

Defining “International Labor Right”:

Can there be Freedom of Association without a Right to Strike?

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Introduction

“International labor rights” is a label used by many but the precise meaning of that label apparently is not fixed. First, there is lack of clarity as to what rights are meant; in particular, whether there are right additional to the four fundamental principles found in the 1998 ILO Declaration. Second, there is a lack of agreement on what certain rights, in particular “freedom of association,” mean. The latter is the focus of this paper.

Collective bargaining is considered by many to be a natural result of workers’ exercising their right of freedom of association. Often unspoken is the critical assumption that for collective bargaining to be a meaningful process, both employers and unions must have leverage. For unions that usually means that the workers must have the ability to inflict some degree of economic pain on the employer. The British say that workers engage in industrial action. The formal language of the American statute says that employees can engage in concerted activity for their mutual aid and protection. The shorthand way of expressing the notion is saying that workers have the right to strike. Without that right, collective bargaining becomes collective begging.

For a right to be an international labor right, it must somehow be recognized internationally. Prior to 1970 the only body engaged in international standard setting with regard to labor and employment was the International Labour Organization. Then other entities such as the UN, the OECD and the European Union became active. By the mid-1990s, when the WTO was established, NGOs and companies were engaged in setting notions of what constituted socially responsible behavior regarding workers. Today, there is a multiplicity of actors, all espousing a labor rights -- human rights approach, and with no particular hierarchy among them. This can create confusion as to what labor rights are cited and what some, such as “freedom of association,” mean. It can also lead to situations where governments or companies state that they accept a certain right but define that right in a way that critics assert eviscerates the right. Moreover, questions arise above the level of one nation, such as when countries sign bilateral

or multilateral trade agreements that include a labor clause as to who determines what a specific right stated therein, such as “freedom of association,” means.

A controversy that arose at the 2012 International Labour Conference (ILC) indicates that these concerns are not mere esoteric academic theorizing but concerns that relate to actual real life events. At the 2012 ILC the Employers group in the Committee on the Application of Standards refused to examine any individual case relating to ILO Convention No 87, Freedom of Association, based on the Employers’ view that the convention should not be viewed as including a right to strike means, and that the ILO’s Committee of Experts should not take that position. The Workers’ group adamantly disagreed with the Employers’ view and an impasse occurred.¹ The Employers’ stance challenged the ILO’s long established supervisory system. It also reflected the position some companies were taking.² In essence, the position strikes at the notion of what moral or legal force an internationally recognized labor right has.

International Recognition of Freedom of Association

Confronting the harsh working conditions found in the early stages of industrialization, workers sought to compel employers to agree to observe basic labor standards in the workplace. The concept that workers should be free to join together and that it should be lawful for workers to engage in collective industrial action had different labels in different countries. In English, the term “freedom of association” was often used. An extended discussion of how workers in different countries sought to join unions and engage in collective bargaining is not possible here,³ but suffice it to say that by 1919 that there was widespread acceptance that member states should give the principle of freedom of association legal recognition as evidenced by its inclusion in the chapter of the Treaty of Versailles that established the International Labour

¹ For a fuller discussion, see Claire La Hovary, “Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right to Strike,” *Industrial Law Journal* 42(4): 338-368 (2013). See also Lee Swepston, Crisis in the ILO Supervisory System: Dispute over the Right to Strike. *International Journal of Comparative Labour Law and Industrial Relations* 29(2): 199-218 (2013).

² See discussion of Cambodia on page .

³ See the Appendix for a summary of developments prior to 1989.

Organization. The crushing of independent trade unions by totalitarian governments during the 1930s caused the ILO to realize that a convention on the express subject of freedom of association was needed. In 1948 ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise, was adopted, followed one year later by the adoption of ILO Convention No. 98, Right to Organise and Collective Bargaining.

The adoption of Conventions No. 87 and 98 established that workers have freedom of association and in particular, the right to organize associations of their own choosing and to bargain collectively. These conventions did not detail what constraints might be imposed on such rights by governments, nor did they expressly state that there is a right to strike. Rather than a statement delineating what freedom of association meant with regard to industrial action, the tripartite constituents seemingly agreed that there should be some way of handling complaints that these conventions had been violated.⁴ In November 1951, the Governing Body established the Committee on Freedom of Association as a tripartite committee of the Governing Body. In its very first year of operation, the CFA proceeded on the basis that a right to strike is implied in Conventions Nos. 87 and 98. In a case dealing with a strike in Jamaica, the CFA stated: “The right to strike and that of organizing unions meetings are essential elements of trade union rights.”⁵

From the early 1950s to the late 1980s, there was little debate at the ILO on this subject. In light of the paucity of discussion on the topic, it was reasonable to conclude that the ILO’s tripartite parties had reached a political accommodation with regard to the meaning of freedom of association and the right to strike. This was to change. It may be that some delegates to the International Labour Conference defended freedom of association and the

⁴ See the Appendix for a fuller discussion.

⁵ Case No. 28, Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica). CFA, second session, March 1952, page 197. [Note: in French *liberté syndical* (freedom of workers’ and employers’ associations) is often used as the equivalent of the English *freedom of association*. The two labels are seen as expressing the same concept in a labor relations context. Trade union rights would express the notion that the workers’ association has a right to take such actions.]

right to strike as part of a Cold War strategy of opposing communist regimes in all forums including the ILO.⁶ With the collapse of the Soviet bloc in 1989, this reason disappeared. It may also be that increasing globalization caused many companies to shift production from advanced market economies to low wage, mainly Asian, countries. This intensified pressure on those companies still in higher wage countries to restrain wages while those companies newly operating in low wage countries were aware of the need to keep their labor cost advantage.

