

## Human Rights and the Global Economy: Bringing Labor Rights Back In

Shareen Hertel

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Shareen Hertel, *Human Rights and the Global Economy: Bringing Labor Rights Back In*, 24 Md. J. Int'l L. 283 (2009).  
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol24/iss1/23>

This Conference is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Human Rights and the Global Economy: Bringing Labor Rights Back In

SHAREEN HERTEL\*

---

*It is because of the defense of their rights as workers that some of the more vulnerable populations in many countries are most in danger.*

—Virginia A. Leary, Professor of Law and SUNY Distinguished Service Professor,  
University of Buffalo School of Law<sup>1</sup>

## INTRODUCTION

The drafters of the 1948 Universal Declaration of Human Rights (UDHR) envisioned “social progress and better standards of life in larger freedom” as a goal to be achieved through protection of the right to work and promotion of robust labor standards (Articles 23 and 24). Every person, the Declaration states, has “the right to a standard of living adequate for the health and well-being of himself [or herself] and of his [or her] family” (Article 25). Access to decent work is central to enabling people to enjoy their right to an adequate standard of living. Yet, for much of the past half century, workers’ rights have been excluded in practice from mainstream scholarship and activism on human rights.<sup>2</sup>

Since the 1990s, new thinking on labor rights has begun to emerge as a result of creative partnerships between labor unions, key human rights organizations, and other groups in civil society, all of which have pushed, together, for greater recognition of contemporary labor

---

\* Assistant Professor, Department of Political Science and Human Rights Institute, University of Connecticut.

1. Virginia A. Leary, *The Paradox of Workers’ Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22, 26 (Lance A. Compa & Stephen F. Diamond eds., 1996).

2. *Id.*

rights violations worldwide along with strengthened policy responses.<sup>3</sup> These activists have marshaled the media, the courts, and the market in defense of workers' rights—within the activists' own countries and transnationally. Political science and legal theory are, in some ways, struggling to catch up with resurgent popular interest in labor rights and the challenges it poses to theories of international relations, comparative politics, and international law.<sup>4</sup>

This article explores the evolving relationship between labor rights and human rights in the context of the current wave of globalization. It argues that contemporary grassroots-level activism on labor rights has forced scholars and policymakers to begin to re-conceptualize these rights. The article also argues that it is time to shift the discussion of corporate responsibility for labor rights from a principal focus on “voluntary initiatives” toward an emphasis on more effective regulation of the private sector. Greater public awareness of the unbridled private sector—nowhere more evident than in the present global economic crisis—is likely to further energize debates over the most effective strategies for protecting and promoting labor rights. The stakes are high: according to International Labour Organization (“ILO”) projections, world unemployment could increase by 20 million by the end of 2009, and the ranks of the poorest people could expand by another 100 million.<sup>5</sup> It is time to bring labor rights back in to the center of discussions of human rights.

#### SCOPE OF LABOR RIGHTS

The market is governed by human choice. In democratic political systems, we vote into office government officials who make the regulations that govern commerce nationally and internationally. Business is responsible, at a minimum, for observing the laws of the

---

3. See, e.g., Lance Compa, *Labor's New Opening to International Human Rights Standards*, 11 WORKINGUSA: J. LAB. & SOC'Y 99 (2008); Margaret Levi, *Organizing Power: The Prospects for an American Labor Movement*, 1 PERSP. ON POL. 45 (2003).

4. See, e.g., JAMES ATLESON, LANCE COMPA, KERRY RITTICH, CALVIN WILLIAM SHARPE & MARLEY S. WEISS, INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY (2008).

