Labor and Employment Law

Organized Labor's International Law Project? Transforming Workplace Rights Into Human Rights

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For more than half a century, large U.S. labor unions, alone or in concert with other labor organization federations, have regularly filed complaints with the International Labour Organization (ILO) against the U.S. Government. This article analyzes the significance of organized labor's forays into international law through the ILO process.

I. Organized Labor Makes its Case to the ILO's Committee on Freedom of Association

The first ILO complaint before the ILO's Committee on Freedom of Association (CFA) was filed in 1950 by the World Federation of Trade Unions. The CFA's decision (properly called a recommendation) stated:

> The complainant has not, in point of fact, made any effort to substantiate these four allegations by concrete examples. No evidence is presented to justify them. Under these circumstances the Committee considers that these four allegations are too vague to permit of consideration of the case on its merits, and, therefore, recommends the Governing Body to decide that they should be dismissed.[1]

In April 2003, the American Federation of Government Employees (AFGE) union filed an ILO complaint concerning the U.S. Government's refusal to grant organizing and collective bargaining rights to employees of the Transportation Security Administration (TSA).[2] In November 2006, the ILO recommendation on that complaint expressed concern for the U.S. Government's attempts to exclude the TSA workers from collective bargaining rights on national security grounds. The Committee encouraged the Government to

> [C]arefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative.[3]

On December 7, 2005, the United Electrical, Radio and Machine Workers of America (UE) and UE Local 150 filed a complaint with the ILO's Committee on Freedom of Association. The complaint against the United States alleged that North Carolina's statutory prohibition of public employee collective bargaining violated the U.S.'s commitments to international labor standards.[4]

On April 3, 2007, the ILO ruled on the 2005 UE complaint. To the delight of labor union organizers in North Carolina and throughout the country, the CFA agreed with complainants that the North Carolina law violated the United States' international commitments and that the Federal Government should "take steps" to overturn North Carolina's law:

> The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina—with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired—and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS §95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.[5]

The most recent ILO complaint against the U.S. Government was filed on October 25, 2007 by the AFL-CIO. This complaint did not address a specific statute or action but rather "the sustained assault on workers' rights in the United States by the National Labor Relations Board (NLRB) over the last several years."[6] Of all the complaints examined, the AFL-CIO's latest is the most general. Using NLRB decisions as evidence, the complaint attempts to show that the agency's majority is biased against unions and, therefore, the agency itself is a violation of international law.

The AFL-CIO's recent complaint concludes by affirming that the U.S. Government is bound by the underlying principles of two ILO Conventions which have not been ratified:

> The Bush Board's decisions demonstrate that the U.S. Government has failed to lived [sic] up to its obligations to abide by the fundamental principles of freedom of association and collective bargaining that bind all members and which underlie Conventions 87 and 98. We ask the Committee to direct the United States to take all necessary steps to restore, in law and in practice, the rights of workers to have full freedom of association and engage in effective collective bargaining.[7]

We can see from this quick overview of a half-century of complaints how the ILO's Committee on Freedom of Association went from a blunt dismissal of a complaint as unsubstantiated and "vague" in 1950, to requesting wholesale federal and state legislative action in 2007. There is no reason to suppose that the CFA will hesitate in recommending that the "Bush Board's decisions" be condemned as well, as a violation of international law and the commitments entered into by the United States.

What happened over these fifty years to make U.S. labor law so unacceptable to the international labor oversight body? Evidently, over fifty complaints during the span of nearly sixty years have convinced the ILO that the U.S. is not living up to its commitments. What are those commitments? The U.S. has signed no relevant new ILO Convention in that time span. Any development of labor law since 1950 has worked to grant U.S. workers greater employment and organizing protection. Domestic labor and employment law provides U.S. workers

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with many more protections today than it did half a century ago and more than what they would enjoy in many other countries today.

This article examines organized labor's use of the ILO process. It shows how U.S. engagement with the ILO and other international processes, coupled with apparent official support of ILO and its goals by successive U.S. administrations has created a framework of commitments which has grown up around and eventually superseded U.S. formal "signatory" commitment to various ILO Conventions.

With each ILO complaint filed by organized labor, each trade agreement containing labor provisions, and each adverse recommendation issued by the CFA or some other supra-national body, it becomes more difficult for the U.S. Government to argue any distinction between its formal and informal obligations under the ILO standards. Organized labor has effectively argued that labor rights ought to be considered not as mere elements of economic policy, but as international human rights proclaimed and monitored by international bodies. Although the ILO has not acquired any new enforcement power for its recommendations, its "moral" authority is strong enough to be used as an effective lobbying tool to attempt to bring about legislative or juridical change on the domestic front. This article addresses that concern.

The analysis in this article attempts to determine (1) whether organized labor's use of the international rulings to date has brought about change in U.S. domestic labor law or is likely to do so; and 2) to what extent the federal government should continue its participation in the ILO's legal process. Phrased in another way: is U.S. engagement in international labor law a dangerous threat to sovereign law-making, an expensive lobbying effort by organized labor, a waste of government resources, or a worthwhile (albeit frustrating) multilateral political endeavor?

The first section provides a brief history and explanation of the ILO.[8] That section is followed by a general discussion on some aspects of international law, particularly international labor law. The third section analyzes some of the complainants' arguments from recent cases as well as the U.S. government's rebuttal arguments. The fourth section draws conclusions on the impact of organized labor's international project and suggests various policy approaches.

II. The ILO: History, Structure, Mission

A. High Ideals Arise out of Global Conflict

The ILO was founded in 1919, as part of the Treaty of Versailles ending World War I. Since then it has been one of the most durable international organizations, surviving the demise of the League of Nations, the political upheaval and realignment of world powers after the Second World War, and constant threats to its own credibility and relevance.[9]

Samuel Gompers, then President of the American Federation of Labor, headed the commission that created the ILO. From its inception, the organization was meant to be an international forum where governments, business, and labor interests would be fairly represented. To that end the ILO adopted its "tripartite" structure in which national governments, business leaders, and labor union leaders all have representation.

