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Establishing rights in the disposable jobs regime

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How elastic is the concept of precarious work? Elastic enough in some hands for the Employer spokesperson at the ILO's October 2011 Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors to introduce his presentation by asserting that agency work "was neither precarious nor atypical".¹

Unions, for whom combating the spread of precarious work has emerged as a major priority, would strongly reject the first of these assertions and insist on probing the meaning of the second. Agency work is precarious by nature. And its rapid expansion and invasive presence in virtually all economic sectors have overturned received notions of what is "typical".

The ILO's core Conventions defining trade union organizing, representation and bargaining rights are built on the assumption of direct, open-ended employment – the "standard employment relationship" against which all other contractual relations are "atypical". It is of course true that at no time in history has even close to a majority of the world's workers enjoyed permanent employment status. Agriculture, with the world's largest labour force, has always been dominated by precarious work. Work in the rapidly expanding hotel and tourism sectors remains predominantly precarious. In manufacturing, even high union-density sectors often sit atop a wider pyramid built on long chains of outsourced, precarious labour. Now even these nodules of permanent direct employment are succumbing to growing casualization.

The labour movement has historically been based on organized workers in a standard employment relationship. In the public and private sectors, in wealthy countries and in poor ones, trade union organization among these workers has been a driving force for social progress, including the elaboration of the rights set out in ILO Conventions and their development through ILO jurisprudence. These rights have in turn served as a lever for further union advances. It is precisely these rights, along with living standards and social security, which are being corroded by the growth of precarious work.

In today's disposable jobs regime, the assumption of direct, open-ended employment has been undermined by the expansion of all forms of precarious work relationships, including agency staffing, in all sectors of economic activity. Precarious work can no longer be seen as a deviation from the norm as it (again) becomes increasingly widespread, even *typical*, leaving workers again searching for a platform of rights for protecting workplace organizing and bargaining.

1. See http://www.ilo.org/wcmsp5/groups/public/--ed_dialogue/--sector/documents/meetingdocument/wcms_175125.pdf.

Do we all mean the same thing by “precarious work”?

We might begin to answer the Employer spokesperson at the ILO’s Global Dialogue Forum by enquiring whether we all mean the same thing by “precarious work”. For trade unionists, precarious work encompasses the range of employment relationships which deny workers essential job security, embody unequal treatment with respect to the wages and benefits of permanent workers and deny them the same protection permanent workers have through their collective bargaining agreements.

Precairous work relationships include direct “temporary” contracts (which can become “permanently” temporary), “seasonal” contracts (which can flourish year round), agency work and other forms of outsourced, indirect, third party or “triangular” relationships which obscure the relationship with the real employer; bogus self-employment as “independent contractors”, abusive “apprenticeships”, “internships” and “training” schemes; and the transformation of employment contracts into commercial contracts through, for example, the creation of “cooperatives”, as in the Brazilian and Colombian sugar, palm oil and banana sectors.

We can arrive at a definition of precarious work which unifies these diverse forms by defining it as the negation of the ILO’s definition of the “standard employment relationship”, described as full-time work, under a contract of employment for unlimited duration, with a single employer, and protected against unjustified dismissal. This gives a precarious work formula incorporating any or all of the following elements: work of no guaranteed/specified/regular hours, fixed, limited duration of contract, multiple or disguised employers and no protection against dismissal (which can take the form of a simple non-renewal of contract). Agency work fits comfortably within this definition.

Forms of precarious work intersect and combine; broad classification, not strict taxonomy is needed. Temporary contracts (short/fixed-term, seasonal, day labour), may be both direct or “triangular”, i.e. outsourced through a labour hire/temporary agency. In response to the European Union Directive on agency work, which in principle promises (but fails) to achieve equality of treatment and access to rights for agency workers, legal “derogations” allow for the creation of permanent employees of “temporary work agencies” who can be employed on terms inferior to those of permanent workers. *The impact of all of these contractual forms and legal regulations is to augment insecurity, entrench unequal treatment and undermine rights.*

The various forms of precarious work can inhabit the same industry, the same plant, the same production lines. In November 2011, members of the IUF-affiliated National Union of Workers (NUW) launched an indefinite strike at the Baiada Poultry plant in Laverton, Victoria over the company’s massive recourse to precarious labour and the refusal to pay comparable wages to non-permanent workers. Of the approximately 430 workers regularly

working at the plant, only 284 were directly employed by Baiada – Australia’s largest poultry producer, with 35 per cent market share. The rest were on various forms of precarious contracts: “contractors” in name only, workers allegedly dispatched by shadowy agencies and a group paid directly in cash.² The results of an NUW industry audit published in 2012 included poultry processors with a “non-standard” workforce of up to 48 per cent. What defines “typical” in this arrangement? The chicken de-boner with a permanent contract or the “independent contractor” on the same line working at a piece rate de-boning chickens for his own paper “enterprise”?

