

International labour standards and the informal economy

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I. The nature of the debate

Nicolas Valticos liked to tell the story of a Belgian professor who was involved in the ILO's formative years. The professor dreamed one night that the ILO had adopted Conventions on every imaginable subject and he wondered what could possibly remain to be done. Upon waking, he realized that this could never come true, since the ILO not only created standards, it had to make sure that they were applied. And with the passage of time, he realized, there would always be a need to revise and update existing standards to reflect new realities.¹ Looming large among today's new realities is what is called the "informal economy". This growing phenomenon poses at once familiar and new challenges to the contribution that international labour standards can make to achieving the goal of social justice and decent work for all.

The "informal economy" – variously perceived – is a topic that has generated debate in the International Labour Organization for over 30 years. Much of this debate has encircled definitions of "formal" versus "informal" – with few satisfactory results. Various definitions have been put forward – by statisticians for purposes of data collection and analysis, by economists for purposes of research and policy prescriptions, by legal experts for purposes of drafting and interpreting legislation. Approaching the task from different perspectives, it is not surprising that no generally agreed definitions have been found. Each discipline uses working definitions for particular purposes. The definitional discourse risks losing sight of the essential question: how can people, whether their work is designated "formal" or "informal", be both empowered and protected?²

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¹ See N. Valticos, "International labour standards and human rights: Approaching the year 2000", *International Labour Review*, vol. 137, 1998, pp. 142-143.

² This is an elaboration of Arturo Bronstein's question, "how to protect the unprotected?"; see A. Bronstein, "Labour law and the informal sector", *Workshop on Regulatory Frameworks and their Economic and Social Impact*, Geneva, 4-5 February 1999, unpublished paper, p. 1.

When the tripartite delegates to the International Labour Conference adopted conclusions on decent work and the informal economy in 2002, they acknowledged that there was no “universally accurate or accepted description or definition.” These conclusions noted, however, that “there is a broad understanding that the term ‘informal economy’ refers to ‘all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements [...] They are operating outside the formal reach of the law; or [...] although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs’”.³ On the other hand, the Conference conclusions distinguished such activities from “criminal and illegal activities, such as smuggling of illegal drugs, [which] are not appropriate for regulation or protection under labour or commercial law”.⁴ This list could have included other relevant branches of law, in particular property law, tax law and human rights law. Since governments use many different rationales to characterize activities as legal or illegal, dwelling on this issue is not particularly helpful in understanding the informal economy or responding to the needs of those operating in it.

The phrase used in the 2002 conclusions, i.e. “appropriate for regulation or protection under labour or commercial law”, provides a useful point of departure, however. The logic of traditional labour law is relatively simple: if factors are present that indicate an employment relationship, the employee benefits from the coverage of labour law, which has as its purpose the rebalancing of the unequal power of capital and labour. As long as it identifies an “employee”, labour law does not care whether the employer is “formal” or “informal” for other purposes, such as being subject to and/or complying with commercial or fiscal regulations. But the labour market has become more complex, threatening this simplicity, and labour law has been struggling to keep pace. At the same time, the power of the State to enforce its regulations, including labour regulations, has been weakened. This too tends to cloud our vision of how to address the problems we see in the informal economy – where, whether *de facto* or *de jure*, too many people remain without legal protection and recourse to rights that could empower them.

Rather than disappearing, the informal economy has expanded and become more diverse. With enhanced global competition, production chains that cross national boundaries, and the erosion of state power, the informal economy and the formal economy have become increasingly linked. The informal economy produces for, trades with, and distributes for the formal

³ See Conclusions concerning decent work and the informal economy, International Labour Conference, 90th Session, 2002, *Record of Proceedings*, vol. II, p. 25/53, para. 3.

⁴ *Ibid.*, p. 25/53, para. 5.

economy. Gender plays a key role in understanding the informal economy and its links to the formal.⁵ However, the debate on the informal economy – or the earlier, related debate on the informal sector – has largely been about means to an end: how to achieve decent work (“work”, not necessarily “employment” in the legal sense) for all workers and employers, whatever the characterization of their work. This challenge is complicated by the segmentation of the informal economy, with situations ranging from barely subsistence activities to cutting-edge exploitation of new opportunities in high-technology fields. Unfortunately, the bulk of those in the informal economy fall closer to the low end of this continuum and are trapped in poverty. How to address their dilemma lies at the heart of the debate over both the informal economy and poverty reduction.

As the World Commission on the Social Dimension of Globalization observed, “while some informal workers provide low-cost inputs to global production systems, the majority are excluded from the opportunities of globalization and confined to restricted markets. This is a major governance issue with a considerable impact on the distribution of the benefits from globalization. First, the lack of rights and protections leads to vulnerability and inequality, undermining many of the principles of governance. Second, there is lack of access to markets and services, so that potential for growth and development is unrealised. Third, there is a failure to build a fair and participative economy, for the rules of the game are in effect not the same for all [...] The goal must be to make these informal activities part of a growing formal sector that provides decent jobs, incomes and protection, and can trade in the international system”.⁶

Aspects of the informal economy debate have involved labour standards, both international and domestic. While Nicolas Valticos did not explicitly take up the informal economy in relation to international labour standards, his conception of human rights in labour matters was sufficiently generous to permit speculation about how he might have seen its relevance to the work of the International Labour Organization. His emphasis on the universality, individuality and flexibility of international labour standards has particular relevance for the informal economy.

On the other hand, international labour standards are deemed by some to be counterproductive in relation to the informal economy. Bariantos, Kabeer and Hossain illustrate this view when they say: “Labour markets today are characterized by a continuum in which the formal shades into the informal and women move between jobs in the traded and non-traded economy. Globally enforced labour standards may improve jobs in the traded sector, but they are only likely

⁵ See M. Chen, J. Vanek, M. Carr, *Mainstreaming informal employment and gender in poverty reduction: A handbook for policy-makers and other stakeholders*, London, Commonwealth Secretariat, 2004.

⁶ See *A Fair Globalization. Creating opportunities for all*, Report of the World Commission on the Social Dimension of Globalization, Geneva, ILO, 2004, paras. 262-264.

to address a very small (formal) segment of this sector. They will do little for those at the informal end of the traded continuum, and even less for those in the non-traded informal economy, and may end up increasing the incentives to informalize. There is a danger that they will simply serve to set up a privileged enclave for the few, while curtailing employment opportunities for the many”.⁷ This essentially “insider/outsider” view becomes less and less convincing as shades of grey replace a black and white picture of the formal and informal.

Looking specifically at international labour standards in relation to the “dilemma of the informal sector”, Carlotta Schlyter notes: “The relation between the informal sector and international labour standards is a subject fraught with questions, two of the main ones being whether regulations designed for the formal sector can be in any way extended to the informal sector without stifling its further growth, and how, otherwise, persons working in the informal sector can be allowed to benefit from the protection offered by international labour standards”.⁸

Cumulatively, these views reflect two common misconceptions. The first is a belief that international labour standards do not address people in the informal economy, whereas in fact many provisions do. The second is confusion between the interplay between international labour standards and domestic laws and regulations (which are often not required by the ILO Conventions or Recommendations concerned and which indeed may be ill-conceived means of achieving implementation of the international instruments).

