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The Right to Strike as Customary International Law

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Article

The Right to Strike as Customary International Law

James J. Brudney[†]

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INTRODUCTION

There has been a dramatic recent resurgence of strike activity in the United States. From auto plants to supermarkets to public schools to fast food outlets, workers around the country have recognized the fundamental importance of strikes—in economic, political, and dignitary terms.¹ Still, judges and legal scholars have had a difficult time establishing that the right to strike, which exists at a statutory level with substantial qualifications, should receive constitutional recognition. There have been isolated instances² or hints³ of judicial support, as well as scholarly contentions that the right may exist in some dormant form.⁴ But arguments to federal courts have regularly come up short, whether based on withholding labor as a due process liberty right;⁵ as resisting involuntary servitude;⁶ or as engaging collectively in freedom of association.⁷ While high profile strikes have become more visible around the world as well as in this country,⁸ labor law scholars have acknowledged, at times reluctantly, that the right to strike is not protected under well-settled U.S. constitutional standards.⁹

1. See Neal E. Boudette, *G.M. Workers Approve Contract and End U.A.W. Strike*, N.Y. TIMES (Oct. 25, 2019); Sandra E. Garcia, *Stop & Shop Strike Ends With Union Claiming Victory on Pay and Health Care*, N.Y. TIMES (Apr. 22, 2019); Brendon O'Brien, *After 11 Days, Chicago Teachers Strike to End as Union, Mayor Reach Deal*, REUTERS (Oct. 31, 2019), <https://www.reuters.com/article/us-chicago-education/after-11-days-chicago-teachers-strike-to-end-as-union-mayor-reach-deal-idUSKBN1XA12Y>; Zachary B. Wolf, *Why Teacher Strikes are Touching Every Part of America*, CNN (Feb. 23, 2019), <https://www.cnn.com/2019/02/23/politics/teacher-strikes-politics/index.html>; Andrew Van Dam, *Teacher Strikes Made 2018 the Biggest Year for Worker Protest in a Generation*, WASH. POST (Feb. 14, 2019); Noam Scheiber, *In a Strong Economy, Why Are So Many Workers on Strike?* N.Y. TIMES (Oct. 20, 2019). See generally Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 47-51 (2016).

2. See, e.g., *County Sanitation Dist. No. 2 of LA County v. Local Service Employees Int'l Union*, 699 P.2d 835, 848-54 (Cal. 1985); *id.* at 855-66 (Bird, C.J. concurring); *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 885 (D.D.C. 1971) (Skelly Wright, J., concurring).

3. See, e.g., *Lyng v. Int'l Union, UAW*, 485 U.S. 360, 366-67 (1988); *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 557-59 (1949) (Rutledge J. concurring).

4. See, e.g., Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2076-89 (2018); Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL FORUM 513, 525-27 (2017).

5. See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926); *Int'l Union UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245, 249 (1949).

6. See, e.g., *NLRB v. Local 74 Carpenters*, 181 F.2d 126, 132 (6th Cir. 1950), *aff'd mem.* 340 U.S. 962 (1950).

7. See, e.g., *Lyng v. Int'l Union, UAW*, 485 U.S. 360, 362-70 (1988); see also *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 425-32 (1990) (lawyers' boycott as court-appointed counsel for indigent defendants not protected from antitrust regulation under First Amendment).

8. For recent high-profile U.S. strikes, see *supra* note 1. For strikes elsewhere, see, e.g., Simran Jain, *Neoliberalism and the Dignity of Labor in the Indian Automobile Industry: A Case Study of the Bajaj Auto Strike, Pune*, 70 LABOR L.J. 193-201 (2019) (2013 India automobile industry strike); Magdalena Kučko, *The Decision of TUFFly: Are the Ryanair Strikes to Be Seen as Extraordinary Circumstances*, 44 AIR & SPACE L. 321 (2019) (2018 Ryanair strike); Samuel Andreas Admasie, *Amid Political Recalibrations: Strike Wave Hits Ethiopia*, 21 J. LABOR & SOCIETY 431-435 (2018) (series of strikes in Ethiopia beginning in 2017); Mark Anner & Xiangmin Liu, *Harmonious Unions and Rebellious Workers: A Study of Wildcat Strikes in Vietnam*, 69 INDUS. & LAB. REL. REV. 3, 23-25 (2016) (study of Vietnam strikes, 2010-12, concluding *inter alia* that "strikes have become an important part of the political and economic landscape in Vietnam").

9. See, e.g., James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527-34 (2004); Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 575-91 (1951). See generally James B. Atleson, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 7, 24-25 (1983); Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, in *PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW* (Hugh Collins et. al. eds.,

This Article pursues a different path. Using international labor and human rights doctrine, it analyzes the right to strike as an integral element of freedom of association among workers, and concludes that this right has achieved the status of customary international law (CIL). It then explores possible ways to incorporate such an international right in the U.S. context, recognizing certain very real jurisdictional and remedial challenges.

Recourse to international law sources has garnered support from several current and recent justices,¹⁰ but the tide may be ebbing. Given evidence of contemporary Supreme Court reluctance to accept developments in international human rights law asserted by foreign nationals as U.S. federal law,¹¹ or to refer to foreign constitutions when interpreting federal constitutional rights,¹² the arguments developed here may be discounted by some readers as more of an aspiration than a practical possibility. There are several reasons, however, to look past this position.

For a start, establishing the right to strike as CIL is an important development in itself, beyond as well as within the U.S. judicial context. Because CIL has long been an incorporated source of English common law upon which courts may draw as required,¹³ the international right to strike may be applicable in British and related common law settings. Moreover, state courts have invoked

2018); Andrias, *supra* note 1, at 17-18.

10. See generally Stephen McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L REV 201 (2013); Susan H. Farbstain, *Justice Ginsburg's International Perspective*, in *ESSAYS IN HONOR OF JUSTICE RUTH BADER GINSBURG* (2013) (on file with Harvard Law School); Stephen Breyer, *America's Courts Can't Ignore the World*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/>.

11. See, e.g., *Jesner v. Arab Bank, PLC.*, 138 S.Ct. 1386 (2018) (declining to extend liability under Alien Tort Statute (ATS) to foreign corporations); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding ATS inapplicable to violations of law of nations occurring within territory of a foreign sovereign); See also *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that International Court of Justice decision requiring notice to certain foreign nationals was not enforceable domestic federal law); *Sanchez-Llamas v. Oregon*, 548 U.S. 341, 352-54 (2006) (holding that the Supreme Court could not impose a remedy in response to violations of the Vienna Convention on Consular Relations); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1023 (7th Cir. 2011). See generally Martin S. Flaherty, *RESTORING THE GLOBAL JUDICIARY 167-73* (2019) (describing how Supreme Court in recent decades has used justiciability factors such as standing and political question, and additional considerations including extraterritoriality and state secrets privilege, to keep foreign affairs controversies out of federal court); *id.* at 233-40 (discussing application of these constraints with specific reference to international human rights norms); Thomas H. Lee, *CUSTOMARY INTERNATIONAL LAW AND U.S. JUDICIAL POWER: FROM THE THIRD TO THE FOURTH RESTATEMENTS* (2020) (describing shift in Restatement of foreign relations law: from encouraging use of U.S. judicial power to advance the customary international law of human rights to discouraging such use and seeking to constrain judicial reliance on the customary international law of human rights).

12. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997); see generally Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006) (describing the limited use of international and foreign law in Supreme Court opinions).

13. See, e.g., *R. v. Jones* [2007] 1 AC 136, 155 (Lord Bingham); *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529, 554 (Lord Denning). See generally James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 67-71* (8th ed. 2012) [hereinafter *BROWNIE'S PRINCIPLES*]. See also *Nevsun Resources Ltd v. Araya*, 2020 SCC 5 (Canadian Supreme Court holds that CIL may apply as Canadian common law to remedy alleged forced labor violations by Canadian company in Eritrea).

CIL when relevant to resolving disputes under their own laws,¹⁴ and they may choose to apply this international right to reconsider the restrictions imposed on strikes under state statutes. Additionally, worker movements in this country may make use of CIL as part of their vocabulary to defend the legality of strikes outside the courtroom.¹⁵

Although the Supreme Court as currently constituted appears skeptical of CIL applications in a foreign affairs context, it has considered international human rights law relevant to domestic legal challenges in relatively recent times.¹⁶ In this regard, commentators and judges have long invoked CIL or its antecedent “law of nations” in aspirational as well as pragmatic terms. On diverse matters such as slave trading and slavery, reasonable and proportionate forms of criminal punishment, and the right to a healthy environment, international human rights doctrine has been deemed applicable even when U.S. laws and courts seemed inhospitable to recognizing relevant legal protections.¹⁷

In what follows, the Article addresses four distinct questions. The first question involves *the contents and contours of the right to strike as recognized under international instruments*. The international right is embedded within two widely endorsed United Nations human rights treaties,¹⁸ and was recently reaffirmed by the human rights committees responsible for monitoring

14. State courts applied CIL for many decades before *Erie R.R. Co. v. Tompkins* 304 U.S. 64 (1938) in ways that rarely diverged from federal courts. See Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 311-32 (2001). Since *Erie*, they have continued to construe state law so as to be consistent with CIL as federal common law. See, e.g., *Republic of Argentina v. New York*, 250 N.E. 2d 698, 700 (NY 1969); *In re Caravas' Estate*, 250 P.2d 593, 596-97 (Cal. 1952); *Peters v. McKay*, 238 P.2d 225, 230-32, 239-40 (Ore. 1951).

15. In states that prohibit public employee strikes, teachers have justified recent walkouts as a form of political speech directed at lawmakers, or as a “work action” rather than a strike. See Mark Walsh, *Are Teacher Strikes Illegal? Depends Where You Are and Who You Ask*, EDUCATION WEEK (May 8, 2018), <https://www.edweek.org/ew/articles/2018/05/09/legalities-and-politics-collide-in-teacher-work.html>; Kate Cimini, *Teacher Strikes Are Illegal in West Virginia . . . So How Do They Strike?* MEDILL NEWS SERVICE (Mar. 8, 2018), <https://dc.medill.northwestern.edu/blog/2018/03/08/67017/#sthash.foE9hx44.dpbs>.

16. See *Graham v. Florida*, 560 U.S. 48, 80-82 (2010) (invoking the laws and practices of other nations as confirmatory support for conclusion that imposing life-without-parole sentences on juveniles violates Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (relying on decades-long practice of looking to other countries and international authorities as “instructive for its interpretation of” the Eighth Amendment, in concluding that imposing death sentence for juveniles constitutes cruel and unusual punishment).

17. See Jenny S. Martinez, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 63-65 (2012) (discussing positions of Justice Marshall in *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) and James Kent in *COMMENTARIES ON AMERICAN LAW* (1826) that transatlantic slave trade—while morally repugnant—was not unlawful under the law of nations; *id.* at 115 (discussing identification of the slave trade as a “crime against humanity” by international legal scholar Henry Wheaton in 1842, and again in Wheaton’s *HISTORY OF THE LAW OF NATIONS* in 1845); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY. L. REV. 743, 867, 908 (2005); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000). See also Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Convention on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?* 16 TEX. J. WOMEN & L. 185 (2007).

18. See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 8(1)(d), 8(2), Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, art. 22(1), 22(3), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICCPR].

implementation of those treaties¹⁹ It is set forth in more precise and detailed terms pursuant to Convention 87 of the International Labor Organization (ILO) addressing freedom of association (FOA), and the interpretations given to that convention by ILO supervisory bodies. Notwithstanding recent objections from employers' groups, the right is recognized by the overwhelming majority of governments that have ratified Convention 87 as being an integral part of the Convention. In this regard, there is an established ILO jurisprudence on the right to strike, developed by two of its key supervisory committees—the independent Committee of Experts (CEACR), and the tripartite Committee on Freedom of Association (CFA),²⁰ and reinforced by observations from the two UN human rights committees.²¹

The Article summarizes this jurisprudence and describes how protections for the international right exceed U.S. protections for the right to strike in two key areas. The international law prohibition on private employers' ability to permanently replace lawfully striking workers conflicts with Supreme Court precedent construing the National Labor Relations Act (NLRA).²² And the international law protection for public employee strikes with only limited exceptions conflicts with the NLRA's allowing states to prohibit all strikes by their employees. At the same time, the international right is hardly untethered: it includes a range of exceptions and limitations that constrain its scope in certain ways when compared with U.S. statutory law.

The second question is *whether this international right to strike qualifies as CIL*. The Article contends that it does, based on the existence of widespread State practice in which ratification or conformity reflects *opinio juris*, a genuine sense of obligation under international law. In addition to Convention 87 having been ratified by more than 80 percent of ILO Member States, the right to strike as an integral part of FOA is an element in broader ILO documents that obligate all countries, including those like the U.S. that have not ratified the Convention.²³ Relatedly, the right is recognized through the two previously mentioned U.N. Covenants whose language expressly incorporates the

19. See Joint Statement by the Committee on Economic, Social, and Cultural Rights and the Human Rights Committee, *Freedom of Association, Including the Right to Form and Join Trade Unions*, para. 4 (Oct. 23, 2019).

20. See CEACR, GIVING GLOBALIZATION A HUMAN FACE 46-65 (2012) [hereinafter 2012 GENERAL SURVEY]; CEACR, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING 161-78 (1994) [hereinafter 1994 GENERAL SURVEY]; CFA, COMPILATION OF DECISIONS 143-82 (sixth ed., 2018) [hereinafter 2018 COMPILATION]; CFA, DIGEST OF DECISIONS 109-36 (5th ed., 2006) [hereinafter 2006 DIGEST].

21. See Diane F. Frey, *Conflict over Conflict: The Right to Strike in International Law*, 8 GLOBAL LAB. J. 17, 20-23 (2017) (citing sources).

22. 29 U.S.C. §§ 151-169 (2012).

23. See ILO Constitution, Oct. 9, 1946, 15 U.N.T.S. 35 (the Constitution governs operation of the different ILO bodies, the functioning of the International Labor Conference, and the adoption and application of international labor standards; it was originally part of the Treaty of Versailles (1919), and has been amended on several occasions, most notably in 1944 through the Declaration of Philadelphia); ILO Declaration on Fundamental Principles and Rights at Work, June 19, 1998, 37 I.L.M. 1237 (1998) [1998 Declaration] (the Declaration commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions; the categories are freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of employment discrimination).

guarantees provided for in Convention 87. The right is further established in prominent decisions from transnational courts, and in domestic legal frameworks around the world (constitutions, statutes, and high court decisions), reinforcing the argument that widespread respect from governments is based on a sense of legal obligation. Further, the broad-based evidence from domestic legal frameworks indicates that ratification reflects not simply formal commitment but active compliance by governments.

Application of the international right to strike recognizes variations in nationally-specific approaches. However, the two key areas in which U.S. law deviates from the international right—approving permanent replacements for lawful strikers and allowing the prohibition of all public employee strikes—are central elements of the right itself, rather than more marginal aspects subject to national circumstances. Finally, notwithstanding that U.S. statutory protections for strikes deviate from international standards in these two areas, respect for the international right is reflected in legislation enacted by Congress in recent decades, and by executive action indicating the express understanding of the Obama and Trump Administrations that the right to strike is an integral part of FOA.²⁴

The third question is *how this CIL interacts with other forms of law in a U.S. domestic setting*. Accepting that the right to strike as a CIL norm is appropriately specific and universal,²⁵ U.S. workers asserting such a right would be seeking direct application of CIL, stemming from legal principles set forth in *The Paquete Habana*²⁶ and subsequent cases. The Article considers two potential impediments in the relationship between CIL and other forms of domestic law. One is whether U.S. courts should determine matters of CIL as federal common law or as state law in light of the *Erie* doctrine.²⁷ Without revisiting the extensive debates on this issue, the Article briefly explains why a CIL right to strike should be accepted as federal common law. The other impediment is whether any applicable treaty or controlling executive, legislative, or judicial act precludes federal courts from recognizing a right to strike as CIL.²⁸ While acknowledging

24. For Congress, see 1984 Trade and Tariff Act and 2002 Trade Act. For executive action, see ILO, Final Report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, February 23-25), para. 16, GB.323/INS/5/Appendix II (Mar. 13, 2015) [hereinafter 2015 Final Report]. See also United States-Mexico-Canada Agreement, art. 23, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA]. These positions taken by Congress and the Executive are discussed *infra* Part II.E.2.

25. This by virtue of its being established as CIL of comparable quality to the norms recognized in international law at the time of the framing. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), discussed in *infra* Part II.E.3; John O. McGinnis, *Sosa and the Derivation of Customary International Law*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (Sloss, Ramsey & Dodge eds., 2011) 481, 481-82.

26. *The Paquete Habana*, 175 U.S. 677 (1900).

27. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modernist Position*, 111 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Commentary: Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998).

28. *The Paquete Habana*, 175 U.S. at 700. See generally *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986); *Agora: May the President Violate Customary International Law?* 80 AM. J. INT'L L. 913 (1986).

cogent arguments in support of a “controlling domestic law” position, the Article contends there is no such controlling prohibition under positive law. Some elements of domestic law are inconsistent with the contours of the international right to strike, but they are not “controlling” in the relevant sense of addressing or responding to developments in CIL, given that the CIL has arisen and become established subsequent to those elements.

The fourth and final question is *whether there is a cause of action that courts can recognize even if Congress has not done so*. The Article proposes an equitable cause of action to enforce a right as defined by CIL. This action is analogous to modern cases recognizing private parties’ right to challenge the statutorily-grounded actions of federal agencies or officials through non-statutory review.²⁹ The most likely federal cause of action is against the federal government, seeking declaratory or injunctive relief to ensure the removal of certain domestic law obstacles to the CIL right to strike—obstacles that arise pursuant to the National Labor Relations Act.³⁰

This final part discusses the two leading domestic law obstacles: private employers’ right to hire permanent replacements for economic strikers, and the banning of strikes by all public employees under multiple state laws. In addressing the permanent replacement doctrine applied by private employers, the Article advances a role for the *Charming Betsy* canon: where legislation is ambiguous, it should be interpreted to conform to international law.³¹ In addressing the prohibition on all public employee strikes enacted by many states, the Article suggests that the more recently generated CIL constraint on such blanket prohibitions should be viewed as prevailing federal law in light of the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*.³² In addition, state courts in jurisdictions that ban all public employee strikes may decide to apply CIL as federal precedent that can help reshape or influence their own legal regime on the right to strike.

The Article pursues the four sets of questions set forth above in the four parts that follow this Introduction. The first and second questions, addressed in greater depth, allow for relatively clear responses in an international law context. The third and fourth questions involve contested aspects of CIL recognition and implied rights of action in the U.S. setting. These areas of contestation raise jurisdictional, procedural, and prudential uncertainties regarding how federal courts might assess the right to strike under CIL as a matter of domestic law.

29. See, e.g., *Mittelman v. Postal Regulatory Comm’n*, 757 F.3d 300, 307 (D.C. Cir. 2014); *Trudeau v. FTC*, 456 F.3d 178, 189 (D.C. Cir. 2006); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996).

30. In seeking declaratory and injunctive relief, as opposed to damages, it is not necessary to address the Court’s increasing reluctance to recognize implied causes of action for damages against the federal government. See *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) (discussing opposition to implying new forms of damages actions based on *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

31. See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135-36 (2d Cir. 2005)

32. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). As explained in *infra* Part III.C, although this CIL may be superseded by federal statute—generated through the political leverage exercised by state and local governments as contemplated by the Court in *Garcia*—it remains controlling federal law unless and until Congress takes such legislative action.

I. THE RIGHT TO STRIKE UNDER INTERNATIONAL INSTRUMENTS

Strikes are an essential means available to workers and their organizations to protect their interests. Although the taking of strike action is a basic right, a strike is not pursued for its own sake. Rather, it is a last resort for workers and their organizations, one that typically follows unsuccessful and contentious negotiations. Strikes carry serious consequences for employers, for workers and their families, and in many circumstances for third parties.

A. *Recognition of the Right to Strike*

Convention 87, addressing freedom of association and protection of the right to organize,³³ was promulgated by the ILO in 1948. Unlike other U.N. specialized agencies, the ILO has a tripartite governing structure. Each of the 187 Member States is represented not only by governments but also by organizations of employers and of workers (referred to as “social partners”). Their right of participation as representatives includes the right to vote; the standard ratio of representation is 2:1:1, or two government, one employer, and one worker.³⁴

In the absence of an express provision on strikes in Convention 87, two leading ILO supervisory bodies have developed over many decades recognition for the right to strike as an essential component of FOA. The independent CEACR was established in 1926; it is charged with making impartial observations that address questions or concerns regarding a country’s progress toward compliance with ratified conventions in law and practice.³⁵ The tripartite CFA was established in 1951, based on recognition that the principles of FOA and the rights to organize and engage in collective bargaining required a dedicated supervisory procedure to monitor compliance even in countries that had not ratified Conventions 87 and 98.³⁶

33. See Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), July 9, 1948, 68 U.N.T.S. 17 [hereinafter Convention 87].

34. See ILO Constitution, *supra* note 23, art. 3. Each of the 187 member states at the International Labor Conference has four member delegates. The Conference, which is a parliamentary-type organization, meets at least once every year—typically in June—to develop and adopt labor standards and recommendations and to approve other policies involving the ILO program and budget. The ILO Governing Body meets more often during the year to set the agenda and draft a program and budget for submission to the Conference. It is composed of twenty-eight government representatives, fourteen employer representatives, and fourteen worker representatives. See *id.* art. 7.

35. The CEACR is composed of twenty individuals appointed by the ILO Governing Body for up to five three-year terms. The Experts are judges, practitioners, legal academics, and human rights specialists with legal expertise at the national and international levels. They come from different geographic regions, legal systems, and cultures. Their role is to provide an impartial and technical evaluation of the application of international labor standards, in response to periodic reports filed by governments on the conventions they have ratified. See Application of International Labour Standards 2019 (I), Report of the CEACR, Report III (Part A), at 2 (describing terms of appointment); *id.* at 12 (presenting Mandate of the Committee). Reporting cycles vary for different types of conventions. The current reporting cycle is three years for fundamental conventions, such as Convention 87, and six years for technical conventions, such as those involving safety and health or social security. In cases where serious compliance issues have arisen, the CEACR may request interim reports in a shorter time frame.

36. Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257 [hereinafter Convention 98]. Convention 98 addressed to collective bargaining, was promulgated in 1949. Unlike the CEACR, the CFA issues

The right to strike and numerous principles relating to that right derive mainly through application of Article 3 of the Convention, which sets out the right of workers organizations to organize their activities and to formulate their programs,³⁷ and Article 10, under which the objective of these organizations is to further and defend the interests of workers.³⁸ Decisions by the CFA recognizing a right to strike date from 1952, and observations by the CEACR recognizing the right began in 1959.³⁹ The right has been amplified in explanatory terms through General Surveys addressing FOA issued by the CEACR, most recently in 1994 and 2012,⁴⁰ and through indexed compilations of CFA decisions, including one last issued in 2018.⁴¹

The position of these two supervisory bodies, recognizing and protecting the right to strike as an intrinsic element of the right of association under the Convention, has in more recent times been criticized by employer organizations in the context of a third ILO supervisory body—the Committee on the Application of Standards (CAS) of the International Labor Conference.⁴² The

decisions in response to outside complaints brought against a member state by employers' or workers' organizations, regardless of whether the member state has ratified Conventions 87 or 98. If the CFA finds there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body, makes recommendations on how the situation can be remedied, and requests a report from the government on implementation of its recommendations. In cases where the country has ratified the relevant conventions, the CFA may refer legislative aspects of the case to the CEACR.

37. Convention 87, *supra* note 33, art. 3 (“1. Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”).

38. Convention 87, *supra* note 33, art.10 (“In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers”) (emphasis in original).

39. The CFA held that “the right to strike and that of organising union meetings are essential elements of trade union rights.” ILO Committee on Freedom of Association, Report No. 2 (1952), Case No. 28 (UK–Jamaica), para 68. A few years later, the CFA asserted its competence to address “allegations relating to prohibitions to the right to strike,” adding that “the right . . . to strike as a legitimate means of defence of [workers’] occupational interests is generally recognized.” ILO Committee on Freedom of Association, Report No. 27 (1958), Case No. 163 (Burma), para 51. The CEACR, in its first General Survey, found that “the prohibition of strikes by workers other than public officials acting in the name of public powers . . . may sometimes constitute a considerable restriction of the potential activities of trade unions,” and that prohibitions on the right to strike are inconsistent with specific articles of Convention 87. ILO, 42d Session, Report of the Committee on the Application of Conventions and Recommendations (1959), Part 1, Report III, pp.114-15. These 1950s sources are discussed in detail in Jeffrey S. Vogt, *The Right to Strike and the International Labour Organisation (ILO)*, 27 KING’S L.J. 110, 113-14, 116 (2016). See generally 2012 GENERAL SURVEY, *supra* note 20, at 46, 48.

40. See discussion of Right to Strike by CEACR in 2012 GENERAL SURVEY, *supra* note 20, at 46-65; 1994 GENERAL SURVEY, *supra* note 20, at 61-78. Pursuant to Article 19 of the ILO Constitution—requiring member States to report at the Governing Body’s request on their law and practice with respect to unratified as well as ratified Conventions—the CEACR publishes an in-depth annual General Survey on member States’ national law and practice, regarding a subject chosen by the Governing Body. ILO Constitution, *supra* note 23, art. 19. These General Surveys, based on information requested from all member states, allow the CEACR to examine the impact of conventions, to analyze the challenges identified by governments as impeding their application or ratification, and to identify possible means for overcoming the challenges.

41. See discussion of right to strike by CFA in 2018 COMPILATION, *supra* note 20, at 143-182; 2006 DIGEST, *supra* note 20, at 109-136.

42. The CAS was established in 1926 along with the CEACR, but operates on a tripartite basis like the CFA. In addition to other activities, the CAS each year selects approximately 25 CEACR observations reflecting especially serious instances of noncompliance for full discussion before the International Labor Conference (the ILO parliament), and invites the non-complying governments to

employers' critique contends that principles regulating in detail the right to strike are grounded in neither the preparatory work for Convention 87 nor an interpretation based on the Vienna Convention on the Law of Treaties.⁴³ The workers' group within the CAS has rejected this critique, and the governments—the third element of tripartite authority under the ILO Constitution⁴⁴—have sided with the workers in agreeing that a right to strike is protected under the text and purpose of Convention 87,⁴⁵ while also agreeing that the right is neither absolute nor unlimited.⁴⁶

Recognition of the right to strike as fundamental by two key ILO supervisory bodies is reinforced by affirmation of the right within a broad framework of international covenants, transnational conventions and judicial decisions, and national constitutions. The right to strike is recognized in the International Covenant on Economic, Social and Cultural Rights of the United Nations (ICESCR).⁴⁷ It has been incorporated into the International Covenant on Civil and Political Rights (ICCPR) by that Covenant's Human Rights Committee, which supervises the Covenant's implementation.⁴⁸ Although these

appear and explain their implementation efforts. Following these discussions, a form of soft-law “shaming,” the CAS issues conclusions on behalf of the full ILO membership, recommending or urging governments to take specific steps to remedy their problems. Since the 1990s, employer members of the CAS have objected to the CEACR and CFA determinations that a right to strike is part of Convention 87; those objections became more strenuous in 2012. *See* Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 *INDUS. L.J.* 338 (2013).

43. *See* 2012 GENERAL SURVEY, *supra* note 20, at 47 (summarizing employers' group position at the CAS); Letter of 29 August 2017 to CEACR from International Organization of Employers (expressing continuing disagreement with CEACR position on the right to strike under Convention 87), available at: <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=134809&token=99f70e1f1a8984f13d6e524d129ab23025f9406fab23025f9406f>.

44. *See supra* text accompanying note 34.

45. *See* 2015 Final Report, *supra* note 24, at 4-7, 13-14 (statements from governments of Latvia on behalf of the European Union, United States, Germany, India, Mexico, Italy, Panama, Argentina, Venezuela, Norway, Angola, Colombia).

46. *See id.* Given the role of the CEACR as an ILO supervisory mechanism, enforceable regulation of strike action takes place at the national level rather than through the CEACR, whose “opinions and recommendations are non-binding, being intended to guide the actions of national authorities.” CEACR Mandate quoted in 2019 CEACR Report, *supra* note 35, at 12, para. 32. At the same time, the CEACR's expertise and authority are well recognized “by virtue of its composition, independence, and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.” *Id.*

Although the employers' objections have not altered the positions taken by the CEACR, CFA, or governments recognizing and applying the international right to strike in national settings, the dispute within the CAS based on their objections persists. In order to accommodate the employers' view and allow the CAS to function as a consensus-based body when identifying the 25 most egregious instances of non-compliance (*see supra* note 42), those 25 cases in recent years have not included discussions related to possible failures to comply with protections for the right to strike under Convention 87.

47. *See* ICESCR, *supra* note 18, art. 8(1)(d). A total of 170 countries have ratified the ICESCR. Status of the International Covenant on Economic, Social and Cultural Rights, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en. The U.S. has signed but not ratified the Covenant. *See* MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 227 (1995); Frey, *supra* note 21, at 20-21.

48. *See* ICCPR, *supra* note 18, art. 22 on FOA, which is silent on the right to strike. A total of

two treaties are more familiar starting points for international human rights analysis than the ILO Conventions, the Article focuses primarily on the Convention 87 applications because of their extensive in-depth nature. In this regard, it is notable that the two U.N. Covenants declare a specific commitment to Convention 87, which is the only other international convention they even mention, and the two treaty bodies regularly apply their relevant articles in terms that are consistent with ILO application of that convention.⁴⁹

The right to strike is also recognized in a number of regional instruments such as the Charter of the Organization of American States;⁵⁰ the Charter of Fundamental Rights of the European Union;⁵¹ and the Arab Charter on Human Rights.⁵² Protection of the right is perhaps most fully developed in regional terms at the European level. Decisions by the European Court of Human Rights (ECHR) affirm that the right to strike is protected under Article 11(1) of the European Convention of Human Rights, citing to CEACR and CFA judgments for support.⁵³ And at a national level, more than 90 countries recognize the right to strike in constitutional terms.⁵⁴ Notable national court decisions affirming the

173 countries have ratified the ICCPR, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&clang=en, though some like the U.S. with reservations. Since 1999, the Covenant's Human Rights Committee has protected the right to strike as part of FOA and monitored States' conduct in this regard. See Patrick Macklem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?*, in *LABOUR RIGHTS AS HUMAN RIGHTS* (Philip Alston ed., 2005) 72-73. Although the U.S. attached a number of reservations to the ICCPR when it ratified in 1992, none relate to the recognition of Convention 87 or the right to strike.

49. See ICCPR, *supra* note 18, art. 22.3, and ICESCR, *supra* note 18, art. 8.3 (stating in identical language that nothing in the labor articles of the covenants authorizes States "to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in" Convention 87); B. Saul, D. Kinley & J. Mowbray, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS* 579-86 (2014) (tracing the Committee on Economic, Social and Cultural Rights interpretations of the right to strike as cognizant of and congruent with CEACR Observations and CFA decisions). See also *infra* note 62 (summarizing one such interpretation).

50. See Charter of the Organization of American States, art. 45(c), Apr. 30, 1948, 199 U.N.T.S. 3 (1993).

51. See Charter of Fundamental Rights of the European Union, art. 28, Dec. 7, 2000, 40 I.L.M. 266.

52. See Arab Charter on Human Rights, art. 35(3). Sept. 15, 1994, reprinted in HRLJ 18 (1997) 151.

53. For recent examples, see *Ognevenko v Russia* App No. 44873/09 (20 November 2018); *RMT v. UK*, Application No. 31045/10, 8 April 2014; *Enerji Yapi-Yol Sen v. Turkey*, Third Section, 21 April 2009, Application No. 34503/97. See also *Demir and Baykara v Turkey* [2008] ECHR 1345 (affirming fundamental right of civil servants to engage in collective bargaining and take collective action to that end). While the European Court of Justice (ECJ) held in 2007 that the right to strike should be exercised proportionately in settings implicating certain business freedoms, the court expressly stated that the right to strike is recognized under Convention 87 and held it to be a fundamental right within European Community Law. See A.C.L. Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37 *IND. L. J.* 126 (2008). The 155 ILO member states that have ratified Convention 87 include every European country, and subsequent ECHR decisions cited in this footnote have reaffirmed the strength of the right to strike while invoking mainstream ILO jurisprudence set forth by the CEACR and CFA. See Tonia Novitz, *Multi-level Disputes Relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources*, at 12-14, forthcoming 36 (4) *INT'L J. COMP. LAB. L. & INDUS. REL.* (2020) (copy on file with author).

54. See Jeffrey S. Vogt, Janice R. Bellace et al., *THE RIGHT TO STRIKE IN INTERNATIONAL LAW* 167-180 (2020) (reproducing language from constitutions in 92 countries recognizing a right to strike). Recent examples include Morocco (2011), Kenya (2010), and Ecuador (2008). For additional support, see 2012 *GENERAL SURVEY*, *supra* note 20, at 50, n.264, listing 92 ILO member countries recognizing the right to strike in constitutional or other terms based on their reports to the ILO. Some omissions have been

existence of this right as constitutionally imbedded, based in part on ILO norms, have come from the Canadian Supreme Court, the South African Constitutional Court, and the Spanish Constitutional Court.⁵⁵

While these additional legal sources amplify the existence and nature of an international right to strike, the right has drawn its principal contours from Convention 87 as applied and interpreted by the CEACR and CFA, reinforced by applications under the ICESCR and the ICCPR. Since 2002, national courts in at least eleven countries on four continents have applied the international right to strike to their domestic legal frameworks by referring to interpretations from the CEACR and/or the CFA.⁵⁶ In what follows, the Article draws on those interpretations to discuss certain recognized limitations on the right to strike, and also some aspects of its broader scope under FOA principles.

B. Substantive and Procedural Limitations on the Right to Strike

The international right to strike is far from absolute. It may be restricted in exceptional circumstances, or even prohibited, pursuant to national regulation. For a start, Convention 87 provides that members of the armed forces and the police may be excluded from the scope of the Convention in general, including the right to strike.⁵⁷ In addition, applications by the CFA and CEACR have concluded that three distinct forms of substantive restriction on the right to strike are compatible with Convention 87.

1. Substantive Limitations

One important restriction applies to certain categories of public servants. The CEACR and CFA have made clear that public employees generally enjoy the same right to strike as their counterparts in the private sector; at the same time, in order to ensure continuity of functions in the three branches of government, this right may be restricted for public servants exercising authority in the name of the State.⁵⁸ Examples include officials performing tasks that involve the administration of necessary executive branch functions or that relate

added since 2012 (for instance, Canada).

55. See *Saskatchewan Fed. of Labour v. Saskatchewan*, [2015] 1SCR 245; *NUMSA (Nat'l U of Metalworkers of SA) v. Bader Pop*, 13/12/2002, Case No. CCT 14/02; Decision 11/1981 Constitutional Court of Spain, Second Chamber, Case No. 38/1981; Vogt et al, *supra* note 54, at 136, 171-73.

56. See Compendium of Court Decisions, ITCILO, <http://compendium.itcilo.org/en/decisions-by-subject-for-decisions-from-Botswana-Brazil-Burkina-Faso-Canada-Colombia-Fiji-Kenya-Nigeria-Peru-Senegal-and-South-Africa>. The compendium of decisions is not assembled on a comprehensive or systemic basis. It reflects submissions to the ILO from interested advocates or parties around the world. European countries are not among the eleven countries listed, perhaps because the European Court of Human Rights has regularly held in favor of an international right to strike, citing to ILO sources; see *supra* note 53 and accompanying text.

57. Article 9 provides in relevant part as follows: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations." Convention 87, *supra* note 33, art. 9. The same language appears in Article 5 of Convention 98, addressing the right to organize and engage in collective bargaining.

58. See 2012 GENERAL SURVEY, *supra* note 20, at 52, para. 129; 1994 GENERAL SURVEY, *supra* note 20, at 69, para. 158 (citing also same formulation in General Surveys of 1959, 1973, 1983); 2018 COMPILATION, *supra* note 20, 154, para. 828; 2006 DIGEST, *supra* note 20, at 118, para. 574.

to the administration of justice.

Each country has its own approach to classifying public servants exercising authority in the name of the State. When considering the international right under Convention 87, some public servant exceptions seem clearly applicable, such as officials auditing or collecting internal revenues, customs officers, or judges and their close judicial assistants.⁵⁹ Some public servant exceptions seem inapplicable, such as teachers, or public servants in State-owned commercial enterprises.⁶⁰ Whether public servants are exercising authority in the name of the State can be a close question under particular national law, one on which the CEACR and CFA have offered encouragement and guidance,⁶¹ as has the Committee on Economic, Social and Cultural Rights (CESCR).⁶²

A second equally important restriction on the right to strike involves essential services in the strict sense of the term. This is an area in which both the CEACR and CFA have developed a detailed set of applications and guidelines.⁶³ The two committees consider that essential services, for the purposes of restricting or prohibiting the right to strike, are only those “the interruption of which would endanger the life, personal safety or health of the whole or part of the population.”⁶⁴

This definition of essential services “in the strict sense of the term” stems from the idea that “essential services” as a limitation on the right to strike would lose its meaning if statutes or judicial decisions defined those services in too broad a manner.⁶⁵ The interruption of services that cause or have the potential to cause economic hardships—even serious economic hardships—is not ordinarily

59. See 2018 COMPILATION, *supra* note 20, at 155, paras. 832, 833, 834.

60. See 2012 GENERAL SURVEY, *supra* note 20, at 52, para. 130 (teachers should benefit from right to strike although under certain circumstances maintenance of minimum service levels may be envisaged); 2018 COMPILATION, *supra* note 20, at 155, para. 831 (public servants in State-owned commercial enterprises should have right to strike subject to essential services qualifier). See also *id.* at 159, para. 842 (citing more than 10 cases identifying education sector as not an essential service).

61. See, e.g., Application of International Labour Standards 2018 (I), Report of the CEACR, Report III (Part A), at 114 (reflecting extended dialogue with government of Japan); Application of International Labour Standards 2012 (I), Report of the CEACR, Report III (Part 1A), at 217 (describing responsiveness from Government of Panama); CFA Case No. 1865, Report No. 340, paras. 751, 781 (describing modest legislative progress in South Korea, 2006).

62. See U.N. Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of Committee on Economic, Social and Cultural Rights: Germany 2001, para. 14, U.N. Doc. E/C.12/1/Add.68 (Sept. 24, 2001) [hereinafter 2001 CESCR Report] (“The Committee reiterates its concern, in line with the Human Rights Committee [of the ICCPR] and the ILO Committee of Experts, that the prohibition by the State party of strikes by public servants [other than those performing essential services] constitutes a restriction of the activities of trade unions that is beyond the scope of Article 8(2) of the Covenant. The Committee disagrees with the State party’s statement that ‘a strike would be incompatible with th[e] duty of loyalty and would run counter to the purpose of a professional civil service,’ as this interpretation of ‘the administration of the State’ mentioned in Article 8(2) of the Covenant exceeds the more restrictive interpretations by the Committee, the ILO and the European Court of Justice.”).

63. See 2012 GENERAL SURVEY, *supra* note 20, at 53-55; 2018 COMPILATION, *supra* note 20, at 156-61, paras. 836-52.

64. 2012 GENERAL SURVEY, *supra* note 20, at 53, para.131 (citing 1994 GENERAL SURVEY, *supra* note 20, at 70, para. 159); 2018 COMPILATION, *supra* note 20, at 156, paras. 836, 838.

65. See 2018 COMPILATION, *supra* note 20, at 156, para. 838; 1994 GENERAL SURVEY, *supra* note 20, at 70, para. 159. See also 2001 CESCR Report, *supra* note 62.

sufficient to qualify the interrupted service as essential. Indeed, the very purpose of a strike *is* to interrupt services or production and thereby cause a degree of economic hardship. That is the leverage workers can exercise; it is what allows a strike to be effective in bringing the parties to the table and securing a negotiated settlement.

The two ILO supervisory committees also have made clear that the essential services concept is not static in nature. Thus, a non-essential service may become essential if the strike exceeds a certain duration or extent, or as a function of the special characteristics of a country.⁶⁶ One example is that of an island State where at some point ferry transportation services become essential to bring food and medical supplies to the population.⁶⁷

When examining concrete cases, the supervisory bodies have considered a range of services, both public and private, too broad to summarize here. As illustrative, the two bodies have determined that essential services in the strict sense of the term include air traffic control services,⁶⁸ telephone services,⁶⁹ prison services, firefighting services, and water and electricity services.⁷⁰ The CEACR and CFA also have identified a range of services that presumptively are deemed not to be essential in the strict sense of the term.⁷¹

In addition, in circumstances where a total prohibition on the right to strike is not appropriate, the magnitude of impact on the basic needs of consumers or the general public, or the need for safe operation of facilities, may justify introduction of a negotiated minimum service.⁷² Such a service, however, must truly be a minimum service, that is one limited to meeting the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear through the strike by a majority of workers.⁷³

66. See 2012 GENERAL SURVEY, *supra* note 20, at 53, para. 131 (discussing characteristics of an island State); 2018 COMPILATION, *supra* note 20, at 161, para. 851 (discussing effects on elderly pensioners of a prolonged interruption in postal services).

67. See Application of International Labour Standards 2013 (I), Report of the CEACR, Report III (Part 1A), at 106 (recognizing this situation as applied to strike by maritime workers in Greece).

68. See 2018 COMPILATION, *supra* note 20, at 157, para. 841; 2012 GENERAL SURVEY, *supra* note 20, at 55, para. 135 (citing to Observation)

69. See 2018 COMPILATION, *supra* note 20, at 157, para. 840 (citing to numerous decisions); 2012 GENERAL SURVEY, *supra* note 20, at 55, para. 135 (citing to Direct Request).

70. See 2018 COMPILATION, *supra* note 20, at 156-57, para. 840 (citing to numerous decisions); 2012 GENERAL SURVEY, *supra* note 20, at 55, para. 135.

71. These include, for example, banking sector services, public transport, air transport services and civil aviation, teachers and the public education service, port services and the loading/unloading of ships, postal services, hotel services, and construction. See 2018 COMPILATION, *supra* note 20, at 157-60, para. 842 (citing to numerous decisions); 2012 GENERAL SURVEY, *supra* note 20, at 54-55, para. 134 (citing to numerous Observations).

72. See 2012 GENERAL SURVEY, *supra* note 20, at 55, para. 136; 2018 COMPILATION, *supra* note 20, at 164, para. 867 (citing numerous cases).

73. Also, because such negotiated minimums curtail a basic form of pressure available to workers to defend their interests, the affected workers' organizations should be allowed to participate in defining such a service, along with employers and the public authorities. See 2012 GENERAL SURVEY, *supra* note 20, at 56, para. 137; 2018 COMPILATION, *supra* note 20, at 165, paras. 869, 871. Both supervisory bodies have stated as well that any dispute on minimum services should be resolved by a joint or independent body (i.e. not by government authorities) that has the confidence of the parties and is empowered to issue rapid and enforceable decisions. See 2012 GENERAL SURVEY, *supra* note 20, at 56,

The third substantive restriction on the right to strike under Convention 87 relates to situations of acute national or local crisis, although only for a limited period and only to the extent necessary to meet the requirements of the situation.⁷⁴

With respect to all three forms of substantive restriction, the CFA and CEACR have indicated that certain alternative options should be guaranteed for workers who are deprived of the right to strike. These options include impartial conciliation followed by arbitration procedures in which any awards are binding on both parties and are to be implemented in full and rapid terms.⁷⁵

2. *Procedural Limitations*

Apart from these substantive limitations, the right to strike under Convention 87 has been subject to procedural prerequisites. Legislation in numerous countries requires that advance notice of strikes be given to administrative authorities or to the employer. National laws also provide for cooling off periods and/or for mandatory conciliation and arbitration procedures before a strike may be called. The ILO supervisory committees regard such procedural requirements as compatible with the Convention so long as their aim is to facilitate bargaining and they are not “so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.”⁷⁶ The CEACR, for instance, has considered that a duration of more than 60 working days as a precondition for exercising the right to strike is excessive and may undermine the right.⁷⁷

Some countries have laws providing that a strike may not be called without approval from a supermajority of workers.⁷⁸ The CEACR and CFA have considered that such supermajority requirements are excessive and may unduly hinder the possibility of calling a strike, especially in larger enterprises.⁷⁹ They have suggested that for any legislatively mandated pre-strike vote, the required

para. 138; 2018 COMPILATION, *supra* note 20, at 167, para. 882.