The first visible sign of a change in position occurred in 1994 at the ILC. During the discussion of the 1994 General Survey on Freedom of Association in the Committee on the Application of Standards sessions, the Employers for the first time directly challenged the view that a right to strike was implied in Convention No. 87 and stressed that there was no explicit statement of a right to strike.

The 1998 ILO Declaration: Identifying Core Rights

Following the fall of the Berlin Wall, calls were being made for the ILO to renew itself and to sharpen its focus by identifying those values which are at the heart of the ILO's mission. For those interested in increasing the visibility of fundamental labor rights, this occurred at an especially auspicious point in time. The impact of globalization on workers was attracting attention but no major international institution had yet made a pronouncement on labor rights. The ILO was to be the first.

The 1990s was an unusually heated period of anti-globalization activity and this lent urgency to the ILO discussion. Some activists, having despaired that ILO conventions could be enforced effectively by reluctant governments, turned their attention to social clauses in trade

⁶ Alfred Wisskirchen, who was a member of the Committee on the Application of Standards from 1969 to 2004 had indicated that the Cold War aspect was the reason the Employers did not raise this issue for many years. Alfred Wisskirchen, "The standard-setting and monitoring activity of the ILO: Legal questions and practical experience," *International Labour Review*, 144:3, 253-289, at 288. (2005).

agreements.⁷ The attempt to link trade and labor standards created particular tension at the WTO's December 1996 Ministerial meeting in Singapore with some governments of emerging economies viewing the proposed link as disguised protectionism by advanced countries. The WTO sidestepped the controversial issue by stating that the ILO was the proper forum for the resolution of these matters since it was the organization within the UN system with competence in labor matters.⁸

Thus, in 1997 the ball was squarely in the ILO's court once again. At the ILO, the task of identifying fundamental values was fairly straightforward. There was little debate on the specific rights to be included because for years certain conventions had been viewed as guaranteeing fundamental rights. It was quickly decided that the device of a promotional declaration would be utilized to highlight their importance.⁹

The 1998 ILO Declaration proclaims four fundamental principles: freedom of association, the prohibition against forced labor, the elimination of child labor and nondiscrimination in employment. Specific core conventions were linked to each principle and were presented as more fully explaining what the principle meant.¹⁰

⁷ For a discussion, see Emily M. Hafner-Burton. *Forced to Be Good: Why Trade Agreements Boost Human Rights*. Ithaca: Cornell University Press (2009).

⁸ Point 4, "Core Labour Standards," Singapore WTO Ministerial 1996: Ministerial Declaration WT/MIN(96)/DEC, 18 Dec 1996 (Declaration adopted 13 Dec 1996).
http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

⁹ For a discussion see Anne Trebilcock, "The ILO Declaration on Fundamental Principles and Rights at Work," in *The ILO and the Social Challenges of the 21st Century*, Roger Blanpain and Chris Engels, eds. (Kluwer, The Hague). pp. 105 – 115, at page 106.

¹⁰ Conventions No. 87 and 98, 29 and 105, 100 and 105, 137 and 182. In June 1998, seven were listed, but the eighth, Convention No. 182, Worst Forms of Child Labour, was already going through the approval process and was added as soon as it was formally adopted.

In the very long debate at the 1998 ILC on the proposed declaration,¹¹ there was no discussion at all, let alone disagreement, on whether freedom of association should be included as a fundamental principle and right at work, or what freedom of association meant, let alone whether it encompassed a right to strike.¹²

While the ILO's 1998 Declaration of Fundamental Principles and Rights at Work proclaimed no new rights, its importance should not be underestimated. Its value was in its framing of certain rights. They were not expressly called "human rights" but they identified as "fundamental." Nor were they labelled "labor standards" but rather "rights at work;" that is, they were rights that all persons possess by virtue of being human and working. As a result, those from outside the ILO who read the Declaration were likely to conceive of them as human rights with particular applicability in work settings.¹³ Those social justice activists without a labor background who were concerned about the impact of neoliberal market policies and globalization on workers needed a succinct, clear statement of fundamental worker rights. The propitious timing of the ILO's 1998 Declaration's adoption¹⁴ resulted in its being deemed the authoritative statement for labor rights/CSR/human rights benchmarking.¹⁵

¹¹ ILO, 1998. The discussion runs 111 pages in the Record of the Proceedings (number 20/1 – 20/111).

¹² The only mention concerned the Spanish translation of "freedom of association" with the Employers' Group taking the view that "libertad sindical" did not cover the full English meaning which includes both workers and employers. [Note: the French *liberté syndical* does equate to the English meaning,] There followed some discussion of how "freedom of association" was translated into Spanish in certain documents, such as the ILO Constitution. Ibid, page 20/65 - 66, para. 207 - 213.

¹³ For a discussion of this point, see Janice R. Bellace, "The ILO Declaration of Fundamental Principles and Rights at Work," *International Journal of Comparative Labour Law and Industrial Relations*, 17:3, pp. 269-287 (Autumn 2001).

¹⁴ The Declaration was adopted at the June 1998 ILC. A huge anti-globalization demonstration occurred at the November 1999 Ministerial Conference of the WTO in Seattle. In July 2001, hundreds of thousands demonstrated outside the G8 meeting in Genoa.