5. International Conference on Financing for Development, Roundtable Side Event, Doha, Qatar, Dec. 1, 2008, *Background Note: Working Out of Crisis: Aligning Finance with Decent Work and a Fair Globalization* 1, <http://www.un-ngls.org/site/doha2008/article.php3?idarticle=616>; see also Radhika Balakrishnan & Diane Elson, *The U.S. Financial Crisis Is a Human Rights Issue*, GLOBAL RES., Oct. 28, 2008, <http://www.globalresearch.ca/index.php?context=va&aid=10736>.

states in which it operates. Each person, in turn, is responsible for contributing to his or her own wellbeing through production—in some cases through wage labor in the “formal” economy, and in other cases through non-wage labor in the household economy. Some people cannot work owing to life circumstances and, once again, citizens together determine (through our decisions about tax and fiscal spending priorities) the scope of the social welfare safety nets available to protect such vulnerable people.

This is admittedly an idealized vision of how market, state, and society are interrelated. In practice, markets work far less efficiently and equitably. In some cases, states are plagued by inefficiency, corruption, or a lack of capacity, making them especially vulnerable to shirking by businesses seeking to avoid their regulatory obligations. And, individual people may not play an active role in promoting their own wellbeing. The reasons for these shortfalls are beyond the scope of this article. What this article *does* grapple with is the role that labor rights play in correcting balance between the responsibilities of state, market, and civil society-based actors.

The UDHR was drafted in the wake of two world wars. Shadowing both wars was a pattern of conflict rooted in uneven economic development, resulting nativism, and rising authoritarianism.<sup>6</sup> The labor rights activism of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries was engulfed by these “isms.” The ILO remained the sole normative outpost until the creation of the modern U.N. system. But the global integration of business quickly outpaced the ability of states to enforce labor rights standards, either individually or collectively. Labor rights were, in effect, eclipsed both by the technological and political challenges of the 20<sup>th</sup> century, and by a choice on the part of many states to forego these rights in the interest of attracting capital.<sup>7</sup>

Today’s new thinking on labor rights is rooted in activists’ and scholars’ revisiting of the UDHR in an effort to adapt its notions of economic and labor rights to the problem of growing inequality amidst burgeoning 21<sup>st</sup> century global economic integration. The current heightened global economic instability makes the challenge

---

6. *See generally* KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2d ed., Beacon Press 2001) (1944).

7. JACKIE SMITH, *SOCIAL MOVEMENTS FOR GLOBAL DEMOCRACY* 222–23 (2008); GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* 24–25 (2007).

all the more pressing. This article employs a three-part definition of economic rights, within which labor rights figure centrally. Economic rights entail: (1) the right to an adequate standard of living, including basic subsistence; (2) the right to work, including non-discrimination, decent work, and fair wages; and (3) the right to basic income guarantees for those who cannot work.<sup>8</sup> By including the right to work centrally within a broader definition of economic rights, this definition brings labor rights back into the mainstream of human rights theory.

Yet contemporary research on economic rights tends to focus disproportionately on the first and third part of the definition (i.e., on measuring the right to an adequate standard of living and analyzing the nature of related legal and social welfare guarantees).<sup>9</sup> By contrast, analysis of the right to work and related labor rights are comparatively understudied in the economic rights literature,<sup>10</sup> with the exception of child labor, which has received considerable attention.<sup>11</sup> This article thus revisits the role of labor rights as instru-

---

8. See Shareen Hertel & Lanse P. Minkler, *Economic Right: The Terrain*, in ECONOMIC RIGHTS: CONCEPTUAL, MEASUREMENT, AND POLICY ISSUES 1 (Shareen Hertel & Lanse Minkler eds., 2007) [hereinafter ECONOMIC RIGHTS].

9. See, e.g., David L. Cingranelli & David L. Richards, *Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark*, in ECONOMIC RIGHTS, *supra* note 8, at 214; Mwangi S. Kimenyi, *Economic Rights, Human Development Effort, and Institutions*, in ECONOMIC RIGHTS, *supra* note 8, at 182; Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment* (Univ. of Conn. Human Rights Inst. Econ. Rights Working Paper Series, Working Paper No. 8, 2008), available at <http://www.econ.uconn.edu/working/8.pdf>; Michael Goodhart, "None So Poor That He Is Compelled to Sell Himself": *Democracy, Subsistence, and Basic Income*, in ECONOMIC RIGHTS, *supra* note 8, at 94; Lanse P. Minkler, *Economic Rights and the Policymaker's Decision Problem*, HUM. RTS. Q. (forthcoming).