74. There may be some overlap between this restriction and essential services. In the case of an acute emergency, the prohibition should apply for a limited period, and responsibility for suspending a strike (based on national security, public health, etc.) should be in the hands of an independent body rather than the government. *See* 2018 COMPILATION, *supra* note 20, at 154, paras. 824-825; 2012 GENERAL SURVEY, *supra* note 20, at 57, para. 140.

75. *See* 2012 GENERAL SURVEY, *supra* note 20, at 57, para. 141; 2018 COMPILATION, *supra* note 20, at 162, para. 856.

76. *See* 2012 GENERAL SURVEY, *supra* note 20, at 58, para. 144; 2018 COMPILATION *supra* note 20, at 159, para. 795.

77. *See* 2012 GENERAL SURVEY, *supra* note 20, at 58, para. 144; Application of International Labour Standards 2011 (I), Report of the CEACR, Report III (Part 1A), at 171 [hereinafter 2011 CEACR Report] (requirement in Tanzania of 60 days’ notice “could constitute an obstacle to collective bargaining”). *Compare* 2018 COMPILATION, *supra* note 20, at 150, paras. 801-02 (20-day notice and 40-day cooling-off period not contrary to principles of FOA).

78. *See* 2012 GENERAL SURVEY, *supra* note 20, at 59, para. 147 (identifying laws in Armenia, Honduras, Mexico requiring a two-thirds vote; Bangladesh and Bolivia a three-fourths vote); *see also* Application of International Labour Standards 2017 (I), Report of the CEACR, Report III (Part 1A), at 179 [hereinafter 2017 CEACR Report] (critical of UK legislative change requiring strike approval from over half of all workers at site, not just all workers voting).

79. *See* 2012 GENERAL SURVEY, *supra* note 20, at 59, para. 147; 2018 COMPILATION, *supra* note 20, at 151, paras. 805-07.

quorum and majority for votes cast should be “fixed at a reasonable level” and with respect to votes actually cast (as opposed to all workers at the facility).⁸⁰

Many countries confer broad powers on their governments to requisition workers in the event of a strike. The supervisory bodies have indicated a preference that such requisitioning be limited to cases in which the right to strike itself may be limited—namely the three substantive restrictions discussed above.⁸¹

Finally, and importantly, the committees have determined that under the Convention, the right to strike normally includes retention of an employment relationship during the strike itself. In this regard, the CFA has made clear that “[t]he use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them . . . constitutes a violation of freedom of association,”⁸² and that “the hiring of workers to break a strike [that does not involve essential services in the strict sense of the term] constitutes a serious violation of freedom of association.”⁸³ And the CEACR has stated that “*provisions allowing employers to dismiss strikers or replace them . . . are a serious impediment to the right to strike, particularly where striking workers are not able to return to their employment at the end of the dispute.*”⁸⁴ Both committees have thus made clear that national law and practice should protect against such permanent replacement efforts by employers.⁸⁵

C. *The International Right to Strike Compared to U.S. Law*

1. *Increased Levels of Protection*

Under the NLRA, private sector employees have a qualified right to strike,⁸⁶ while public employees are by definition excluded from coverage under

80. See 2012 GENERAL SURVEY, *supra* note 20, at 59, para. 147; 2006 DIGEST, *supra* note 20, at 115, para. 555.

81. See 2012 GENERAL SURVEY, *supra* note 20, at 61, para. 151; 2018 COMPILATION, *supra* note 20, at 172-73, paras. 920-21.

82. See 2018 COMPILATION, *supra* note 20, at 179, para. 962 (citing to discussion in eleven decisions involving nine countries, from November 2006 to June 2014). See also *id.*, at 172, para. 919 (identifying hiring of replacement workers for an indeterminate period as undermining the right to strike) (citing to discussion in four decisions in four countries, from March 2007 to June 2011).

83. See 2018 COMPILATION, *supra* note 20, at 172, para. 918. See, e.g., Chile, June 2011, Case 2770, Report at 360, para. 372; Peru, June 2010, Case 2638, Report at 357, para. 797; Cormoros, March 2009, Case 2619, Report at 353, para. 574; Indonesia, November 2006, Case 2472, Report at 343, para. 966.

84. 2012 GENERAL SURVEY, *supra* note 20, at 61, para. 152 (emphasis in original, bold added). See 1994 GENERAL SURVEY, *supra* note 20, at 76-77, para. 175 (describing the hiring of permanent replacements for legal strikers as a practice that “seriously impairs the right to strike and affects the free exercise of trade union rights”).

85. See 1994 GENERAL SURVEY, *supra* note 20, at 61-62, para. 139; 2018 COMPILATION, *supra* note 20, at 172, para. 918. A number of countries expressly prohibit the use of permanent replacements by legislation. See James J. Brudney, *A Taxonomy of Striker Replacements*, 39 COMP. LAB. L. & POL’Y J. 555, 566 (2018) (referencing laws in seven countries). The author has not found a country with laws expressly authorizing permanent replacements for workers engaged in lawful strikes.

86. See 29 U.S.C. § 163 (“Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

the statute.⁸⁷ The scope and contours of the international right exceed U.S. protections for the right to strike in two respects that are important for our purposes; they will be addressed in detail in Parts III and IV.

One is the ban on permanent replacement of strikers under international law. Although the NLRA is silent on this issue, employers' right to hire such replacements was recognized by the Supreme Court in dicta, set forth in its 1938 decision, *NLRB v. Mackay Radio & Telegraph Co.*⁸⁸ The right to engage permanent replacements has been reaffirmed in a number of Court decisions since 1938.⁸⁹

A second substantial divergence involves the right to strike in the public sector. As discussed earlier, this right is subject to relatively narrow exceptions under international law, involving public employees engaged in administration of the State or in providing essential services. By contrast, U.S. restraints on public employees' right to strike are determined under state law because the NLRA excludes public employers from coverage. Most state governments either prohibit or seriously restrict strikes by public employees.⁹⁰ As one example, the high-profile teacher strikes in Arizona, Oklahoma, and West Virginia since 2018 were all illegal under the laws of those states.⁹¹

87. See 29 U.S.C. § 152(2) (definition of "employer" excludes "any State or political subdivision thereof").

88. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

89. The Court has invoked or relied on the *Mackay Radio* permanent replacement doctrine in subsequent cases. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790 (1990); *Trans World Airlines Inc., v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 433-34 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504-05 n.8 (1983). See also 29 U.S.C. § 159(c)(3) (language added to NLRA in 1947, addressing who can vote in representation elections, referencing that employees engaged in a strike may be deemed not to be entitled to reinstatement). For detailed discussion of the conflict between CIL and the permanent replacement doctrine, see Parts II.D, IV.B *infra*.

90. Historically, the majority rule in the states was that public-sector strikes were illegal at common law and thus were protected only if a statute expressly authorized them. See *Anchorage Educ. Ass'n v. Anchorage Sch. Dist.*, 648 P.2d 993, 995-96 (Alaska 1982). As of 2014, 40 states allowed at least some public employees to engage in collective bargaining, but only 12 had statutes and/or court decisions allowing strikes. Police officers and firefighters are prohibited from striking in all state jurisdictions, except Hawaii and Ohio. See Milla Sanes & John Schmitt, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 5, 8-9, 25, 51-52 (Center for Economic & Policy Research, 2014).

A third area of expanded protection at the international level involves the definition of a strike itself. The CEACR and CFA view limited work stoppages such as go-slow actions and work-to-rule as presumptively protected strikes, with restrictions justified only if the action ceases to be peaceful. See 2012 GENERAL SURVEY, *supra* note 20, at 51, para. 126; 2018 COMPILATION, *supra* note 20, at 148, para. 784. By contrast, although the NLRA text does not exclude such limited work stoppages from protection as "strikes," go-slow actions as a form of collective withholding of work have long been deemed unprotected and thus subject to employer discipline. See *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950). The Supreme Court has given limited protection to short-term job walkouts induced by severe health or safety circumstances. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). On the issue of sympathy strikes, the CEACR and CFA appear somewhat more protective than U.S. law. The ILO bodies regard sympathy strikes as protected based on whether the initial strike they are supporting is itself lawful. See 2012 GENERAL SURVEY, *supra* note 20, at 51, para. 125; 2018 COMPILATION, *supra* note 20, at 146, para. 770. Prevailing U.S. law regards employees' refusal to cross a lawful picket line as protected concerted activity but also allows the employer to take responsive measures short of discharge on a case-by-case basis. See *Western Stress, Inc.*, 290 N.L.R.B. 678 (1988); *Business Services by Manpower, Inc. v. NLRB*, 784 F.2d 442, 451-54 (2d Cir. 1986).

91. See Sanes & Schmitt, *supra* note 90 at 14-15 (Arizona); 52-53 (Oklahoma); 64-65 (West Virginia). For detailed discussion of the conflict between CIL and restraints on public employees' right to strike, see *infra* Parts II.D, IV.B.

It is worth noting that while the great majority of countries have ratified Convention 87, ratifying States do not follow the two international norms set forth above in identical ways.⁹² With respect to public employees' right to strike, some governments guarantee the right for public workers but prohibit strikes by "civil servants" who are variously defined.⁹³ Other governments prohibit strikes by "sensitive civil servants,"⁹⁴ or else restrict which types of public employee industrial actions are protected,⁹⁵ or impose certain procedural restrictions on strikes by civil servants.⁹⁶ Notwithstanding these variations, however—and unlike the case in the United States—many if not most public employees do enjoy a right to strike under the laws of national governments that have ratified Convention 87.⁹⁷

Finally, although purely political strikes are not covered under Convention 87 principles, the CEACR and CFA have concluded that trade unions should be able to use strike action as part of their search for solutions to problems posed by major policy trends that directly impact their members' socio-economic or occupational interests—and that such strike actions are therefore not purely political.⁹⁸ Relatedly, because a democratic system is central to the free exercise of trade union rights, workers' organizational efforts calling for the recognition and exercise of certain core civil liberties come within the framework of legitimate trade union activities, including through recourse to peaceful strikes.⁹⁹ Strikes based on threats to basic civil liberties occur with some frequency in countries that lack an established democratic structure or tradition.¹⁰⁰

92. See generally Monika Schlachter, *Regulating Strikes in Essential Services from an International Law Perspective* 29, 36-37, in *REGULATING STRIKES IN ESSENTIAL SERVICES* (Mironi & Schlachter eds., 2019); Christina Hiebl & Monika Schlachter, *Comparative Analysis* 517, 525 in *id.*

93. See Bernd Waas, *The Right to Strike: A Comparative View*, in *THE RIGHT TO STRIKE: A COMPARATIVE VIEW* 42-43 (Waas ed., 2014) (discussing laws in Japan, Ecuador, Germany).

94. See *id.* at 43 (France).

95. See *id.* at 44 (Sweden).

96. See *id.* at 44 (Finland and Hungary).

97. There are comparable variations in approach regarding laws related to the replacement of lawful strikers. Many countries that have ratified Convention 87 allow for *temporary* striker replacements in limited circumstances even if rarely invoked. See Waas ed., *supra* note 93, at 61-62, 136, 253, 359 (discussing laws in Finland, Poland, Russia, Ireland, Israel, Chile, Germany, Japan). On the other hand, a number of countries—including with some overlap—specifically prohibit the use of *permanent* replacements for lawful strikers. See *id.*; *INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, vol. IA at 5-78-79, 56-60; vol. IIA at 10-80, 16-49, 19-80, 42-48 (Keller & Darby eds., 4th ed., 2013) (discussing laws of Finland, Germany, Japan, Bulgaria, Netherlands, Sweden, Switzerland). No ratifying country appears to authorize or permit the prompt use of permanent replacements as a matter of law.

98. See 2012 GENERAL SURVEY, *supra* note 20, at 50-51, para. 124; 2018 COMPILATION, *supra* note 20, at 144-45, paras. 758-66. See generally *id.* at 136, paras. 722-23 (relying on the resolution concerning the independence of the trade union movement, adopted by the International Labour Conference in 1952, stating that "the fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers.")

99. See 2012 GENERAL SURVEY, *supra* note 20, at 50-51, para. 124; 2011 CEACR Report, *supra* note 77, at 166-67 (critical of Swaziland Public Order Act applied to repress lawful and peaceful strike action); 2018 COMPILATION, *supra* note 20, at 144, paras. 776, 782. The resolution adopted by the International Labor Conference in 1970 concerning trade union rights and their relation to civil liberties reaffirms this essential link, which was already emphasized in the 1944 Declaration of Philadelphia. The 1944 Declaration was incorporated into the annex of the ILO Constitution. ILO Constitution, *supra* note 23, annex pt. I [hereinafter Declaration of Philadelphia].

100. See, e.g., Mark Anner, *Wildcat Strikes and Better Work Bipartite Committees in Vietnam: Toward an Elect, Represent, Protect and Empower Framework* (Better Work Discussion Paper No.24,

Protecting the right to strike with respect to concerted actions protesting social or economic policies that have direct consequences for workers, or in response to deprivation of civil liberties that are a precondition for the exercise of trade union rights, may appear to have relatively little impact on the realities of modern U.S. labor law.¹⁰¹ These applications, however, reflect that FOA under Convention 87 cannot be fully developed in national settings absent a democratic system that respects fundamental rights and civil liberties. Particularly in situations where law or practice severely restrict democratic developments or pluralistic alternative voices in the political sphere, trade unions may become an important impetus for broader democratic changes.¹⁰² That kind of situation does not seem altogether remote in the context of current U.S. structural and political realities involving campaign finance and electoral politics.

2. *Comparative Limitations*

While the international right includes protections that exceed those available under U.S. law, the right also is subject to a series of limitations. The range and diversity of these limitations combine to constrain the scope of an international right to strike when compared with the U.S. statutory right to strike in the private sector.

In substantive terms, the range of essential services where strikes can be interdicted exceeds what U.S. law would contemplate. The ILO supervisory bodies identify as workers providing essential services firefighters, air traffic controllers, and security forces—all of whom would be prohibited from striking under federal or state law. But also deemed essential under international law are telephone services, water and electricity services, and health and ambulance services—these workers would not be prohibited from striking under the NLRA.

Additionally, provision for negotiated minimum service that would limit the scope of strikes even in non-essential areas allows for broader restrictions than U.S. law currently recognizes. Further, the prohibition on strikes in situations of acute national or local crisis allows for prohibiting strikes in the event of a serious natural disaster. This too suggests a capacity to restrict strike activity—during and after forest fires, earthquakes, or flooding, for instance—that would seem to exceed what is contemplated under U.S. law.¹⁰³ And from a

ILO 2017); Radio Free Asia, *Rohingya Refugees Protest, Strike Against Smart ID Cards in Bangladesh Camps* (26 Nov. 2018), <https://www.refworld.org/docid/5c2cc3b011.html>; Michael Weissenstein & Gonzalo Solano, *Ecuador Indigenous, President Strike Deal to End Protests*, ASSOCIATED PRESS (Oct. 13, 2019), <https://apnews.com/1a0ae2d37624412a8c1cc2b9d71cf7d0>; *Chile Protests: What Prompted the Unrest?*, AL JAZEERA (Oct. 30, 2019), <https://www.aljazeera.com/news/2019/10/chile-protests-prompted-unrest-191022160029869.html>.

101. *But see* Katie Reilly, *Here's What 5 Teachers in Different States Are Fighting For a Year After Walkouts and Protests*, TIME (May 7, 2019), <https://time.com/5583760/what-teachers-want-national-teacher-day/>; Jon N. Hale, *On Race, Teacher Activism, and the Right to Work: Historicizing the Red for Ed Movement in the American South*, 121 W. VA. L. REV. 851 (2019).

102. *See* 2012 GENERAL SURVEY, *supra* note 20, at 21-22, para. 59; 2018 COMPILATION, *supra* note 20, at 17-18, paras. 70-77 (citing to numerous decisions).

103. A rough analog in terms of acute national crisis might be a shutdown of freight transport during a railroad strike. This is provided for under the Railway Labor Act through requests for the

procedural standpoint, international law's acceptance and implicit approval of pre-strike voting requirements differs substantially from practices under the U.S. system, where membership typically delegates strategic choices to leaders at the start of negotiations, including when/whether to call a strike.

To be sure, the contours of the international right to strike are subject to myriad qualifiers at the national level. The CEACR has regularly stated that the right must be applied based on national circumstances, and its approach to the essential services exception, among others, reflects this reality. In addition, many countries ratifying Convention 87 do not comply with all aspects of the right to strike jurisprudence identified above.

Notwithstanding these country-specific variations, the existence of an international right to strike is well established. And while governments frequently engage ILO committees in dialogue about application to their own national circumstances, the dialogue and disagreements occur within a framework of accepting and respecting the existence of the right.¹⁰⁴

II. THE INTERNATIONAL RIGHT TO STRIKE AS CIL

That an international right to strike is widely recognized by governments does not mean the right has assumed the status of CIL. This Part seeks to forge that link, to show how the international right to strike qualifies as CIL. It begins (II.A) by identifying the two basic elements of CIL and explaining why the right to strike is an integral textual and conceptual component of FOA. It then establishes (II.B and C) that FOA and the right to strike satisfy both elements of CIL—a general practice accepted by States, stemming from a sense of legal obligation. While there are variations and qualifiers at the national level, the contours of CIL status are clear: a basic right subject to three substantive restrictions; a recognition that strikers retain their employment relationship during the strike itself; and certain procedural prerequisites or limitations.¹⁰⁵

This Part next demonstrates (II.D) that the two U.S. practices discussed earlier as deviating from the international right to strike—denying all public employees the right and authorizing permanent replacement of lawful strikers—contravene core aspects of the right to strike as CIL. Finally (II.E), this Part introduces the complexities of the U.S. position on FOA and the right to strike as international rights, reflected in the failure to ratify Convention 87 while both Congress and the executive branch embrace Convention 87 principles including the right to strike.

appointment of a presidential emergency board. *See* 45 U.S.C. § 160 (2012).

104. *See, e.g.*, 2015 Final Report, *supra* note 24, at 13, para. 50, 55 (statements by governments of Norway and Colombia, relying on dialogue with, and guidance provided by, ILO supervisory bodies).

105. Part II explicitly discusses one of the three substantive restrictions, involving public employees, and also the recognition that strikers retain ongoing employment status. It does not address the two other substantive restrictions identified in Part I, involving essential services and situations of acute national or local crisis (*see supra* text accompanying notes 63-74); it also does not address the procedural elements discussed in Part I that can limit the right to strike (*see supra* text accompanying notes 76-81).

*A. Initial Definitions and Considerations**1. CIL Standards*

The two basic elements that determine the existence and content of a rule of CIL are first, the requirement of a general practice by States, and second, the requirement that the general practice be undertaken from a sense of legal right or obligation (*opinio juris*).¹⁰⁶ The first element is objective: whether there is a sufficiently widespread and consistent practice of States endorsing and adhering to the rule. Evidence of such a general practice may include governmental conduct in connection with treaties; legislative or administrative acts; decisions of national courts; conduct in relation to resolutions adopted by an international organization; diplomatic acts and correspondence; and executive operational conduct on the ground.¹⁰⁷ The second element, *opinio juris*, is more subjective: the general practice must be undertaken based on its acceptance as law, rather than being accepted based on mere usage or habit or some pragmatic motive. As is true for general practice, evidence of acceptance as law may come in a range of forms. These include public statements made on behalf of States; government legal opinions; decisions of national courts; treaty provisions; diplomatic correspondence; and conduct related to resolutions adopted by an international organization.¹⁰⁸

2. The Right to Strike as Integral to FOA

Freedom of association is one of the core principles on which the ILO was founded and continues to exist.¹⁰⁹ As set forth under Convention 87, FOA includes a series of integral elements, of which the right to strike is one. The two ILO supervisory mechanisms that have regularly applied or interpreted Convention 87 have understood it to include the right to strike from the early days of the Convention's existence.¹¹⁰ Leading U.N. human rights covenants also recognize FOA as a basic right, including the right to strike as a component.¹¹¹ And the labor provisions of the 2019 U.S.-Mexico-Canada trade

106. See Int'l Law Commission Report on the Work of its Seventieth Session, ch.V: Identification of Customary International Law, U.N. Doc. A/73/10 at 117-27 (2018) [hereinafter *ILC Report*]; RESTATEMENT 3D OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 102(2) (1986) [hereinafter *THIRD RESTATEMENT*]; BROWNLIE'S PRINCIPLES, *supra* note 13, at 23-27.

107. See *ILC Report* at 120; BROWNLIE'S PRINCIPLES at 24.

108. See *ILC Report* at 120; BROWNLIE'S PRINCIPLES at 26-27.

109. See ILO Constitution, pmb., July 28, 1919, 15 U.N.T.S. 40 [hereinafter 1919 ILO Constitution] (identifying "recognition of the principle of freedom of association" as "urgently required"); Declaration of Philadelphia, *supra* note 99 ("reaffirm[ing] the fundamental principles on which the Organization is based and, in particular, that: (a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress"); 1998 Declaration, *supra* note 23, para. 2(a) ("[declaring] that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining"); Declaration on Social Justice for a Fair Globalization (June 13, 2008).

110. See *supra* note 39 and accompanying text.

111. See *supra* notes 47-49 and accompanying text, discussing ICESCR and ICCPR, and fact

agreement include the following statement: “*For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.*”¹¹² Accordingly, if FOA is seen as Customary International Law (CIL), and the right to strike is an essential component of FOA, then the right to strike should also be understood to be part of CIL.