The first misconception – that international labour standards do not address those in the informal economy – appears to meld three strands of thought:

- (i) that workers in the informal economy are outside the scope of application of international labour standards (false for many but not all provisions);
- (ii) that given the circumstances under which work is performed, the standards are irrelevant to those in the informal economy (false for many but not all provisions);
- (iii) that international labour standards are not applied in practice in the informal economy (true in most cases, but non-application is not limited to the informal economy; in any event, failure to implement voluntarily ratified Conventions, whether in the formal or the informal economy, reflects a

⁷ See S. Bariantos, N. Kabeer, N. Hossain, “The gender dimension of the globalization of production”, Policy Integration Working Paper No. 17, ILO, Geneva, 2004, p. 14. Curiously, this “insider/outsider” approach has not been applied to theories that stress the importance of formalizing property rights (e.g. as espoused by Hernán De Soto), since not all people will end up as owners of productive assets. Wealth created by labour, on the other hand, knows no such limits (the key question being its distribution).

⁸ See Carlotta Schlyter, *International Labour Standards and the Informal Sector: Developments and Dilemmas*, Geneva, ILO, Employment Sector, Working Paper on the Informal Economy 2002/3, p. 1.

lapse of governance. This may entail failure to marshal sufficient resources to ensure respect for the rule of law or in some instances, failure to reform the law to keep pace with new realities).

The second misconception, involving the relationship between international and domestic rules, ignores the quite general wording of many ILO instruments. Often, ILO Conventions and Recommendations call only for a government to adopt “a national policy” or “measures” towards a goal. Moreover, ILO Conventions frequently contain “flexibility clauses” designed to address differences in levels of economic development between countries and sectors of activity within countries. Among the flexibility clauses most pertinent to the informal economy are the following:

- (i) clauses which permit a State, when ratifying a Convention, to exclude certain economic sectors (although admittedly these are infrequently invoked by States upon ratification);
- (ii) clauses which allow for the application of a Convention or a Recommendation by means of laws, regulations, collective agreements, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practices, account being taken of national conditions;
- (iii) clauses which provide for progressive extension of the application of an instrument or permit action to be taken progressively to implement it.

Sometimes this lack of knowledge of the content of international labour standards is compounded by a mistaken belief that a voluntarily ratified Convention, developed in a debate open to all 177 ILO member States and representatives of workers and employers within them, has somehow been imposed on a country by the ILO. Such a view ignores the Vienna Convention on the Law of Treaties (1969) and in particular its incarnation of the principle of *pacta sunt servanda*.

The related question of extension of international labour standards, on the other hand, involves issues not unique to the informal economy, but which are shared to a large extent by micro and small-scale enterprises. The question is not whether to apply relevant standards, but how.

The discussion of decent work and the informal economy at the 2002 International Labour Conference referred to a matrix which portrayed the informal economy from the viewpoint of both production units by type and jobs by status in employment.⁹ These are basically statistical rather than legal concepts, however. International labour Conventions generally apply to categories

⁹ See *Decent work and the informal economy*, International Labour Conference, 90th Session, 2002, *Report VI*, Table A.1, Matrix: A conceptual framework for the informal economy, p. 123.

of persons or to work performed under certain (physical) circumstances rather than to “observation units” used for statistical purposes. Sometimes the scope of application of Conventions refers to types of undertakings or enterprises, and here the two approaches can more closely converge.

A more productive debate would involve a closer examination of the various realities involved, the type of standards and their utility in relation to specific groups in the informal economy, the flexibility for their application, and the use of social dialogue techniques for resolving disputes in relation to them. No one pretends that each of the 71 Conventions now designated by the ILO as up-to-date should be applied to the informal economy.¹⁰ Some are clearly aimed at formal enterprises, such as provisions for notification of closure of undertakings of a certain size under the Termination of Employment Convention, 1982 (No. 158), among other examples that could be cited.

International labour standards that embody fundamental human rights, on the other hand, are to be enjoyed by people whether they work in formal or informal settings. Workers’ rights are, after all, human rights. And even an “informal” enterprise can have “employees” under national legislation governing the employment relationship, with resulting rights and duties for both the employer and the employee. Moreover, a number of ILO instruments, the most important described below, apply explicitly to “workers” rather than the legally narrower term “employees”, or do not contain language limiting their application to the formal economy. A small enterprise may be classified as informal because of its failure to register or to pay taxes on income, but formal in terms of creating an employment relationship with a worker – thus entitling him or her to vindicate rights such as being paid a wage, protected from discriminatory practices, and having legal capacity to join a trade union.

Indeed, denial of rights under Conventions that already apply to the informal economy is a disservice not only to workers, but to employers and government policy makers as well. As quoted by Carlotta Schlyter in her ILO Working Paper on the informal economy, “as a general rule, the inability of the informal sector to comply with certain aspects of labour legislation is not necessarily an indication that something is wrong with the legislation itself; it should rather be taken as a reflection of the quite unsatisfactory conditions in which the informal sector has to operate”.¹¹ These conditions reflect and perpetuate the low productivity trap into which many in the informal economy fall. “The problem of failure to apply the law”, note Maldonado, Badian and Miélot, “is linked to

¹⁰ The numbering of Conventions is sequential, and 184 had been adopted by 2004. A number of these have been revised by subsequent instruments or determined by the ILO Governing Body to no longer be up-to-date instruments subject to active supervision by the supervisory procedures for monitoring application. Currently, 71 Conventions are classified as “up to date”.

¹¹ See Schlyter, *op. cit.*, *supra* note 8, p. 5.

the precarious nature of micro-enterprises. This problem will not be solved until they can operate profitably in a more stable environment".¹² As Deakin and Wilkinson argue, "under-valued labour leads to productive inefficiency, hampers innovation and leads to short-term strategies and destructive competition. Basic labour rights are necessary in order to correct this market failure".¹³ Providing empirical support for this view, Kucera and Galli have found that for Latin America, countries with higher labour standards tend to have higher levels of formal employment and lower shares of informal employment.¹⁴

The Office report that laid the basis for the 2002 Conference discussion on decent work and the informal economy made these points about ILO instruments and the informal economy:

- (i) ILO Conventions often have a provision to the effect that standards should be implemented in a way appropriate to national circumstances and capabilities;
- (ii) it is untrue that ILO standards are only for those in the formal economy where there is a clear employer-employee relationship;
- (iii) when a standard initially applies only to workers in the formal economy, there is sometimes explicit provision for its extension to other categories of workers (citing the example of instruments dealing with labour inspection and labour administration);
- (iv) there are instruments which focus on specific categories of workers who are often in the informal economy;
- (v) even when informal workers are not explicitly referred to in the text, indications of the applicability of a particular instrument can be sought within the framework of the ILO's supervisory system.¹⁵

Within the body of international labour standards, some instruments apply to all workers, irrespective of their work status or place of employment, whereas others refer specifically to the self-employed or, more recently, to persons in the informal sector/economy.¹⁶

¹² See C. Maldonado, C. Badian, A. Miélot, *Methodes et instruments d'appui au secteur informel en Afrique francophone*, ILO, IFP/SEED, Geneva, 2004, p. 26 (translation by the author).

¹³ See S. Deakin and F. Wilkinson, "Labour law and economic theory", in H. Collins, P. Davies, R. Rideout (eds.), *Legal regulation of the employment relation*, London, 2000, pp. 56-61, as summarized by B. Hepple, *Labour law, inequality and global trade*, Amsterdam, Hugo Sinzheimer Instituut, 2002, p. 19.

¹⁴ See R. Galli and D. Kucera, "Labor standards and informal employment in Latin America", *World Development*, vol. 32, 2004, No. 5, pp. 809-828.