¹⁵ For instance, SA8000 contains eight core elements, four of which are fundamental principles (health and safety, working hours, child labor, forced labor, discrimination, freedom of association and collective bargaining, wages, and discipline. <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=472>

The 1998 Declaration extends the approach previously used by the ILO with freedom of association when the Committee on Freedom of Association was established; namely, that all member states of the ILO by virtue of joining the ILO are bound to respect the fundamental principles of ILO regardless of whether they have ratified a given convention. To make this commitment meaningful, the ILC in 1998 agreed to institute a new mechanism, of “follow up” procedures, by which there would be a global report summarizing the reports by which member states would report on their implementation of the principles regardless of whether they had ratified the pertinent conventions.

The adoption of the 1998 Declaration had another important result. Responding to the ILC’s criticism that many conventions had a low number of ratifications, the Director General responded by initiating a ratification campaign which focused on the core conventions. The campaign has been hugely successful. At present, the ILO has 186 members. Five of the eight core conventions have more than 170 ratifications. The child labor convention dealing with minimum age for entry into employment, Convention No. 138, has 168 ratifications. Of the eight core conventions, the two with the least ratifications are those dealing with freedom of association and collective bargaining, Conventions No. 87 and 98, which have only 153 and 164 ratifications respectively. The fact that so many member states, of varying sizes and economic status, have ratified all the core conventions has operated to make these internationally recognized rights at work truly universal rights. Significantly, however, the United States, China, and India have not ratified Convention No. 87 or Convention No. 98.

UN Global Compact: Promoting Labor Rights

At the height of the anti-globalization protests in the late 1990s, UN Secretary-General Kofi Annan engaged with the trade liberalization debate. In a speech¹⁶ at the January 1999 World Economic Forum in Davos, he proposed “a global compact of shared values and principles.” He called on businesses “to embrace, support and enact a set of core values in the areas of human

¹⁶ For the text of the speech, see <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

rights, labour standards, and environmental practices.” Annan pointed out that the three areas listed were areas in which “universal values have already been defined by international agreements.” The UN Global Compact (UNGC) was launched on 26 July 2000. Among the UNGC’s principles are four in a category simply labeled “Labour.” These four principles word-for-word are identical to the four fundamental principles of the ILO’s 1998 Declaration.

On its website,¹⁷ the UNGC acknowledges the ILO as the source of the Labour principles¹⁸ and states that the “Declaration calls upon all ILO Member States to apply the principles in line with the original intent of the core Conventions on which it is based.” But the website does not list the eight core conventions, nor does it refer readers to those conventions as a source of more information concerning the meaning of terms like “freedom of association.”

The UN Global Compact was widely publicized and promoted. Thousands of companies signed it, although many later failed to submit even a first report.¹⁹ The UN Global Compact clearly was a factor in raising the public’s awareness of the ILO’s four fundamental principles. This in turn affected what labor rights companies included in their own company code of conduct. It became standard practice for those drafting company codes to track the language of the UN Global Compact including the language from the ILO 1998 Declaration. Whether the inclusion of these rights on codes of conduct has changed corporate behavior is difficult to determine in part because independent audits rarely take place. Critics note that companies who have agreed to abide by freedom of association still locate in or source goods from producers in countries where unions are suppressed.²⁰ But it is undeniable that within the course of a

¹⁷ The UNGC uses its website as the main means of information dissemination. Various documents in pdf form can be downloaded. <http://www.unglobalcompact.org>

¹⁸ <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/labour.html>

¹⁹ Andreas Rasche and Georg Kell. *The United Nations Global Compact: Achievements, Trends and Challenges*. Cambridge University Press (2010).

²⁰ An example would be the very large garment manufacturing sector in Bangladesh where a law enacted in 1972 established special export processing zones and stated that regular labor law did not apply to enterprises located in EPZs.

decade, company codes of conduct routinely began to list the four fundamental principles found in the 1998 ILO Declaration.

UN Guiding Principles on Business and Human Rights

Shortly after the UN Global Compact was launched as an initiative of the UN Secretary General, another part of the UN began working on a document entitled “Norms on the Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights.” This effort stalled in the face of criticism by companies who perceived it as an effort to place on business the responsibilities that should be placed on governments. In July 2005, the UN Secretary General appointed Professor John Ruggie as his Special Representative in an effort to move the effort forward in the midst of a “deeply division debate”.²¹

On 16 June 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles for the Implementation of the UN “Protect, Respect and Remedy” Framework.”²²

Using this framework, Part II of the Guiding Principles focuses on the “corporate responsibility to respect human rights” and lists five foundational principles, the first of which declares “Business enterprises should respect human rights.” Part II, paragraph 12, states:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

The commentary states what instruments comprise an “authoritative list of the core internationally recognized human rights.” It further states that these “coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the

²¹ John Gerard Ruggie. *Just Business: Multinational Corporations and Human Rights*. W.W. Norton & Company, New York (2013), page 3.

²² The Report of the Special Representative of the Secretary-General was adopted by resolution on 16 June 2011. A/HRC/17/31 The Guiding Principles are found in the Annex to this report, pages 6 -27. Available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

Declaration on Fundamental Principles and Rights at Work” set the benchmarks for assessing human rights impacts.