Consider in this regard the following integral elements of Convention 87. The fact that as part of FOA, workers and employers “shall have the right to establish and . . . to join *organizations of their own choosing without previous authorization*”¹¹³ means the State may not impose unreasonably high membership requirements that hinder the establishment of organizations, or require that members may not join several different organizations.¹¹⁴ Similarly, the fact that under FOA, workers and employers “shall have the right to . . . elect their representatives *in full freedom* [and that] public authorities shall *refrain from any interference which would restrict this right* or impede the lawful exercise thereof,”¹¹⁵ means the State may not impose limits on candidates due to their nationality, literacy, political opinions, moral standing, or for workers, their non-employment in the employer’s occupation or enterprise.¹¹⁶ And the fact that as part of FOA, workers “shall have the right . . . to *organize their . . . activities and to formulate their programs*” free “from any interference [by the public authorities]”¹¹⁷ means that worker organizations, in order to defend the occupational interests of their members, have the right to hold trade union meetings, the right to have access to places of work and to communicate with management, and the right to organize nonviolent protest action including strikes.¹¹⁸

B. FOA and the Right to Strike as General Practice

There is ample support that FOA is widely accepted in objective terms. Convention 87 has been ratified by 155 countries, or 83 percent of the 187 ILO Member States.¹¹⁹ In addition, the ILO Constitution, endorsed by all members,

that in applying FOA and right to strike the human rights committees monitoring application of the two covenants defer to ILO applications under Convention 87. In addition, the Universal Declaration of Human Rights recognizes the rights to freedom of assembly and association, and the right to form and join trade unions for the protection of their interests. See arts. 20(1), 23(4).

112. USMCA, *supra* note 24, art. 23.3(a) n.6 (emphasis added).

113. Convention 87, *supra* note 33, art. 2 (emphasis added).

114. See 2012 GENERAL SURVEY, *supra* note 20, at 33-34, paras. 89-91; 2018 COMPILATION, *supra* note 20, at 80-81, paras. 435-47, 88-89, paras. 477-84.

115. Convention 87, *supra* note 33, art. 3 (emphasis added).

116. See 2012 GENERAL SURVEY, *supra* note 20, at 40-41, paras. 102-05; 2018 COMPILATION, *supra* note 20, at 114-17, paras. 609-24.

117. Convention 87, *supra* note 33, art. 3 (emphasis added).

118. 2012 GENERAL SURVEY, *supra* note 20, at 45, para. 115, 49 para. 119; 2018 COMPILATION, *supra* note 20, at 135-38, paras. 717-31, 143, paras. 751-54.

119. Convention 98, addressing the right to organize and collective bargaining, has been ratified by 167 countries. Data on ratifications is available through the ILO website. NORMLEX Information System on International Labour Standards, ILO, https://www.ilo.org/dyn/normlex/en/?p=1000:10011::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F [hereinafter Status of ILO Conventions].

specifies the critical role of FOA both in its 1919 founding document and the 1944 Declaration of Philadelphia as a constitutional addition.¹²⁰ More recently, ILO Declarations issued in 1998 and 2008, again embraced by all members, make clear that even Member States that have not ratified Convention 87 are obligated to act in good faith to respect and effectuate FOA principles.¹²¹

Beyond the ILO realm, workers' freedom of association, including the right to form and join trade unions and expressly the right to strike, is recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations General Assembly to be effective 1976.¹²² The Covenant has been ratified by 171 countries, including two of the four large-population countries that have not ratified Convention 87.¹²³ Another major UN Human Rights treaty, the International Covenant on Civil and Political Rights (ICCPR), also adopted by the U.N. General Assembly to be effective in 1976, recognizes FOA including the right to form and join trade unions.¹²⁴ The ICCPR has been ratified by 173 countries, including three of the four large-population countries that have not ratified Convention 87; its human rights committee has consistently recognized the right to strike as part of FOA under the Covenant.¹²⁵ Indeed, of the 187 ILO Member States, only 11 relatively small-population countries have not ratified at least one of Convention 87, the ICESCR, or the ICCPR.¹²⁶

120. See 1919 ILO Constitution, *supra* note 109, pmb.; ILO Constitution, *supra* note 23, annex pt. I.

121. See 1998 Declaration, *supra* note 23, para. 2(a) (quoted at *supra* note 109). These principles include freedom of association and the effective recognition of the right to collective bargaining. The 1998 Declaration provides for Annual Review Reports from countries that have not yet ratified one or more of the eight fundamental Conventions, allowing governments to report on measures taken towards achieving respect for the Declaration, and giving organizations of employers and workers a chance to voice their views on progress made by governments. See also ILO Declaration on Social Justice for a Fair Globalization (2008), which adds that freedom of association and the effective recognition of the right to collective bargaining are of particular significance for the achievement of the ILO's key strategic objectives.

122. See ICESCR, *supra* note 18, art. 8; Janice R. Bellace, *The ILO and the Right to Strike*, 153 INT'L LAB. REV. 29, 50-52 (2014).

123. Four large-population countries have not ratified Convention 87 (though they recognize the constitutional obligations associated with membership). Of these four, Brazil has ratified ICESCR without reservations. India and China have ratified ICESCR with reservations placed on Article 8, providing for it to be interpreted consistent with each country's constitution. The U.S. has signed ICESCR but has not ratified it. More generally, the U.S. lags well behind other States in ratifying key international covenants related to labor and human rights, having ratified only two of the eight fundamental ILO Conventions (all eight having been ratified by 155 or more of 187 ILO members), and having not ratified the ICESCR (ratified by 171 of 193 UN members). For ratification status of ILO Conventions, see Status of ILO Conventions, *supra* note 119. For ratification of UN Treaties, see Depository: Status of Treaties, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en.

124. See ICCPR, *supra* note 18, art. 22.

125. See Macklem, *supra* note 48, at 72-73 & n.44 (summarizing human rights committee applications of right to strike in Germany (1996), Chile (1999), and Lithuania (2004)). Of the four large-population countries that have not ratified Convention 87, Brazil has ratified ICCPR, again without reservations. India has ratified ICCPR, again with a reservation placed on article 22 that it be interpreted as consistent with article 19 of India's constitution, which states in relevant part that "all citizens will have the right to form associations and unions." The United States has ratified ICCPR and has added a reservation that none of the articles should restrict the rights of free speech and association. China has signed ICCPR but has not ratified it.

126. The eleven countries are Brunei Darussalam, Cook Islands, Malaysia, Oman, Palau, Saudi Arabia, Singapore, South Sudan, Tonga, Tuvalu, and United Arab Emirates. Of these, only four have

FOA is also expressly recognized in a labor setting in the European Convention on Human Rights, which has been ratified by all 48 countries in the Council of Europe.¹²⁷ At a national level, the vast majority of constitutions provide for freedom of association, although some use general language that (unlike the international instruments just mentioned) does not specify workers or trade unions.¹²⁸

Apart from States' nearly-universal embrace of FOA as a general matter, the right to strike itself has been broadly accepted by governments. As noted earlier, more than 90 countries have made a public commitment to the right to strike in their constitutions.¹²⁹ These commitments have translated to actual practice when national courts have relied on guidance from the CEACR and CFA in assuring compliance with their constitutional right to strike. Judicial interpretation of the international right as part of applying a domestic constitution often involves assuring compliance by governments or employers,¹³⁰ though it also may require compliance by unions.¹³¹ And compliance with the international right to strike may even emanate from application of a national constitution that endorses FOA without being explicit about the right to strike.¹³²

populations exceeding six million: Saudi Arabia (34.1 million), Malaysia (31.9 million), South Sudan (11.1 million), and UAE (9.8 million).

127. Article 11 of ECHR closely parallels the language of Convention 87 in relevant respects, including restriction of FOA rights for public employees involved in administration of the State:

Freedom of assembly and association; 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

European Convention on Human Rights, art. 11, Nov. 4, 1950, E.T.S. 5 (emphasis added).

128. See CONSTITUTE PROJECT, https://www.constituteproject.org/search?lang=en&key=assoc&status=in_force (applying pre-set topic of freedom of association to indicate that as of 2014, 181 out of 193 in-force constitutions have a provision on freedom of association). For geographically diverse examples, see CONSTITUTION OF ALGERIA, art. 41; CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 8 (Braz.); KONSTITUTSIA NA REPUBLIKA BALGARIA [Constitution] art. 44 (Bulg.); CONSTITUIÇÃO DE MOÇAMBIQUE [Constitution] art. 52 (Mozam.); CONSTITUCIÓN POLÍTICA DEL PERÚ, art. 28; CONSTITUCIÓN ESPAÑOLA [C.E.] sec. 22 (Spain). A number of these listed constitutions (e.g., Brazil, Bulgaria, Mozambique, Peru) expressly protect the freedom to form trade unions.

129. See *supra* note 54 and accompanying text.

130. See, e.g., *NUMSA (Nat'l Union of Metalworkers of S. Afr.) v. Bader Bop*, 2002 (CC), Case No. CCT 14/02 (S. Afr.) (applying the constitutional provision protecting the right to strike, relying on CEACR and CFA guidance when rejecting employers' arguments, and holding that minority unions have the right to strike when collective bargaining negotiations have failed); Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 1999, Sentencia T-568/99, *Sindicato de las Empresas Varias de Medellín v. Ministry of Labour & Social Security* (Colom.) (applying the constitutional provision protecting the right to strike and relying on CEACR and CFA guidance to reject government declaration of a strike as illegal when based on ruling from an administrative mechanism that was not impartial).

131. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], agosto 27, 2014, Expediente SL11763-2014, Radicación No. 59413, *R y R. Asociados S.A. v. Nat'l Trade Union of Workers in the Cork, Plastics, Polyethylene, Polyurethane, Synthetics, Components & Derivatives Processing Indus.* (Colom.) (applying the constitutional provision protecting the right to strike, relying in part on CEACR and CFA analysis of acceptable procedural conditions when calling a strike unlawful, and holding that strike was unlawful because union did not provide adequate notice).

132. See High Court of Botswana, Aug. 9, 2012, MAHLB-000674-11, *Bots. Pub. Emps.' Union v. Minister of Labour & Home Affairs* (Bots.) (interpreting Botswana's national constitution, which protects FOA but is silent on the right to strike, as extending to a right to strike given the country's ratification of C87 and C98; and further relying on CEACR guidance when holding that "essential

Among the many national courts that have invoked the CEACR and/or CFA in support of a right to strike,¹³³ two other cases worth noting involve Brazil and Kenya because neither country has ratified Convention 87. In 2012, the Labour Court in Brazil ordered reinstatement of workers terminated for participating in a work stoppage.¹³⁴ Under Brazil's Constitution, "norms that define fundamental rights and guarantees are directly applicable."¹³⁵ Given that the Court found that the employer's conduct had violated the principle of freedom of association and the free exercise of the right to strike, it seems that the "principle of freedom of association" was being directly applied as a matter of customary international law rather than through a ratified treaty or convention.¹³⁶ In 2013, the Industrial Court of Kenya ordered the reinstatement of five workers dismissed for participating in a strike and strike-related activities. The Court's reasoning derived from Kenya's general participation in the ILO, including "respect for International Labour Standards," rather than direct application of fundamental norms as in the Brazil case.¹³⁷ The Industrial Court invoked a report by the CEACR and decisions by the CFA to support its decision; its recognition of FOA as an accepted international standard suggests that reports from the ILO supervisory bodies served as evidence of CIL.¹³⁸

Finally, states' widespread practice is reflected in the negotiation of trade agreements over the past two decades that recognize both FOA and the right to strike. Since 2003, labor provisions in U.S. trade agreements have regularly featured linkages to FOA as one of the fundamental ILO norms.¹³⁹ The commitment by signatory states to FOA as understood under the 1998 ILO Declaration has been progressively strengthened during this period—from providing that parties "shall strive to ensure" protection of FOA under domestic laws¹⁴⁰ to specifying that parties shall "adopt and maintain [FOA rights] in

services" limits on right to strike imposed by statute may not include diamond cutting, sorting and selling services, or teaching services).

133. See *supra* note 56 (citing to courts in eleven countries on four continents).

134. See T.S.T., No. TST-RR-77200-27.2007.5.12.0019, Relator: Min. Vieira de Mello Filho, 15.02.2012, *Zavascki v. Companhia Minuano de Alimentos*, Brasília (Braz.).

135. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5(1) (Braz.).

136. Article 5(2) of the Constitution authorizes the courts to apply as law a treaty entered into by Brazil. *Id.* at art. 5(2). See Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31 [hereinafter Convention 111]. While the court's decision invokes ratified Conventions 98 and 111 (addressing collective bargaining and nondiscrimination), neither convention discusses or refers to the right to strike as part of FOA, suggesting that the principle was being applied through article 5(1).

137. See *Univ. Academic Staff Union v. Maseno Univ.* (2013) (I.C.K.) (Kenya) ("Kenya is a member of the ILO and is expected to respect its [sic] obligations including respect for International Labour Standards").

138. It is possible that the Court was deciding the case on a quasi-treaty basis, with its obligation coming directly from ILO membership considerations. Still, the fact that a national court recognizes FOA and the right to strike, when its government has not ratified the ILO Convention establishing that right, offers support for FOA as customary international law.

139. See *Free Trade Agreements*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements> (showing bilateral agreements with Chile (2003), Peru (2006), Colombia (2012) and Panama (2012) and, at a regional level, the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR) (2004)).

140. See *United States-Chile Free Trade Agreement*, Chile-U.S., art. 18, June 6, 2003, 42 I.L.M. 1026; CAFTA-DR, art. 16, Aug. 5, 2004, 119 Stat 462, 43 I.L.M. 514.

[their] statutes and regulations, and practices thereunder.”¹⁴¹ The latest trade agreement, involving the United States, Mexico, and Canada (approved as a successor to NAFTA) expressly provides that the right to FOA necessarily includes protection for the right to strike.¹⁴² Trade agreements involving EU countries also feature commitments to respect and implement under domestic law the principles of FOA as understood in the ILO context.¹⁴³ This wide network of similarly worded, mostly bilateral trade agreements addressing the subject of FOA constitutes additional evidence of general practice for CIL purposes.¹⁴⁴

The pervasive nature of actual practice regarding FOA and the right to strike does not mean that the right’s content is static or fixed. To be sure, there is broad acceptance of the two previously discussed features on which U.S. law is out of step: the prohibition on permanent replacements¹⁴⁵ and public employees’ right to strike with certain exceptions.¹⁴⁶ And although particular limits on the right may vary from one country to another, there is an international consensus that the right exists and that any limits should be reasonable.¹⁴⁷ The International Court of Justice (ICJ) does not require uniformity in practice in order to establish CIL, and indeed, it has countenanced some degree of variation:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general be consistent with such rules.¹⁴⁸

C. *FOA and the Right to Strike as Opinio Juris*

There is also considerable support for the proposition that the general practice of states on FOA and the right to strike stems from acceptance as a matter of legal obligation. Admittedly, while the existence of *opinio juris* may be inferred from a general practice, the International Court of Justice (ICJ) has at times noted the insufficiency or inconclusiveness of such practice, instead

141. See United States-Peru Trade Promotion Agreement, Peru-U.S., art. 17, Apr. 12, 2006, 121 Stat. 1455; United States-Colombia Trade Promotion Agreement, Colom.-U.S., art. 17, Nov. 22, 2006, entered into force in May 2012; U.S.-Panama Trade Promotion Agreement, art. 16, June 28, 2007, 125 Stat. 427. The same language is also included as part of the Trans-Pacific Partnership Agreement, art. 19.3(1), Feb. 4, 2016, which President Trump renounced.

142. See USMCA, *supra* note 24, art. 23.3 (Labor Rights), para. 1(a) n.6 (“For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.”).

143. See Free Trade Agreement Between European Union and its Member States, of the One Part, and Republic of Korea, of the Other Part, art. 13.4, para. 3, 2011 O.J. (L 127) 6, May 14, 2011, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2011:127:TOC> [hereinafter *Korea-EU FTA*]; Free Trade Agreement, Between European Union and Its Member States, of the One Part, and Colombia and Peru, of the other Part, art. 269, para. 3, 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2012:354:TOC>.

144. See THIRD RESTATEMENT, § 102 cmt. (i) (1986); Jonathan Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 978-79 (1986).

145. See *supra* notes 82-85 and accompanying text.

146. See *supra* notes 58-62 and accompanying text.

147. See *supra* notes 92-97 and accompanying text.

148. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Reports 14 (June 27) [hereinafter *Nicaragua*].

seeking confirmation that “[states’] conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”¹⁴⁹ Trade agreements, for instance, may represent treaty law and may qualify as evidence of general practice, but they are typically entered into by States that have specific economic or political objectives rather than from a desire to embrace obligations arising under international law.¹⁵⁰ Further, it is possible that even with respect to ILO conventions, widespread ratification is in part a function of acculturation, insofar as endorsements across a region contribute to socialized acceptance of norms on FOA, reassuring peer countries that protecting rights to association including the right to strike will not place them in an inferior competitive position.¹⁵¹

That said, the ICJ often does infer the existence of *opinio juris* from a general practice and/or from determinations by national or international tribunals.¹⁵² And there are ample reasons to draw such an inference here. To start, FOA is consciously accepted as an obligation by ILO member states not simply through ratification of Convention 87 (covering more than 80 percent of them) but by virtue of membership itself. The ILO Constitution expressly requires support for FOA principles, and these principles are further imbedded through a tripartite governance structure that allocates power-sharing roles to worker organizations alongside governments and employers.¹⁵³ Thus, ILO members understand there is an underlying obligation to respect FOA in law and practice.¹⁵⁴

A second reason is that domestic law can provide relevant evidence regarding the presence of *opinio juris* among states. Commitments to FOA expressed in national constitutions, statutes, and court decisions are not necessarily evidence of a state’s belief that the principle is international as

149. *Id.* at 108-09 (quoting *North Sea Continental Shelf (Ger. v. Neth.)*, Judgment 1969 I.C.J. 3).

150. With respect to the Western hemisphere trade agreements discussed at notes 139-41 and accompanying text, the “smaller” Central and South American countries are presumably seeking increased trade with the United States. (especially for their exports) and are prepared to accept commitments to labor standards as part of the deal. The United States. would seem motivated by an interest in enhanced markets and also in higher labor standards that will offer greater protection for American jobs, perhaps as much as (if not more than) it is acting based on an acceptance of international law.

151. See Sara Kahn-Nisser, *The Ripple Effect: Peer ILO Treaty Ratification, Regional Socialization, and Collective Labor Standards*, 22 GLOBAL GOVERNANCE 513, 525 (2016) (finding ripple effect in EU countries since the late 1990s with respect to ratification of collective labor rights conventions, notably Conventions 87 and 98); James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 U. PA. J. INT’L L. 1, 15-16 (2017) (discussing similar pattern regarding ratification of child labor conventions in Latin American countries during same period).

152. See THIRD RESTATEMENT, *supra* note 106, § 102(2), (3) cmt. b (1986); BROWNIE’S PRINCIPLES, *supra* note 13, at 39 & n.46 (citing to nine ICJ decisions from 1969 to 2011, including *North Sea Continental Shelf* (1969); *Gulf of Maine* (1984); *Nicaragua* (1986); *Armed Activities on the Territory of the Congo* (2005); and *Pulp Mills on the River Uruguay* (2010)).

153. See *supra* note 34 and accompanying text (discussing composition of International Labor Conference (Parliament) and Governing Body (Executive) at 2:1:1 ratios).

154. As discussed earlier, the right to strike has been understood to be part of FOA through Convention 87 for many decades, since shortly after Convention 87 was promulgated in 1948. And almost all of these Member States have also ratified one or both of the dominant U.N. Covenants that incorporate the right to strike as understood and applied by the ILO supervisory bodies. See *supra* notes 47-49, 122-126 and accompanying text (discussing the ratification of ICESCR and ICCPR and their consistency of application with Convention 87 on the right to strike).

opposed to domestic law. Nonetheless, the International Law Commission has made clear that evidence of acceptance as law (*opinio juris*) “may take a wide range of forms,” including but not limited to “official publications; government legal opinions; [and] decisions of national courts.”¹⁵⁵ In this regard, the CEACR in 2012 identified 92 countries where “the right to strike is explicitly recognized, including at the constitutional level”; the list includes six countries that have not ratified Convention 87.¹⁵⁶

Recognition in domestic law of a right to strike alongside a conscious decision not to ratify Convention 87 could give rise to an inference that these six countries are rejecting the right as a principle of *international* law. However, as explained earlier, national courts for two of the six non-ratifying countries (Brazil and Kenya) expressly invoke ILO membership and/or principles as guidance in their domestic law decisions.¹⁵⁷ In addition, Canada—a country not listed among the 92 endorsing the right to strike in the 2012 General Survey—has since recognized a constitutional right to strike under national law, relying in part on international law principles including CEACR and CFA determinations.¹⁵⁸ The Canadian Supreme Court had previously been explicit in invoking Convention 87, ICESCR, and ICCPR as “documents [that] reflect not only international consensus but also principles that Canada has committed itself to uphold.”¹⁵⁹

Further, a third country in the group of six—South Korea—has affirmed in its trade agreements with the United States and the EU its obligation to “adopt and maintain in its statutes and regulations, and practices” FOA in accordance with the ILO Declaration.¹⁶⁰ And in various CFA complaints against South Korea for violating FOA principles, including the right to strike, the Government has disputed the facts of the complaints while at the same time recognizing that such rights are embedded in international law.¹⁶¹ Accordingly, a more relevant reference point in this setting may be that “when States act in conformity with a

155. *ILC Report*, *supra* note 106, at 140.

156. See 2012 GENERAL SURVEY, *supra* note 20, at 50 n.264. The six are Brazil, Guinea-Bissau, Kenya, South Korea, Morocco, and the United States.

157. See *supra* text accompanying notes 133-138.

158. Saskatchewan Fed. of Labour v. Saskatchewan, [2015] 1 S.C.R. 245 (Can.) (“Besides [Canada’s] explicit commitments [as a party to ICESCR and Charter of the Organization of American States], other sources tend to confirm the protection of the right to strike recognized in international law. Canada is a party to the International Labour Organization (ILO) *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972. Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention . . . Striking, according to the Committee of Experts, is ‘one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests.’”)

159. See *Health Servs. & Support Facilities Subsector Bargaining Ass’n. v. British Columbia*, 2007 SCC 27, 134, [2007] 2 S.C.R. 391 (Can.).

