

Chapter II

INTERNATIONAL FRAMEWORK FOR ASSESSMENT OF U.S. LABOR STANDARDS

A. STANDARDS AT THE GOVERNMENTAL LEVEL

ILO CONVENTION 87 ON FREEDOM OF ASSOCIATION (1948)

Article 1. Each Member of the International Labour Organisation [(ILO)] for which this Convention is in force undertakes to give effect to the following provisions.

Article 2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3.

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

* * *

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

* * *

Article 11. Each Member of the [(ILO)] for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

Article 15

1. This Convention shall be binding only upon those Members of the [(ILO)] whose ratifications have been registered with the Director-General.

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998)

37 I.L.M. 1237 (1998).

The International Labour Conference * * *

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has

established relations, pursuant to article 12 of its Constitution, to support these efforts:

- (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
- (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and
- (c) by helping the Members in their efforts to create a climate for economic and social development.

* * *

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

Notes and Questions

1. Goals of the ILO. Growing out of earlier efforts at international cooperation in the advancement of labor standards, including the International Association for Labour Legislation in 1900, the ILO was established by Part XIII of the Treaty of Versailles of 1919, which marked the end of the first world war. Part XIII contained a labor charter and the ILO Constitution. The Preamble to the Constitution sounds two themes: (1) the need to alleviate “conditions of labour * * * involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled”; and (2) the need to address “the failure of any nation to adopt humane conditions of labour [which lie as] an obstacle in the way of other nations which desire to improve the conditions in their own countries” * * *. At its General Conference held in Philadelphia in 1944, the ILO issued a Declaration of its aims and purposes, in which it reaffirmed “the fundamental principles on which the Organization is based and, in particular, that”—

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unremitting vigor within each nation, and by continuous and concert-

ed international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

2. ILO Convention No. 98. The 1949 Convention No. 98 on the Right to Organize and Collective Bargaining declares in part that “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment . . . Such protection shall apply more particularly in respect of acts calculated to—a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish union membership; b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities.”

3. Structure of the ILO and Compliance Mechanisms. The states are the members of the organization; each member has four representatives, or delegates, to the General Conference “of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople” of the member state chosen in consultation with the “most representative” employer and union organizations in the state (Art. 3, ¶¶ 1, 5). This essentially tripartite structure also characterizes the 28-member Governing Body; indeed, union and employer representatives to that body are selected separately by the union and employer delegates (Art. 7). The adoption of a Convention or Recommendation (to deal with circumstances “not considered suitable or appropriate at that time for a Convention,” Art. 19, ¶ 1) requires a two-thirds vote of the delegates (Art. 19), but Conventions failing to obtain such a vote can still be agreed to among the members themselves (Art. 21).

Once a Convention or a Recommendation has been adopted, each of the members “undertakes that it will,” within “18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action” (Art. 19, ¶¶ 5(b) & 6(b)). However, if the member “does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member,” except to report the extent of its efforts (Art. 19, ¶ 5(e)). Any member can file a complaint that another member is not observing the terms of a Convention it had ratified, which can lead to the appointment of a Commission of Inquiry (Art. 26) which ultimately makes a report with recommendations (Art. 28). If the recommendations are not accepted by the member state that is the subject of the complaint, the complaining state can refer the matter to the International Court of Justice (ICJ) (Art. 29). Under Article 33, if a member fails to carry out the recommendations contained in the report of a Commission of Inquiry or an ICJ decision,

“the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.”*

In addition, “[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision” to the ICJ (Art. 37, ¶ 1) or a special tribunal established by the Conference (*id.*, ¶ 2).

4. Role of the United States. Although a major player in the negotiation of the Treaty of Versailles, the U.S. did not join the ILO until 1934. It is presently an active participant and has ratified several ILO conventions, including No. 105 on the Abolition of Forced Labour (1991) and No. 182 on the Worst Forms of Child Labour (1991). It has not ratified No. 87 on Freedom of Association or No. 98 on the Right to Organize. See generally Nancy H. Chau & Ravi Kanbur, *The Adoption of International Labor Standards Conventions: Who, When, and Why* 113 ff. (Brookings Trade Forum: 2001).

The U.S. Government has taken the position that “its laws are generally in compliance with ILO Conventions Nos. 87 & 98.” 70 ILO Bull. 14 (1987). The U.S. Council for International Business (USCIB), an employer group, has argued before Congress and the ILO Freedom of Association Committee that “re-examination” of any aspect of the U.S. labor law system “would constitute labor law reform in the United States and upset [that] accepted balance of employer and employee rights that have existed in the United States since 1947.” 72 ILO Bull. 52 (1992). This perspective is developed in Edward E. Potter, *Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 & No. 98* (1984). For a critique of the U.S. position, see James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 *Empl. Rts. & Employ. Pol’y J.* 65 (1999) (U.S. employers want to avoid international scrutiny of weak U.S. labor law system).

5. Effect of Declaration of Fundamental Principles and Rights at Work? Has the U.S. in effect adopted the ILO conventions on freedom of association and the right to organize by agreeing to the 1988 Declaration of Fundamental Principles and Rights at Work, or is the substance of its agreement limited to the particular measures required in ¶ 3 of the Declaration? Edward Potter, Vice-Chairman of the ILO Committee that drafted the Declaration and representative of the U.S. employers’ group in the ILO, observed during the 2003

* Article 33 has been invoked only once—in the 2000 proceeding complaining of Myanmar (formerly, Burma)’s continued use of forced labor. See ILO Resolution Concerning the Measures Recommended by the Governing Body under Article 33 of the ILO Constit. on the Subject of Myanmar, 88th Sess. (Ge-

neva 2000), available at www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I; also Francis Maupain, *Is the ILO Effective in Upholding Workers’ Rights?: Reflections on the Myanmar Experience*, ch. 4 in *Labour Rights as Human Rights* (Philip Alston ed. 2005).

