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ARTICLES

EXAMINING WORKERS’ RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW: THE FAST-FOOD WORKERS’ MOVEMENT IN THE UNITED STATES

Sévrine Knuchel*

I. INTRODUCTION

The contention that “the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet” has almost become a truism in scholarly analyses focusing on workers’ rights.1 According to that observation, the labor movement does not appeal to international human rights, and human rights organizations concentrate on other civil and political rights issues. In recent years,

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however, commentators have noted that the two tracks tend to meet “more often,” with labor activists increasingly turning to human rights for the improvement of working conditions. The movement launched by fast-food workers in the United States, whose demands for higher wages and union rights have received increased public attention since 2013, provides a renewed opportunity to question this premise and to reflect on human rights at work more broadly. Underlying the controversy over whether invoking international human rights is a useful strategy to advance the cause of workers is a more fundamental disagreement as to whether workers’ rights are human rights at all. The lack of remedies available to workers to enforce their rights and the cost of realizing such rights, for example, are two considerations commonly advanced to deny that workers’ human rights are rights in the first place. Another line of reasoning also contends that workers’ rights are not of sufficient urgency to qualify as human rights.

This article uses the fast-food workers’ movement as a vignette to highlight the issues raised by international human rights—that is, the rights of individuals recognized under international law—in the context of work. After introducing the fast-food workers’ movement and its demands, it examines whether there are provisions of international human rights law relevant to the demands of the fast-food workers and whether these provisions are applicable in the United States. The analysis then takes a normative perspective and discusses whether the

2. See, e.g., Tonia Novitz & Colin Fenwick, Introduction to HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW & REGULATION 1-2 (Colin Fenwick & Tonia Novitz eds., 2010); Andreopoulos, supra note 1, at 369; Kevin Kolben, Labor Rights as Human Rights?, 50 VA. J. INT’L L. 449, 450, 461 (2010); Dave Spooner, Trade Unions and NGOs: The Need for Cooperation, 14 DEV. PRAC. 19, 21 (2004). Several grounds have been advanced to explain this evolution, among which are the decline in union membership and the “juridification of the social sphere.” See Kolben, supra, at 461; Mundlak, supra note 1, at 240. See generally Matthew Evans, Note, Trade Unions as Human Rights Organizations, 7 J. HUM. RTS. PRAC. 466, 466-483 (2015), for a recent contribution arguing that trade unions should be considered as human rights organizations.


fast-food workers’ demand for higher wages can be treated as a human rights issue. Section IV concludes by attempting to identify the insights that this movement can offer to the wider debate on human rights at work.

II. THE MOVEMENT AND ITS DEMANDS

The fast-food workers’ movement began in November 2012, with several one-day strikes in New York City by workers demanding that McDonald’s and other fast-food chains increase their wages to $15 per hour and refrain from opposing union organizing efforts.8 Organizers claim that “hundreds” of workers participated in this first series of protests.9 The movement, which became known as “Fast Food Forward” or “Fight for $15,”10 quickly expanded as similar actions took place in Seattle, Milwaukee, Detroit, St. Louis, and Chicago in April and May of 2013.11 These were followed by several coordinated strikes in more than fifty different cities throughout the United States in August and December of 2013, as well as in September 2014 and November 2015.12 Most notably, in April 2015, organizers staged what they claim to be the largest protest by low-wage workers in United States history, with workers walking off their jobs in over 200 cities.13 Moreover, in May 2015, workers presented a petition featuring 1.4 million signatures demanding a $15-an-hour pay to McDonald’s during its annual shareholders meeting at its headquarters in Illinois.14 While this article

10. Finnegan, supra note 8.
focuses on the fast-food workers, the movement has since expanded to a broader spectrum of occupations including airport workers, nursing home workers, and adjunct faculty supporting the “Fight for Fifteen.”

The funding for the fast-food workers’ movement is underwritten by the Service Employees International Union (SEIU). With the help of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF), a global union federation of twelve million workers in 126 countries, the movement sought to further extend its reach and organized a global day of action for fast-food workers on May 15, 2014; according to the movement, fast-food workers in more than 230 cities in thirty-three countries took this occasion to stand for higher wages and union rights.

Organizers also note that their day of action on April 15, 2015 extended beyond U.S. borders, with strikes by fast-food workers taking place in Japan and New Zealand.