As with the United Nations itself, born in the aftermath of World War II, the ILO came into being immediately following a great global conflict. Inspired by heady ideals and determined to preempt future global crises, the ILO's originators conceived the organization as an instrument to promote permanent peace and harmony between what were then seen as the two great, implacable political and social antagonists: capital and labor. The ILO would achieve enduring reconciliation between these forces with its unique deliberative processes eliminating the perceived root cause of disharmony: injustice in the workplace.[10]

The organization aimed at the improvement in the lives and working conditions of the downtrodden workers of the world not by Marxist revolution but by the creation of international standards that Member States would be somehow encouraged or pressured into observing. The ILO's areas of focus constitute a comprehensive list of policies that today seem permanent fixtures in the edifice of workplace regulation. They include

> regulation of the hours of work including the establishment of a maximum working day and week; regulation of labour supply, prevention of unemployment and provision of an adequate living wage; protection of the worker against sickness, disease and injury arising out of his employment; protection of children, young persons and women; provision for old age and injury, protection of the interests of workers when employed in countries other than their own; recognition of the principle of equal remuneration for work of equal value; and recognition of the principle of freedom of association.[11]

The ILO's main function is to create and then monitor the observance of international labor standards and their implementation through domestic legislation. The standards are enunciated through ILO Conventions and Recommendations and encompass what the ILO refers to as (significantly, as will become evident) "basic labor rights," including freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment and "other standards addressing conditions across the entire spectrum of work-related issues."[12]

As of January 2008, there were 188 ILO Conventions and 199 Recommendations, not including the specific recommendations which arise out of complaints to the Committee on Freedom of Association. When a Member State ratifies a Convention the member is bound to incorporate the principles of the Convention into its domestic law. Recommendations, by contrast, are non-binding guidelines which come into being either through the ILO's legislative process or as the outcome of formal complaints made to an ILO Committee.

Although a Member State's obligations differ according to which Conventions it has ratified, the ILO will still monitor that Member State's actions with respect to *all* Conventions, ratified or unratified. With the North Carolina statutory prohibition on public sector collective bargaining case, for example, an ILO constituent (*e.g.,* a labor organization) brought a complaint against a Member State (the United States) based on that State's failure to uphold an international labor standard (Convention

151). The CFA found that the statutory prohibition was, in fact, not in accord with the international standard, and recommended that the member do something about it. Whether or not the Member State has ratified Convention 151 is immaterial: it is still subject to ILO monitoring on the subject.

In this way, the ILO becomes a general international watchdog for the labor practices of all ILO members. The universal overseer prerogative is based on the ILO's understanding that the sum of ILO Conventions and Recommendations represents the universal standard or floor of labor rights. The ILO defines these standards (*i.e.,* Conventions and Recommendations) as "universal instruments adopted by the international community and reflecting common values and principles on work-related issues." In this way, a Member State may still be "invited," "encouraged," "urged" or otherwise exhorted to promote the principles of a given convention, although unratified. The ILO refers to this process as "keep[ing] track of developments in all countries, whether or not they have ratified [a convention]."

If a Member State has not ratified a Convention in question, the ILO complaint and recommendation process does not bind the Member to implement any change in domestic law. Nevertheless, membership does require the member to explain why it has refrained from incorporating into domestic law the principles promoted by a particular Convention or Recommendation. The complaint/recommendation/report procedure tends to blur the lines delineating a Member State's cognizable legal responsibilities, at least in the public perception.

The resulting confusion may be useful to the "prevailing" party in a CFA complaint but it is not an enforceable decision. The responding government does not "lose" the case in the same way a party in a civil suit loses a case. Because the ILO considers comprehensive ratification of conventions and recommendations as the minimum standard of compliance with international labor standards derived from broad international agreement, unless the government in question has ratified all 188 Conventions and 199 Recommendations and incorporated them explicitly into domestic law, it could "lose" any case brought against it.

In other words, "losing" an ILO case means having to be told by the ILO how one's laws are not in compliance with the universal legal standards governing labor, urged to change the offending legal framework, and admonished to report back on all efforts made.

B. The United States and the ILO

The United States joined the ILO in 1934. Over the years, successive administrations have stayed consistently reluctant to ratify most of the ILO's major conventions. In 1977, the reluctance turned into outright rejection when the U.S. withdrew from the ILO altogether to protest a perceived bias in the ILO's reporting and censuring of Member States within the Communist bloc as well as a perceived bias against Israel. In 1980, the U.S. rejoined the organization. Since that time, the U.S. has attempted to influence the ILO to become more transparent and impartial in the creation and monitoring of standards. Despite increased participation in the process, however, to date the U.S. has ratified only fourteen of the ILO's 188 Conventions, and only twelve of the fourteen are currently in force. It would seem the policy of non-ratification remains generally popular across the domestic political spectrum.[13]

There are three key ILO conventions which the U.S. has never ratified: Conventions 87, 98, and 151. In large measure, the "legal" basis for the complaints outlined above—denial of organizing and collective bargaining rights to the TSA workers, North Carolina's statutory prohibition of collective bargaining rights for public sector workers, and the global complaint concerning the "Bush Board's" purported assault on workers' rights through the NLRB—are all based on the U.S. Government's "non-compliance" with these three conventions, none of which it has ratified. For example, the UE North Carolina complaint describes U.S. breach of the unratified Conventions as a "failure by the United States to uphold its obligations arising from its membership in the ILO to protect the fundamental rights which are the subjects of Conventions 87, 98, and 151."[14]

Briefly, the three conventions deal with the right of public and private sector workers to organize for purposes of collective bargaining.

