Chapter Three:
The ILO and Sovereignty:New Dawn or New Dinosaur?

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The theme of my address is quite simple.

Slowly but surely, countries like New Zealand and Australia are being enveloped in a spreading net of international obligations that eat away at national sovereignty and independence.

However, the inability of international bodies, particularly the longer established bodies like the ILO, to change these obligations quickly enough to meet rapid globalisation and public expectations will reduce their relevance, and therefore hopefully any damage, to member nation states over time.

Inevitably, my comments will be drawn more from my experience as a New Zealander, rather than from those of an Australian. Nevertheless, a study of our respective histories does show a remarkable symmetry of experience between Australia and New Zealand in the years since our formation.

We think pretty much alike in foreign affairs, in defence (though I am ashamed to say that the NZ Labour/Alliance government is rapidly widening the gap between Australia and New Zealand in capability and strategic overview), and in human rights. Economic and trade policy, especially under the impetus of our Closer Economic Relationship, has converged significantly in the last 15 years.

We have diverged in some areas (such as New Zealand's Multi-Member Proportional electoral system, and dealing with indigenous issues), but in general our countries have had much more in common than in contrast.

Against this background, I imagine that the experiences I am about to share on the implications for Australia's and New Zealand's sovereignty of membership of the International Labor Organisation (ILO) will be easily understood. The question of what to do about them, and whether they have lessons for continued support of the ILO and its Conventions, is a matter I will return to later in this paper.

What is the ILO?

The ILO is an old international institution. Only the International Parliamentarians' Union is older.[2] Formally created in 1919, the ILO had its roots in the International Association for Labour Legislation founded in Basel in 1901.[3] The initial motivation was humanitarian, sparked by concern for the condition and exploitation of workers and their families.

The second motivation was political. The fear was that without an improvement in their conditions, the workers, whose numbers were increasing rapidly as a result of industrialisation,[4] would create industrial unrest, perhaps even revolution. Given the influence of Karl Marx's dogma and Lenin's aspirations for Russian Communism at the time, this was not unreasonable.

The third motivation was economic. Any industry or country adopting social reform would find itself at a disadvantage compared with its competitors, so the ILO was to embrace all countries to level the playing field of (increasing) international competition.

Unlike any other international body since, the ILO was set up as a tripartite body involving governments, employer organisations and unions. It remains unique, even though international bodies have increasingly been forced to involve non-governmental bodies in their policy formation processes.

An examination of the ILO's roots is interesting. The reasons for its formation were essentially defensive – to stop something worse (such as revolution) happening. Similar fears of

war, discord and financial chaos triggered the formation of the UN and other such major bodies as the World Bank and the IMF.

With the passage of time, the role of the ILO has changed. Fear of revolution no longer drives it. Greater altruism is a major driving force, to further the interests of its tripartite membership (especially unions and employers) and to defend and extend its Conventions and standards.

The original ILO economic objective still has great relevance. That is to ensure that countries with highly developed social systems are not put at a competitive disadvantage to those without such systems, and the humanitarian objective in lesser developed countries.

The European Union (EU) in particular has been putting pressure on Asian-Pacific countries, where social security systems are not as developed (and therefore do not enter into country cost structures). The EU, as a region with high social security costs, believes it is at a competitive disadvantage in world markets and the ILO can and should help resolve such a disadvantage.

Thus the EU and some other countries are using the ILO Convention process to pressure ILO developing members, particularly in Asia, into compliance with Conventions that would establish costly social systems in the hope that the perceived competitive disadvantage is removed.[5]

The ILO and National Sovereignty : a Case Study

In 1994, Senator Rod Kemp presented an excellent paper to the Society, entitled *International Tribunals and the Attack on Australian Democracy*.[6] In it, he outlined the way in which the Keating Government used the ILO to subvert the powers of States, in this case Victoria, to impose federal industrial relations powers by ratifying ILO Convention 158.

The government was then duty bound by international rules to pass legislation which, according to Senator Kemp, protected the power and privilege of Victorian trade unions, and imposed minimum standards on workplaces in spite of the State's legislation.

It is unusual, if not unique, for a national government to use the ILO against a democratically elected local or State government of its own country. What is more common is the use by one or other of the tripartite partners to berate the elected government of the day.

The underlying thesis is simple, on the basis that the closer to God you are, the greater the moral authority you have to impose your view of the world on those below you. As international organisations are perceived to be closer to God than member states, the greater is the moral authority they can wield, sometimes to the disadvantage of a member state.

