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## CUSTOMARY INTERNATIONAL LABOR LAWS AND THEIR APPLICATION IN HUNGARY, POLAND, AND THE CZECH REPUBLIC

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### I. INTRODUCTION

With the spread of industrialization from England to Western Europe and America,<sup>1</sup> the emerging class of industrial workers quickly recognized that their position concerning the factors of production changed.<sup>2</sup> That change, which

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1. Sidney Pollard, *Industrialization and the European Economy*, in *THE ECONOMICS OF THE INDUSTRIAL REVOLUTION* 165 (Joel Mokyr ed., 1989). England was the first country to industrialize, followed shortly by France, Belgium, and the United States. Although cottage industry and guilds for the artisans existed in the pre-industrial economies, they tended to be more analogous to the modern day employer's associations, working to protect the businesses and any monopolies rather than the laborers hired by the master craftsmen. Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, in *THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE* 10, 39-40 (T.H. Aston & C.H.E. Phipin eds., 1985).

2. In an agrarian society, the worker had control over land he worked, including the methods, timing, and perhaps even the product he grew. Industrialization changed that relationship, leaving the employer or capitalist with control, not only over all the land and capital usage, but also over the worker's methods and working conditions. Postan discusses the extent to which the lords could extract surplus production from the peasants for rents and concludes that the lords had much less control over the peasants' excess production than commonly believed. M.M. Postan & John Hatcher, *Population and Class Relations in Feudal Society*, in *THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE* 64 (T.H. Aston & C.H.E. Phipin eds., 1985).

reduced the workers' control over their working environment, resulted in increased exploitation by the employer and deteriorating working conditions.<sup>3</sup> As early as the 1840s, workers began responding to their plight by organizing, not only locally and nationally, but also internationally.<sup>4</sup> These labor organizations began exerting pressure on industrialized economies to regulate the labor relationship, both domestically and internationally.<sup>5</sup>

The initial success of the international labor movement has conferred upon it a unique status in international law. The International Labor Organization (ILO), one of the most respected United Nations (UN) organs,<sup>6</sup> has primary responsibility for oversight of international labor laws. The ILO promulgates and enforces conventions enacted through its conferences and resolves any disputes or complaints that arise from non-compliance with such conventions.<sup>7</sup> However, the ILO is not the only source from which international labor law arises.<sup>8</sup> Many human rights instruments, international and regional, include provisions on labor standards.<sup>9</sup> Bilateral treaties provide additional basis for the international regulation of labor relations.<sup>10</sup> Scholars have persuasively argued that together these sources form a kind of international labor code,<sup>11</sup> which

3. Although the workers suffered abuses at the hands of the early industrialists, it is clear that their standard of living did improve as a result of industrialization. Peter Lindert & Jeffery G. Williamson, *English Workers' Living Standards During the Industrial Revolution: A New Look*, in *THE ECONOMICS OF THE INDUSTRIAL REVOLUTION* 177, 186 (Joel Mokyr ed., 1989). The improvement in living conditions, however, did not excuse the working conditions during the industrializing process.

4. LEWIS L. LORWIN, *THE INTERNATIONAL LABOR MOVEMENT* 3-7 (1953).

5. Some of the earliest labor laws were enacted under Bismark's regime in the 1880s in the social security area in Germany, specifically providing for workers compensation and old-age pensions. FRITZ STERN, *GOLD AND IRON: BISMARCK, BLEICHRODER, AND THE BUILDING OF THE GERMAN EMPIRE* 217-20 (1979). The first legislation in the United States was protectionist legislation for women and child workers. See *Muller v. Oregon*, 208 U.S. 412 (1908); *Hammer v. Dagenhart*, 247 U.S. 251 (1908).

Internationally, Robert Owen, J.A. Balnqui, Villerme, and Ducpetiaux founded the movement for international regulation of labor, while in the 1840s David Legrand systematized and lobbied the European governments to adopt such regulations. NICHOLAS VALTICOS, *INTERNATIONAL LABOUR LAW* 17 (1979).

6. Elizabeth Dole, former Secretary of Labor and current American Red Cross President, has called the International Labor Organization (ILO) the United Nation's (UN) most effective advocate of human rights. *'Human Rights Priest' Urges Stronger U.S. Role in ILO*, *ILO WASHINGTON FOCUS* (Washington Branch of ILO, D.C.) Oct. 1992 at 1, 4. Additionally, Senator Daniel Patrick Moynihan (D-NY) has stated that "[t]he ILO plays an extraordinary role in multilateral efforts to secure human rights worldwide. . . . Indeed, the ILO was the first international organization to bring the subject of human rights to the world community." *Id.* at 6.

7. See *CONST. OF THE ILO*, arts. 10, 19, 22, 26, 37 (highlighting some of the procedural provisions with regard to the relationship between the ILO and the conventions).

8. See VALTICOS, *supra* note 5, at 63-70 (discussing other UN and human rights instruments that regulate international labor).

9. See *infra* notes 126-46 and accompanying text.

10. See *infra* notes 147-52 and accompanying text (discussing bilateral United States trade treaties mandating labor standards in return for Generalised System of Preferences status).

11. The debate has centered around whether the treaties are separate legal instruments, binding only on those signing the documents, or the foundation of a system with the force of "internal" law. VALTICOS, *supra* note 5, at 45 (acknowledging that "a large amount of truth" exists in the view that ILO Conventions comprise complete body of law). See also John Wood, *International Labour Organisations Conventions — Labour Code or Treaties?*, 40 *INT'L & COMP. L.Q.* 649, 650, 657 (1991) (discussing strength of argument that ILO Conventions comprise a comprehensive code and concluding that it is more logical and natural to regard the totality of Conventions as a code).

offers limited protections for worker rights, for the rights depend on the States being signatories of the international instrument.

Recent developments in the former Eastern-bloc States reveal that the status of the international labor code may be broader than the limits of the international conventions. As Hungary, Poland, the Czech Republic, and Slovakia move from totalitarian, socialist governments to democratic, market-oriented governments, their labor codes have begun to comply with international treaties. Most of the former socialist-bloc nations have been parties to ILO Conventions and other human rights instruments for many years and nominally provided for compliance with the international standards.<sup>12</sup> However, in reality, most of the States violated international law. Currently, not only have the aforementioned States enacted new laws that clearly embrace international standards, but their governments are striving to enforce these new laws in practice.<sup>13</sup> The recent political and economic changes in Eastern Europe forced this evolution in their labor laws.

In order for normative standards to become customary international law, often a disrupting political event intervenes, necessitating the change.<sup>14</sup> The political event forces States to turn to these normative standards which previously had been ineffective or ignored and resurrect them to aid the international community in coping with the event.<sup>15</sup> The reliance on the norms changes their character. From reliance follows a need to enforce the standards. The first step in enforcement becomes transforming the norms into a legal obligation.<sup>16</sup> These changes in Eastern Europe have forced the labor law obligations beyond treaty law and denote solidification of the international labor norms into customary law. Consequently, the international labor code really consists of more than treaty law combined in a rational sequence. Currently the core of international labor law has expanded beyond treaty law to encompass customary or public international law. Accordingly, those labor standards which have become customary international law bind not only parties to the respective conventions, but all other nonparty States as well.<sup>17</sup>

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12. See *infra* notes 177-200. The Marxist/Leninist tradition considered labor the most important factor of production. As such, it was closely controlled by the state. This leads to the contradiction, which will be further explored later in this paper, that although these states deemed themselves "workers' states," the workers really had little power and few rights, especially with regard to organizing and collective bargaining rights.

13. Governments have been working with international labor institutions to fulfill their obligations. See Report on ILO Mission to Poland (Nov. 5-12, 1989) (on file with author); Report on Meeting organised by EUROPE on "ILO Assistance to Hungary and Poland" (Sept. 12, 1989) (on file with author).

14. See Richard Falk, *Indigenous Peoples Interest Group: Indigenous Peoples and the Right to Self-Determination*, in PROC. EIGHTY-SEVENTH ANN. MEETING. AM. SOC'Y INT'L L., CHALLENGES TO INT'L GOVERNANCE 198-201 (1993).

15. *Id.* The example given was the Basket 3 of Human Rights from the Helsinki Accords of 1975. Originally the Accords were negatively viewed as only validating the division of Germany, acknowledging the sovereign domination by the U.S.S.R. of Eastern Europe, and positing non-binding human rights standards. In the light of the recent political changes in Eastern Europe, the human rights standards have become effective in international law.

16. The actual enforcement of the norm is another matter.

17. Customary or public international law has universal application, whether or not a State has consented to the norm. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971).

This paper will illustrate that the most fundamental aspect of international labor law, that is the right to organize and bargain collectively, has become customary international law. Although worker rights originated largely as treaty rights from treaties and domestic legislation, widespread movements towards democratization and capitalism have created customary international labor law.<sup>18</sup> The first part of this article will define customary international law and the process by which practices become law, and then, through application, demonstrate the existence of customary international labor law. The second part comprises a case study of the Eastern European States of Hungary, Poland, the Czech Republic.<sup>19</sup> It will describe the changes, both legislative and practical, that occurred with democratization of their governments, emphasizing the role of international labor law and the organizations that work for compliance with them. The article will conclude that, as evidenced by the developments in Eastern Europe, States have an obligation to protect the organizing and collective bargaining rights of their citizens, a legal obligation binding on all nations which is imposed by the international community.

## II. ESTABLISHMENT OF CUSTOMARY INTERNATIONAL LABOR LAW

### A. Customary International Law Defined

Customary international law is among the most elusive, but most important, sources of law.<sup>20</sup> It is among the most powerful sources because it binds all nations, whether or not they have participated in its formation or later consented to it.<sup>21</sup> In general, States and other parties are reluctant to declare rules

18. For purposes of this paper, the term "capitalistic system" denotes a system that includes an economy based primarily on market transactions with limited governmental interference. The governments associated with capitalistic systems tend to be democracies or social-democracies. The primary producers in the system contract out their labor to the people owning and controlling the capital, who then extract the majority of the surplus rent from the labor.

The term "communist system" implies a totalitarian system, the economy of which is controlled by central planning done by the sole party, the Communist Party. The political system is controlled by the Communist Party, which nominates and selects the head of state, who is generally also the head of the Party. Theoretically, the primary producers, the proletariat, own the means of production, but in reality the dictatorship by the Party controls all inputs, land, labor, and capital of production. Although the Eastern-bloc states were often denoted "socialist states" because they had not achieved the Marxist definition of Communism, that denotation will not be used in this paper. It is clearer to use communism to distinguish between the economic and political configurations in the East European states and the socialistic governments in Western Europe.

19. Because the split between the Czech and Slovak Republics occurred so recently, before the original draft of this article the Slovak Republic had not developed its own labor legislation. Although the Czech Republic will likely retain its current labor code, it is currently unknown how or when the Slovak Republic will amend the laws it inherited from the defunct Federation. Therefore, this article will focus on the Czech Republic, with the provision that if Slovakia does not change its labor code, the analysis applies to it also. It is most probable that the Slovak Republic will change its legislation to reflect economic and political differences with the Czech Republic, but that it will still comply with international standards.

20. Sources of international law include customary international law, treaty law, general principles of law such as equity, judicial decisions, treatises by scholars, and non-binding declarations or resolutions by international organizations. MALCOLM N. SHAW, *INTERNATIONAL LAW* 60-98 (3d ed. 1991); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 102 (1986).

21. D'AMATO, *supra* note 17, at 87. There is an issue of the effectiveness of customary international law. For example, the principles applied in the Nuremberg War Crimes Trials have been declared customary

customary international law because of its universally binding nature.<sup>22</sup> They do not wish to infringe upon the sovereignty of other States, or have their sovereignty infringed upon by creating these generally applicable laws. Accordingly, the field of customary law remains narrow and slow to expand.<sup>23</sup>

Customary law develops from the actions of States, not from any written record, and can only be employed in situations of clear and definitive actions of States. This legislation through practice makes customary law theoretically cumbersome and at times contradictory.<sup>24</sup> Additionally, because customary laws often gain acceptance after long periods of time, the precise process of a norm becoming customary law itself proves enigmatic.

Customary international law is considered a primary source of international law, along with treaty law and general principles.<sup>25</sup> These three sources often overlap, with treaties codifying customary law and, at times, even creating customary law.<sup>26</sup> Hierarchically speaking, treaty law takes precedence over customary law except in the case of *jus cogens*, non-derogable customary norms.<sup>27</sup> Customary law does, however, take precedence over general principles of law and other secondary sources.<sup>28</sup> This hierarchy is not always clear due to the overlapping nature of the sources, and is only applied in cases of clear conflict.<sup>29</sup> International law can be determined from several sources, depending upon the type of law. In general, the best evidence of the rules of

international law. Currently, half-a-dozen examples of the violation of those laws exist, including the armed conflict in Bosnia-Herzegovina, Angola, and past conflicts in Cambodia and El Salvador. The issue of effectiveness depends largely on enforcement mechanisms. This paper will not delve deeply into enforcement mechanisms, but will discuss the overall effectiveness of the customary international labor laws.

22. See *North Sea Continental Shelf (F.R.G. v. DEN.; F.R.G. v. Neth.)*, 1969 I.C.J. 232 (Feb. 20) (dissenting opinion of Judge Lachs stating "[o]ne should of course avoid the risk of petrifying rules before they have reached the necessary state of maturity and by doing so endangering the stability of and confidence in law").

23. See Michel Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 116, 141-42 (Max Sørensen ed., 1968) [hereinafter Sørensen, *PUBLIC INTERNATIONAL LAW*].

24. The reason that customary international law is theoretically uncomfortable is that it ultimately must be practical. D'AMATO, *supra* note 17, at 16. The only reason it exists is because people are able to use it. Therefore, the theory behind the law must be in strict accordance with the realities of the international community. It also reverses the logical order for development of law. Normally the practice follows the law, but in customary law, the practice must precede the law. Sørensen, *PUBLIC INTERNATIONAL LAW*, *supra* note 23, at 130. One of the most theoretically difficult areas, which will not be addressed in this article, is that of change of customary law. If a practice becomes law because of its usage by states, and then states either do not comply with the law or decide they are not bound by the law, does that mean the law does not exist or the states are simply in violation of the norm? See SHAW, *supra* note 20, at 76-78.

25. See Stat. I.C.J. art. 38(1); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 102(1)(a) (1986).

26. SHAW, *supra* note 20, at 58.

27. Rudolf Bernhardt, *Customary International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 62 (1984) [hereinafter *PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA*]. The Vienna Convention defines *jus cogens*, or peremptory norms, as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, art. 53 [hereinafter Vienna Convention]. This is essentially a special category of customary international law that has been limited to forbidding practices that are universally agreed to be abominable, such as genocide, slave trade and piracy.

28. *PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA*, *supra* note 27, at 62.

29. *Id.*

international law comes from "judgments and opinions of international judicial and arbitral tribunals,<sup>30</sup> judgments and opinions of national judicial and arbitral tribunals, writings of scholars, and pronouncements by States that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other States."<sup>31</sup> All of these sources are used in order to determine the existence of customary international law.