¹⁵ See *Decent work and the informal economy*, *op. cit.*, *supra* note 9, pp. 44-47.

¹⁶ For discussion of these issues in slightly different contexts, see J.-M. Servais, "Secteur informel: un avenir pour le droit du travail?", *Actualités du droit*, Paris, 1994, No. 3, p. 663, and G. Minet, "Coverage of contract labour by international labour standards" (unpublished), 1999.

Home-based work engages many in producing goods or services in the informal economy. Curiously, then, the Home Work Convention, 1996 (No. 177), appears to define a homeworker in such a way as to exclude independent workers, and refers to the product and service being specified by “the employer” (Art. 1). While workers in the informal economy may have employers, a large portion of them are own-account workers. The Office report to the ILC for the discussion of the informal economy in 2002 took the view that the Home Work Convention was directly relevant, and noted that it has been used as an advocacy and advisory tool.¹⁷

Against this backdrop, this article highlights provisions in ILO Conventions and Recommendations that are particularly relevant to addressing labour issues in the informal economy. It groups them under three headings: labour market policy frameworks for better governance (II); human capabilities and empowerment (III); and protection of people (IV).

While not pretending to be exhaustive, this review reminds us that while international instruments may not be widely applied in practice in the informal economy, some are highly relevant to it. Indeed, the failure to apply those instruments reflects a failure in governance that needs to be addressed by multilateral institutions as well as by governments. Ideas in international labour standards can also inspire action by non-governmental actors and serve as touchstones for advocacy. They are also subject to monitoring by the ILO supervisory machinery under articles 19 and 22 of the ILO Constitution. This process keeps issues in the public eye, provides an opportunity for employers’ and workers’ organizations to comment on the extent of observance of international labour standards by governments and, in cases of non-observance, maintains pressure for change.

II. Labour market policy frameworks for better governance

The tripartite conclusions on decent work and the informal economy called upon the ILO to “help member States to formulate and implement, in consultation with employers’ and workers’ organizations, national policies aimed at moving workers and economic units from the informal economy into the formal economy”.¹⁸ Guideposts for such national policies can be found in a number of existing international labour Conventions and Recommendations. The most pertinent are highlighted in this section. The key role that government at all levels

¹⁷ See *Decent work and the informal economy*, *op. cit.*, *supra* note 9, p. 46.

¹⁸ See Conclusions concerning decent work and the informal economy, *op. cit.*, *supra* note 3, para. 37(a).

can play is reflected in the ILC delegates' observation that, "informality is principally a governance issue." An important part of governance involves the labour market, in which workers, employers and their representative institutions as well as different branches and levels of government play a role. International labour standards that provide guidance to national economic and social policy by their nature extend to the issue of decent work and the informal economy.

1. *Employment policy*

1.1 Employment Policy Convention, 1964 (No. 122)
and Recommendation, 1984 (No. 169)

Under the Employment Policy Convention, 1964 (No. 122), ratifying States "declare and pursue, as a major goal, an active policy to promote full, productive and freely chosen employment" (Art. 1, para. 1). The policy aims at ensuring that there is work for all who are available and seeking it, that the work is as productive as possible, and that a worker has free choice and opportunities irrespective of race, colour, sex, religion, political opinion, national extraction or social origin (Art. 1, para. 2). The policy is to take account of the level of economic development and the relationship between employment objectives and other economic and social goals, and should be pursued by methods appropriate to national conditions and practice. (Art. 1, para. 3). The measures taken to attain the goals of the Convention are to be kept under review within the framework of a coordinated economic and social policy (Art. 2(a)).

In reviewing the application of Convention No. 122, the Committee of Experts on the Application of Conventions and Recommendations remarked in 2002 that, "workers in the informal economy are among the most vulnerable and worst protected groups. The informal economy also has a high concentration of child labourers and women workers in low-productivity jobs with difficult working conditions. The Committee appreciates the fact that several governments' reports include information on the informal sector and programmes undertaken, often with assistance from the ILO, to promote productive employment and to integrate informal economy workers in the more modern sectors of the economy. In this respect, the Committee again notes that almost all governments mentioned in their reports the very important role of micro, small and medium-sized enterprises in creating jobs, as well as the contribution of self-employment to employment promotion (see, for example, Barbados, Costa Rica and Uruguay)".¹⁹

¹⁹ See *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 90th Session, 2002, *Report III (Part 1A)*, para. 71.

The Committee encouraged member States, in line with the Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), “to examine ways in which they can provide further support to smaller scale producers as a means of promoting employment”.²⁰

In applying the Convention, representatives of the “persons affected by the measures taken” are to be consulted on employment policies (Art. 3). As the Committee of Experts on the Application of Conventions and Recommendations has noted in a dialogue with a number of governments over the years, this includes workers in the informal economy/sector.²¹ This dialogue has revealed that governments find it difficult to reach out to those in the informal economy. Schlyter attributes this to the low level of organization, the heterogeneity of the informal sector, the fear of informal operators at dealing with authorities and the strained relationship between national and local authorities.²²

The Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), contains several provisions of direct relevance to the informal economy. As some of the “General Principles of Employment Policy”, the Recommendation provides that “Members should take measures to combat effectively illegal employment, that is employment which does not comply with the requirements of national laws, regulations and practice” (Para. 8). Para. 9 continues: “Members should take measures to enable the progressive transfer of workers from the informal sector, where it exists, to the formal sector to take place”. Recommendation No. 169 devotes its Part V to the informal sector. This Part provides:

27. (1) National employment policy should recognize the importance as a provider of jobs of the informal sector, that is economic activities which are carried on outside the institutionalised economic structures;

(2) Employment promotion programmes should be elaborated and implemented to encourage family work and independent work in individual workshops, both in urban and rural areas.

28. Members should take measures to promote complementary relationships between the formal and informal sectors and to provide greater access of undertakings in the informal sector to resources, product markets, credit, infrastructure, training facilities, technical expertise and improved technologies.

It continues, in Para. 29 (1): “While taking measures to increase employment opportunities and improve conditions of work in the informal sector,

²⁰ *Ibid.*

²¹ See Schlyter, *op. cit.*, *supra* note 8, pp. 17-18.

²² *Ibid.*, p. 19.

Members should seek to facilitate its progressive integration into the national economy". This is followed by: "(2) Members should take into account that integration of the informal sector into the formal sector may reduce its ability to absorb labour and generate income. Nonetheless, they should seek progressively to extend measures of regulation into the informal sector".

These provisions capture what economists often see as the dilemma of the informal economy. However, the concept behind these provisions seems to visualize two clearly distinct sectors, rather than economic relationships of various types blending into one another.

Under Convention No. 122, the Government is to consult on employment policy with "representatives of the persons affected by the measures to be taken, and in particular representatives of employers and workers" (Art. 3). As part of its review of the application of this Convention, the ILO Committee of Experts on the Application of Conventions and Recommendations has noted the importance of including representatives of persons active in the informal economy in these consultations. Governments that have responded to this concern have cited difficulties in extending consultations in this way.²³ This in turn reflects the "representation and voice" deficit in the informal economy, linked to a denial of freedom of association and weak capacity for collective action. Recently, the Committee of Experts expressed the view that "it is the joint responsibility of governments and the representatives of employers and workers to ensure that representatives of the most vulnerable and marginalized groups of the active population are associated as closely as possible with the formulation and implementation of measures of which they should be the prime beneficiaries".²⁴

While not explicitly referring to the informal sector/economy, Part IX of Recommendation No. 169 contains guidance on international economic cooperation and employment that was echoed, almost twenty years later, in the Conference conclusions adopted in 2002. What the conclusions added to the ideas in Recommendation No. 169 was a framework focusing on reduction of decent work deficits, greater understanding of the interrelation of the informal and formal economies, and related considerations.