> Convention 87 is the "Freedom of Association and Protection of the Right to Organise Convention." This convention came into force in 1950 and has 148 signatories among Member States. The self-evident purpose of Convention 87 is to grant workers the right to form labor organizations without interference or restriction by the State.
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> Convention 98 is the "Right to Organise and Collective Bargaining Convention," adopted in 1951 and ratified by 158 members. Article 6 of Convention 98 commits the signatory to a guarantee that: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[15]
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> Convention 151 is the "Labour Relations (Public Service) Convention," which entered into force in 1981 and has 44 ratifications among Member States. This convention guarantees public sector workers the right to form unions and collective bargaining.

The U.S. approach to observing international labor standards has always been to commit only so far as its own domestic law permits and to promote informally all of the ILO's goals. Preeminent among U.S non-binding or informal endorsement of ILO standards is the Philadelphia Declaration.[16] Successive administrations have therefore sought to remain in compliance with the "black letter" of ratified conventions' mandates. By not ratifying Conventions 87, 98 and 151, the U.S. intended to refrain from making commitments it was unwilling to keep and was not constitutionally able to keep, given the federalist system of government. As will be explained later, such an approach does not work in assessing the extent of the U.S. "liability" with regard to international standards where the law is created by consensus rather than known by "black letter" provisions.

C. How a Broad General Principle Becomes a Binding Commitment

International law is a layered and complex body of law. Some question whether it is "law" at all, because it lacks, among other things, a sovereign to promulgate and enforce it.[17]

For the limited purposes of this article, profound questions of political and legal philosophy as well as constitutional considerations ought to be set aside in favor of a pragmatic acknowledgement of the "fact" of international law in general as applied in its machinery. Simply stated, the ILO exists and the U.S. is an active member in the ILO's processes. The ILO generates standards and monitors compliance, according to defined procedures. The U.S. duly reports to the ILO concerning its own observance and compliance with the standards, and according to the prescribed procedures.

As a legal entity, the ILO promulgates "laws" in the form of standards, declarations, policy goals, recommendations, etc., and these acts have some kind of effect on parties who have willingly subjected themselves to the ILO's jurisdiction, *i.e.*, constituent Member States. The U.S. is a voluntary member, and could withdraw its membership at any time. In this sense the U.S. voluntarily submits to the ILO's jurisdiction, as some have analogized to the way an individual voluntarily submits to the legal jurisdiction of the country, state, municipality, or branch of the military under whose authority he or she chooses to live. Apart from the obligations of membership, the U.S. has implicitly sanctioned the exercise of ILO authority by attempting to persuade the ILO to act in one way or another in cases where violations occur in other Member States to which U.S. is not a party. For example, the U.S. justified its withdrawal from the ILO in 1977 by citing the organization's laxity in monitoring observance in Soviet influenced members.[18]

The ILO machinery works by drafting conventions that are then ratified (or not) by the Member States. As discussed above, the convention mechanism is not the only expression of the international "law" concerning labor. As with all international organizations, the ILO has a panoply of other "soft law" instruments such as declarations, strategic objectives, and organizational targets and goals. These instruments do not carry the same legal weight as the conventions and recommendations. But they too, are legal "facts" albeit of a flimsier "exhortational" quality.[19]

The Philadelphia Declaration is the primary example of the ILO's soft law process.[20] In 1944, when the ILO sought to save itself from extinction along with the League of Nations, the organization held its 26th International Conference in Philadelphia. That life-saving event produced the Philadelphia Declaration; generally seen as reaffirming the ILO's Constitution. Although the Declaration is not "binding" in the way the Constitution or conventions are, it is held in high prestige and incorporated by association with the Constitution. In fact, published versions of the ILO Constitution include the Declaration as an annex to the main document.

The Declaration proclaimed four governing principles or ideals: 1) labor is not a commodity; 2) freedom of expression and of association are essential to sustained progress; 3) poverty anywhere constitutes a danger to prosperity everywhere; and 4) the war against want must be carried on through international cooperation between states, and representatives of labor, employers, and governments, freely and democratically with a view to the promotion of the common welfare.[21]

The Declaration also announced several more detailed, but still vague, international policy goals and authorized the ILO to "include in its decisions and recommendations any provisions which it considers appropriate."[22]

However vague, the Philadelphia Declaration does carry legal weight. Declarations of this kind can unexpectedly gain heightened significance when they pass from a mere statement drafted by a state's political representative into a joint conclusion arrived at by many states, as the consensus or "outcome statement" of a multilateral process. In doing so, these declarations acquire legal significance independent of particular commitments such as those embodied in the normal ILO system of conventions.

Finally, the Philadelphia Declaration recognized a long list of policy objectives, the promotion and implementation of which would be the "solemn obligation of the International Labour Organization." This list included, among other things:

> *the effective recognition of the right of collective bargaining*, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.[23]

It concluded with an affirmation that

> the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.[24]

In 1998, a second major ILO Declaration was adopted in Geneva and endorsed by the U.S. Representative which reaffirmed the principles and commitments of the ILO Constitution and the Philadelphia Declaration. Although described as a "promotional instrument,"[25] the 1998 Declaration contained the following significant language:

> [T]he Declaration commits Member States to respect and promote principles and rights in four categories, *whether or not they have ratified the relevant Conventions*. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.
>
> The Declaration makes it clear that *these rights are universal, and that they apply to all people in all States*—regardless of the level of economic development. [26]

Nonetheless, assuming that the U.S. Government's representatives at the 1944 Philadelphia Conference and the negotiation team for the 1998 Declaration fully endorsed all the Declarations' principles and objectives, as generally aligned with their administrations' own policies and principles, why were the corresponding conventions never ratified? Neither President Roosevelt's administration nor that of President Clinton ever

took the next step in committing the country formally by means of the conventions governing issues such as universal collective bargaining rights. Doubtless, ratification of the relevant ILO Conventions was politically inexpedient or impossible, given a voting public suspicious of international authority and the Constitution's system of checks and balances, as applied to the signing of treaties. In theory, then, the Declaration approved in 1944 should be no more binding on successive administrations than any other political statement of a particular administration, such as a State of the Union address or Executive Order.