160. See United States-Korea Free Trade Agreement, S. Kor.-U.S., art. 19.2, June 30, 2007, 125 Stat. 428; *Korea-EU FTA*, *supra* note 143, at art. 13.4, ¶ 3.

161. See, e.g., Report No. 383, Oct. 2017 re: Case No. 3238, para. 276-282, INT’L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0:NO:50002:P50002_COMPLAINT_TEXT_ID:3523636;ReportNo.386,June2018re:CaseNo.3237,para.183-189,INT’L LABOUR ORG.,https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0:NO:50002:P50002_COMPLAINT_TEXT_ID:3950216.

treaty provision by which they are not bound . . . this may evidence the existence of acceptance as law (*opinio juris*) in the absence of any explanation to the contrary.”¹⁶²

Stepping back, domestic law on FOA and the right to strike, which for many countries developed after Convention 87 and its initial applications by the CEACR and CFA, may be viewed in part as a window into countries’ sense of obligation in law and practice. A state may at times adopt labor provisions of a trade agreement for reasons of comity or relative competitive advantage. These reasons may play a more modest role with respect to adoption of certain human rights treaties or ILO conventions.¹⁶³ But evidence of practice and obligation in the domestic law sphere—especially when informed by regard for international instruments—seems almost by definition to be a function of acceptance as law rather than susceptibility to strategic motivations. In this regard, there are numerous instances in recent years where governments have expanded their legislative protections for the right to strike following a period of dialogue with the CEACR, and that committee has recognized and applauded the changes in law.¹⁶⁴ Of particular relevance to the U.S. setting, these expansions have included assuring the right to strike for public sector employees and prohibiting the hiring of replacements for strikers.¹⁶⁵

162. *ILC Report, supra* note 106, at 139; *see also Nicaragua, supra* note 148, para. 186 (“If a State acts in a way *prima facie* incompatible with recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”).

163. *See Bernhard Boockmann, Mixed Motives: An Empirical Analysis of ILO Roll-Call Voting*, 14 CONST. POL. ECON. 263 (2003) (recognizing that countries have distinct economic interests regarding labor competitiveness but also that there is considerable symbolic meaning in voting for many of these conventions); Kahn-Nisser, *supra* note 151.

164. *See, e.g.*, Application of International Labour Standards 2020 (I), Report of the CEACR, Report III (Part A), at 83 [hereinafter 2020 CEACR Report] (noting with satisfaction a legislative change by government of Bulgaria extending FOA and right to strike protections to all civil servants except for managing senior civil servants); *id.* at 77 (noting with satisfaction legislative changes by government of Botswana deleting from list of essential services a range of public sector occupations including teaching, government broadcasting, and immigration and customs); 2017 CEACR Report, *supra* note 78, at 78 (noting with satisfaction a provincial legislative change in Canada granting public employees FOA rights, including the right to engage in strike action, “in accordance with the Committee’s previous request”); *id.* at 81 (noting with satisfaction legislation by government of Chile repealing prior provision that allowed for replacement of striking workers under certain conditions and deeming such replacements in the future a serious unfair practice warranting monetary sanctions); *id.* at 95 (noting with satisfaction a legislative change by the government of Costa Rica establishing a lower numerical threshold of minimum support in order for a strike to be legal); Application of International Labour Standards 2016 (I), Report of the CEACR, Report III (Part 1A) at 105-06 (noting with satisfaction legislation by government of Peru revising the required quorum or majority to call a strike so that it is fixed at a reasonable level); Application of International Labour Standards 2015 (I), Report of the CEACR, Report III (Part 1A), at 81 (noting with satisfaction three legislative changes made by the government of Georgia abrogating restrictions on strike action); *id.* at 129 (noting with satisfaction a legislative change by the government of Swaziland (now Eswatini) deleting sanitary services from the list of essential services); *id.* at 130 (noting with satisfaction legislative changes by the government of Turkey, removing a number of services from the previous strike prohibition and expanding protection for solidarity strikes and go-slows, also noting with satisfaction a recent Constitutional Court decision removing banking services and urban transportation services from the statutory list of essential services).

165. *See supra* note 164 (addressing legislative changes protecting strikes by public sector employees in Bulgaria and Botswana (2020), Canada (2017), and Eswatini and Turkey (2015), and addressing legislative change prohibiting replacements for strikers in Chile (2017))

A third reason to infer *opinio juris* (in addition to the centrality of FOA principles within the ILO Constitution and the strong evidence of FOA and right-to-strike practice and obligation under domestic law) involves recent statements from high officials in the United Nations indicating that the right to strike is understood by its leaders as CIL. In his 2016 report to the U.N. General Assembly, the U.N. Special Rapporteur on the rights to freedom of peaceful assembly and association explained, “The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law.”¹⁶⁶

In 2018, responding to a press briefing on a strike by U.N. employees following announced pay cuts, the Deputy Spokesman for the U.N. Secretary-General reiterated the U.N. view that the right to strike is indeed CIL and did so in the context of the right being asserted by public employees not involved in the administration of the state:

Question: Does the Secretary-General believe that U.N. staff have a right to take part in industrial action?

Deputy Spokesman: We believe the right to strike is part of customary international law.¹⁶⁷

These statements did not simply materialize in recent times. Two major U.N. Human Rights treaties—the ICESCR and the ICCPR—have been interpreted by their relevant treaty bodies to include a right to strike; these bodies have reaffirmed their joint commitment to the right to strike as part of FOA, and they regularly monitor governments’ record of compliance with this right.¹⁶⁸ And as noted earlier, the two treaties—each ratified by over 80 percent of U.N. members—include a clause explicitly identifying respect for ILO Convention 87.

In sum, the principles of FOA including the right to strike would appear to satisfy both prongs of the CIL test. The widely recognized general practice on strikes has sufficient shape and contours: a basic right, three substantive

166. Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, para. 56, U.N. Doc. A/71/385 (Sept. 14, 2016), <https://undocs.org/A/71/385>.

167. Press Release, Secretary-General, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (Mar. 16, 2018), <https://www.un.org/press/en/2018/db180316.doc.htm>.

168. On reaffirmation of joint commitment, *see supra* note 19. On monitoring application in national contexts, *see, e.g.*, United Nations Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany, para. 20, U.N. Doc. E/C.12/DEU/CO/5 (July 12, 2011) [hereinafter 2011 CESCR Report] (criticizing restrictions on the right to strike for public servants, citing to ICESCR art. 8 and also Convention 87); ICCPR Human Rights Committee, Concluding observations on the fourth periodic report of Estonia, paras. 31-32, U.N. Doc. CCPR/C/EST/CO/4 (Apr. 18, 2019) [hereinafter 2019 ICCPR Concluding Observations] (joining CESCR in urging further legislative reforms to allow the full right to strike for nonessential public servants, citing to ICCPR art. 22); ICCPR Human Rights Committee, Concluding observations on the sixth periodic report of the Dominican Republic, paras. 31-32, U.N. Doc. CCPR/C/DOM/CO/6 (Nov. 27, 2017) (expressing concern at reports that employers are restricting FOA and urging government to adopt measures that safeguard FOA and the right to strike, citing to ICCPR art. 22).

exceptions (public servants involved in administration of the state, essential services in the strict sense of the term, and acute national emergencies), a recognition that strikers retain their employment relationship during the strike itself, and certain procedural prerequisites or attached conditions.¹⁶⁹ There are variations in national practice and also disagreements at the margins about what the right to strike protects, but these aspects are not different in kind from diversity and contests regarding international rights prohibiting child labor, or for that matter domestic constitutional rights involving freedom of expression or the right to bear arms. As for *opinio juris*, a broad range of sources combine to establish that the general practice stems from a sense of acceptance and obligation: ILO foundation and structure; two widely endorsed United Nations human rights treaties; national constitutions; government representations; domestic legislative and judicial decisions that expressly refer to or impliedly accept international standards and practices; and contemporary U.N. leadership.

D. Public Employees and Permanent Replacement

Accepting that FOA including the right to strike qualifies as CIL, it is also established that application of the right is based on national circumstances, and variations exist on a country-specific basis.¹⁷⁰ Accordingly, a question arises whether the two practices that might give rise to a cause of action in U.S. courts—prohibition on public sector strikes, and recognition of the right to use permanent replacements—lie at the margins of the right to strike, governed largely or exclusively by national circumstances, or are centrally encompassed as part of CIL. The Article has suggested aspects of a response at different points in Sections B and C of this Part,¹⁷¹ but a more direct examination seems warranted.

1. Public Employees Have a Right to Strike, with Limited Exceptions

On the right to strike for public employees, the presence of nationally specific limitations for certain subgroups does not overcome States' widespread recognition that the right applies to public employees as a group. The recognition is manifested initially in textual terms, through the overwhelming ratification of Convention 87 along with the ICESCR and the ICCPR that have expressly embraced this Convention.¹⁷² In the text of Convention 87, only one provision explicitly assigns the scope of convention guarantees to the exclusive control of

169. See *supra* Part I.B.

170. See *supra* text accompanying notes 59-61, and in paragraph following *supra* note 103, recognizing these variations with respect to classification of public servants exercising authority in name of the State and in the nature of essential services.

171. See *supra* notes 58-62, 82-85, 92-97, 164-165, and 167 and text accompanying these footnotes.

172. See *supra* text accompanying notes 49 and 119-126 (establishing that the two UN treaty bodies have declared a specific commitment to Convention 87 and its application by ILO supervisory bodies, and that of 187 ILO Member States, only 11 relatively small-population countries have failed to ratify at least one of these three international treaties.

national laws or regulations.¹⁷³ This is the *only provision prescribing such exclusive control for national law within Convention 87*. Apart from the armed forces and the police, the FOA rights and protections accorded to all other public employees are the same as for private employees. Indeed, the very concept of a limited express assignment to exclusive national authority occurs against the backdrop that all other coverage under Convention 87 is understood to apply without such limitation.¹⁷⁴ While the CEACR and CFA have recognized some restrictions on the right to strike for public servants engaged in the administration of the state, those restrictions are embedded in the general practice that public servants not engaged in the administration of the state, as well as all public employees who are not public servants, enjoy the right to strike to the same extent as their private counterparts.¹⁷⁵

As noted earlier, country-specific variations as to which public employees enjoy the right to strike in practice often involve distinctions between certain civil servants (who are prohibited from striking) and other public employees who have the right to strike.¹⁷⁶ Germany and Ecuador are explicit about a distinction between *all* civil servants and other public workers,¹⁷⁷ although both the European Court of Human Rights and the relevant U.N. human rights committees (CESCR and ICCPR) have held that a ban on strikes by all civil servants is too expansive.¹⁷⁸ France prohibits strikes only by “sensitive civil servants” such as police, prison officers, and judges, while some countries (Finland, Hungary) grant most civil servants the right to strike subject to procedural limitations, and still others—including Ireland, Australia, Uruguay,

173. See Convention 87, *supra* note 33, art. 9(1) (stating that any FOA protections for the armed forces and police “shall be determined by national laws or regulations”).

174. This *expressio unius* structure of Convention 87 is far from unique. Provisions in other ILO Conventions also make it structurally explicit that only certain rights, protections, or obligations are to be set exclusively through national laws or regulations, or that national governments have the option of limiting the scope of their obligations under a Convention in specific respects. See, e.g., Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182) June 17, 1999, 2133 U.N.T.S. 161, art. 4(1) [hereinafter Convention 182] (definition of hazardous work that qualifies as worst forms of child labor); Convention Concerning Minimum Age for Admission to Employment (No. 138), June 26, 1973, 1015 U.N.T.S. 297, art. 3(2) [hereinafter Convention 138] (definition of work jeopardizing safety and health applicable to persons under age 18); Convention Concerning Termination of Employment (No. 158), June 22, 1982, 1412 U.N.T.S. 159, art. 2(2) [hereinafter Convention 158] (allowing for exclusion of certain categories of workers from termination protection); Convention Concerning Social Security (No. 102), June 28, 1952, 210 U.N.T.S. 131, art. 2 [hereinafter Convention 102] (allowing States ratifying this basic social security convention to accept certain articles and not others).

175. It is also notable that Convention 98, addressing the right to collective bargaining, expressly states (art.6) that it does not deal with the position of public servants engaged in the administration of the State. This suggests that the scope of FOA under international law, including the right to strike, is presumptively broader regarding public servants than the scope of the right to engage in collective bargaining.

176. See *supra* text accompanying notes 92-97.

177. See Waas, *supra* note 93, at 43-44. Waas also identifies Japan and South Korea under the same civil servants versus other public employees umbrella. *Id.* at 43.

178. See *Enerji Yapi-Yol Sen v. Turkey*, Third Section, 21 April 2009, Application No. 68959/01 (ECHR); 2011 CESCR Report, *supra* note 168, para. 20 (critical of restrictions on right to strike for public servants, citing to art. 8 and also Convention 87); 2019 ICCPR Concluding Observations, *supra* note 168, paras. 31-32 (joining with CESCR in urging further legislative reforms to allow full right to strike for non-essential public servants, citing to art.22).

and Slovenia—extend the right to strike to nearly all public sector employees.¹⁷⁹ At the opposite extreme, Chile has ratified Convention 87 but under law prohibits strikes by public employees. Yet as a matter of practice, public employee trade unions in Chile regularly negotiate and exercise the right to strike in that country.¹⁸⁰ And while there is an ongoing dialogue between various governments and the CEACR and CFA regarding the range of public employees that may be excepted from the right to strike,¹⁸¹ this dialogue often helps lead governments to reduce the scope of their constraints on the right.¹⁸² In short, the general practice that emerges is of public employees enjoying the right to strike, subject to limited exceptions that vary in size and scope.

As for *opinio juris*, it is useful to reiterate the ICJ interest in confirmation that “[States’] conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’”¹⁸³ Legal obligation to protect public employees’ right to strike has been recognized in recent times by a number of states, including Bulgaria, Botswana, Canada, Eswatini, and Turkey. These governments have amended their laws to grant or extend public employees’ right to strike, as part of a dialogue with the CEACR.¹⁸⁴ Further support comes from national court decisions in Kenya and Canada, recognizing public employees’ right to strike as CIL based wholly or in part on reports from ILO supervisory bodies.¹⁸⁵ This range of recent country-specific examples illustrates the sense of obligation regarding public employees’ right to strike that emanates from international sources of authority.

2. *Lawful Strikers May Not be Permanently Replaced*

Inclusion of a ban on permanent replacement of lawful strikers as part of CIL stems almost definitionally from international understanding of the right to strike itself. Under broadly endorsed legal norms, the employment relationship is suspended but not terminated during a lawful strike. Employees are not compensated while on strike, but they resume the contractual relationship with

179. See Waas, *supra* note 93, at 42-44.

180. See *id.* at 43. See also *Chilean Public Employees on Strike*, LATIN AMERICAN HERALD TRIBUNE, <http://laht.com/article.asp?ArticleId=364460&CategoryId=14094> (reporting 80,000 public employees staging strike on June 11, 2020).

181. See, e.g., 2012 GENERAL SURVEY, *supra* note 20, at 52, para. 130 & n. 279 (identifying governments that imposed undue restrictions on the right to strike according to the CEACR’s country-specific observations and direct requests in 2010-2011).

182. Among governments identified in the 2012 GENERAL SURVEY, *supra* note 20, para. 130, see, e.g., 2020 CEACR Report, *supra* note 164, at 83 (CEACR expresses satisfaction with legislative change in Bulgaria extending right to strike protections to virtually all civil servants); *id.* at 43 (noting legislative change by government of Albania providing right to strike to civil servants with some limits); Application of International Labour Standards 2014 (I), Report of the CEACR, Report III (Part 1A), at 104 (noting with interest legislative change by government of Estonia restricting ban on public employee strikes to public servants exercising authority in name of the State); Panama, Dept. of State, 2019 Country Reports, Bureau of Democracy, Human Rights, and Labor, sec. 7(a) (noting that by law the majority of public employees now may strike although not employees of the Panama Canal Authority).

183. *Nicaragua*, *supra* note 148, at 108-09 (quoting *North Sea Continental Shelf (Ger. v. Neth.)*, Judgment, 1969 I.C.J. 3).

184. See *supra* note 164 (identifying details).

185. See notes 137-38 and accompanying text (decision by Industrial Court of Kenya); notes 158-59 and accompanying text (decision by Canadian Supreme Court).

their employer when the strike ends, absent unusual unlawful or violent conduct.¹⁸⁶ This helps explain the difference between national laws allowing temporary striker replacements in specific circumstances and the same national laws banning permanent replacements.¹⁸⁷ Other common law countries similarly provide that the use of replacement labor is limited to the period during which a lawful strike takes place.¹⁸⁸ The United States is highly unusual if not unique in authorizing permanent replacements for lawful strikers.¹⁸⁹

Unsurprisingly, the CFA and CEACR have condemned employers for dismissing strikers and refusing to take them back.¹⁹⁰ The great majority of caselaw examples involve disputes in which the government declares a strike unlawful when dismissing the workers, a declaration disputed by the workers and usually by the CFA, but a declaration reinforcing the prevalent norm that *lawful* strikes do not warrant such dismissals and replacements.¹⁹¹ The CEACR and CFA discussion of the U.S. example is again distinctive for its emphasis on legislation or caselaw authorizing permanent replacement of lawful strikers.¹⁹²

Finally, regarding *opinio juris*, the reality that almost no countries endorse permanent replacement of lawful strikers largely removes prospects for demonstrating that banning the practice is undertaken based on its acceptance as law. That said, one recent example involves the government of Chile: the CEACR in 2017 noted with satisfaction that the government had repealed a prior provision allowing for replacement of striking workers under certain circumstances, and had deemed such replacements in the future to be a serious unfair labor practice warranting monetary sanctions.¹⁹³ And as noted above, the fact that almost all governments dismissing and replacing strikers seek to defend their practice based on the *unlawfulness* of the strike¹⁹⁴ reflects a tacit understanding of legal norms related to replacing lawful strikers. In sum the prohibition against permanent replacements is at the center rather than the

186. See, e.g., International Labor and Employment Laws, *supra* note 97, vol. 1A at 3-77 (Belgium); 4-63 (France); 5-78, 5-79 (Germany); 7-56 (Spain); 50-120, 50-126 (South Africa); 75-62 (Brazil).

187. See, e.g., laws of Bulgaria, Switzerland, Sweden, Finland, Germany, Japan, and Netherlands, discussed in Brudney, *supra* note 85, at 566.

188. See M.M. Botha and M. Lephoto, *An Employer's Recourse to Lock-Out and Replacement Labour: An Evaluation of Recent Case Law* [2017] PER 34, TAN 77-78, http://www.saflii.org/za/journals/PER/2017/34.html#_ftnref77 (South Africa). In the United Kingdom, lawful strikers are protected against dismissal for at least the first 12 weeks of a strike. See *If we go on strike, are we protected from dismissal?*, WORKSMART, <https://worksmart.org.uk/work-rights/trouble-work/industrial-action/if-we-go-strike-are-we-protected-dismissal>.

189. See *NLRB v. Mackay Radio & Telegraph Co.*, 333 U.S. 333, 345-46 (1938) (discussed at *supra* text accompanying note 88).

190. See *supra* sources at notes 84 and 85.

191. See, e.g., 2018 COMPILATION, *supra* note 20, at 172, para. 918 (referring to Thailand, 372d Report, Case No. 3022 (2014); Pakistan, 365th Report, Case No. 2902 (2012); Philippines, 346th Report, Case No. 2488 (2007); Sri Lanka, 344th Report, Case No. 2380 (2007); Colombia, 343d Report, Case No. 2355 (2006)).

192. See 1994 GENERAL SURVEY, *supra* note 20, at 76, para. 175 (“The difficulty [with hiring replacement workers in a lawful strike] is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute” with a footnote reference to a CFA case involving the U.S.).

193. See *supra* note 164.

194. See *supra* cases discussed at note 191 and accompanying text.

margins of the right to strike, given that virtually no countries besides the U.S. allow it under law, and those that invoke it in practice are persistently excoriated.

E. The U.S. Position on FOA and Right to Strike as International Rights

How does the U.S. position on FOA and the right to strike fit into the CIL story? On the one hand, the U.S. is generally reluctant to ratify international human rights conventions, a reluctance evidenced in the administrations of both parties.¹⁹⁵ And the executive branch is unlikely to conclude as a matter of diplomacy that an international human rights norm is CIL without engaging in an extensive internal interagency clearance process.¹⁹⁶ On the other hand, the U.S. is one of six countries that recognizes a right to strike even while refusing to ratify Convention 87.¹⁹⁷ And in trade legislation as well as recent free trade agreements, Congress and the executive have endorsed the FOA principles of Convention 87 despite not moving toward ratification. Accordingly, the complex U.S. position on whether FOA and the right to strike are international rights that could be accepted as CIL warrants attention.

1. Formal Response to International Instruments

In terms of formal responses to international instruments, the U.S. has ratified ICCPR with some reservations, but these do not restrict its commitment to FOA generally—indeed one reservation singles out FOA for special protection.¹⁹⁸ The U.S. has signed ICESCR but has not ratified it,¹⁹⁹ just as it has not ratified Convention 87.

The U.S. is, however, committed to the principles of FOA set forth in the convention, through its enduring support of key constitutional documents and ILO Declarations.²⁰⁰ In this regard, the failure to ratify Convention 87 since

195. See Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321, 327-28 (2010); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341-350 (1995); Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263 (2002). One theory is that the reluctance is located to a considerable extent in the Senate, because under Article II of the Constitution, a minority veto (one-third plus one of a Senate quorum) is sufficient to defeat ratification.

196. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 391-97 (2013).

197. See *supra* note 156 and accompanying text.

198. See Status of the International Covenant on Civil and Political Rights: Declarations and Reservations: United States, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=en (last visited Jan. 7, 2021), Reservations, para. 1. The U.S. also ratified ICCPR with the express declaration that it was not a self-executing treaty and therefore did not itself create obligations enforceable in the federal courts. See *id.*, Declarations, para. 1. The absence of legal obligations created under the Covenant does not detract from the instant argument based on CIL.