Customary international law is generally defined as having two elements. The first element consists of an act or actual practice of States,<sup>32</sup> and the second element comprises the belief by States that they are acting under a legal obligation, comprising the mental aspects of the law, known as *opinio juris*.<sup>33</sup> Different theorists have placed different weights of importance on each of the elements;<sup>34</sup> however, most discussion regarding the definition of customary international law centers around State practice, and, in fact, the name itself denotes the importance of practice.<sup>35</sup> It seems intuitive that if a State practice occurs long enough and is universally applied, despite the fact it did not originate as a legal obligation, it could acquire that designation, especially with those who do not research or have an interest in the historical source of the practice. The other argument supporting the importance of practice concerns the fact that *opinio juris* becomes too difficult to prove because it really amounts to the "subjective perception of the particular State or States."<sup>36</sup> Accordingly,

30. It must be remembered that the judgments of the ICJ are not precedential in nature. See Stat. I.C.J. art. 59. Other international courts have followed this practice. This does not mean, however, that their decisions are given no weight, and, in fact, they are often followed as persuasive authority. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 cmt. b (1987). "If an international court, especially the ICJ, has found that a certain norm is part of international law, such a pronouncement is often more widely accepted than any widespread practice without such support." PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63.

31. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103(2) (1986).

32. See SHAW, *supra* note 20, at 62 (defining this element as "[m]aterial facts, that is, the actual behavior of states"); D'AMATO, *supra* note 17, at 87 (characterizing this as a quantitative element, requiring act or commitment); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986) (requiring "consistent practice of states"); PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63 (looking for uniformity of practice for this element); North Sea Continental Shelf, 1969 I.C.J. at 44 (stating the acts should "amount to a settled practice").

33. See North Sea Continental Shelf, 1969 I.C.J. at 44 (holding "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"); SHAW, *supra* note 20, at 63 (depicting this as "the psychological or subjective belief that such behavior is 'law'"); D'AMATO, *supra* note 17, at 74 (defining element as "[o]bjective claim of international legality [to] be articulated in advance of, or concurrently with, the act"); RESTATEMENTS (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986) (characterizing this element as "sense of legal obligation").

34. SHAW, *supra* note 20, at 63.

35. The group placing the emphasis on the *opinio juris* element have been denoted the positivists. *Id.* They argue that even if a practice is performed only once, as long as the state believed it had a legal obligation to perform the act, it can be inferred that the state has tacitly consented to the rule. *Id.* This argument does not seem to accurately depict the solidification of customary international law, and also does not survive the criticisms of the opposing theorists.

36. *Id.* Shaw cites Kelsen as one who supports the notion that courts, not states, should make the final verdict as to whether a set of practices has become custom. *Id.* Each decision of a domestic court, in and by itself, amounts to an act, showing the possibility for *opinio juris* to fold into state practice. The two can be separated by the act of making the decision being state practice and the words and decisions in the court's

State practice should receive the primary focus in any proof of customary international law.

Any evaluation of customary international law should look to the circumstances of the particular case. The two elements are interrelated and should not be separated completely. "The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach."<sup>37</sup>

### 1. State Practice in Customary International Law

State practice constitutes the most concrete element of customary international law. In order to determine if a practice has risen to the level sufficient to become customary law, several factors must be explored. The most obvious factors of State practice include the relevant acts that comprise the norm, the number of States that comply with the norm, and the length of time for which they have been applying the norm.<sup>38</sup> Additionally, the definition of State practice becomes important, as well as the consistency and repetition of the practice. Not only is the quantity of the States important, but also the quality or relative importance of the States.

For the issue of State practice to be raised at all, the practice in question must be general enough that it could become an international legal norm. The International Court of Justice (ICJ) has held that "the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."<sup>39</sup> This standard entails the potential widespread application of State practice, particularly by those States concerned with the norm.

The actions that constitute State practice clearly depend on the circumstances of the case. In some cases, the State act is an easily recognizable practice, such as the reception of ambassadors.<sup>40</sup> The nature of the State act can range from diplomatic actions and instructions, to public measures, official statements of policy and other governmental acts.<sup>41</sup> Acts of private entities can also contribute to the practice of States, "but only so far as their conduct is supported or at least tolerated by States."<sup>42</sup> These acts can be found in such sources as newspapers, historical records, official publications, and even memoirs of past public leaders.<sup>43</sup> Omissions by States, as opposed to acts, create a theoretical problem with regard to this issue. The predecessor to the ICJ resolved this issue with a holding stating that an omission to institute criminal proceedings could constitute an affirmative State action, but only if it is coupled with the

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pronouncement standing for *opinio juris*.

37. North Sea Continental Shelf, 1969 I.C.J. at 176 (dissenting opinion of Judge Tanaka). See also PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63.

38. PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 62-63.

39. North Sea Continental Shelf, 1969 I.C.J. at 42-43.

40. D'AMATO, *supra* note 17, at 88. D'Amato lists other examples of distinctive state actions that founded international norms, including sending up artificial satellites, testing nuclear weapons, expelling aliens, capturing pirate vessels, and setting up drilling rigs on the continental shelf. *Id.*

41. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(3) cmt. b (1986).

42. PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63.

43. SHAW, *supra* note 20, at 70.



consciousness of a internationally binding duty to refrain from such prosecutions.<sup>44</sup> Others have disagreed, stating that non-action can indicate tacit acceptance of the legality of a practice.<sup>45</sup> The issue then becomes whether the omission is intentional, because to rise to the level of an action, it must show desire by the State to indicate a practice.

The duration of the actions by States was considered in the past to be a significant factor with regard to practices becoming customary international law. Originally, customary international law developed over centuries; however, with modern methods of communication and rapid technological innovation, rules arise in much shorter periods of time.<sup>46</sup> These shorter time periods of development mandate that other factors be present to compensate for the lack of length of the practice, including greater uniformity of practice and greater number of acting States.<sup>47</sup> Overall, one of the most important factors of State practices is that they "have been both extensive and virtually uniform in the sense of the provision invoked."<sup>48</sup> This involves both the nature of the State practice and the character of the States which execute the practice. The ICJ has denied claims which based an argument on customary international law, holding the practice was too uncertain and contradictory to rise to the level of customary law.<sup>49</sup> The uniformity of the practice generally is more important than the extent or the volume of past State practice. Naturally, no absolute number of occurrences of State practice can be defined, just as no absolute number of State participants can be defined. The best guideline is that "persuasiveness in part depends upon the number of precedents."<sup>50</sup> Even one State act can have persuasive weight, depending on the circumstances of the act, although the greater number of acts increases the persuasiveness of the argument.

The character of the State participating in the act considerably influences the persuasiveness of the customary international law argument. Character looks at both the interests of the practicing State and the relative world power of the State. Clearly, States that have little or no interest in the norm at stake do not

44. North Sea Continental Shelf, 1969 I.C.J. at 44-45 (citing *Lotus Case*, 1927 P.C.I.J. (ser. A.) No. 10 (Sept. 7) at 28. See also PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 64.

45. SHAW, *supra* note 20, at 69.

46. SHAW, *supra* note 20, at 60; PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 64; North Sea Continental Shelf, 1969 I.C.J. at 44; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 reporters' note 2 (1986).

47. North Sea Continental Shelf, 1969 I.C.J. at 43.

48. *Id.*

49. Asylum Case (*Colum. v. Peru*), 1950 I.C.J. 266 (Nov. 20). The ICJ denied a claim asserting that a customary law would allow a country to decide if a non-national, who sought asylum in the first state's embassy, was guilty of a criminal or political offense, after the individual's state had found him guilty of a criminal offense. The court found the practices did not amount to "constant and uniform" usage, and therefore did not rise to the level of customary international law. *Id.* at 276. Anthony D'Amato has argued that "constant and uniform" usage is too strict as an absolute standard for the establishment of customary international law; see Letter from Anthony D'Amato to Leslie Deak (June 15, 1993) (on file with author); however, that does not diminish its usefulness as a guideline to determine the existence of customary law. It would be difficult to imagine the formation of a customary international law that had not achieved any consistent or uniform treatment by states.

50. D'AMATO, *supra* note 17, at 91.

greatly affect the status of the norm by not implementing the practice.<sup>51</sup> However, the global status of the State is also taken into consideration. If too many major world powers reject a practice, whether they have a great interest in the norm or not, it is unlikely that practice will become a binding legal norm.<sup>52</sup> Still, it is possible that if the majority of States affected follow a certain practice, it could become regional or "particular" customary law,<sup>53</sup> regardless of the relative importance of the States. The nature of the acting States must be viewed with regard to the total circumstances.

## 2. *Opinio Juris*

The second half of proving the existence of customary international law concerns the legal nature of the State practice. States must undertake the practice out of a sense of legal obligation, or "because they are convinced it is binding upon them to do so."<sup>54</sup> The concept of customary law needing more than uniform and consistent practice to become binding originates in the *Lotus* case.<sup>55</sup> The ICJ held that for an abstention to facilitate creation of international law, the abstention must be "based on their [the States] being conscious of a duty to abstain."<sup>56</sup> This element becomes extremely difficult to discern because it reflects the intent of States. Intent is difficult enough to discern in live persons;<sup>57</sup> the intent of an artificial legal entity, a State, becomes that much more elusive.

*Opinio juris* is the element that transforms a simple practice or custom into public international law. Professor D'Amato explicates this element with four factors.<sup>58</sup> First, the act must have the characterization of legality, as distinguished from a characterization of social habit, courtesy, custom, or ethical requirement.<sup>59</sup> Second, the legal norm in question must concern international

51. North Sea Continental Shelf, 1969 I.C.J. at 95 (discussing how non-ratification of treaty concerning continental shelf by land-locked states did not affect decision that customary international law had not been formed); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) cmt. b (1986) (stating the practice should reflect wide acceptance among state particularly involved in activity); PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63-64.

52. SHAW, *supra* note 20, at 67. "[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. . . . Law cannot be divorced from politics or power and this is one instance of the proposition." *Id.*

53. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) cmt. b. (1986).

54. SHAW, *supra* note 20, at 72.

55. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18.

56. *Id.* at 42.

57. PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63.

58. D'AMATO, *supra* note 17, at 73. D'Amato defines *opinio juris* as an "objective claim of international legality [that must] be articulated in advance of, or concurrently with, the act which will constitute the quantitative elements of custom." *Id.* at 74. Thirlway disagrees with D'Amato's assertion and argues that D'Amato is replacing the psychological element with one of articulation and act. H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 51 (1972). In the final analysis, D'Amato does not replace *opinio juris* with a new test, but explicates the element by giving factors that provide evidence of the state believing itself legally bound. When the element is one of intent, the best proof of intent is action combined with an articulation explaining the action.

59. D'AMATO, *supra* note 17, at 73.

law, not domestic law.<sup>60</sup> Third, in cases of abstentions, the articulation of the action must characterize the abstention as legally required.<sup>61</sup> Fourth, the acting State must have reason to know of the articulation of the legal rule.<sup>62</sup> These factors comprise a rigorous analysis of the belief of legal obligation, and again the overriding test must be held against the backdrop of the surrounding circumstances. For example, if a few States abstain from a practice without characterizing the abstention as legally required, and they do not have a real interest in the legal norm or are not powerful States, abstention will not jeopardize the characterization as legally binding.

Focusing on articulation helps solve the problem of exactly what actions can constitute evidence of *opinio juris*. "Unilateral allegations of legal claims and rules and the acquiescence of the international community when these allegations are brought forward" have been asserted to be the best evidence of *opinio juris*.<sup>63</sup> It seems that policy statements, domestic judicial decisions of international issues, domestic legislation conforming to the international norm, and perhaps some types of legislative history could indicate a State's belief in the binding nature of the international norm.

International organizations can play a powerful role in formation of binding customary laws. The United Nations Secretariat has asserted that:

[I]n view of the greater solemnity and significance of a 'declaration,' it may be considered to impart, on behalf of the organization adopting it, a strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon States.<sup>64</sup>

For the organization to use a non-binding statement as an instrument for promulgating rules, States must have a basis for following those rules.<sup>65</sup> Accordingly, this might be limited to multilateral international organizations that regularly institute multilateral conferences and conventions, such as the International Labor Organization.<sup>66</sup>

*Opinio juris* embodies the essence of customary international law. It is recognizable once it has fully ripened, but deciphering exactly what ingredients are necessary to complete the process remains cryptic.<sup>67</sup>

60. *Id.* at 79. This factor has expanded with the rise of human rights laws. Human rights generally regulates areas that had traditionally been reserved for domestic law, specifically entering into the relationship between the state and its citizens. See SHAW, *supra* note 20, at 196.

61. D'AMATO, *supra* note 17, at 81.

62. *Id.* at 85.

63. PUBLIC INTERNATIONAL LAW ENCYCLOPEDIA, *supra* note 27, at 63 (discussing Verdross' and D'Amato's views that these statements comprise best evidence of *opinio juris*).

64. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) reporters' note 2 (1986), quoting Memorandum from the Office of Legal Affairs, U.N. Secretariat, E/CN.4/L. 610, quoted in 34 U.N. ESCOR, Supp. No. 8, at 15, U.N. Doc. E/3616/Rev. 1 (1962).

65. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 reporters' note 2 (1986) (asserting that "the universal character of many of those organizations and the forum they provide for the expression by states of their views regarding legal principles, such resolutions sometimes provide important evidence of law").

66. See generally Sørensen, PUBLIC INTERNATIONAL LAW, *supra* note 23, at 139-40.

67. De Visscher likened the development of customary international law to the formation of a footpath. In the beginning, people do not follow it exactly and it is not always clear why they follow it in the first place. But over time, the path becomes defined and eventually becomes a road, binding people to that direction.

### B. *Treaty Law and Customary International Law*

Treaty law, in addition to its own position as a major vehicle for international law, plays a vital role in contributing to international law by codifying and initiating customary law.<sup>68</sup> The role the treaty adopts depends on the type, either a treaty-contract or law-making treaty.<sup>69</sup> The treaty-contract is an agreement between a limited number of States, often bilateral, on a narrow subject. These do not create new law, but can be evidence of *opinio juris* for formulation of customary international law.<sup>70</sup> The other type of treaties, law-making treaties, "are those agreements whereby States elaborate their perception of international law upon any given topic or establish new rules which are to guide them for the future in their international conduct."<sup>71</sup> These agreements primarily are widely-ratified multilateral instruments, preferably created through conferences attended by a large number of national and non-governmental organization (NGO) representatives.<sup>72</sup> An example of a law-making treaty is the Genocide Convention, portions of which codified customary international law, and other portions of which created new international law.<sup>73</sup> In this context, an important relationship has developed between customary international law and treaty law.

The clearest interaction between treaties and customary law occurs with the codification of international law through treaties. When the treaty codifies customary law, the provisions that originated as customary law remain binding on all States, while any new provisions bind only the States that ratify the treaty. The Vienna Convention on the Law of Treaties<sup>74</sup> codified such international laws as the rules on interpretation, material breach, and fundamental change of circumstances.<sup>75</sup> The further question that arises is whether the remaining provisions that do not codify international law create customary law.

The treaty can create customary international law in two ways. It can signify State practice as a single element or, if the creation and ratification embraces enough States, both elements will be satisfied and the norms in the treaty can be immediately elevated to the status of customary international law.<sup>76</sup> The ICJ used treaty law in the *North Sea Continental Shelf* case<sup>77</sup> as

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SHAW, *supra* note 20, at 66-67. See also CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 152-54 (1957).

68. D'AMATO, *supra* note 17, at 104.

69. SHAW, *supra* note 20, at 80.

70. *Id.* at 81. An example of this kind of treaty could be a bilateral tariff agreement on a single product line between two non-member states of the GATT treaty system.

71. *Id.*

72. *Id.*

73. Sørensen, *PUBLIC INTERNATIONAL LAW*, *supra* note 23, at 196 (discussing primarily ICJ case regarding state reservations in the convention, but that decision was based on the fact that many principles in conventions were already binding on states as customary international law).