debates: “It is clear that Members have no obligations as concerns the specific provisions of the Conventions they have not ratified. Moreover, the Declaration is no wider in scope than the fundamental Conventions themselves.” Int’l Labour Conference, 91st Sess., 13th mtg., No. 14, at 1 (2003) (provisional record), *available at* <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/pr-14.pdf>. Francis Maupin, Special Advisor to the ILO General Secretary, by contrast, argues that the Declaration marks an important positive step in rooting a set of fundamental labor rights directly in the ILO Constitution, rather than the practice of member states in ratifying and complying with particular Conventions, as universal “enabling right[s]” that are of “‘particular significance in that they enable persons concerned to claim freely and on the basis of equality of opportunity, their fair share of the wealth they have helped to generate.’” Maupin, *supra*, at 130 (quoting Declaration’s Preamble).

6. Commentary: For examples of the extensive literature on the ILO’s contribution to an emerging jurisprudence of labor rights as human rights. See, e.g., *Labour Rights as Human Rights* (Philip Alston ed. 2005); Steven Charnovitz, *The ILO in its Second Century*, 4 *Max Planck Yearbook of United Nations Law* 148–84 (2000); Brian Langille, *The ILO and the New Economy*, 15 *Int’l J. of Comp. Lab. L. & Indus. Rels.* 229 (Fall 1997).

B. STANDARDS FOR EMPLOYERS

1. State-Generated Standards

ILO TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (AS AMENDED IN NOVEMBER 2000)

83 ILO Bull., Series A, No. 3 (2000).

41. Multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.

FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE

42. Workers employed by multinational enterprises as well as those employed by national enterprises should, without distinction whatsoever, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation. They should also enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

43. Organizations representing multinational enterprises or the workers in their employment should enjoy adequate protection

against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

44. Where appropriate, in the local circumstances, multinational enterprises should support representative employers' organizations.

45. Governments, where they do not already do so, are urged to apply the principles of Convention No. 87, Article 5, in view of the importance, in relation to multinational enterprises, of permitting organizations representing such enterprises or the workers in their employment to affiliate with international organizations of employers and workers of their own choosing.

46. Where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively.

47. Representatives of the workers in multinational enterprises should not be hindered from meeting for consultation and exchange of views among themselves, provided that the functioning of the operations of the enterprise and the normal procedures which govern relationships with representatives of the workers and their organizations are not thereby prejudiced.

* * *

COLLECTIVE BARGAINING

49. Workers employed by multinational enterprises should have the right, in accordance with national law and practice, to have representative organizations of their own choosing recognized for the purpose of collective bargaining.

50. Measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

51. Multinational enterprises, as well as national enterprises, should provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements.

52. Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation.

53. Multinational enterprises, in the context of bona fide negotiations with the workers' representatives on conditions of employment, or while workers are exercising the right to organize, should not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of the right to organize; nor should they transfer workers from affiliates in foreign countries with a view to undermining bona fide negotiations with the workers' representatives or the workers' exercise of their right to organize.

* * *

EXAMINATION OF GRIEVANCES

58. Multinational as well as national enterprises should respect the right of the workers whom they employ to have all their grievances processed in a manner consistent with the following provision: any worker who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure. This is particularly important whenever the multinational enterprises operate in countries which do not abide by the principles of ILO Conventions pertaining to freedom of association, to the right to organize and bargain collectively and to forced labour.

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES—PART IV (2000)

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

1. a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;
- b) Contribute to the effective abolition of child labour;
- c) Contribute to the elimination of all forms of forced or compulsory labour;
- d) Not discriminate against their employees with respect to employment or occupation on such grounds as race,

- colour, sex, religion, political opinion, national extraction or social origin * * *.
2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;
 - b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment;
 - c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
 4. a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;
 - b) Take adequate steps to ensure occupational health and safety in their operations.
5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.
 6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful co-operation to mitigate the effects of such decisions.
 7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enter-

prises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.

8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

Notes and Questions

1. Status of ILO Tripartite Declaration. The ILO Tripartite Declaration, first adopted in 1977, represented a new approach for the ILO whose traditional focus had been the setting of standards in the context of binding treaties termed Conventions. This Declaration is not legally binding nor subject to the reporting and monitoring systems that the ILO regularly uses for its Conventions and Recommendations. There is a system for requiring members to reply to queries regarding its implementation and disputes can be referred to the Governing Body. See Virginia A. Leary, *Nonbinding Accords in the Field of Labor*, in *International Compliance with Nonbinding Accords* 247 ff. (Edith Brown Weiss ed. 1997).

2. Status of OECD Guidelines. The OECD Guidelines were initially promulgated in June 1976 by the Council of Ministers of the then-33 member Organization of Economic Cooperation and Development (OECD) as a set of “good conduct” standards for all multinational enterprises (MNEs) operating in or from OECD countries. The Guidelines deal with a number of subjects including taxation, investment, environmental protection and information disclosure in addition to employment and industrial relations. The 2000 revision of the Guidelines called on MNEs to “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments,” OECD Guidelines: Review 2000, pt. 1, § II, ¶ 2 (4th ed. 2000); added recommendations on the elimination of child labor and forced labor, id. § IV, ¶ 1(b)–(c); and urged MNEs to “[e]ncourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines,” id., § II, ¶ 10. The Guidelines are not legally binding on OECD members states or MNEs operating in the OECD area. “Rather, the declaration containing the guidelines represents a political commitment on the part of OECD governments to foster such corporate conduct” Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 *Colum. J. Transnational L.* 389, 410 (2005). Each OECD member identifies a “national contact point”—for the U.S., the director of the State Department’s Office of Investment Affairs—responsible for promoting the Guidelines and providing information on compliance. Disputes concern-

ing the Guidelines are referred to the OECD's Committee on Investment and Multinational Enterprises (CIME), which lacks any enforcement powers. A brief description of action takes on cases of alleged non-compliance by MNEs can be found in Report by the Chair of the Ann. Mtg. of the National Contact Points, Annex 3 (Specific Instances Considered by National Contact Points), in Ann. Rep. on the OECD Guidelines for Multinational Enterprises (2006), available at www.oecd.org/dataoecd/23/33/37439881.pdf.