After summarizing the 2002 ILC conclusions on decent work and the informal economy, the Committee of Experts recalled provisions of Recommendation No. 169 and noted information from several governments on measures taken in support of the informal economy. Their report, a general survey

²³ See *Decent work and the informal economy, op., cit., supra* note 9, p. 47.

²⁴ See *Promoting employment: Policies, skills, enterprises – General Survey concerning the Employment Policy Convention, 1964 (No. 122) and the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169)*, International Labour Conference, 92nd Session, 2004, *Report III(Part 1B)*, para. 493, p. 131.

under Art. 19 of the ILO Constitution, provides examples of initiatives taken by governments, in both developing and developed countries, to address the needs of people in the informal economy.²⁵

1.2 Job Creation in Small and Medium-Sized Enterprises, 1998 (No. 189)

The Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), provides further guidance relevant to the informal economy. It stresses the importance of organization by noting that, “small and medium-sized enterprises and their workers should be encouraged to be adequately represented, in full respect for freedom of association. In this connection, organizations of employers and workers should consider widening their membership base to include small and medium-sized enterprises” (Para. 18). The Recommendation indicates a number of ways in which such organizations can contribute to the development of such enterprises (Para. 17). In addressing the issues of decent work and the informal economy, the Committee of Experts noted recently that it also believes that Recommendation No. 189 “provides valuable guidance for the adoption of measures aimed at encouraging job creation or facilitating the integration of informal employment into the formal sector by promoting small and medium-sized enterprises”.²⁶

This Recommendation applies to “all branches of economic activity and all types of small and medium-sized enterprises, irrespective of the form of ownership (for example, private and public companies, cooperatives, partnerships, family enterprises, and sole proprietorships)” (Para. 4). The last four of these in particular could well be in either the informal or the formal economy, or in both for different purposes.

In terms of the measures to be taken to promote small and medium-size enterprises, “appropriate legal provisions as regards, in particular, property rights [...] as well as adequate social and labour legislation”, are mentioned, along with “avoiding policy and legal measures which disadvantage those who wish to become entrepreneurs” (Para. 5(b),(c)). Improved access to product and capital markets, credit, technologies, information, skills upgrading, and so forth are among the measures recommended to remove constraints to the development and growth of SMEs (Para. 6). The Recommendation also calls for extension of social protection (Para. 7). There is thus common cause between the provisions of Recommendation No. 189 and the 2002 conclusions on decent work and the informal economy – a concern for appropriate policy and legal frameworks and the active roles of organizations of employers and workers.

²⁵ *Ibid.*, paras. 171-177, pp. 56-58.

²⁶ *Ibid.*, para. 173, p. 56.

Under Recommendation No. 189, the policies adopted by governments should be reviewed in consultation with the most representative organizations of employers and workers, and updated (Para. 9(3)). Many elements of the service infrastructure recommended by the Recommendation (Part IV, Paras. 11 to 16) for SMEs would be of benefit to those operating in the informal economy.

A recent in-depth study of the policy environment for small enterprises in seven countries finds that while SMEs are an engine of job creation, in many cases these new jobs simply replace jobs lost elsewhere. Moreover, many jobs in SMEs are of poor quality – “incomes may be at poverty level; dangerous working conditions can put workers at risk of losing their livelihood through work-related illness or accident; and few SMEs are covered by the social security systems that protect workers against such risks”.²⁷ Like much of the informal economy, many SMEs are survivalist in nature. “There are tremendous differences between the most fragile and precarious micro-enterprises and the most dynamic and prosperous small enterprises”.²⁸ Like the informal economy, “SMEs can have a crucial role in development, but they are not a panacea that automatically solves the pressing problems of unemployment, underemployment and poverty”.²⁹

Where SMEs operate independently of laws and regulations – especially those in the informal economy – they can be caught in a low-cost/low-productivity trap. While SMEs contribute significantly to employment creation, it is largely a result of policies that have generated a great many new survivalist enterprises and increased poor quality employment. “For example, an SME that hides from government authorities to avoid registration is affected by regulations precisely because the attempt to evade them prevents the enterprise from becoming more visible, using more publicity, or expanding.”³⁰

Most SMEs are neither completely formal nor completely informal – like the informal economy, there is a continuum. As Maldonado observed, “legalization should [...] be seen primarily as a changing process (moving backwards or forwards according to the state of the economy) rather than as a situation attained once and for all”.³¹ As the above-mentioned ILO study has noted, “SMEs can be encouraged to comply with the laws of the land through a twofold process that enhances the capacity and desirability of enterprises to comply, while reviewing (that is, simplifying and streamlining) regulatory procedures”.³² Furthermore,

²⁷ See G. Reinecke and S. White, *Policies for small enterprises: Creating the right environment for good jobs*, Geneva, ILO, 2004, p. xii.

²⁸ *Ibid.*, p. xiii.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. xiv.

³¹ See Carlos Maldonado, “The informal sector: Legalization or laissez-faire?” *International Labour Review*, vol. 143, 1995, p. 727.

³² See Reinecke and White, *op. cit.*, *supra* note 27, p. 153.

“SMEs that complied with basic registration requirements were found to create more employment over time than SMEs that did not comply [...] Policies and laws that are biased against SMEs can reduce the rate of compliance and hence, reduce employment in SMEs”.³³ SMEs that comply with basic registration requirements were found to have better access to financial services and provided better social security coverage to their workers.³⁴

In most countries, the same ILO study has found, the government’s approach to SMEs is contradictory. On the one hand, government-sponsored projects and programmes are designed and implemented to provide support to SMEs. On the other hand, however, the broader environment of policies, laws and regulations is biased against MSEs, compared with larger enterprises. This suggests a need for nuanced policies. This involves recognizing that “regulations are necessary, for instance to protect workers from exploitative practices, or consumers from health hazards. On the other hand, government policies can open up market opportunities, for example by re-designing public tendering procedures in view of SME participation or by ensuring SMEs’ access to export incentive schemes”.³⁵

1.3 Promotion of Cooperatives Recommendation, 2002 (No. 193)

The Promotion of Cooperatives Recommendation, 2002 (No. 193) addresses a number of issues relevant to decent work and the informal economy. Para. 9 urges governments to promote “the important role of cooperatives in transforming what are often marginal survival activities (sometimes referred to as the ‘informal economy’) into legally protected work, fully integrated into mainstream economic life”. A number of the measures identified in this Recommendation echo those contained in Recommendation No. 189 on small and medium-sized enterprises. This is not surprising since in relation to the informal economy, SMEs and cooperatives share many challenges to moving up the scale towards decent work. In some countries, cooperatives also face obstacles due to restrictions on freedom of association and underdevelopment of legal frameworks. Cooperatives provide an avenue for empowerment of people in the informal economy. The ability of cooperatives to achieve this result is thus closely linked to respect for the fundamental human right to freedom of association.

³³ *Ibid.*, p. xiv.

³⁴ *Ibid.*

³⁵ *Ibid.*, p. xvi.

