BOOK REVIEW

Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards, Lance Compa (Ithaca: Cornell University Press, 2004, 264pp., $16.95, paperback)

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Human Rights Watch is a U.S.-based NGO that "conducts regular, systematic investigations of human rights abuses in some seventy countries around the world." In 2000, it published a major study on freedom of association in the United States by reference to international human rights standards. This report has now been republished by Cornell University Press, with the addition of an Introduction that reviews the impact of the original Report, and provides an update on some of the case studies contained therein.[1]

The republication of the Report and the update is welcome for a number of reasons: first, it serves as a timely reminder that the principle of freedom of association for trade union purposes *is* a fundamental human right, and should be respected as such; second, it provides a telling antidote to any perception that breach of the principle of freedom of association is the exclusive preserve of totalitarian regimes in the developing world; and, third, it provides a chilling picture of the lack of respect for an internationally recognized human right in the self-appointed guardian of freedom and of democratic values throughout the world.

The Report is clearly-written, and should be readily comprehensible even to those who are not familiar with United States Labor Law. It is, however, unfortunate that there is no Bibliography and no Index. The value of the Report as a reference tool is significantly reduced by these omissions.

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1. LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004).

I. FREEDOM OF ASSOCIATION AS A FUNDAMENTAL HUMAN RIGHT

The notion that freedom of association for trade union purposes should be regarded as a fundamental human right finds recognition in a number of international standard-setting instruments, including the Preamble to the Constitution of the ILO, the Declaration of Philadelphia, the Universal Declaration of Human Rights (Articles 20(1) and 23(4)), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (Article 8) and the International Covenant on Civil and Political Rights (ICCPR) (Article 22).[2]

The most significant elaborations of the principle are to be found in the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and Right to Organise and Collective Bargaining Convention 1949 (No. 98). These are amongst the most-ratified of all ILO Conventions,[3] and both of them form part of the Declaration on Fundamental Principles and Rights at Work which was adopted by the International Labour Conference in 1998.[4] Supervision of compliance with these Conventions is a major part of the work of the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts), and over the years has formed the basis for a number of representations and complaints under Articles 24 and 26 of the Constitution of the ILO.

Respect for the principles enshrined in Conventions Nos. 87 and 98 is seen to be so fundamental to the rationale for, and functioning of, the ILO that all Member States are taken to have agreed to observe those principles by force of the very fact of becoming a

2. For a more detailed review of international standards relating to freedom of association see Breen Creighton, *Freedom of Association*, *in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES (Roger Blanpain ed., 2004).

3. As of September 1, 2005 Convention No. 87 had been ratified by 144 Member-States, whilst Convention No. 98 had attracted 154 ratifications.

4. For descriptive analyses of the Declaration see H. Kellerson, *The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future*, 137 INT'L LAB. REV. 223 (1998); J. Bellace, *The ILO Declaration of Fundamental Rights at Work*, 17 INT'L J. COMP. LAB. L. & INDUS. REL. 269 (2001); A. Trebilcock, *The ILO Declaration on Fundamental Pinciples and Rights at Work: A New Tool*, *in* THE ILO AND THE SOCIAL CHALLENGES OF THE 21ST CENTURY (R. Blanpain & C. Engles, eds. 2001). For a robust critique see Philip Alston *Core Labour Standards and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); *cf.* B. Langille, *Core Labour Rights—The True Story*, 16 EUR. J. INT'L L. 409 (2005) and F. Maupin, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439 (2005), together with Alston's rejoinder in *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467 (2005).

Member of the Organisation. This in turn provides the basis for the jurisdiction of the Governing Body's Committee on Freedom of Association (CFA).