2. Privately Promulgated Standards

NIKE CODE OF CONDUCT*

Nike, Inc. was founded on a handshake.

Implicit in that act was the determination that we would build our business with all of our partners based on trust, teamwork, honesty and mutual respect. We expect all of our business partners to operate on the same principles.

At the core of the NIKE corporate ethic is the belief that we are a company comprised of many different kinds of people, appreciating individual diversity, and dedicated to equal opportunity for each individual.

NIKE designs, manufactures and markets products for sports and fitness consumers. At every step in that process, we are driven to do not only what is required, but what is expected of a leader. We expect our business partners to do the same. NIKE partners share our commitment to best practices and continuous improvement in:

1. Management practices that respect the rights of all employees, including the right of free association and collective bargaining
2. Minimizing our impact on the environment
3. Providing a safe and healthy work place
4. Promoting the health and well-being of all employees

* * *

Wherever NIKE operates around the globe, we are guided by this Code of Conduct. Contractors must post this Code in all major workspaces, translated into the language of the employee, and must train employees on their rights and obligations as defined by this Code and applicable local laws.

* Available at www.nike.com/nikebiz.jhtml?page=54 (visited March 22, 2007).

While these principles establish the spirit of our partnerships, we also bind our partners to specific standards of conduct. The core standards are set forth below.

Forced Labor. The contractor does not use any forced labor—prison, indentured, bonded or otherwise.

Child Labor. The contractor does not employ any person below the age of 18 to produce footwear. The contractor does not employ any person below the age of 16 to produce apparel, accessories or equipment. * * * To further ensure these age standards are complied with, the contractor does not use any form of homework for Nike production.

Compensation. The contractor provides each employee at least the minimum wage, or the prevailing industry wage, whichever is higher; provides each employee a clear, written accounting for every pay period; and does not deduct from employee pay for disciplinary infractions.

Benefits. The contractor provides each employee all legally mandated benefits.

Hours of Work/Overtime. The contractor complies with legally mandated work hours; uses overtime only when each employee is fully compensated according to local law; informs each employee at the time of hiring if mandatory overtime is a condition of employment; and on a regularly scheduled basis provides one day off in seven and requires no more than 60 hours of work per week on a regularly scheduled basis, or complies with local limits if they are lower.

Environment, Safety and Health (ES&H). The contractor has written environmental, safety and health policies and standards, and implements a system to minimize negative impacts on the environment, reduce work-related injury and illness, and promote the general health of employees.

Documentation and Inspection. The contractor maintains on file all documentation needed to demonstrate compliance with this Code of Conduct and required laws; agrees to make these documents available for NIKE or its designated monitor; and agrees to submit to inspections with or without notice.

Notes and Questions

1. Binding Contractors. The Nike Code purports to bind contractors—a reflection of the fact that this company out-sources 97 percent of its footwear products to factories in four countries—China, Indonesia, Thailand, and Vietnam—none of which is known for its labor standards or their proper enforcement:

Nike products are manufactured in factories owned and operated by other companies. Out-sourcing * * * is pervasive in the industry * * *. The workers are predominantly women, ages 19–25. The geographic dispersion is driven by many factors including pricing, quality, factory capacity, and quota allocation * * *.

Our goal is to do business with contract factories that consistently demonstrate compliance with standards we set and that operate in an ethical and lawful manner. * * *

Nike, Inc., *Workers and Factories: Our Business Model and Its Challenges* (2004), available at www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=businessmodel

2. Integrity of Private Standard-Setting Process. Private codes have proliferated. For listings, see World Bank Group Corporate Social Responsibility Practice, Company Codes of Conduct and International Standards: An Analytical Comparison (2003); U.S. Council for International Business, Corporate Responsibility Committee, USCIB Compendium of Corporate Responsibility Initiatives (2002); OECD, Codes of Corporate Conduct: Expanded Review of their Contents (Working Paper No. 2001/6, available at www.oecd.org/dataoecd/57/24/1922656.pdf).

Are these largely desirable developments raising corporate awareness, promoting compliance with human rights norms and providing benchmarks for monitoring by external groups? Or are they no more than a corporate public relations campaign designed to put off meaningful international scrutiny of the operations of MNEs and their contractors? See Emeka A. Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *Yale L.J.* 443, 532–33 (2001). It is generally agreed that the integrity and effectiveness of a private company code depends on its provisions for internal and external monitoring. See generally National Research Council, *Monitoring Labor Standards: Techniques and Sources of Information* (2004); Special Issue: *Monitoring International Labor Standards* (Margaret Hilton ed.), 24 *Comp. Lab. L. & Pol’y J.* 281 (Winter 2003).

3. Role of Monitoring and Certification. A good many organizations have emerged to provide independent monitoring and certification services. See Charles Sabel, Dara O’Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (Feb. 23, 2000) (Appendix), available at www2.law.columbia.edu/sable/papers/ratchPO.html:

- The Fair Labor Association (FLA). In 1996, the Clinton administration convened the Apparel Industry Partnership (AIP) to “ensure that the products companies make and sell are manufactured under decent and humane working conditions, and to develop options to inform consumers that the products they buy are not produced under exploitative conditions.” In 1997, the

AIP released a “Workplace Code of Conduct and Principles for Monitoring,” which includes provisions for freedom of association and collective bargaining and a process for developing a system of independent external monitoring. In the fall of 1998, the AIP evolved into the Fair Labor Association (FLA) which is the body now responsible for establishing monitoring criteria, certifying monitors, reviewing audits, granting “sweat-free” labels, and reporting on audit results. FLA members include Nike, Reebok, Liz Claiborne, Patagonia, Levi’s, Adidas, Kathie Lee Gifford, LL Bean, Nicole Miller, Phillips Van-Heusen, the Lawyers Committee for Human Rights, the International Labor Rights Fund, the RFK Memorial Center for Human Rights, the National Consumers League and over 100 US universities.