Nor has the current administration of President George W. Bush attempted to separate itself from the Declarations' commitments. On the contrary, far from downplaying the significance of commitments made in the 1944 and 1998 Declarations, the Government, in its response to the North Carolina public sector case boldly reaffirmed support for the Declarations' principles.[27] So, the question arises: by its original and subsequent endorsements, what lasting commitment, if any, did the U.S. Government make?

No domestic politician or political theorist would seriously argue, for example, that a political endorsement of the Philadelphia Declaration in 1944 bound the U.S. to a national minimum wage, universal health coverage, free movement of labor, or the right to have a job that one likes and can do well. It would be unreasonable, unconstitutional, and undemocratic to determine national economic policy on the basis of statements made in the context of one seemingly unimportant meeting of an international organization more than fifty years ago. So, can the Declaration be used now to bind the U.S. to guarantee the right to collective bargaining?

In the ILO Committee's recommendation in the North Carolina public sector case, the principles endorsed in Philadelphia and Geneva are taken to be generally binding,.[28] The principles of the Declarations are transformed from political rhetoric into something greater: universally recognized, binding international "customary" law. And the international consensus built around the Declarations is seen as binding on all Member States, regardless of the U.S. government's consistent unwillingness to commit to the right to collective bargaining as a specific obligation under Conventions 87 and 98. A 1975 ILO Report on Chile explicitly enunciated this concept: "[Member States are] bound to respect a certain number of general rules which have been established for the common good... [A]mong these principles, freedom of association has become a customary rule above the Conventions."[29]

International law develops differently from statutory or judge-made law, however. The overlapping layers of specific and general commitments (binding or "non-binding"); multilateral "outcome statements" endorsed at the end of some international process, such as a United Nations conference; statements of international consensus, such as the 1998 Geneva Declaration; and membership in a treaty or organization such as the ILO, combined with the laws and practices of other states, eventually reach critical mass and are declared by some adjudicating body to be customary rules. For adherents of this view of international law, a state party can be held answerable even to an unpromulgated, unratified, organically developed law, as happened in the North Carolina case.

The ILO's website explains the process of "[a]pplying conventions when countries have not ratified them."[30] The explanation given makes a distinction between the appropriate means of encouraging compliance. Article 19 of the ILO Constitution created a process that obliges members to report on specific labor standards. The process clearly contemplates that a member may have chosen not to ratify a convention, and therefore not be bound by that convention. The state which has not ratified still is obliged by membership to report and explain its continued non-ratification:

> International labour standards are universal instruments adopted by the international community and reflecting common values and principles on work-related issues. While member States can choose whether or not to ratify any conventions, the ILO considers it important to keep track of developments in all countries, whether or not they have ratified them. Under article 19 of the ILO Constitution, member States are required to report at regular intervals, at the request of the Governing Body, on measures they have taken to give effect to any provision of certain conventions or recommendations, and to indicate any obstacles which have prevented or delayed the ratification of a particular convention.[19]

This unambiguous language regarding a Member State's election not to ratify a convention, and by not ratifying not be bound in the same way as a ratifying member, would seem to settle the matter. Why, then, was U.S. non-ratification of Conventions 87, 98, and 151 insignificant to the ILO Committee in the North Carolina case?

Strengthening the distinction between obligations under a ratified as opposed to a non-ratified convention, the ILO's own description of its processes provides this explanation under the heading "Conventions and Recommendations":

> They are either *conventions*, which are legally binding international treaties that may be ratified by member states, or *recommendations*, which serve as non-binding guidelines. In many cases, a convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous, i.e. not linked to any convention.[20]

However, the organization goes on to further "clarif[y]" the significance of ratification:

> The ILO's Governing Body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[21]

Under this rubric, an ILO member has to respect "fundamental" conventions even if unratified. Now, the non-ratifying state will no longer be able not to conform to an unratified convention if that convention happens to be one of the "fundamental principles and rights at work."

The Complainants in the North Carolina case argued that, by endorsing the Declarations, the U.S. submitted itself to the ILO's jurisdiction on the relevant issues, in this case the universal right to collective bargaining. The adjudicating committee

claimed that the ILO need not rely on commitments made in the 1998 Declaration. Rather, the ILO assumed authority to rule on the issues in this case because of its broader mandate to safeguard general rights to workers, independent of a country's specific convention obligations.

Employing reasoning from an earlier decision, the adjudicating committee argued

> The Committee recalls, as it had done when examining Case No. 2227 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 is not linked to the 1998 ILO Declaration—which has its own built-in follow-up mechanisms—but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee has emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association and to protect individuals as one of the primary safeguards of peace and social justice. It is in this spirit that the Committee intends, as it did in Case No. 2227, to pursue its examination of the present complaint which is limited to an examination uniquely of the collective bargaining situation in North Carolina.[31]

In short, determining a member's obligations is not so simple as determining what commitments the member has voluntarily, unilaterally ratified, at least as far as the ILO is concerned. In defending against the UE's complaint, the U.S. government was unsuccessful in arguing that, because it had not ratified the specific ILO convention dealing with the alleged international right to collective bargaining in the workplace, it was not bound to guarantee that right to North Carolina's public sector workers.

