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Human Rights and the Global Economy: The Centrality of Economic and Social Rights

MARLEY S. WEISS*

The essays which follow in this volume, on human rights and the global economy—by political scientist Shareen Hertel, law professor Hope Lewis, and Justice Bess Nkabinde of the South African Constitutional Court¹—address how globalization has affected human rights, and vice versa. As these authors suggest, intensified international integration has had profound effects upon law at the international level, upon law at the domestic level, as well as upon legal, economic, social, and cultural practices in the lives of ordinary people. Some of these systemic effects upon human rights may occur by design, as intended consequences flowing from the nature and structure of the forms of globalization that have proceeded to date. Other effects, however, may be unintended byproducts of global integration. In addition to delving into the ways and means of interaction between globalization and human rights, these authors speculate about how globalization could be harnessed to mobilize a virtuous, upward spiral of enhanced human rights, rather than the feared dystopia-like consequences. Here, I will present a few brief observations to provide a background framework for these papers.

The very phrase “human rights and the global economy” brings to mind cause and effect interactions, too often with negative

* Professor of Law, University of Maryland School of Law. Copyright © 2009 Marley S. Weiss. Published by permission of the author.

1. Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 MD. J. INT'L L. 283 (2009); Hope Lewis, *Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy, and the Human Rights Movement at 60*, 24 MD. J. INT'L L. 296 (2009); Bess Nkabinde, *The Right to Strike, An Essential Component of Workplace Democracy, Its Scope and Global Economy*, 24 MD. J. INT'L L. 270 (2009).

connotations. Technological change has been combined with human change in business organizations, and especially in legal and other international human arrangements, to facilitate the heightened cross-border mobility of goods, services, capital, and people and workers that, in the aggregate, we label “globalization.” Technological change has dramatically cut the cost, and tremendously increased the speed, of mobility of the factors of production as well as of the people who perform the work. Changes in domestic and especially international law have facilitated the form of globalization now prevailing, in which diminishing legal barriers to cross-border mobility of goods, services, and capital permit economic actors to build upon the plummeting costs and accelerating speed of transport and transfer to render markets in goods and services partially global. At the same time, the markets for labor in areas of the economy subject to international competition or substitution have become partially globalized. However, because barriers to trans-border migration have not dropped in parallel to obstacles to the import and export of goods, services, and capital, the mobility of persons, as workers and as human beings, remains limited.

The spread of ideas, too, has become partially globalized, since telecommunications technology has yielded methods of communication which are nearly free and instantaneous, albeit limited to persons and countries able to afford the requisite infrastructure. Subjects of ideas being spread through these new media include matters of business and productivity improvement, as well as ideas about human rights, nondiscriminatory inclusion of racial and ethnic minorities, decent work, minimum standards of living and working, and how to organize to advance these standards within countries where they have until now been lacking.²

There was some initial thought given to characterizing this group of papers as “economic and social rights II,” in light of their emphasis on labor rights and labor markets. There is indeed a strong

2. See, e.g., Alfio Cerami, *Europeanization, Enlargement and Social Policy in Central and Eastern Europe*, CAHIERS EUROPEENS DE SCIENCES-PO, July 4, 2007, http://portedeurope.org/IMG/pdf/Cerami_Connex_Paper.pdf (arguing that European Union dissemination of social policy ideas, interests, and institutions played an important role in inducing incorporation of economic and social rights, particularly as to gender equality, pensions, health care, employment, and social inclusion of “vulnerable groups” such as the Roma and other ethnic minorities, in Central and Eastern European countries in the course of their transition from state socialism).

interconnection between the themes of the papers focusing on economic and social rights, such as the right to health, and the more tightly globalization-related human rights themes addressed by Professors Hertel and Lewis and Justice Nkabinde.³ Yet the labor rights, migratory human rights, and gender, racial, ethnic, and other minority rights at issue here are a bit different. In and of themselves, these rights straddle the boundaries of civil and political rights, on the one hand, and economic and social rights, on the other; they appear in both the International Covenant on Civil and Political Rights,⁴ as well as the International Covenant on Economic, Social and Cultural Rights,⁵ fleshing out the more general provisions of the Universal Declaration.⁶ Analysis of rights of this type highlights, as famously has been pronounced, the interdependency of all human rights.⁷

