Nyasaland, Government Printer, 1936.

its labor conditional on any terms.[51] The Nyasaland government had coped out of this situation by leaving it to the host states to secure the interests of its migrant workers.[52]

However, the Chief Native Commissioner of Southern Rhodesia, where the majority of Nyasaland's emigrant labor ended up, reported the following:

(1) That the abundance of labor supply created by the influx of emigrant labor resulted in a drastic reduction in wages.
(2) An increase in European undertakings failing to pay their laborers when their ventures were unsuccessful.[53]
(3) That generally, compensation was not paid out to the dependants of natives that died from miners' phthisis or that got injuries on the mines.[54]
(4) That invalid workers were repatriated back to Nyasaland on an open lorry or train with no medical treatment, and in some cases only to the "nearest point of destination [to] walk the rest of the way" – usually distances exceeding a hundred miles, clothed only in rags.
(5) That no special facilities were provided for the remitting of workers' savings back to Nyasaland. Rather, inducements were laid out for them to spend all their earnings. [55]

In Tanganyika, the Government absolved itself from responsibility for the conditions experienced by emigrant workers in the Lupa gold areas. Consequently, most of the employers hired more workers than they could actually pay "in the hope that something will turn up" from the digging.[56] Often this resulted in unpaid work and if the workers complained to the authorities, they secured only a promise of pay. Similarly children that were employed as diggers often went without pay, working only for the promise that they would be paid if they found something.[57] Ill health,

[51] See Reports and Enquiries: Recruiting I and Native Welfare in Nyasaland, International Labor Review vol. 33 p.853.
[52] Ibid.
[53] Ibid. p.854.
[54] Ibid.
[55] Ibid.
[56] Ibid. p.855.
[57] Ibid.

including ulcers, scurvy and venereal disease were common among emigrant workers on the alluvial Lupa goldfields.

Therefore, host states' failure to recognise, promote and protect the dignity inherent in native indigenous African migrant workers, coupled with sending states' failure to agree minimum standards of practice for the protection of native migrant workers allowed for a situation where (i) European undertakings' instincts for personal enrichment flourished at the expense of the legal protection of labor, and (ii) the dignity of migrant labour went unrecognized, unprotected and inappropriately rewarded.

3. THE ILO AND THE PROTECTION OF THE DIGNITY INHERENT IN INDIGENOUS PEOPLES OF SUB-SAHARAN AFRICA AS HUMAN BEINGS[58]

It is hardly surprising that the *conversion* of indigenous and tribal peoples from their previously unrestricted, loosely structured but well knit community based lifestyles to the imposed, individualistic "wage earner" style of life in Europe's colonies of Sub-Saharan Africa would become an ILO interest from the outset.

First, the pattern and cycle of expropriation of ancestral land and domains that the native Africans had held from time immemorial, coupled with their *coercion* to serve as seasonal, migrant, bonded or home-based laborers was repeated everywhere colonisation occurred.[59] Secondly, in respect of the development of agricultural production in the colonies[60] the system that emerged regarded Europeans as providers

[58] Examining barriers to greater recognition of indigenous people's rights, see also Debeljak, J. (2000) "Barriers to the recognition of Indigenous People's human rights at the United Nations", Monash University Law Review vol. 26 p.159; Tennant, C. (1994) "Indigenous Peoples, International Institutions, and the International Legal literature from 1945-1993", Human Rights Quarterly vol. 16 p.1; Goudal, J. (1939) "Agricultural Development and Indigenous Labor in the French Colonies of tropical Africa", International Labor Review vol.40 p.209; Barsh, R. L. (1994) "Indigenous Peoples in the 1990s: From Object to subject of international Law?" Harvard Human Rights Journal vol.7 p.33; Anaya, S.J. (1991) "Indigenous rights norms in contemporary international law", Arizona Journal of International and Comparative Law vol. 8 p.1; Getches, D.H. (2005) "Indigenous peoples' right to water under international norms", Colombia (Columbia, no?) Journal of International Environmental Law and Policy vol.16 p.259.

[59] Examining this phenomenon in German, Portuguese and British colonies of Southern Africa in the nineteenth century, see Chigara, B. (2004) Land Reform Policy: The Challenge of Human Rights Law, Ashgate, Aldershot, Chapter 1. See also Meek, C.K. (1949) Land Law and Custom in the Colonies, Oxford University Press.

[60] See also Goudal, J (1939) "Agricultural development and Indigenous Labor in French colonies of tropical Africa", International Labor review vol.40 p.209

of capital and technical skill, and the native indigenous populations as providers of labor. This paradigm began a process of social transformation that disrupted traditional systems of land utilisation – themselves products of centuries of adaptation to the environment.[61]

This approach to the economic development of the colonies was opposed vehemently by personalities in the ILO who had a long history of commitment to ending slavery and forced labor. One was Albert Thomas, the ILO's first Director General who championed concern for the welfare of indigenous people in the colonies.[62]

The ILO position was justified also by the fact that "… in the early stages of European economic penetration Africans showed little inclination to look for paid employment of their own accord. … [T]hey had no experience of the European system of work in return for pay, and memories of the slave trade … encouraged them to keep away from European undertakings".[63] Consequently, the idea of offer of labor may be said to have been practically non-existent[64] because native indigenous Africans conducted themselves according to their customary activities, based on a perception and use of land as a common heritage of the community.[65]

Beinart and Delius[66] write that no other country on the African continent has experienced the systematic and comprehensive displacement of the native indigenous population as South Africa. It reduced the native indigenous population into wage laborers that worked directly under the control of settler farm landowners and capital mining organizations.

> White owned farmlands have stood for over three quarters of a century, in stark juxtaposition to overcrowded and impoverished African reserves. The latter, which came to comprise roughly thirteen per cent of the country, became primarily reservoirs of migrant labor in which

[61] See also Tevoedjre, A. (1969) A strategy for Social Progress in Africa and the ILO's contribution", International Labor Review vol. 99 p.61 at 63.
[62] See also D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.480.
[63] ILO (1958) African Labor Survey: Studies and Reports, New Series No.48, Imprimeries Reunie S.A., Lausanne, Switzerland p.295.
[64] Ibid.
[65] Ibid. p.51-2.
[66] (eds. 1986) Putting a plough to the ground: Accumulation and dispossession in rural South Africa – 1850 to 1930, Ravan Press, Johannesburg, p.1.

> even those with plots of land rarely scraped more from the land than an inadequate supplement to migrants' wages.[67]

Thus, native African populations were not only expelled from ancestral domains that they had been brought up on and nurtured to live off for generations, but also had to bear daily the indignity of legitimating such alienation by going back to earn an inadequate wage on the same land that was now under the control of European undertakers.[68] The forms of labor exploitation that occurred in these circumstances fell under both the object and subject jurisdictions of the ILO.[69] Consequently, only two years after its creation the ILO began in 1921 to address the situation of so-called "native workers" in the overseas colonies of European powers.[70]

a) Problematizing "indigenousness" and its protection under international human rights law

It would be pretentious, even misleading to presume that there was fixity about the idea of indigenousness because the literature evidences shifting understandings of the idea, some more enduring than others. The Maasai of Kenya and Tanzania, the Maya of Guatemala, the Roma and the Saami of Europe, the peoples of the Chittagong Hill Tracts of Bangladesh and the Maoris of New Zealand, Canada and Australia are often cited as examples of indigenous peoples.[71] The ILO began in the post-Second World War period to use the term "indigenous and tribal" to separate the consideration of the social situation from the question of original habitation.