This Committee was originally established to act as a kind of filter-mechanism for the Fact-Finding and Conciliation Commission on Freedom of Association, but has in practice usurped the functions of the Commission to such an extent that that body is now of little practical relevance, except in relation to countries that are Members of the United Nations but not of the ILO.[5]

By and large, the principles that have been developed by the CFA are coterminous with, and are described by reference to, the requirements of Conventions Nos. 87 and 98. However, it is important to appreciate that strictly speaking the principles applied by the CFA and the requirements of the two Conventions are not one and the same thing. For example, the ILO principles relating to the right to strike were originally developed by the CFA as part of the principles of freedom of association, and were then "read-in" to Convention No. 87 by the Committee of Experts.[6] Furthermore, the CFA adopts a more ad hoc approach to the issues that are before it in any given case, whereas the Committee of Experts adopts a more juridical and internally consistent approach to the application of ratified Conventions. It is misleading, therefore, to suggest that (page 46) "the United States has accepted jurisdiction and review by the ILO Committee on Freedom of Association of complaints filed against it under these Conventions."

Despite its extensive recognition as a fundamental human right in international standard-setting instruments and in the activities of the supervisory activities of the ILO, freedom of association for trade union purposes often appears to be marginalized in human rights discourse and to be accorded only limited attention in the context of monitoring respect for fundamental human rights in an international context. As Compa points out (page 40):

> International human rights analysts and advocates have been slow coming to grips with issues of workers' rights. Attention has focussed on pressing problems of arbitrary detention and torture, massacres of indigenous peoples and ethnic minorities, atrocities of war and civil war, and other gross human rights violations, and not on workers' rights to form and join trade unions and bargain

5. Interestingly, one of the most recent cases examined by the FFCC involved alleged breaches of freedom of association in Puerto Rico at a time that the United States was not a member of the ILO. *See* N. VALTICOS & G. VON POTOBSKY, INTERNATIONAL LABOUR LAW ¶ 690 (2d ed. 1995).

6. *See* Int'l Labour Conference, 81st Session, Report III, part 4B, ¶¶ 145–51, Geneva 1994.

collectively. For their part, worker representatives have been slow to see human rights aspects in their work.

To some extent this may reflect the fact that a specialized UN agency, in the form of the ILO, has adopted detailed standards in this area, and has developed sophisticated supervisory procedures to oversight respect for those standards, with the consequence that other supervisory agencies tend to focus on other problems, and to leave freedom of association issues to the ILO. It may also reflect a perception that breaches of the principle of freedom of association is in some way less serious than other human rights violations such as denial of the right to life and liberty. In some respects, that is indeed the case, but it is important also to appreciate that denial of one fundamental right is often accompanied by, or is a precursor to, denial of another.

To the extent that *Unfair Advantage* helps to bring respect for the principles of freedom of association into the mainstream of human rights debate, it performs an invaluable service for all who are concerned with the protection of fundamental human rights at both national and international level. That it does so by reference to law and practice in the world's largest and most sophisticated economy is both telling and profoundly disturbing.

II. NOT IN THE US OF A

The great majority of cases that come before the CFA come from the developing world. For example, an analysis conducted by this reviewer in 2004 showed that of the 87 cases dealt with by the Committee in 2002, only four came from Western Europe or North America, whilst 13 came from Africa, 14 from Asia, and 45 from Latin America.[7] In terms of subject-matter, around a quarter of cases involved denial of human rights in the sense of violence against the person and/or deprivation of liberty. The others involved unfair labor practices, interference with the right to organize, denial of the right to engage in autonomous collective bargaining and (total or partial) denial of the right to strike.[8]

It by no means follows that breach of the principles of freedom of association is confined to developing countries and/or totalitarian regimes outside Europe and North America. On the contrary, even a cursory reading of the annual reports by the Committee of Experts

7. See Creighton, *supra*, note 2, at 253–56.
8. As might be expected, many complaints involved more than one alleged infraction.

shows that there is widespread breach of the principles enshrined in Conventions Nos. 87 and 98 throughout both the developed and the developing world.[9] The material presented in *Unfair Advantage* clearly establishes that there are significant levels of non-compliance with these principles in the Unites States, although as will appear presently, there is relatively little evidence of this in the reports of the supervisory bodies of the ILO.