199. See generally Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990). For discussion of political realities in the Senate, flowing from the Cold War era, that impeded efforts to ratify the ICESCR and other human rights instruments from the Carter through Clinton administrations, see Connie de la Vega, *Human Rights and Trade: Inconsistent Application of Treaty Law in the United States*, 9 UCLA J. INT'L L. AND FOR. AFF. 1, 11-14 (2004). See generally Bradley, *supra* note 195.

200. See *supra* 1919 Constitution Preamble, 1944 Declaration of Philadelphia, 1998 Declaration

President Truman submitted it to the Senate in 1949 would not confer the status of “persistent objector” to the CIL norm of FOA.²⁰¹ Any potential U.S. objection has not been “maintained persistently,” and in light of the Truman administration’s support for the Convention in 1949 an objection was not made “while the rule was in the process of formation.”²⁰² Moreover, persistent objector status has little traction in the ILO setting, where promulgation of conventions carries only the expectation that a government will make its legislature aware of the convention’s existence with no obligation to act for or against ratification.²⁰³ The U.S. also has not attempted to attach a reservation to Convention 87 or indeed any ratified convention—and in ILO practice such reservations are not accepted.²⁰⁴

In recent decades, there has been an awareness among national political leaders of both parties that failure to ratify fundamental ILO conventions undermines U.S. credibility when defending human rights generally and when using trade policy to promote respect for internationally recognized worker rights.²⁰⁵ In a 1985 Senate committee hearing on the U.S. relationship with the ILO, the principal focus was on how non-ratification adversely impacted the U.S. status in the ILO, as well as on whether ratifying various conventions would

on Fundamental Principles and Rights at Work, 2008 Declaration on Social Justice for a Fair Globalization, at notes 109, 120, 121 and accompanying text, all of which emphasize the importance of FOA.

201. A persistent objector is a sovereign State that has clearly objected to a norm of customary international law since the norm’s formation, and considers itself not bound to observe the norm. *See* BROWNIE’S PRINCIPLES, *supra* note 13, at 28.

202. *See ILC Report, supra* note 106, at 152 (Conclusion 15). For a description of the Truman Administration’s review of Convention 87, culminating in its support for ratification, *see* U.S. DEP’T OF LABOR, BRIEFING PAPER ON ILO CONVENTION 87 CONCERNING FREEDOM OF ASSOCIATION (Oct. 1980) [hereinafter DOL BRIEFING PAPER], reprinted in *The United States and the International Labor Organization: Hearing Before the Sen. Comm. on Labor and Human Resources*, 99th Cong. 49-53 (1985).

203. *See* ILO Constitution, *supra* note 23, art. 19(5)(a) (requiring that Conventions adopted by the International Labour Conference be communicated to all Member States for possible ratification). Under Article 19(5)(b)-(e), the legislative body in each Member State, once made aware of a new Convention, may decide to pursue ratification, to decline such an effort, or to defer action.

204. Unlike other human rights instruments, ILO conventions are the product of its tripartite governance structure, involving voting and decision-making rights for employer and worker organizations. *See supra* note 34. It would undermine this structure to allow one member of the tripartite group—governments—to undo even partially what all three groups have agreed upon. *See* Lawrence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 686 (2006). A handful of conventions do allow for flexibility at the national level on an express basis. *See, e.g.*, Convention 182, *supra* note 174, art. 4(2) (types of hazardous work for children shall be determined by national law); Convention 138, *supra* note 174, art. 2 (minimum age shall be specified by each country so long as tied to compulsory schooling age level); Convention 158, *supra* note 174, art. 2(2) (allowing countries to exclude certain categories of workers from job-termination protection); Convention 102, *supra* note 174, art. 2 (allowing ratifying States to accept certain social security articles and not others). Convention 87 does not include such provisions.

205. *See* Steve Chamovitz, *The ILO Convention on Freedom of Association and its Future in the United States*, 102 AM. J. INT’L L. 90, 94-98 (2008). Chamovitz focuses on observations from Republican leaders during the 1980s. In 2010, the Obama Administration Department of Labor attempted to rekindle ratification efforts. *Secretary of Labor Hilda L. Solis chairs 1st meeting of Presidents Committee on the International Labor Organization in 10 years.* *See* <https://www.dol.gov/newsroom/releases/ilab/ilab20100505> (Department of Labor press release, May 5, 2010). The press release refers to Secretary Solis planning to work with the President’s Committee toward ratification of Convention 111, prohibiting employment discrimination; however, no proposal was submitted to the Senate from 2010-2016.

require modification to federal law.²⁰⁶ But the issue of the U.S. rejecting or disagreeing with FOA on the merits did not come up. If anything, the hearing largely affirmed that the U.S. believed it was in substantial conformity with the principles of Convention 87,²⁰⁷ and that “even if a country does not ratify many conventions, it is still responsible as an ILO member for complying with the basic principles of the labor rights conventions, Nos. 87 and 98.”²⁰⁸

2. *Political Branch Positions on FOA and Right to Strike*

This approach has been reinforced by the support of the executive branch at various points for ILO efforts on FOA with other countries. Undersecretary of Treasury for International Affairs Timothy Geithner noted in a 2000 House hearing that Indonesia had ratified Convention 87 “partly in response to the urging of the United States.”²⁰⁹ And the Bureau of International Labor Affairs (ILAB) in the Department of Labor has regularly monitored and reported in detail on labor standards performance regarding FOA and other fundamental principles by countries with whom the U.S. has trade agreements.²¹⁰

Beyond the testimony and conduct of executive branch officials, Congress has enacted legislation making clear that the U.S. recognizes the FOA principles of Convention 87 even without ratifying the convention. In 1984, Congress included “freedom of association” as an “internationally recognized worker right” in the Trade and Tariff Act.²¹¹ In the 2002 Trade Act, after the prior law had expired, Congress explicitly noted that the “overall trade negotiating objectives” should include the promotion of “worker rights . . . consistent with core labor standards of the ILO,” including freedom of association.²¹² Because

206. See DOL BRIEFING PAPER, *supra* note 202, at 1-2 (Sen. Hatch); *id.* at 4 (Sen. Thurmond); *id.* at 5, 9 (Secretary of State Schultz); *id.* at 26-33 (Secretary of Labor Brock). See also Orrin G. Hatch, *Ratify International Labor Conventions*, CHRISTIAN SCI. MONITOR (Dec. 10, 1985) (stating that “our dismal non-ratification record undercuts our credibility at the ILO”). Both Secretary of State Schultz in 1985 and Secretary of Labor Dole in 1989 observed that because we have not ratified most ILO conventions, we are prohibited under the ILO Constitution from bringing complaints against other governments for non-compliance with those conventions. See DOL BRIEFING PAPER at 8 (Secretary Schultz); Charnovitz, *supra* note 205, at 94-95 (reproducing statement from Secretary Dole).

207. See DOL BRIEFING PAPER, *supra* note 202, at 12 (Secretary Schultz). But cf. *id.* at 80, 91-97 (statement of Abraham Katz, U.S. Council for International Business, describing various issues on which Convention 87 was alleged to be inconsistent with U.S. labor law).

208. *Id.* at 21 (Secretary Brock).

209. *Indonesia: Confronting the Political and Economic Crises: Hearing Before the Subcommittee on Asia and the Pacific of the House Committee on International Relations*, 106th Congress 53, 58 (2000).

210. From the Obama Administration, see, e.g., *Standing Up for Workers: Promoting Labor Rights through Trade* (2015), <https://www.dol.gov/agencies/ilab/standing-workers-promoting-labor-rights-through-trade>; *Public Report of Review of U.S. Submission 2012-01 (Honduras)* (2012), <https://www.dol.gov/agencies/ilab/public-report-review-submission-no-2012-01-honduras>. From the G.W. Bush Administration, see, e.g., *Labor Rights Report: Chile* (2003), <https://www.dol.gov/agencies/ilab/labor-rights-report-chile>; *Labor Rights Report: Singapore* (2003), <https://www.dol.gov/agencies/ilab/labor-rights-report-singapore>.

211. Pub. L. No. 98-573, Sec. 503 (1984) (“For purposes of this title, the term ‘internationally recognized worker rights’ includes—(A) the right of association; (B) the right to organize and bargain collectively . . .”).

212. 19 U.S.C. § 3802(a). The 2002 Act requires that U.S. trade agreements aim “to strengthen the capacity of United States trading partners to promote respect for core labor standards.” Pub. L. No. 107-210, § 2102(b)(11)(C), 16 Stat. 994 (2002).

“[n]ational legislation, while it is most often the product of political choices, may be valuable as evidence of acceptance as law,”²¹³ these statutory additions provide further support for the argument that the U.S. recognizes the principles as binding. They also reinforce the notion, mentioned earlier in relation to 1980s testimony by executive branch officials, that Congress’s refusal to ratify Convention 87 may well be for reasons unrelated to the Convention’s core principles.²¹⁴

Moreover, the evolving emphasis on FOA in the labor provisions of congressionally ratified trade agreements further strengthens the U.S. commitment to FOA as an international set of rights. Trade agreements negotiated in 2003 and 2004 specified that the parties shall “strive to ensure” protection under domestic laws for FOA and other labor principles recognized under the 1998 Declaration.²¹⁵ Agreements negotiated after 2006 provided more forcefully that each party shall “adopt and maintain in its statutes and regulations, and practices thereunder” the rights to FOA and others as stated in the ILO Declaration.²¹⁶ During this same time period, the U.S. government has repeatedly linked FOA and the right to strike. In its 2015 presentation to the ILO Governing Body, the U.S. representative stated as follows:

In the decades since the adoption of Convention No. 87, the CEACR and CFA had provided observations and recommendations with regard to the right to strike [T]hey had observed that freedom of association and particularly the right of workers to organize their activities for the purpose of promoting and protecting their interests could not be fully realized without protecting the right to strike The CFA had confirmed and applied the relationship between the right to strike and the right to freedom of association in almost 3000 cases without dissent. The United States concurred [with the statement of the Government Group] that the right to strike was protected under Convention No. 87, even though the right was not explicitly mentioned in the Convention.²¹⁷

And as noted earlier, in the 2019 U.S.-Mexico-Canada trade agreement, negotiated by President Trump to replace NAFTA and endorsed by the executives of all three countries in December 2019, the labor provision emphasizes that “[f]or greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.”²¹⁸

213. *ILC Report*, *supra* note 106, V: Identification of Customary International Law, U.N. Doc. A/73/10 (2018), Conclusion 10, Cmt. (5), p. 141

214. *Cf.* *Flomo v. Firestone Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (expressly crediting this possibility in relation to U.S. failure to ratify Convention 138 on child labor).

215. *See* CAFTA, art. 16.1 (2004); Chile FTA, art. 18.1 (2003).

216. *See* Peru FTA, art. 17.2 (2006); Panama FTA, art. 16.2 (2012); Colombia FTA, art. 17.2 (2012).

217. *See* 2015 Final Report, *supra* note 24, at 5, para. 16.

218. *See* U.S.-Mexico-Canada Agreement, art. 23.3, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. Dec. 13, 2019 text. This is not to suggest that the Trump Administration is prepared to introduce legislation prohibiting permanent replacements or protecting strikes by state and local government employees. But it is worth noting the contrast between reluctance by Republican administrations to strengthen the right to strike under domestic law with consistent U.S. government support in recent decades for FOA principles *internationally* including the right to strike.

3. *Federal Courts' Position on CIL as National Law*

What about the position of the federal courts toward CIL and its acceptance as national law in the US? The leading Supreme Court decision, *Sosa v. Alvarez-Machain*,²¹⁹ involved a claim by Alvarez-Machain for violation of CIL under the Alien Tort Statute (ATS).²²⁰ A cause of action under the ATS may be distinguished from the right to strike setting in two respects. As a jurisdictional matter, the ATS typically involves lawsuits alleging violations of CIL committed in foreign countries and brought by citizens of foreign countries. By contrast, as developed in parts III and IV, the right to strike as CIL would be asserted by U.S. workers against U.S. employers within the U.S. Further, as explained in Part III, the CIL right to strike is to be asserted directly as a form of federal common law, rather than being applied through a particular statute that may impose its own historically grounded limits.²²¹

At the same time, the substantive standard set forth in *Sosa* is relevant in allowing for suitably delineated CIL to be directly applied in domestic federal and state court contexts.²²² While urging lower courts to exercise a “restrained conception” when considering new causes of action based on CIL, the Court in *Sosa* added that such claims can be recognized if “rest[ing] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”²²³ The Court’s formulation in the ATS setting is slightly different from the two elements—general practice and *opinio juris*—that have been discussed at length in defining and applying modern CIL.²²⁴ But *Sosa*’s emphasis on international law norms that are precisely defined and reflect the importance of general practice is compatible with contemporary conceptions of CIL.²²⁵

Lower courts have understood that *Sosa* sets a “‘high bar to new private causes of action’ alleging violations of CIL”²²⁶ based on whether the sources of such law are “sufficiently specific, universal, and obligatory.”²²⁷ But they have proceeded to recognize such causes of action when “multiple international agreements (including one that is binding on more than 160 signatory states), as well as the domestic laws of over 80 states, adopt a particular definition of that

219. 542 U.S. 692 (2004).

220. 28 U.S.C. § 1350.

221. See Martin S. Flaherty, *Jesner and the Supreme Court’s Ongoing Assault on International Human Rights*, in SUPREME COURT REVIEW 2017-2018 111, 119-20 (Stephen D. Schwinn ed., 2d ed., 2018) (discussing Court’s reliance in *Sosa* on causes of action under late-18th century Law of Nations when fashioning new CIL causes of action under ATS).

222. See generally McGinnis, *supra* note 25, at 490-93 (noting *Sosa*’s implications for deriving CIL beyond the ATS setting); William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 21 (2009).

223. *Sosa*, 542 U.S. at 725.

224. See *supra* Parts II.A.1, II.B, II.C.

225. See Flaherty, *supra* note 221, at 120-21. Applying the standard to the facts before it, the Court concluded that—even assuming a CIL norm that prohibits prolonged arbitrary detention—Alvarez-Machain’s claim based on his illegal detention of less than a day could not qualify. See *Sosa*, 542 U.S. at 736-37.

226. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009) (quoting *Sosa*).

227. *Id.* at 174 (referencing *Sosa* and *Paquete Habana*).

norm.”²²⁸ As has been amply demonstrated in sections B and C of this Part, the universality of the claims based on the right to strike as part of FOA can qualify under this approach. The right is recognized under multiple international agreements (including ILO conventions ratified by over 150 states and other international agreements ratified by over 170 states); regional human rights agreements around the world; domestic constitutions and laws in over 90 countries; and major court decisions at both a regional and national level. Further, this CIL norm includes a sufficient level of specificity regarding the two key areas that are the focus of analysis for purposes of U.S. law: the right of public employees to engage in strike activities with limited exceptions and the right of all strikers to be protected against permanent replacement.²²⁹

All of the above suggests that U.S. failure to ratify Convention 87 is likely to be compatible with its recognizing FOA and the right to strike as CIL.²³⁰ At the same time, there is no independent or tripartite analysis comparing Convention 87 to U.S. labor law, identifying what changes in national and state law would be needed to comply with the Convention in general and the right to strike in particular.²³¹ U.S. employer representatives have expressed concern that ratification would alter national and state labor law in a number of important respects including the right to strike.²³² Given the U.S. historical position of non-objection alongside non-ratification, the Article next addresses whether—even if the right to strike under FOA is accepted as CIL in traditional international law terms and is recognized under the *Sosa* standard—the right can be asserted in U.S. courts as CIL. This question implicates several distinct problems, which are discussed in Parts III and IV.

228. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 386 (S.D.N.Y. 2009) (invoking the standard applied by the Second Circuit in *Abdullahi* (*id.* at 384-85) and recognizing plaintiffs’ claims based on crimes against humanity). *See Abdullahi*, 562 F.3d at 184-85 (relying inter alia on ICCPR in recognizing claims based on nonconsensual medical experimentation); *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 130-31 (E.D. Pa. 2011) (recognizing claims based on child sex tourism); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 1019-22 (S.D. Indiana 2007) (recognizing claims based on child labor); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 686-87 (S.D. Texas 2009) (recognizing claims based on forced labor and trafficking). *See also Siderman de Blake v. Republic of Argentina*, 965 F.3d 699, 716-17 (9th Cir. 1992) (recognizing that acts of torture by government violate CIL); *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260, 277 (2d Cir. 2007) (Katzmann, J., concurring) (concluding that liability for aiding and abetting violations of international law is itself “sufficiently ‘well-established[and] universally recognized’ to be considered customary international law for the purposes of the ATCA”). Although these claims were all brought under the jurisdiction of the ATS, the substantive *Sosa* standard is relevant when directly applying CIL in the domestic context. *See supra* notes 222-25 and accompanying text.

229. *See supra* notes 58-74, 85-100, 164-65 and accompanying text.

230. This recognition is not essential for CIL to exist; FOA and the right to strike can still qualify based on sufficiently broad acceptance and obligatory reasoning as set forth in parts II.B and C above. *See Flomo v. Firestone Rubber Co.*, 643 F.3d 1013, 1021-22 (7th Cir. 2011) (U.S. and other developed countries cannot “veto” CIL through one or two refusals to ratify a convention that otherwise meets the standards). Still, in order for this CIL to have a chance at being enforceable in U.S. courts, recognition of its sufficiency under the *Sosa* standard is likely important.

231. *See Charnovitz, supra* note 205, at 103.

232. *See* Edward Potter, *The Growing Importance of the International Labour Organization: the View from the United States*, in *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* 356 (John Craig & Michael Lynk eds., 2006); Edward E. Potter, *FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING: THE IMPACT ON U.S. LAW AND PRACTICE OF RATIFICATION OF ILO CONVENTIONS NO. 87 AND NO. 98* (Labor Policy Assn., 1984); *DOL BRIEFING PAPER, supra* note 202 (testimony from U.S. Council of International Business at 1985 Senate committee hearing).

III. INTERACTION BETWEEN CIL AND OTHER FORMS OF U.S. LAW

A. Preliminary Framing

In order for the international right to strike to receive protection in a U.S. domestic law setting, this CIL right must be cognizable in federal court. Workers asserting such a right would be seeking direct application of CIL, stemming from legal principles set forth in *The Paquete Habana*²³³ and subsequent cases.

The Paquete Habana involved U.S. seizure of two Spanish fishing vessels during the Spanish American War. The Court relied on customary international law to hold that the vessels and their cargoes were exempt from capture as prizes of war.²³⁴ Justice Gray's oft-quoted language, recognizing that CIL is part of the law of the United States, is as follows:

*International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .*²³⁵

In a number of decisions beginning in the 1960s, the Court has applied CIL rules when determining the legal status of submerged offshore areas, helping guide its application of federal statutes and treaties implicating the law of the seas.²³⁶ The Court has also invoked CIL in determining when an instrumentality of a sovereign state becomes the “alter ego” of that state, a question not controlled by the relevant foreign sovereign immunity statute.²³⁷ Relatedly, the Court in *Banco Nacional de Cuba v. Sabbatino*²³⁸ relied on a judge-made principle of U.S. foreign relations law—the Act of State doctrine—to decline to examine the validity of the taking of property by a foreign sovereign government within its own territory.²³⁹

Turning to lower federal courts, the courts of appeals have regularly applied the Vienna Convention on the Law of Treaties “as an articulation of the

233. *The Paquete Habana*, 175 U.S. at 708.

234. *See id.* at 708.

235. *Id.* at 700 (emphasis added).

236. *See Koh, supra* note 27, at 1836 & n.64 (summarizing e.g., *United States v. Alaska*, 521 U.S. 1, 15-21 (1997); *United States v. Alaska*, 503 U.S. 569, 588 & n.10 (1992); *United States v. Louisiana*, 470 U.S. 93, 106-07 (1985); *United States v. Louisiana*, 394 U.S. 11, 22 (1969); *United States v. California*, 381 U.S. 139, 164-65 (1965)).

237. *First Nat. City Bank v. Banco Para El Comercio Exterio de Cuba*, 462 U.S. 611, 626-27 (1983). The Court made clear that the Foreign Sovereign Immunities Act could not resolve this issue—it was a matter of CIL plus federal common law. *Id.* at 621-22. For a lower court application of this alter ego rule, *see EM Ltd v. Banco Central de la Republica Argentina*, 800 F.3d 78, 89-96 (2d Cir. 2015).

238. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)

239. *Id.* at 431-37. The Act of State doctrine, adopted by British as well as American courts, provides that courts will not sit in judgment of a foreign government's acts done within its own territory. The doctrine, while not required as a matter of treaty law or CIL in the U.S., reflects judicial respect both for the sovereignty of other nations and for the authority of the U.S. executive in foreign affairs. *See* Louis Henkin, *International Law as U.S. Law*, 82 MICH. L. REV. 1555, 1559 (1984) [hereinafter Henkin, *International Law as U.S. Law*]. *See generally* Belhaj and another v. Straw and others, Rahmatullah (no 1) v. Ministry of Defence and another, [2017] AC 964, [2017] 3 All ER 337 (discussing the scope and applicability of Act of State doctrine in the UK).

customary international law of treaty interpretation, even though the United States is not a party to the treaty itself.”²⁴⁰ And at least one district court has recognized FOA and the right to organize as CIL when denying a motion to dismiss.²⁴¹ Finally, the executive branch also has applied CIL in certain circumstances. Although the U.S. voted against adoption of the 1982 UN Convention on the Law of the Seas, the U.S. government accepts its key provisions regarding the maximum breadth of territorial sea and the extent of exclusive economic zones as CIL.²⁴² In short, U.S. courts and executive branch officials have directly applied CIL and been guided by its teachings in a range of doctrinal settings.²⁴³

As noted earlier, CIL on human rights has been deemed applicable in U.S. courts for suitably defined misconduct occurring in other countries.²⁴⁴ These doctrinal precedents do not involve direct application of CIL in a domestic law setting akin to the labor and human rights claims being proposed here. That said, lower courts have invoked CIL when applying federal rules of decision in a range of domestic law contexts. Indeed, the use of CIL when applying and construing various federal statutes has increased markedly in recent decades.²⁴⁵ Examples include its use when applying an armed conflict statute to establish limits on detention of a U.S. citizen within the U.S.,²⁴⁶ when construing the same statute to help establish requirements for release and repatriation of a foreign national held on U.S. soil,²⁴⁷ and when limiting the scope of an immigration statute’s

240. *Pliego v. Hayes*, 843 F.3d 226, 232 (6th Cir. 2016) (referencing applications by three other circuits). *See also Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 194 (1993) (Blackmun, J., dissenting) (invoking the Vienna Treaty as authority under CIL).