- SA8000, created in 1997 by the US NGO Council on Economic Priorities (CEP), is patterned on the ISO family of standards and includes the core ILO conventions and a number of additional provisions on wages and work hours. It seeks to motivate multinational firms and their subcontractors to agree to a code of conduct and to a system of inspections. CEP designed the code and also created the Council on Economic Priorities Accreditation Agency (CEPAA) to officially certify firms as capable of performing competent social audits. Corporations seeking the SA8000 stamp of approval hire certified auditors to evaluate whether their subcontractors are complying with the code of conduct, and then CEP publicizes the results. Approximately 30 firms have been certified under SA8000 as of January 2000.
- The Clean Clothes Campaign (CCC), with members throughout Europe, developed a 1998 model code of conduct based on ILO conventions that applies to entire subcontracting chains (including homeworkers). Firms who comply with the code would be eligible to use a label showing they are a “clean” firm. * * *
- The Worker Rights Consortium (WRC) was developed by the United Students Against Sweatshops (USAS) in cooperation with UNITE, the AFL-CIO, and a number of human rights, labor, and religious NGOs in 1999. The WRC employs three broad strategies: (1) information forcing; (2) verification systems; and (3) pro-active inspections. The WRC requires members to commit to broad public disclosure and to mechanisms to verify information reported by companies and their workers. The WRC [will not] certify company compliance with a code of conduct or standard.
- The Ethical Trading Initiative is a coalition of NGOs, labor unions, and businesses that was convened by the British government in 1998. It has established a “Base Code” of conduct and monitoring system and is now conducting pilot studies, organizing training programs for monitors, and building coalitions in developing countries to carry out verification work.

For evaluations of the Nike monitoring process, see Richard Locke & Monica Romis, *Beyond Corporate Codes of Conduct: Work Organization and Labor Standards in Two Mexican Garment Factories* (MIT Sloan Working Paper No. 4617-96, Aug. 2006), available at www.ssrn.com; Richard Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards?: Lessons from Nike* (MIT Sloan Working Paper No. 4612-06 (July 2006)); Richard Locke, *The Promise and Perils of Globalization: The Case of Nike*, in *Management: Inventing and Delivering Its Future* (Richard Schmalensee & Thomas A. Kochan eds. 2003). Working from data based on factory audits in 800 of Nike's suppliers in 51 countries, Locke, Qin & Brause conclude:

Some factories appear to be in or close to full compliance with Nike's code of conduct while others appear to suffer from persistent problems with wages, work hours and healthy and safety conditions. This variation in working conditions appears to be the result of country effects (the ability of the labor inspectorate to enforce labor laws and standards in the country in which the factory is located), factory characteristics (the age and size of the factory) and the relationship between Nike and the particular supplier (whether or not the supplier is a strategic partner, how often Nike (noncompliance) staff visit and interact with the factory, and who else is sourcing product from the same factory).

* * *

After years of developing more comprehensive monitoring tools, hiring growing numbers of internal compliance specialists, conducting hundreds and hundreds of factory audits, and working with external consultants and NGOs, analyses of Nike's own data suggest that conditions in some of its suppliers have improved somewhat but that in many of them, things have remained stable or deteriorated.

C. CRITICISM OF U.S. LABOR STANDARDS

AFL-CIO AND CONFEDERATION OF MEXICAN WORKERS

ILO Committee on Freedom of Association Case No. 2227 Report No. 332
(Oct. 18, 2002).

The complainants allege that, following the Supreme Court decision in the case of *Hoffman Plastic Compounds v. National Labor Relations Board*, on the basis of their immigration status, millions of workers have lost the only protection that had been available to ensure respect for their freedom of association rights[.]

* * *

599. The Committee takes due note, in the first instance, of the [U.S.] Government's reply to the complainants['] allegations

concerning United States obligations under Conventions Nos. 87 and 98, as well as the ILO Declaration on Fundamental Principles and Rights at Work. The Government rightly states that having not ratified these two instruments, it has no international law obligations directly pursuant to Conventions Nos. 87 and 98. The Government adds that the 1998 ILO Declaration on Fundamental Principles and Rights at Work is a non-binding statement of principles that does not give rise to legal obligations.

The Committee would recall, however, that, since its creation in 1951, it has been given the task to examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate * * * stems directly from the fundamental aims and purposes set out in the ILO Constitution. * * *

The Committee notes that the complainants challenge not only the conformity of the Supreme Court's decision in *Hoffman* with the principles of freedom of association, but also the inaction of the executive and legislative branches of the Government to redress this violation. * * *

604. The question in this case is whether the remedies remaining for undocumented workers to protect them in their exercise of freedom of association rights after *Hoffman* can be considered sufficient to ensure that these rights have any real meaning. * * *

The consequences for the employer for illegally dismissing the undocumented worker are now limited to a cease and desist order in respect of violations of the NLRA and the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices. The employer will be subject to contempt proceedings in certain circumstances should it not comply.

