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A Question of Timing

Lance A. Compa
Cornell University ILR School, lac24@cornell.edu

Deborah Greenfield
AFL-CIO

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Abstract
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'American exceptionalism' to international law is deeply rooted in American legal culture. Outside a small cadre of comparative and international specialists, most actors in the US labour law system have little familiarity with ILO conventions and labour provisions in other international instruments.

But our small cadre is growing as unions intensify their efforts to achieve global solidarity.

Increasingly, American trade unionists and NGO allies are turning to the ILO's Committee on Freedom of Association and other international bodies to lodge complaints against the United States and employers who violate workers' freedom of association under international standards, regardless of whether US law sanctions their tactics. Are we – and should we be – setting the stage for a campaign to ratify ILO Conventions 87 and 98? We explain here that legal barriers to ratifying conventions, coupled with strategic organising considerations, make such a campaign unlikely in the near term.

The US and the Committee on Freedom of Association

The United States has ratified only fourteen of the ILO's 187 conventions, and only two of the eight 'core' conventions: No. 105 on forced labour and No. 182 on the worst forms of child labour. It has not ratified Convention No. 29 on forced labour, No. 87 on freedom of association, No. 98 on the right to organise and collective bargaining, No. 100 on equal pay, No. 111 on non-discrimination, and No. 138 on child labour.

But readers familiar with ILO jurisprudence know that the principles of Conventions 87 and 98 occupy a paramount status deriving from the Constitution and the Philadelphia Declaration. All member countries must comply with these principles, regardless of whether they have ratified the Conventions. Since its creation in 1951, the Committee on Freedom of Association has articulated rules shaping an international 'law' on freedom of association.

When the AFL-CIO and other trade unions file complaints with the Committee, the US government's defence is to claim that US law and practice complies with the spirit of these principles; that the details don't matter. In fact, US labour law violates ILO standards not at the margins, but at their core. Key non-complying aspects include:

- Denying the right to organise to millions of agricultural workers, supervisors, and so called 'independent contractors' (even when they are completely dependent on a single employer for their jobs) – they can be sacked with impunity for trying to form a union;
- In the name of 'free speech', giving employers the right to campaign aggressively against workers' organising efforts through interference and intimidation, including captive audience speeches and managerial pressure tactics;
- Denying workers the right to meet union representatives at the workplace to discuss forming a union;
- Allowing employers to fire undocumented immigrant workers for trying to form a union and denying those workers a legal remedy for such discrimination;
- Perpetuating delay-ridden, ineffectual administrative and judicial procedures and remedies;
- Prohibiting trade union solidarity through harsh secondary boycott laws;
- Allowing employers to permanently replace workers who exercise the right to strike;
- Denying federal employees the right to bargain over wages and benefits and prohibiting them from striking under any circumstances; stripping large groups of formerly union-represented federal employees of their bargaining rights in the name of 'homeland security';
- Denying collective bargaining rights to public employees in many of the 50 states.

Even the business community agrees that US labour law violates Conventions 87 and 98, although for largely self-serving reasons. In 1984, the chief counsel to the US employers' delegation to the ILO, Edward E. Potter, wrote an entire book on the subject. *Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on US Law and Practice of Ratification of ILO Conventions No. 87 and No. 98* details many ways – including some that are arguable, at best – in which US law diverges from ILO standards and how, from a management perspective, ratification is contrary to employers' interests. Potter's book has become management's 'bible' in its unrelenting opposition to ratification of the ILO's freedom of association conventions.

In several cases brought against the United States, the Committee on Freedom of Association has found that key features of US labour law violate ILO freedom of association standards – permanent striker replacement, denying the rights of immigrant workers, prohibiting collective bargaining by state and federal public employees, and more. The Committee's rulings help raise trade union consciousness and provide valuable support in courts of public opinion. But they do not achieve domestic labour law reform, and, ironically, they may take us farther away from ratification of Conventions 87 and 98.

Legal barriers

Some countries ratify ILO conventions as a precursor to reforming domestic law and practice. Not so in the United States, precisely because ratification would create an obligation to bring domestic law into compliance with the conventions. Here is where American exceptionalism kicks in: the US government is loath to change

DEBORAH GREENFIELD is an Associate General Counsel at the AFL-CIO in Washington, DC. where she handles ILO matters
LANCE COMPA is a Senior Lecturer at Cornell University's School of Industrial and Labor Relations, New York

domestic laws under compulsion of international treaties.