The New Zealand case study I want to outline concerns ILO Conventions 87 and 98 and the way the ILO was used for domestic political purposes.[7]

Convention 87 concerns the freedom of association and the rights of unions to form collective organisations. Convention 98 confers on unions the rights to organise and bargain collectively. New Zealand has not ratified either of these Conventions. We have not been able to, as our labour laws over many years have not fitted the letter of the ILO Conventions and interpretations, nor have we pretended they do.

Seemingly this doesn't matter. In 1993, the NZ Council of Trade Unions (NZCTU) took the New Zealand government to the ILO Freedom of Association Committee (FAC), alleging *inter alia* that the *Employment Contracts Act (ECA)* violated Conventions 87 and 98 by first, not promoting collective bargaining over individual agreements or contract. Secondly, the NZCTU asserted that collective contracts were not "true" collective agreements as contemplated by the ILO. They also claimed that the processes of collective bargaining that emerged under the *ECA* were "contrary to the principle that both employers' and workers' organisations should bargain in good faith and make every effort to come to agreement".[8]

The Freedom of Association Committee is one of the ILO's audit committees, or more

correctly the ILO's Convention Police. It hears complaints from anyone who wants to make one, and determines whether a breach of ILO Conventions, standards, articles or decisions has occurred. While its processes allow the accused the right to make submissions, it is a "Star Chamber" in the sense that there are no open hearings, rights of cross examination or own right of reply as part of the FAC's report. Furthermore, this all takes place even if a government has not ratified the Convention it is accused of violating.

For example, Article 8 of Convention 98 makes it quite clear:

> "This Convention shall be binding only upon those Members of the ILO whose ratifications have been registered with the Director-General".

So why didn't the ILO simply reject the NZCTU complaint, given New Zealand hadn't ratified Convention 98?

Instead, the ILO processes simply took over, and the government of the day acquiesced to the so-called higher moral authority vested in the ILO. The domestic public opprobrium of refusing to see an ILO mission investigating a complaint about two Conventions New Zealand didn't formally endorse or recognise was obviously something the government didn't relish.

However, there was a principle involved, and in retrospect, New Zealand should not have given the NZCTU complaint credence by receiving the ILO mission. Our acquiescence gave credence to a complaint that had no credence because of the outdated nature of the ILO Conventions in question, their limited relevance to modern day industrial relations practices, and because the Conventions hadn't been ratified by us.

So in that case, the New Zealand government ceded a degree of sovereignty to an international organisation many see as increasingly an historical anachronism.[9]

The dysfunctional demand on nation states to adhere to ILO Conventions well past their use-by date is best illustrated by the following quote from the ILO report on the NZCTU complaint:

> "237……..The Committee further notes that the Government considers that the Act (the *ECA*) is an integral part of its wider economic policy strategy, which enabled it to achieve significant results….Whilst appreciating the importance of these factors for governments, employers and workers alike, the Committee stresses that it is not called in this case to examine whether and to what extent the Act has contributed to an improvement in the fiscal, financial and economic situation of the country".

Perhaps the Committee should have, as it might well have drawn a different conclusion than it did about the complaint. It might have also learned about the lack of contemporary relevance of two of the ILO's most controversial Conventions for countries like New Zealand.

The FAC concluded that rather than examine the relevance of a Convention to today's world, New Zealand was to be adjudged "guilty" of not having industrial relations legislation "fully consistent" with an ILO Convention written 50 years ago.

Being Dealt with by the ILO : Who Really is at Fault?

What are some conclusions from New Zealand's experience in this case, a case that is not out of line with the general approach taken by the ILO with many other complaints?

First, it is hard to escape a sense of "guilty until you prove yourself innocent" in the way the FAC conducts itself. The status accorded to complaints is to accept *prima facie* the claims made, then require the body against whom the complaint is made (usually governments) to disprove it.

Second, it doesn't matter whether a country has ratified ILO Conventions or not. A country can be adjudged guilty of violating a Convention — especially the so-called Fundamental Conventions[10] — even if it hasn't ratified.[11]

Third, as was the case for New Zealand in respect of the *Employment Contracts Act*, there was a clear domestic electoral mandate for the passage of the legislation. The principles of the

legislation were laid out well in advance of the election that saw National become the government in 1990. Those principles included the provisions the NZCTU later complained about to the ILO.