Temporary employment can be doubly and even triply outsourced, giving employers multiple legal buffers against responsibility for the employment relationship and engaging in collective bargaining. A prime example is the situation at US chocolate maker Hershey which was brought to light in 2011, where the destruction of union jobs was the result of a meticulously implemented management strategy built on a triple layer of employment outsourcing.³

In 2002, the unionized Hershey packaging facility in Palmyra, Pennsylvania was closed – and reopened with a non-union workforce. The union launched an organizing effort to recapture the formerly union jobs. Hershey contracted operation of the warehousing and co-packing facility to Exel, a wholly owned subsidiary of Deutsche Post/DHL (a company we meet throughout this paper). To ensure that the site would remain non-union, Exel contracted SHS Staffing Solutions to provide it with “leased” employees. SHS, in turn, subcontracted recruitment to the Council for Educational Travel, USA (CETUSA). CETUSA in turn provided a workforce made up entirely of J-1 visa holders. The J-1 visa is a two-month work-study visa allowing non-residents to work in the United States.

The students, from countries as diverse as China, the Republic of Moldova, Nigeria, Turkey and Ukraine, paid from US\$3,000 to US\$6,000 each for the privilege of working round-the-clock shifts lifting heavy packages on fast-moving lines packing Hershey-branded chocolates. They were paid \$8 per hour to perform what were formerly union jobs. Extortionate rent for substandard, crowded housing and compulsory fees for company transportation to and from the plant, personal protective equipment, mandatory drug tests and even time cards were automatically deducted from their paychecks, leaving many workers with less than \$100 for a 40-hour workweek.⁴

2. See “Strike against brutal, precarious conditions at Australia’s largest poultry producer, supplier to one of Australia’s biggest supermarket chains”, available at: <http://cms.iuf.org/?q=node/1237>.

3. See “Strike by student exchange workers at US chocolate maker Hershey exposes sordid trail of outsourcing and exploitation”, available at: <http://cms.iuf.org/?q=node/1096>.

4. According to a *New York Times* article by Fordham University professor Jennifer Gordon, “[r]ecent exposés by journalists and advocates have found similar abuse of J-1 visa holders at fast food restaurants, amusement parks and even strip clubs”. Further: “The J-1 program is attractive to employers because it is uncapped and virtually unregulated; companies avoid

The scheme only came to light when workers angered by the extortionate rents walked off the job – leaving US government officials investigating wages and hours violations with a desperate search to determine the employer. Hershey successfully evaded all legal responsibility, as did Exel/DHL, which was the whole point of the scheme.

The Hershey case only stands out in the sordid nature of the details of what amounts to trafficking; the general phenomenon – diluting the employment relationship through intermediaries – is increasingly commonplace. The doctrine of “dual employer responsibility” current at the US National Labor Relations Board – which requires the agreement of both the agency *and* the user enterprise to secure union recognition – effectively ensures that workers in this situation will not succeed in winning union recognition (already a difficult enough task in the United States today with a *single* employer!).

The expansion of agrofood transnational corporations (TNCs) into developing markets has relied heavily on outsourcing production *and* employment. US-based Kraft Foods, for example, entered production for Indian market with its famous Oreo biscuits and wafers produced through three layers of precarious employment: outsourced production (or third-party manufacturing); casual employment; and no employment contracts. Oreos were previously imported into India and sold at a high price; after the 2010 acquisition of Cadbury, Kraft shifted distribution of Oreo brands to Cadbury India and initiated local manufacturing to compete with local brands by now producing Oreos at less than half their earlier import price. Kraft Foods’ Oreo is now a major brand in India, aggressively increasing its market share. Growth has been built on brand recognition, but Kraft itself has no manufacturing operations in India, and no Indian workers on its payroll. The biscuits are produced by 720 workers at Bector Food Specialties’ plant in Punjab. Of these 720 workers 625 are directly employed casual workers (500 women and 125 men), 60 are contract workers and only 35 are permanent. The 625 casual workers have no employment contracts and work a minimum 12-hour shift.⁵

paying Medicare, Social Security and, in many states, unemployment taxes for workers hired through the program. One sponsor authorized by the State Department even offers a ‘payroll taxes savings calculator’ on its Web site, so potential employers can see how much they would save by hiring J-1 visa holders rather than American workers. Visa holders can be deported if they so much as complain, and cannot easily switch employers.” See “America’s Sweatshop Diplomacy”, published 24 August 2011, available at: http://www.nytimes.com/2011/08/25/opinion/americas-sweatshop-diplomacy.html?_r=1&scp=4&sq=hershey&st=cse. The previously cited union survey of the Australian poultry industry found a high preponderance of immigrant student workers in the plants.