In 1984, shortly after returning to the ILO after a three-year withdrawal, and in the course of ratifying Convention 144 on tripartite consultations, the US Senate sought to ensure sovereignty of domestic lawmaking with respect to international labour standards. The Senate set out three conditions for future ratification of ILO conventions:

(1) US law must comply with the ILO convention *before* the Senate ratifies it – that is, only both houses of Congress can change federal labour law through the normal legislative process, not the Senate alone 'through the back door' by ratifying an ILO convention;
(2) a government-business-labour committee called the US Tripartite Advisory Committee on International Labor Standards (TAPILS) must agree by consensus that US law comports with the ILO convention before submitting it for ratification; and
(3) ratification cannot change state labour law and practice.

Although these are stringent rules, they need not have become insurmountable barriers to ratification. Instead, they could have yielded fruitful comparisons between US law and ILO standards as the first step in domestic law reform and subsequent ratification of conventions.

Not surprisingly, Congress – backed by the business community – has lacked the political will to choose this course. Instead, the standard reply of US governments when faced with criticism of its paltry ratification record is, "would you conventions and violate them, or not ratify them and comply with their spirit?" However, this begs the question of the extent to which the US complies with ILO conventions and how we can achieve meaningful domestic law reform in line with ILO standards.

Prospects for ratification

Under the Clinton Administration, a glimmer of hope emerged that the US might move toward ratification of Conventions 87 and 98 when it acknowledged for the first time serious problems with US labour law and practice when measured against ILO standards. In its first annual follow-up report under the Declaration of Fundamental Principles and Rights at Work, the US government said:

'...The United States acknowledges that there are aspects of this system that fail to fully protect the rights to organise and bargain collectively of all employees in all circumstances...

The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time... Union representatives often have little access to employees at work, particularly when compared to employers' access...

The NLRA does not provide for compensatory or punitive damages for illegal terminations... Remedies available to the NLRB may not provide a strong enough incentive to deter unfair labour practices by some employers during representation elections and first contract campaigns.

Other issues in US law ...include the lack of NLRA coverage of agriculture employees, domestic service employees, independent contractors, and supervisors. Additionally, there are varying degrees of protection for public sector workers with regard to collective bargaining and the right to strike.

Under United States labour law an employer may hire replacement workers in an attempt to continue operations during a strike... This provision of United States labour law has been criticised as detrimental to the exercise of fundamental rights to freedom of association and to meaningful collective bargaining'.

While the Clinton administration's willingness to express self-criticism under ILO standards signalled possible progress on ratification, any movement ended abruptly with the Bush administration. In fact, the United States has moved backward. Its annual report under the Declaration has removed the self-examination discussed above. It states that US law and practice are 'generally in compliance' with ILO norms and concedes no difficulties in implementation. It has disregarded several obligatory deadlines for self-reporting on the conventions. Tripartite consultations have ground to a halt. In its 2007 report, the ILO's Committee of Experts seriously questioned the Bush administration's compliance with its tripartite obligations under Convention 144. Nothing will happen between now and January 2009, when a new president takes office.

But even then, it is highly unlikely that winning ratification of Conventions 87 and 98 will become a priority for the labour movement and its allies. For one thing, it takes two-thirds of the Senate to ratify an ILO convention. Republicans are likely to oppose any measures creating greater rights for workers and unions. Democrats are unlikely to win enough seats in 2008 to achieve ratification on their own.

A bedrock political challenge lies underneath these numbers. American workers, trade unionists and other labour advocates cannot expect ratification of Conventions 87 and 98 to solve the problems endemic to US labour law. They have to do the hard job of political organising and mobilising to win a Congress and White House sympathetic to workers' concerns. That's only a start. It will take more political action to win reforms that will bring US labour law into conformity with ILO standards. The Employee Free Choice Act, now pending in Congress, stands at the centre of labour's efforts to implement genuine freedom of association in our federal law.

Even with a pro-labour Democrat in the White House and a solid Democratic majority in Congress, significant labour law reform will certainly meet a ferocious counterattack by employers. But it is more democratic and more sustainable for workers to win labour law reform by hard struggle in their domestic political system than to seek – vainly, in light of the two-thirds requirement and the rules laid down by the Senate – ILO ratifications beforehand. When we win the fight to make our labour laws meet international standards, we will have set the stage for ratification of ILO conventions.

A final observation: this does not mean that American labour advocates will stop invoking the principles that underlie Conventions 87 and 98 or filing ILO complaints against the US government. Indeed, using the ILO and other international labour rights instruments and mechanisms has become an important trade union strategy in many organising and bargaining struggles. Its importance grows as workers worldwide build international solidarity in defence of trade union rights. US unions, NGOs and their allies are eager to work with counterparts in this movement.

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