The UN Guiding Principles for the first time linked the concept of business responsibility to respect human rights with the rights enumerated in the eight core conventions of the ILO. The implication was clear. The labor rights, including “freedom of association.” meant what the ILO said they meant. This set the stage for the 2012 controversy at the annual Conference of the ILO. The Employers’ group attacked the ILO’s Committee of Experts asserting that neither the preparatory work for Convention No. 87 nor the text itself “offers a basis for developing, starting from the Convention, principles regulating in detail the right to strike” and that “the right to strike has no legal basis in the freedom of association Conventions.”²³ The Employers in the Committee on the Application of Standards also took the view that only the ILC could decide rules for a right to strike, commenting that “[o]therwise it is up to the national legal systems to do so.”²⁴

The Employers’ vice chair at the 2012 ILC indicated the particular reason for their concern. He complained that the General Surveys of the Committee of Experts are “seen as being the position of the Organization which they are not” and commented that it would be “damaging” if the views of the Committee of Experts were taken as the views of the ILO in UN or other international forums. In this regard, the Employers’ vice chair stated that the Employers were aware that the fundamental ILO conventions are “embedded into” the UN Global Compact, the UN Human Rights Council’s Ruggie framework, and other prominent guidelines for multinational enterprises. He did not note another issue that could be troublesome; namely, that the rights listed in the 1998 Declaration are also included in many company codes of

²³ *Report of the Conference Committee on the Application of Standards. Extracts from the Record of the Proceedings*, International Labour Conference, 101st Session, Geneva, 2012. This was expressed at two points; at the beginning of the CAS session, Doc. 19, Part I/34, para. 146, and at the end of the session, Doc. 27, 27/3.

²⁴ This quote is from the end of the session, Doc. 27, 27/4. The same point was made earlier. Doc. 19, Part I/35, para. 147.

conduct, thereby implying that the company has agreed to abide by an internationally recognized worker right.²⁵

Some have asked why the Employers at the ILC were so adamant in their opposition to the view that Convention No. 87's guarantee of a right to strike includes a right to strike. In many countries, the law relating to collective bargaining and strikes has been settled for decades. But this is not the case in many emerging economies, and these are the countries where manufacturing has moved over the last thirty years. Governments in these countries are aware that they attract foreign investment because of low wages and view this as a development strategy. Some governments act to suppress unionization as a way of keeping wages low.²⁶ Others may support labor rights but they may lack the will or capacity to enforce existing labor legislation.²⁷

The Meaning of the Rights in Labor Clauses in Trade Agreements²⁸

The 1993 NAFTA agreement opened a debate in the USA that has never ended. NAFTA has come to represent something much more than a free trade agreement. Rather, it has become shorthand for the impact of international trade on workers and living standards.²⁹ One commentator has noted that NAFTA was the first trade agreement in the post-WWII era made

²⁵ Some may have felt that they had been entrapped in that they had voluntarily agreed to abide by a right which they understood differently. For a discussion, see Janice R. Bellace, "Hoisted on Their Own Petard? Business and Human Rights," *Journal of Industrial Relations* (Australia) 56:3, 443 – 458. (June 2014).

²⁶ An example is Bangladesh, a country that ratified Convention No. 87 in 1972 but then established export processing zones where the regular labor laws did not apply.

²⁷ An example is Indonesia, a democracy for only fifteen years, which has ratified all eight core conventions. Nonetheless, the government is challenged by applying law in a country of nearly 250 million persons located in approximately 16,000 islands.

²⁸ Material in this section is based on a paper by the author presented at the June 2015 Labour Law Research Network conference in Amsterdam titled "Bringing Labor Clauses in Free Trade Agreements within the Orbit of the Global Governance System."

²⁹ Robert E. Scott, *NAFTA's Legacy: Growing US Trade Deficit Cost 682,900 Jobs*, Economic Policy Institute (Dec. 17, 2013). <http://www.epi.org/publication/nafta-legacy-growing-us-trade-deficits-cost-682900-jobs/>

by the United States with a poorer country, and as such, its impact on workers should have been anticipated but that overall its goals of increased GDP have been met.³⁰ The major difference between 1994 and 2015 is that today the American public is aware that there are winners and losers from increasing international trade. Rather than confront that reality, many proponents of liberalizing trade often give reasons to explain job losses that are unpersuasive, most notably that technology is the reason for these job losses. Within any one country, new technology may result in job losses, but technology is not the reason for job losses in the higher wage country when a company opens up a production facility (using the same level of machinery and technology) in a lower wage country. For instance, millions of jobs in garment and shoe manufacturing were lost in the USA as companies shifted production to low wage countries in Asia. The reason why today there are four million workers in the ready-made garment industry in Bangladesh is not due to technology but to extremely low wages.³¹

Trade union resistance to free trade agreements (FTAs) often focuses on potential job losses. Yet, the debate on FTAs usually has little to do with FTAs per se but instead is a reaction against liberalized international trade in general. Many unions decry the fact that manufacturing has moved to developing countries where working conditions contravene notions of basic safety standards and where worker rights, such as freedom of association, are denied.

In the 1990s the furor during the negotiations over NAFTA about the potential for jobs to move to Mexico because of low labor standards produced an innovation. Congress responded to demands for fair trade, not simply free trade³² by including for the first time, a statement in the FTA whereby the three signatory nations agreed to uphold a set of labor standards. The

³⁰ Gary Clyde Hufbauer, Cathleen Cimino, and Tyler Moran. *NAFTA at 20: Misleading Charges and Positive Achievements*, Peterson Institute for International Economics, No. PB14-13 (May 2014). <http://www.iie.com/publications/pb/pb14-13.pdf>

³¹ Numerous fires and the Rana Plaza collapse are evidence of deplorable working conditions and a lack of effective and comprehensive labor inspection.