Anaya[72] uses social history to problematize the search for a definition of indigenousness and arrives at a liberal characterisation of the idea. Anaya's approach appears to be Miller[73] compliant in that it is inclusive, excluding only "the most transient or migratory segments of humanity."[74] Therefore, although European

[67] Ibid.
[68] See Chigara, B. (2004) Land Reform Policy: The challenge of human rights law, Ashgate, Aldershot
[69] "Background on ILO work with indigenous and tribal peoples", available on ILO website @ http://www.ilo.org/public/english/indigenous/background/index.htm (visited 01 December 2007)
[70] See ILO (1958) African Labor Survey: Studies and Reports, New Series No.48, Imprimeries Reunie S.A., Lausanne, Switzerland p.295.
[71] See for example Anaya, S.J. (2004) "International human rights and indigenous peoples: The move toward the multicultural state", Arizona Journal of International and Comparative Law Vol21 p.13.
[72] Ibid.
[73] Supra, p.2.
[74] Ibid.

nationalities that were responsible for colonialism remained indeed indigenous to their homelands,

> The dominant settler populations that were born of colonial patterns have created societies so that many might now be described as indigenous to the place of settlement. It even may be said that recently migrating populations are in the process of becoming part of the dominant indigenous receiving society or laying down roots that will, over time, establish their own distinctive indigenous connections with the place of migration.[75]

In similar vein others have argued that because of her social history and her participation in both the multilateral and the regional arrangements and regulations on refugee protection, Zimbabwe has become a multicultural state whose indigenous peoples include Zimbabweans of European, American, African and Asian descent.[76] Therefore, it is arguable that although the term indigenous and terms such as native have for a long time been used to denote:

> [A] particular subset of humanity that represent a common set of experiences that are rooted in historical subjugation by colonisation, or something like colonialism, today, indigenous peoples are identified, and identify themselves as such, by reference to identities that pre-date historical encroachments by other groups and the ensuing histories that have challenged their cultural survival and self-determination as distinct peoples.[77]

(b) Indigenousness as a tool for the development of native labor rights

The ILO writes that the International Labor Conference Session at which the Forced Labor Convention (1930) was adopted, was intended primarily to deal with the continuing direct and indirect pressure[78] applied on native indigenous Africans in colonial territories[79] for the purpose of facilitating Europeans' desire for economic penetration of the colonies by ensuring labor for the construction of public utilities such as roads, railways and harbours.[80]

Goudal writes that the Europeans had both capital and technical skill and they knew where to find markets. "[I]n almost every part of the African continent, white men had

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[75] Anaya, supra. n.71.
[76] See Chigara, B. (2001) "From oral to recorded governance: Reconstructing title to real property in 21st century Zimbabwe, Common Law World Review vol. 30 No.1 pp.36-65.
[77] Anaya. Supra. n.71.
[78] ILO (1958) African Labor Survey: Studies and Reports, New Series No.48, Imprimeries Reunie S.A., Lausanne, Switzerland p.295.
[79] Ibid p.296.
[80] Ibid.

to abstain from any kind of manual work."[81] Further, private undertakings, including plantations and mines required a level of constant labor supply that was simply not to be had on a voluntary basis. This resulted particularly in the inter-war period, in:

> … widespread and systematic imposition of forced labor on the African population, particularly in territories where Europeans did not confine themselves to trading but also engaged in agriculture or mining. Native chiefs were required periodically to supply contingents of able-bodied men, the numbers of which were fixed by the authorities. These men were used primarily for public works, although some of them might have turned over to private employers. Moreover, even in the case of recruitment by private individuals, coercion played a large part since such operations were carried out with the help and direct participation of the authorities. Taxes imposed on able-bodied men in some territories constituted an indirect form of forced labor, since only through paid employment could many Africans hope to find the necessary money.[82]

Indigenous Africans were worst affected by coercive labor practice when the institutions of the colonial authority combined with private economic interests to achieve a system whereby:

1) Penal sanctions were made an acceptable and appropriate sanction for breaches of employment contracts. Maul[83] reports that worker representatives at the 1939 ILO Conference condemned this widespread practice as an unholy alliance between private profit interests and colonial powers. The potential collusion between the colonial authority and the European undertakings disincentivised employers from creating acceptable working and wage conditions. Further, it undermined and exempted them from any legal obligation to create acceptable working and wage conditions.
2) The portions of land that native indigenous Sub-Saharan Africans could hold were deliberately limited to below subsistence levels.
3) Vagrancy laws were passed and taxes imposed to compel indigenous Sub-Saharan Africans to take paid work.[84]

[81] (1939) "Agricultural development and indigenous labor in the French colonies of tropical Africa", International Labor Review vol. 40 p. 210.
[82] ILO (1958) African Labor Survey: Studies and Reports, New Series No.48, Imprimeries Reunie S.A., Lausanne, Switzerland p.295.
[83] D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.482.
[84] Ibid. p.480.

One consequence of the uses of these coercive labor practices was the perpetual pressurisation of the natives to cooperate with the colonial administrations by providing labor whenever it was needed, or in the case of Nyasaland, to emigrate "for the express purpose of earning money to pay taxes".[85] The British Government Colonial Report of 1934[86] estimated that the native indigenous population of Malawi numbered 1,600,713. It estimated that approximately 120,000 Nyasaland natives were absent; approximately 75,000 of that number were reported to have migrated to Southern Rhodesia (present day Zimbabwe), 20,000 to the Union of South Africa (present day Republic of South Africa), and 15,000 to Tanganyika (present day Tanzania).

Further, and in support of the economic emigration theory, the Report analysed the tax situation and found that for tax alone, in the five districts that had a native population of 328,314 natives, the tax collected in 1934 at the basic rate of six shillings per year amounted to £18,379. Using the results of the 1930 native labor census, the Report found that the maximum that natives could earn in local employment was a mere £12,000 per year. Trade in native produce from the districts failed to reach one thousand pounds. Therefore, the situation pointed to a native community cash deficit for tax alone, for which the natives had to make up for by becoming emigrant workers – arguably the most vulnerable of all recognised groups of workers anywhere in the world.

Literature[87] is unequivocal about the coercive use of colonial police forces to conduct veritable labor recruitment raids on natives in order to ensure labor supply in the colonies. In Central and West Africa, France resorted to the practice of *deuxieme portion du contingent* – compulsory labor disguised as military service, where the recruits worked under military supervision for prolonged periods of time, doing whatever tasks they were given.

The ILO 1946 investigative tour of the arrangements for the compulsory recruiting of labor and the conditions of employment of such labor in Kenya, Tanganyika, Uganda,

[85] ILO Reports and Enquiries (1936) "Recruiting and Native welfare in Nyasaland", International Labor Review vol.33 p.850.
[86] Ibid.
[87] See ibid. p.479.

and Zanzibar[88] found that the European enterprise appeared to be well ahead of the wants of the African. Secondly, the native indigenous African economy was still largely intact, surviving parallel to the European ventures. Native indigenous Africans could not be induced en-masse to accept wage-paid employment.

Period	Country	Native indigenous population	Total employed as wage earners
1943	Tanganyika	5,200,000	275,000
1943	Kenya	3,280,000	248,426
1943	Uganda	3,725,000	160,000

Table 1: Measure of native indigenous voluntary participation in labor market, mostly for the European economic enterprise.

While the private European undertakings decried labor shortages and lobbied the political authorities to ensure the availability of labor when needed, for several reasons, native indigenous Africans would not oblige them.