The complainants argue that these existing remedies are insufficient to protect foreign workers' freedom of association rights and describe a post-*Hoffman* workplace environment where either employers intimidate foreign workers into not exercising these rights or where these workers are quite simply too frightened to even try to exercise this basic right. * * *

607. The Government, in its reply, indicates a variety of measures that it has taken to ensure that *Hoffman* is not applied beyond its intended scope, including the drafting of Labor Department fact sheets to clarify that the decision does not affect the application of the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act concerning, in particular, minimum wages and overtime rates. It adds that the United States Equal Employment Opportunity Commission (EEOC) has

released a statement stressing that, while the decision may affect a person's eligibility to receive some forms of relief once a violation is established, immigration status remains irrelevant to the EEOC when examining the underlying merits of a charge.

The Committee recalls that the remedies now available to undocumented workers dismissed for attempting to exercise their trade union rights include: (1) a cease and desist order in respect of violations of the NLRA; and (2) the conspicuous posting of a notice to employees setting forth their rights under the NLRA and detailing the prior unfair practices. * * * The Committee considers that such remedies in no way sanction the act of anti-union discrimination already committed, but only act as possible deterrents for future acts. Such an approach is likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action.

* * *

In light of all of the above considerations, the Committee concludes that the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination.

* * *

613. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:

The Committee invites the Government to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision. The Government is requested to keep the Committee informed of the measures taken in this regard.

Notes and Questions

1. The U.S.'s Legal Obligation? Note the position of the ILO Freedom of Association Committee that the U.S. is bound to the organization's "principles of freedom of association" because the Committee's mandate "stems directly from the fundamental aims and purposes set forth in the ILO Constitution." Is this a sustainable position in view of the fact that Conventions that have not been ratified are not binding on member states, or can the U.S. be said to be bound to these principles by virtue of having agreed to the 1988

Declaration? See notes 2–5, *supra* pages 56–60. Reconsider after reviewing Human Rights Watch, *Unfair Advantage*, *infra* pages 75–84 & notes 1–3.

2. Elements of Freedom of Association as a Fundamental Human Right? In what sense do workers have a right of association when they lack the legal right to work in a country? And if they have a right of association as a fundamental human right, without regard to positive law, what does the right entail? Should any or all of the following be included in the formulation of this human right?

- The right to discuss working conditions with other workers?
- The right to form an association for mutual benefit?
- The right to file a complaint with government authorities regarding working conditions?
- The right to insist on collective bargaining with one’s employer?
- The right to strike?
- The right to participate or enlist others in a secondary consumer boycott?
- The right to participate or enlist others in a secondary producer boycott?
- The right to be consulted and to have a say in company decisions affecting their jobs?

If any of these rights should be included in the fundamental right of freedom of association, what are the grounds for such inclusion? Presumably, the state should not be able to use its criminal process to punish workers for exercising such rights. Is the state also enjoined from attaching any adverse consequences to the exercise of such rights, such as initiating deportation proceedings on the basis of information obtained from the employer that the workers in question are undocumented workers? Does the state also have an obligation to prevent or remedy job-based retaliation against the exercise of any of the rights so included? Reconsider in light of *Matter of Alberta Reference* below.

3. “Bitter with the Sweet”? In a portion of its report quoted in note 4, *supra* page 7, the ILO Committee stated that its “concern is uniquely to examine whether the remedies available under the NLRA are sufficiently for effectively ensuring that the basic trade union rights it purports to guarantee to all workers, including undocumented workers”? Would the Committee’s have been different if the NLRA contained an express exclusion for undocumented workers? If the NLRA is being relied upon as source of positive rights, can it be read independent of aspects of U.S. law which may curtail the remedial authority of the NLRB?

Comparative Note: Canadian Charter of Rights and Freedoms: Matter of Alberta Reference (1987)

The U.S. Constitution’s First Amendment guarantee of freedom of association does not apply to private conduct. By contrast, the compa-

rable Canadian Charter of Rights and Freedoms guarantee (§ 2(d)) does reach private action. In *Matter of a Reference re Alberta Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, 3 W.W.R. 577, 38 D.L.R. (4th) 161, the provision of the Alberta public sector labor relations law barring police strikes was challenged as inconsistent with the Charter. The Supreme Court of Canada rejected the challenge:

Per Beetz, Le Dain and La Forest JJ.: * * * The constitutional guarantee of freedom of association in s. 2(d) of the Charter does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. In considering the meaning that must be given to freedom of association in s. 2(d) of the Charter, it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the Charter, the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation.
* * *

What is in issue here is not the importance of freedom of association in this sense but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection are sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. * * * The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates the extent to which the Court becomes

involved in a review of legislative policy for which it is really not fitted.

* * *

Per Dickson C.J. and Wilson J. (dissenting): * * * While s. 2(d), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed. What freedom of association seeks to protect, however, is not associational activities qua particular activities, but the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licen[s]e for all group activity. * * * The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. * * *

In the context of labour relations, the guarantee of freedom of association in s. 2(d) of the Charter includes not only the freedom to form and join associations but also the freedom to bargain collectively and to strike. The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers, and the capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. It remains vital to the capacity of individual employees to participate in ensuring equitable and humane working conditions. Under our existing system of industrial relations, the effective constitutional protection of the associational interests of employees in the collective bargaining process also requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter. Indeed, the right of workers to strike is an essential element in the principle of collective bargaining. This is not to say that s. 2(d) of the Charter entrenches for all time the existing system of labour relations. The area of industrial relations is subject to significant legislative regulation. The point is that this regulation cannot define the scope of the underlying freedom.

HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE

Workers' Freedom of Association in the United States Under
International Human Rights Standards (2000).

II. FINDINGS AND RECOMMENDATIONS

* * * So long as worker organizing, collective bargaining, and the right to strike are seen only as economic disputes involving the

exercise of power in pursuit of higher wages for employees or higher profits for employers, change is unlikely. Reformulating these issues as human rights concerns can begin a process of change.