2. *Institutions of governance*

2.1 Protection of Wages Convention, 1949 (No. 95) and Recommendation, 1949 (No. 85)

Taking the idea of labour market institutions in its wide sense, the Protection of Wages Convention, 1949 (No. 95), contains important parameters and safeguards relating to the primary motivation for work: income, in this case from wages. The term “wages” is defined broadly to include “remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable by virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered” (Art. 1). The Convention applies to “all persons to whom wages are paid or payable” (Art. 2, para. 1), although it permits the national authorities to indicate certain exclusions upon ratification. The Committee of Experts has noted with concern that in certain cases large numbers of workers, such as agricultural workers, casual workers and homeworkers, are left unprotected, which it finds inconsistent with the limited and provisional nature of exemptions permitted under Art. 2, paragraph 2 of the Convention.³⁶ Recommendation No. 85, which supplements the Convention, contains among its other provisions more specific protections in relation to payment periodicity for work done on a piece-work basis (Paras. 4 and 5) – a common situation for workers in the informal economy.

2.2 Labour Administration Convention, 1978 (No. 150)

Turning now to a more classic concept of governance, the Labour Administration Convention, 1978 (No. 150), provides for gradual extension of labour administration functions to activities relating to “categories of workers who are not, in law, employed persons, such as: [...] (b) self-employed workers who do not engage outside help, occupied in the informal sector as understood in national practice” (Art. 7). While labour administration is a wider concept than labour inspection, labour inspection may also be extended to workplaces in the informal economy that are subject to enforceable legal provisions.³⁷

³⁶ See *Protection of wages: Standards and safeguards relating to the payment of labour remuneration – General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949*, International Labour Conference, 91st Session, 2003, *Report III(Part 1B)*, para 64, p. 33.

³⁷ For a fuller discussion, see Schlyter, *op. cit.*, *supra* note 8, pp. 23-24.

Labour administration functions pertaining to protection of fundamental principles and rights at work would be especially important to extend to those in the informal economy. In addition, mediation skills, procedures and institutions developed for resolving labour disputes³⁸ have considerable relevance in relation to differences that erupt between local authorities and informal economy operators.

2.3 Right to Organize and Collective Bargaining Convention, 1949 (No. 98) and Collective Bargaining Convention, 1981 (No. 154)

While the effective recognition of the right to collective bargaining is a fundamental principle under the ILO Declaration on Fundamental Principles and Rights at Work, collective bargaining is a means of governance and as such a labour market institution. Collective bargaining is the practical expression of freedom of association, whereby people band together to maximize their bargaining power. Where people in the informal economy can be categorized as employers and as workers forming organizations, the principle guaranteeing the right to engage in collective bargaining applies directly. In other cases, such as independent workers negotiating with local authorities, it is *collective action* that holds promise for raising and resolving issues. In both cases, principles of conciliation and mediation of disputes developed in the context of labour relations offer guidance and techniques for finding solutions that promote economic and social progress.

2.4 Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113) and Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

These two instruments build upon a guarantee of freedom of association. While the terms of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), specifically refer to various matters in relation to the development, ratification and reporting on such standards, Convention No. 144 has been an impetus to social dialogue of a broader nature. In a review of the effect given to this instrument and its accompanying Recommendation (No. 152), the Committee of Experts on the Application of Conventions and Recommendations has noted: “Although the Convention requires that the most representative organizations of employers and workers participate in consultations, it does not in any way prevent the involvement of representatives of other

³⁸ Such institutions are to be promoted under Convention No. 154.

organizations. Above all, it may be useful to receive the opinions of representatives of categories of workers or employers who may be inadequately represented by the principal representative organizations, such as self-employed workers, farmers or members of cooperatives”.³⁹

By the same token, the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), provides that “measures appropriate to national conditions should be taken to promote effective consultation and co-operation at the industrial and national levels between public authorities and employers’ and workers’ organizations” (Para. 1(1)). The general objective of these consultations is to promote “mutual understanding and good relations” between them, “with a view to developing the economy as a whole or individual branches thereof, improving conditions of work and raising standards of living” (Para. 4). Among the types of consultations mentioned are seeking views on the preparation and implementation of laws and regulations affecting the interests of employers’ and workers’ organizations, and the elaboration and implementation of plans of economic and social development (Para. 5). There is nothing in this Recommendation that limits it to the formal economy or to labour laws. Organizations of employers or workers in the informal economy could use this instrument for advocacy purposes in their efforts to have more responsive public authorities.

3. *Skills and training: enhancing human capital*

3.1 Human Resources Development Convention, 1975 (No. 142)
and Recommendation, 2004 (No. 195)

Since skills play a key role in both the formal and the informal economies, the Human Resources Development Convention, 1975 (No. 142), and its recently revised accompanying Recommendation, 2004 (No. 195), are pertinent for this discussion. The Convention calls on ratifying States to “adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training closely linked with employment, in particular through public employment services” (Art. 1). Further, vocational training systems are to be gradually extended, adapted and harmonized “to meet the needs for vocational training throughout life of both young persons and adults in all sectors of the economy and at all levels of skill and responsibility” (Art. 4).

³⁹ See *Tripartite consultation – General Survey concerning the Tripartite (International Labour Standards) Convention, 1976 (No. 144) and the Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152)*, International Labour Conference, 88th Session, 2000, *Report III (Part 1B)*, p. 22.

The new Recommendation continues in a similar vein. It calls upon member States to “formulate, apply and review national human resources development, education, training and lifelong learning policies which are consistent with economic, fiscal and social policies” (Para. 1). These are policies which, *inter alia*, “address the challenge of transforming activities in the informal economy into decent work fully integrated into mainstream economic life; policies and programmes should be developed with the aim of creating decent jobs and opportunities for education and training, as well as validating prior learning and skills gained to assist workers and employers to move into the formal economy” (Para. 3(d)). Countries should also “promote access to education, training and lifelong learning for [...] workers in small and medium-sized enterprises, in the informal economy, in the rural sector and in self-employment” (Para. 5(h)). They should “recognize workplace learning, including formal and non-formal learning, and work experience” (Para. 9(e)). Thus, “measures should be adopted, in consultation with the social partners and using a national qualification framework, to promote the development, implementation and financing of a transparent mechanism for the assessment, certification and recognition of skills, including prior learning and previous experience, irrespective of the countries where they were acquired and whether acquired formally or informally” (Para. 11(1)).

Many other provisions that do not refer directly to the informal economy are relevant to it, such as those recommending various measures to facilitate social inclusion, promote entrepreneurship and greater opportunities to obtain decent work, enhance employability, and promote coherent policies and programmes which place education, training and lifelong learning at the centre of development policies. Thus the Human Resources Development Convention, 1975 (No. 142), obligates ratifying States to “establish and develop open, flexible and complementary systems of general, technical and vocational education, educational and vocational guidance and vocational training, whether these activities take place within the system of formal education or outside it” (Art. 2). Art. 4 of this Convention provides that each Member State “shall gradually extend, adapt and harmonise its vocational training systems to meet the needs for vocational training throughout life of both young persons and adults in all sectors of the economy and branches of economic activity and at all levels of skill and responsibility”.

With the adoption of Recommendation No. 195, which revised and replaced the Human Resources Development Recommendation, 1975 (No. 150), the ILO now has a suite of instruments relevant to employment policy, labour market institutions, training/education/lifelong learning, and the promotion of small-scale entrepreneurship and cooperatives. Far from not applying to the informal economy, these instruments urge governments to address it and provide ideas for grappling more successfully with the challenges posed by the growth of the informal economy.