10. Philip Harvey is one of the few scholars to focus extensively on the right to work. Examples of his wide-ranging scholarship include: *Benchmarking the Right to Work*, in ECONOMIC RIGHTS, *supra* note 8, at 115, and *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363 (2002).

11. See generally Peter Dorman, *Worker Rights and Economic Development: The Cases of Occupational Safety and Health and Child Labor*, in ECONOMIC RIGHTS, *supra* note 8, at 363; Kaushik Basu & Zafiris Tzannatos, *The Global Child Labor Problem: What Do We Know and What Can We Do?* (Cornell Univ. Ctr. for Analytic Econ., Working Paper No. 03-06, 2003), available at <http://www.arts.cornell.edu/econ/CAE/Basu-Tzannatos%2012.pdf>; Eric V. Edmonds & Nina Pavcnik, *Child Labor in the Global Economy*, 19 J. ECON. PERSP. 199 (2005); CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER (Burns H. Weston ed., 2005); The Director-General, *A Future without Child Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, delivered to the 90<sup>th</sup> Session of the International Labour Conference*, Report I (B) (2002); ATLESON ET AL., *supra* note 4, ch. 10.

mental to achieving the UDHR's promise of "social progress and better standards of life in larger freedom."

#### RULES AND NORMS THAT INFORM LEGAL OBLIGATIONS

Current scholarship generally divides labor rights into two categories: *fundamental human rights* (the right to life; to protection against forced labor; to protection from the worst forms of child labor; and freedom of association)<sup>12</sup> and *other labor standards* (wages; benefits; health and safety; and other working conditions deemed "economic and social" in nature).<sup>13</sup> The ILO's 1998 Declaration on Fundamental Principles and Rights at Work reinforced the scope of the fundamental, or "core," set of labor rights by including non-discrimination, protection against forced and child labor, and freedom of association and collective bargaining. Notably, there is considerable theoretical and legal debate over the scope of the right to freedom of association.<sup>14</sup> The purpose of this article is not to reify these existing categories but, rather, to explain them as a point of departure for understanding the social ferment over how to define and apply labor rights in the 21<sup>st</sup> century.

International human rights law has historically obliged states, not companies, to respect, protect, and fulfill human rights.<sup>15</sup> Despite what activists on the ground may assert, human rights law only

---

12. These fundamental labor rights overlap with rights that have the force of *jus cogens* (e.g., protections from slavery, forced labor, involuntary servitude, and human trafficking). See ATLESON ET AL., *supra* note 4, at 30.

13. See *id.* at 4.

14. This debate centers on whether or not freedom of association extends either to the right to collective bargaining or to strike. For a list of examples of related case law, see *id.* ch. 8. See also 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).

15. See Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/10 (Nov. 2001), cited with approval in Hum. Rts. Council [HRC], *Addendum: State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, Report of the Special Representative of the Sec'y-General on the Issue of Human Rights and Transnational Corporations and Other Bus. Enterprises, 9 n.13, U.N. Doc. A/HRC/4/35/Add.1 (Feb. 13 2007) (prepared by John G. Ruggie) [hereinafter *Addendum on State Responsibilities Report*]. There are many legal standards (in hard and soft law) that undergird labor rights, including: the UDHR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights; General Comments to ICESCR; a wide range of ILO Conventions, declarations, and commentary; the Limburg Principles (1986) and Maastricht Guidelines (1997); and the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises.