Moreover, the rights under discussion here straddle a boundary of a second type as well. Labor, human mobility, and minority rights stand precisely at the intersection between human rights on the one hand, and trade and commercial rights on the other. Despite their status as workers and national citizens, with human rights in both capacities, people are alternatively regarded as “factors of production” and consumers, elements in regimes to enhance global welfare through expanded trade, heightened productivity, and cheaper goods

3. Hertel, *supra* note 1; Lewis, *supra* note 1; Nkabinde, *supra* note 1.

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

5. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

6. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

7. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. . . . [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”). The World Conference at which this declaration was adopted was convened at the behest of the U.N. General Assembly to “review and assess progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights, and identify obstacles and ways in which they might be overcome,” as well as to examine “the link between development, democracy and economic, social, cultural, civil and political rights,” and evaluate “the effectiveness of United Nations methods and mechanisms.” Office of the High Commissioner for Human Rights, *World Conference on Human Rights*, <http://www.unhchr.ch/html/menu5/wchr.htm>. For a critique of the indivisibility thesis, see Octávio Luiz Motta Ferraz, *Moving Beyond Rhetoric: A Critical Analysis of the Indivisibility of Human Rights* (Aug. 3, 2008) (unpublished working paper), available at <http://ssrn.com/abstract=1294322>.

and services. This dual aspect is at the heart of the relationship between globalization and human rights.

This intersectionality extends to the very description of the nation-states and their citizens, the conceptual building blocks of today's international order. While the U.S. traditionally has had immigrant, racial, and ethnic minority populations sufficiently dispersed geographically to make American conceptualization of the issue of equality and discrimination largely independent of location, this is not so in many other countries. In most countries, ethnic and especially linguistic minority status has been strongly correlated with geographical and territorial history, bringing nation-state monopoly control over persons and territory sharply into question regarding the matter of minority rights. Growing international mobility of persons may alter this paradigm, facilitated by the trans-border demand for labor on the part of business and heightened by the demand for paid work on the part of workers who find employment opportunities lacking in their home country. Yet, as citizenship and nationality blurs, the need for a common bond, community, and shared identity in a democratic polity, especially one which will effectuate social and economic rights, is put at increasing risk. Common humanity may (perhaps) provide a strong enough bond to support sentiment for economic, if not military, intervention against the extreme genocide in far-off countries. Conversely, it may be too weak to induce support for a large influx of resettled foreign citizens who threaten labor market stability, local citizens' earning power, and tax rates, as well as dilute the dominant culture and identity in palpable ways.

Just as market forces may operate to undermine the full realization of the labor, migration, and minority rights at issue here, market-based political and collective action mechanisms also may be used to promote their effectuation. Economically based social mobilization through devices such as consumer boycotts of multinational corporation branded goods and services, codes of corporate conduct, as well as facilitation of worker self-empowerment through union organizing and collective bargaining and similar forms of direct collective action, are prominent examples of the diverse means through which economic leverage may be used directly by workers and citizens to promote corporate compliance with work-related aspects of human rights, all without entailing the intermediation of

government.⁸ Social and political globalization may wholly or partially offset the pressures of economic globalization towards increasing disparities of income and wealth both within and between countries and, taken together, may decrease economic and political discrimination within countries against ethnic minorities.⁹

Important elements of globalization may have a disproportionate economic and social impact on the most vulnerable workers—members of racial, ethnic, and linguistic minorities, immigrants and internal migrants, and women of all races and cultural backgrounds. These are the workers who, everywhere, are most likely to be in the informal, rather than the formal economy. Therefore, they are legally or illegally excluded from those protections of economic and social rights implemented at the national level for more privileged workers in the so-called “primary” labor force sector. These are the very workers and persons for whom economic, social, and cultural rights are intended to provide protection; their full effectuation could moderate some of the harshest consequences of globalization.

These rights also are distinctive, even from other social and economic rights, in how they are generated and enforced. As the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights elaborates,¹⁰ these rights impose three types of obligations upon ratifying countries: “to respect, protect and fulfil.”¹¹ The obligation “to respect” means that the state itself is prohibited from directly acting to violate or interfere with these rights.¹² In the labor rights area, for example, this may prohibit the adoption of laws limiting the freedom of association and the right to organize only to the officially-approved trade union. The obligation “to respect” also prohibits governments acting as employers from interfering with

8. In addition to the discussion of this point in the article within this collection by Justice Nkabinde, *supra* note 1, see generally JAMES ATLESON ET AL., *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY* (2008).