74. Vienna Convention, *supra* note 27.

75. See SHAW, *supra* note 20, at 561 and accompanying notes in text (detailing origins of rights codified by Vienna Convention).

76. See United Nations Convention of the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122 (1982). It has been asserted that this immediately became customary international law because of the breadth

an indication of State practice, and, finding not enough States had acceded to the relevant treaty instrument, held the practice not to be customary international law.<sup>78</sup> The ICJ viewed State practice as the act of signing the international document, but it did not discuss the actual implementation of standards from the treaty. The act of signing a treaty by itself constitutes an act for the purposes of State practice.<sup>79</sup>

Although treaty law clearly indicates State practice, it should also serve to satisfy *opinio juris*: The signature of a State on an international agreement inherently declares that the State believes the norms included in the treaty have legally-binding status. State practice comes as a second step; once the State ratifies the treaty and begins to implement and obey its provisions, State practice occurs.<sup>80</sup> Treaty law that States do not truly follow should not be convincing evidence that the agreement has become customary international law. However, it can indicate that the State believes, at least nominally, the rights and obligations in the treaty are legal rights and obligations, not simply moral or habitual.

The drafters of the Vienna Convention on the Law of Treaties made it clear that treaties could become customary international law.<sup>81</sup> Further, the Hague Convention of 1907<sup>82</sup> and the Geneva Convention on Prisoners of War of 1929<sup>83</sup> were applied in the Nuremberg War Crimes Trials as customary international law despite the fact they technically were not applicable to the situation.<sup>84</sup> The Tribunal applied them, citing them as "good evidence of the

of participation in the founding conference and the widespread adoption after the conference.

77. 1969 I.C.J. 3. This case involved several disputes, the primary dispute being between Germany and Denmark, over whether the 1958 Geneva Convention on the Continental Shelf had become customary international law and therefore binding on all states, regardless of whether the states had signed the convention or not. Germany was not a party to the Geneva Convention and opposed the fundamental premise of the Convention, that each state should essentially be granted monopoly rights to the natural resources of the subsoil and seabed in the continental shelf for three miles off the state's coast. By the date of the case, 39 states had ratified the Convention, with numerous states criticizing various parts of the treaty. The ICJ held that the Convention had not become part of customary international law, because the number of states ratifying the treaty lacked both qualitative and quantitative force. The treaty did not suffice to fulfill the requirements of state practice.

78. North Sea Continental Shelf, 1969 I.C.J. at 42-43. Judge Lachs, in his dissent, also used ratification of treaties to justify his conclusion that the disputed practice was customary international law. Judge Lachs included agreements other than the Convention on the Continental Shelf of April 29, 1958, in his proof that sufficient state practice existed. *Id.* at 229.

79. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446-47 (Robert Tucker ed., 1966). Kelsen describes a treaty as a contract. When the state party exercises its free will to sign a treaty, it commits an act demonstrative of state practice.

80. The state may not need to ratify the treaty. Some states have a provision in their constitutions stipulating that international law, treaty, and custom occupies a higher status than domestic law, and therefore, the state is automatically bound once it signs the treaty.

81. Vienna Convention, *supra* note 27, art. 38 (stating that nothing in any treaty would prevent it from becoming customary international law and therefore binding on third party states).

82. Hague Peace Conference, Final Act and the Hague Conventions I to XIV, 100 B.F.S.P. 281 (1907).

83. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

84. Professor D'Amato cites three reasons why the Hague Convention only applied as customary international law and not treaty law. First, Article 2 of the Convention was a "general participation" clause which made it inapplicable to World War II; second, it did not provide for the criminal sanctions applied in the Trials; and third, the conventions only applied to states, not to individuals. D'AMATO, *supra* note 17, at

customary law of nations."<sup>85</sup> Before that instance, it is questionable whether either of those conventions could have been considered customary international law in its entirety.<sup>86</sup> The evolution of a treaty into customary law depends on the generality of the norm in the agreement, the number of States ratifying the treaty, the importance of the States ratifying the treaty, and to some extent, the procedure by which the treaty was written. Fundamentally, the same totality of circumstances evaluation applies to the development of treaty law into customary law as to the development of other international norms into customary law.<sup>87</sup> The wholesale transition of a treaty into customary international law occurs very rarely, as it should be. Otherwise, treaties could present a danger of a few States legislating norms for all countries through small multilateral instruments.<sup>88</sup>

Overall, treaties provide invaluable means of confirming and solidifying customary international law. Without them, the application of international standards would be much more difficult. The effect of treaties has been especially powerful in the field of international labor laws, since individual treaties have progressed from collectively composing an international labor code to founding a body of customary international labor law.

### III. INTERNATIONAL LABOR LAWS AS CUSTOMARY LAW

One of the most important questions in international law is when customary or public international law is formed; when do normative standards become legally binding? The metamorphosis of international labor standards into customary law provides a perfect example of the theory that a political event acts as a precondition for the transformation of normative standards into law.<sup>89</sup>

The necessary political impetus to declare that standards that have been customarily followed have become binding on all nations has occurred to force select labor law standards into customary international law. Until recently, international labor laws have held a status as widely accepted norms, binding on those nations that had ratified appropriate conventions<sup>90</sup> or bilateral treaties.<sup>91</sup>

121.

85. *Id.* (citing International Military Tribunal for the Far East, Judgment 65 (1948)). The application of the Conventions could only be used in the trials for Japanese war crimes through customary international law because Japan was not a party to either of the Conventions.

86. This does not preclude the fact that individual norms within the Conventions were already customary international law.

87. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) cmt. i (1986); SHAW, *supra* note 20, at 82.

88. *Id.*

89. See earlier discussion concerning Professor Richard Falk's theory. Falk, *supra* note 14. This theory remains distinct from the legal proof of customary international law, although they work in tandem. It is paradoxical that the elements could be present for customary international law, but the law would not really be effectual until the political event occurred. It is a paradox because customary international law depends on the practice of states, so one would assume that the law would be effectual before it became customary. However, history does not bear that out. The development of humanitarian law and the application of the Hague and Geneva Conventions at the Nuremberg War Crimes Tribunal, *see* discussion, *supra* notes 74-76 and accompanying text, witnesses the effectuation of humanitarian law as customary international law after a political event, although the elements for customary international law had been in existence for a while.

90. These conventions include not only the ILO Conventions, but other human rights instruments that include labor standards. *See infra* notes 130-32 and accompanying text.

The fall of the Communist regimes in the former Soviet Union and Eastern-bloc States provides the political event that transforms the standards into binding laws. As will be discussed in depth later in this paper, the communist labor system had a fundamentally different basis than the capitalistic, or even a mixed socialist/capitalist system. As a result, the international labor conventions, which were signed and nominally supported by the communist States, were not followed in those States as they were in capitalistic States. With the change in regime in the Eastern-bloc States, international labor standards are in the process of becoming fully effectual. That realization of the international labor standards crystallizes the transformation of those standards from norms to customary international law.

### A. *Rights Protected by Customary International Labor Law*

#### 1. Right to Freedom of Association and Collective Bargaining

The right to organize and bargain collectively has become customary international labor law, but to be effective, it depends on a foundation of other rights. The freedom of association is a necessary precursor to the ability to organize and bargain collectively. The freedom of speech and expression are also indispensable for true collective bargaining rights. Other rights, such as the right to fair remuneration, form the groundwork for mandatory collective bargaining subjects.

International labor law is really a component of human rights law. Accordingly, the standards for international labor law come from both international labor instruments and human rights agreements. The primary documents for international labor law are ILO Convention Concerning Freedom of Association and Protection of the Right to Organise, No. 87,<sup>92</sup> and ILO Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively, No. 98.<sup>93</sup> These documents are supported by the Preamble to the Constitution of the International Labour Organization,<sup>94</sup> which calls for the recognition of freedom of association. These three documents explain and provide a foundation for basic rights, as well as form the basis for further discussion of the issues.

ILO Convention No. 87 provides the basic rights to establish trade unions and employer associations, which are necessary components to collective

91. The bilateral treaties primarily refer to the General System of Preference (GSP) treaties between the United States and various developing nations that condition favorable trade status on, among other things, appropriate labor practices. See *infra* notes 147-52 and accompanying text.

92. Convention Concerning the Freedom of Association and Protection of the Right to Organise, July 9, 1948, 31 ILO Official Bull., Ser. B, No. 1 (1948) [hereinafter ILO Convention No. 87]. This Convention succeeds Convention No. 11, which gave agricultural workers the same rights of association belonging to industrial workers, and Convention No. 84, which gave the right of association to workers in non-metropolitan territories. See VALTICOS, *supra* note 5, at 81.

93. Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively, July 1, 1949, 32 ILO Official Bull., Ser. B, No. 3 (1949) [hereinafter ILO Convention No. 98].

94. CONST. OF THE ILO pmbl.

bargaining. Employers<sup>95</sup> and employees have the right to establish and join the organizations without previous authorization from the government.<sup>96</sup> Organizations have the right to establish their own constitutions and rules, elect representatives, and organize activities and programs, all without government interference.<sup>97</sup> Organizations also have the right to form federations and confederations, and associate themselves with international organizations.<sup>98</sup> The government cannot suspend or dissolve these organizations, and it cannot place administrative conditions on the organizations that would restrict the application of the aforementioned rights.<sup>99</sup> ILO Convention No. 87 emphasizes the right of unions to be free from governmental interference, whether the interference come from excessive regulation, restrictions on political activity, or denial of civil liberties, such as freedom of assembly or freedom of the press.<sup>100</sup> Additionally, The Convention provides the foundation for the right to strike. The Committee of Experts asserts that a prohibition on the right to strike "constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members and of the right of trade unions to organize their activities."<sup>101</sup>

ILO Convention No. 98<sup>102</sup> focuses on collective bargaining rights.<sup>103</sup> One of the most important protections provided is the right to freedom from anti-union discrimination. This includes the protection from conditioning employment upon agreements not to form or join unions, and protection from dismissal for union activities.<sup>104</sup> Unions and employer associations must have adequate protection against interference from each other, including prohibition of acts

95. Convention No. 87 provides equal rights for employer and employee organizations. The ILO has a tripartite structure, with equal representation from labor unions, employer associations and governments. Accordingly, all ILO instruments will address the rights and obligations of all three groups. Other instruments, generally human rights instruments, which will be discussed later, specify the rights belonging to workers and the right to form trade unions. This does not violate or go against the principle of protection of the right of the employer to association. Historically and traditionally, as long as a right to freedom of association has existed, employers have not been barred from that right. Much too frequently workers have been prevented from organizing despite the existence of a freedom of association. The history of unionism in the United States bears this out. See generally SELIG PELLMAN & PHILIP TAFT, HISTORY OF LABOR IN THE UNITED STATES (1935).

96. ILO Convention 87, *supra* note 92, art. 2. The following rights apply to everyone except the military and police. *Id.* art. 9.

97. *Id.* art. 3.

98. *Id.* art. 5.

99. *Id.* arts. 4, 7.

100. BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T LABOR, WORKER RIGHTS IN U.S. POLICY, 22 (1991) [hereinafter WORKER RIGHTS IN U.S. POLICY].

101. VALTICOS, *supra* note 5, at 86 (citing REP. COM. EXP. 1973, Vol. 4B, Nos 107-114, 44-47). The Freedom of Association Committee has concurred with this reading of the Convention, stating that the right to strike is a legitimate means for defending occupational interests. *Id.*

102. This Convention, as with ILO Convention No. 87, exempts military and police forces. Additionally, Convention No. 98 does not cover public employees, but it states that their exemption should not be construed so as to prejudice their rights or status in any way. ILO Convention No. 98, *supra* note 93, art. 6.

103. The right to organize and bargain collectively generally covers the relationship between unions and employers, with the government in a distant regulatory role. This is different from the freedom of association, which concerns the relationship between union and the government. WORKER RIGHTS IN U.S. POLICY, *supra* note 100, at 23.

104. ILO Convention No. 98, *supra* note 93, art. 1.



promoting the establishment of workers' organizations under the domination of the employer.<sup>105</sup> Finally, the State should take measures "appropriate to the national condition" that develop and promote voluntary collective bargaining agreements between employers' and workers' organizations to regulate the terms and conditions of employment.<sup>106</sup> This includes establishing the legal machinery necessary to implement collective bargaining.<sup>107</sup> Legal machinery and processes are especially important for review of worker complaints of anti-union discrimination, because in order to be effective, the processes must be such that the workers believe them to be fair and impartial.<sup>108</sup>

The two ILO conventions encompass fundamental rights for workers. They ensure that the workers can have a voice in their employment setting and the voice has a process by which it must be heard. It is clear that these rights have become part of customary international law.

## 2. Policy Considerations Behind the Right to Association and Collective Bargaining

Behind the evolution of freedom of association and collective bargaining lie important political and economic considerations. Although unions tended to form around concrete labor disputes, such as wage or termination policies, a moral argument exists to support State protections. Moral policy argues that all individuals should have some degree of participation and control over their work environment or they are little better than slaves for hire. The only means for the average worker to gain any control, assuming the employer does not automatically grant the worker power, is for the worker to join with others and work together to gain a share of the power. Hence unions developed. The argument concludes that once unions develop, workers will fight to use the unions as their voice in the workplace. Through the struggle and accompanying success of unions' gaining power and a contributive voice in the workplace comes more humane and tolerable working conditions and wages. The overall result ends in workers with acceptable standards of living. Accordingly, any discussion of justification for international labor standards implies the right to association and collective bargaining at its core.

The economic justifications for decent labor standards are persuasive, especially because they focus on developing economies. The U.S. Department of Labor (DOL) has defined four reasons why artificially low labor standards can retard economic development:

First, [low labor standards] encourage employers to pursue flawed business strategies, which promote inefficiencies and act as disincentives to development. Second, they result in work force instability and increase turnover rates, which act as barriers to development. Third, they inhibit domestic consumption and demand, thereby discouraging the creation of small enterprises to satisfy consumer demand.

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105. *Id.* art. 2.

106. *Id.* art. 4.

107. *Id.* art. 3.

108. WORKER RIGHTS IN U.S. POLICY, *supra* note 100, at 30.

Fourth, artificially low labor standards in some countries can depress labor standards in other countries.<sup>109</sup>

In developing countries, the second reason (workforce instability) does not really apply because normally the workforce is attracted from the agricultural sector to the industrial sector by higher wages.

The most frequently cited reason for international labor standards (alluded to by the fourth DOL rationale) concerns international trade theory. With artificial labor standards, as with any other market disruption, the comparative advantage of countries can be distorted.<sup>110</sup> This holds true for unnaturally high standards, from which countries fear that their goods will not be competitive because the cost will be too high, as well as artificially low labor costs. With international standards, all States start on a level playing field, and comparative advantages can be maximized.

The ILO operates on a basis of political rationales for international labor standards. According to its Constitution, among its primary goals is contribution to the consolidation of peace through the abatement of social injustice. The ILO Constitution states "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled."<sup>111</sup> History has shown that labor unrest can have political ramifications for the entire society, with frequent resultant violence.<sup>112</sup> It has also shown that granting labor these rights possibly staved off great turmoil.<sup>113</sup> In addition to working for social justice in facilitation of peace, international labor standards contribute to the goal of social justice itself.<sup>114</sup> Individual political, economic, and moral rights can be partially achieved through the recognition of worker rights. Finally, international standards contribute to stabilization of migration of workers.<sup>115</sup> The more equal the labor standards are across borders, the lower and more even the flow of migration will be. Currently, a number of countries, including the United States and Germany, are experiencing large influxes of immigrants. Although it is questionable whether the migrant workers hurt the host country's economy, employment and adequate working conditions in the workers' home countries to create incentives for workers to stay are by far the most desirable situation.