In East Africa, native indigenous Africans perceived wage earning as a short-term measure only so that even the small minority that settled with their families near their work "intended for the most part to return eventually to their home villages."[89] Moreover, even this small number that accepted work would not work on a property that had a bad reputation for whatever reason.[90] Thus, unknown to the colonial administrations, native indigenous African labor already held very strong views about its human dignity and fiercely protected it. In the extreme, European undertakings that failed to appreciate this fact undermined their own potential to attract and recruit native indigenous labour.

In French colonies, where a policy had been pursued of parallel development of the agricultural industry by supporting both private European agricultural undertakings, and the development of native indigenous peasant farming,[91] an outstanding

[88] See ILO Reports and Enquiries (1946) "Labor Conditions in East Africa", International Labor Review vol. 54 p.37.
[89] Ibid. p.38
[90] Ibid. p.38.
[91] By a Decree of 5 September 1935 a committee had been established for the promotion of European Agriculture and indigenous peasant farming. The Committee's terms of reference were " [T]o recommend the best means of promoting European agriculture on the one hand, and the economic and social development of the indigenous peasantry on the other, these two objects being interdependent".

characteristic of the labor situation emerged. Labor was offered spontaneously to indigenous undertakings, while European undertakings found it extremely difficult to recruit.[92] Scholars of different persuasions have been exercised by this phenomenon.

Labouret[93] investigated aspects of this phenomenon in French Guinea, Senegal and the Ivory Coast partly because of its potential impact on the two forms of agricultural development and found that:

1) The native indigenous African worker cared about the material conditions of employment, including the wages. French West African workers were attracted to better conditions of employment in neighbouring British colonies. While the French employers insisted on long-term contracts - for instance three years, both native indigenous African and European employers in British territory "were quite ready to conclude monthly renewable agreements by word of mouth, pay being settled weekly and none of it deferred".[94]
2) The native indigenous African worker was concerned about the social and psychological conditions of employment offered by European and native indigenous undertakings respectively so that humane treatment was key to whether or not he would accept work.

In a related study, Rinkenbach concluded that:

> In the employment of a European, the worker receives wages in cash and kind; he works under the supervision of a foreman; he is no way materially interested in the output of the undertaking. On the contrary, when the employer is an African, the worker is a partner rather than a wage-earner; although it is his employer's land that he tills, he has a share of the crop and quite often two days off each week to cultivate on his own account, an allotment placed at his disposal by the employer. When his work consists mainly in helping gather in the crop, he has a share of what is gathered, that share being agreed upon in advance. There is therefore no fixed remuneration, and, under the ordinary conditions for working indigenous plantations, the worker has considerable freedom in the choice of his hours and methods of work. ….
> All experience shows that *the African dislikes work which leaves nothing to his own initiative and does not give him some authority. This psychological factor alone can explain the repeated failure of attempts to create a permanent supply of voluntary workers*.[95]

See Goudal, J. (1939) "Agricultural Development and Indigenous Labor in the French Colonies of tropical Africa", International Labor Review vol.40 p.213.
[92] Ibid. p.216.
[93] Labouret, H. (1936) "*Le probleme de la main-d'oeuvre dans l'Ouest Africain Francais"* cited in Goudal, ibid. p.217.
[94] Ibid. p.217.
[95] "*Le Salariat indigene en Afrique occidentale francaise", cited in* Goudal J. (1939) "Agricultural Development and Indigenous Labor in the French Colonies of tropical Africa", International Labor Review vol.40 p.217-8. Emphasis added.

Consequently, European undertakings in French West Africa kept pestering government for effective support in the procurement of labor, effectively a request to compel labor supply as and when it was required by European undertakings in Africa. They did not have to try hard. Moreover, the colonial clause in the ILO Constitution (1919) had already shown metropolitan powers' readiness to compel labor supply in the colonies. The clause entitled them to exclude partially or entirely, their overseas territories from application of international labor treaties that they had themselves ratified. This keenness of colonial powers to maintain a distinction between a labor law for the citizen at home and another or none, for the colonial native in the colonies posed for the ILO the challenge of establishing a genuinely international labor code that integrated also the welfare of native colonial labor into the general sphere of the Organization.[96]

(c) ILO Strategy

The ILO strategy for addressing both the native indigenous emigrant labor problem and the coercion of native indigenous Africans by the collusion of European undertakings and colonial administrations was constrained by the rejection and insistence by the latter that the emergent International Labor Code did and could not apply to their colonies. Maul writes that up to this point, the ILO code had a universal code only to the extent that it was generally valid for all those countries that rec`ognized it.[97]

Thus, the constitutive universal jurisdiction of the ILO set out in the Peace Treaty of 1919, and by which the achievements of the Organization would be measured, required a response to this scenario. The ILO responded by adopting a strategy that differentiated and categorized its subjects as a means to inscribe colonial native labour under some form of protection against inhumane treatment. The ILO achieved this by deploying the argument that membership of a distinctly recognisable group is alone significant to invoke complete legal protection of the dignity that is inherent in members of that group as human beings. That view was justified by the fact that other

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[96] Maul, D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.480.

[97] Ibid.

distinct groups already enjoyed similar legal protection of their dignity as human beings by virtue of group membership, or of their access to, or their links with the political establishment. The same argument formed the rationale of the Human Rights Committee more than fifty years later, in the *Lovelace case*[98] and other similar cases that followed it.

By this strategy, the ILO sought to protect the dignity inherent in individuals *qua* human beings by several means, including resort to whatever claim rights could be secured from one's identity in relation to his community, one's relationship with one's environment, and one's history. If it worked, then this strategy would consolidate the ILO's place in the vanguard of the protection of the human rights of individuals, especially the human rights of the politically disenfranchised indigenous peoples of Africa.[99] Would it work?

Categorising colonial labor as a special class of labor, in this case, a vulnerable class by implication, enabled the ILO to argue for the development of a special class of labor standards for the specific task of protecting native indigenous labour in colonial territories - a Native Labor Code[100] (NLC), quite separate and distinct from the International Labor Code that comprised the main ILO Conventions and Recommendations. However positive this strategy might have appeared to be at the time, it made the colonies a jurisdiction of separate and "ultimately less stringent legislation".[101]

The main weakness in this strategy lay in that it inadvertently sanctioned discrimination between the standards for the protection of the dignity of metropolitan labor on the one hand, and protection of colonial territories on the other. It might also

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[98] Supra. n.33.
[99] See also Thomas, A. (1921) "The International Labor Organisation. Its origins, development and future", International Labor Review Vol. 1 No.1 p.1. See also Vol.135 (1996) N0.3-4; The ILO: What it is and what it does @ http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/broch_0904.pdf (visited 01/12/07)
[100] Discussing the background and procedures to the adoption of the ILO regime against forced labor see also Swepston, L. (1990) "A new step in the international Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989", Oklahoma City University Law Review vol. 15 No.3 p677 at 67982; Anaya, J. (2004) "International Human Rights and Indigenous Peoples: The move toward the multicultural state", Arizona Journal of International and Comparative Law vol. 21 No.13 p13.
[101] D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.479 at p.481.

have morally exonerated colonial powers' argument that the emergent ILO code could not be applied in the colonial territories, contrary to the object and purpose of the ILO constitution, which had given the Organization a universal jurisdiction in the fight against social justice.[102] The Norwegian Government argued before the European Commission in *Iversen v Norway* that both C. 29 and C. 107 were inapplicable to Norway because they were part of the NLC that had been adopted "in the special context of forced labor in colonial or dependent territories".[103]

The positive side is that the lack of legal protections for native indigenous peoples under colonial occupation served to emphasise one of the fundamental functions of the ILO, namely, the gathering and processing of information regarding the welfare and condition of people everywhere in their relations with public and private actors. Without accurate information about labour conditions across the world, situations that threaten conditions of hardship, and privation to large numbers of people so as to threaten or, produce unrest so great that the peace and harmony of the world would be imperilled[104] would fester and develop into social time-bombs without much notice.