9. For an empirical study suggesting this result in developing countries, see Krishna Chaitanya Vadlamannati, *The Triumph of Globalization at the Expense of Minority Discriminations? An Empirical Investigation on 76 Countries, 1970–2005* (Nov. 10, 2008) (unpublished working paper), available at <http://ssrn.com/abstract=1298886>. This paper argues that globalization has led to decreased discrimination and exclusion of ethnic minorities, largely as a result of the spread of human rights ideas.

10. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Econ., Soc. & Cultural Rts., *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000) [hereinafter *Maastricht Guidelines*].

11. *Id.* ¶ 6.

12. *Id.*

public employees exercising their right to organize a trade union. The obligation “to protect” goes beyond refraining from governmental action hostile to the rights in question by requiring the government to prevent violations by others. “To protect” means the state must enact and effectively enforce domestic legislation making these rights real in the labor market and workplaces of the country.¹³ For example, in the labor rights area, a government must adopt and enforce laws prohibiting racial discrimination in employment by private as well as public employers. Two illustrations of breaching the obligation “to protect” are the interpretation of U.S. labor law as permitting employers to permanently replace economic strikers, in effect robbing the formal right to strike of its practical power,¹⁴ and also the American failure to enact legislation suitably restraining this type of employer power.¹⁵

“The obligation to fulfill requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.”¹⁶ Going beyond simple incorporation and enforcement of the international norm within domestic law, this obligation entails recognition of impediments within other legal, social, and economic structures to the full effectuation of the objective of the international right. The treatment

13. *Id.* ¶¶ 6, 14(a)–(b), (e), 15(a), (c)–(d), (h).

14. See ILO Committee on Freedom of Association, Complaint Against the Government of the United States Presented by AFL-CIO, Case No. 1543, para. 92, in 278th Report of the Committee on Freedom of Association, 74 International Labor Office Bulletin, para. 60 (1991, Series B) [hereinafter ILO CFA Report No. 278]. This report states that:

The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.

Id.

15. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). See also *Trans World Airlines, Inc. v. Indep. Fed’n of Flight Attendants*, 489 U.S. 426 (1989) (applying the *Mackay Radio* holding to the Railway Labor Act). But see ILO CFA Report No. 278, *supra* note 14, paras. 60–93 (criticizing the American understanding as failing to provide a minimum guarantee of the right to strike as entailed within the broader obligation to guarantee freedom of association and the right to collective bargaining under the ILO Constitution).

16. *Maastricht Guidelines*, *supra* note 10, ¶ 6.

of the Roma¹⁷ population in several countries in Central and Eastern Europe provides countless illustrations of failures here. De facto residential and educational segregation, lack of access to relevant vocational education and job training, and failure to counter discrimination in hiring and placement in the labor market means that full attainment of equality for this linguistic and ethnic minority group poses a nearly intractable problem for these societies.¹⁸ The Arab and Muslim minority populations in several Western European countries pose other examples where formal law is less a problem than the disproportionate and exclusionary impact upon racial, ethnic, and linguistic minorities of long-established patterns of segregation, institutional structures, and social practices which countries are loathe to disrupt in order to open up possibilities for real gains in vindicating these rights. Other examples of failures to “fulfill” international economic and social rights norms are found in several European countries that are slow to progress towards increased equality for women in employment. These countries have had difficulty breaking the glass ceiling of vertical, along with horizontal, occupational segregation, as well as unlocking the iron cage of women’s relegation to part-time work because of strong cultural norms regarding their “primary” role in childcare and homemaking.¹⁹

The three essays on the theme of globalization and human rights combine to form a mosaic illustrating the intersections and commonalities among issues of labor, class, gender, race, ethnic, cultural, and linguistic minority status, within international human rights norms.

17. Roma is the proper name for the ethnically, culturally, and linguistically distinct minority populations in many European countries, especially Central and Eastern Europe, who may be popularly labeled “gypsies,” “tzigane,” “cigany,” and similar terms.