5. See “Precarious x 3: The layers of precarious employment beneath Kraft’s Oreo biscuits and wafers”, available at: <http://cms.iuf.org/?q=node/1033>.

Box 1. The changing core

Companies defending their use of precarious labour typically invoke the “core vs non-core” defence. In manufacturing, earlier waves of outsourcing were implemented in the name of shedding “ancillary” services like cleaning, security, canteens, packaging and logistics in order to concentrate on the “core”. As we have seen, this can result in the erection of multiple layers of outsourcing, as companies providing products as well as services in turn resort to indirect, precarious forms of employment. In the case of Hershey and DHL/Exel described here, the end result of the process was the elimination of *all* direct employment – the workforce was permanently “leased”. Hotel chains have become little more than branding operations even in their dwindling number of directly owned and operated properties. Cleaning, kitchen services, booking, even the front desk have virtually eliminated the direct workforce. These developments explode the risible claims of the agency lobby to be “creating jobs which otherwise would not exist”.

The real difficulty for the “core vs non-core” defence is the infinitely malleable nature of the core, which is continuously redefined. Precarious work is rampant at all levels of manufacturing, including final assembly. The core becomes increasingly elusive, and then vanishes. Some leading food and beverage manufacturers include in their definition of the core manufacture based on proprietary technology, or stringent product quality and/or safety requirements. How far this diverges from actual practice can be seen in the self-description of DHL/Exel, which continues to describe itself as a logistics company. “What we do” on their website* informs the visitor that

Exel offers customers a helping hand with manufacturing a broad spectrum of food and beverage products. Our Power Packaging operation is the largest contract manufacturer of food and beverage products in North America. We produce everything from aseptic beverages to cake mixes for some of the largest consumer brands in the world. And we deliver it in highly popular forms of packaging, ranging from rigid containers to handy, single-serving beverage flavor packs.

Entrust us with your formula and raw materials and we'll leverage our facilities, equipment, people, and processes to blend, fill, carton and case pack your products in one of our dedicated or multi-customer operations. With on-site quality assurance labs in each of our seven North American facilities, we continually test products to make sure every run meets your high standards.

The cycle has run full circle. Set up to free manufacturers from “non-core” activities like logistics, Exel's activities have mutated back into the core: manufacturing proprietary products and assuring quality control!

* See http://www.exel.com/exel/exel_manufacturing_services.jsp (consulted 28 April 2012).

The scope and dynamic of the problem

The reality of the growth in precarious employment is beyond dispute, although official statistics under-report the extent of the phenomenon. The global figure of 10 million employees of global agencies cited by the Employer spokesperson at the Global Dialogue Forum⁶ cannot be taken seriously, even if one assumes it excludes China and India. More crucial still is the *dynamic* of that expansion.

The number of temporary workers in Japan, where part-time and temporary workers now make up over 30 per cent of the workforce, more than tripled between 1999 and 2007, from 1.07 million to 3.8 million, with staffing agencies supplying a steadily rising proportion of these workers. The use of contract labour in Indian manufacturing increased from 13 to 30 per cent between 1994 and 2006. In South Africa, labour brokers now supply over half the workers in many major unionized manufacturing companies, including those in the IUF sectors, where they typically receive one-half or less of the wages and benefits of permanent workers but work alongside them performing the same jobs.⁷

According to an article published in *BloombergBusinessweek*, the number of dispatched agency workers in China has doubled since 2008 – *from 30 million to 60 million workers*.⁸

In the OECD countries, from 1985 to 2007 permanent waged employment grew by 21 per cent, but temporary jobs grew more than twice as fast, increasing by 55 per cent. The growth of precarious jobs in the European Union was even more pronounced, increasing by 115 per cent compared with a 26 per cent growth in overall employment. Disposable jobs, including both fixed-term direct employment and agency work, represented just under one-third of all jobs created during this period.

In Latin America during this period, the proportion of workers on temporary contracts increased from 19 to 26.5 per cent.

Agency labour on a massive scale has been *relatively* slow to take off in the United States, because loose enforcement of labour legislation and the doctrine of “employment at will” impose few restrictions on employer hiring and firing. Nonetheless, according to the US American Staffing Association (ASA), “[s]taffing firms hired a total of 12.9 million workers

6. See note 1 above.

7. The above figures are taken from *Policies and regulations to combat precarious employment*, the background paper produced by ILO ACTRAV for the ACTRAV Symposium on Precarious Work, 4–7 October 2011, available at: http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-actrav/documents/meetingdocument/wcms_164286.pdf.