III. Human capabilities and empowerment

Another type of international labour standard that plays a key role in relation to the informal economy is embodied in the instruments that provide the basis for human beings to fulfil their potential and to exercise power over their own lives. While not a Convention or a Recommendation, the ILO Declaration on Fundamental Principles and Rights at Work (1998) identified four principles as essential to enabling people to enjoy a fair share of the wealth they have helped to generate:

- (i) freedom of association and effective recognition of the right to collective bargaining;
- (ii) elimination of all forms of forced or compulsory labour;
- (iii) effective abolition of child labour;
- (iv) elimination of discrimination in respect of employment and occupation.

This section takes a very brief look at the Conventions linked most closely to these fundamental principles and rights, but does not pretend to be an in-depth review. The Global Reports produced under the Follow-up to the Declaration, alongside reports of the Committee of Experts on the Application of Conventions and Recommendations, the Committee on Freedom of Association of the ILO Governing Body, and commissions of inquiry established to look into allegations of non-respect for these Conventions have to some extent addressed issues relevant to the informal economy, and can be expected to do so more fully as it expands.

A recent issues paper by the United Kingdom Department for International Development outlines the social and economic case for core labour standards as a key element of poverty reduction.⁴⁰ It also points to the positive correlation between respect for certain other international labour standards, such as those to ensure occupational safety and health, and poverty reduction strategies. One of the policy recommendations is the encouragement of alliances between workers in the formal sector and those not traditionally protected by labour market institutions.⁴¹

Professor Bob Hepple argues for an expansion of the scope of national labour law “to bring about an equality of capabilities. This embraces the substantive freedoms that individuals need in order to survive and prosper, including freedom to pursue education and training and a career of their choosing, freedom of association and freedom to participate in economic and political decision-making that affects their lives as well as the capacity to obtain decent work”.⁴²

⁴⁰ See *Labour standards and poverty reduction*, Department for International Development, London, May 2004.

⁴¹ *Ibid.*, p. 29.

⁴² See Hepple, *op. cit.*, *supra* note 13, p. 31.

1. *Freedom of association in ILO instruments*

As basic human rights instruments, the fundamental ILO Conventions play a particularly important role for people in the informal economy because they are linked to their empowerment. Most basic is the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), which applies to “workers [...] without any distinction whatsoever”. The scope of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), extends to “all workers”. Conventions Nos. 87 and 98 are designated as fundamental Conventions. The Rural Workers’ Organizations Convention, 1975 (No. 141), applies to “all rural workers, whether they are wage-earners or self-employed”. Speaking of Conventions Nos. 87 and 98, Gerry Rodgers has responded to commentators who see them as relevant only to the needs and institutions of advanced countries: “Freedom of association is as important in the informal economy as it is in the formal, although it may take different forms. It is a basic freedom, in [Amartya] Sen’s sense, one which also permits the other freedoms to be attained. The real issue is how to extend these rights to all segments of the labour market, not to limit their application”.⁴³

Yet for workers in the informal economy, serious “rights deficits” exist in relation to these Conventions and to the broad principle of freedom of association and effective recognition of the rights to collective bargaining.⁴⁴ Although trade union efforts to organize in the informal economy have stepped up in several countries, particularly India and South Africa,⁴⁵ the obstacles to doing so remain great.⁴⁶ Yet a review of literature on effective interventions in relation to workers in the informal economy highlighted the importance of association building – which is simply not possible in the absence of freedom of association.⁴⁷ This freedom is an essential element for what has been described as “voice representation security”.⁴⁸

⁴³ See G. Rodgers, “Decent work as a development objective”, adapted from an article appearing in *Indian Journal of Labour Economics*, vol. 44, 2001, p. 12.

⁴⁴ See *Organizing for social justice*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 92nd Session, 2004, *Report I(B)*, pp. 44-47. See also *Decent work and the informal economy, op. cit.*, *supra* note 9, pp. 38-41.

⁴⁵ See, for instance, Tanya Goldman, *Organizing in South Africa’s informal economy: An overview of four sectoral case studies*, ILO, Geneva, SEED Working Paper No. 60, 2004.

⁴⁶ See, for instance, Godfrey Kanyenze, *Giving voice to the unprotected workers in the informal economy in Africa: The case of Zimbabwe*, ILO, Harare, Discussion Paper No. 22, 2004.

⁴⁷ See Richard Rinehart, *Designing programmes to improve working and employment conditions in the informal economy: A literature review*, ILO, Geneva, Conditions of Work and Employment Series No. 10, 2004.

⁴⁸ See Guy Standing, *Modes of control: A labour-status approach to Decent Work*, ILO, Geneva, 2000, SES Papers, p. 33.

The Right of Association (Agriculture) Convention, 1921 (No. 11), states simply that member States undertake to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights. As a recent symposium of agricultural workers showed, however, this is not the reality in many countries, where among the deprivations experienced by such workers, many of whom are in the informal economy, is denial of freedom of association.⁴⁹

Furthermore, the Rural Workers' Organizations Convention, 1975 (No. 141), provides that "(1) all categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations, of their own choosing without previous authorization" and that "(2) the principles of freedom of association shall be fully respected" (Art. 3). The key role of freedom of association in development is reflected in Art. 4 of this Convention which stipulates that "it shall be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organizations of rural workers as an effective means of ensuring the participation of rural workers [...] in economic and social development and in the benefits resulting therefrom".

Freedom of association also lies at the heart of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which contains extensive provisions on these peoples' decision-making and participation (especially Art. 7). It calls on governments to consult them and their representatives whenever consideration is given to measures which may affect them directly (Art. 6, para. 1).

While the traditions and tools of organizing in the informal economy may not be quite the same as in the organized parts of the economy, it can only happen in a legislative and political environment that protects freedom of association and the right to engage in collective action. As explored earlier, they also set the stage for improved governance of societies, based on participation.

2. *Elimination of all forms of forced or compulsory labour*

A similar situation prevails for other fundamental ILO Conventions. The Forced Labour Convention, 1930 (No. 29), applies to "any person", and the Abolition of Forced Labour Convention, 1957 (No. 105), is equally inclusive. The limited access persons in the informal economy may have to legal recourse, coupled with a lack of inspection by the authorities, make workers in the in-

⁴⁹ See *Decent work in agriculture*, ILO, Geneva, 2003, International Workers' Symposium on Decent Work in Agriculture, pp. 18-20.

formal economy vulnerable to modern versions of forced labour.⁵⁰ Trafficking in human beings for labour purposes has taken on alarming dimensions in the context of globalization.⁵¹ At the same time, the persistence of age-old practices of bonded labour acts as a major drag on development in some countries. As Amartya Sen has observed, “seeing development as freedom permits a direct approach to this issue”.⁵²

The story of the chestnut peelers in the Atalaya area of Peru illustrates the relevance of measures to combat forced labour to workers in the informal economy. Minors were recruited for this work by small, unregistered companies. After inspection, those engaging in forced labour practices were banned and those using lawful practices were legalized.⁵³ The situation also illustrates the often overlapping problems of forced labour, child labour and social exclusion of certain ethnic groups.