18. See generally EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR EMPLOYMENT & SOC. AFFAIRS, THE SITUATION OF ROMA IN AN ENLARGED EUROPEAN UNION (2004), available at <http://www.errc.org/db/00/E0/m000000E0.pdf> (last visited Mar. 25, 2009); Gabor Daróczy, *Roma Children in the Hungarian Education System*, in BALANCE SHEET, DISADVANTAGED SOCIAL GROUPS IN HUNGARY IN 2007, 125 (Magda Kósa Kovács & Andrea Pető eds., Andrew T. Gane trans., 2007); *Interview with Károly Danyi*, in BALANCE SHEET, DISADVANTAGED SOCIAL GROUPS IN HUNGARY IN 2007, *supra*, at 149; Alina Vamanu, *Roma Rights and the Production of Scandalous Ethnicity in the Romanian Written Media* (June 2008) (unpublished working paper), available at <http://ssrn.com/abstract=1140931>. Individual country reports by the European Roma Rights Centre addressing the treatment of Roma minorities in several European countries may be found at European Roma Rights Centre, Country Reports, http://www.errc.org/Countryrep_index.php (last visited Mar. 25, 2009).

19. See, e.g., European Commission, *Report on Equality Between Women and Men*, COM (2008) 10 final (Jan. 2008).

These essays likewise highlight the similarities and differences of this complex of issues compared to other types of economic and social rights.

Shareen Hertel's paper focuses on bringing "labor rights back in" to the heart of general discussions about human rights and the global economy.²⁰ She reprises the very useful three-part definition that she and Lanse Minkler formulated for economic rights as (1) the right to an adequate standard of living, including a right to subsistence; (2) the right to work, including non-discrimination, decent work, and fair wages; and (3) the right to basic income guarantees for those unable to work.²¹ The matters encompassed in her first and third categories largely parallel those addressed by the articles in this issue explicitly focused on "economic and social rights," while her second category, interpreted expansively, tracks the labor, migration, and minority issues at the heart of the three globalization and human rights papers. Her paper focuses on the limitations of the traditional understanding that only nation-states are the obligors of international human rights and labor rights norms. She highlights the corresponding problems with relying on non-state, non-international organization measures to bind multinational corporations to fulfill and effectuate these international human rights norms through their corporate supply chains. She discusses the pros and cons of rendering businesses direct obligors of international human rights duties. Intensified commitment to democratic participation, both within the state and within the workplace, through union or other worker representation, may present an important avenue for protecting labor rights. Nevertheless, Professor Hertel expresses skepticism towards reducing reliance on the state, preferring instead to enhance and empower citizen participation to strengthen state capacity to enact and enforce laws to fulfill their international human rights obligations. This is a perspective toward which I am strongly sympathetic. Professor Hertel also comments on the undocumented worker problem in relation to these issues and in conjunction with the limits in existing international law of protections for undocumented as opposed to documented migrant workers.

Hope Lewis' paper, *Transnational Dimensions of Racial Identity*:

20. Hertel, *supra* note 1.

21. Shareen Hertel & Lanse P. Minkler, *Economic Rights: The Terrain*, in ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 1 (Shareen Hertel & Lanse Minkler eds., 2007).

Reflecting on Race, the Global Economy and the Human Rights Movement at 60, outlines the deep tendency to omit race and ethnicity and their global economic dimensions in international human rights analysis.²² She deplores the perceived tendency to “treat race . . . as irrelevant, or at least less relevant, than economic class alone,”²³ and calls for a rethinking of human rights law and policy in the context of globalization in order to put such core identity issues back into an equally central position in our analyses. Professor Lewis uses social and economic issues arising from the domestic and international migration of Blacks to make manifest the abject failure of prevalent human rights thinking to account for intersectionality and for the disproportionate impact of globalization processes on races, ethnic and linguistic minority group members, and especially upon the women of these groups. She also brings into sharp relief the extent to which dominant discourse privileges civil and political rights over economic, social, and cultural human rights, notwithstanding pious attestations about the unity of all human rights. The consequences of this prioritization, she points out, are highly racially skewed. She outlines the flawed human rights treatment of black (im)migrants to provide a stark example of the fallacy of omitting simultaneous, “multidimensional” consideration of gender, race, and ethnicity, along with class, as well as the reification of the public–private dichotomy in the field on international human rights.