III. Case Analysis

A. North Carolina Ban on Public Sector Collective Bargaining

i. Complainants: U.S. International Obligations Go Beyond the Letter of Ratified Conventions

North Carolina General Statute (NCGS) 95-98 expressly prohibits collective bargaining in the public sector as

> against the public policy of the State, illegal, unlawful, void and of no effect, any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government.[32]

In the North Carolina case, the complainants alleged that the U.S. Government had the power to overturn this prohibition, and its failure to guarantee collective bargaining rights to public sector workers in North Carolina breached obligations it held as an ILO member "to protect the fundamental rights which are the subjects of Conventions Nos. 87, 98, and 151."[33] The complainants attempted to refute the Government's basic rebuttal argument that the Congress lacks authority in the federal system to impose contractual obligations on the states.[34]

In referring to the binding nature of the unratified Conventions, the complainants contended that, under the ILO's case law, the North Carolina ban "directly contravenes the basic principles of Convention No. 98," because the Committee on Freedom of Association (the adjudicating body) has expressly recommended that the right to collective bargaining be guaranteed to workers.[35]

The complainants also argued that the U.S. Government's obligation to force states to pass laws that "comport[] with core labour standards" is derived from its endorsement of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[36]

ii. The Government's Response

Although the government attempted to refute the UE's assertions of fact and conclusions drawn from international law, its principal argument was a constitutional one: there is no protection under the U.S. Constitution of the right to collective bargaining, because there is a crucial distinction between freedom of association and the right to collectively bargain. Therefore, the federal government has no obligation to overturn state laws that forbid bargaining.[37] Although a state cannot deny anyone the right to associate, neither can a state be forced to contract with another party.

Next the Government challenged the complainants' assumption that the collective bargaining process is the only means that workers have to affect their workplace conditions. The Government contended that public sector workers can bring about change through the legislative process and can also form labor organizations to do so more effectively. The Government then sought to refute the claim that the ban on collective bargaining "opens the gates for discrimination, unsafe or unhealthful work, or substandard pay," citing statutory and constitutional protections already in place.[38]

The Government's last argument responded to the allegation that the ban on collective bargaining somehow breaches its commitment to larger human rights principles. Here the Government reaffirmed its endorsement of the ILO Constitution and the Philadelphia Declaration. As noted above, the Philadelphia Declaration affirms the right to collective bargaining. To justify the apparent contradiction between the right the Declaration endorses and the government's toleration of North Carolina's ban, the Government placed responsibility for the ban on the "people of North Carolina, through their elected representatives." This argument's implication is that the U.S. Government neither enacted nor upholds the ban, and that therefore there ought not to be a dispute over the Government's commitment to uphold "fundamental principles upon which ILO membership is based."[39]

iii. CFA Conclusion and Recommendations: North Carolina's Prohibition of Public Sector Collective Bargaining Should Be Overturned

The Committee first asserted its own authority to hear and rule on the case arising out of its general mandate, stemming from the ILO Constitution: to "examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions."[40]

Next the Committee on Freedom of Association

reaffirmed a legal conclusion reached in an earlier case involving public sector collective bargaining; namely, that collective bargaining rights may only be denied to public employees who are "engaged in the administration of the State."[41] This concept was at issue in earlier CFA decisions. A government is not always acting in its role as executive, but rather sometimes merely as employer. As such, prior case law holds that employees in a non-administrative context cannot be denied the right to collectively bargain.[42]

The committee next rebutted the U.S. Government's principal constitutional argument, *i.e.,* that there is no constitutional obligation placed on a public employer and employee representative to contract with one another. It distinguished between obliging two parties to contract and *allowing* them to do so voluntarily if they choose.[43] To the argument that all workers can freely associate, and thus the ban does not dampen union membership, the CFA answered by observing that the main objective of organizing is to achieve a collective bargaining relationship. Banning collective bargaining, the committee asserts, "unavoidably frustrates the main objective and activity for which such unions are set up."[44]

The CFA next refuted the Government's claims that mandatory collective bargaining would illegitimately shift the public responsibility of allocating public resources to a private organization. To avoid this, the CFA posited that the federal government could allow the state to enter bargaining within a "framework" more attuned to budgetary and other public concerns. Such a concession, it asserted, could never compromise the actual freedom of workers' associations to negotiate the terms and conditions of their employment.

Finally, the CFA addressed the niceties of the U.S.'s federal system of government. Here, the committee's language was sympathetic but unequivocal:

> The Committee notes that it always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries. Thus, while noting the issues arising from the federal structure of the country, the Committee is bound to observe that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.

The final recommendation of the CFA stated:

> The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina—with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired—and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS § 95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.[45]

B. The Case of Collective Bargaining for TSA Workers: Do National Security Concerns Justify the Restriction of Federal Employees' Collective Bargaining Rights?

i. Complainants: Denying TSA Workers the Right to Collectively Bargain Violates International Law and Cannot Be Justified On National Security Grounds

In August 2003 the American Federation of Government Employees (AFGE) filed an ILO complaint challenging the federal government's restrictions on collective bargaining rights for various groups of federal employees.[46] The complaint sought to address the "ever-growing and increasingly methodical effort to undermine federal employee collective bargaining rights and federal labour unions in the name of American National Security."[47] The complainants challenged abuses by all administrations, dating back to President Carter, of the statutory grant of authority in the Federal Service Labor-Management Relations Statute (FSLMRS), by which the President may exclude federal workers from rights which would they would otherwise have enjoyed under the statute.[48]

The offending statute's relevant provision allows the President to exclude workers from collective bargaining rights if the workers are primarily involved in national security or intelligence. AFGE argued, and the CFA agreed, that although national security is a legitimate reason to limit certain workplace rights, the U.S. government, by executive order and statutes such as the Homeland Security Act of 2002, had unreasonably expanded the category of jobs related to national security in order to strip federal workers of collective bargaining rights.[49]

According to the complainants, the arbitrary removal of collective bargaining rights, apart from lacking any national security justification, also constituted a violation of the government's international obligations. These obligations stem from ILO conventions 87, 98, and 151—not ratified by the U.S.—and also by the Declaration on Fundamental Principles and Rights at Work.

ii. The Government's Response

The Government's response first restated the familiar argument; that, since the U.S. has not ratified the conventions in question, it is not bound by the conventions' provisions.[50] The Government then noted that it was not bound by Convention 151 (public sector collective bargaining rights) because 151 was not one of the "fundamental conventions" which the Declaration on Fundamental Principles and Rights at Work was designed to promote.[51] In effect, the Government argued that it did not have to comply with unratified and non-fundamental conventions, and that, in any case, its "labor laws and practices laws [were] in general conformity with ILO conventions concerning freedom of association."[52]