applies directly to companies in instances where corporations are liable for “certain war crimes and crimes against humanity” through complicity with states.<sup>16</sup> However, the recent doctrine adopted by the United Nations, the “responsibility to protect,” requires each state not only to hold corporations accountable for observing federal, state, and local labor law, but also to prevent, investigate, and punish abuse by non-state actors, such as private corporations, and to provide access to redress.<sup>17</sup> The responsibility to protect has been the point of departure for theorizing the nature of corporate accountability for human rights. It is integral not only to the conceptualization of both the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, but also to the U.N. Global Compact. However, the scope of state responsibility resulting from possessing extra-territorial jurisdiction over corporate activity remains far less clear.<sup>18</sup>

Corporations, in turn, have adopted voluntary standards which commit them to protect workers’ rights and the rights of people in communities affected by corporate operations, over and above what national law would require. These standards range from company-specific “codes of conduct” to industry-wide or sector-based standards.<sup>19</sup> They are generally adopted by private sector companies

---

16. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Hum. Rts., *Promotion and Protection of Human Rights*, Interim Report of the Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corporations and Other Bus. Enterprises, ¶¶ 61–62, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (prepared by John G. Ruggie) [hereinafter *Promotion and Protection of Human Rights Report*].

17. See *Addendum on State Responsibilities Report*, supra note 15; see also Hum. Rts. Council [HRC], *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corporations and Other Bus. Enterprises, ¶¶ 18–22, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (prepared by John G. Ruggie) [hereinafter *Protect, Respect and Remedy Report*]. For more on the “responsibility to protect,” see Report of the Secretary-General’s High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2004); and G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (adopting the 2005 World Summit Outcome).

18. Hum. Rts. Council [HRC], *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Sec’y-General on the Issue of Human Rights and Transnational Corporations and Other Bus. Enterprises, 6 n.10, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John G. Ruggie) [hereinafter *Business and Human Rights Report*].

19. Deborah Leipziger provides an excellent summary of voluntary Corporate Social Responsibility standards in DEBORAH LEIPZIGER, *THE CORPORATE RESPONSIBILITY CODE BOOK* (2003).

(typically not by state-owned corporations), largely in response to public pressure from consumers and investors.<sup>20</sup> Such voluntary standards are not legally binding unless affixed to contracts with suppliers, thus creating a form of “hybrid” law.<sup>21</sup> Indeed, as Atleson, Compa, Rittich, Sharpe, and Weiss explain, “because these guidelines are non-binding ‘soft law’ . . . their location at the intersection of public and private international law has remained uncertain.”<sup>22</sup> John G. Ruggie, the U.N. Secretary General’s Special Representative on Human Rights and Transnational Corporations, echoes this observation, noting that the standards to which companies and citizens refer for corporate conduct on labor rights “in many instances do not simply ‘exist’ out there waiting to be recorded and implemented but are in the process of being socially constructed.”<sup>23</sup>

In many ways, the controversy over the nature of legal obligations for labor rights in the 21<sup>st</sup> century stems from the creative, ongoing use by activists of a rhetoric of “workers’ rights as human rights.” This rhetoric asserts dual responsibility for rights protection (i.e., shared equally by states and corporations) while leaving free range to theorists and lawyers to update their theoretical frameworks and transform public policy accordingly. As industrial relations scholar Lance Compa observes:

Trade unionists find that charging employers with violations of international human rights, not just violations of the [United States National Labor Relations Act], throws companies on the defensive and gives more force to their appeals to the court of public opinion. Employer conduct that is entirely legal under U.S. law—captive audience meetings, one-on-one supervisor pressure, threats of permanent replacement, and much more—is vulnerable to attack in light of International Labour Organization (ILO) standards and international human rights norms.<sup>24</sup>

On the one hand, then, labor rights activists and grassroots defenders have played a unique role in transforming public consciousness and formal political institutions to be more responsive to

---

20. For detail on the range of actual corporate practice on human rights, see *Business and Human Rights Report*, *supra* note 18, at 15–24.