241. *See Estate of Rodriguez v. Drummond Co. Inc.*, 256 F.Supp.2d 1250, 1262-64 (N.D. Ala. 2003). *See also Aquamar S.A., v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (invoking CIL to assist in determining whether foreign government waived sovereign immunity in action by Ecuadorian shrimp farmers alleging severe economic damage from herbicides and pesticides).

242. *See Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW* 28-29, § 2-2 (fifth ed. 2011); Paul C. Ney, Jr., *The Charney Lecture: The Rule of Law in International Security Affairs: A U.S. Defense Department Perspective*, 52 VAND. J. TRANS. L. 773, 790 (2019) (Sept. 3, 2019 speech by U.S. Defense Dept. General Counsel underscoring U.S. acceptance of these provisions as CIL).

243. *See also Graham*, 560 U.S. at 80-82 (2010) (invoking the laws and practices of other nations, including international human rights treaty and the “overwhelming weight of international opinion,” as relevant and confirmatory support for conclusion that imposing life-without-parole sentences on juveniles violates Eighth Amendment prohibition against cruel and unusual punishments); *Roper v. Simmons*, 543 U.S. 551 575-78 (2005) (relying on decades-long practice of looking to other countries and international authorities, including ICCPR, as “instructive for its interpretation of” the Eighth Amendment prohibition, in concluding that imposing death sentence for juveniles constitutes cruel and unusual punishment); *id.* at 604-05 (O’Connor, J., dissenting) (observing with approval that for nearly 50 years “the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”).

244. *See supra* note 228 for cases recognizing claims under the *Sosa* standard, brought pursuant to the ATS, that involved crimes against humanity; nonconsensual medical experimentation; child sex tourism; child labor; and forced labor.

245. *See Bart M.J. Szewczyk, Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 G.W. L. REV. 1118, 1134-46 (2014) (identifying six categories of cases where courts invoked international custom as part of interpreting federal statutes: extraterritoriality; sovereign immunity; law of armed conflict; maritime cases; immigration including international human rights; and other).

246. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

247. *See Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

authorization of detention.²⁴⁸ In addition, CIL has been applied to help courts apply the choice between indefinite detention and exclusion under a different immigration statute,²⁴⁹ and to assist judicial construction of a statute regulating recovery of sunken warships in U.S. waters.²⁵⁰ It is not obvious why CIL should be deemed *inapplicable* when construing federal statutes that implicate appropriately qualified labor/human rights misconduct occurring within our borders.²⁵¹

Moreover, as previously noted, a number of other countries have accepted the right to strike as a principle of international law when applying their own domestic law despite their conscious decision not to ratify Convention 87.²⁵² Once one accepts that recognized CIL has substantive traction in a domestic law setting, the focus should be on whether this CIL can be situated in relation to certain procedural or jurisdictional limitations that characterize the U.S. judicial context. Accordingly, application of CIL to sustain claims based on FOA and the right to strike requires consideration of how this CIL relates to other aspects of U.S. law.

B. *CIL as Federal Common Law*

A threshold question is whether U.S. courts should determine matters of CIL as federal common law or as state law in light of the *Erie* doctrine.²⁵³ The question has been extensively debated by able international law scholars,²⁵⁴ and I will not attempt to add new value in this setting. I am persuaded that CIL should be understood and litigated as federal common law, for reasons presented at length in a range of sources.²⁵⁵ Indeed, as one international law scholar has

248. See *Ma v. Reno*, 208 F.3d 815, 829-30 (9th Cir. 2000), vacated on other grounds sub nom *Zadvydas v. Davis*, 533 U.S. 678 (2001) (invoking *Charming Betsy* canon to construe 1996 immigration reform statute so as to comply with CIL prohibition against prolonged arbitrary detention).

249. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981).

250. See *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 643 (4th Cir. 2000).

251. See *supra* note 243 for Eighth Amendment cases. And consider child labor as an example different from the right to strike. Under U.S. law, children at age 14 may work regularly as baristas, bussers, dishwashers, cashiers, and fast food restaurant cooks. See 29 C.F.R. § 570.34. Under Convention 138 (ratified by 173 of 187 ILO Member States but not the U.S.), the minimum age for such non-hazardous jobs in developed countries is 15 (see Convention 138, *supra* note 174, arts. 2(3), 2(4)(5)). Assuming arguendo that the age-15 standard passes muster under *Sosa* (a non-trivial question, although I have shown this test can be satisfied in the right to strike context), one would hope that 14 year olds in Boston would have the same international protections as 14 year olds in Berlin or Buenos Aires. *But cf.* *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1254-58 (11th Cir. 2012) (holding that drug trafficking does not violate CIL, and Congress's determination that it does in Maritime Drug Law Enforcement Act is unconstitutional under "Offences against the Law of Nations" clause of Article I).

252. See notes 134-138 and accompanying text (describing domestic courts' reliance on international law in Kenya and Brazil, countries that have not ratified Convention 87). See also notes 154-155 and accompanying text (discussing Canadian Supreme Court's recent reliance on international law when recognizing right to strike under its domestic constitutional law).

253. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

254. Compare *Bradley & Goldsmith*, *supra* note 27 (arguing that CIL is state law) with *Koh*, *supra* note 27 and *Henkin*, *International Law as U.S. Law*, *supra* note 239 (arguing that CIL is federal law).

255. See *Koh*, *supra* note 27; Carlos M. Vazquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 N. DAME.

recently and thoroughly explained, “[t]he law of nations was the original federal common law.”²⁵⁶

The basic contours of this position were set forth by the Supreme Court in *Sabbatino*, when it held that the Act of State doctrine is federal law, binding on the states and not within the scope of *Erie*.²⁵⁷ In the words of Justice Harlan for an eight-member majority, “an issue concerned with a basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”²⁵⁸ Subsequently, leading commentators have joined the Court in concluding that *Erie* was never meant to apply to CIL;²⁵⁹ that federal courts’ incorporation of the CIL of labor and human rights follows post-*Erie* precedent recognizing and helping to create a federal common law for labor relations and for other uniquely federal interests;²⁶⁰ that CIL may reflect developments in the international arena of labor and human rights in addition to filling gaps with respect to jurisdictional statutes such as the ATS and the Torture Victim Prevention Act (TVPA);²⁶¹ and that CIL remains subject to the democratic checks of supervision, endorsement, or revision by the federal political branches.²⁶² Relying on the weight of these arguments in *Boyle v. United Technologies Corp.*, Justice Scalia for the Court recognized that a few areas involving “uniquely federal interests” are committed to federal control, including the development of federal common law, and he cited Court precedent on CIL as one such area.²⁶³

L. REV. 1495, 1620-23 (2011); William Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. IN BRIEF 1 (2007); Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Gerald Neuman, *Sense and Nonsense About Customary International Law*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); THIRD RESTATEMENT, *supra* note 106, at § 111, Reporter’s Note 3.

256. Thomas H. Lee, *The Law of Nations and the Judiciary Branch*, 106 GEO. L.J. 1707, 1745 (2018)

257. *Sabbatino*, 376 U.S. at 425-27.

258. *Id.* at 425.

259. *See Sabbatino*, 376 U.S. at 425 (relying inter alia on 1939 law review article by Professor Philip Jessup, subsequently appointed to the International Court of Justice); Lee, *supra* note 256, at 1734-36 (discussing how *Erie* was limited solely to the power of federal judges to make rules of decision based on general law in citizen-citizen diversity controversies and did not foreclose federal courts’ power to invoke CIL as rules of decision under any of the other Article III grants of judicial power).

260. *See Sabbatino*, 376 U.S. at 426-27 (noting in precedential terms certain distinctly federal interests such as construing collective bargaining agreements to promote stable labor-management relations, establishing rights and duties of the U.S. regarding commercial paper, and resolving water apportionment or boundary disputes between states).

261. TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992).

262. *See Koh*, *supra* note 27, at 1841-45; Vazquez, *supra* note 255, at 1570-72; Goodman & Jinks, *supra* note 255, at 515-29. For arguments that CIL should be regarded as state law, *see, e.g.*, Bradley & Goldsmith, *supra* note 27; Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, SUP. CT. REV. 153 (2004); Julian Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004).

263. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citing *Sabbatino*, 376 U.S. at 426-27).

C. *The Presence or Absence of Controlling Law*

As indicated in *The Paquete Habana* excerpt above, an important additional consideration is whether there is a treaty or any “controlling executive or legislative act or judicial decision” that would preclude federal courts from recognizing a right to strike as CIL. Lower court decisions invoking the “controlling law” principle from *Paquete Habana* have applied a fairly rigorous standard, relying on a comprehensive scheme of statutes and regulations addressing the precise issue,²⁶⁴ or on a treaty ratified by the U.S. directed to the same problem.²⁶⁵ These lower courts also have invoked Supreme Court statements that focus on the central role of legislative expression when concluding that certain controlling congressional acts were taken with a purpose to preclude the application of CIL to a particular situation.²⁶⁶

Under this standard, controlling U.S. domestic law does not preclude federal courts’ authority to recognize a right to strike as CIL; on the contrary, it arguably supports such authority. As an ILO member, the U.S. is a party to the 1944 Declaration of Philadelphia, the 1998 Declaration on Fundamental Principles and Rights at Work, and the 2008 Declaration on Social Justice for a Fair Globalization.²⁶⁷ Each of these core ILO commitments specifies the fundamental importance of FOA. Congress in two separate trade statutes has incorporated FOA as an “internationally recognized worker right.”²⁶⁸ In addition, the U.S. has ratified the ICCPR, which has incorporated the right to strike as part of FOA, and has signed the ICESCR, which expressly recognizes that right within its text.²⁶⁹ And both the Administration’s 2015 statement at ILO Governing Body proceedings and its most recent trade agreement, drafted and executed by the Trump Administration, have specified that the right to strike is an integral part of FOA.²⁷⁰

It is worth emphasizing this series of developments. United States political diplomacy and input from executive branch experts has helped the transnational

264. See, e.g., *Ramirez v. Gonzales*, 247 Fed. Appx. 782, 786 (6th Cir. 2007) (controlling statutes and regulations govern requirements for reopening INS removal proceedings); *Galo-Garcia v. I.N.S.*, 86 F.3d 916, 918 (9th Cir. 1996) (Congress has enacted a comprehensive legislative scheme for admission of refugees including procedures for deportation, hence CIL is inapplicable); *Clancy v. Office of Foreign Assets Control of U.S. Dept. of the Treasury*, 2007 WL 1051767 at *16-17 (E.D. Wisc. 2007).

265. See *United States v. Frank*, 486 F.Supp.2d 1353, 1359 (S.D. Fla. 2007). The Eleventh Circuit in an earlier context had found such controlling authority in the acts of the Attorney General denying parole revocation hearings to a group of unadmitted aliens. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986). There has been broad scholarly criticism of the determination that CIL can be disregarded based on the controlling act of any executive official other than the President, or even by the President himself unless Congress has authorized such disregard by statute. See, e.g., *Agora: May the President Violate Customary International Law?* 80 AM. J. INT’L L. 913-37 (1986) (essays by Jonathan I. Charney, Michael J. Glennon, and Louis Henkin).

266. See *Oliva v. U.S. Department of Justice*, 433 F.3d 229, 233-34 (2d Cir. 2005) (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) and *Sosa*, 542 U.S. at 731 (2004) in holding that the INA provision defining circumstances under which hardship to child can be considered as ground for relief from removal, rather than CIL, governed alien’s application).

267. See *supra* notes 109 and 121 (specifying language of these three declarations)

268. See *supra* notes 211-12 and accompanying text.

269. See *supra* notes 122-25 and accompanying text.

270. See *supra* notes 217-18 and accompanying texts.

legal process to strengthen the international right to strike. The U.S. has been a leading advocate on the international stage promoting both FOA principles and the right to strike—in its trade legislation, bilateral and regional trade agreements, and official positions at the ILO Governing Body. That the U.S. has not ratified Convention 87 does not mean it is somehow undemocratic or improper for U.S. officials to be bound by rules that U.S. influence helped create.

To be sure, *Sosa* recognizes that Congress may “shut the door to the law of nations” explicitly or implicitly by treaties or statutes that occupy the field.²⁷¹ And there is some domestic law that is inconsistent with the right to strike set forth in CIL. As discussed in Part I.C, this law notably includes a 1935 statutory provision exempting states as “employers” under the NLRA, thereby relegating public employees to state-by-state regulation of FOA and the right to strike; and a 1938 Supreme Court decision allowing private employers to hire permanent replacements for strikers.²⁷² But these expressions of domestic law do not appear to be “controlling” in the relevant sense of addressing or responding to the CIL that is asserted here. The 1935 statutory provision and 1938 Supreme Court decision predate the promulgation of Convention 87 by a decade or more—hence they are not in any way responsive to the existence of FOA or the right to strike at an international level.²⁷³

The Court has relied on its 1938 statutory interpretation decision approving of permanent replacements in more recent decades.²⁷⁴ And there were legislative efforts in the early 1990s to overturn the permanent replacement doctrine that did not succeed.²⁷⁵ It is possible to contend that despite the absence of legislative approval for permanent replacements, the Court’s continuing endorsement of its jurisprudence, and Congress’s failure to override those decisions, are sufficiently controlling in this context.

On the other hand, there is a respectable and perhaps persuasive argument that these judicial decisions and instances of congressional inaction do not amount to a sufficiently comprehensive scheme of statutes and regulations addressing the precise issue.²⁷⁶ Relatedly, there is no indication that either the Court or Congress acted with a purpose to preclude the application of CIL in the right-to-strike setting, or even with an awareness that relevant CIL existed.²⁷⁷ In this regard, it is noteworthy that the international right to strike assumed

271. *Sosa*, 542 U.S. at 731.

272. See 29 U.S.C. § 152(2) (1935) (defining employer to exclude state and local governments); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (allowing for permanent replacements in dicta), both discussed at *supra* notes 87-91 and accompanying text.

273. The 1947 statutory amendment addressing when replaced strikers can vote in union elections—referenced at *supra* note 89—also predates the promulgation of Convention 87 in 1948.

274. See *supra* note 89 (referring to Court decisions from 1990, 1989, and 1983).

275. In two successive Congresses, bills to overturn the doctrine passed the House but failed to overcome a filibuster in the Senate. For 1991-92 Congress, see 137 Cong. Rec. 18,655 (1991) (recording House approval of bill to ban permanent replacements by vote of 247-182); 138 Cong. Rec. 14,875 (1992) (Senate cloture vote fails 57-42). For 1993-94 Congress, see 139 Cong. Rec. 12,866 (1993) (recording House approval of bill to ban permanent replacements by 239-190); 140 Cong. Rec. S8524 (daily ed. July 12, 1994) (Senate cloture vote fails 53-47).

276. See *supra* note 264 and accompanying text.

277. See *supra* note 266 and accompanying text.

increased visibility and importance beginning in the mid to late 1990s, following elevation of FOA as one of the eight fundamental ILO conventions and the promulgation of the 1998 Declaration. The Supreme Court in the context of admiralty law—relying on the law of nations—has applied recent CIL to overrule its own precedents, or to bypass or distinguish earlier statutory provisions.²⁷⁸ In doing so, the Court has recognized the primacy of evolving developments in CIL so long as these changes in the law of nations are not directly contradicted by earlier federal statutory text.²⁷⁹

Violations of CIL, like violations of international law generally, can produce friction between nations that hinders the accomplishment of foreign relations goals.²⁸⁰ As noted earlier, government officials and scholars have expressed concern in recent decades that failure to ratify Convention 87 and other fundamental ILO conventions can undermine U.S. standing on matters of international labor and human rights law.²⁸¹ At the same time, the U.S. has been a leading advocate on the international stage promoting both FOA principles and the right to strike—in its trade legislation, bilateral and regional trade agreements, and official positions at the ILO Governing Body. And again, while CIL can give way when there is genuinely controlling positive law, such law must be meant to control an otherwise applicable CIL. The mere presence of a relevant statutory provision or judicial decision, without evidence that Congress or the court was aware the CIL existed, is unlikely to qualify.

Moreover, if there is a potential conflict between established CIL and sufficiently clear federal statutes, the relative timing of these two sources of law becomes important. The Court has made clear that Congress can override CIL based on subsequent clear legislation.²⁸² It is also well-settled that federal statutes and treaties are equal in authority such that “if a treaty and a federal statute conflict, ‘the one last in date will control the other.’”²⁸³ Given the status

278. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388 (1970) (overruling CIL precedent to allow recovery for wrongful death action from unseaworthiness in state territorial waters, based on intervening developments in the law of nations and despite recognized gap in statutory coverage); *Sea-Land Services v. Gaudet*, 414 U.S. 573, 587-88 (1974) (extending recovery for such unseaworthiness actions in territorial waters to cover loss of society despite longstanding federal statutory precedent prohibiting such recovery from wrongful death actions on the High Seas). Admiralty law is an area in which international jurisprudence has historically played a prominent role. That said, a major thrust of this Article is the increased role of CIL in the labor and human rights area on a global scale as well as in the U.S. It is also noteworthy that the role played by CIL in *Moragne* and *Gaudet* involves the rights and remedies available for workers and their families.

279. See *Moragne*, 398 U.S. and *Gaudet*, 414 U.S. where the Court established rights and remedies under CIL applicable in territorial waters that coexist with or supersede whatever rights and remedies might have been relevant under federal statutes governing the High Seas. See generally David W. Denton Jr., *Lifting “The Great Shroud of the Sea”: A Customary International Law Approach to the Domestic Application of Maritime Law*, 37 TUL. MAR. L.J. 1, 25 (2012).

280. See Vazquez, *supra* note 255, at 1620.

281. See *supra* notes 205-06 and accompanying text; de la Vega, *supra* note 199, at 3-4, 11-15.

282. *Sosa*, 542 U.S. at 731. For a contrary argument, that CIL should always supersede inconsistent federal statutes because it is constantly being renewed through actions and beliefs of the international community, see Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT’L L. 393 (1988).

283. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). See *Cook v. United States*, 288 U.S. 102, 118-19 (1933) (holding that a later treaty supersedes

accorded to CIL as federal law comparable to treaties, it should follow that the last-in-time rule also applies to resolve any differences between an earlier-enacted federal statute and a later CIL norm, at least one that meets the *Sosa* standard of definiteness, specificity, and widespread acceptance.²⁸⁴

Applying the last-in-time rule in our setting, the two most prominent divergences between CIL and existing federal statutory law would be resolved in favor of CIL. The NLRA doctrine allowing employers to permanently replace lawful strikers is not addressed at all in the text. It was derived from the 1935 law as part of a 1938 Supreme Court interpretation that has been relied upon in subsequent Court decisions through the late 1980s. The exemption of state and local government workers from federal law was itself part of the 1935 statute. Both the Court decisions establishing a permanent replacement doctrine and the text exempting state and local governments arose well before—and with no evident awareness of—the establishment and evolution of CIL on FOA and the right to strike. This CIL began emerging in the late 1960s and became fully developed from the late 1990s, continuing to the present.

Admittedly, even later-in-time CIL will not overcome a clear constitutional ruling addressing the precise legal issue, inasmuch as CIL is understood to have the status of a statutory norm rather than a constitutional one.²⁸⁵ But the Supreme Court's most direct constitutional pronouncement, from 1926, held that there is no absolute right to strike as a liberty interest under the Fourteenth Amendment.²⁸⁶ In a later case, the Court held that strikers' rights of association are not undermined if the government declines by statute to subsidize the exercise of the right through food stamps.²⁸⁷ Because the international right to strike is far from absolute, it is unlikely that these and other Supreme Court decisions invoking constitutional considerations are incompatible with recognition of the less-than-absolute right as a matter of CIL.

Instead, application of the CIL right to strike gives rise to conflicts with the two different aspects of U.S. *statutory law* identified above. The permanent replacement doctrine was judicially constructed in the face of an inconclusive or silent text. As discussed in Part IV below, the presence of such statutory ambiguity implicates the *Charming Betsy* canon, developed by the Court to help address conflicts between statutory text and international law, including CIL.²⁸⁸

an earlier statute).

284. See Henkin, *International Law as U.S. Law*, *supra* note 239, at 1566; Szewczyk, *supra* note 245, at 1172-76. See generally Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 933 (1986) [hereinafter Henkin, *The President and International Law*] (“[C]ourts will probably conclude that customary law, being equal to treaties in international law, has the same status as treaties in the domestic legal hierarchy as well If so, like a treaty, a principle of customary law will not be given effect if supervening national legislation is inconsistent with it. But a supervening principle of customary law will not be denied domestic effect because of some earlier act of Congress.”). Because the *Sosa* standard of definiteness, specificity, and widespread acceptance is not readily satisfied, courts are likely to invoke the last-in-time rule for CIL on an infrequent basis. See Szewczyk, *supra* note 245, at 1177.

285. See Henkin, *The President and International Law*, *supra* note 284. See also THIRD RESTATEMENT, *supra* note 106, at sec.115, comment d (noting that in regard to the law of the sea, the United States has accepted CIL that modifies earlier treaties and also U.S. statutes).

286. See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

287. See *Lyng v. International Union UAW*, 485 U.S. 360, 367-68 (1988).

288. See *The Charming Betsy*, 6 U.S. (2 Cranch) at 118 (“[A]n act of Congress ought never to be

This canon has been invoked in labor-related settings when seeking to avoid conflict with treaties or international legal obligations involving foreign employers.²⁸⁹ It also may be applied where the international legal norms are protective of workers.