The question is which mandate (or sovereignty) should have preference? Should a democratic election result take preference over 50 year old ILO Conventions? If so, then the ILO shouldn't begin a process of calling a member country to account, and certainly not from a complainant politically opposed to its domestic legislation.

In this New Zealand case study, no complaint process should have commenced, as the two Conventions in question hadn't been ratified.

Fourth, no defence is allowed if an ILO Convention is clearly out of date. We would argue that Convention 98 is, on the basis that it is 50 years old, and industrial relations practices have moved on. There is no logic in requiring that collective bargaining be given preference over individual agreements, especially if legislative protection against undue influence is available to the individual.

There is no conceivable reason these days why unions alone should have monopoly bargaining powers, or that groups of employees can't bargain collectively of their own free will and register their own enforceable agreements. Yet ILO Conventions imply monopoly powers and prevent non-union organisations concluding collective agreements. Such provisions might have been relevant 50 years ago when employee bargaining power was weak in developed countries, but they aren't now.

They might be appropriate in some developing countries today, but the real question is whether a "one size fits all" approach to ILO Conventions can work in a rapidly diversifying world. Patently, they can't. If the ILO is to remain a credible international institution it needs to change its approach to modernising Conventions and "policing" mechanisms.

Fifth, even though the ILO has no punishment regime to speak of, the court of public opinion both at home and abroad can be very damaging. Often the news reports are based on complete ignorance of the facts or the relevance of out-of-date Conventions that no single country can realistically modify. What journalist can be bothered trying to understand the arcane ways of bodies like the ILO? It is enough for many citizens to hear a country is in breach of its international commitments for the damage to be done.

Sixth, in these days where we are supposed to act in "good faith", I find it bizarre that the tripartite partners in the ILO, including those at home and their international bodies, will use the ILO processes to pursue a domestic political agenda. Often the real objective is to publicly embarrass the government of the day back home, rather than seek a lofty and higher ideal. Australia and New Zealand have been afflicted with this perverse use of an international organisation's processes.[12]

It seems to me that the fault lies at the heart of the ILO's processes. Surely they weren't shaped originally to allow mischievous or malicious use of international commitments for domestic political purposes? The ILO now operates in a world entirely different from that when it was formed in 1919. Yet its Constitution, its Conventions and its *modus operandi* haven't changed appreciably.

There is a further penetrating, if not insidious, influence to take account of as well. That is what gets the headline, and sells the papers.

The increasing predilection of our Courts to look to international treaties and commitments in interpreting domestic law – especially common law – is fraught with potential dangers. This point was developed in Senator Kemp's paper in 1994 and in Dr Howard's in 1993. [13]

If one concludes that ILO Conventions, articles and decisions are to be used by domestic and international courts in second-guessing elected Parliamentary democracies, then we have to be confident ILO "law" is relevant and contemporary. So there is a significant premium on any elected government to be satisfied the international commitments it makes are relevant and contemporary. These observations lead me to conclude the ILO is far from being a relevant and

contemporary international institution.

Getting Consensus for Change

In a rapidly globalising world, the representational form of the ILO, the statutory framework of its Conventions, the operational nature of its policing machinery, and perhaps the very existence of the ILO, need fundamental re-assessment.

If that wasn't enough, the ILO, like other international bodies, has become an active agent for change in many nation states, including our own, in a manner not contemplated by the founding fathers. Decisions of various international and national Courts have spurred on the ILO, as have domestic and international pressure groups using the resources and mechanisms of the ILO, and the "audit" committee structures of the ILO.

More insidious though, is the distressing political pressure of not wanting to be seen as not conforming, even though your better judgment says otherwise. Elected politicians are but passing ships in a sea of permanent international civil servants and domestic ministries of this and that. The civil servants and ministries have a vested interest in seeing the continuation, if not the expansion, of international bodies such as the ILO and the UN, as well as the use of *ad hoc* bodies to deal with specific issues (eg. APEC, WTO, Climate Change).

Some might see this as a conspiracy to replace nation states with supra-national institutions that will take over where countries like Australia and New Zealand leave off. I don't subscribe to that view, although there will be individuals whose political dogma would like to see this happen.

A much more convincing explanation is the cock-up theory of management. It is simply too hard to revisit historical commitments, or weed the international organisation patch.

We don't make it easy on ourselves. Since 1980, Australia has signed up to 780 international treaties. New Zealand isn't much better. We signed 467. So two small countries signed 1,247 internationally binding commitments in 20 years. All will be more difficult to change or dispose of than to sign. 99.9 per cent will remain on the statute books in perpetuity to tie countries in as much red tape as that afflicting domestic business.