III. INTERFERENCE WITH FREEDOM OF ASSOCIATION IN THE UNITED STATES

The United States has always had a somewhat uneasy relationship with the ILO. Despite the role of President Wilson in the establishment of the Organisation, the United States did not join until 1935 and withdrew from membership for a period in the 1970s, rejoining only in 1981. On the other hand, it contributes almost one quarter of the Organisation's budget, and exerts a significant (some would say, excessive) influence over the direction and functioning of the Organisation.

In keeping with its uneasy relationship with the ILO, and with international human rights standard-setting institutions generally, the United States has not ratified either Convention No. 87 or No. 98. Among other things, this means that its law and practice in this area is not subject to periodic scrutiny by the Committee of Experts, and cannot be subject to Representations or Complaints under Articles 24 and 26 of the Constitution. However it is subject to the reporting obligations relating to the Declaration on Fundamental Principles and Rights at Work, and it is subject to the jurisdiction of the CFA. Significantly, however, relatively few complaints against the United States have been presented to the Committee over the years.

It is interesting to speculate why this should be the case. One possible explanation may reside in the failure, noted earlier, of worker representatives in the Untied States to view the difficulties they encounter on a day-to-day basis from a human rights perspective. Other factors may include: a lack of awareness of the extent to which U.S. law and practice are out of sympathy with accepted international norms in this area; a perception on the part of potential complainants that there would be little point in bringing such complaints due to the fact that there is little possibility that law and practice would be

9. *See* Creighton, *supra* note 2, 245–52. *See also* the most recent General Survey by the Committee of Experts on Freedom of Association *supra* note 6.

brought into line with any decision the Committee may hand down ; and a reluctance to prosecute complaints against the mother country in an international forum on the ground that it would be "unpatriotic" to do so.

It is interesting to note that even international organizations such as the International Confederation of Free Trade Unions or the World Federation of Trade Unions, and the various trade secretariats, also appear to have been reluctant to prosecute complaints against the United States over the years. This may have been understandable in the Cold War period, where there appears to have been a kind of unwritten understanding that "free" trade union organizations would not initiate complaints against Communist States, and vice versa. It is disappointing that the practice of self-denial should have continued in the post-Communist era. It is also disappointing that Compa did not see fit to proffer any views on these issues.

Whilst *Unfair Advantage* leaves no doubt that both law and practice in the United States are in breach of international law relating to freedom of association, it is important to keep the nature and extent of non-compliance in perspective. In particular, there is little evidence of State-sanctioned suppression of trade union organization, and (page 8):

> U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining or strikes are outlawed.

That said (ibid):

> the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary, workers' freedom of association is under sustained attack in the United States, and the government is often failing in its responsibility under international human rights standards to deter such attacks and protect workers' rights.

Furthermore, some of the breaches identified in the Report do involve significant levels of interference with the personal freedoms of individual workers,[10] and on occasion evince a measure of government complicity in denial of basic organizational rights.[11] Nevertheless, it is true that most of the breaches of the principle of freedom of association that are described in *Unfair Advantage* relate to various

10. *See*, *e.g.*, COMPA, *supra* note 1, at 94–104 and xxx (discussion of attempts at union organization amongst North Carolina slaughterhouse workers).

11. *See*, *e.g.*, *id.* at 99–100 and 104 (North Carolina slaughterhouse workers), 128 (Louisiana shipbuilding dispute), and 142 (breaking strike of Washington apple pickers).

forms of unfair labor practices such as interference with the right to engage in collective bargaining or the right to strike rather than interference with life or liberty.

Compa notes (page 9) that the objects of the National Labor Relations Act (NLRA) "comport with international human rights norms regarding workers' freedom of association." Unfortunately (ibid):

> The reality of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimised in reprisal for their exercise of the right to freedom of association.