Next, the Government declared its support for ILO's Declarations guaranteeing fundamental workplace rights, including collective bargaining, but added that the right to collective bargaining for public sector workers was not a fundamental right, and so the Government was not bound to guarantee it.[53]

Lastly, the Government argued that its exclusion of certain workers from collective bargaining rights was in conformity with ILO principles and precedents, because the workers in question performed functions related to national security. The Government noted that the ILO had contemplated such

exclusions for those employed in the administration of a state.[54]

iii. Conclusions and Recommendations: Not Every Federal Employee Can Be Involved In the Administration of the State

The committee limited its conclusion to an expression of "concern" about two aspects of the Government's position. Firstly, it had concern over an "ever-enlarged definition of the type of work connected to national security to exclude employees that are further and further away from the type of employee considered to be "engaged in the administration of the State." Secondly, it was troubled that there was no chance for employees to seek judicial review of their exclusion.

To resolve the first concern, the CFA recommended that the Government bargain on everything and with everyone except when there is a direct connection to national security. There was no explicit recommendation concerning the lack of judicial review, beyond a general exhortation to "effectively guarantee[] in practice' the "organizational rights of these employees."

IV. Assessing the Impact of the Decisions

The foregoing explanation and analysis focuses on how international labor standards are applied to the U.S. Government through the ILO process. The more important inquiry for lawmakers, citizens, employees, and legal practitioners is what impact the process has on U.S. labor law and policy. If the answer is "none" or "not much," then why should the U.S. Government take part in the ILO at all? Alternatively, if there is no threat to sovereign lawmaking from the ILO, where is the harm in a little non-binding multilateralism? From an employee's perspective, moreover, one who may be forced into subsidizing union expenses, including pointless litigation of ILO cases, might wonder how the expense can be justified.

If, on the other hand, ILO recommendations on matters such as collective bargaining rights in North Carolina's public sector actually do have an impact on the development of law, then the ILO's process ought to be taken seriously.

Commenting on the North Carolina case, Cornell Professor Lance Compa, a leading authority on U.S. labor obligations under trade agreements and international law, assessed the worth of labor's international legal efforts: "[R]aising our national labor law problems to an international dimension can be helpful if it's part of a broader campaign strategy."[55] In an earlier article, Compa proposed very broad parameters for such a strategy, including having human rights groups and scholars pay greater attention to perceived labor relations abuses, use of trade agreements and their corresponding oversight bodies to incorporate the language and ideals of the ILO Declarations, and promotion of international cooperation among labor unions.[56] The successful ILO litigation of CFA cases ought to be seen as but one aspect of the broader strategy, an activity more akin to lobbying than to the practice of law.

With the North Carolina case, the lobbying is taking place at the state, federal, international levels. At the state level the United Electrical, Radio and Machine Workers, made extensive lobbying use of the case, before and after the recommendation was issued. All North Carolina General Assembly Members were informed of the ILO's adverse decision.[57] On the heels of the ILO Report, a bill was introduced in North Carolina's General Assembly to repeal G.S. 95-98, North Carolina's public sector collective bargaining ban. The bill did not get out of committee.[58]

Federally, AFGE's general counsel, Mark Roth, claimed the decision in its case would "give[] AFGE the momentum to push Congress' new Democratic leaders and moderate Republicans to take a second look at the Aviation Transportation Security Act and reconsider union rights for screeners."[59]

And on the international level, implementation of the "broader campaign strategy" as envisioned by Compa had the UE following up on its ILO success by filing complaints against U.S. state laws with the Inter-American Commission on Human Rights (IACHR), an agency of the Organization of American States (OAS), and the Government of Mexico, via the UE's Mexican strategic partner union, alleging violation of the North American Agreement on Labor Cooperation (NAALC), which is the NAFTA labor rights side agreement.[60] Like the Philadelphia and Geneva Declarations, the NAALC contains specific provisions ensuring collective bargaining rights.[61]

On the other hand, there has been no change in U.S. or North Carolina labor law as a result of the ILO decisions.

So why spend time on legal analysis of the ILO? What can be learned from this study except that non-binding ILO obligations may be binding but no ILO obligation is enforceable? Is that a useful lesson? Indeed, any effort at legal analysis—such as a law review article—would seem time wasted by author and reader, merely paying unwarranted attention to a process that is best ignored.

This could be called the Slobodan Milosevic approach to international engagement, a la the former Serbian leader's high-profile refusal to participate in his own International Criminal Court trial.[62] According to that approach, the whole regulatory construct of the ILO is illegitimate and insignificant, the processes flawed, and enforcement impossible. Certainly the ILO has faced such criticism from its inception.[63]

On the other hand, a cynical observer might decide that, despite its shortcomings, the process need not be entirely forsaken if there were some advantage to participating. This pragmatic approach was surely the one Secretary of State George Schulz favored in 1985, when he counseled Congress to consider reviewing its long-standing policy of non-ratification.[64] Successive administrations, including the present one, also seemed to prefer that type of engagement, and not because of any groundswell of political support or understanding of the international commitments involved. Using that approach, the Member State is diligent in fulfilling its reporting commitments, warm in its rhetorical support for the policies and ideals of the international entity, yet indifferent to any censure of its behavior by the international body. The pragmatist knows that there is no possibility of enforcement under the ILO; that the process is a glorified lobbying exercise.

In favor of participation, some might make the following arguments. First, participation in a process such as the ILO dovetails with the larger democracy project which is currently a feature of U.S. foreign policy. Second, support for international standards may provide legal cover for U.S. business abroad,

vulnerable to costly litigation from foreign and domestic courts. Third, participation in the process allows the U.S. to request monitoring of other nations' labor laws, where abuse of workers' rights often does constitute grave human rights violations. As an international watch-dog, the ILO, it could be argued, contributes to greater stability in the midst of globalization and economic progress in developing nations.