(d) The discourse on forced labor in the colonies

Literature[105] shows that by the late 1920s the ILO was already leading an international alliance against coercion of native labor in the colonies because the boundaries between "acceptable" and "unacceptable" labor practices had for the first time shifted away from a discussion about slavery to the realm of "free labor".[106] Because negotiations on the Slavery Convention (1926)[107] had exposed colonial powers' reluctance to condemn the practice of utilization of man by man beyond slavery, the League of Nations had mandated the ILO to conduct a study into the prevention of compulsory labor in order to banish conditions akin to slavery.[108] The ILO utilised this opportunity to push for a normative solution to the problem of forced labor[109] by

[102] Supra. p.1.
[103] The Times, March 13, 1964.
[104] Supra n.3.
[105] D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.479.
[106] Ibid.
[107] Adopted by consensus.
[108] D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.480.
[109] Ibid.

setting up a Committee of Experts on Native Labor. The committee was tasked with examining the systems of forced or compulsory labor operating in non-self-governing territories.[110] This resulted in the adoption in 1930 of three ILO Native Labor Code (NLC) instruments, namely:

1. Convention Concerning Forced or Compulsory Labor (C.29)
2. ILO Recommendation No. 35 (1930) - Concerning Indirect Compulsion to Labor.
3. ILO Recommendation No. 36 (1930) - Concerning the Regulation of Forced or Compulsory Labor.

Both the ILO and the UN have progressed beyond these pioneering anti-coercive labor standard setting achievements by adopting further standards. They include the following:

1. ILO Recommendation No. 70 (1944) - Concerning Minimum Standards of Social Policy in dependent Territories, adopted at the Conference meeting in Philadelphia. The Recommendation sets the roadmap for the pursuit of better social conditions for natives of colonised territories by (i) confirming the application of C. 29 to dependent territories; (ii) urging the suppression of forced or compulsory labor in all its forms within the shortest possible period – Article 7; and (iii) reiterating that slave trade and slavery in all its forms has no place in all dependent territories of the colonial powers of Europe.
2. ILO - Convention Concerning the Abolition of Forced Labor (1957) or C. 105 that targeted also the post war tendencies of using forced labor as a tool of political oppression.[111]
3. UN - International Convention on the Elimination of All Forms of Racial Discrimination (1966) [112]
4. UN Declaration on the Elimination of Discrimination against Women (1967)[113]

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[110] Vincent-Daviss, D. (1982-1983) "Human Rights Law: A research guide to the literature – Part III: The International Labor Organization and human rights", New York University Journal of International Law and Policy, p. p.241.
[111] See also Daviss, ibid.
[112] 660 UNTS 195.

5. ILO -Indigenous and Tribal Peoples Convention (1989) or C. 169.
6. ILO - Declaration on Fundamental Principles and Rights at Work (1998). The Declaration obliges all member states parties of the ILO, even if they have not ratified the ILO Conventions in question, to respect, promote and realize the principle of the elimination of all forms of forced or compulsory labor and also places a duty on the ILO to assist member States in their efforts to do so.[114]
7. ILO - Convention on the worst forms of child labor (1999) or C. 182.
8. ILO - Recommendation No. 190 – Worst forms of child labor (1999).

ILO Conventions, No.105 and No. 29 have each been ratified by over one hundred and sixty states, placing them in the category of the most ratified international conventions. This development demonstrates states' theoretical condemnation of forced or compulsory labor.

Adopted by the General Conference of the ILO on 10 June 1930, some eighteen years before the adoption of the UDHR (1948), C. 29 inaugurated international legislative concern for the protection of the individual's personal integrity and personal freedom from coercion to work, quite apart from the prior discourses that had examined the issue of forced labor only as a corollary of slave labor. C. 29 began the normative process of making labor a voluntary undertaking also in the non-self-governing territories.[115] But like all groundbreaking pieces of legislation that seek to institute such monumental culture change, C. 29 had to be practical by facing up to two realities.

One was the dehumanising effect of forced labor in the colonies, which according to Albert Thomas could not be sustained without risking race wars and the facilitation of communist propaganda.[116]

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[113] General Assembly Resolution 2263 (XXII) of 7 November 1967.

[114] See ILO (2005) Human Trafficking and Forced Labor Exploitation: Guidance for Legislation and Law Enforcement, Geneva, p.17.

[115] ILO (1958) African Labor Survey: Studies and Reports, New Series No.48, Imprimeries Reunie S.A., Lausanne, Switzerland p.296. See also *Iversen v Norway*, The Times, 13 March 1964; (1468/62) CD12, 80

[116] See also D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.481.

The other was that colonial powers would not abandon forced or compulsory labor at the stroke of a pen. This is not surprising because according to Alexis de Tocqueville:

> When the citizens of a community are classed according to rank, profession, or birth, and when all men are constrained to follow the career which chance has opened before them, every one thinks that the utmost limits of human power are to be discerned in proximity to himself, and no one seeks any longer to resist the inevitable law of his destiny. Not, indeed, that an aristocratic people absolutely deny man's faculty of self-improvement, but they do not hold it to be indefinite; they can conceive amelioration, but not change: they imagine that the future condition of society may be better, but not essentially different; and, whilst they admit that humanity has made progress, and may still have some to make, they assign to it beforehand certain impassable limits.[117]

Consequently, the ILO opted for a compromise that showed first, the colonial powers' recognition of the widespread use of forced or compulsory labor in the colonies. Secondly, they emphasised states parties' belief that forced or compulsory labor was inhuman and should be abolished incrementally, reservations being made for certain purposes deemed transiently necessary for stability and normalcy in the colonies. Had the ILO done anything more radical, like for instance, producing a treaty couched in more stringent terms, the result would probably have been a stillborn treaty[118] because of the reasons discussed above.

Article 2(1) is the substantive provision of C. 29. It defines the object of the Convention 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 operational provisions of C. 29 are contained in Articles 1(1-3) and 2(2)(a-e). The latter exempts forced or compulsory labor in public services, by convicted felons in many circumstances; compulsory military service; and in cases of public emergency. The former makes the object of abolishing forced or compulsory labor a goal to be achieved within "the shortest possible period". In particular, it sets a transitional period of five years within which state parties should draw the curtain on the practice (a period that expired in 1935). The accompanying Recommendation No.

[117] Democracy in America, Book 2 Chapter 8. See also Fordham University website, available @ http://www.fordham.edu/halsall/mod/tocqueville-democracy.html (visited 6 January 2008)
[118] The International Trade Organization (1948) concluded in Havana never came to force because it failed to attract the required minimum number of ratifications to come into force.

35 enumerates a stringent checklist that may allow for resort to compulsory or forced labor inside the five-year transition period. They include:[119]

1) The population's capacity for labor.
2) Voluntarily available labor.
3) The negative impact that too sudden a withdrawal/ drying up of labor might have on habits of life and the social conditions of the population.