³² For a contemporary discussion, see Lance A. Compa, *Free trade, fair trade, and the battle for labour rights*, in *Rekindling the movement: Labour's quest for relevance in the 21st Century*, 314–338. (Lowell Turner, Harry Katz & Ronald Hurd eds., Cornell Univ. Press, 2001).

idea of inserting a clause³³ relating to labor in an FTA led logically to the question of what standards or principles should be included.³⁴ The ILO Declaration made this task easier. Drafters of labor clauses in FTAs quickly seized upon the non-controversial four fundamental principles in the 1998 ILO Declaration. All FTAs after 1998 have utilized them.³⁵

This use of ILO principles in trade agreement labor clauses at first glance indicates governments' acceptance of these principles. Thus this link between FTA labor clauses and the 1998 ILO Declaration, which expressly refers to eight core conventions, implies a common understanding of what these principles mean. But, as has been noted, "in application, this link runs the risk of implementing inconsistent practices, namely, if the States or bodies established by trade agreements use the ILO instruments, as incorporated in their provisions, under a normative or legal meaning that deviates from that previously provided by the ILO supervisory bodies."³⁶

A recent incident in Cambodia illustrates that this risk is not merely theoretical. In 2001 the United States and Cambodia signed a Bilateral Textile Agreement which set quotas for textile imports into the USA. In extending this agreement in 2002, the U.S. Trade Representative's office stated: "The nine percent increase for 2002 reflects Cambodia's progress towards ensuring that working conditions in its garment sector are in substantial compliance with internationally recognized labor standards and provisions of Cambodia's labor law" and noted that the ILO and the USA had projects underway "assisting Cambodia with the implementation

³³ Sometimes these clauses are called "social clauses" and sometimes "labor clauses." In this paper, the term "labor clause" will be used.

³⁴ Available at: <https://www.unglobalcompact.org/aboutthegc/thetenprinciples/>

³⁵ For a detailed discussion, see Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq, *Social Dimensions of Free Trade Agreements: Fostering Their Consistency with the ILO Standards System*. International Labour Office, March 2014.

³⁶ *Id.* at 6. The authors refer specifically to the the ILO's Committee of Experts on the Application of Conventions and Recommendations and the ILO's Committee of Freedom of Association as the bodies that review member States' application of specific core conventions and note where there are deviations between application and what is required.

of its labor law.”³⁷ Cambodia has ratified all eight of the ILO’s core conventions. Yet in February 2014, at a time of violent labor confrontations in the garment industry, the Cambodian Federation of Employers and Business Associations (CAMFEBA) and the Garment Manufacturers Association in Cambodia (GMAC) ran large advertisements in local media saying the public had been misled over the right to strike. The ads stated: “The right to strike is not provided for in ... [the ILO’s Convention 87 on Freedom of Association] and was not intended to be... Is the right to strike therefore a fundamental right? NO. The right to strike is NOT a fundamental right.”³⁸ Called upon to respond, Tim de Meyer, a senior ILO official in Asia stated:

“The claims that the right to strike is not a fundamental right and that C. 87 does not establish a right to strike are not consistent with the position taken by the International Labour Organization and its tripartite constituency as a whole (i.e. governments, employers and workers) over a period of at least the last 60+ years.”³⁹

Although this statement is factually correct, the CAMFEBA (Employers’ federation) vice president, Sandra D’Amico, demanded that the ILO retract the statement since the “remarks in *The Phnom Penh Post* do not reflect global developments, tripartite consensus or interpretation of right to strike and convention 87.”⁴⁰ This pressure from employers in a country dependent on exports⁴¹ has led the government to propose curbing workers’ freedom of association.⁴²

³⁷ January 7, 2002 press release available at:

<http://fordschool.umich.edu/rsie/acit/LaborStandards/LaborInUSCambodiaTextile.pdf>

³⁸ Shane Worrell, *Groups tell ILO to retract ‘right to strike’ claim*. *The Phnom Phenh Post*, Feb 6, 2014. [This paper is in English.] <http://www.phnompenhpost.com/national/groups-tell-ilo-retract-%E2%80%99right-strike%E2%80%99-claim>

³⁹ *Id.*

⁴⁰ *Id.* D’Amico was referring to the controversy that arose in June 2012 at the International Labour Conference over the right to strike and the Employers’ position that the ILO’s Committee of Experts had overstepped its authority by saying that the right to strike is implied in Convention No. 87, a position first taken by the Committee on Freedom of Association in 1952. For a discussion of this controversy, see Janice R. Bellace, *The ILO and the Right to Strike*, *International Labour Review*, vol. 153 no.1 (March 2014) 29-70. See also, Lee Swepston, *Crisis in the ILO Supervisory System: Disagreement over the Right to Strike*, *International Journal of Comparative Labour Law and Industrial Relations*, vol.29 no. 2 (2013) 199-218.

⁴¹ For background, see Kevin Kolben, *Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories*. *Yale Human Rights and Development Journal*, vol 7, no. 1 (2014) 79-107. <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1043&context=yhrdlj>

If employers support a FTA with one understanding of what the labor clause means,⁴³ and workers accept that FTA with another understanding of what the labor clause means, it calls into question whether the labor clause in FTAs has any utility beyond mere political convenience. As FTAs increase, this question of the meaning of the labor clauses in FTAs is likely to become more troubling. For instance, the proposed TransPacific Partnership⁴⁴ will have Vietnam as a signatory, a country which does not permit free trade unions,⁴⁵ although recently strikes led by unofficial worker groups have been occurring with some frequency.⁴⁶

There is ample evidence that labor rights continue to be violated in countries that have entered into bilateral trade agreements with the United States. The resources for bolstering domestic enforcement of labor laws, investigating violations of trade pact labor provisions, and adjudicating complaints are often lacking. In some countries, ratifying the ILO's core

⁴² *Cambodia must make draft law public*. April 17, 2014. <http://www.rfa.org/english/news/cambodia/unions-04172014170804.html>

⁴³ There is some question about what companies do think the ILO's fundamental principles mean in part because the promotional nature of the UN Global Compact (which uses the same exact formulation of the rights) gives little or no explanation of terms such as "freedom of association." It may be that some companies agreed to the UNGC and put rights language in the company code of conduct without fully realizing the operational implications of so doing. See Janice R. Bellace, *Hoisted on their own petard? Business and Human Rights*, *Journal of Industrial Relations*, vol.56 no. 3 (June 2014) 3442-457.