8. “Why China’s factories are turning to temp workers”, 8 March, 2012, available at: <http://www.businessweek.com/printer/articles/12340-why-chinas-factories-are-turning-to-temp-workersChina>.

in 2011, *equivalent to about one of every 10 workers on nonfarm payrolls*” [author’s emphasis].⁹ The same source reported that *temporary and contract employment in the first quarter of 2012 had grown by 22 per cent*.¹⁰ Temporary and contract employment in the first quarter of 2012, according to the ASA, averaged 2.8 million workers per day, an increase over the previous year’s average of 2.6 million.

While both government and private statistics tend to jumble together precarious employment of all types – part time, agency, directly employed temporary, etc. – the dynamic is clear. The Chinese source cited in the Bloomberg article estimates that agency labour could expand by 30–50 per cent again in 2012, as employers attempt to combat the higher wages won by Chinese workers through the recent wave of mass strikes.

The casualization of work (conversion of permanent to precarious jobs, failure to create permanent jobs even as employment is growing) can take place by shock – as with legislative coups from Belarus to New Zealand which have abolished at a stroke collective bargaining and employment rights – or it can take place by stealth, through the steady erosion of workplace rights. In all its forms, precarious work draws disproportionately on the most vulnerable groups of workers, including women, minorities and migrants. It deepens poverty and insecurity, undermines solidarity and entrenches inequality. It weakens union membership and saps bargaining power. Rolling back precarious work is therefore a union priority.

Rebuilding membership, rebuilding power

Unions have in many cases achieved significant successes in rolling back precarious work – and found that in so doing they generate a powerful dynamic in which the organizing of precarious workers builds new membership mobilizing capacity which in turn leads to still more recruitment and bargaining power.

In the United Kingdom, for example, when IUF affiliate Unite began organizing to rebuild union strength in the poultry processing industry, agency workers accounted for some 70 per cent of employment. In 2008, the union launched a campaign with strong support from the IUF and affiliates around the world to win equal treatment for agency workers employed at meat producers supplying the UK-based retailer Marks & Spencer. As a result of the campaign, by year’s end thousands of UK agency workers were employed on permanent contracts – giving employment security to many newly

9. See “Staffing employment grew 8 per cent in 2011”, available at: http://www.american-staffing.net/newsroom/newsreleases/march_06_12.cfm.

10. See “April staffing up 6.9 per cent from a year ago”, available at: http://www.american-staffing.net/statistics/staffing_index.cfm.

arrived migrant workers for the first time. The union added 13,000 new members and 300 new shop stewards; the proportion of precarious to permanent workers was reversed and union density in the poultry sector increased dramatically. Building on these gains, the union targeted poultry companies supplying other major retailers. Membership in the sector continues to grow, boosting recruitment in the red meat sector.

In May 2010 the Milk Food Factory Workers Union at the Horlicks factory in Nabha, India, owned by the pharmaceutical, health and personal care products giant GlaxoSmithKline (GSK), won its fight for the right of casual workers to direct, permanent employment. Under the agreement, 452 casual workers employed on a “temporary” basis for more than a decade were made permanent. Building on this, with the support of the IUF, the union at the company’s Rajmundry plant mobilized around the same demand in their January 2011 bargaining proposals. In July 2011, the union negotiated an agreement which created permanent positions for 205 casual workers, who after two decades of precarious employment could now access their fundamental trade union rights: joining the permanent workers’ union and securing the protection and benefits of the collective agreement, rights they had been denied on the basis of their employment status.

The same organizing/recognition/organizing dynamic has been achieved in the IUF’s global company work, helping win international recognition of the IUF (or strengthening existing relationships within global companies) and stimulating further organizing – a cascade of positive synergies.

In 2009, the IUF initiated a campaign to support the fight for permanent employment at Unilever’s Lipton/Brooke Bond tea factory in Khanewal, Pakistan. Direct employment at the factory, and with it union membership, had shrunk over the course of a decade to a mere 22 workers, out of a workforce of around 780. The 22 permanent workers were the only workers at the factory eligible for union membership and a collective bargaining relationship with Unilever. The remaining workers were employed through a number of labour contractors, at a fraction of the wages and benefits of permanent workers, on a “no work, no pay” system. The successful CASUAL-T campaign mobilized global support and led to recognition of the IUF by Unilever, a company whose stated policy had always been to deny recognition to the IUF or indeed to any union organization above the national level. Comprehensive agreements were reached between the IUF and Unilever at global level. These agreements created hundreds of permanent jobs for contract and casual workers at the Khanewal and Rahim Yar Khan personal products factories, revitalizing union membership and bargaining power. Union membership at Khanewal increased ten-fold. The IUF and Unilever now have a structured relationship and meet regularly to review progress on rights issues. Ongoing engagement provides for an international dispute resolution mechanism. This process supported the successful 2011 fight for permanent employment at the Lipton tea facility in Pune, India, where

hundreds of casual workers had been on revolving three-month contracts for up to ten years.