21. *Promotion and Protection of Human Rights Report*, *supra* note 16, ¶ 50, at 13.

22. ATLESON ET AL., *supra* note 4, at 18.

23. *Promotion and Protection of Human Rights Report*, *supra* note 16, ¶ 54, at 14.

24. Compa, *supra* note 3, at 108.



the plight of workers at risk worldwide. The creation of multi-stakeholder initiatives to monitor the production of apparel for American universities and colleges is but one example.<sup>25</sup> On the other hand, international human rights law, as currently interpreted, remains state-centric, which means that holding corporations accountable for human rights violations is nearly impossible except in the currently limited circumstances discussed above. Sloppy theorizing can exaggerate the power of existing norms and institutions (as the old adage warns: when everything is a right, nothing gets protected). Yet, ignoring public demands to constrain, or at least channel, corporate power in the context of burgeoning global economic integration and widening inequality can erode democratic legitimacy of states.

#### NEW CONCEPTUAL FRAMEWORKS FOR STATE, MARKET, AND CIVIL SOCIETY RELATIONS

Today, a number of debates animate the discussion over how to secure labor rights in the 21<sup>st</sup> century and beyond. This section touches on but two. The first debate centers on how best to define the human rights responsibilities of non-state actors. The second debate centers on how labor rights apply to migratory or non-citizen workers, such as undocumented migrant workers. The section will take up each debate briefly and explore their implications upon the interaction between states, corporate actors, and civil society.

Debates over the legal obligations of non-state actors for labor rights are thorny, particularly as they relate to corporations. If the burden for protecting labor rights shifts to be equally shared by states *and* corporations, then what are the implications for democracy? How would civil society-based actors hold corporations accountable, other than through consumer activism such as selective purchasing or boycotts? Without the capacity to “vote” a corporation out of office, do only those consumers with economic “clout” count (as distinct from democratic systems within which each voter has an equal “voice” through his or her vote, at least in theory)?

Ruggie has argued that since corporations are, by definition, distinct from democratic public interest institutions, any efforts to

---

25. David Vogel discusses these and a wide range of other multi-stakeholder initiatives in the U.S.A. and Europe in DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005).

make them co-equal duty bearers with governments risk “undermining efforts to build indigenous social capacity and to make governments more responsible to their own citizenry.”<sup>26</sup> In his capacity as U.N. Special Representative on Business and Human Rights, Ruggie has provoked considerable controversy with non-governmental organizations (NGOs) involved in labor and economic rights advocacy by arguing that the optimal way to promote corporate social responsibility is not through regulation, but rather, through voluntary standards.

Labor rights are best protected when states are capable of, and willing to enforce, robust regulations. This, in turn, means that labor rights advocates themselves must shift their focus from an emphasis largely on corporate reform through voluntary standards-based programs, to an emphasis on strengthening democracy in the places where production occurs and where corporations are based. Democratic politics create an arena for channeling citizen pressure to regulate corporate activity in the interest of protecting workers and promoting more equitable social development (for example, through corporate tax policy). Democratic politics also allow for the creation of processes and institutions through which citizens can hold governments accountable for enforcement of labor standards. And democratic politics allow for the creation of civil society organizations that engage in direct organizing of workers and also shadow the process by which government makes and implements policy.

Admittedly, again, this is an idealized view of democratic politics. Part of the reluctance of some labor rights advocates to embrace a “democracy promotion” agenda may stem from cynicism about the limits of democracy, or pragmatism about the willingness of corporations to tolerate, let alone embrace, regulation.<sup>27</sup> But business ethicist David Vogel argues:

Corporate responsibility should be about more than going “beyond compliance”; it must also include efforts to raise compliance standards. In fact, the most critical dimension of

---

26. Letter from John G. Ruggie, Special Representative of the Sec’y-Gen. on Bus. & Human Rights, to Olivier De Schutter & Antoine Bernard, Federation Internationale des Ligues des Droits de l’Homme (Mar. 20, 2006), *available at* <http://198.170.85.29/Ruggie-response-to-FIDH-20-Mar-2006.pdf>.