⁴⁴ The TPP is a proposed regional regulatory and investment treaty. The twelve countries currently participating in negotiations on the TPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. The U.S. already has trade agreements with Australia, Canada, Chile, Mexico, Peru and Singapore.

⁴⁵ *Made in Vietnam: Labor Rights Violations in Vietnam's Export Manufacturing Sector*. Worker Rights Consortium (May 2013). Available at: http://www.usfashionindustry.com/pdf_files/WRC-Report-Vietnam.pdf Vietnam has ratified five of the ILO's eight core conventions. It has not ratified Convention No. 87 on Freedom of Association nor Convention No. 98, Collective Bargaining.

⁴⁶ Online media has reported many strikes in the first part of 2015. See, e.g., <http://www.amchamvietnam.com/3347/haiphong-garment-workers-strike-over-pay-cut/>; http://www.salon.com/2015/04/01/thousands_strike_at_major_shoe_factory_in_vietnam/ On March 31, 2015, Bloomberg Business pointed to unilateral changes by government to pension entitlements. <http://www.bloomberg.com/news/articles/2015-03-31/nike-shoes-on-hold-as-vietnam-workers-strike-over-pension-change>

conventions seems to have been the price to be paid to gain trading rights. Cambodia is one example where preferential textile trading rights was the goal. There is little indication that the Cambodian government in 2001 was truly committed to reforming its industrial relations and labor law system, nor that it has lost trade privileges due to lackadaisical enforcement of labor rights. Moreover, there appears to be extreme reluctance to utilize mechanisms to enforce trade agreement terms. For instance, no labor complaint in a trade agreement to which the United States is a party has ever gone to arbitration. Guatemala presents the egregious example of a country where violence against union members is pervasive, with murders of union officials documented, and this case has yet to go to arbitration under CAFTA.

Conclusion

Nearly 100 years after the Treaty of Versailles was signed and where it was deemed urgent that the principle of freedom of association be recognized, the issue is once again on the agenda. Today, in a globalized world, a suggestion that individual national governments should decide what freedom of association means undermines the purpose of an internationally recognized right. Similarly, the belief that individual companies through monitoring of their operations can decide what freedom of association means flies in the face of reality. Regardless of what a company code of conduct says, an individual company operates in an industry and must compete with other companies (which may not be upholding worker rights) and most importantly, the company must contend with the social, legal and political environment of the country in which the goods are being made. This is not to say that codes of conduct and other CSR initiatives do not have a role to play, but simply to point out that they are no substitute for proper governance mechanisms. As the ILO Director General recently observed, they may or may not “be elements of governance,” but even if they are, the “ILO has found it difficult to definite its role in respect of CSR,m even though its standards are frequently cited” in these codes.⁴⁷

⁴⁷ Report of the Director-General, International Labour Conference, 104th Session, June 2015. “The future of work centenary initiative.” Report I. paragraphs 80-81.

The next generation of labor clauses should specify that signatories are bound to observe, apply and enforce internationally recognized labor standards, and in particular the four fundamental principles set forth in the 1998 ILO Declaration *and* the linked eight core conventions. Such a clause should expressly state that “these rights should be understood in a manner consistent with that expressed by the ILO’s supervisory system.” One century after the Treaty of Versailles, it is time to make clear what internationally recognized labor rights mean.

Appendix⁴⁸

Confronting the harsh working conditions found in the early stages of industrialization, workers sought to compel employers to agree to observe basic labor standards in the workplace. In the 19th century, at a time when legislation in no country mandated these standards, workers sought to achieve them by joining together and using their collective bargaining power to compel employers to agree. Unions did not rely solely on bargaining power, although the extent to which they sought to use political means to achieve legislated labor standards varied by country. In the 19th century in most countries the law was hostile to forms of workers’ collective industrial action as the law recognized property and contract rights but not workers’ rights.

The concept that workers should be free to join together and that it should be lawful for workers to engage in collective industrial action had different labels in different countries. In English, the term “freedom of association” was often used, and it usually was linked with the

⁴⁸ This summary of the history of freedom of association and the right to strike at the ILO is based on material found a longer article by the author. See Janice R. Bellace, “The ILO and the right to strike,” *International Labour Review* 153:1, 29-70 (March 2014).

notion that workers should have to right to engage in collective bargaining.⁴⁹ Since there was no legislation, there was no legal definition of “freedom of association.” When legislation was enacted, such as the National Labor Relations Act in 1935 in the USA, the term remained undefined. Rather the NLRA set forth certain rights, but without articulating a specific vision of workers’ rights.

The United States was not unusual. Most legislation is framed in terms of existing national legislation and legal doctrines. For instance, British legislation in effect created a space for lawful union activity by declaring that if workers were acting “in contemplation or furtherance of a trade dispute” the workers would be subject to legal penalty.⁵⁰

Freedom of Association and the ILO

1919 - 1940

In March 1919, Part XIII of the Treaty of Versailles, which established the ILO, was agreed. The preamble to Section I, Labour, of Part XIII points to conditions of labour that exist which involve 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 declares that “an improvement of those conditions is urgently required.” Certain terms and conditions of employment are listed as needing improvement. Included in this list is “recognition of the principle of freedom of

⁴⁹ In French, the term often used was *liberté syndical*, which denoted that the combination of workers should have freedom to act. The French term places emphasis on the fact that workers act together and that the entity (e.g., the union) has rights. The American notion is usually cast as an individual right, although with regard to collective bargaining and strikes, it is a right impossible to operationalize on an individual basis.