What is most needed is a new spirit of commitment by the labor law community and the government to give effect to both international human rights norms and the still-vital affirmation in the United States' own basic labor law for full freedom of association for workers. The specific findings and recommendations that follow should be seen in this broader context.

* * *

Finding: Discrimination against Union Supporters

The basic international norm protecting the right to organize is stated in ILO Convention 98: "Workers shall enjoy adequate protection against acts of anti-union discrimination . . . more particularly acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or participation in union activities." The NLRA's Section 8(a)(3) appears to meet this goal, making unlawful any discrimination against workers for concerted activity, including union activity.

Firing a worker for organizing is illegal but commonplace in the United States. Many of the cases examined by Human Rights Watch for this report reflect the frequency and the devastating effect of discriminatory discharges on workers' rights. * * *

Recommendation: Interim Reinstatement; Tougher Remedies

Two measures are needed to give effect to the international norm cited above. First, where the NLRB's investigation finds merit in a worker's charge of discriminatory discharge, the worker should be reinstated while the case continues to be litigated. * * *

Second, abuses should carry a meaningful price so that remedies and sanctions have a deterrent value. Workers should receive full back pay regardless of interim earnings. They should receive punitive damages in cases of willful violations of U.S. law. In addition to paying workers victimized by violations, employers who repeatedly engage in discrimination against union supporters should pay substantial fines to the NLRB.

* * *

Finding: Exclusion of Millions of Workers from Protection of Organizing and Bargaining Rights

International norms refer to the right of "every person" to form and join trade unions and to bargain collectively. Several of

the cases examined by Human Rights Watch for this report involved workers excluded from coverage by the NLRA, such as agricultural workers, domestic employees, and “independent” contractors who actually work in a dependent relationship with a single employer for years. Moreover, supervisory and managerial exclusions are used to deny organizing rights to many workers inappropriately placed in these categories. In the public sector, many states deny state and local employees the right to bargain collectively. [M]any welfare recipients employed in workfare programs are categorized as “trainees” and excluded from organizing and bargaining protection.

* * *

Recommendation: Eliminate Statutory Exclusions, Narrow Supervisory and Managerial Definitions

Congress should bring agricultural workers and domestic workers under NLRA coverage with the same rights and protections as all other covered workers. Legal reform should also subject employers’ claims of workers’ independent contractor status to strict scrutiny by the NLRB and the courts under standards that make workers’ real-life dependence on employers the test for NLRA coverage. Congress should also act to bring low-level supervisors and managers under the mantle of laws protecting rights of association, with adequate safeguards against conflicts of interest among groups of employees. Federal and state legislation should be enacted to protect public employees’ exercise of the right to bargain collectively and the right to strike, under conditions established in international norms. Welfare-to-work and workfare employees should be covered by laws protecting rights of organizing and collective bargaining.

* * *

Finding: Subcontracted and “Leased” Workers are Denied Freedom of Association and Effective Remedies

As seen in several cases in this report involving farmworkers, express-delivery employees, and high-technology temporary agency employees, many employers can use subcontracting arrangements, supplier chains and temporary employment agencies to avoid any obligation to recognize workers’ rights of organization and collective bargaining. In effect, workers labor “for” the prime employer while nominally employed “by” a supplier, subcontractor or agency.

* * *

*Recommendation: Make Prime Contractors and Employers of
“Permatemps” Responsible for Workers’ Rights of Asso-
ciation, Organizing, and Collective Bargaining*

Congress should enact legislation cutting through the fiction of subcontracted employment relationships like those cited that are structured to avoid responsibility for recognizing workers’ rights. Fixing responsibility should be based on a test of effective economic power to set workers’ terms and conditions of employment, not the formality of an employment relationship. The dominant entity in the employment relationship holding real power over workers’ terms and conditions of employment should have legal responsibility to recognize and bargain with workers when a majority choose representation. This principle should apply to large apparel retailers for sweatshop workers, to building owners’ associations for janitorial cleaning workers, to agricultural growers who use labor-supplying middlemen, and to other forms of labor contracting.

*Finding: Nullification of the Right to Strike
by the Permanent–Replacement Doctrine*

Employers’ power to permanently replace workers in the United States who exercise the right to strike runs counter to international standards recognizing the right to strike as an essential element of freedom of association. International norms * * * do not authorize permanent replacements. The ILO has determined that the right to strike “is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally.”

* * *

Recommendation: Reverse the Permanent–Replacement Doctrine

Congress should enact legislation prohibiting the permanent replacement of economic strikers. * * * [T]emporary replacements should give way to employee strikers when the strike ends. In effect, prohibiting permanent striker replacements effectuates a “balance of pain” in a strike that promotes more rapid resolution of a dispute while respecting both workers’ right to strike and management’s ability to operate.

Finding: Stifling of Solidarity Action by Workers

U.S. labor law creates a total prohibition on workers involved in a labor dispute seeking solidarity help from other workers at companies doing business with their employer. The NLRA backs up the ban by requiring the NLRB to seek an immediate injunction to halt any solidarity action or “secondary boycotts.” * * *

In contrast to the United States' total ban, other countries have fashioned rules for balancing the interests of workers and employers, protecting workers' right to join in solidarity and employers' right to avoid unwarranted economic harm if they are truly neutral to a dispute. * * *

Recommendation: Reformulate Rules to Allow Workers' Solidarity Action in Keeping with Principles of Freedom of Association

* * * Rather than removing any and all restrictions, Human Rights Watch recommends a serious effort by Congress to craft new rules allowing workers to seek and to afford solidarity support, looking to comparative experience in other developed countries and to ILO analysis and principles for guidance.