The successful experience at Unilever encouraged the Pakistan National Federation of Food, Beverages and Tobacco Workers (NFFBTW) in its struggle for permanent jobs and trade union rights and recognition at Coca-Cola. The IUF 2010 Red Card Penalty Campaign in support of contract workers at Coca-Cola resulted in an agreement establishing a joint review committee at national level to deal with union rights issues at all the company's six plants. Through its Pakistan Office, the IUF supported the NFFBTW's successful drive to organize and register unions at two unorganized plants; all Coca-Cola plants in Pakistan are now unionized and members of the IUF. The conversion of temporary to permanent jobs is a permanent item on the collective bargaining agenda. This in turn has boosted successful fights for permanent jobs at Coca-Cola globally.

These struggles, and many other struggles by the IUF and its affiliates as well as other unions around the world, show that precarious work can be confronted and successfully rolled back by negotiating restrictions on its introduction into the workplace, bringing precarious workers into the bargaining unit and into union membership and negotiating the conversion of precarious to permanent jobs. In many cases, it can be accomplished with the traditional tools of trade union organizing.

Organizing alone, however, has limits. None of these successes, significant as they are, altered the legal/regulatory framework which facilitates and promotes the expansion of disposable jobs. Restrictions on indirect employees' right to join a union of permanent workers and inclusion in a bargaining unit of permanent workers were only overcome by making casual workers permanent. The restrictions remain in force for the huge majority of precarious workers who cannot make use of international support in a fight with a transnational company. Regulation is ultimately necessary if rights are to be secured for *all* workers.

Precarious work – what are our rights?

In the conflicts with Unilever and other transnational companies, the IUF has effectively made use of the OECD Guidelines complaint procedure as a component of precisely calibrated international campaigning to bring additional pressure on the companies to come to the table. Furthermore, the Guidelines were revised in 2011 in ways which offer additional potential through the expanded employment and the new human rights chapters. The struggles discussed here take on a wider significance when they are seen as building blocks in the process of constructing a platform of rights to combat precarious work, a platform which is essential to both organizing in the workplace and organizing for legislative and regulatory change.

How do international human rights instruments, including the Conventions and jurisprudence of the ILO, define the rights of precarious workers?

Precarious work and the ILO

The ILO's eight core Conventions¹¹ say nothing about precarious work *as such*. In fact, with the exception of Convention No. 181 on temporary work agencies and Recommendation No. 198 on the employment relationship, ILO instruments *generally* assume direct open-ended employment to be the norm (the “standard employment relationship”).

Unequal treatment of precarious workers and the systematic denial of their rights do not constitute “discrimination” as currently defined by Convention No. 100 and Convention No. 111, because these Conventions define discrimination (in the form of unequal remuneration) as based on sex (Convention No. 100) or as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin” (Convention No. 111). These qualifications for the determination that unequal treatment = discrimination are based on what are often called “inherent characteristics” – gender, nationality, etc. Unequal treatment resulting from *social practices* – e.g., employing workers on two different types of employment contract to perform the same work but with different pay and benefits – does not conform to this understanding of discrimination. Discrimination and unequal treatment remain conceptually distinct – as so defined, there can be unequal treatment without discrimination, and thus no violation of rights.

The definition of discrimination in Convention No. 111 does appear to offer a basis for widening the grounds for discrimination when it adds to the “inherent characteristics” “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies”. This could include, for example, employment status, but it is up to the “Member concerned”.

11. Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

The ILO's 2012 Report of the Committee of Experts on the Application of Conventions and Recommendations¹² in its discussion of the Republic of Korea and Convention No. 111 reflects the tension between recognizing the blatantly unequal treatment accorded to "irregular" workers (fixed-term, part-time and agency workers) and the language of discrimination. The report

... notes that the Conference Committee also expressed concern that the large majority of non-regular workers were women. In this regard, the KCTU states that measures to eliminate discrimination based on gender and employment status have been insufficient and that discrimination on the basis of employment status is particularly severe for women resulting from the fact that 70 per cent of women in the labour force are non-regular workers; the quality of women's employment has also deteriorated as jobs were created by expanding part-time work after the current economic crisis.

It is the *government* in this case which argues that the purpose of the 2006 Act on the protection of irregular workers "is not so much to achieve gender equality but to reduce undue discrimination against fixed-term and part-time workers." It is presumably admissible to speak of discrimination against irregular workers in this case because the Member has in its legislation found "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment", although the report shows just how thoroughly the government of the Republic of Korea has failed in its task.