The chances of changing, modifying or getting rid of international bodies no longer serving the purpose for which they were formed is hideously difficult, if not impossible. The theory of large numbers should make it easier, but in fact it doesn't. In 1945 there were 51 member states in the UN. Now there are 189. In 2000, the ILO has 349 countries, territories, and areas participating in its conferences and processes – multiplied by three, as there are employer and union bodies involved as well.

Getting consensus for change in international bodies, let alone their voluntary liquidation, is virtually impossible given the vagaries of international politics. The sheer distress of trying to obtain agreement on what should change, beyond the banal declarations of, "Yes, we should do this, so let's form a committee and meet in Addis Abbaba next year to discuss it", is daunting for all but the foolhardy.

I am not attempting to say that all the treaties we have signed are irrelevant or wrong. Clearly many aren't. The ANZCER and ANZCDR are vital expressions of the living relationship between Australia and New Zealand, for example. Many of the fundamental universal declarations of the UN are values we should all subscribe to as citizens of a civilized world. Where there ought to be real concern, is the way in which countries are being tied into concepts and rules I daresay elected politicians of nation states have little appreciation of. Once agreed to, they are virtually impossible to change or re-negotiate.

In the period I was Minister of Labour, New Zealand launched a reform agenda for the ILO. It was modest, on the basis that by not scaring the chickens too much, a consensus for change might emerge. With the support of Australia, and a number of other Asian-Pacific government members, we proposed an agenda[14] to:

- Review all existing ILO conventions and standards against two key tests: their relevance and

effectiveness to the world today, recognising *"the ILO must adjust to the changing reality around it"*.

- Eliminate the bureaucratic proliferation of subject matter on Conventions (e.g., the processes of the FAC and other "audit committees" of the ILO) by adopting less prescriptive, more flexible standards and better achieve the core principles of the ILO.
- Establish evaluation procedures to test whether a Convention has achieved what it set out to do. In other words, measure and evaluate outcomes *"rather than simply assess and criticize compliance with labour standards, some of which are of questionable moment in a modern world"*.
- Improve the "teaching" functions of the ILO so it can educate organisations and countries (especially developing countries) on how to achieve the revised core principles of the ILO. This implies reducing the resources of the Convention Police, and increasing those of the training and extension services to member states.

Even this modest agenda was too much for many member governments, let alone the union and employer interests. ILO staff thought it too ambitious. Reform became too difficult, even though the new Director-General made noises during his election campaign about the need for reform. Consequently, nothing has happened. Nor will it.

In the meantime, the ILO will carry on gradually chipping away at the sovereignty of its members by creating more Conventions and standards. The ILO, together with the myriad of proliferating international bodies, will make it more, not less, difficult for elected Parliaments to address the problems of their nation state.

Cyberspace and New Threats to Sovereignty

The difficulties will multiply as international bodies use the enormous power of the Internet and the technological revolution it embraces. The harnessing by business of the Net and E-Commerce is rapidly eroding the power and relevance of national borders, national laws, and national taxation systems. Increasingly, all sorts of international bodies are directly reaching across to the citizens of nation states and mobilizing their votes in support of special interest issues. Greenpeace is a good, but now aging, example.

The outreach of politically inspired international groups is burgeoning and beginning to make life considerably more complex for national governments. Consider the impact of the collection of disparate groups against globalisation. They were capable of being organized only because of the Net, terrorizing national governments and the World Trade Organisation alike as they pursued a diverse, if not anarchistic, agenda.

Now the formal international bodies are using the Net in a similar manner too. For example, the ILO is using it to marshal support for its own causes. IPEC, the *International Programme on the Elimination of Child Labour*, a worthy cause, is being driven in a totally different way from earlier ILO programmes to ensure compliance with its conventions.

How much of a threat is this to national sovereignty or the ability of elected governments to pursue their democratic mandate? Indeed, did the framers of the original charter of the ILO contemplate direct contact with the citizens of member states in the manner made possible by the Net?

We cannot dismiss the difficulties this creates for democratically elected governments. The only direct accountability to voting citizens of democracies like Australia and New Zealand is through their elected national governments. Only governments can be called to account. The ILO can't. Nor can the UN, the IMF, the World Bank or the score of other international bodies now intruding on the space of elected governments.