Stopping forced labour is not only about legal prohibition and its enforcement. It is about creating alternatives for people, many of whom are in the informal economy. A wide range of initiatives – from job creation to microcredit schemes controlled by the community – can improve prospects for people in the informal economy while also avoiding forced labour.⁵⁴

3. *Elimination of discrimination*

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by using the term “occupation”, extends to self-employed and independent workers and is not limited to the formal economy.⁵⁵ As noted in the first Global Report on the principle of the elimination of discrimination in employment and occupation under the ILO Declaration, the principle extends to own-account workers, owners of enterprises and unpaid family workers as well as employees. The report cites the refusal of land ownership, inheritance

⁵⁰ See *Decent work and the informal economy*, *op. cit.*, *supra* note 9, pp. 41-42.

⁵¹ See *Stopping forced labour*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 89th Session, 2001, *Report I(B)*. For more recent information, see the website of the ILO’s Special Action Programme to Combat Forced Labour at www.ilo.org/declaration.

⁵² See Amartya Sen, *Development as freedom*, Anchor Books, New York, 1999, p. 30.

⁵³ This example is cited by Schlyter, *op. cit.*, *supra* note 8, p. 13.

⁵⁴ The ILO’s programmes to promote microcredit and to combat forced labour address these issues from complementary entry points. Initiatives to eliminate child labour and trafficking of migrants are also making important contributions to fighting abuse.

⁵⁵ See a review of the legislative history and comments by the ILO Committee of Experts on the Application of Conventions and Recommendations, in Schlyter, *op. cit.*, *supra* note 8, pp. 11-12.

and credit to illustrate discrimination in relation to occupation.⁵⁶ Similarly, the Equal Remuneration Convention, 1951 (No. 100), applies to “all workers”, but its application in practice calls for creative national policy-making in relation to workers in the informal economy. Another important instrument for equality between men and women, the Workers with Family Responsibilities Convention, 1981 (No. 156), also speaks in terms of national policy in relation to workers, without regard to categorization, with a view to creating effective equality of opportunity and treatment. Specific provisions of the more detailed accompanying Recommendation (No. 165), however, are couched in terms that would apply in an employment relationship in a more formal enterprise.

The Indigenous and Tribal Peoples Convention, 1989 (No. 169), zeroes in on educational measures to eliminate prejudices against these peoples (Art. 31), while providing for measures to combat discrimination and ensure full realization of their rights (especially Arts. 2 and 3). In addition, while the Convention does not directly address issues of the formal/informal economy, the concentration of these peoples in the informal economy makes its policy guidance relevant to their circumstances. Under this Convention, ratifying States “have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee the respect for their integrity” (Art. 2, para. 1). This includes assisting them in eliminating “socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life” (Art. 2, para. 2(c)). Governments are also called upon to strengthen and promote “handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned” (Art. 23, para. 1). Many of these would be carried out in the informal economy.

Convention No. 169 further provides that “special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned” (Art. 4, para. 1). Among provisions dealing with land (Part II of the Convention), it is stipulated that “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities” (Art. 14, para. 1). It then calls upon governments to identify the lands which the peoples concerned traditionally occupy, guarantee effective protection of the rights of

⁵⁶ See *Time for equality at work*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 91st Session, 2003, *Report I(B)*, p. 19.

ownership and possession, and establish adequate procedures to resolve land claims. (Art. 14, paras. 2, 3; see also Art. 17, para. 3, and Art. 18 for further protections)). The references to land and property in Convention No. 169 are noteworthy given the emphasis given by certain writers to the importance of securing property rights in the context of the informal economy.⁵⁷

What these instruments have in common is their force for social inclusion. By calling for active policies of eliminating discrimination rather than for simply passively refraining from discrimination, they too can serve as platforms for advocacy in relation to the informal economy.

4. *Abolition of child labour: protection of young workers*

Turning briefly now to child labour, the Minimum Age Convention, 1973 (No. 138), calls on member States to specify a minimum age for admission to “employment or work”, a phrase that extends its reach to the informal economy. This is crucial, since child labour is most often found in the informal economy. Theoretically, while the “informal sector” could be excluded through resort to a flexibility clause, no country has done so. The Committee of Experts has noted that the Convention “applies to all kin of employment or work regardless of the formal nature of the work, unless recourse is made to the flexibility clauses”.⁵⁸

The Worst Forms of Child Labour Convention, 1999 (No. 182), is also broad in its application, with a focus on practices that are most likely to be found in the informal economy. The measures Convention No. 182 advocates – from preventing children from entering hazardous work and other worst forms of child labour to removing them and ensuring access to free basic education or vocational training – necessarily address children in the informal economy and their parents/guardians. As the first Global Report under the ILO Declaration noted, “the preponderance of child labour in the informal economy beyond the reach of most formal institutions in countries at all levels of income represents one of the principal challenges to its effective abolition”.⁵⁹ The practical measures pursued by the ILO’s International Programme for the Elimination of Child Labour stress prevention, removal from immediate

⁵⁷ See H. De Soto, *The Mystery of capital: Why capitalism succeeds in the West and fails everywhere else*, New York, 2001.

⁵⁸ See ILO Committee of Experts on the Application of Conventions and Recommendations, Direct request concerning Convention No. 138 to Equatorial Guinea (1999).

⁵⁹ See *A future without child labour*, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 90th Session, 2002, *Report I(B)*, p. 24.

dangers, and progressive elimination of child labour. They necessarily see child labour in the context of broader development issues affecting both children and their parents and guardians.⁶⁰

Another Convention that illustrates the role of the State in protecting minors is the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78). This instrument provides that children and young persons under age 18 must not be admitted to employment or work in such occupations unless a medical examination, to be provided free of charge, has found them fit for such work. The Convention stipulates that it also applies to children in “itinerant trading or any other occupation carried out in the streets or in places to which the public have access”. This Convention well illustrates, however, the breach between the intended scope (covering the informal economy) and the realistic prospects of its application in the informal economy, which are extremely low.

IV. International labour standards and protection of people

1. Social security instruments

The comment just made is apt in relation to many aspects of social protection that depend upon government action. With declining public sector budgets in ministries and municipalities responsible for occupational health and safety, and the trend towards privatization of social security schemes, fewer and fewer people are in fact covered by such protections. This situation has stimulated a two-pronged response:

- (i) a global campaign on social security and coverage for all;⁶¹
- (ii) support for community-based initiatives such as those led by the STEP (Strategies and Tools against Social Exclusion and Poverty Programme) as a stepping stone towards the longer-term goal.

The basic ILO instrument in this field is the Social Security (Minimum Standards) Convention, 1952 (No. 102). Certainly, its gender-biased language would suggest contemporary irrelevance; however, the underlying approach of the

⁶⁰ See *Eliminating the worst forms of child labour: A practical guide to ILO Convention No. 182*, ILO, Geneva, 2002.

⁶¹ See *Social security: A new consensus*, International Labour Conference, 89th Session, 2001, Report I(A).

Convention is fully up to date for addressing the informal economy. It is based on notions of solidarity and progressive extension of coverage. This approach is at odds with more recent trends in social protection that shift the burden of risk to the individual, and link delivery to profit-making institutions. These are trends that are of little use to the poor or indeed to those who risk falling into poverty because of a catastrophic event.