The interconnected nature of collective labor rights, such as freedom of association, and issues of labor migration, and class and linguistic minority status, are well illustrated by the notorious *Hoffman Plastic* case,²⁴ which provides an especially egregious example of American flouting of its obligations under international law. The company, in the course of resisting a union organizing campaign, fired a number of union supporters. Among them was one who, during the remedial phase of National Labor Relations Board proceedings, turned out to have used someone else’s papers to gain employment, since he was undocumented. The *Hoffman Plastic* Court declined to revisit its prior *Sure-Tan* decision,²⁵ which had construed the term “employee” in the National Labor Relations Act (NLRA), the main American law providing for union organizing and

22. Lewis, *supra* note 1.

23. *Id.* at 255.

24. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

25. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

collective bargaining rights in the private sector, as covering *all* workers in an employment relationship with a covered employer, undocumented as well as documented.²⁶ That construction is consistent with international human and labor rights instruments, which generally require equal freedom of association and collective bargaining rights for all workers, even those not lawfully entitled to be employed. However, the Supreme Court in *Hoffman Plastic* concluded that a worker who obtains work through the use of false documentation, but is later dismissed from employment because he or she participated in efforts to organize a union at the workplace, is entitled to no individual remedy. Relief was held to be limited to the posting of a cease and desist notice.

Thus, the *Hoffman Plastic* decision not only provided no compensation to the victim of the unlawful dismissal, but precluded any deterrent effect against employers who might consider emulating Hoffman Plastic Compound's behavior in the future. The five-to-four Supreme Court majority regarded the post-*Sure-Tan* enactment of the U.S. Immigration Reform Control Act (IRCA),²⁷ which

26. Supervisory, managerial, and confidential employees are categorically excluded, the former by express terms of Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) (2006) ("The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . ."), and the others by judicial gloss on the statute. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (excluding managerial employees); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (same); NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) (excluding confidential employees). The supervisory exemption, in turn, has been expansively interpreted in a pair of Supreme Court decisions, NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571 (1994); and NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001), as well as in a subsequent trilogy of National Labor Relations Board decisions, Oakwood Healthcare, Inc., 348 N.L.R.B. 686 (2006); Croft Metals, Inc., 348 N.L.R.B. 717 (2006); and Golden Crest Healthcare Ctr., 348 N.L.R.B. 727 (2006), stripping increasingly large categories of employed workers of their statutory status as covered "employees," thereby depriving them of domestically protected rights of freedom of association and collective bargaining. *See generally* Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status: Fertile Delta or Bermuda Triangle*, in LABOR LAW STORIES 353 (Laura J. Cooper & Catherine L. Fisk eds., 2005). The supervisory exclusion has been the subject of proceedings before the International Labour Organization's Committee on Freedom of Association, in which the Committee expressed concern that the broadened exclusion may infringe U.S. membership obligations under the ILO Constitution by excluding from the right of freedom of association workers other than employees "genuinely representing the interests of employers." ILO Committee on Freedom of Association, Complaint Against the Government of the United States Presented by AFL-CIO, Case. No. 2524, para. 856, in 349th Report of the Committee on Freedom of Association, ILO Doc. GB.301/8, para. 749 (2008, Series B).

27. Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359

prohibits employers from knowingly employing undocumented workers and prohibits workers from submitting false documents to verify their lawful employability, as dictating its result.

This decision at once constitutes a denial of the requirement that governments provide equal labor rights to all workers, regardless of immigrant status, as well as of the rights of all workers to freedom of association and collective bargaining. Besides impairing the ability of undocumented workers to form unions and seek to bargain collectively, because of the collective nature of these rights, the holding gravely undermines the same rights for their documented immigrant and citizen co-workers.

These economic and social rights are prescribed by the Universal Declaration,²⁸ as well as the International Covenant on Economic, Social and Cultural Rights,²⁹ and the Constitution of the International Labor Organization (ILO).³⁰ More recently, they have been further addressed in the ILO Declaration on Fundamental Principles and Rights at Work,³¹ which is binding on all ILO members including the U.S. In addition, these rights are the subject of the relatively recent International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.³² The ILO has repeatedly urged the U.S. to change its domestic law to override the result in *Hoffman Plastic* as violative of its ILO membership obligations to guarantee freedom of association to *all* workers employed in the U.S., but thus far to no avail.³³

(codified as amended in scattered sections of 8 U.S.C.).

28. UDHR, *supra* note 6.

29. ICESCR, *supra* note 5.

30. Constitution of the International Labour Organization, as amended, June 22, 1972, 25 U.S.T. 3253, available at <http://www.ilo.org/ilolex/english/iloconst.htm>.