Furthermore, "when the law is applied, enervating delays and weak remedies invite continued violations" (ibid).

The author cites a formidable body of evidence in support of this assessment. He also identifies a number of areas where either or both of the substance of the law and its application are inconsistent with international standards on freedom of association. Among the most significant of these are:

- The fact that the NLRA has been interpreted in such a way that it is permissible for employers permanently to replace employees who engage in "economic" strike action severely curtails the capacity of employees to take industrial action to protect and to promote their interests. It is of little comfort that workers who strike in response to unfair labour practices cannot be permanently replaced, although they can be replaced for the duration of their strike.
- In 1991, in Case No 1543, the CFA determined that this practice "entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights."[12] Despite this, the Courts have not shown any inclination to reverse the line of authority which gave rise to this state of non-compliance. Nor has Congress evinced any preparedness to bring law and practice into line with accepted international standards in this respect.
- The "exclusion" clause in section 2 of the NLRA has the effect that some 20% of the US workforce have no protection of the right to form or join a trade union, and have no legally recognized right to engage in collective bargaining. Among the excluded categories of workers are agricultural workers,

12. 74 ILO Off'l Bull. ¶ 93 (CFA 278th Rep. 1991).

domestic servants, low-level supervisors, independent contractors and public servants, although the latter do have some measure of protection by force of the First Amendment to the Constitution.

- Immigrant workers are subject to widespread abuse and denial of their legal rights. Decisions such as *Hoffman Plastic Compounds Inc v National Labor Relations Board* 535 US 137 (2002) show that this discriminatory and abusive behaviour has the sanction of the legal system.[13]
- Section 10 of the NLRA entirely proscribes "secondary boycotts" – that is, industrial action taken by workers at one location in support of workers at another plant. This clearly runs counter to the Committee of Experts' view that:
- Where a boycott relates directly to the social and economic concerns of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike.[14]
- Although the NLRA imposes an obligation to bargain in good faith where there has been a successful representation ballot, the remedies in relation to failure to bargain in good faith are so woefully inadequate as seriously to compromise the right of workers to engage in autonomous collective bargaining as required by Article 4 of convention No 98.
- Finally, as in most other developed countries, US Labour law has signally failed to come to terms with the emergence of new forms of work relationship such as (page 160) "temporary work, part-time jobs, contracted and subcontracted employment, on-call employment, day labor and other forms of atypical, non-standard, contingent, and often precarious work." Most such employees fall outside the scope of the regulatory regime, such as it is, essentially because that regime (ibid) "presumes a stable employment relationship between a worker and a clearly identified employer." According to Compa (ibid):

> The widespread denial of associational rights for workers in these new forms of employment relations and the failure of authorities to

13. In this case, "the Court decided that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the NLRA." COMPA, *supra* note 1, at xxi.

14. Int'l Labour Conference, Report of the Committee of Experts, 76th Session, Report III, Part 4A, 238–39 (1989), *quoted in* COMPA, *supra* note 1, at 212.

> protect them raise serious concerns under international human rights standards.

Overall, Compa provides a damning indictment of the failure of U.S. labor law to accord an appropriate level of respect to the fundamental human right of workers to combine together to promote and to protect their legitimate social and economic interests. Depressingly, there appears to be little prospect of change for the better (page 214):

> Labor law in the United States is deeply entrenched against even domestic pressure for change, let alone international human rights influence.

The author does claim to find some cause for hope in the linkage of labor rights and liberalization of trade in the NAFTA Labor Agreement (pages 218–19) and in various bilateral arrangements such as those between the United States and Jordan, Chile, Singapore and Australia (page 217). He also sees ground for optimism in the adoption of the OECD's "guidelines for multinational enterprises." It is a sad reflection on the state of U.S. labor law that the author can derive comfort from a process of such limited scope and so lacking in effective supervisory procedures as the OECD guidelines.