There are good reasons, however, to favor neither Milosevic's policy of scorched-earth nor Schultz' path of enlightened pragmatism.

First, there is legitimate concern that domestic courts may allow themselves to be influenced by the rulings of international tribunals.[65] In recent years, the U.S. Supreme Court has held that state laws on capital punishment for minors and state laws against homosexual sodomy ought to be overturned on the grounds that an international "consensus" opposed such laws.[66] A similar international consensus on labor rights might convince a federal judge to do the same with North Carolina's law on public sector collective bargaining. The debate over the propriety of U.S. courts' incorporating international rulings into domestic decisions raises important sovereignty questions.[67]

A second consideration is more abstract. As a nation, the United States should stand for a transparent, democratic, and constructive collaboration in the international community. Moreover, there are some international processes which are very important, *e.g.,* the Geneva Conventions, and UN-sponsored nuclear proliferation monitoring, to name two.The pragmatic approach has a hypocritical quality to it inconsistent with the highest ideals of liberal democracy and reduces our international credibility. Although many ILO members ratify ILO conventions, but do not intend to comply with the corresponding commitments or abide by adverse, unenforceable CFA recommendations (and, in fact, do not comply), it does not follow that the U.S. ought to abuse the ILO process in like manner. As with the Kyoto Accords and International Criminal Court, the U.S. might do more to legitimize valuable multilateral bodies or processes in which it participates by remaining outside those that it considers inconsistent with our system of government or unwise, and candidly explaining why, rather than by participating in the latter in a cynical or self-serving way. The brief tenure of John Bolton as US Ambassador to the UN comes to mind as an example of international engagement which steered clear of the extremes of cynical pragmatism or Milosevic-style non-participation.

Several other factors weigh against participation. First, all engagement in international law is also entanglement. If there were an effective argument in support of the distinction between hard and soft ILO commitments, that would be a valuable contribution to international labor law. However, if it is impossible to argue successfully that unratified conventions are non-binding, and that commitment to general statements of principle cannot supersede signed, explicit commitments, then the U.S. will "lose" every case before the CFA. It is difficult to see the point in perennially standing alone on this principle and never prevailing. The Government is merely providing lobbying material to the unions.

Eventually, if it is to continue its participation in the ILO, the U.S. government must come up with a good argument against the principal allegation that its simultaneous endorsement of ILO Declarations has superseded its original signatory commitment to a limited number of conventions. If this situation applied to the U.S. in another area of policy, concerning trade or the military, for example, the situation would be intolerable. Given accepted principles of international law, an effective argument in favor of the distinction between signatory obligations and the obligations derived from customary international law may be impossible. On the other hand, international development and economic expansion has occasioned growing potential liability for the U.S. under host country rules, trade agreement rules, and even domestic tort liability under a statute such as the Alien Tort Claims Act.[68] As a potential litigant in a foreign, domestic or international tribunal, the U.S. would be better able to defend itself if it need only point to fulfillment of its specific signatory commitments under the ILO conventions and compliance with all applicable reporting procedures.

To conclude, non-participation in the ILO process will not prevent international scrutiny of U.S. labor law. Moreover, as international legal machinery goes, the ILO process does not pose as serious a threat to national sovereignty as does the International Criminal Court, for example. Nonetheless, ILO processes are a lobbying tool for organized labor and a potential embarrassment for the United States as long as it participates in them and does not comply with the CFA's interpretations of ILO Conventions that the U.S. has not ratified. Consequently, the U.S. government might well give serious consideration to withdrawing from ILO membership, while candidly explaining its reasons for doing so.

Endnotes

1 2nd Report of the ILO Committee on Freedom of Association, Case No. 33, para. 137. All recommendations from the ILO Committee on Freedom of Association arising from the various complaints made against the United States are contained in the CFA's Reports, *available at* http://www.ilo.org/ilolex/english/newcountryframeE.htm.

2 ILO Committee on Freedom of Association, Case No. 2292.

3 343rd Report of the ILO Committee on Freedom of Association, Case No. 2292, para. 798.

4 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf.

5 *Id.* at para. 999.

6 *Complaint to the ILO Committee on Freedom of Association by the AFL-CIO Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act*, , Case No. 2608, filed October 25, 2007 (hereinafter the *2007 AFL-CIO ILO Complaint*), *available at* http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf.

7 *Id*. at 41.

8 The official history of the ILO is summarized at http://www.ilo.org/global/About_the_ILO/Origins_and_history/Constitution/lang--en/index.htm.

9 *See generally,* Brett, B. *International Labour in the 21st Century: The ILO, Monument to the Past or Beacon for the Future?,* London: European Policy Institute, 1994.

10 *See* ILO Const., Preamble.

11 *Id.*

12 ILO Mandate, *available at* http://www.ilo.org/public/english/about/mandate.htm.

13 Stephen I. Schlossberg, *United States' Participation in the International Labor Organization: Redefining the Role*, 11 Comp. Lab. L. J. 1, 48-80 (Fall 1989).

14 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, para. 944, page 214, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf.

15 ILO Convention No. 98, *Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (drafted 1949, adopted 1951), *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098,

16 *Declaration Concerning the Aims and Purposes of the International Labour Organisation*

("Declaration of Philadelphia") (May 10, 1944), Annex to ILO Constitution, *available at* http://www.ilo.org/ilolex/english/constq.htm.

17 *See* J. Austin, The Province of Jurisprudence Determined, in Lloyd's Introduction to Jurisprudence, ed. M.D.A. Freeman, 7th Edition, 253: "And hence, it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected."

18 Linda L. Moy, *The U.S. Legal Role in International Labor Organization Conventions and Recommendations*, The Int'l Lawyer, Vol. 22 No. 3 (Fall 1988), pp. 767-9; *see also* Remarks of then-Secretary of State George P. Schultz appearing before the Senate Committee on Labor and Human Relations' Hearing on Examination of the Relationship Between the United States and the

International Labor Organization, 99th Cong., 1st Sess. 12 (1985) *available at* http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3999589.