These policy considerations provide the foundation for customary international labor law. The considerations bolster the *opinio juris* and solidify its stature. They have given the standards the strength to "embody an international minimum that can reasonably be expected to apply across a wide range of national, cultural and economic conditions."<sup>116</sup> They form the

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109. Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 57-58 n.80 (1989).

110. See VALTICOS, *supra* note 5, at 21.

111. CONST. OF THE ILO. pmbl., *supra*. note 7.

112. Examples can be seen in 1920 Italy before Mussolini arose to power and before the Bolshevik Revolution in Russia. In Russia, the primary power base of the Bolsheviks was the industrial workers. ALEC NOVE, AN ECONOMIC HISTORY OF THE U.S.S.R. 74 (1986).

113. See *infra* note 162.

114. VALTICOS, *supra* note 5, at 24.

115. *Id.* at 25.

116. Sumner M. Rosen, *Protecting Labor Rights in Market Economies*, 14 HUM. RTS. Q. 371, 374 (1992).

underlying rationale for the States' moving State practice beyond the realm of acts and into the realm of customary international law. The State practice must exist, and then the *opinio juris* creates the stature for the practice.

## B. Evidence of Customary International Labor Law

The following discussion applies principles of customary international law to the state of international labor law. The element of State practice is present as seen in the duration and ratification of international labor treaties, quality and quantity of State acts, as well as the compliance of the former communist nations. Additionally, State articulation fulfills the requirement of *opinio juris*. Thus, international labor standards have reached the status of customary international law.

### 1. State Practice

The overwhelming evidence of State practice supports the premise that the right to organize and bargain collectively have become part of customary international law. The right to organize and bargain collectively are general rights that apply to all workers, regardless of their nationality or profession. These rights are among the most important human rights areas for workers.<sup>117</sup> The right to unionize and effectuate that right have been deemed "fundamental human and civil right[s]."<sup>118</sup> The importance and the widespread application of the rights qualifies them as being capable of becoming customary international law.

#### a. Duration of International Labor Laws

Duration of these worker rights supports the notion that the right to freedom of association and collective bargaining have become customary international law. These rights have not been evolving over hundreds of years, as many of the customary laws of war have.<sup>119</sup> However, these rights developed by necessity. Industrialization normally is considered to begin between 1760 and 1830 in England.<sup>120</sup> It spread slowly to the rest of Europe, first to Belgium and France, and traveled further east, when between the 1870s to the turn of the century, industrialization reached Russia.<sup>121</sup> At this point, while Central and Eastern Europe were only partially industrialized, the movement to protect

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117. The other human rights fundamental to workers include the abolition of forced or slave labor, the elimination of all forms of discrimination, equal pay for work of equal value, the elimination of child labor, and the establishment of a minimum wage. JOHN HOERR, HUMAN RIGHTS AT WORK AND THE ILO: A READER FOR AMERICANS 1-4 (1992); Schlossberg, *supra* note 109, at 48-49.

118. Schlossberg, *supra* note 109, at 77 (quoting David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135 (1988)).

119. 1 WALDEMAR A. SOLF ET AL., INTERNATIONAL HUMANITARIAN LAW: MATERIALS AND PROBLEMS 3-39 (1992).

120. Joel Mokyr, *The Industrial Revolution and the New Economic History*, in THE ECONOMICS OF THE INDUSTRIAL REVOLUTION 1, 3 (Joel Mokyr ed., 1985).

121. Sidney Pollard, *Industrialization and the European Economy*, in THE ECONOMICS OF THE INDUSTRIAL REVOLUTION 172-75 (Joel Mokyr ed., 1985).

worker rights began with conferences in 1897 in Zurich and Brussels.<sup>122</sup> The precursor of the ILO, the International Labour Conference, first met in 1919.<sup>123</sup> Although none of these conventions resulted in a treaty specifically guaranteeing the right to organize and bargain collectively, the international trade union movement was simultaneously organizing and beginning to assert those rights.<sup>124</sup> As a result, when the ILO Conventions Nos. 87 and 98 were signed, States accepted that workers had a right to associate and participate collectively in the workplace. In the past forty years, these rights have gained the status of fundamental rights.<sup>125</sup> Clearly, worker rights existed for as long as they have been necessary, developing with society as with all international norms. That factor, along with the other incidents of State practice, fulfill the requirements for customary international law.

#### b. Treaties as State Practice

The substantial inclusion in treaties of the relevant labor rights provides extensive evidence of state practice, supporting the proof of customary international law. The ILO Constitution stipulates that the rights to freedom of association and right to bargain collectively are "fundamental principles on which the Organization is based."<sup>126</sup> This binds those countries, such as the United States, that are members of the ILO but have not ratified the relevant conventions.<sup>127</sup> Nonetheless, both the ILO Conventions Nos. 87 and 98 have been ratified by a strong majority of nations.<sup>128</sup> Additionally, States that do not ratify conventions will follow general principles.<sup>129</sup> For example, despite the fact India has ratified few of the conventions, they have adopted most of the basic principles of the ILO into their laws and practice.<sup>130</sup> Many of the States that do not ratify the Conventions refrain from ratification more due to administrative systems that restrict the rights than true prohibition of the rights.<sup>131</sup>

122. VALTICOS, *supra* note 5, at 17-20.

123. *Id.* at 19.

124. LORWIN, *supra* note 4, at 3-37.

125. Schlossberg, *supra* note 109, at 49.

126. INTERNATIONAL LABOR ORGANIZATION (ILO) CONST., Annex, § 1, 3(e) (1919). The preamble to the Constitution also enumerates the freedom of association as one of the objectives which the Contracting Parties agrees to work to obtain. *Id.* at pmb1.

127. C. WILFRED JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOR STANDARDS 16 (1960).

128. As of January, 1991, 99 states have ratified ILO Convention No. 87, and 115 states have ratified ILO Convention No. 98. Fact Sheet: Freedom of Association, Washington Branch, International Labor Office (1991) (photocopy on file with author). Those are a majority of the ILO's 149 member states.

129. See generally A. Pankert, *Freedom of Association*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 146-65 (R. Blanpain ed., 1982).

130. Schlossberg, *supra* note 109, at 58 (citing JOSHI, INTERNATIONAL LABOUR ORGANIZATION AND ITS IMPACT ON INDIA 59 (1985)). The United States follows the same practice of implementing the principles without ratifying the conventions.

131. ILO, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: GENERAL SURVEY BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, INTERNATIONAL LABOUR CONFERENCE, 69th Sess., Rep. III (pt. 4B) (1983). Most of the restrictions do not prevent the application of general principles. For example, the government of Malaysia allows workers to join unions that represents their specific trade, and not any union they choose. *Id.* at 127. The government of Morocco only allows Moroccan nationals to take part in the administration of trade unions. *Id.* at 128. Several Canadian provinces

The right to organize and bargain collectively is not found exclusively in the ILO Conventions. Many other human rights instruments include protections for those rights. The International Covenant on Economic, Social and Cultural Rights ensures many of the same rights as ILO Convention No. 87, including the right to form and join trade unions, the right of unions to form and join federations and confederations, and the right to strike.<sup>132</sup> This Convention also details other rights intrinsic to collective bargaining contracts, including fair wages, safe and healthy working conditions, and reasonable limitation of working hours.<sup>133</sup> The International Covenant on Civil and Political Rights provides protection for the freedom of expression,<sup>134</sup> the freedom of assembly,<sup>135</sup> and the freedom of association,<sup>136</sup> which includes the right to form and join trade unions. Both of these treaties are United Nations (UN) documents and accordingly ratified by a large number of States.<sup>137</sup>

In addition to the UN instruments, a number of regional treaties provide for the right to organize and bargain collectively. Several documents propagated by the American States include the right to organize. The Charter of the Organization of American States (OAS) mandates that employers and workers have the right to freedom of association for the purpose of collective bargaining, including the right to strike.<sup>138</sup> The Charter also recognizes the independence of such organizations from the State, and the importance of their contributions to the life and development of society.<sup>139</sup> The American Declaration of the Rights and Duties of Man provides additional support for the right of freedom of association in order to protect, among others, labor union interests.<sup>140</sup>

European States have also adopted several instruments which protect freedom of association rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms affords the basic rights of freedom of expression,<sup>141</sup> peaceful assembly and association, as well as the further elaboration of the right to join trade unions for the protection of specific interests.<sup>142</sup> The document has had a powerful impact on the effectuation of

have provisions that restrict government employees from participating fully in labor relations. *Id.* at 130. Whereas each of these examples describe non-compliance with the ILO Conventions, they do not indicate complete rejection of the underlying principles that form the basis of customary international law.

132. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 8, 993 U.N.T.S. 3 [hereinafter *Covenant on Economic Rights*].

133. *Id.* art. 7.

134. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 19, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*].

135. *Id.* art. 21.

136. *Id.* art. 22. This closely mirrors Art. 8 of the *Covenant on Economic Rights*, *supra* note 130, art. 8.

137. As of Dec. 31, 1993, the International Covenant on Economic, Social and Cultural Rights had 127 Party States, and the International Covenant on Civil and Political Rights had 125 Party States. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DEC. 1993 114, 124 (1994).

138. Charter of the Organization of American States, Apr. 30, 1948, art. 43(c), 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter *OAS Charter*].

139. *Id.* art. 43(g).

140. American Declaration of the Rights and Duties of Man, O.A.S. res. XXX, art. XXII (1948).

141. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

142. *Id.* art. 11.

human rights protections in Europe. The European Economic Community has institutionalized the right of association and collective bargaining in their founding treaty, the Treaty of Rome.<sup>143</sup> Moreover, the Council of European Communities has taken a further step with the formulation and implementation of the European Social Charter.<sup>144</sup> The European Social Charter details organizing and collective bargaining rights as fundamental rights.<sup>145</sup> The document includes the right to strike and appropriate legal mechanisms for facilitation of settlement of industrial disputes, including mediation and arbitration.<sup>146</sup> This instrument is especially important because the Commission of the European Communities has the responsibility to ensure compliance by the twelve member States.<sup>147</sup> This greatly increases the incidence of State practice because the Commission has the right to bring a non-complying member State before the European Court of Justice for enforcement purposes.<sup>148</sup>

In addition to multilateral instruments, the United States established a bilateral treaty system to encourage developing countries to protect workers' rights. The Generalized System of Preferences (GSP), established in Title V of the Trade Act of 1974,<sup>149</sup> and the Caribbean Basin Initiative (CBI)<sup>150</sup> are programs granting favorable terms of trade for developing nations. The United States has conditioned the terms of trade with respect for basic worker rights, including the right to freedom of association and collective bargaining.<sup>151</sup> Countries in Africa,<sup>152</sup> South America, Latin America,<sup>153</sup> and Asia<sup>154</sup> have

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143. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 118, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

144. The Community Charter for the Fundamental Social Rights of Workers, May 1990 (photocopy on file with Tulsa J. Comp. & Int'l L.) [hereinafter European Social Charter].

145. *Id.* ¶¶ 11-14.

146. *Id.* ¶ 13.

147. The Commission has already implemented several action programs to ensure implementation of the programs. See COMMISSION OF THE EUROPEAN COMMUNITIES, FIRST REPORT ON THE APPLICATION OF THE COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS (1991) [hereinafter REPORT ON SOCIAL CHARTER].

148. EEC Treaty, *supra* note 141, art. 169.

149. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2066 (1975) (codified at 19 U.S.C. §§ 2461-2466 (1980)). This was extended through 1993 by the Renewal Act of 1984, Title V of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 501-506, 98 Stat. 3020 (codified at 19 U.S.C. §§ 2461-2466 (1988)).

150. Caribbean Basin Economic Recovery Act, Title II, Pub. L. No. 98-67, 97 Stat. 384 (1983) (codified at 19 U.S.C. §§ 2701-2707 (1988)).

151. The GSP mandates the recipients respect "internationally recognized worker rights" in order to receive the benefits, defining internationally recognized worker rights as: "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." Trade Act of 1974, § 502(a)(4) (codified as amended at 19 U.S.C. § 2462(a)(4) (1984)).

The CBI does not define a list as the GSP does, but it does mandate that one of the discretionary criteria which the President must take into account in designating a country as eligible for CBI is the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively. 19 U.S.C. § 2702(c)(8), *cited in* LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND U.S. FOREIGN POLICY: WORKER RIGHTS UNDER THE U.S. TRADE LAWS 33-34 (1988) [hereinafter WORKER RIGHTS UNDER U.S. TRADE LAWS].

152. The African nations that participate in the program include Benin, Central Africa Republic, Liberia, Sudan, Suriname, and Zaire. LYLE, *supra* note 100, at 17.

received benefits from the programs, and in return have agreed to implement basic worker rights and allow review of the rights by the United States. The wide range of States bound by these treaties emphasizes the acceptance by Third World nations of these rights.

Overall, these treaties show a widespread recognition that the right to association and collective bargaining should be respected. The vast majority of States have voluntarily bound themselves to documents that mandate protection of these rights. This indicates that general practice in the States should conform with the treaties, and the right to organize and bargain collectively should be the legal norm in the vast majority of States.

### c. Conformity of State Practice with International Standards

Collectively, the quantity of State acts complying with international labor standards suffice to illustrate State practice. Virtually all of the industrialized countries in the world have enacted labor law legislation that exceeds the international standards. Once domestic legislation is enacted, it can be assumed that the State practice complies with the laws and that compliance fulfills quantitative State act requirements. The United States has protected the basic labor rights of freedom of association and collective bargaining under the Wagner Act since its enactment in 1936.<sup>155</sup> The twelve Member States of the European Community all had to enact domestic labor laws in order to comply with the Treaty of Rome, as well as subsequent documents, such as the Social Charter. Unquestionably, all the Member States have complying laws and adequately enforce them.<sup>156</sup> The remaining States in Europe, such as Switzerland, Austria, and the Scandinavian nations, have also provided the workers and employers within their borders the rights of freedom of association and collective bargaining.<sup>157</sup> The compliance of Japan with international labor standards completes the consensus

153. The South and Latin American states that do or have in the past received benefits under the GSP program include Chile, Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, and Paraguay. *Id.* Other countries participating in the CBI program are Barbados, Costa Rica, Dominica, Dominican Republic, Jamaica, Netherlands Antilles, Panama, Trinidad and Tobago, Antigua and Barbuda, Belize, Grenada, Honduras, Montserrat, and the British Virgin Islands. Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 263 (1988).

154. The Asian countries participating in the GSP program include Burma, Indonesia, Malaysia, Nepal, Philippine Republic, South Korea, Suriname, and Taiwan. Additionally, several Middle East countries have received GSP benefits, such as Israel, Bangladesh, Syria, and Turkey. WORKER RIGHTS IN U.S. POLICY, *supra* note 100, at 17. In both the GSP and CBI programs, the exact list of participants changed over time, due to several reasons. As countries became more developed, such as Korea, Taiwan, and Singapore, they graduated from the program. WORKER RIGHTS UNDER U.S. TRADE LAWS, *supra* note 149, at 36-37 (1988). Additionally, states, including Chile, Romania, Nicaragua, and Paraguay have been suspended from the program for violation of worker rights. *Id.* at 33.

155. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (9135) (current version at 29 U.S.C. §§ 151-168 (1982)).

156. See REPORT ON SOCIAL CHARTER, *supra* note 145. The Report details the compliance of each Member State with the various rights and obligations in the Social Charter. Each state does provide workers and employers the right to organize collectively and negotiate terms of employment. They differ on the state regulation of the activities, but none of the regulation reaches the status of restricting any of the rights.