These concerns characterise forced labor as an intolerable evil for both the individual victim and his society at large.[120]

(e) Elements of forced labor[121]

The ILO Secretary General writes that three elements must be established in the case of compulsory or forced labor.[122] The activity must constitute either work or services that have nothing to do whatsoever with the requirement to undergo education or training.[123] Secondly, the work or services must be "exacted from any person under the menace of a penalty". Penalty refers in this instance to loss of privileges or loss of rights, constituting duress that impedes the exercise of the individual's will to either accept or reject the offer/request to work. Threat or actual use of one or other of the following will suffice as menace of a penalty:[124]

a) Physical or sexual violence.
b) Dismissal from current employment.
c) Exclusion from future employment.
d) Exclusion from community and social life.
e) Shift to even worse working conditions

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[119] See Article 1 of Recommendation No.35 Concerning Indirect Compulsion to Labor.

[120] See also Vincent-Daviss, D. (1982-1983) "Human Rights Law: A research guide to the literature – Part III: The International Labor Organization and human rights" New York University Journal of International Law and Policy p.241.

[121] See also ILO "Guidance on legislation and law enforcement regarding the question of human trafficking and forced labor (2005)", Available also at Cornell University website, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1021&context=forcedlabor (last accessed 22 March 2008)

[122] Somavia, J. (2005) "A global alliance against forced labor" International Labor Conference 93rd Session 2005 Report IB, p.6.

[123] Ibid. p.19.

[124] Listed in ILO Guidance, ibid. p.20. (is this "ibid" or "op cit"?)

f) Threat of supernatural retaliation.
g) Restriction of movement of the worker, including imprisonment or other physical confinement.
h) Withholding wages or refusing to pay the worker at all – financial penalties.
i) Retention of passports and or other identity documents.
j) Threat of denunciation to the authorities, commonly applied against irregular migrant workers.
k) Debt bondage/bonded labor, which occurs when a victim serves as security against a debt or loan. "The individual works partly or exclusively to pay off the debt which has been incurred. In most cases, the debt is perpetuated because on the one hand, the work or services provided are undervalued and on the other hand, the employer may provide food and accommodation at such inflated prices that it is extremely difficult for the worker to escape from debt. Debt may also be incurred during the process of recruitment and transportation, which affects the degree of freedom of the employment relationship at the final stage".

The third element refers to the absence of consent in the relationship between the "worker" and their "employer" regardless of (i) the type of activity performed[125] - whether harzadous or not, or (ii) the legality of the activity – whether it is legal, or illegal under domestic law;[126] or (iii) the official classification of the activity – whether it is officially recognised as an economic activity or not. Thus, women forced into sex work fall under the regime of C. 29 because of the involuntary nature of the work and the menace that sustains their relationship with their employer.[127]

Worryingly, the ILO writes that today, forced labor is present in some form on all continents, in almost all countries, and in every kind of economy.[128] "At least 12.3 million people are victims of forced labor worldwide. Of these, 9.8 million are exploited by private agents, including more than 2.4 million in forced labor as a result of human trafficking. Another 2.5 million are forced to work by the state or by rebel

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[125] ILO. (2005) "A global alliance against forced labor" International Labor Conference 93rd Session 2005 Report IB, p.6.
[126] Ibid.
[127] Ibid.
[128] Ibid. p.1.

military groups."[129] This is troubling because of the contradiction that arises from unrivalled state participation the two ILO conventions against forced labor - C. 29 and C.105. Scholars have advanced several reasons for this contradiction between theory and practice of states on the matter of compulsory or forced labor.

The first is that states appear incapable of generating and sustaining the political will necessary to instigate the detailed investigations required to identify forced labor practices and confront them.[130] Secondly, the victims of forced labor may themselves be reluctant to come forward to provide testimony, fearing not only reprisals from their exploiters but perhaps also action against them by immigration and other law enforcement authorities.[131] However, the problem is that compulsory or forced labor is an attack not just on the individual victim, but his society as a whole.[132] Thirdly, the precarious legal status of millions of irregular migrant women and men makes them particularly vulnerable to coercion, because of the additional and ever present threat of denunciation to the authorities.[133] Most worrying of all, the ILO writes that there have been precious few prosecutions for forced labor offences anywhere in the world.[134] This is incomprehensible because of the estimated scale of the problem.

If this is correct, then the contradiction arises most probably because nation states are presently operating on a combination of socio-economic policies that encourage, facilitate and support rather than impede or suppress forced labor practices. With a few notable exceptions, national laws of most countries do not define forced labor in any detail. Consequently, law enforcement agents struggle with identifying and prosecuting forced labor offences.[135]

Secondly, the contradiction between state practice and theoretical claims regarding compulsory or forced labor is sustained by national market regulations and migration policies that appear to foster and facilitate rather than reduce and suppress the

[129] Ibid. p.10
[130] Ibid. p.1-2.
[131] Ibid. p.2
[132] Supra. n.115.
[133] Ibid.
[134] Ibid.
[135] Ibid.

possibility that workers will be trapped in forced labor situations.[136] The moral of all of this is that unless states make policy reforms in their migration and labor market regulations for the specific purpose of deliberately suppressing forced labor practices, they most certainly will sleepwalk into forced labor driven social chaos.

(f) Impact of C. 29 on practice in Europe's African colonies

The Forced Labor Convention (1930) seeks to ensure human security by promoting the policy of free labor and the suppression of coercive labor practices. In effect it insists on the policy of suppression and abolition of coercive labor practices – Articles 1, 4 and 6. In this sense C. 29 insists on a paradigmatic cultural change of significant proportions.

In colonial Sub-Saharan Africa, the policy to abolish compulsory or forced labor was revolutionary in every sense and European undertakings that had the most adaptation to make under the new policy cried foul. This is because:

> [I]n most colonies, action in favour of European undertakings was for a long time considered to be not merely the normal practice but even the duty of the administration. European undertakings established in the colonies counted more or less implicitly on the Administration to supply them with labor, and the practice was not explicitly forbidden by labor legislation.[137]

In French West Africa, where for many years, native indigenous labor had been recruited by use of "work permits" issued by the competent authorities, European undertakings protested against the new policy, with a lot of support from home - France. In practice the work permits served as notices on the native village leaders and elders, to supply the required numbers of personnel at appointed intervals. Cooperation of the subjects was not guaranteed, and this always presented an enormous difficulty for the native indigenous leadership whose authority was recognised by the colonial authority mainly in the service of dehumanising practices such as compulsory labor *chibharo/isbhalo* in Southern Rhodesia.

In the Ivory Coast, a circular of 18 January 1925 sought to curtail the practice. A further circular of the Governor-General on 3 November 1936 severely disabled the

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[136] Ibid.

[137] Goudal, J. (1939) "Agricultural Development and Indigenous Labor in the French Colonies of tropical Africa", International Labor Review vol.40 p.229.

administrative authorities' involvement in the recruitment of labour by European undertakings.[138] On 24 June 1937 France ratified the Forced Labor Convention (1930).

Owing to native indigenous Africans' participation in the agricultural development of their own countries parallel to European undertakings, a serious labor shortage now loomed over the European undertakings because the large European concessions required labor mostly when the native indigenous Africans were busiest on their own farms.[139] By 1937, of the 64,000 hectares under coffee production in the Ivory Coast 12,000 were owned by native indigenous Africans; and of the 80,000 hectares under cocoa production, 69,000 were under native indigenous African cultivation.

In a speech given at a session of the Government Council on 23 November 1937, the Governor-General of French West Africa responded to critics of two policies of his Administration that were linked to labor shortages in the European agricultural sector.