31. ILO Declaration on Fundamental Principles and Rights at Work, *adopted* June 18, 1998, 37 I.L.M. 1233, available at http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang_en/index.htm.

32. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93 (*entered into force* July 1, 2003). See generally Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGRATION REV. 737 (1991).

33. ILO Committee on Freedom of Association, Case No. 2227, in 332d Report of the Committee on Freedom of Association, paras. 551–613 (2003) (initial findings). Successive follow-ups in which the U.S. failed to take any responsive action include the following reports of the Committee on Freedom of Association: 333d Report, para. 181 (Mar. 2004); 334th Report, paras. 92–94 (June 2004); 335th Report, paras. 82–87 (Nov. 2004); 336th Report, paras. 142–44 (Mar. 2005); 337th Report, paras. 180–82 (June 2005); 338th Report,

Justice Bess Nkabinde's paper focuses on a single, central international labor right, the right to strike, as an essential component of workplace democracy and its role in empowering workers in the global economy.³⁴ Her work, drawing on conceptions of human dignity, equality, and freedom as core values of both international human rights instruments and the South African Constitution, highlights the empowerment of capital, in effect to exit or to strike, through disinvestment or refusal of (re)investment, against regulation aimed at vindicating economic and social rights, particularly labor rights, but also payroll and business taxation-based social welfare provision. As she points out, the right to strike may provide workers some means to collectively vindicate their own interests, without which freedom of association and collective bargaining are hollow exercises. Moreover, if broadly construed and effectuated, these rights may permit trade unions operating transnationally to work together towards objectives at the heart of human rights in relation to globalization: to counter the growing power of multinational corporations, with their vastly greater mobility compared to that of workers, to attempt to reinvigorate schemes of national regulatory and social provision, and to seek the fulfillment of both civil and political rights and economic and social rights related to work.

Justice Nkabinde's paper brings into sharp relief some of the distinctive features of labor and labor market-related migration rights, as compared to other economic and social rights. Each nation-state regulates terms of employment, terms under which freedom of association and collective bargaining rights may be exercised, and rules for lawful labor market participation status for immigrant workers. At the domestic level, the main obligor of these rules is the employer, while the international norms, which the national laws are to implement and effectuate, are directed at the nation-state. On the international plane, the "subject," i.e., the party with standing to enforce the international obligations against violation, is another nation-state that is party to the instrument. However, the intended beneficiaries and the main actors with a real stake in enforcement are

paras. 343–45 (Nov. 2005); 340th Report, paras. 90–97 (Mar. 2006); 342d Report, paras. 204–05 (June 2006); 343d Report, paras. 208–09 (Nov. 2006); 346th Report, para. 192 (June 2007); 348th Report, paras. 79–89 (Nov. 2007); 349th Report, paras. 308–09 (Mar. 2008); 350th Report, paras. 215–16 (June 2008); 351st Report, para. 180 (Nov. 2008), all available at <http://webfusion.ilo.org/public/db/standards/normes/libsynd>.

34. Nkabinde, *supra* note 1.

the workers and their trade union representatives, who are usually “subjects” with enforcement rights under domestic law but not international law. Moreover, since globalization means increased mobility of businesses and workers’ jobs, as well as goods and services, across national borders, divergent national labor law regimes pose increasing barriers to effective implementation of the international norms. These barriers remain even if both the sending and receiving country, regarded in isolation, have enacted domestic labor law regimes in full compliance with international obligations. Her paper poses the optimistic scenario of international trade union and worker solidarity providing a means to surmount some of these obstacles to effectuation of international human rights-derived labor rights. A pessimist, however, would note the contrary trend in European Union law, which of late has tended to prioritize free movement of capital and freedom to relocate an establishment across borders over workers’ rights to deploy economic weaponry in cross-border labor disputes, even though the forms of industrial action were legal in the sending country.³⁵

We can only dip our collective toes into these waters through these richly provocative articles. Nevertheless, it is to be hoped that they are an opening salvo in extended discourse among advocates for labor rights, migrant worker rights, and racial and ethnic minority rights, and between them and other human rights advocates.

35. See Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767; Case C-438/05, *Int’l Transp. Workers’ Fed’n v. Viking Line ABP*, 2007 E.C.R. I-10779; Case C-346/06, *Dirk Ruffert v. Land Niedersachsen*, 2008 E.C.R. I-01989.