157. See GUNTER ENDRUWEIT ET AL., HANDBUCH DER ARBEITSBEZIEHUNGEN: DEUTSCHLAND, OSTERREICH, SCHWEIZ (1985); G.P. Cella & Tiziano Treu, *National Trade Union Movements*, in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 166-89 (R. Blanpain ed., 1982).

of compliance by the industrial nations of the world. Although Japan's industrial system has a slightly different base than Western systems, the fundamental rights to organize and bargain collectively are protected.<sup>158</sup>

The developing nations have tended to have poorer records with regard to worker rights, but they have been improving. United States Trade Representative (USTR) reports regarding compliance with the GSP and CBI programs indicate that countries with a large interest in United States trade have progressively increased their compliance with the international standards.<sup>159</sup>

Most of the non-compliance of developing nations with international legal standards constitutes a violation of the standards rather than detracting from the amount of State practice necessary to form customary law.<sup>160</sup> The fact that most of those countries have bound themselves to one or more treaties, mandating the standards becomes the deciding factor. By signing the treaty, especially a bilateral aid treaty, the State has committed a definite act towards the fulfillment of the element of State practice. The binding and articulating nature of signing a treaty obligating the State to uphold the norm goes to proving the element of *opinio juris*. Because both of the elements are present, the test for customary international law is satisfied. Accordingly, any deviation from international law is a violation, and the signatures on treaties and any subsequent compliance strengthens the State practice argument.

The remaining States, the second world or former-Communist States, provide key support for the formation of customary international law. Before the changes in 1989, Eastern-bloc States nominally supported worker rights standards, but did not comply in practice. Their practices fit within the theoretical economic framework of their system, however, that conflicted with the system assumed by customary international labor law.<sup>161</sup> Because of this actual denial of the freedom of association and right to bargain collectively, those rights could never become customary international law. Consequently, with the movement towards capitalism, the actual compliance of State practice by the East European States with international standards greatly increased the amount of State practice. This increase in State practice allows for elevation of those standards to customary international law.

Not only does the transformation of the former-Communist States influence State practice regarding the quantity of acting States, but also influences it regarding the quality or relative importance of practicing States. Naturally, for a practice that developed due to industrialization to become customary international law, it is most important that the industrialized nations follow the

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158. See Cella & Treu, *supra* note 155, at 170-71. The Japanese system is based on company loyalty to and cooperation with one company for a worker's lifetime. The unions have had their independence from the companies questioned, but the culture of the society may dictate that type of union. Generally, the unions are acknowledged to be independent unions.

159. WORKER RIGHTS UNDER U.S. TRADE LAWS, *supra* note 149, at 35-41 (1988).

160. There is another aspect to the non-compliance of developing nations. Because these standards evolved with industrialization, it might not be appropriate to look towards the non-industrialized nations for the formation of customary law. This argument fails because countries are not industrializing slowly as England did originally, but at much faster, if uneven, rates. Even the most under-developed countries will have a few modern industries, creating the conditions that necessitate application of the worker rights standards.

161. See *infra* notes 177-200 and accompanying text for further discussion.



practice. Once the actions of the industrialized world have been ascertained, attention is then focused on the partially industrialized nations of the second or former-Communist world for two reasons. The first reason is political. The world, before 1989, had taken on a bipolar power structure, with the United States forming one side and the Soviet Union in opposition.<sup>162</sup> For half of the international power structure to reject in practice a specific norm considerably weakens any argument for the norm's rising to the level of customary international law. Secondly, the former Soviet-bloc nations are considered partially industrialized, more industrialized than the Third World nations, but not so much as to qualify them as industrialized States. Their degree of industrialization makes them the second most important group of States in terms of need for industrial States' compliance. Again, their compliance finalizes the argument that the right to organizing and collective bargaining is customary international law. Compliance by developing nations should not be ignored, and the fact many States are working towards compliance is important support for the argument. But the incidents of their non-compliance should not be decisive of a lack of a customary standard, not only because of the aforementioned reasons, but also because their compliance is not as important as compliance by other States. Overall, the more developed or more industrialized States fulfill the State practice requirement through their legal implementation of the standards.

The overwhelming weight of State practice evidences the fact that the right to association and collective bargaining are customary international laws. In order for the practices to truly be customary law, State practices must be undertaken out of a sense of legal obligation.

## 2. *Opinio Juris*

Nations that adhere to the principles of the freedom for workers to organize and bargain collectively do so out of a legal obligation. Worker rights are slightly different than most human rights; the origins root as much in economic forces as moral or ethical ones.<sup>163</sup> Often, however, the States would grant worker rights at least partially on a moral basis.<sup>164</sup> These rights have evolved from moral forces; however, they extend beyond that. It becomes "a matter of enlightened self-interest for the world community of nations to extend [these] democratic values and to secure basic human rights."<sup>165</sup> Out of this self-inter-

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162. See ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 23-60 (1989) (discussing bipolar hegemonic power structure and its gradual erosion to more interdependent relations). Although the bipolar relationship was devolving, it remained the basis for international politics until the demise of the Soviet Union.

163. The workers who fought to unionize in the 19th and early 20th centuries did not do so out of pure moral inspiration; they generally wanted economic, and often health and safety gains. The right to unionize is merely a means to those ends. See generally WILLIAM D. HAYWOOD, *THE AUTOBIOGRAPHY OF BIG BILL HAYWOOD* (1929) (describing the formation of unions, specifically the Industrial Workers of the World, around mining communities in Western United States).

164. It is clear states often had other motives. A strong argument can be made that Franklin D. Roosevelt enacted the National Labor Relations Act in the United States during the depths of the Great Depression to placate workers and forestall what looked like a threat of a worker revolution.

165. Schlossberg, *supra* note 109, at 49.

est, nations have bound themselves to protection of the right to freedom of association and collective bargaining.

According to Professor D'Amato's proof of *opinio juris*,<sup>166</sup> the first factor to consider is whether the act has the characterization of legality. Unquestionably, organizing and collective bargaining rights have the character of legality. Most nations, whether complying with international standards or not, will introduce an industrial relations framework into their legal system. The coverage of the legal system ranges from the freedom of association being part of the State constitution to more detailed regulation on external activities of trade unions like collective bargaining.<sup>167</sup> This State regulation imparts the character of law.

The second factor in the analysis of *opinio juris* is whether the norm concerns international, as opposed to domestic law. The freedom of association and collective bargaining are considered basic human rights.<sup>168</sup> The issue then becomes how human rights law is a concern of international law. Because human rights concern the relationship between the individual and the State, the regulation of that relationship normally is reserved for the State. However, for a number of reasons, the world community has moved the protection of individuals, including their right to association, out of the realm of the State and into the international arena.<sup>169</sup> Today, it is well-established that international law does govern the treatment of human rights, both through treaty and customary international law.<sup>170</sup>

The third factor regarding abstentions is not relevant to this analysis because this analysis does not consider abstentions or non-acts to prove customary international law.

Finally, the last factor concerns the acting States' awareness of the articulation of the legal rule. Clearly, most States must realize that the right to organize and bargain collectively has been articulated as a legal rule. Objectively,<sup>171</sup> the vast majority of States have signed some treaty instrument that binds them to uphold and enforce these rights.<sup>172</sup> Outside treaty law, human rights instruments that have become customary international law include the right to freedom of association, binding all States universally. The Universal Declaration

166. See *supra* notes 55-58 and accompanying text.

167. See Pankert, *supra* note 127, at 146.

168. See Secretary of Labor Elizabeth H. Dole, statement before the Senate Foreign Relations Committee, United States Senate (Nov. 1, 1989) in Schlossberg, *supra* note 109, at 78-79 n.242 (stating that ILO "is the UN's most effective advocate of human rights").

169. An in-depth study of this issue is beyond the realm of this paper. See generally RICHARD FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 33, 33-62 (1981). Falk describes a number of theoretical foundations to explain the movement of protection of human rights from the state sovereign to the world community. His theories include a statist logic, hegemonical logic, naturalist logic, supranational logic, transnational logic, and populist logic. These different logics or "propositions about what ought to happen with respect to the exercise of authority in the world political system," work together in a certain balance, forcing a protection of human rights at a level above the state. *Id.* at 34.

170. See SHAW, *supra* note 20, at 187-94; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 cmt. b (1986).

171. This factor is a pure objective test based on "whether a reasonable man so situated would have been informed." D'AMATO, *supra* note 17, at 86.

172. See *supra* notes 126-52 and accompanying text.

of Human Rights<sup>173</sup> provides for freedom of association, the right to just and favorable conditions of work, and the right to form and join trade unions for the protection of the worker's interests.<sup>174</sup> The Universal Declaration is generally recognized as customary international law,<sup>175</sup> or if not rising to that level, it "has been widely endorsed and invoked as authoritative in all parts of the world."<sup>176</sup> Far too many States have either signed the Universal Declaration or some other international instrument for any argument to survive as to a State's ignorance of these legal rules.

In addition to a formalistic proof of the existence of *opinio juris*, the ILO structure and mechanisms provide further support for the notion of *opinio juris* attaching to the freedom of association and the right to bargain collectively. The ILO possesses the structure and procedures to imbue the treaty standards with legal character. It provides a legislative procedure<sup>177</sup> through the International Labor Conference, which adopts conventions and recommendations, an executive entity, embodied in the Director-General, that administers the goals of the legal documents, and a judicial arm, in which committees, such as the Freedom of Association Committee and Committees of Experts, work to adjudicate claims of violations.<sup>178</sup> The ILO occupies a unique position in the international arena; independently, through technical expertise and participative procedures, it has developed general international consensus for progressive labor standards. This international consensus combines with the legal procedures to create an international rule of law with regard to labor rights. Accordingly, rights embodied in the ILO treaties acquire the type of legitimacy intended by the test for *opinio juris*.

From this exposition, worker rights of freedom of association and collective bargaining have achieved legally binding status. Combined with State practice, worker rights have conclusively become part of customary international law. The evolution of the labor standards in the East European States since 1989 both resulted from and contributed to the strength of the labor standards.

#### IV. CASE STUDY: HUNGARY, POLAND, AND THE CZECH REPUBLIC

The former Communist States of Hungary, Poland, and the Czech Republic provide the key to the binding nature of the international labor standards of the right to organize and to bargain collectively. Since their democratization, they

173. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

174. *Id.* arts. 20, 23(1), 23(4).

175. See SHAW, *supra* note 20, at 196-97 (discussing important effect of Universal Declaration, though not stating whether it is customary or not); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 reporters' notes 2, 4 & 6 (including Universal Declaration among those instruments building customary international human rights law) (1986); *Filartiga v. Americo Norberto Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (finding Universal Declaration part of customary international law).

176. FALK, *supra* note 167, at 138.

177. In fact, legislation is one of the primary purposes of the ILO. ILO, THE INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 68 (1931).

178. C. WILFRED JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOR STANDARDS 16-22 (1960). See also E. OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOR ORGANIZATION (1985).

have moved away from communist-based labor systems to meet international standards. This change has had two consequences: it solidified the right to association and collective bargaining as customary international law, and it shows the effectiveness of the customary law in implementation of the standards.

### A. *Labor Laws in the Communist State*

The Communist State affords an interesting paradigm with regard to its labor relations system. These States based their entire economic system on the worker and physical production of workers. They preached the religion of the rights of the worker as paramount, while restricting these rights in the reign of terror that began in the Soviet Union and spread throughout Eastern Europe.<sup>179</sup> Although the leaders who founded the Soviet Union honestly believed they would establish a workers' State,<sup>180</sup> they believed other exigencies more pressing, and discovered repression the most expedient means of achieving the overriding goals of surviving wars and feeding workers in the cities.<sup>181</sup> In the end, the paradox of worker rights in the midst of repression resulted in a theoretically convoluted labor relations system.

The basic tenet of a communist system moves away from the traditional capitalistic idea that workers sell their labor as a commodity for wages. This is the first impediment to the freedom of association and collective bargaining. With the sale of labor for wages in a capitalistic system, negotiation over the price and terms of wages for a contract becomes the foundation of a relationship. From that, a labor relations system naturally centers around collective bargaining. Communists reject that model, believing it results in worker oppression, and instead view workers as "implementing" their right to work by using working capacity within specific economic, administrative, or social organizations and discharging the duties of that post.<sup>182</sup> The surplus value produced by the workers, instead of going to the capitalist, is distributed directly among the workers or used in the interest of the workers.<sup>183</sup> Accordingly, workers should not have to bargain over their wages because the surplus value of their labor, any profits over fixed costs, goes directly to them.

179. In the end, Trotsky prophetically recognized the danger of their situation, stating "having taken over production, the proletariat is obliged, under the pressure of iron necessity, to learn by its own experience a most difficult art—that of organizing a socialist economy. Having mounted the saddle, the rider is obliged to guide the horse—in peril of breaking his neck." NOVE, *supra*, note 112, at 80 n.49 (citing ALLEN & UNWIN, *THE DEFENSE OF TERRORISM* 94-95 (1935)). Unfortunately, the rider did break his neck.

180. See generally *THE LENIN ANTHOLOGY* (Robert C. Tucker ed., 1975); *SELECTED WRITINGS OF ALEXANDRA KOLLONTAI* 151-200 (Alix Holt trans., 1977). Kollontai was one of the few women in the Bolshevik hierarchy after the Russian Revolution, and around 1920, wrote about the direction of trade unions and the reasons for such developments.

181. See generally NOVE, *supra* note 112 (discussing political responses to economic and military crises); W. BRUCE LINCOLN, *RED VICTORY: A HISTORY OF THE RUSSIAN CIVIL WAR* (1989) (describing general means of repression in the Russian Civil War). The Bolshevik leaders were more concerned with rapid industrialization and concentrating their own power after basic survival of the regime and its peoples.

182. ANDOR WELTNER, *FUNDAMENTAL TRAITS OF SOCIALIST LABOUR LAW: WITH SPECIAL REGARD TO HUNGARIAN LEGISLATION* 16 (1970).

183. *Id.*

A second impediment is that the Communist system does not recognize a divergence of interests between employers and employees.<sup>184</sup> The State is a worker's State and because the State itself owns all of the enterprises, essentially the workers own all the enterprises. This puts the worker in the position of both employer and employee,<sup>185</sup> making collective bargaining anomalous. The problem arises that the State, generally a huge, complex bureaucracy, cannot truly represent the needs of the workers. The State, replacing the collective bargaining system, established the wage system for all workers, a complex system of incentive programs based on production quotas.<sup>186</sup> In the end, workers had no voice or participation in the establishment of their wages.

The State also had the duty, often mandated by its constitution, to ensure adequate working conditions.<sup>187</sup> Again, this usurps a crucial function of the trade union or body representing the workers. The State adopted a dual function in the labor law system, an "industrial" function, that of encouraging the growth of production, and a "defensive" function, that of protecting workers' rights.<sup>188</sup> Unfortunately, these functions should be separated because they inherently conflict. In Western labor relations systems, the industrial function is normally relegated to the employers, while the unions or workers' organizations monitor the defensive function. Although the two functions need not be adversarial,<sup>189</sup> the Soviet experience, with the lack of worker protections, evidenced the need for separation.<sup>190</sup>

In correlation with the state usurping the function of free trade unions, the unions had duties that should have been the province of the state. Instead of

184. 2 PAUL MARER & SALVATORE ZECCHINI, *TRANSITION TO A MARKET ECONOMY: SPECIAL ISSUE* 123-26 (1990).