The Governor-General took a progressive view of the issue of competition between agricultural output of native indigenous African peasant farmers and European undertakings. In his view, the genie was already out of the bottle. Revisionists had had their day and lost the motion already because developments showed that native indigenous agricultural production and European agricultural production were not only closely connected, but also complementary. They both deserved applause because they combined to form a harmonious whole.

Concerning the issue of abolition of forced or compulsory labor, the Governor-General referred to the Forced Labor Convention (1930) and cited its substantive provisions.

> The recruitment of labor must be free from compulsion. That is one of the principles of our constitutional law, which the Minister for the Colonies has repeatedly affirmed in French West Africa and in France ever since he has been managing the affairs of our Colonial Empire. Forced or compulsory labor for private undertakings is utterly condemned both by our laws and by the general trend of French thought … Will the Africans agree to work for others .if they are allowed to choose? Certainly they will, if they feel that it is in their interest to do so. … ……. ….. …… ……. …… …… ….… I have made a point to quote that Article

[138] Ibid. p.218.
[139] Ibid. p.219.

> (Article 6) because it will, I hope, check useless argument; the officials of this country are faced with imperative legal provisions, which it is their duty to enforce.[140]

Mr. Reste, the Governor-General of French Equatorial Africa dismissed criticisms that the strengthening native indigenous farming had created a labor problem that would undermine the colony's development. "There had never been so much work done in French Equatorial Africa as since the abolition of forced and compulsory labor."[141] He argued instead that the challenges created for the European undertakings as a result of C. 29 required discovery of the right balance between the two forms of cultivation. In the immediate short term, that required: "European settlers … …to organise with a view to keeping their (labor) requirements down to a minimum."[142]

In the Cameroons, the Commissioner of the Republic thought that complaints about shortages of labor resulting from the abolition of compulsory or forced labor were disingenuous. He adopted an almost positive discrimination approach to C.29. By an order dated 27 March 1937, he provisionally suspended throughout the territory, further grant of agricultural concessions. Responding to criticisms, he stated that: "The fact must be faced that European settlement in our possessions on the West Coast of Africa has reached its highest point and must now give way to Native settlement."[143]

With a similar take on the question of shortage of labor habitually attributed to the suppression and abolition of forced labor in the colonies since the ratification of C.29 on 24 June 1937, Governor Boisson celebrated this development. He argued that it showed among other things that France had succeeded in integrating native indigenous Africans into the international trading system. He argued also that the native indigenous African's aversion to the status of wage earner, whether in industry or in agriculture made reversal of this development unthinkable.[144]

In Madagascar the Chamber of Commerce and other European Undertakings lobbied the Administration to re-introduce coercion - disguised in one way or another. The

[140] Ibid. p.220.
[141] Ibid. p.222.
[142] Ibid.
[143] Ibid. p.223.
[144] Ibid.

Administration declined, holding fast to the requirement since 24 June 1937, to suppress and abolish forced labor.[145]

In spite of the United Kingdom having ratified the Forced Labor Convention in the immediate aftermath of its adoption, (3 June 1931), forced labor for private undertakings had been authorised in Kenya, Tanganyika and Nigeria while in Northern Rhodesia, conscript labor under government control had been made available to farmers during the war.[146] The British government's resort to compulsory or forced labor was adopted with great reluctance, and only as a last resort due to the urgent needs dictated by the war effort. This sorry episode for a nation that had inspired others to support the idea during the negotiation of C. 29 is difficult to understand.

> In Tanganyika, in January 1945, the conscript labor force numbered 26, 256 – representing just over 8 per cent of the total number of African workers in all occupations; in Kenya, in January 1945, conscript labor totalled 21, 903. The forced labor used on Nigerian tin mines came to an end in 1944, and in other territories it was decided that no further men should be compulsorily recruited for private employment after 31 December 1945.[147]

Thus, C. 29 appeared to have incrementally achieved the cultural turnaround in the colonies of Africa in a relatively short period of time.

(g) Impact of C. 29 on the development of international substantive standards on forced labor[148]

Qualitative analysis of normative international treaties shows that the human rights movement unequivocally abhors forced labor and states in theory do not support it either. Recent recommendations of the Parliamentary Assembly of the Council of Europe, including Recommendations 1523 (2001)[149] on Domestic Slavery and 1663

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[145] See Goudal, ibid.
[146] REPORTS AND ENQURIES, Labor conditions in East Africa, International Labor Review vol. 54 p.38.
[147] Ibid.
[148] See especially Vincent-Daviss, D. (1982-1983) "Human Rights Law: A research guide to the literature – Part III: The International Labor Organization and human rights" New York University Journal of International Law and Policy p. 240.
[149] See Council of Europe website also available @ http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/EREC1523.htm (visited 31 December 2007)

(2004)[150] on Domestic slavery: Servitude, *au pairs* and mail order brides; and reports of the Parliamentary Assembly of the Council of Europe; and the Report on Equal Opportunities for Women and Men (2001); and a number of cases, including *Iversen v Norway* (1964)[151] and *Siliadin v France* (2005);[152] and the work of the French Committee against Modern Slavery show that the mischief of forced labor has become a critical issue in the developed northern hemisphere.[153] The social perils of globalisation, including the mischief of human trafficking now make forced labor a matter of universal concern. In its Report of 17 May 2001 the Parliamentary Assembly of the Council of Europe observed that:

> In France, since its foundation in 1994 the Committee against Modern Slavery (CCEM) has taken up the cases of over 200 domestic slavery victims, mostly originating from West Africa (Ivory Coast, Togo, Benin) but also from Madagascar, Morocco, India, Sri Lanka and the Philippines. The majority of victims were women (95%). One-third arrived in France before they came of age and most of them suffered physical violence or sexual abuse.
>
> The employers mostly came from West Africa or the Middle East. Twenty percent are French nationals. Twenty percent enjoyed immunity from prosecution, among them one diplomat from Italy and five French diplomats in post abroad. Victims working for diplomats mainly come from India, Indonesia, the Philippines and Sri Lanka. It has been estimated that there are several thousand victims of domestic slavery in France.[154]

Siliadin v France challenges the view of the 1955 ILO Committee of Experts on the Application of Conventions and Recommendations Report that provisions of C. 29 "have for the most part been surpassed by the social evolution which has taken place in the majority of territories".[155] Consequently, the relevance of C. 29 appears to have broken its contemplated geographical remit as part of the NLC.

(i) Siliadin v France[156]

The simplicity of the facts of the case belie the accompanying indignities. Siwa-Akofa Siliadin - the Applicant, a Togolese national had been brought to Paris in January 1994, aged fifteen by Mrs D, a French national of Togolese origin. Mrs. D had

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[150] See Council of Europe website also available @ http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta04/EREC1663.htm#_ftn1 (visited 31 December 2007)
[151] The Times, March 13, 1964; (1468/62) CD12, 80
[152] 45 ILM 962 (2006). See also *Iversen v Norway,* The Times, March 13, 1964; (1468/62) CD12, 80
[153] An idea seemingly perpetuated through to C.107. See "ILO Convention 107, Recommendation 104, and Conclusions of the meeting of experts, 1986" also available @ http://www.cwis.org/fwdp/International/ilo_107.txt (visited 14 December 2007)
[154] Infra. Next foot note (Siliadin)
[155] ILO (1955) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part IV), International Labor Conference, 38th Session, Geneva, p.8.
[156]

undertaken to regularise the Applicant's immigration status and to arrange for her education. In return, the Applicant would do housework for her until she had earned enough to pay her back for her air ticket. Instead the applicant became an unpaid servant to Mr and Mrs D and her passport was confiscated.