To this add the cyberspace threat. The virtually zero cost of the Net as a delivery mechanism for "programmes" and campaigns like IPEC, means elected governments will be faced

with yet more single issue politics, driven by international organisations who have jumped over government's accountability responsibilities, into the voter base of member states.

Conclusions

I began by asserting that countries like New Zealand and Australia are being enveloped in a spreading net of international obligations that eat away at national sovereignty and independence. New Zealand's experience with the ILO proves this.

If you believe there is a role for international organisations (and I do, if they are constrained to establishing and promoting values the human race should aspire to, to allow us to live in peace and security) then those organisations have to be able to change with the times. The ILO has shown it can't, and probably will never be able to given its structure and *modus operandi*.[15]

Does that mean countries like Australia and New Zealand should forsake continued membership in order to protect our sovereignty? Whatever the decision, in my view it has to be a conscious one to stay and attempt further change *or* to leave and pursue the relevant ideals of the ILO in other ways.

One thing is certain. The tide of history, and the technological revolution we are just entering will sweep aside international bodies like the ILO if they do not fundamentally change.

Ironically, the Internet revolution rivals the Industrial Revolution that spawned the ILO. The question is whether the ILO, and other international bodies like it, can transmogrify enough to meet the challenges of a radically different world?

Perhaps the answer for the ILO *et al* lies in the fate of the dinosaurs.

Endnotes:

1. The views expressed in this paper are the author's alone and do not represent the views of the New Zealand National Party or the National Party Opposition.

2. The International Parliamentarians' Union was formed in 1889.

3. See www.ilo.org for more detail.

4. By this stage the Industrial Revolution had just about reached its zenith.

5. In the last few years in which I attended the ILO annual Conference, there have been significant by-plays by European nations, supported in some cases by the US, calling on greater compliance with ILO Conventions by major Asian states. There has been resistance by the European bloc to a major revision of ILO Conventions, and to allowing less developed countries to reflect the broad intent of Conventions in different ways, depending on the state of development of a country's economy. In my term as Minister for Labour, New Zealand argued that slavish adherence to the letter of Conventions is less important than establishing processes that encouraged countries to move toward implementing the outcome of a well-functioning labour market with desirable social outcomes. This would mean a comprehensive review of all ILO Conventions, and their expression in terms of outcomes rather than particular structures that might suit some countries given their stage of development or economic and cultural history, but not suit others.

6. Senator Rod Kemp, *International Tribunals and the Attack on Australian Democracy*, in

Upholding the Australian Constitution, Proceedings of The Samuel Griffith Society, Volume 4 (1994), p.119.

7. A similar case study involving Australia can be found in Case 1511, where the International Federation of Air Line Pilots' Associations accused the Australian government of violating Conventions 87 and 98. It basically involved an international union taking a domestic industrial dispute to the ILO. Even the FAC rejected this level of intrusion into a domestic dispute, but not without barbs in its judgment with respect to the rights for employers to take common law action against unions for breaking the law.

8. Para 686, Case 1698, Report 292 of ILO Freedom of Association Committee.

9. In an 83 page report, the FAC made a number of decisions which highlighted the differences between industrial practices that were incorporated into 50 year old Conventions, and the needs of a modern economy. See Part D of Report 292.

10. ILO Conventions 29 and 105 (forced labour), 87 and 98 (freedom of association and collective bargaining); 100 and 111 (discrimination); 138 and 182 (child labour).

11. This is sanctified in a little known passage of the ILO *Declaration on Fundamental Principles and Rights at Work* promulgated in 1998. The key passage is:

> "..all Members, *even if they have not ratified the Conventions in question*, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions."

This seems to conflict with the provisions of some Conventions (eg. Article 8 of 98), where there is express provision for exclusion from a binding commitment until ratification.

12. Besides the case study above, the NZ Employers' Federation took a complaint in 1987 against the Labour government. Australia has its examples, for example the case outlined by Senator Kemp in his speech to the Society in 1994, and the case referred to in endnote (7) above.

13. Dr Colin Howard, QC, *Australia's Diminishing Sovereignty*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993), p.195.

14. See transcript of the address by Hon Max Bradford, Minister of Labour at ILO Conference 85th Session, 1997.

15. The history of international organisations transmogrifying from within is not encouraging. Change from without, by repeal and replacement, isn't much better, although the United Nations did replace the League of Nations after the First World War. Should this be the new dawn for the ILO?