* * *

With regard to agricultural workers, Human Rights Watch finds and recommends as follows:

Finding: Agricultural Workers' Exclusion

Under current law, all agricultural workers, residents and immigrants alike, are excluded from coverage under the National Labor Relations Act affording protection of the right to freedom of association and rights to organize, to bargain collectively, and to strike. Except in a few states, agricultural workers can be fired with impunity for exercising the right to organize and have no means of obtaining recognition and collective bargaining through elections or other means of demonstrating majority support. No law makes such reprisal an unfair labor practice, or provides a hearing and enforcement mechanism for redress. Furthermore, because of the intermittent and often itinerant nature of agricultural labor, workers are not able to pursue a claim even if a forum were available.

Recommendation: End the Exclusion with Added Provisions for Farmworkers' Specific Problems

Human Rights Watch recommends including *all* workers under stronger laws effectively protecting freedom of association, including agricultural workers.

* * *

III. WORKERS' FREEDOM OF ASSOCIATION UNDER
INTERNATIONAL HUMAN RIGHTS LAW * * *

The United States has committed itself, through international agreement, to effectively enforce U.S. laws protecting workers' rights to organize, to bargain collectively and to strike. It has affirmed obligations to honor workers' freedom of association in its own trade laws and in laws governing U.S. involvement in the

World Bank, the International Monetary Fund, and other multilateral bodies. In all these laws, freedom of association is held out as the foremost internationally recognized workers' right.

International Human Rights Instruments

The Universal Declaration of Human Rights (1948) states that "[E]veryone has the right to freedom of peaceful assembly and association," and "[E]veryone has the right to form and to join trade unions for the protection of his interests."⁴⁷

The International Covenant on Civil and Political Rights (ICCPR, 1966) declares: "[E]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."⁴⁸

The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) obliges governments to "ensure the right of everyone to form trade unions and join the trade union of his choice . . . ; the right of trade unions to function freely . . . ; the right to strike . . ."⁴⁹

The United States ratified the International Covenant on Civil and Political Rights in 1992. The ICCPR requires ratifying states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The ICCPR also constrains ratifying states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."⁵⁰

When the U.S. Senate ratified the International Covenant on Civil and Political Rights in 1992, it entered several reservations, understandings, and declarations sidestepping certain obligations in the covenant, perhaps most notably reserving the right to impose capital punishment on minors.⁵¹ But it took no reservations, understandings or declarations with respect to Article 22 on the right to form and join trade unions, or to Article 2 requiring an "effective remedy" for rights violations.⁵²

Acknowledging the obligation, the U.S. State Department's first report on compliance with the ICCPR stated that "provisions

47. Universal Declaration of Human Rights, G.A. Res.217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) (art. 20(1); art. 23(4)).

48. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (art. 22).

49. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (art. 8).

50. International Covenant on Civil and Political Rights, Article 2.

51. See U.S. Senate, Ratification of ICCPR, April 2, 1992. * * *

52. In a written exchange between the Senate and the White House on questions posed by Senator Daniel Moynihan, first as to whether ICCPR Article 22 alters or amends U.S. labor law, the administration responded, "No," assert-

of the First, Fifth and Fourteenth Amendments guarantee freedom of assembly in all contexts, including the right of workers to establish and join organizations of their own choosing. . . . The rights of association and organization are supplemented by legislation.”⁵³ Distressingly, however, the United States devalued the importance of protecting the right to freedom of association by claiming that the widespread exclusion of workers from coverage under U.S. labor laws—primarily agricultural workers, domestic workers, and supervisory employees—“means only that they do not have access to the specific provisions of the NLRA . . . for enforcing their rights to organize and bargain collectively.”⁵⁴ “Only” lacking access to enforcement mechanisms means these workers’ rights can be violated with impunity. There is no labor board or other authority to remedy violations.

* * *

ILO Conventions and OECD Guidelines

Building on this international consensus, the ILO, a U.N.-related body with nearly universal membership and tripartite representation by governments, workers, and employers, recognizes freedom of association and protection of the right to organize as core workers’ rights. Over decades of painstaking treatment of allegations of violations of workers’ rights, the ILO’s Committee on Freedom of Association has elaborated authoritative guidelines for implementation of the right to organize, the right to bargain collectively, and the right to strike.

* * *

U.S. Commitments in the Multilateral Setting

The United States championed the 1998 adoption of the ILO’s Declaration on Fundamental Principles and Rights at Work that set

ing that Article 22’s “general right of freedom of association, including the right to form and join trade unions . . . are fully contemplated by the First Amendment to the U.S. Constitution.” On the question whether ratification of Article 22 commits the U.S. to ratify ILO Convention 87, the administration again responded in the negative, saying “the two agreements are different in the scope of the rights and obligations they provide.” This exchange, not reflected in the instrument of ratification, does not lessen the United States’ obligation to fully comply with Article 22 of the ICCPR.

53. See Office of the Legal Advisor, U.S. Department of State, “Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights,” Department of State publication 10200 (July 1994; released September 1994).

54. See U.S. Department of State, “Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights” (July 1994), p. 166.

out freedom of association as the first such principle and right. Upon adoption, U.S. Labor Secretary Alexis Herman declared, "The ILO has underlined and clarified the importance of the fundamental rights of workers in an era of economic globalization . . . ILO members have accepted the need to be accountable, and with this action there will now be a process within the ILO to demonstrate that accountability."⁶⁵

Whether or not a country has ratified Conventions 87 and 98, the ILO has determined that ILO member countries are "bound to respect a certain number of general rules which have been established for the common good . . . among these principles, freedom of association has become a customary rule above the Conventions."⁶⁶ Though it has so far not ratified Conventions 87 and 98, the United States has accepted jurisdiction and review by the ILO Committee on Freedom of Association (CFA) of complaints filed against it under these conventions.

Several ILO cases involving the United States in the past fifteen years have raised issues cited in this Human Rights Watch report. The United States has defended itself in these cases by describing its elaborate system of labor laws and procedures and asserting that the system generally conforms to ILO standards.⁶⁷ In many cases, the CFA "noted with concern" and "drew the attention of the U.S. government" to problems the Committee perceived. In some cases, the Committee recommended changes in policy and practice. However, the ILO has no enforcement powers, and the United States took no action to implement the recommendations.