Around October time in 1994 Mrs D. "lent" the Applicant to Mr and Mrs B so that the Applicant would assist them with housework and look after their young children until Mrs B had given birth. But after the birth of her third child Mrs B decided to keep the applicant, making her work from 7.30 a.m. until 10.30 p.m. seven days a week, except for when she allowed her special permission to go to mass on Sundays. The applicant slept on a mattress on the floor of her children's bedroom and wore old clothes. She was never paid, but received two 500-franc notes, from Mrs B.'s mother.

Following the recovery of her passport which she entrusted to an acquaintance of Mr and Mrs B, the applicant confided in a neighbour, who alerted the Committee against Modern Slavery (CCEM), which reported the matter to the prosecuting authorities. Mr and Mrs B were prosecuted under Article 225-13 of the Criminal Code for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person, and for subjecting that person to working or living conditions incompatible with human dignity under Article 225-14 of the Criminal Code.

The applicant's heads of argument included the following:

1) The right not to be held in servitude guaranteed by Article 4 of the European Convention on Human Rights[157] (ECHR) was an absolute entitlement from which no derogation was allowable.[158] Consequently, states have a positive obligation to enact criminal law provisions to deter such offences, backed up by law enforcement machinery for the prevention, detection and punishment of such provisions.[159]
2) Article 1 of the ECHR requires states to set up a system of criminal prosecution and punishment that would ensure tangible and effective

[157] 213 UNTS 221.
[158] Ibid. para. 70
[159] Ibid. para. 71

protection of the rights guaranteed by Articles and/or 8 against the actions of private individuals.[160]

3) The exploitation to which she had been subjected while a minor amounted to a failure by the state to comply with the sum of its positive obligations under Articles 1 and 4 of the Convention to ensure adequate criminal law provisions to prevent and effectively punish the perpetrators of those acts.[161]

The doctrine of "positive obligations" relied upon by the court to settle this case is analogous to arguments advanced by the ILO in the early 1920s to undo what Maul refers to as colonial powers' "strong resistance to all the initiatives that went beyond a condemnation of the legal status of slavery and the slave trade and aimed at including wording banning various forms of forced labor".[162]

To stop the colonial powers from sanctioning compulsory or forced labor in the colonies, the ILO had argued that the natives were in a *distinct and special class* of their own. Consequently, they required and merited a special Native Labor Code binding on both the European economic interests and the colonial powers themselves to stop compulsory or forced labor. The idea was to protect native indigenous labor from the consequences of a combined onslaught of colonial authority and discipline and European economic interest.[163]

Similar arguments were rehearsed by the Court in *Siliadin v France*. The court first identified and distinguished Article 1 and 4 of the ECHR as a class of civil and political rights with inherent positive obligations on the state. This special class of rights requires participating states to adopt measures in their domestic law in order to ensure that protected rights are respected and when they are breached, that victims have adequate legal remedies.[164] The Court stated that: "[T]he fact that a state refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations".[165]

[160] Ibid. para. 67
[161] Ibid. para. 65
[162] D.R. Maul (2007) "The ILO and the struggle against forced labor from 1919 to the present", Labor History Vol. 48 No.4 p.480.
[163] Supra.
[164] Supra. N.10 para.79
[165] Supra. n. 10 para.77

Earlier on in *Sovtransavato Holding v Ukraine*[166] the Court had stated that the obligation to secure Convention rights establishes for participating states positive obligations. "In such circumstances, the state cannot simply remain passive, and there is no room to distinguish between acts and omissions." *X and Y v The Netherlands*[167] is further authority for the proposition that such positive obligations apply also in the sphere of relations between private individuals. It is noteworthy that both Article 1 and 4 are substantive provisions of C.29, itself the cornerstone of the of the NLC regime.[168] Therefore, there are not only linkages of semantics, purpose and quality of standards between the provisions of the ECHR and ILO C.29, but also strategic mechanisms employed to secure those rights.

The Court justified its doctrine of "positive legal obligations" for the protection of special Convention rights that include Articles 1 and 4 on the principles of inherent, implied temenement and necessity based on the sum of the UN human rights legislative effort, starting with the UDHR (1948). The Court realised that:

> [L]imiting compliance with Article 4 of the Convention only to direct action by the state authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that Governments have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions, which penalise the practices, referred to in Article 4 and to apply them in practice.

Qualitative analysis of the object and purpose of relevant UN human rights instruments, including Article 4 of C. 29 adopted by the ILO on 28 June 1930, and ratified by France on 24 June 1937; Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery adopted on 30 April 1956, and which entered into force for France on 26 May 1964; Articles 19 and 32 of the International Convention on the Rights of the Child, 20 November 1989 that entered in force for France on 6 September 1990 - showed that Article 4 of the ECHR is a special provision that has established positive legal obligations that require states to ensure that the guarantee to exercise their free will in the determination whether to work or not is a reality for every individual on their territories.

[166] (2004) 38 EHRR 1 para.57
[167] (1986) 8 EHRR 235 para 23.
[168] See Articles 1(1) and 4(1).

The Court also applied constitutional reductionism to argue that Articles 2, 3 and 4 constituted the basic values of the democracies of Europe.[169] Two things are salient and noteworthy. The first is that *Siliadin* is authority for the proposition that governments of the democratic societies that constitute the Council of Europe have positive legal obligations to adopt criminal-law provisions that penalise breaches of basic provisions of the ECHR in order to ensure that victims have tangible and effective protection of those rights against the actions of private individuals.

Thus, while the ECHR may initially have been drafted to prevent state institutions from interfering with the civil and political rights of individuals, through a robust application of the Convention, the Court has extended the purposes of the Convention to impose positive obligations on the state in order to ensure the recognition, promotion and protection of the dignity inherent in individuals *qua* human beings.

The second is that the Court's languge *is synonymous* with that used by the ILO as it tackled the problem of forced labor in the colonies. If this is a correct observation, then the ILO's influence as front-runner in the setting up of standards and strategies for the protection of the dignity inherent in individuals as human beings is confirmed. This is arguably the strongest reason for tribunals' increasing resort to the doctrine of positive obligations.[170]

The doctrine of positive legal obligations of states to ensure protection of the dignity inherent in native indigenous labor as human beings against the economic considerations of European ventures can be traced back to the NLC. For instance Article 25 of C. 29 states that "The illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are *really adequate* and are strictly enforced".[171] *M.C. v Bulgaria* stated that: "Governments

[169] Supra. n. 10 para. 82
[170] Problematising the growth of positive obligations see also Cullen, H. (2006) Siliadin v France: Positive obligations under Article 4 of the European Convention on Human Rights", Human Rights Law Review vol.6 No.3 p.4.
[171] Emphasis added.

have positive obligations … to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice".[172]

In its guidance for legislation and law enforcement in aid of the Special Action Programme to combat Forced Labor (2005), the ILO indicates that:

> [T]he exaction of forced or compulsory labor could be a "penal offence" under either the criminal or labor law (of the state), although "adequate" penalties for this basic human rights violation are more likely to be included in the penal or criminal code. Penal sanctions can be imposed in the form of fines or imprisonment. Fines should be high enough to act as an effective deterrent[173]

While state parties retain discretion regarding the determination of the exact penalty applicable in each case for the violation of this obligation even by third parties, it is unequivocal that by 1930, the ILO was inaugurating positive legal obligations in the effort to protect the dignity of native indigenous labor in the colonies of Europe's empire building nations. More recently, international tribunals have applied this strategy of the ILO to interpret human rights instruments established originally to "prevent so called negative interferences by the state or public authorities – *breaches of the obligation not to interfere with the rights of individuals*",[174] in order to ensure effective protection of the dignity inherent in individuals qua human beings.