27. Robert B. Reich presents a trenchant critique of the limits of corporate social responsibility in *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007). See especially chapter 5, on “Politics Diverted.”

corporate responsibility may well be a company's impact on public policy. A company's political activities typically have far broader social consequences than its own practices. Yet relatively few of the demands raised by activists or social investors have addressed business-government relations.

....

If companies are serious about acting more responsibly, then they need to reexamine their relationship to government as well as improve their own practices. . . . Civil and government regulation both have a legitimate role to play in improving public welfare.<sup>28</sup>

Commenting more broadly on international labor rights activism, sociologist Gay Seidman observes that advocates often "recognize the limits of [corporate] voluntarism, but few see any viable alternative."<sup>29</sup> She joins a chorus of diverse voices calling for greater attention to the role of civil society groups in promoting democracy hand-in-hand with labor rights. As Compa points out, simply asserting "workers' rights are human rights" without also working toward renewed "industrial democracy" itself (i.e., through the use of unions) can result in an overly legalistic process that "stifles militancy and direct action."<sup>30</sup> Labor historian Joseph McCartin echoes this sentiment, noting that "the 'workers' rights are human rights' formulation alone will prove inadequate to the task of rebuilding workers' organizations in the United States unless we couple it with an equally passionate call for democracy in our workplaces, economy, and politics."<sup>31</sup>

The second debate addressed briefly in the remainder of this article centers on the rights of migratory and noncitizen workers. We live in an era in which capital is more mobile than at any prior time in history, while labor is comparably less able to move freely and legally. Indeed, the rules of the global economy continue to reflect a bias toward the protection of capital over labor.<sup>32</sup> This bias renders

---

28. VOGEL, *supra* note 25, at 171–74 (internal citations omitted).

29. SEIDMAN, *supra* note 7, at 40, 44.

30. Compa, *supra* note 3, at 115.

31. Joseph A. McCartin, *Democratizing the Demand for Workers' Rights: Toward a Re-Framing of Labor's Argument*, DISSENT, Winter 2005, available at <http://www.dissentmagazine.org/article/?article=271>, cited with approval in *id.* at 115.

32. See generally JAGDISH BHAGWATI, *A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY* (1998).

undocumented workers (or “irregular migrants” as they are also known) among the most vulnerable of all working people, not only with regard to violations of their non-derogable rights not to be killed or enslaved,<sup>33</sup> but also in terms of violations of labor rights and working standards.<sup>34</sup> Yet, workers continue to migrate regardless of their legal status and they do so more cheaply and quickly than ever before.

Advocates have increasingly begun to employ international human rights standards in defense of migrant and noncitizen workers’ rights, appealing to their rights as human beings *regardless* of citizenship or legal status. Such standards range widely—from longstanding ILO conventions, such as No. 143 on Migrant Workers<sup>35</sup> to the newer Migrants’ Rights Convention.<sup>36</sup> The North American Agreement on Labor Cooperation (NAALC) of 1994, commonly known as the “labor side accord” to the North American Free Trade Agreement, also includes specific provisions on migrant laborers’ rights.<sup>37</sup> References to domestic work are included, as well in international “soft law,” such as the Declaration and Programme of Action of the World Summit for Social Development. Yet without broad-based public support for migrants’ rights, policymakers are often reluctant to champion a constituency that cannot vote—particularly one comprised of people who are working illegally.

In the absence of ratification of relevant treaties and of more

---

33. See generally KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* (1999).

34. See generally James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 *ETHICS & INT’L AFF.* 321 (2006); Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 *U. PA. J. INT’L L.* 169 (2007); Sarah S. Willen, *Exploring “Illegal” and “Irregular” Migrants’ Lived Experiences of Law and State Power*, 45 *INT’L MIGRATION* 2 (2007).