⁵⁰ The 1875 Conspiracy and Protection of Property Act protected workers from criminal liability. The 1906 Trade Disputes Act protected workers from civil liability. [Typically an employer would file a suit asserting that the workers had committed a tort. In all strikes, workers are inducing others to breach their contract of employment (that is, to stop working and go on strike. The strike nearly always leads to the employer suffering financial loss.) This did not end litigation as specific manifestations of industrial action can be legally analyzed in different ways, and at common law, judges can take different views of whether the specific case fell within the statute’s grant of immunity in tort.

association.”⁵¹ In the Treaty itself, there is no amplification of the meaning of this term beyond the reference in Article 427 relating to General Principles of “the right of association for all lawful purposes by the employed as well as by the employers.”

The Labour Commission (that is, the committee) that drafted Part XIII of the Treaty of Versailles was chaired by Samuel Gompers, then head of the American Federation of Labor. Gompers strongly advocated that unions should focus on improving their members’ terms and conditions of employment through collective bargaining, not through political activity or government regulation. Gompers recognized that to achieve gains workers would have to rely on their own bargaining power. The proposed text that was the basis of Part XIII was drafted by the British. To the British at the 1919 peace conference, “freedom of association” for workers was understood as more than simply the ability to join together lawfully; rather it was inextricably linked to the right of unions to formulate collective bargaining demands and to take industrial action and not be put out of existence by having to pay damages resulting from industrial action.

Although the Treaty of Versailles proclaimed that freedom of association should be recognized, it did not define the term. The Treaty however envisioned conventions that would delineate what rights contained in Part XIII of the Treaty meant, and in 1921 Convention No. 11, Right of Association (Agriculture) was adopted, with Article 1 states that those who work in agriculture have the “same rights of association and combination” as industrial workers. For a member state to apply Convention No. 11 to agricultural workers, it had to understand industrial workers’ right of association and combination. This created a problem because by the early 1920s it had become more difficult to ignore the fact that there was a fundamental right the meaning of which the delegates to the International Labour Conference (ILC) disagreed, in part because they viewed the right not only from the government, employer or worker perspective,

⁵¹ The text of Part XIII was published in the Official Bulletin of the ILO April 1919 to August 1920 (Geneva, 1923), pp. 332 - 343. It can be accessed online at <http://www.ilo.org/public/english/bureau/leg/download/partxiii-treaty.pdf>

but also through the lens of their own national experience. Although the Office (the staff of the ILO) in 1923 was directed by the Governing Body to study this issue in depth, political disagreements among the tripartite constituents prevented the Office from sending out a survey questionnaire designed to elicit information and views, and the subject was dropped in 1927. In discussing the deliberations of the committee the ILC had appointed to draft the questionnaire, the Office noted that “the employers were mainly concerned to delimit the freedom of combination for trade purposes, to emphasise rather the principle of individual liberty and to define more narrowly the right of combined action.” (ILO, 1927, pages viii – ix). In contrast, the workers “were anxious to specify more precisely the rights implied in the freedom to combine for trade purposes.” (page ix) The rise of fascism in the 1930s and the outbreak of war made it impossible for the ILO to resume consideration of this topic until the conclusion of World War II.

1944 – 1970

The crushing of independent trade unions in the 1930s by totalitarian regimes and the massive destruction to civil society during World War II moved the ILO to take an affirmative, declaratory stance on the right of freedom of association. In the 1944 Declaration of Philadelphia,⁵² freedom of association was listed as the second of four “fundamental principles on which the Organization is based.”⁵³ The principles set out in the Declaration of Philadelphia subsequently became embodied in the ILO’s Constitution, a critical legal development because membership of the ILO requires that a member state formally accept the obligations stated in the Constitution.⁵⁴

The impetus to move quickly on the question of freedom of association was the political situation in the late 1940s. The Soviet Union was moving into eastern and central European

⁵² The Declaration of Philadelphia is a resolution unanimously adopted by the International Labour Conference at its 1944 annual meeting which was held in Philadelphia, USA.

⁵³ Constitution of the ILO, Annex, I (b).

⁵⁴ *Ibid.*, Article 1(3).

countries, and there was a move for the new United Nations to consider the issue of trade union rights.⁵⁵ The question of “Freedom of Association and Industrial Relations” was placed on the agenda of the 30th Session of the International Labour Conference in June 1947. By the end of that Conference in early July 1947, the general principles on freedom of association that would form the basis of Convention No. 87 had been agreed and the proposed convention was placed on the agenda for the 1948 Conference.⁵⁶ Although agreement on the text of a convention on freedom of association had eluded the ILC in the 1920s, it was able to act within a matter of months based on the preparatory paper drawn up by the Office. This paper was based on the research done in the 1920s and on an analysis of why the member states had not been able to reach agreement then. In the preparatory paper’s survey of labor legislation, there is no explicit mention of the right to strike, but instead, an observation that at times trade unions “are obliged to resort to economic pressure.”⁵⁷ The preparatory paper put forward two ways of securing a guarantee of freedom of association, one which would set forward a list of detailed regulations and the other which would present essential principles. The Office preferred the latter, perhaps to avoid the ILC’s getting bogged down in debate when there was a perceived need to act expeditiously to preempt UN action on the same topic.