The Committee makes a number of excellent recommendations, but in its conclusions continues to grapple with the constraining definition of discrimination and the effective application of a law which is about unequal treatment on the basis of contractual status and not gender: "The Committee urges the Government to make special efforts to address direct and indirect discrimination based on sex of fixed-term and part-time workers, and to ensure the effective enforcement of the Act on the protection, etc. of fixed-term and part-time employees of 2006, particularly in industries and occupations in which women are predominantly employed." The Committee cannot transcend the narrow interpretation of Convention No. 111; government practice is reviewed with reference to its own legislation, not to Convention No. 111, because the Committee appears unsure of how to apply the potentially broader sense of the Convention. In this recommendation, discrimination and unequal treatment still display characteristics of both affinity and mutual exclusion. Their occasional congruence is uneasy.

The non-discrimination Conventions of the ILO clearly need to be expanded through the careful use of the complaints mechanism to apply to

12. See http://www.ilo.org/global/standards/WCMS_175675/lang-en/index.htm.

contractual relationships which allow for unequal treatment. Widening the jurisprudence is a process of struggle and mobilization.

On the other hand, Conventions Nos 87 and 98, which establish workers' rights to come together in unions (freedom of association) for the purposes of negotiating the terms and conditions of their employment (collective bargaining) are wide-ranging, powerful instruments whose implications and applications as tools for challenging precarious work have begun to be applied.¹³

ILO Conventions are considered to guarantee rights not only on paper, but to make possible in practice the effective exercise of these rights. Key decisions of the ILO's Committee on Freedom of Association involving agency workers in the Republic of Korea (Case No. 2602, a case involving Hyundai Motors) and in Colombia (Case No. 2556) make it clear that employment schemes employing agency workers to frustrate union membership and collective bargaining rights violate Conventions Nos 87 and 98. The former states explicitly that subcontracting at Hyundai was used for the purposes of frustrating the effective exercise of basic rights. The same reasoning was echoed in the ILO's 2008 report on industrial relations at Coca-Cola's Colombia bottlers, which shows how by outsourcing many activities which are central to the operations of the bottlers the companies systematically deny and restrict the ability of those workers to exercise their rights to join a union of their choice.¹⁴

The 2008 Colombia decision (Case No. 2556) concerned the government's refusal to register a union of workers at a chemical company on the grounds that its membership application included employees of temporary agencies. The government contended that the agency workers were service, not chemical workers, because of their status as agency employees, and thus not eligible for membership in a chemical workers' union. The Committee affirmed that "the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities... that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing". This is a determination based solely on contractual status; the Committee did not have to search for a preponderance of women, migrants, etc. to condemn this as a violation of basic rights.

It follows from this that the many laws and regulations in force around the world which prevent workers on temporary contracts, and/or workers formally employed by agencies, from joining a union of permanent workers, violate Conventions Nos 87 and 98 and are therefore illegal under international

13. See, for example, IUF, March 2010 submission to the UN Special Representative on business and Human Rights *Precarious Work: Undermining Human Rights*, available at: <http://www.reports-and-materials.org/IUF-submission-to-Ruggie-re-precarious-employment-Mar-2010.pdf>.

14. See <http://www.ilo.org/public/english/dialogue/sector/papers/food/mission.pdf>.

law. Unions should make greater use of this in confronting both governments – and companies (more below). In matters of labour law, the ILO is the ultimate reference.

The potential application of Conventions Nos 87 and 98 can be further widened. The Colombia decision cited above states that workers – regardless of their formal employment status – have the right to join the union of their choice, without restriction, and to participate in its activities. For a union, what activity is more fundamental than collective bargaining?

What is not yet explicit in the jurisprudence of the ILO is the right of temporary/agency workers to be represented by a union of permanent workers for collective bargaining purposes. Many unions do, in fact, negotiate the terms and conditions of those on temporary and/or agency contracts employed in their workplaces. But in many countries and situations they are denied this right. It must be made explicit.

The rights set out in Conventions Nos 87 and 98 are rooted in recognition of the unequal bargaining relationship between the worker and the employer. To rectify this imbalance, workers must have the right to resist coercion by joining together to negotiate the terms and conditions of their employment. Since the right can only be exercised collectively, it follows that employment practices which dilute that right by fragmenting collective bargaining coverage by inserting a third party – the agency – between the worker and the real employer which organizes the collective labour of the enterprise violate the human rights foundations of collective bargaining. The agency employee may be “free”, in principle, to pursue her/his collective bargaining rights with the agency which is their formal, legal employer. But the real bargaining in this relationship takes place between the “user enterprise” and the agency. Since collective bargaining is understood to be the exercise of a collective right to bargain the terms and conditions of employment, this right is real only to the extent that it can be exercised with respect to the power which ultimately sets those terms and conditions. Agency work undermines that fundamental right.