This is not to say that social security laws do not need reform. ILO studies in French-speaking African countries on the informal economy suggest that laws should be more flexible in relation to social security contributions and taxation. This would mean extension of social protection to workers in the informal economy by means of a mixed regime involving their own contributions to be supplemented by governmental contributions, the promotion of mutualist forms of social protection, with informal sector organizations encouraged to conclude contracts with private insurance companies, and improvement of the quality of basic benefits for the most vulnerable in the informal economy.⁶² Local strategies for health stress the importance of association building, recalling the crucial role of freedom of association. Recent examples involve health micro-insurance schemes, now being marshalled in the fight against HIV/AIDS in the informal economy.⁶³

Furthermore, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), calls for social security schemes to be progressively extended, and for resources to design and deliver adequate health services under their own responsibility and control. (Art. 25, paras. 1 and 2). The provision of such health services is to be coordinated with other social, economic and cultural measures in the country (Art. 25, para. 4).

While maternity protection is also a matter of labour market policy and gender equality, the thrust of ILO instruments on this topic are usually seen as part of social protection. The most recently adopted instrument on this subject, the Maternity Protection Convention, 2000 (No. 183), applies to “all employed women, including those in atypical forms of dependent work”. Some of these women will be found in the informal economy. The Convention provides for maternity leave as well as benefits. More typically, however, maternity protection in the informal economy, to the extent that it exists, will be found in locally-based mutualist arrangements. Unfortunately, space constraints do not permit full exploration of these issues, which are key to both poverty reduction and improving the situation of people in the informal economy.

⁶² See Maldonado et al., *op. cit.*, *supra* note 12, pp. 123-124.

⁶³ ILO, *Contributing to the fight against HIV/AIDS within the informal economy: The existing and potential role of decentralized systems of social protection*, ILO, ILOAIDS and STEP Working Paper, Geneva, 2002.

2. *Safety and health instruments*

Most people in the informal economy have only themselves to rely on for income and the security it can bring for them and their families. Injury and illness directly threaten this, and are often work-related. ILO instruments dealing with occupational health and safety offer important policy guidance as well as advocacy tools for the informal economy.

The Occupational Safety and Health Convention, 1981 (No. 155), applies to “all workers in the branches of activity covered” (Art. 2) and to “all branches of economic activity” (Art. 1) – unless flexibility clauses permitting certain exclusions have been used. However, the Convention further defines “workers” to be “all employed persons” (Art. 3(b)); technically, then, its application could be seen as limited to those who are “employees” of formal enterprises. Nevertheless, its main article would have a reach that would extend to the entire range of economic activity, since it provides for the adoption, implementation and periodic review of a coherent occupational safety and health (OSH) policy (Art. 4). The aim of this policy is to prevent accidents and injury to health “arising out of, linked with or occurring in the course of work” – wording clearly broad enough to embrace the informal economy.

Enforcement of laws and regulations is to be secured by an adequate and appropriate system of inspection (Art. 9, para. 1; see also under Convention No. 81 on labour inspection, described above). Measures to promote safety-friendly design, manufacture, import, provision and transfer of equipment and machinery for occupational use also provide guidance to policy-makers (Art. 12). Convention No. 155 is supplemented by Recommendation No. 164 on the same topic, which contains more detailed measures for the public authorities to take in relation to health and safety at the workplace.

The Guarding of Machinery Convention, 1963 (No. 119), and the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), apply to “all branches of economic activity”. Whether or not this was intended to mean the informal economy, the ideas in these instruments are also relevant to improving conditions of work.

Some instruments directly address the self-employed, many of whom are in the informal economy. The Safety and Health in Agriculture Convention, 2001 (No. 184), calls for a coherent national policy on safety and health in that branch. The Safety and Health in Agriculture Recommendation, 2001 (No. 192), for instance, calls for the progressive extension of the protection afforded by the Convention to self-employed farmers (Para. 12). The Rural Workers’ Organization Convention, 1975 (No. 141), extends to “any person engaged in agriculture, handicrafts or a related occupation in a rural area” – “whether wage-earners or self-employed” (Arts. 2 and 3). A number of other international Conventions and Recommendations on health and safety explicitly refer to the “self-employed”,

a category which overlaps to a greater or lesser extent with the informal economy of various countries.

In addition, safety and health instruments are often worded to extend to all workers or all activities in the sector covered. Examples include the Safety and Health in Mines Convention, 1955 (No. 176), the Safety and Health in Construction Convention, 1988 (No. 167), the Asbestos Convention, 1986 (No. 162), and the Benzene Convention, 1971 (No. 136). In the case of Convention No. 167, covering a field that occupies many on an informal basis, it applies to “all construction activities” (Art. 1) and “worker” is defined as anyone “engaged in construction” (Art. 2(d)) – regardless of his/her status.

On the other hand, the substantive articles of such Conventions distinguish between rights of workers, obligations incumbent upon employers and responsibilities of the competent authorities (the Safety and Health in Mines Convention illustrates this most clearly). A similar approach is taken by the Safety and Health in Agriculture Convention, 2001 (No. 184), which, however, excludes subsistence farming from its scope. Where no employer/employee relationship is present, the Conventions remain relevant in terms of the action called for by the competent authorities. A further example is the Chemicals Convention, 1990 (No. 170), which provides for the formulation, implementation and periodic review of a coherence policy on safety in the use of chemicals at work (Art. 4).

Finally, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), provides that “workers belonging to these peoples” not be subjected to “working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances” (Art. 20, para. 3(b)).

Taken together, these instruments have also served as the springboard for the development of codes of practice in relation to a wide range of work, as well as the articulation of fundamental principles of safety and health.⁶⁴ Many are just as useful in the informal as the formal economy.

⁶⁴ See B. Alli, *Fundamental principles of occupational health and safety*, ILO, Geneva, 2001.

V. Conclusion

This sketch of provisions from a range of Conventions and Recommendations relevant to decent work and the informal economy has cut across what are sometimes more hermetic discussions of issues that approach similar problems from different perspectives. It has classified ILO instruments in a less traditional way, precisely in order to stimulate debate and further reflection. This is a reflection that needs to go beyond the traditional boundaries of international and national labour law. Only in this way can approaches be developed on the informal economy that are, in the words of the World Commission on the Social Dimension of Globalization, “mutually supporting”.⁶⁵

The conclusions adopted by the International Labour Conference in 2002 on decent work and the informal economy reflected the commitment of the ILO and its constituents to making decent work a reality for all workers and employers. As these conclusions note, “the promotion of decent work for all workers, women and men, irrespective of where they work, requires a broad strategy: realizing fundamental principles and rights at work; creating greater and better employment and income opportunities; extending social protection; and promoting social dialogue. These dimensions of decent work reinforce each other and comprise an integrated poverty reduction strategy”.⁶⁶

International labour standards contribute to this in six ways:

- (i) some enable and empower people in the informal economy;
- (ii) some contain substantive provisions that guide policy, particularly for governments that may have neglected informal economy issues;
- (iii) when ratified (or examined in a general survey), international labour standards trigger a supervisory system that involves periodic review and offers opportunities for employers’ and workers’ organizations to raise issues of concern in relation to the informal economy;
- (iv) they can offer platforms for advocacy towards achieving “decent work for all”;
- (v) when not applied (although applicable), they lay bare failures of governance;
- (vi) when applied in the context of the informal economy, they promote development with equity.

Many international labour standards are far from being irrelevant or inapplicable to the informal economy. They may only be in need of serious implementation.

⁶⁵ See *A fair globalization, op. cit., supra* note 6, para. 286.

⁶⁶ See Conclusions concerning decent work and the informal economy, *op. cit., supra* note 3, p. 25/53, para. 2.