(ii) Iversen v Norway (1964)[175]

In summary, the facts of the case are that in June, 1956 the Norwegian government passed a provisional piece of legislation that provided for obligatory public service for dentists. In 1958 Dr. Iversen qualified as a dentist, having studied in Germany and Norway and also undertaken his military service in Norway for one year as a dentist. In accordance with the Act the Minister for Social Affairs directed Dr. Iversen in November, 1959 to fill a dental position for one year in Nordland, in the north of Norway where there was an acute shortage of dentists. Dr. Iversen served for six months and left the position and challenged the requirement as a dentist for one year in Nordland *inter alia* as a breach of his right under Article 4 of the ECHR not to be subjected to forced or compulsory labor.

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[172] Application No. 39272/98, para.153.

[173] ILO (2005) "Human Trafficking and Forced Labor Exploitation: Guidance for Legislation and Law Enforcement", International Labor Office, Geneva, p.17.

[174] Campbell, A.I.L. (2006) "Positive obligations under the ECHR: Deprivation of liberty by private actors", Edinburgh Law Review vol. 10 pp.399.

[175] The Times, March 13, 1964.

The Commission found that the requirement on Dr. Iversen to fill a dental position for one year in Nordland did not constitute compulsory or forced labor within the meaning of Article 4. The Commission referred to ILO conventions relating to forced labor and concluded that the Act of June 1956 and its application to Dr. Iversen lacked crucial elements of forced labor.

4. CONCLUSIONS

Serious difficulties attributable to two policies of Europe's colonial powers coincided with the establishment of the ILO so that the success or failure of the ILO in its early years was inevitably going to be determined in large measure by how it reacted to policies that challenged directly the Organization's purpose and also fell with the Organization's enumerated and implied competencies

One was colonial powers' differentiation between metropolitan and colonial labor. This differentiation formed the basis upon which labour rights accrued or did not accrue to workers. Initially, native indigenous African labor was precluded from the benefits that the emergent international labour code offered at the start of the inter-War years.

The other difficulty was that of compelling native indigenous Africans through a variety of mechanisms, to provide labor to the swirl of private European undertakings in the colonies. This setting placed the ILO on an inevitable collision course with colonial powers that had also inserted a colonial phrase in the constitutive document of the ILO. This ensured that they could deny colonial labor the protections available to metropolitan labor. The setting could not have been clearer for the battle of legitimacy for the ILO, led by the able Albert Thomas on the one hand, and colonial powers on the other.

The ILO adopted as its key strategy, the categorisation of native indigenous African colonial labor as "indigenous labor", something that the colonial powers readily accepted. However, the ILO went further to declare that the status of *indigenousness* itself presupposed an inherent claim to the recognition and protection of rights that

required the institutionalisation of particular ILO Conventions – the Native Labor Code.

The experience gained from its work in the early 1920s as leader of the predominantly European and North American dominated international alliance against colonialism, and also from its campaign against slavery, had by the mid 1920s placed the ILO in a good position to land the task of conducting a study into the possible steps necessary for the prevention of compulsory labor from developing into conditions analogous to slavery. This resulted in the adoption of the Forced Labor Convention (1930) – arguably the anchor of the NLC. Other legislation developed and adopted under the NLC include ILO Recommendation No. 35 (1930) - Concerning Indirect Compulsion to Labor; ILO Recommendation No. 36 (1930) - Concerning the Regulation of Forced or Compulsory Labor; Recruiting of Indigenous Workers Convention (1936); Penal Sanctions (Indigenous Workers Convention (1939); and the Indigenous and Tribal Populations Conventions (1957 and 1989).

In the context of colonial Sub-Saharan Africa, C.29 sought a cultural paradigmatic change of enormous proportions. There was significant resistance to the abolition of compulsory or forced labor for private purposes in France's African colonies following France's ratification of C.29 on 24 June 1937. But it was met with stern determination, which in some cases advocated a form of positive discrimination in favour of the native indigenous Africans.

British colonies were among the first to abandon the practice for private purposes, Britain having been the only colonial power to have supported the immediate abolition of forced labor for private undertakings during the negotiation of C. 29, and having maintained its commitment to the idea by ratifying the Convention on 3 June 1931. However, during the war effort forced labor for a private undertaking was called upon in several British colonies mainly to ensure supply of ordinances.

Nonetheless, state practice shows that C.29 inspired paradigmatic cultural change swept across the European colonies in Sub-Saharan Africa, reversing entirely, previously entrenched practices that were premised on Administrative support of compulsory or forced labor against the native indigenous population. In this sense,

C.29 helped to define and develop the doctrine of positive legal obligations whose origins can be traced back to the NLC. The Strassbourg based European Court of Human Rights, the UN Human Rights Committee and national Courts have both referred to this doctrine in recent case law, challenging the long established view under the UN human rights system that civil and political rights require states merely not to interfere with individuals' freedoms

Thus, while the UN Universal Declaration of Human Rights (1948) may habitually be cited in the literature as the most significant embodiment of human rights standards, and as showing signs of having achieved the status of holy writ within the human rights movement, and as the spiritual parent of the human rights documents;[176] the author has shown that through its standard setting practice, and particularly through its development of the NLC, the ILO had begun to codify the social purposes of economic development for the benefit of the dignity inherent in people everywhere long before the adoption and the appearance of the UDHR (1948).

The ILO has maintained its founding and inspirational role in the development of standards for the protection of the dignity inherent in individuals qua human beings, including those that find themselves as twenty-first century migrant workers, child workers, forced workers, etc. In this sense the ILO has evolved to become the "*spear-force*" of the international human rights movement.

To sustain its function as the *spear-force* of the international human rights movement, the ILO must reinforce its technical assistance initiatives because they facilitate up to date connection with the experiences of individuals at national level and challenges facing governments. Secondly the ILO must reinforce its information gathering and processing enterprise because history shows that these two activities have been critical to the development of both the NLC, and the new international labor code,[177]

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[176] See Mutua, M. (2007) "Standard setting in Human Rights: Critique and Prognosis", Human Rights Quarterly Vol 29 No.3 p554. He writes that "There appears to be consensus within the UN and among states, academics, and human rights advocates that the UDHR is the most significant embodiment of human rights standards. It has been described as See also Teitel, R. (1997) "Human Rights in Theory", Fordham Law Review Vol. 66 pp.301-17; Glendon, M.A. (1998) "Knowing the UDHR", Notre Dame Law Review Vol. 73 p.1153.
[177] See Chigara, B. (2007) "Latecomers to the ILO and the Authorship and Ownership of the International Labor Code", Human Rights Quarterly, Vol. 29 No.3 pp.706-726

which have achieved incalculable successes for the ILO in relation to its legitimacy when measured against its subject and object jurisdictions, and in relation to the development of human security for the politically disenfranchised native indigenous populations of Sub-Saharan Africa.

The strengthening of the ILO's information gathering and processing enterprise would ensure also the highest possible quality advice dispensed by the ILO to states regarding social justice issues with potential to result in conditions of hardship, and privation to large numbers of people so as to threaten or produce unrest so great that the peace and harmony of the world might be imperilled.

5. INDICATIVE LIST OF REFERENCES

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