Separate considerations come into play regarding states' right to prohibit strikes by all public employees. This issue has been raised in the CFA, which reviews complaints under Conventions 87 and 98 against all member states including those that have not ratified those two conventions. A 2009 complaint brought by national and local labor unions against the U.S. attacked New York state legislation barring all strikes in the public sector, and its specific application to the transport sector, as violative of both conventions.²⁹⁰ In its response to the CFA, the U.S. emphasized its "unique, decentralized and diverse system of government [is] rooted in the U.S. Constitution," adding that state and local labor-management relations are understood as "essential functions" of these governments' "separate and independent existence."²⁹¹ The U.S. relied on the same legal position of powers constitutionally reserved to the states when defending against a similar complaint that attacked North Carolina's statutory prohibition on collective bargaining agreements for public employees.²⁹²

The Supreme Court in the past had recognized the constitutional sufficiency of these state legislative judgments regarding assertedly essential sovereign functions and deferred to them on federalism grounds.²⁹³ But its more recent decision in *Garcia v. San Antonio Metropolitan Transit Authority*²⁹⁴ arguably requires a different analysis. By holding that the states are amply and adequately protected in Tenth Amendment terms through the federal political process,²⁹⁵ the Court in *Garcia* removed the Tenth Amendment as an absolute barrier to federal law—including CIL as federal common law.

In *Garcia*, the relevant federal law was the Fair Labor Standards Act (FLSA), involving Congress's authority to subject state and local governments

construed to violate the law of nations if any other possible construction remains.").

289. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25, 32-33 (1982) (holding that canon was consistent with scope of a labor agreement executed by the President providing for preferential employment of Filipino citizens at U.S. military facilities in Philippines); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 312-13 (1970) (Harlan, J., dissenting) (objecting that canon should have applied to help deny Jones Act jurisdiction to an alien seaman seeking damages for injury sustained aboard a foreign-flag vessel in a U.S. port). *But cf.* *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 142-43 (2005) (Ginsburg, J., concurring) (contending that canon should not be read so broadly as to preclude application of Americans With Disabilities Act to foreign cruise ships "where there is no potential for international discord").

290. Case No. 2741, Nov. 10, 2009 [hereinafter Case No. 2741], closed November 2011, reported in full in Report No.362; see 2018 COMPILATION, *supra* note 20, at 154-55, para. 830. See also Case No. 2460, Dec. 7, 2005 [hereinafter Case No. 2460], closed March 2007, brought by national and local labor unions against the United States, attacking North Carolina state legislation that prohibits collective bargaining agreements in the public sector, reported in full in Report No.344; see 2018 COMPILATION, *supra* note 20, at 233, para. 1242.

291. Case No. 2741, *supra* note 290, para. 756.

292. Case No. 2460, *supra* note 290, para. 965. *Cf. Medellín*, 552 U.S. at 519-20 (recognizing that an agreement to give domestic effect to the result of an international adjudication can be obligatory "so long as the agreement is consistent with the Constitution").

293. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

294. *Garcia*, 469 U.S. 528.

295. *Id.* at 547-57.

to generally applicable federal laws—in that instance to treat their status as public employers the same as private employers for purposes of wage and hour regulation. The instant setting likewise involves a federal standard, incorporated through CIL, that would subject state and local government employers to the same generally applicable legal norm as private employers, here with respect to regulation of labor-management relations. It therefore differs in material respects from post-*Garcia* decisions invalidating federal government efforts to commandeer the States as implementers of federal regulation,²⁹⁶ or to enlist state and local officials in such implementation.²⁹⁷

Accordingly, state and local governments have no constitutional shield against CIL standards regulating and protecting the right to strike by public employees, just as they had no such shield after *Garcia* against federal standards establishing public employees' right to overtime protections. These governments remain free to persuade Congress to enact federal laws that would restore restrictions or prohibitions on strikes as they have existed in many jurisdictions.²⁹⁸ That in fact is what they did following *Garcia*, lobbying successfully to modify federal wage and hour law with respect to overtime compensation for state and local government employees.²⁹⁹ But until such laws are enacted by Congress, one can argue that the later-in-time CIL rule protecting the right to strike for most public employees—those not engaged in the administration of the state or in essential services—remains controlling. Put differently, the default following *Garcia* is not deference to states under the Tenth Amendment but recognition of states' capacity to protect themselves through Congress.

IV. THE CONTOURS OF A CAUSE OF ACTION FOR THE RIGHT TO STRIKE UNDER CIL

Assuming that the CIL right to strike is cognizable as federal common law and that there is no controlling federal law precluding recognition of a CIL cause of action, there remain the challenges of how such a cause of action might be formulated and what obstacles it would face.

A. *A Non-Statutory Cause of Action Seeking Injunctive Relief*

My focus is on the two salient conflicts identified in earlier Parts between the CIL right to strike and federal statutory law: permanent replacement of lawful strikers in the private sector and prohibitions on public employees' right to strike. Although these conflicts involve the conduct of private employers and states, not the federal government,³⁰⁰ the Article anticipates a right of action against the

296. See *New York v. United States*, 505 U.S. 144, 160-61 (1992) (distinguishing *Garcia*).

297. See *Printz*, 521 U.S. at 904-05 (following *New York v. United States*).

298. See *supra* note 90 (discussing state laws expressly authorizing strikes by public employees in 12 states out of 50).

299. See FLSA Amendments of 1985, Pub. L. No. 99-150, codified at 29 U.S.C. § 207(o) (establishing procedures for negotiating and administering compensatory time instead of overtime for state and local government employees).

300. Federal law, separate from the NLRA, directly prohibits strikes by federal employees. See Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7103(a)(2)(B)(v), 7311(3). Some

U.S. as a sovereign bound by international law, including CIL. The cause of action would be for injunctive or declaratory relief, seeking to ensure there are no legal obstacles to the CIL right to strike, obstacles created either directly or indirectly by the NLRA and Supreme Court interpretations of that statute.

When reviewing federal common law actions for damages against federal officials, the Supreme Court in recent decades has cautioned lower courts, acting as “common-law tribunal[s],” to “pay particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation.”³⁰¹ Because this is an action for injunctive or declaratory relief rather than damages, the Court’s oft-stated instruction about “special factors counseling hesitation” does not obviously apply. The Court in recent years also has been skeptical about implying causes of action for injunctive relief in a statutory setting.³⁰² At the same time, the Court has been willing to justify an implied cause of action based on the substantive prohibitions found in a statute,³⁰³ or on regulations carrying out a statute’s objectives.³⁰⁴

Given this contested landscape, it seems apparent that a domestic law action for injunctive relief based on CIL would need to be precisely focused, addressing issues that are squarely within the CIL domain while minimizing interference with the sovereign status of the U.S. and implementation of otherwise-applicable federal law. This aspect of tailoring requires more attention than can be given here.³⁰⁵

Regarding jurisdiction, however, there is ample authority for plaintiffs suing federal officials in their official capacity for injunctive relief to stop threatened or ongoing violations of constitutional rights without violating sovereign immunity.³⁰⁶ While this would be a cause of action to stop ongoing violations of CIL rather than the Constitution, the same principles could apply.

federal workers, like air traffic controllers, would be regarded as performing essential services under CIL while others would not. Formulating a cause of action against the federal government qua employer seems less challenging once causes of action are deemed appropriate against the federal government as enabler of CIL violations by private employers and state/local government employers. Accordingly, the Article does not address actions against the federal government as an employer.

301. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). This line of constitutional damages actions against public officials originated in *Bivens*, 403 U.S. at 396 (damages based on violations of Fourth Amendment rights). Early post-*Bivens* cases recognized additional causes of action for damages; see *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Fifth Amendment). For more recent skepticism toward new *Bivens* damages actions, see *Ziglar*, 137 S.Ct. 1843; *Minnecci v. Pollard*, 565 U.S. 118 (2012); *Wilkie*, 551 U.S. 537.

302. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). See also *Correctional Services v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (asserting that “we have abandoned that power to invent “implications” in the statutory field”).

303. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177-78 (2005) (distinguishing and limiting *Sandoval*)

304. See *Global Crossing Telecomm. v. Metrophones Telecomm.*, 550 U.S. 45, 58-59 (2007) (distinguishing *Sandoval*).

305. See generally *Coleman v. Schwarzenegger*, 922 F.Supp. 2d 882 (E.D. Cal. & N.D. Cal. 2009) (three-judge court) (addressing challenges of issuing a prisoner release order to address overcrowding and inadequate medical and mental health care in California prisons).

306. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489, 491 n.2 (2010); *Schneider v. Smith*, 390 U.S. 17, 21-22 (1968); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912).

Justice Harlan in his *Bivens* concurrence emphasized the broad reach of a federal court's equitable powers, extending to all areas encompassed by the grant of federal question jurisdiction.³⁰⁷ More recently, courts of appeals have recognized that individuals may challenge the actions of federal agencies or officials through non-statutory review.³⁰⁸ They have concluded that jurisdiction is available under the general federal question statute, and there is no sovereign immunity bar with respect to injunctive relief.³⁰⁹

Ironically, the most relevant precedent may be *Chamber of Commerce v. Reich*,³¹⁰ in which the D.C. Circuit established a non-statutory right of action for employers to challenge President Clinton's Executive Order as inconsistent with the permanent replacement doctrine established by the Supreme Court. Borrowing from the justification in *Reich*, a district court here would have original jurisdiction in a suit to prevent deprivation of rights accorded under CIL.³¹¹ And courts should presume that agencies are expected to obey the commands of CIL and grant relief in such settings, just as (in *Reich*) they were expected to obey the commands of the Court's ongoing interpretation of a federal statute.³¹²

B. Pursuing the Cause of Action in Federal Court: Two Approaches

The D.C. Circuit in *Reich* relied on the canon disfavoring implied repeals, because the later-enacted Procurement Act (on which the Executive Order was based) did not contradict the NLRA itself.³¹³ By contrast, the later-evolved CIL on the right to strike does directly contradict the text and application of the NLRA. As evidenced by the CEACR General Survey, the CFA Compilation, and numerous other transnational and national sources, there is a direct conflict between CIL and the Supreme Court interpretation of the NLRA on permanent replacement, as well as the NLRA provisions declining to apply federal law to strikes by public employees.

Regarding the permanent replacement of private strikers, a different canon than the one disfavoring implied repeals becomes important. The *Charming Betsy* canon provides that when legislation is ambiguous, it should be construed to conform to international law, including the "law of nations" or CIL.³¹⁴ Federal courts have made clear that they will apply the *Charming Betsy* principle if

307. *Bivens*, 403 U.S. at 404-05.

308. See, e.g., *Mittelman*, 757 F.3d at 307; *Trudeau*, 456 F.3d at 189; *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996).

309. *Reich*, 74 F.3d at 1329 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949)).

310. *Id.* at 1322.

311. *Id.* at 1328.

312. *Id.*

313. The court noted that the Federal Property and Administrative Services Act, 40 U.S.C. § 471 et seq. (Procurement Act), enacted in 1949, does not address labor relations in any way. See *Reich*, 74 F.3d at 1332. While the Secretary of Labor relied on language in the Procurement Act bestowing broad discretion on the President to set procurement policy, the court found that position tantamount to an argument for repeal by implication, which it rejected. *Id.* at 1332-33.

314. See *Charming Betsy*, 6 U.S. (2 Cranch) at 117-18.

conflict exists between CIL and statutes that are ambiguous or inconclusive.³¹⁵ Thus, a federal appeals court—recognizing a “clear international prohibition” against prolonged and arbitrary detention, evidenced inter alia in the ICCPR—construed an ambiguous statutory immigration provision so as not to authorize the indefinite detention of removable aliens.³¹⁶ And a district court—relying on a ratified OECD Convention—construed an ambiguous criminal statute so as to authorize broad prosecution of bribes involving officials of State-owned enterprises.³¹⁷

At the same time, lower courts have indicated that the *Charming Betsy* canon comes into play only when the statute itself is ambiguous. “It is always the case that clear congressional action trumps customary international law and previously enacted treaties.”³¹⁸ When a statute makes plain Congress’s intent, “Article III courts . . . must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.”³¹⁹

In this context, the permanent replacement doctrine is best understood as reflecting not clear congressional action but rather an inconclusive statutory text. When the Supreme Court grafted a permanent replacement doctrine onto the NLRA in 1938, it acknowledged that the doctrine was not based on any language in the text itself.³²⁰ Statutory amendments from 1947 and 1959 make no reference to an employer’s right to hire permanent replacements for lawful strikers. The only mention of strikers not entitled to reinstatement is language added in 1947 and modified in 1959,³²¹ discussing voting eligibility for employees engaged in an economic strike who are not entitled to reinstatement. But that reference, in a section titled “Representatives and Elections” that is unrelated to the section dealing with lawfulness of employer practices, is at best ambiguous.³²² Non-entitlement to reinstatement could be for various reasons, and the agency is given broad discretion to determine voter eligibility “consistent

315. See *Guaylupo-Moya*, 423 F.3d at 135-36; *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (per curiam), cert. denied 540 U.S. 933 (2003); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); *U.S. v. Marino-Garcia*, 679 F.2d 1371, 1380 (11th Cir. 1982); *U.S. v. Aguilar*, 783 F. Supp. 2d 1108, 1117 (C.D. Cal. 2011).

316. *Kim Ho Ma*, 257 F.3d at 1114. The Ninth Circuit decision followed by one month a remand from the Supreme Court in *Zadvydas*, 533 U.S. 678 (consolidated with *Kim Ho Ma*). Justice Kennedy, although disagreeing with the Court’s interpretation of the immigration statute at issue, recognized the relevance of CIL doctrine on detention of refugees and asylum seekers. See *id.* at 721 (Kennedy, J., dissenting).

317. *Aguilar*, 783 F. Supp. 2d at 1116-17.

318. *Capitol Records, Inc. v. Tomas*, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008) (internal quotations omitted).

319. *Guaylupo-Moya*, 423 F.3d at 135-36 (citing *Yousef*, 327 F. 3d at 93 (per curiam)).

320. See *Mackay Radio*, 304 U.S. at 345-46, which relies on gaps in statutory language: “Although section 13 of the act, provides, ‘Nothing in this Act (chapter) shall be construed so as to interfere with or impede or diminish in any way the right to strike,’ it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.”

321. 29 U.S.C. § 159(c)(3).

322. Section 9, “Representatives and Elections” addresses issues wholly distinct from those covered in separate Section 8, titled “Unfair Labor Practices.” See 29 U.S.C. § 159; 29 U.S.C. § 158.

with the purposes and provisions of this subchapter.”³²³

As previously noted, subsequent Supreme Court decisions have invoked the permanent replacement doctrine.³²⁴ Yet still other Court decisions are arguably inconsistent with *Mackay Radio*,³²⁵ and the legal basis for allowing permanent replacements has been harshly criticized for decades.³²⁶ In the early 1990s, Congress came close to prohibiting the doctrine, while making no textual changes during its effort.³²⁷ Overall, continued reliance on a controversial Court decision that construed statutory silence, and instances of congressional failures to act, would not appear to qualify as unambiguous statutory action trumping the CIL that has developed during and after the Court actions and congressional inactions, and that is now well-established. As discussed in Section III.C, the Supreme Court in admiralty law has overruled precedents or distinguished statutes when newer developments in CIL justify such action.³²⁸ In this setting, the *Charming Betsy* canon could encourage an updated construction of the NLRA, essentially forcing the Court to rethink its position.

Regarding the prohibition on coverage for state employers, this statutory language is unambiguous and therefore the *Charming Betsy* canon has no application. The conflict here involves the United States allowing the states unlimited rights to control the strike-related activities of their employees. As explained above, the United States has justified this unlimited right of control before the CFA by relying on the dual sovereignty of federalism as a constitutional matter.³²⁹ But that is not obviously applicable after *Garcia* altered the constitutional equation in 1985 with respect to laws of general applicability. Moreover, CIL on the right to strike comes into its own long after the 1938 exclusion of states from federal statutory coverage. Instead, the U.S. should grant injunctive relief prohibiting states from violating CIL regarding the right to strike, at least until Congress has addressed the issue.

323. 29 U.S.C. § 159(c)(3). For instance, employees who engage in a strike within any applicable statutory notice period lose their status as employees for purposes of section 9, although they can regain this status if and when re-employed by the same employer. See 29 U.S.C. § 158(d).

324. See *supra* note 89 (identifying *Curtin Matheson Scientific*, 494 U.S. at 790; *Trans World Airlines*, 489 U.S. at 433-34 (1989); *Belknap*, 463 U.S. at 504-05 n.8).

325. See *NLRB v. Erie Resistor Corp.* 373 U.S. 221, 231-33 (1963) (holding that grant of super-seniority to strikers who cross picket line is unlawful while hiring permanent replacements for strikers is protected). As prominent labor-law scholars explain, “it is as though the law permits killing but not wounding.” JULIUS G. GETMAN, BERTRAND B. POGREBIN & DAVID GREGORY, *LABOR MANAGEMENT RELATIONS AND THE LAW* 166 (1999). See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (affirming NLRB holding that employer must advance legitimate business reasons for failure to pay striking workers their accrued vacation benefits while paying such benefits to striker replacements and returning strikers); *id.* at 39 (Harlan, J., dissenting) (pointing out conflict between Court’s holding and right to hire permanent replacements with no showing of business justification under *Mackay Radio*).

326. See Pope, *supra* note 9; GETMAN, POGREBIN & GREGORY, *supra* note 325; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 301-02 (1978); George Schatzki, *Some Observations and Suggestions Concerning a Misnomer: “Protected” Concerted Activities*, 47 TEX. L. REV. 378, 383 (1969); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 634, 639-41 (1966); Leonard B. Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 830-32 (1941).

327. See *supra* note 275 (describing House passage on two occasions, followed by majority support in Senate to break filibuster that did not reach the required level of 60 votes).

328. See *supra* notes 278-79 and accompanying text.

329. See *supra* notes 290-92 and accompanying text.

C. *CIL Applied in State Courts*

The Supreme Court has made clear that state statutes intruding into the realm of foreign affairs raise constitutional concerns.³³⁰ On the other hand, state courts for a century or more have applied CIL as common law authority in matters involving foreign affairs and international law.³³¹ And in the decades since *Erie*, state courts have relied on this CIL as federal common law that trumps state statutory arrangements.³³² As expressed by the New York Court of Appeals, “[i]t is settled that, where there is neither a treaty, statute, nor controlling judicial precedent, all domestic courts must give effect to customary international law.”³³³

Accordingly, the right to strike as CIL may be applied by state courts in appropriate contexts. One setting of particular relevance involves the right to strike in states where public employees are entirely prohibited from doing so under state law. The argument based on *Garcia*, which was advanced to address federalism concerns of assertedly constitutional magnitude, is available to state judges as well as their federal counterparts. But in addition, and importantly, state courts in jurisdictions that ban all public employee strikes may apply CIL directly to narrow the scope of such laws. At a minimum, state judges may require their governments to identify the categories of public employees that are exercising authority in the name of the state or are performing essential services.³³⁴ After public employees or their representatives have been given a chance to contest the contours of the government’s categories, state courts would be in a position to rule on the scope of exceptions to the right to strike, and direct that the right be available for all other public employees.

330. See, e.g., *American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 413-27 (2003); *Zschernig v. Miller*, 389 U.S. 429, 435-41 (1968).

331. See, e.g., *Bradford v. Director General of Railroads of Mexico*, 278 S.W. 251, 252 (Tex. Civ. App. 1925) (holding it would be contrary to law of nations to grant state trial court jurisdiction over suit against railroad owned and operated by foreign sovereign); *Mason v. Intercolonial Ry. of Canada*, 83 N.E. 876, 877 (Mass. 1908) (dismissing personal injury damages action against railroad that is property of foreign sovereign, based in part on principles of laws of nations); *Hassard v. Mexico*, 61 N.Y.S. 939, 939 (App. Div. N.Y. 1899) (dismissing lawsuit by bondholders against foreign government based on “axiom of international law of long-established and general recognition” that a sovereign state cannot be sued without its consent and permission”; see generally *Ku*, *supra* note 14, at 311-32).

332. See, e.g., *Republic of Argentina v. City of New York*, 250 N.E. 2d 698, 700 (N.Y. 1969) (relying on CIL to hold that property owned by foreign State and devoted to consular uses was exempt from imposition of municipal real estate taxes); *In re Caravas’ Estate*, 250 P.2d 593, 596-97 (Cal. 1952) (relying on principle of international law to hold that state probate code limitations provision was tolled for period when existence of a state of war prevented Greek citizen and sole heir from having access to the courts); *Peters v. McKay*, 238 P.2d 225, 230-32, 239-40 (Ore. 1951) (relying on *The Paquete Habana* and CIL in holding that ten-year limitation in state escheat statute as applied to Dutch residents was suspended by state of war). See generally Hon. Jack L. Landau, *Customary International Law in State Courts: A State Court Perspective*, 20 WILLAMETTE J. INT’L L. & DISPUTE RESOLUTION 48, 50-56 (2012).

333. *Republic of Argentina*, 250 N.E. 2d at 700.

334. See *supra* notes 58-71 and accompanying text (discussing scope of these exceptions under international law).

CONCLUSION

This Article has presented an ample basis for why the right to strike should be regarded as customary international law. There is a rich breadth and depth of support for the right, both as a general practice and a self-conscious legal obligation. Support is evidenced through international human rights treaties; regional instruments and court cases; domestic constitutional, legislative and judicial decisions; and representations from governments and U.N. officials. Of particular relevance, the right is established with sharp specificity regarding two areas of divergence from U.S. law and practice: prohibiting the permanent replacement of lawful strikers, and protecting the decision to strike for public employees, with limited exceptions.

Application of CIL on behalf of U.S. workers in domestic courts faces distinct challenges. The Article has examined these challenges and proposed ways in which they may be countered if not overcome. In the short-term, the challenges may seem too large in light of jurisdictional and procedural hurdles, linked in many ways to the Supreme Court's current reluctance to accept international human rights law in a federal court setting.

Nonetheless, the exploration of this international right remains important for a number of reasons. A common law right to strike may open doors to litigation for public employees in states that are more hospitable to recognizing CIL than the current majority of justices. The right also may have immediate utility for American workers seeking a persuasive language in which to justify their growing interest in strike activities. Further, given that the Court in its relatively recent past has recognized the relevance of international human rights law, there is reason to believe that it may do so again—in which case this in-depth analysis of how one significant human right has been advanced and applied in other countries may well be of value. Finally, arguments stemming from the right to strike under international law are sure to have ongoing resonance beyond U.S. borders, as the right continues to be developed and debated on the global stage.