35. International Labour Organization [ILO] Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 17426 U.N.T.S. 1120. For a list of key ILO conventions and other relevant international standards related to the rights of migrant workers, see Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants – International standards, <http://www2.ohchr.org/english/issues/migration/rapporteur/standards.htm> (last visited Mar. 24, 2009).

36. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* May 2, 1991, 30 *I.L.M.* 1517 [hereinafter *Migrant Rights Convention*].

37. The full text of the NAALC is available at <http://www.naalc.org/naalc.htm> (last visited Mar. 24, 2009).

generalized protections for workers in international trade law,<sup>38</sup> migrant and noncitizen workers remain vulnerable to abuse. In many countries on the “receiving end” of migratory labor flows, including the United States, domestic labor law has become increasingly biased against immigrant workers. The prominent U.S. advocacy organization Human Rights Watch has observed: “Federal [U.S.] laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights.”<sup>39</sup> Indeed, the U.S. Supreme Court, in its now infamous *Hoffman Plastic* decision,<sup>40</sup> ruled that because of their illegal status, workers were not entitled to back pay for lost wages—a ruling that provoked a complaint by the AFL-CIO to the ILO’s Committee on Freedom of Association and a resulting decision by the Committee *against* the United States in November 2003.<sup>41</sup>

This bias, in turn, extends to the position that “recipient” countries take on migrants’ rights in regional and international forums.<sup>42</sup> The creation of the new Migrants Rights’ Convention<sup>43</sup> appears to be a hopeful development, but it disproportionately protects legal over “irregular” migrants.<sup>44</sup> Only thirty-nine states are party to the treaty, all of which are migrant “sending” countries. Not a single migrant “receiving” country in the industrialized world has yet ratified the convention.<sup>45</sup> Advocates have begun a concerted campaign aimed at increasing ratification; however, these efforts remain diffuse.<sup>46</sup> Traditionally, nongovernmental organizations such as the International Labor Rights Fund have been the principal advocates for irregular migrants and other especially vulnerable groups of working people.

---

38. See generally SUSAN ARIEL AARONSON & JAIME M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING* (2008).

39. Compa, *supra* note 3, at 106 (citing HUMAN RIGHTS WATCH, *BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS* (2004)).

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

41. For details, see Compa, *supra* note 3, at 111–12; see also ATLESON ET AL., *supra* note 4, at 797–801.

42. CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES (Christian Joppke ed., 1998).

43. Migrant Rights Convention, *supra* note 36.

44. See generally Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT’L MIGRATION REV. 737 (1991).

45. See generally Juhani Lönnroth, *The International Convention on the Rights of Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT’L MIGRATION REV. 710 (1991).

46. See generally Graziano Battistella, *The Human Rights of Migrant Workers: Agenda for NGOs*, 27 INT’L MIGRATION REV. 191 (1993).

2009]

BRINGING LABOR RIGHTS BACK IN

295

But new allies have emerged, both from within the international labor movement, which increasingly has recognized the need to unionize citizen and noncitizen workers alike, and from among mainstream human rights NGOs. For example, Human Rights Watch has begun to report on labor rights abuses against non-citizen workers, calling upon host states and home states to better regulate protections for these vulnerable workers while also calling upon employers to fulfill their obligations under domestic labor law.<sup>47</sup>

There still may be a long way to go toward bringing labor rights back into the mainstream practice of human rights. But this dynamic, and often highly contentious, process is already underway, presenting fascinating opportunities for scholarly inquiry and practical action on behalf of some of the most vulnerable people in the “new” global economy.

---

47. HUMAN RIGHTS WATCH, “AS IF I AM NOT HUMAN”: ABUSES AGAINST ASIAN DOMESTIC WORKERS IN SAUDI ARABIA (2008), available at <http://hrw.org/reports/2008/saudiArabia0708>.