185. Although this can be said of all employee-owned enterprises, the divergence of interests is recognized in capitalistic areas. In Communist states, the fact that all businesses in the entire economy possessed that structure meant they had no comparison with which to discern the different interests. Officially, the Communists believe:

[t]hat a sharp distinction between individual and collective labour law is unfounded, for it is under socialist conditions, and it follows from the sociological, organizational, and legal position of the workers developed within the economic organizations that legal relations of an individual and collective nature are not categories placed apart from each other, but such as are intertwined, mutually conditional on each other, and even coordinated.

WELTNER, *supra* note 180, at 77. Accordingly, collective bargaining has no place in the Communist system.

186. MARER, *supra* note 182, at 122. Of course, in addition to setting the wages, the state established goals for the entire economy through five-year plans. This is the character of a centrally-planned economy. See generally NOVE, *supra* note 112.

187. WELTNER, *supra* note 180, at 18. Some of the functions reserved for the State are considered State functions in the Western world, including the right to welfare and unemployment compensation, the prohibition of forced labor, the insurance of hygienic and safe working conditions, and the enforcement of equal pay for equal work. However, the State functions go much further into what is considered private sector functions, such as "the right to work and the moral obligation of participation in the work of society . . . [and] the reconciliation of social and private interests, the obligation of a cooperation of employers and employees, the obligation of a proper use of rights, the prohibition of an abuse of rights, etc." *Id.*

188. Semion Ivanov, *Labor Law in Socialist Countries: Three Issues of General Theory*, 11 *COMP. LAB. L.J.* 81, 82 (1989).

189. Most systems, especially the European labor law systems, are cooperative not adversarial, as the United States system. Whichever model is applicable, this separation insures greater equal protection of each interest.

190. Ivanov, *supra* note 186, at 83.

defending worker rights, the unions were charged with the goal of "fulfilling economic plans and ensuring productivity."<sup>191</sup> To force unions to protect the economic health of the enterprise eliminates any independent purpose for the union. At times, the interest of the workers and employers will coincide; however, a trade union must be prepared to protect and represent workers when the interests diverge. If the union is not so prepared, the unions become a management entity.

Many of these problems would have been much less severe if trade unions, the representatives of the workers, had been true representatives of workers. However, due to Lenin's philosophy that saw "unions acting as 'transmission belts' to convey [Communist] party directives to the masses,"<sup>192</sup> trade union independence from the Communist Party was impossible.<sup>193</sup> Because the Party really ruled the State, which in turn owned all the enterprises, the trade unions could not independently represent the workers.<sup>194</sup>

From the backdrop of this firmly entrenched system, Hungary, Poland, and the Czech Republic have enacted new laws and introduced new organs to rid themselves of the paradox in their labor relations system. The following section will highlight problems with their old laws, the changes that have recently been made, and the effectiveness of the developments in creating independent trade unions. These changes resulted in the actualization of the right to freedom of association and collective bargaining.

## B. Hungarian Labor Law System

### 1. Labor Law System Under the Communist Regime

Hungary's former labor law structure was typical of the Communist countries. The Hungarian Constitution institutionalized the fundamental

191. ADRIAN KARATNYCKY, ET AL., *WORKERS' RIGHTS, EAST AND WEST: A COMPARATIVE STUDY OF TRADE UNION AND WORKERS' RIGHTS IN WESTERN DEMOCRACIES AND EASTERN EUROPE* 59 (1980). The goals of Soviet trade union are clearly explicated in the preamble to the bylaws:

The central task of the trade unions is to mobilize the masses for the attainment of our principal economic goal -- the creation of the material and technical basis of communism, for further strengthening of the Soviet Union's economic and defense power, for ensuring a steady rise in the people's material and cultural standards.

*Id.*

192. David Buchan, *The Real Lessons of Solidarity*, *FIN. TIMES*, Oct. 13, 1982, at 17.

193. *THE LENIN ANTHOLOGY*, *supra* note 178, at 571-72. Lenin saw:

[t]he connection between leaders, party, class and masses, as well as the attitude of the dictatorship of the proletariat and its party to the trade unions are as follows: the dictatorship is exercised by the proletariat organized in the Soviets; the proletariat is guided by the Communist Party of Bolsheviks . . . [and] [i]n its work the Party relies directly on the trade unions. . . . [A]ll the directing bodies of the vast majority of unions, . . . are made up of Communists and carry out all the directives of the Party.

*Id.*

194. Even a few trade union officials under the former-Communist regime recognized that the unions were not independent enough to fulfill their responsibility to the workers. See Buchan, *supra* note 189, at 17 (discussing statement of Sandor Gaspar, Hungarian trade union leader, that unions must become more independent minded to win credibility with members in order to effectively protect them "against the bureaucratic offshoots of its own state").

principles of the labor law system. These principles included the right to work,<sup>195</sup> the right to healthy and safe working conditions,<sup>196</sup> and "the principle of payment according to the quantity and quality of work performed."<sup>197</sup> Freedom of association and the right to organize and bargain collectively, which should be as fundamental as the aforementioned rights, are not included in the Constitution.

The old system implemented worker rights through State established unions or workers' collectives. The structure provided for one union at each enterprise, and that union, functioning as part of the Communist party, belonged to the Central Council of Trade Unions (SzOT).<sup>198</sup> Freedom of association was limited to the freedom to associate with that one union, which is essentially no freedom. These unions had three functions: 1) independent regulatory functions, including distribution of the company's social and cultural grants and benefits; 2) joint regulatory functions with the State, such as enforcing the collective agreement; and 3) consultative functions with the State.<sup>199</sup> These functions were eventually reduced to one principal function, that of distribution of benefits to the workers. This was due to the fact that the union really was an offshoot of the State, and both the workers and the unions were under the control of the Communist Party.<sup>200</sup>

Collective bargaining was not a major portion of the union's responsibility. Collective agreements did exist at the enterprise level, but they could only exist within the confines of the laws. The theory allowed collective agreement to operate between the laws that regulate the rights and obligations of both workers and employers and the guidelines suggested by the Ministry of Labor for employer implementation of the laws.<sup>201</sup> Naturally, government regulations foreclosed substantive opening between the regulations and guidelines and relegated the union activity to distribution of benefits.<sup>202</sup> Additionally, only enterprises engaged in production that had their own finances were allowed to conclude collective agreements, compounding restrictions on the right to bargain

195. A MAGYAR KÖZTÁRSASÁG ALKETHMÁNYA [Constitution] art. 55 (Hung.), translated in 6 INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS 41 (Roger Blanpain ed., 1984) [hereinafter HUNG. CONST.] .

196. *Id.* art. 17. The principle of protection of health and safety at work is extrapolated from the general protection of health and safety.

197. *Id.* art. 55.

198. BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR, COUNTRY LABOR PROFILE: HUNGARY 7 (1992) [hereinafter U.S. DEP'T OF LABOR (HUNG.)] .

199. HUNG. CONST., *supra* note 192, at 58. The last function was divided into two separate functions, "regulation by the states . . . with the endorsement of the trade union (e.g. a Minister's decree or disposition; company statutes for labour safety) [and] regulation by a state organization after consultation with the trade union (e.g. Acts of the Council of Ministers)." Essentially, the last two elements are only different degrees of the same thing, amounting to three functions.

200. U.S. DEP'T OF LABOR (HUNG.), *supra* note 195.

201. HUNG. CONST., *supra* note 192, at 225.

202. U.S. DEP'T OF LABOR, (HUNG.), *supra* note 195.

collectively.<sup>203</sup> Unquestionably, the right to collective bargaining that remained did not approach fulfilling the international standard.

## 2. New Labor Law System

The new Hungarian Constitution and Labor Code grant to workers in compliance with international standards, both the right to freedom of association and the right to organize and bargain collectively.<sup>204</sup> Article 63 of the Constitution gives the right to citizens to form and join associations not prohibited by law, and, in accordance with Article 62, those associations have the right to freedom of peaceful assembly. Article 70/C provides the right to form and join organizations "for the protection of his or her economic and social interest."<sup>205</sup> This well-drafted provision affords protections to both trade unions and employer associations. It also allows for the right to bargain collectively, for that is the activity that unions depend on to protect economic interests. Finally, the Constitution explicitly sanctions the right to strike, with the normal caveat that it must conform to State regulations.<sup>206</sup> This new Constitution secures the fundamental rights mandated by international standards. Assuming the rights are not substantially diminished by the subsequent labor legislation, Hungary stands as an example of the strength of customary international labor law.

The new Hungarian Labor Code works to protect the rights provided by the Constitution. The Code reiterates fundamental rights originating in the Constitution, the right to freedom of association and collective bargaining,<sup>207</sup> and it further explicates the procedures by which those rights can occur. With regard to the freedom of association, employees and employers have the right to join the organization of their choice, and those organizations have the right to join federations and confederations at the national or international level.<sup>208</sup> The Labor Code does not discuss the establishment of union or employer associations or their rights to develop their own rules, elect representatives, and formulate their own plans and programs.<sup>209</sup>

The rights found in ILO Convention No. 98 are also generally guaranteed by the new Hungarian Labor Code. The Labor Code protects workers from

203. HUNG. CONST., *supra* note 192, at 225. In effect, this eliminated agricultural and producers' cooperatives, budget-financed economic organs, financial institutions, and state administrative and judicial organs. This excluded a substantial percent of the population, primarily because Hungary has a large agricultural sector.

204. The Hungarian Labor Minister publicly announced the intention to conform with international labor standards.

We considered it an important, essential matter to ensure this harmony with the labour legislation norms prevailing in developed market economies . . . . From the point of view of the international judgement of this law, the question of its conformity with international agreements is not an avoidable question either. Even in the past few years, labour legislation has been characterized by its attempt to harmonize its rules with international conventions.

*Labour Minister Presents Bill on New Labour Code to Parliament*, B.B.C. SUMMARY OF WORLD BROADCASTS, Nov. 1, 1991, at EE/1218/B/1.

205. HUNG. CONST. *supra* note 192, art 70/C(1).

206. *Id.* art. 70/C(2).

207. MK. § 14 (Hung. Gazette).

208. *Id.* § 15(1)-(2). This conforms with ILO Convention No. 87, *supra* note 92, arts. 2, 5.

209. ILO Convention No. 87, *supra* note 92, art. 3.



discrimination by the employer due to union activity<sup>210</sup> or by the union due to membership or non-membership in the union.<sup>211</sup> The Labor Code does not mandate that unions and employer associations refrain from interference in each others' affairs, it only allows collective bargaining contracts to be concluded by organizations that "represent interests independent of those of the other party."<sup>212</sup> This right is crucial to effective labor relations. The Labor Code also provides the legal machinery necessary to encourage and promote voluntary collective bargaining.<sup>213</sup> The Code sets forth which unions and employer associations should be party to the agreement,<sup>214</sup> a dispute resolution system in cases of impasse,<sup>215</sup> subjects of bargaining,<sup>216</sup> and termination of the agreement.<sup>217</sup> One of the interesting features of the Labor Code is the detail with which minimum working rules and conditions are regulated.<sup>218</sup> The law mandates a thorough grievance procedure between employees and employer,<sup>219</sup> various work rules,<sup>220</sup> leave time, break time, holidays,<sup>221</sup> and a worker participation scheme.<sup>222</sup> Importantly, the Code specifies the right of the union to bargain above the legal minimums.<sup>223</sup> The provisions, however, display the States' greater developing involvement in the protection of the workers, made easier by relinquishing their role as employer.<sup>224</sup>

Clearly, the new statutes implement all the important international law standards. With the intended implementation of the laws, the labor relations system would radically depart from the Communist system formerly employed. The actual state of labor relations currently in Hungary demonstrates the effectiveness of the customary international labor law.

210. MK., *supra* note 204, § 26(1)-(3).

211. *Id.* § 27. This right is found in ILO Convention No. 98, *supra* note 93, art. 1.

212. MK., *supra* note 204, § 32.

213. *Id.* This section is in observance of ILO Convention No. 98, *supra* note 93, art. 4.

214. MK., *supra* note 204, §§ 33-34.

215. *Id.*; Part IV, ch. I, §§ 194-98. The Code briefly describes the mediation and arbitration procedures to be used during labor disputes. The legislation on the right to strike details when workers lawfully can strike. Law on the Right to Strike (Hung.).

216. *Id.* § 30. The contract may cover "rights and responsibilities arising from employment, methods for their exercise and fulfillment, and related procedures; [and] the relationship between the parties entering into a collective agreement." *Id.*

217. *Id.* arts. 39-40.

218. United States labor law leaves most of these areas solely to collective bargaining contracts without specifying any minimum standards. Often the standards set by U.S. law fall so far below the average employment contract, that they almost become irrelevant. A good example of this is the minimum wage law.

219. See MK., *supra* note 204, § 23.

220. See *Id.* §§ 103, 105 (regulating time and manner of employee's performance of work, including work outside of job description).

221. Leave time is regulated in numerous sections. *Id.* §§ 107, 124, 130-133, 137, 138-140.

222. *Id.* ch. IV, §§ 42-70.

223. *Id.* § 13.

224. The privatization is not complete, but Hungary has made more progress with regard to selling the state enterprises than other Central and East European countries. ROBERT GABOR, HUNGARY: ECONOMIC DEVELOPMENTS IN 1991 4 (1992).

### 3. The Current State of Labor Relations in Hungary

With the implementation of the new Labor Code, Hungary has effectuated international labor laws. Independent unions have been freely forming and organizing since 1990.<sup>225</sup> Currently, eight federations of trade unions are operating, led by the former Communist union, SzOT, which has changed its name to MSzOSz, and declared itself not a successor to the Communist trade union. The AFL-CIO supports the Democratic League of Free Trade Unions (LIGA) as the democratic free trade union. The remaining federations consist of the Hungarian Workers' Council, the Autonomous Trade Unions, Intellectual Trade Unions, Federal Employees Union, Solidarity Trade Union, and Christian Trade Union Movement. In general, relations between the unions have been fractious, with strong competition and rivalries developing.<sup>226</sup> The unions have primarily concerned themselves with the division of the SzOT's assets and workers' council elections. In some shops, however, there will be problems of freeing the elections and participation at work from the taint of Communism.<sup>227</sup>

Basically, MSzoSz is the strongest and largest of the union confederations. It was successful in the workers' council elections, which then determined the division of shares of property formerly belonging to SzOT. Accordingly, MSzoSz acquired the majority of money and property.<sup>228</sup> Despite the fact that the leadership of the MSzoSz has not changed in the past four years since democratization of Hungary<sup>229</sup> and contrary to the ideology of the AFL-CIO,<sup>230</sup> MSzoSz has won the endorsement of the International Confederation of Free Trade Unions (ICFTU) as a free trade union. The LIGA, which the AFL-CIO believes to be the only democratic trade union, has dramatically lost support due to internal political problems, and represents only a fraction of the workers. Aside from the political disagreements as to whether the various unions are democratic or not, it is clear that the workers in Hungary have a choice

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225. U.S. DEP'T OF STATE DISPATCH, 1990 Human Rights Report: Hungary, § 6(b) Worker Rights (Feb. 1, 1991); Interview with Robert Gabor, Senior Policy Advisor, Free Trade Union Institute, AFL-CIO, in Washington, D.C. (Mar. 11, 1993) [hereinafter Gabor Interview] (on file with author); U.S. DEP'T OF LABOR (HUNG.), *supra* note 195.

226. See U.S. DEP'T OF LABOR (HUNG.), *supra* note 195, at 8.

227. Gabor Interview, *supra* note 222. Hungarians are afraid of being seen as Communists, and if the shop foreman is or was a strong Communist, a worker might still be afraid of running for election because it could be seen as either opposing the foreman or colluding with the foreman, neither option being particularly appealing. Opposition to a foreman who was a strong Communist could place the worker in a disfavored position with management and jeopardize the worker's continued employment, and, with the high unemployment in Hungary, the risk of unemployment is a strong deterrent.