19 For general discussion of "soft law" see Gunther F. Handl, et al., *A Hard Look at Soft Law*, 82 Am Soc'y Int'l L. Proc. 371 (1988); *c.f.* R. Blanpain, and M. Colucci, The Globalization of Labour Standards: The Soft Law Track, The Hague: Kluwer Law International, 2004.

20 See *supra* note 16.

21 *Philadelphia Declaration,* Sec. I.

22 *Id*. at Sec. II(e).

23 *Id*. at Sec. III(e) (emphasis added).

24 *Id*. at Sec. V.

25 Monique Cloutier, *ILO Declaration on Principles: A New Instrument To Promote Fundamental Rights (A Workers' Education Guide)*, ILO (2000), *available at* http://www.ilo.org/public/english/dialogue/actrav/publ/declfune.pdf.

26 *About the Declaration*, ILO website, *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN; see also text of *ILO Declaration on Fundamental Principles and Rights at Work* ("Declaration of Geneva") (June 1998), *available at* http://www.ilo.org/public/english/employment/skills/hrdr/instr/decla.htm. (emphasis added)

27 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, at paras. 977, 984, 997 (2007).

28 *Id*. at paras. 998-9.

29 *See*, International Labor Organization, *Fact Finding and Conciliation Commission on Chile*, Geneva, Switzerland (1975), para. 466.

30 ILO website, "Applying Conventions When States Have Not Ratified Them: General Survey (Article 19)", *available at* http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Applyingconventions/index.htm.

31 *See supra* note 4, at para 985.

32 N.C. Gen. Stat. §95-98.

33 Case No. 2460, para. 944.

34 *Id*. at para. 954-955.

35 *Id*. at para. 952.

36 *Id.* at para. 953.

37 *Id*. at para 962.

38 *Id*. at para 967.

39 *Id*. at para. 976.

40 *Id*. at para. 985.

41 *See* Case No. 1557, 284th Report, paras. 758-813.

42 *Id*. at para. 989.

43 Case 2460, para 990.

44 *Id*. at para. 991.

45 *Id*. at para. 999.

46 *See supra* nn.2, 3.

47 Report No. 343, Case 2292, para. 717.

48 *See* 5 U.S.C.A. §7103(b)(1).

49 Case No. 2292 at para. 727..

50 *Id*. at para. 739.

51 *Id*. at para. 740.

52 *Id*. at para. 739.

53 *Id*. at para. 740.

54 *Id.* at para. 741-742.

55 David Moberg, *Solidarity Without Borders:*

Confronted with multinationals and business-friendly trade agreements, unions have begun to act globally, In These Times (Feb. 7, 2007).

56 Lance Compa, *The ILO Core Standards Declaration: Changing the Climate for Changing the Law*, Perspectives on Work, Vol. 7, No. 1, 24-26

57 *See* UE April 13, 2007 press release, *available at* http://www.ueunion.org/uenewsupdates.html?news=308

58 N.C. House Bill 1583 status report, *available at* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H1583; and Jim Stegall, *Collective Bargaining Looms as Issue*, Carolina Journal (May 31, 2007) *available at* http://www.carolinajournal.com/exclusives/display_exclusive.html?id=4098.

59 *TSA Under More Pressure To Allow Workers Union Rights*, Federal Times, November 27, 2006.

60 UE Dec. 2, 2007 press release regarding OAS complaint *available at* http://www.ueunion.org/uenewsupdates.html?news=351; and Oct 26, 2006 release regarding NAALC complaint *available at* http://www.ueunion.org/uenewsupdates.html?news=279.

61 *North American Agreement on Labor Cooperation* between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (1993), *available at* http://www.dol.gov/ILAB/regs/naalc/naalc.htm.

62 *See* Human Rights Watch Report, *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, Vol. 18, No. 10 (D), December 2006; *available at* http://hrw.org/reports/2006/milosevic1206/5.htm#_Toc153263170.

63 *See, e.g.,* Jenks, C.W., *The Origins of the International Labor Organization*, in Int'l. Labour Rev., Vol. 30, No. 5, pp. 575-581 (1934), discussing the opinion of American legal advisers to the Versailles treaty negotiations that it would be "constitutionally impossible for the United States to give effect to the International Labour Conventions upon matters normally reserved for state legislation", *available at* http://www.ilo.org/public/libdoc/ilo/P/1934/09602(1934-30)575-581.pdf. Criticism of the ILO was manifested

by the U.S. refusal to join during the organization's first fifteen years, until FDR in 1934.

64 Remarks of then-Secretary of State George P. Schultz appearing before the Senate Committee on Labor and Human Relations' Hearing on Examination of the Relationship Between the United States and the

International Labor Organization, 99th Cong., 1st Sess. 12 (1985), *available at* http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3999589.

65 For full treatment of this issue, see Federalist Society Symposium on *American Exceptionalism and the Constitution: Citation of Foreign Law*, Nov. 17, 2007, *available at* http://www.fed-soc.org/publications/pubID.454/pub_detail.asp.

66 *See* Lawrence v. Texas, 539 U.S. 558 (2003); Roper v. Simmons, 543 U.S. 551 (2005).

67 Unfortunately, however, activist judges do not require an adverse ruling of an international tribunal against the U.S. to incorporate foreign authority into a domestic decision. In at least two notorious recent instances of international law playing a part in a Supreme Court decision—*Lawrence v. Texas* and *Roper v. Simmons*—the majority did not rely on a specific ruling of an international body, but looked to laws, customs, and anything else that might have gone into forming the "evolving standards of decency that mark the progress of a maturing society." No action by the U.S. can stop foreign or international standards from evolving or creative judges from basing decisions on them. No participation in or rejection of the ILO could prevent domestic courts from noticing foreign or international authority.

68 Alien Tort Claims Act, 28 U.S.C. §1350.