* * *

Before 1999, U.S. reports to the ILO on compliance with freedom of association standards offered boilerplate descriptions of American labor law and asserted that U.S. law and practice "appears to be in general conformance" with Conventions 87 and 98. Significantly, however, the United States in a 1999 report acknowledged for the first time that "there are aspects of this [U.S. labor law] system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances."

The 1999 U.S. report stated that "the United States is concerned about these limitations and acknowledges that to ensure respect, promotion and realization of the right to organize and

^{65.} See U.S. Labor Department News Release, June 18, 1998, available at www.dol.gov.

^{66.} See Fact Finding and Conciliation Commission on Chile, International Labor Organization, Geneva, Switzerland (1975), para. 466.

^{67.} See ILO, CFA Cases nos. 1130 (1987), 1401 (1987), 1416 (1988), 1420 (1988), 1437 (1988), 1467 (1988), 1543 (1991), 1523 (1992), 1557 (1993), available at www.iloex.ilo.ch.

bargain collectively, it is important to reexamine any system of labor laws from time to time to assure that the system continues to protect these fundamental rights.’’⁷¹

* * *

To sum up, an argument that international human rights and labor rights law [are] not relevant to U.S. labor law and practice cannot be sustained. Basic U.N., ILO and regional human rights instruments have forged an international human rights consensus on workers’ freedom of association that includes the United States. The consensus is strengthened by the accelerating international engagement of the United States at the ILO and in regional and multilateral trade fora, where it actively supports the cause of internationally recognized workers’ rights. To fulfill both the obligations it has assumed and the objectives that it promotes in the international community, the United States must live up in its own labor law and practice to international labor rights norms on workers’ freedom of association and rights to organize, to bargain, and to strike.

Notes and Questions

1. Binding Commitments for the U.S.? In view of Part III of its report, has Human Rights Watch (HRW) persuasively made the case that the U.S. has undertaken a binding commitment as a matter of international law to recognize and give effect to the right of freedom of association of U.S. workers? If so, how is the content of that right to be determined? See also note 2, *supra* page 72.

2. Role of Customary International Law. In considering the questions posed above and in the previous section of this chapter, note that international law obligations can arise not only by treaty but as a matter of custom—that is, “evidence of a general practice accepted as law”. Statute of the International Court Justice Art. 38(1)(c), available at www.un.org. Customary international law thus contains two elements: (1) a “general practice” that has been (2) “accepted as law”. The latter inquiry, often called “opinion juris,” “attempts to ascertain whether a practice is observed out of a sense of legal obligation or necessity, or, rather, merely out of courtesy, neighborliness, or expediency.” David J. Bederman, *International Law Frameworks* 17 (2d ed. 2006). The HRW report makes a claim of customary international law (CIL), for example, when it states that “[i]n contrast to the United States’ total ban, other countries have fashioned rules for balancing the interests of workers and employers, protecting workers’ right to join in solidarity and employers’ right to avoid unwarranted economic harm if

⁷¹. See *Annual Report for 1999 to the ILO regarding aspects of Conventions 87 and 98*, available from the U.S. Department of Labor and on file with Human Rights Watch.

they are truly neutral to a dispute.” Even if it is assumed for purposes of discussion that all other (at least developed) nations do not have an absolute ban on secondary boycotts, a CIL claim would ordinarily require proof that these states eschew such a ban, not only because they have a different view of domestic labor policy but because of their understanding of the obligations inhering in the international law of freedom of association. This difficulty may explain why HRW supplements its argument based on custom with arguments based on the U.S.’s express commitments.

3. Vulnerability of Wholesale Exclusions from Coverage?

Is there a particularly strong basis for international scrutiny of exclusions from all coverage under U.S. labor law? Once the U.S. has established a general floor of labor law protections for most workers, does it undertake a heavy burden of justification to explain wholesale exclusions for supervisory, domestic and agricultural workers? Compare *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, 2001 SCC 94 (striking down repeal of provision covering agricultural workers in Ontario Labour Relations Act (LRA) as inconsistent with Canadian Charter of Rights and Freedoms):

The LRA is clearly designed to safeguard the exercise of the freedom to associate rather than to provide a limited statutory entitlement to certain classes of citizens. Through the right to organize inscribed in s. 5 of the LRA and the protection offered against unfair labour practices, the legislation recognizes that without a statutory vehicle employee associations are, in many cases, impossible. Here, the appellants do not claim a constitutional right to general inclusion in the LRA, but simply a constitutional freedom to organize a trade association. This freedom to organize exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases. The appellants have met the evidentiary burden of showing that they are substantially incapable of exercising their fundamental freedom to organize without the LRA’s protective regime. While the mere fact of exclusion from protective legislation is not conclusive evidence of a Charter violation, the evidence indicates that, but for the brief period covered by the ALRA, there has never been an agricultural workers’ union in Ontario and agricultural workers have suffered repeated attacks on their efforts to unionize. The inability of agricultural workers to organize can be linked to state action. The exclusion of agricultural workers from the LRA functions not simply to permit private interferences with their fundamental freedoms, but to substantially reinforce such interferences. The inherent difficulties of organizing farm workers, combined with the threat of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario. Equally important is the message sent by the exclusion of agricultural workers from the LRA, which delegitimizes their associational activity and thereby contributes to

its ultimate failure. The most palpable effect of the [repealer] is, therefore, to place a chilling effect on non-statutory union activity.

Would the court have come out the same way if the Ontario law had never covered agricultural workers? If so, do supervisors and managers in Canada similarly have a claim under the Charter to form unions? To require employers to bargain with them? To strike?