228. Judith Pataki, *Trade Unions' Role in the Victory of Former Communists in Hungary*, 3 RFE/FL RESEARCH REP., No. 26, at 3 (July 1, 1994).

229. *Id.* at 1.

230. The AFL-CIO has been active in Eastern Europe for the past decade. They strongly adhere to the practice of not associating with the former Communist unions, regardless of the situation in the specific country. It is very difficult for a former Communist union to be certified as independent and democratic by the AFL-CIO, a process which involves severing ties with other former Communists and redrafting the union constitution and bylaws. This policy may have merit in some countries such as Russia, but in Hungary, where the former Communists have genuinely embraced democratic reforms, the policy inhibits accurate characterization of the labor relations system.

between competing unions and have the chance to democratize the group that represents them.

Collective bargaining exists and contracts are being agreed upon and executed. Most of the negotiation occurs at the enterprise level, although some industries, such as mining and education, have practiced industry-wide bargaining.<sup>231</sup> The results of the bargaining have been mixed; the economy is poor, and that accounts for some unions not making great progress. However, truck drivers and miners have had success with their negotiations. With regard to the enforcement of statutes, the current coalition government is not pro-union, and accordingly is not enforcing the statutes so strictly.<sup>232</sup> They have intervened in several strikes, but only when the stoppage severely affects the economy.<sup>233</sup> No State action has been so interventionist as to necessitate a complaint to the ILO or other international body.

Overall, the compliance with international law reaches acceptable standards. It has taken a short time to remove all former Communists in each of the enterprise locations compounded with problems from poor economic performance. Some unstable elements exist in the State, especially right-wing extremists and gaps in the legal structure, including rules for the tripartite committee. These elements, combined with a projected twenty percent unemployment, paint a troublesome picture.<sup>234</sup> These problems are no worse than those faced in the rest of Central and Eastern Europe, and with external aid,<sup>235</sup> Hungary can be kept on the right track. Unquestionably, the changes validate the force of the international labor law standards, and that force should help reinforce the progress that has already been made.

### C. Polish Labor Law System

The Polish labor system has had a prominent role in the media because of its force in the recent changes in the government. The changes have been implemented to achieve compliance with standards of customary international labor law. The developments go far enough to fulfill the elements of State practice. The element of *opinio juris* has been present since Poland signed the ILO Conventions, completing the requirements for customary international law. Reality does not fulfill the standards as completely as does the Hungarian labor system, but the acting parties are striving for compliance.

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231. Gabor Interview, *supra* note 222. The Department of Labor disagrees slightly with this assessment, stating that most negotiation occurs at the national level through the Interest Reconciliation Council (IRC). The IRC is a tripartite body, with representatives from government, labor, and business, established to give the parties a forum to discuss labor relations and to advise the government on labor issues. However, this body has no official role in negotiations. Additionally, the competition between the federations precludes too many industry-wide contracts because more than one federation and local union will be present in an industry.

232. *Id.*

233. *Id.*

234. See ROBERT GABOR, GAME-PLAN FOR HUNGARY 3 (1993).

235. Both the ILO and the AFL-CIO have been extremely active in the restructuring of the labor law system. See *infra* note 264.

### 1. System Under the Communist Regime

Polish labor law under the Communist regime has had an interesting evolution. Solidarity forced the abandonment of labor laws to martial rule in the early 1980s and the development of the new labor laws in the mid-1980s. The strength of Solidarity, the largest trade union in Poland, and the international ties of Solidarity forced changes on the Polish system earlier than the other East European countries. The Labor Code formed the basis for the Polish labor relations systems.<sup>236</sup> It was supported by other statutes, specifically the 1982 Law on Trade Unions, and the 1986 Law on Collective Agreements. The Labor Code is currently in force with most of the developments occurring in the additional statutes. It did appear to protect the majority of the worker rights mandated by the international customary laws and the treaties to which Poland was a party. In the Trade Union Law of 1982, the administration of the freedom of association and the right to organize can be found. The statute granted the freedom of association, with permissible exceptions of military and police, and non-permissible exceptions of public employees.<sup>237</sup> The statute allowed for formation of unions other than the official Communist union without prior authorization.<sup>238</sup> However, in order to acquire legal personality, the union had to register with the courts and the courts had the right to refuse registration if "the organization in question is not a trade union as defined by law."<sup>239</sup> Naturally, that left a large area for operation of the discretion of the court, and in accordance with that discretion, all independent trade unions were officially banned.<sup>240</sup> Additionally, the State retained the right to dissolve independent unions by legislative resolution.<sup>241</sup> This constituted a gross violation of international standards, since any right to dissolve unions allowed the State to rule the union's administration, contrary to customary law and treaty law.

The lack of independent trade unions, combined with other statutes, resulted in almost no collective bargaining. Statutorily, collective bargaining existed. Trade unions had the right to bargain for collective agreements with all levels of industry on working conditions and wages.<sup>242</sup> However, the importance of these agreements was reduced by the 1975 Labor Code, which promulgated regulations covering most areas of labor relations.<sup>243</sup> Additionally, any agreements on wage rates could not vary from the State established wage rate

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236. MARIA MATEY, *LABOR LAW AND INDUSTRIAL RELATIONS IN POLAND* 54-55 (1988).

237. *Id.* at 145. ILO Convention No. 87, art. 9, allows for national provisions to govern freedom of association for the police and military, but no other workers. ILO Convention No. 87, *supra* note 92.

238. MATEY, *supra* note 233, at 145.

239. *Id.*

240. BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T OF LABOR, *COUNTRY LABOR PROFILE: POLAND 9* (1992) [hereinafter U.S. DEP'T OF LABOR (POL.)]. See also Russell B. Wolff, *Poland's Trade Union Statute: An Impermissible Violation of International Human Rights Law*, 10 *BROOKLYN J. INT'L L.* 25, 33-37 (1984).

241. MATEY, *supra* note 233, at 146.

242. *Id.* at 147.

243. *Id.* at 153.

due to the *popiwiek*,<sup>244</sup> which instituted a prohibitive tax on payment of wages above the State level. The right to strike was also ostensibly granted, but it was so encumbered by regulations and contingencies that it was practically impossible to use effectively.<sup>245</sup> In the end, as with the right to freedom of association, the regulations so restricted action as to make the right to bargain collectively moot.

The Solidarity case brought before the ILO highlighted the malevolence of the restrictions on the freedom of association and collective bargaining. International unions brought the first complaint in 1981, accusing the Polish government of violating ILO Conventions Nos. 87 and 98. The complaints listed violations of prohibition of trade union activity, arrest, and forcible detention of union activities, holding activists *in communicado* in deplorable conditions, anti-union discrimination including dismissal of workers for union activity, and forcing workers to renounce membership in Solidarity in order to retain their employment.<sup>246</sup> The government pleaded that the measures were necessary to prevent anarchy and forestall a civil war. The ILO found the Polish government in violation of the conventions, requested those interned for trade union activity be released and the government allow an ILO mission to go to Poland and investigate.<sup>247</sup> In general, the Polish government was less than cooperative, and took the position that the ILO was biased against it. Subsequent cases alleging roughly the same violations were brought in 1982, 1983, and 1984.<sup>248</sup> In each subsequent case, the Polish government gradually responded to the allegations, first by drafting new legislation, then by slowly releasing the imprisoned union activists, and finally granting some allowances for the establishment of independent trade unions.<sup>249</sup> The repression of trade unions in Poland was extreme, and although the ILO made progress through its complaint procedure, the situation did not abate until the change of regime.

## 2. New Labor Law System

The contribution of Solidarity to the democratization of Poland has put labor issues at the forefront of discussion. The government has responded with legislation protecting almost all of the necessary rights. The new labor system consists of a package of four acts: the Trade Union Act, the Act Respecting

244. Interview with Carolyn Lauer, Program Officer, Free Trade Union Institute, in Washington, D.C. (Mar. 9, 1993) [hereinafter Lauer Interview] (on file with author). The *popiwiek* imposes a 500% surtax on businesses that pay any amount of wages over state set levels. The goal is to keep wage inflation under control.

245. Wolff, *supra* note 237, at 45.

246. *Complaints Presented by ICFTU and WCL against the Government of Poland*, 65 ILO OFFICIAL BULL., 214th Rep. of Comm. on Freedom of Ass'n, Case No. 1097 (Dec. 14, 1981).

247. *Id.*

248. See Case No. 1097, 60 ILO OFFICIAL BULL., Ser. B, No. 1, 217th Rep. (1982); Case No. 1097, 61 ILO OFFICIAL BULL., Ser. B, No. 1, 225th Rep., 120-35 (1983); *Report of the Commission instituted under Art. 26 of the Constitution of the ILO to examine the complaint on observance by Poland of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), presented to delegates at the 68th Session of the International Labor Conference*, 62 ILO OFFICIAL BULL., Spec. Supp., Ser. B (1984) [hereinafter 1984 Polish Complaint].

249. 1984 Polish Complaint, *supra* note 245, at 127, 134, 145.

Settlement of Collective Disputes, the Act Respecting Employers' Organizations, and an act regulating collective bargaining at the local level.<sup>250</sup> Currently, the fourth section has not been enacted, but it severely limits bargaining on the enterprise level.

The Polish Constitution does grant the rights necessary for compliance with international standards. The Constitution grants the basic rights of freedom of assembly<sup>251</sup> and expression.<sup>252</sup> However, it prohibits "associations whose objective or activities menace the socio-political system or the legal order of the Republic of Poland."<sup>253</sup> This could be construed to disallow independent trade unions and other dissident groups, and therefore could violate international standards. Implementation of this restriction will reflect Poland's regard for international law. Article 85 is devoted entirely to trade unions. It does not impart any substantive rights, but only lauds the unions for their role in society and indicates that their representation of the workers plays an important part in the development of the society. One hopes this indicates that unions will not be persecuted as they have been in the past.

Of the three new pieces of labor legislation, the Trade Union Act of 1991 insures many of the rights mandated by international law. The Act grants a broad spectrum of workers the right to organize and join unions, including agricultural workers, home workers, police, and some military personnel.<sup>254</sup> The language of the Act does not specify that workers have a right to join the union of their choosing, but other provisions in the statute provide for situations in which more than one union exists at a location.<sup>255</sup> Therefore, assuming the statute is internally consistent, the workers will have a choice with regard to their union. The unions have the right to establish their own founding constitution or statute.<sup>256</sup> The statute should organize the administration of the union, determine the methods of operations, and delineate goals and tasks of the union.<sup>257</sup> The trade unions still must register with the courts, but the court does not have absolute discretion to delete the union from the register and dissolve it, as with the previous law.<sup>258</sup> The statute clearly establishes the trade union's independence from the State, employers, and other organizations, in accordance with ILO Convention No. 87.<sup>259</sup> Additionally, the unions have the right to form and join federations, confederations, and international workers' organizations.<sup>260</sup> Overall, the Trade Union Act clearly establishes the right to freedom of association for workers.

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250. Lauer Interview, *supra* note 241.

251. POL. CONST. ch. 8, art. 84.

252. *Id.* art. 83.

253. *Id.* art. 84, § 3.

254. Trade Union Act of 1991 art. 2, §§ 1, 2, 5, 6.

255. *Id.* art. 30 (providing mechanism for 2 different unions to operate in 1 shop).

256. This is in accordance with ILO Convention No. 87, *supra* note 92, art. 3.

257. Trade Union Act of 1991, *supra* note 251, art. 13.

258. *Id.* art. 17. This statute limits dissolution to when the trade union statute specifies it, if the enterprise at which the union membership works goes out of business, and if the number of members falls below the statutory minimum of 10 people over a period of 3 months. *Id.*

259. *Id.* art. 1, § 2.

260. *Id.* art. 11.

The Trade Union Act also protects the right to collective bargaining as described in ILO Convention No. 98. One of the Act's most important features consists of the protection against anti-union discrimination. Article 3 of the Trade Union Act firmly prohibits any "negative consequences" as a result of trade union membership, which encompasses dismissal or making non-membership a condition of continued employment. In conjunction with that right, trade unions must represent all workers in their bargaining unit, regardless of the worker's relationship with the union.<sup>261</sup>

The mechanisms for collective bargaining have not been coherently codified. While unions have the right to bargain collectively,<sup>262</sup> the terms for which they can bargain remain undefined. As mentioned above, a fourth act which was to complete the labor relations structure has not been implemented, leaving a gap in the system. It remains unknown to what degree local unions can negotiate contracts with terms either above or below the statutorily designated levels.<sup>263</sup> Unquestionably, wages will not be negotiated above State minimum levels due to the *papiwek* tax. However, the government has established a mechanism for resolving collective disputes. The Act of 1991 Respecting Settlement of Collective Disputes provides a complete dispute resolution mechanism.<sup>264</sup> The Act also grants the right to strike as a last resort in cases of impasse.<sup>265</sup> With the exception of the gap in the legislation, the existing laws do fulfill the requirement of ILO Convention No. 98 for measures to encourage and promote voluntary collective bargaining.<sup>266</sup>

The Polish government has worked to conform its labor legislation with international standards. It has cooperated with the ILO and other international organizations in an attempt to raise its levels of compliance.<sup>267</sup> The actual effect of the new legislation is a general improvement in the labor relations system.

### 3. The Current State of Labor Relations in Poland

The new labor relations system in Poland has resulted in more freedom and an actualization of the statutory rights. Unfortunately, with the freedoms has come apathy. This, combined with the widespread economic decline, especially high unemployment, means difficult times for Polish trade unions.<sup>268</sup> The independent trade union movement lacks the competition of the Hungarian unions and needs to improve its representational skills<sup>269</sup> to become truly

261. *Id.* art. 7.

262. *Id.* art. 21.

263. See Lauer Interview, *supra* note 241; Ludwik Florek, *Problems and Dilemmas of Labor Relations in Poland*, 13 COMP. LAB. L.J. 111, 121 (1992).

264. The Act begins with mandating good faith negotiations, provides for mediation and arbitration to attempt settlement, and ends with allowance of strikes as a last resort. See 1991 Act Respecting Settlement of Labor Disputes arts. 8, 10-15, 17 (on file with author).

265. *Id.*

266. See ILO Convention No. 98, *supra* note 93, art. 4.

267. See REPORT ON ILO MISSION TO POLAND (Nov. 5-12, 1989) (on file with author); Report on Meeting Organized by EUROPE on "ILO Assistance to Hungary and Poland" (Sept. 12, 1989) (on file with author).