Post 1948

It has been emphasized that the right to strike is not explicitly mentioned in Convention No. 87. This is correct but this does not mean the question was overlooked, or that the right to strike was rejected. The Office’s preparatory paper set out the position of the World Federation of Trade Unions and the AFL. Both listed the right to strike, with the AFL, in a numbered list of fourteen issues the ILO should consider, asking succinctly in number eight: “To what extent is

⁵⁵ In 1947, the World Federation of Trade Unions asked the Economic and Social Council of the United Nations (ECOSOC) to consider the guarantees relating to the exercise of trade union rights. This referral to ECOSOC, rather than to the ILO, was strongly opposed by the American Federation of Labor which considered the WFTU to be socialist dominated. The AFL made its own referral to ECOSOC on the same subject so that it could present its framing of the issue while also arguing that this matter was properly within the competence of the ILO.

⁵⁶ For the complete record of the Committee’s report, see Appendix X, Seventh Item on the Agenda, Freedom of Association and Industrial Relations, International Labour Conference, Thirteenth Session, Geneva, 1947, pages 561 – 578.

⁵⁷ ILO, 1947a, page 55.

the right of workers and their organizations to resort to strikes recognized and protected?”

(ILO, 1947, page 6). In the 1947 and 1948 discussions, neither governments nor employers proposed that there be a limitation on the right to strike in the convention, nor made any statement about it at all.⁵⁸

In 1949, the ILC adopted Convention No. 98, Right to Organise and Collective Bargaining, which was viewed not as granting new rights but rather, stating a principle that had already been accepted; namely, that workers and employers in exercising their right of freedom of association must be able, if they choose, to form associations which are independent and able to represent their interests for the purposes of collective bargaining.

The adoption of Conventions No. 87 and 98 established that workers have freedom of association and in particular, the right to organize associations of their own choosing and to bargain collectively. They did not, however, expressly state that there is a right to strike, let alone what constraints might be imposed on such a right by governments. Rather than a statement delineating what freedom of association meant with regard to industrial action, the tripartite constituents seemingly agreed that there should be some way of handling complaints that these conventions had been violated. Various proposals for some sort of a fact finding body were considered. Who exactly (impartial jurists or representatives) would be on such a body were debated. In November 1951, the Governing Body established the Committee on Freedom of Association as a tripartite committee of the Governing Body.

At its first session in 1952,⁵⁹ the Committee on Freedom of Association did not expound on the meaning of freedom of association. Rather, the CFA noted that it would examine cases and

⁵⁸ At the 31st Session of the ILC, there was very little discussion at all about the text of Convention No. 87 beyond the statements strongly supporting the proposed convention made by the Workers' and Employers' reporters on the Committee on Freedom of Association that had produced the report. The vote was 127 in favor, 0 opposed with 11 abstentions.

⁵⁹ The reports of the Committee on Freedom of Association were published as an appendix to the ILO's report to the UN for the first five years. The report for 1952 is appendix V in *Sixth Report of the International Labour Organisation to the United Nations*, Geneva, 1952, pages 169 to 237.

would apply certain (unspecified) criteria to these cases. In its very first year of operation, the CFA proceeded on the basis that a right to strike is implied in Conventions no. 87 and 98. In a case dealing with a strike in Jamaica, the CFA stated: “The right to strike and that of organizing unions meetings are essential elements of trade union rights.”⁶⁰

The CFA’s initial approach has continued to this day. It decides cases strictly on the facts and it does not make general statements about the meaning of freedom of association. A review of nearly 3000 cases reveals that the CFA has proceeded on the basis that there is a right to strike, but not an unlimited right.⁶¹ Since 1959, the ILO’s Committee of Experts has recognized a right to strike both in its consideration of a member state’s compliance with its obligations as a signatory of Conventions no. 87 and 98, and in periodic General Surveys on the topic.

The Cold War Period

From the mid - 1950s through the 1970s, there was little debate about freedom of association and/or the right to strike at the ILC. An exception occurred in 1970, occasioned by the adoption in 1969 of the International Covenant of Economic, Social and Cultural Rights⁶² which in Article 8 obligates signatory states to ensure the right of everyone to form trade unions and to join a union, and to ensure the right of trade unions to affiliate with national and international confederations. Article 8(d) states that signatory states should undertake to ensure “(t)he right to strike, provided that is exercised in conformity with the laws of the particular country.” Responding to this, the ILC established a committee to make a report on “Trade Union Rights and Their Relation to Civil Liberties” at its 1970 meeting as a basis for the

⁶⁰ Case No. 28, Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica). CFA, second session, March 1952. Page 197

⁶¹ Periodically the ILO publishes the “Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO.” This is a reference volume. Each paragraph takes a single principle and lists the cases the CFA has decided where this principle was applied. Part 10 covers the “Right to Strike.”

⁶² The United States ratified the 1966 International Covenant on Civil and Political Rights but it has not ratified the 1969 covenant.

ILC's drafting a resolution on the subject. In the discussion on the report⁶³ that occurred, various points of tension were raised. At no point in the discussion did an Employer representative raise the issue of the right to strike, let alone query its existence or meaning. At the conclusion of the discussion, the draft resolution that was approved was essentially that proposed by the Workers' Group.⁶⁴

⁶³ The Report of the Committee on Trade Union Rights appears as Appendix 33 in the Record of Proceedings, ILC, 54th Session, 1970, Seventh Item on the Agenda: Trade Union Rights and Their Relation to Civil Liberties, pp. 578-594.

⁶⁴ *Ibid.*, pages 591-594.