Imposing a human rights framework on companies: The OECD Guidelines

The OECD Guidelines, which were revised in 2011, previously contained only vague references to employees’ human rights. They now explicitly reference the ILO core Conventions as well as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ESCR), opening up new possibilities for their use in organizing to combat precarious employment.

While human rights treaties are developed by States, for States, the revised Guidelines incorporate the UN Guiding Principles on Business and Human Rights (the “Ruggie Principles”), which establish these human rights

commitments as a standard to which corporations as well as States must adhere. The rights set out in these instruments are not negotiable – they constitute a standard against which all practices must be measured. While these international human rights instruments, like ILO Conventions Nos 87 and 98, say nothing about precarious employment as such, they say a great deal about the human rights obligations of companies with respect to worker and trade union rights in the light of the expansion of employment practices which can violate basic rights. They can help us elaborate a framework for establishing strict criteria for the employment of precarious workers and benchmarks for reversing it.

Article 7 of the ESCR sets out the right of all workers “to the enjoyment of just and favourable conditions of work.” Article 7a(i) establishes the right to “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”. Unlike the non-discrimination Conventions of the ILO, this is a definition of unequal treatment which goes beyond discrimination rooted in “inherent characteristics” (“without distinction” is arguably broad enough to include the distinction between, for example, permanent and agency staff). Article 7(c) sets out the right to “[e]qual opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”.

On the basis of Article 7, inequality of treatment between permanent and non-permanent employees violates international human rights commitments, and Article 7(c) suggests that it is a violation to maintain temporary and agency workers working alongside permanent workers in a situation of permanent precariousness.

This incorporation of the Ruggie Principles into the Guidelines includes the requirement for companies to engage in “human rights due diligence”. This process applies equally to their supply chains as well as to their own operations. Human rights due diligence in supply chains means that companies are responsible for the human rights impact of their business partners, contractors, licensees and franchisees. It imposes on them the requirement to minimize the risk of potential rights violations and to take appropriate corrective action when violations occur. Contract manufacturers and agencies supplying labour are clearly part of this expanded definition of the supply chain, and heighten the risk of real or potential human rights violations. The expansion of precarious work would constitute a violation of the corporate obligation to minimize human rights risks. Failure to reduce precarious work would mean complicity in rights abuses.

There is additional reinforcement for this approach in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The MNE Declaration itself has no implementation mechanism, but it is referenced in the revised Guidelines as a tool “in

Box 2. Inequality of treatment from day one: How companies are exploiting “derogations” from the European Union Directive on agency work

Transposition into national law of the EU Directive on temporary agency work allows for “derogations” from the principle of equality of treatment which subvert the Directive’s intended content. In Germany, for example, derogation which permits negotiated agreements which formalize unequal treatment of agency workers with respect to permanent employees engendered a rash of agreements negotiated by hastily assembled “unions” almost as soon as the Directive came into effect, posing a major challenge to the DGB and its affiliates.

In the United Kingdom, companies were fast off the mark to profit from a so-called “Swedish derogation” (actually a UK/Danish/Swedish hybrid).

To circumvent the requirement that after 12 weeks of continuous employment agency workers should enjoy equal access to pay and some, but not all, benefits (there is no equality of treatment when it comes to redundancy notice, redundancy pay or pension benefits) companies and agencies swiftly collaborated to make these workers permanent employees of the agency.

Overnight, derogation became widespread in the retail and other sectors. A spokesperson for supermarket giant Tesco told the *Financial Times* shortly after the Directive came into effect that “[t]he derogation is being used very widely across the economy by the agencies as a way of ensuring that agency work remains competitive and flexible. The approach has been recognized by the government, the British Retail Consortium and the CBI.”^a What is missing in this statement is the role of the agencies’ clients in encouraging and implementing the practice.

Two days later, the *Financial Times* reported that one agency was moving 8,000 of its 25,000 temporary workers on to permanent contracts – including those working at a DHL operation supplying parts to a Jaguar Land Rover car assembly factory, where Unite members were being pressured to sign contracts giving them up to GBP 200 less *per week!*^b

And on 31 October, a spokesperson for the Morrisons supermarket chain told the JustFood internet food industry publication: “The recruitment agencies we work with have been considering how they will comply with this legislation for some time. They have proactively considered using this model or are already employing their workers. Through our network of agency suppliers, Morrisons will be offered temporary workers who may be employed by the recruitment agencies with contracts of employment referred to as Swedish Derogation.”^c The Morrisons workers slated for “derogation” are employed in both logistics and food manufacturing.

understanding the Guidelines to the extent that it is of a greater degree of elaboration”.