268. See Lauer Interview, *supra* note 241.

269. See Florek, *supra* note 260, at 117.

successful. Solidarity remains the largest independent trade union, but its membership is declining. It has lost membership both to unemployment and to rising employment in the growing private sector, which is primarily non-union.<sup>270</sup> Its fiercest rival is the All-Poland Trade Union Alliance (OPZZ), a creation of the former Communist government that has managed to distance itself from its past and become a viable entity. The OPZZ survives because of the current economic difficulties, opposing market-oriented reforms, promoting nationalism, and the introduction of socialist programs into the economy.<sup>271</sup> These views have been popular with workers, and OPZZ unions may have as much as twice the membership as Solidarity. Needless to say, this support endangers the market-oriented reforms of the government in power.<sup>272</sup> The AFL-CIO is working with the Solidarity union to improve its organizing skills.<sup>273</sup>

The Polish unions have similar problems in collective bargaining as in organizing and representational activities. The unions have limited expertise in negotiations and dispute resolution techniques.<sup>274</sup> Much of the labor relationship is still regulated by the State, leaving little room for bargaining. The previously discussed problem of the lack of legislation to govern the activities of local unions is largely responsible for this. Additionally, the economic conditions, specifically high inflation, have encouraged the State to control such factors as wages and other benefits.<sup>275</sup> Together, these factors have resulted in limited collective bargaining. These problems are also reflected in the dispute resolution system. Already, one complaint has been brought before the ILO Committee on Freedom of Association by a union alleging violations by the government.<sup>276</sup> The miners' union accused the government of not following legal dispute resolution procedures, while the government claimed that for various reasons it was following procedures appropriate to the situation.<sup>277</sup> The ILO Committee found that although the government was not following the statutory procedures, it was continuing to negotiate in good faith, and therefore was not guilty of violating either ILO Convention No. 87 or 98.<sup>278</sup> Inexperience with a modern dispute resolution system seems to be the root cause of this problem.

This case typifies the Polish labor relations system. The intention to comply with international standards is clearly present, nevertheless, other factors interfere in the execution. The present state of the economy is the biggest impediment. As long as the government can forestall left-wing extremists and

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270. See Lauer Interview, *supra* note 241; U.S. DEP'T OF LABOR (POL.), *supra* note 237, at 8-9.

271. U.S. DEP'T OF LABOR (POL.), *supra* note 237, at 9.

272. Florek, *supra* note 260, at 115-16.

273. Lauer Interview, *supra* note 241 (discussing organizing drive Service Employees' International Union will begin with Solidarity to unionize health industry workers).

274. U.S. DEP'T OF LABOR (POL.), *supra* note 237, at 9.

275. Florek, *supra* note 260, at 120.

276. *Complaint Against the Government of Poland Presented by the Federation of Mining Unions*, 74 ILO OFFICIAL BULL., Ser. B, No. 3, 279th Rep., 85 (1991).

277. *Id.* at 86-90.

278. *Id.* at 91.



enable the reforms to take shape, Poland will be able to attain full compliance with customary international labor laws.

#### D. *Czech Labor Law System*

The Czech labor law system sufficiently complies with international labor standards to have enabled the standards' development into customary international law. The system has its own characteristics, specifically the retention of the revamped communist trade union, but those aspects have been freely adopted by the workers. By all accounts, the right to freedom of association and collective bargaining is fully operational.

##### 1. System Under the Communist Regime

The old Czechoslovakian labor law system closely resembled the Hungarian and Polish Communist systems. The base of the system was one trade union federation, the Revolutionary Trade Union Movement. Ostensibly, the unitary labor federation had been developing in Czechoslovakia before World War II as a reaction to problems arising from extreme factionalism between unions.<sup>279</sup> The Communist government continued the trend, and although it allowed some freedom with regard to local unions, it did not encourage freedom of association.<sup>280</sup>

The Czechoslovakian Constitution did not grant the necessary rights for compliance with international standards. Workers did not have the right to freedom of association nor the right to join organizations of their own choosing.<sup>281</sup> However, the Constitution did guarantee representational and participatory rights to the union. In fact, the rights seemed quite extensive, including the right to represent workers with regard to labor relations issues before government agencies and bodies, the right to participate in some duties of State administration, and the right to organize assemblies and demonstrations in support of workers' issues.<sup>282</sup> The rights, however, were meaningless as long as the union remained an instrument of the State because the union would never oppose the State in favor of the workers.

The Trade Union Movement did have collective bargaining rights at the industry and local level.<sup>283</sup> The bargaining unit for the contract could have been an organizational unit within an enterprise, if the union so agreed. The Labor Code defined three main objectives of these contracts: 1) ensuring the

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279. M. Belina & M. Kalenska, *Czechoslovakia*, in 3 INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW & INDUSTRIAL RELATIONS 40, 201 (R. Blanpain ed., 1990) [hereinafter Belina, *Czechoslovakia*].

280. *Id.* at 201. The local unions could be organized along regional or occupational lines. The locals were allowed to promulgate their own organizational statutes which did not have to be registered with the government. *Id.* The non-registration, however, would not amount to a substantive right because the local unions would still be subject to the control of the federation, the Trade Union Movement.

281. *Id.* at 202.

282. *Id.* at 202. The Constitution guaranteed other rights such as the right to support workers' activities in the fields of education, science, culture, and the right to distribute use of recreational facilities during workers' leisure time, but these rights were typical in the Socialist state. *Id.*

283. *Id.* at 210. The union at the state level had other participatory rights, including the right to participate in drafting of labor regulations and legislation. *Id.* at 205.

socio-economic development of the socialist organization; 2) improving the working, health, social, and cultural conditions of workers; and 3) "consolidating relations of comradely cooperation."<sup>284</sup> Along with these objectives, other provisions in the Labor Code and supplemental regulations determined the subjects of collective bargaining. Overall, the State provided a mechanism for collective bargaining through detailed legislation, a condition mandated by international standards.<sup>285</sup> Nevertheless, this mechanism was hollow because the unions really belonged to the State, making criticism dangerous and meaningful dialogue impossible.<sup>286</sup> As a result, although superficially claiming compliance, the State was not in compliance with international standards.

The complaint brought before the ILO regarding non-compliance of the Czechoslovakian government with international standards captures the essence of the violations of the regime.<sup>287</sup> The complaint alleged that through administrative harassment, anti-union discrimination, and judicial repression of leaders and membership, the State forced the dissolution of the Jazz Section of the Musicians' Union.<sup>288</sup> The government defended itself, arguing that the union had "considerably overstepped its mandate" by publishing books, selling posters and recordings of music, and organizing exhibits and other promotional events.<sup>289</sup> As a result of this commercial activity, the government argued that the Jazz Section was not really a trade union and therefore, it did not deserve the protections due to trade union. The Committee of Freedom of Association disagreed with the State and found that the Jazz Section was a union deserving of protections in accordance with international standards.<sup>290</sup> Therefore, the State violated its international obligations through dissolution of the union by State administrative procedures and discriminatory treatment of union leaders.<sup>291</sup> Despite any rhetoric to the contrary, the government clearly limited the unions to the role it had devised for them; any activity that did not comply with that resulted in the State illegally containing the activity.

## 2. Current Czech Labor Laws

The Czechoslovakian government gradually reformed its labor laws over a period of time, beginning in 1989.<sup>292</sup> Fundamental labor rights are found in the Constitution and then further regulated by the Labor Code and associated statutes. The laws have developed to conform with customary international labor laws.

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284. *Id.* at 211.

285. Igor Tomes, *Social Reform: A Cornerstone in Czechoslovakia's New Economic Structure*, 130/2 INT'L LAB. R. 191, 192 (1991).

286. *Id.*

287. *Complaint Against the Government of Czechoslovakia Presented by the International Confederation of Free Trade Unions (IFCTU)*, 70 ILO OFFICIAL BULL., Ser. B, No. 3, 253rd. Rep. 95 (1987) [hereinafter *Jazz Musicians' Union Case*].

288. *Id.* at 96.

289. *Id.* at 99.

290. *Id.* at 100-01.

291. *Id.* at 101.

292. The Czech Republic has decided to retain the labor laws and most other laws promulgated by the joint Czech and Slovak Federal Republic.

The Constitution provides for the right to freedom of association and organizing.<sup>293</sup> The basic rights are in both the section on political rights and economic, social, and cultural rights.<sup>294</sup> The section on political rights guarantees the right to freedom of association, especially with regard to joining political parties,<sup>295</sup> as well as the ancillary rights of freedom of expression<sup>296</sup> and the right to assembly.<sup>297</sup> The section on economic, social, and cultural rights discusses specifically the role of trade unions. Article 27 establishes freedom of association for unions and "similar organizations" that work to protect the economic and social interests of people. Although not specifying employer associations, clearly they are covered by this provision. The article goes further than the general freedom of association; it mandates the independence of unions from the State apparatus and forbids limitations on the number of unions in existence.<sup>298</sup> These rights become vital in counteracting the pervasive State influence in the Communist unions. Finally, the Constitution preserves the right to strike, subject to reasonable administration and limitations.

The rights to organize and bargain collectively from ILO Convention No. 98 are primarily incorporated into Czech law through the Labor Code and the Law on Collective Bargaining. The Labor Code protects against anti-union discrimination in the first paragraph.<sup>299</sup> This right must carry through the regulation of labor relations that follows in the statute. The Code does not appear to delineate any machinery which would ensure the right to organize is observed, but appears to assume that with the freedom to create unions, organizing rights will be protected. The Law on Collective Bargaining provides a detailed legal mechanism for collective bargaining. The law defines the parties eligible to complete collective bargaining agreements, the procedure by which an agreement is concluded, and a complex dispute resolution system that includes mediation, arbitration, and strike rights.<sup>300</sup> The Law on Collective Bargaining guarantees the right to strike, and grants broad powers to the union with regard to this right.<sup>301</sup>

As a whole, developments in the Czech labor legislation vastly improve the guarantee of international rights and generally satisfy customary law. Perhaps

293. These rights are found in the Charter of Fundamental Rights and Freedoms, Constitutional Act of Jan. 9, 1991. ÚST. ZÁK. ČSFR [Constitution] § 1 (Czech & Slovak Fed. Rep.) [hereinafter CZECH CONST.].

294. See *Id.* ch. 2, divs. 2 (Political Rights) & 4 (Economic, Social and Cultural Rights).

295. *Id.* art. 20.

296. *Id.* art. 17.

297. *Id.* art. 19.

298. See *Id.* art. 27(2). This provision provides for compliance with ILO Convention No. 87, art. 3, which mandates the right of unions to establish their own system of governance, elect representatives, and plan activities without state interference. ILO Convention No. 87, *supra* note 92.

299. The Labor Code, para. 1. The introduction states "[c]itizens . . . shall enjoy these rights without any limitations and discrimination by . . . trade union activities." The rights discussed are the right to work, free choice of employment, just working conditions, and protection against unemployment. *Id.*

300. 1991 Law on Collective Bargaining arts. 2-5, 8-9, 10-22 (Czech.).

301. *Id.* art. 16. Articles 17 through 21 regulate limits on the strike. In general, the regulations do not restrict the right but only work to insure the strike is used as a last resort and will not jeopardize the public welfare of the state. These are legitimate restrictions. See Mark McLaughlin Hager, *Constructing a New Liberal Capitalism: Czechoslovakian Labor Law in Transition*, 7 AM. U. J. INT'L L. & POL'Y 503, 520 (1992) (discussing right to strike and replacement of striking workers).

more importantly, the reality of the Czech labor system indicates the actualization of the international standards.

### 3. The Current State of Labor Relations in the Czech Republic<sup>302</sup>

Although the freedom of association and organization do exist,<sup>303</sup> one union predominates in the Czech labor relations system. The Czech and Slovak Confederation of Trade Unions (CSKOZ) has replaced the official Communist union. The transfer did not amount to more than a paper transfer of membership rolls, but a new leadership has been elected, and the new leaders are true advocates of democracy.<sup>304</sup> It is generally acknowledged that despite its communist past, the CSKOZ has transformed itself to a democratic and representative union of the workers.<sup>305</sup> Several smaller unions have formed, including a Christian-Democratic Union, but they do not comprise serious competition for the CSKOZ. Additionally, the vast majority of workers already belong to a union, estimated between eighty-four and ninety percent, so further organizing work becomes superfluous.<sup>306</sup> Union membership has declined slightly due to privatization, because strong unions have not developed in the private sector.

Collective bargaining occurs regularly at the local level. Regulations for working conditions are set at the national level, and the local unions can bargain for benefits more generous than the regulations. Most of the bargaining concerns wages,<sup>307</sup> despite the fact that a 1991 regulation, analogous to the Polish *popiwiek*, imposes a surtax on wages above a prescribed level to control inflation.<sup>308</sup> The right to strike has been used sparingly since its inception, and a negligible amount of workdays were lost to strikes in 1991.<sup>309</sup> In general, it is difficult to assess why, during poor economic times, labor disputes have been so peaceful. Conventional wisdom suggests it is more the character of the Czech population than inexperience with the system or pressure from the State to refrain from striking.

Overall, it appears the Czech government has successfully promulgated labor reforms. The labor relations system complies with the customary international standards.

## V. CONCLUSION

The experiences in Hungary, Poland, and the Czech Republic illustrate the strength of the international labor laws. These States, emerging from decades

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302. Most of the information is for both the Czech Republic and Slovakia. It still should be accurate for the Czech Republic.

303. See U.S. DEP'T OF STATE, 1990 HUMAN RIGHTS REPORTS: CZECHOSLOVAKIA (1991) (finding freedom of association in workers' right to form unions of their choosing without prior authorization of state).

304. See Lauer Interview, *supra* note 241.

305. U.S. DEP'T OF LABOR, COUNTRY LABOR PROFILE: CZECHOSLOVAKIA 4 (1992) [hereinafter U.S. DEP'T OF LABOR (CZECH.)].

306. See Lauer Interview, *supra* note 241.

307. *Id.*

308. Tomes, *supra* note 282, at 197.

309. U.S. DEP'T OF LABOR (CZECH.), *supra* note 302, at 4.

of externally-imposed authoritarian regimes, have quickly moved to conform with the current international labor standards. By doing so, they have confirmed these labor standards have attained the status of customary international law.

At times, it seems purely semantical to describe a standard as customary international law. International law, especially customary international law, appears to be a vague, unenforceable theory with no base upon which to stand. The changes in the East European countries directly contradict that. The international community has emphasized the importance of the fundamental human rights of freedom of association and collective bargaining and firmly insists upon proper implementation. These preemptive actions by the world community really are the most important role for customary international labor laws. Because labor laws concern the relationship of a State to its citizens, the most effective enforcement mechanisms of these standards will be State mechanisms. Therefore, the international community compelling a State in a relatively early stage of development to adopt and effectively implement labor laws, will most likely insure compliance.

The importance of these human rights standards becoming customary international law manifests itself in several additional aspects. Without delving too far into the area of enforcement, the status of customary international law creates a cause of action under which a claim could be brought before the International Court of Justice. Accordingly, countries that are not parties to either the ILO conventions or other regional instruments would be held responsible for upholding labor standards in cases before that court.

Finally, the accession of labor laws to the status of customary international law gives States a sort of "claim of right" which they can use to enforce these standards through diplomatic negotiations rather than established legal venues. Lesser-developed countries argue that wealthier nations are imposing "western" values on them by conditioning money and trade benefits.<sup>310</sup> However, when the values have become international law, this argument becomes significantly weaker. Enough lesser-developed countries have conceded that the rights are legally binding for the right to become international law, making it difficult for other nations to object or claim impossibility of implementation.

In the end, these rights will have concrete effects on millions of lives. Customary international law will result in the improvement of lives across borders, as it was meant to do.

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310. See *The Blue and the Red: A Clash of Values between North and South should not be Allowed to Result in Second-Class Rights for the Poor*, *ECONOMIST*, May 8, 1993, at 21 (discussing objections of poorer nations to international human rights in the context of the United Nations Human Rights Convention in Vienna, but concluding that enumerated rights are too fundamental to human life to be limited to only wealthy citizens). The renewal of most-favored-nation (MFN) status for China from the United States also raised this issue. The Clinton administration considered conditioning MFN status on improvement of human rights in China. Although the conditioning of trade status on human rights might not be a narrowly enough drawn method of human rights enforcement, the closing of the United States as a market for goods is a powerful weapon. This could only be done for fundamental human rights that are clearly established as customary international law.