Paragraph 16 of the MNE Declaration states that companies “should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise”. Paragraph 25 states: “Multinational enterprises equally with national

In company speak, the operation brings “synergies” to the demand for “flexibility”. The real synergy provides the user enterprise with generous cost savings and allows the agencies to expand their colonization of the labour market.

In the United Kingdom, Unite had had an understanding with the transnational brewer Carlsberg that agency work in logistics would be limited to around 15 per cent of the workforce. The union requested discussions when that percentage was exceeded, but when the Directive came into effect the company instructed all its agencies to convert temporary workers into permanent employees. At the same time, Carlsberg entrenched CBA language which starts new hires at 80 per cent of the pay of longer-serving employees, moving to 90 per cent after a year – and stopping there. Under the current agreement, these workers will never achieve 100 per cent pay parity. The “synergy” here is low pay rates for an increasing portion of the directly employed workforce and the institutionalized denial of equal terms and conditions for the growing army of agency workers.

With the growing tendency for companies to lock in two-tier agreements, agency workers who escape “derogation” now find the comparison against which equal treatment is measured is starter pay at or barely above the legal minimum, with few or no benefits.

These applications of the Directive demonstrate the patent absurdity of the claims by the agency lobby CIETT that “appropriate regulation” of agency employment promotes decent work and the “creation of jobs which otherwise would not exist”.^d

Viewed within the human rights-based framework outlined here, these and similar “derogations” from the principle of equal treatment violate international human rights commitments, and can be challenged on this basis. No one has yet proposed a derogation from the principle of non-discrimination which in practice might allow employers to discriminate in employment or remuneration on the basis of national origin, or to exclude such workers from a bargaining unit of permanent employees – yet a contract with an agency confers on employers this power.

^a See *Employers are exploiting temps, claim unions*, available at: <http://www.ft.com/cms/s/0/76f5fec4-fe4e-11e0-a1eb-00144feabdc0.html#axzz1tzkDxC6T>.

^b See *DHL to use temps get-out clause*, available at: <http://www.ft.com/cms/s/0/1ea278fa-ffe9-11e0-ba79-00144feabdc0.html#axzz1tzkDxC6T>.

^c See *Unions blast Morrisons over temporary workers*, available at: http://www.just-food.com/news/unions-blast-morrisons-over-temporary-workers_id117194.aspx.

^d This assertion is a consistent leitmotiv in the record of the ILO Global Dialogue Forum cited earlier, and throughout Ciett’s lobbying and publicity work.

enterprises, through active manpower planning, should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment.”

Paragraphs 16 and 25 of the Declaration on Multinational Enterprises, then, establish the responsibility of companies to act to ensure the progressive

realization of secure employment which provides adequate and fair remuneration and access to social security benefits. Companies must demonstrate that they are moving away from precarious employment to promoting more stable and secure jobs. Paragraph 25 clearly suggests that they should be negotiating agreements on employment security. Full disclosure of the use of precarious employment contracts, at contract manufacturers as well as in directly owned and operated enterprises, is consistent with the employer obligation to provide the information necessary for meaningful collective bargaining to take place which is established in the jurisprudence of the ILO (and specifically stated also in the OECD Guidelines Chapter V on Employment and Industrial Relations).

In short, the use of precarious employment above and beyond what can be established to be necessary for legitimate, demonstrable purposes (and this determination itself has to be negotiated through collective bargaining!) violates fundamental human and trade union rights. The exercise of fundamental rights is not subject to qualification in the name of “flexibility” or “seasonality”, which are claims but not rights grounded in international human rights law; rights cannot be “seasonally adjusted”, and rights as such are not flexible. Compliance with international human rights obligations requires companies to work together with trade unions to negotiate the progressive reduction of precarious employment as part of “human rights due diligence”; failure or refusal to do so violates the UN Guiding Principles and makes a company liable to a complaint under the OECD Guidelines. The IUF has shown that such complaints may, under the right circumstances, be an important lever in winning organizing and bargaining rights for precarious workers.

Beyond the possibilities for challenging precarious work using the OECD Guidelines, whose scope of application is limited, the rights framework outlined here can be a tool in organizing and campaigning to win new members, new bargaining rights and new regulation to restrict and ultimately eliminate precarious work. Because the basic international human rights instruments discussed here have been almost universally ratified, their importance for attacking legal barriers to genuine equality of treatment and for eliminating restrictions on trade union rights derived from employment status is potentially enormous. The framework provides an organizing and bargaining platform and the rights-based foundation for a set of political demands to defend worker rights under a regime of disposable jobs. It will have to be elaborated and continuously developed through a process of continuous organizing.