More recently, in August 2015, with support from the IUF, the SEIU contributed substantial funding for the journey


18. About Us, supra note 11.

of union activists who testified against McDonald’s before a committee of the Brazilian Senate, joining other fast-food workers demonstrating for higher wages and union rights.\textsuperscript{20}

The movement’s demands are twofold: (i) a “living wage” and (ii) union rights.\textsuperscript{21} The fast-food industry is among the largest minimum wage employers in the United States;\textsuperscript{22} by one count, there are more than 3.5 million fast-food workers in the United States, which makes them one of the biggest groups of low-paid workers.\textsuperscript{23} The U.S. federal minimum wage is set under the Fair Labor Standard Act, which provides that workers covered by the statute are entitled to a minimum wage of $7.25 per hour.\textsuperscript{24} According to the International Labor Organization (ILO), approximately 90% of all states have some kind of minimum wage setting procedure, though the mechanisms vary widely.\textsuperscript{25} While a majority of states have enacted minimum wage laws, some states, like Switzerland, Austria, Italy, and Sweden, rely instead on employers and trade unions to set minimum remuneration through collective


\textsuperscript{21} See \textit{FIGHT FOR $15}, supra note 9. While fast-food workers have also raised concerns about other issues affecting their working conditions such as safety or wage theft, the present analysis is restricted to their main demands. See, e.g., Dave Jamieson, \textit{McDonald's Systematically Steals Worker Wages, Lawsuits Claim}, HUFFINGTON POST (Mar. 13, 2014, 12:28 PM), www.huffingtonpost.com/2014/03/13/mcdonalds-wage-theft-lawsuits_n_4957593.html; Dave Jamieson, ‘Managers Told Me to Put Mustard on It’: Fast-Food Workers say Burns are Rampant, \textit{File OSHA Complaints}, HUFFINGTON POST (Mar. 17, 2015, 10:59 AM), http://www.huffingtonpost.com/2015/03/16/fast-food-burns_n_6877440.html.

\textsuperscript{22} See Robin Leidner, \textit{Fast-food Work in the United States, in LABOUR RELATIONS IN THE GLOBAL FAST-FOOD INDUSTRY} 8, 11 (Tony Royle & Brian Towers eds., 2002). In 1998, there was an estimate of 2.5 million fast-food workers in the United States. \textit{Id}.


bargaining. Other states incorporate consultations with representatives of employers and workers into the legislative process that will lead to the enactment of the statute regulating the minimum wage, but this is not the case in the United States.

Minimum wage in the United States was last raised in 2009, and has not kept pace with the cost of living; as a result, it remains "low by historical standards and inadequate for meeting the basic expenses faced by working families." Campaigns for a living wage in the United States are not new. Due to the difficulties of getting a federal minimum wage increase given that the federal minimum wage can only be raised by an act of Congress, since the early 1990s, activists have launched campaigns in favor of state and citywide minimum wage laws enabling workers to support themselves and their families. Yet, at a time when wage stagnation and inequality are major concerns in the United States, the fast-food workers' movement has successfully brought the issue of the working poor to the forefront of the national debate in a way that traditional union advocacy had not been able to do.


28. GEORGETOWN LAW, IMPROVING WAGES, IMPROVING LIVES: WHY RAISING THE MINIMUM WAGE IS A CIVIL AND HUMAN RIGHTS ISSUE 1 (2014), http://civilrightsdocs.info/pdf/reports/Minimum-Wage-Report-FOR-WEB.pdf. This study calculated, for example, that a “two-adult, two-child family with one full-time worker paid the national minimum wage and benefiting from federal working family tax credits would end up 17 percent below the poverty line.” See id. at 4-5. Also the Economic Policy Institute’s Report highlights that today, “low-wage workers [in the United States] have to work longer hours just to achieve the standard of living that was considered the bare minimum almost half a century ago.”


30. See id. at 12-13.

in recent years.\textsuperscript{32} Organized labor has declined sharply in the United States: the membership rate for the private sector in 2014 was at 6.6%, which represents 7.4 million workers and, according to commentators, is the lowest level in a century.\textsuperscript{33} While efforts to raise the minimum wage at the federal level appear to be in a stalemate despite repeated appeals to Congress by President Obama,\textsuperscript{34} some states and cities have undertaken efforts to increase their own minimum wages. Seattle’s move in January 2014 to increase its minimum wage to $15 per hour, for instance, was viewed as prompted by the fast-food workers’ movement;\textsuperscript{35} in May 2015, the governor of New York announced the establishment of a Fast Food Wage Board charged with “investigat[ing] and mak[ing] recommendations on an increase in the minimum wage in the fast food industry”\textsuperscript{36}; and in June 2015, Los Angeles enacted an
increase in its minimum wage from $9 an hour to $15 an hour by 2020. Thirty-seven states, including Florida, New York, and Washington, also raised their minimums at the start of 2015, and for the first time, a majority of states (29) have minimum wages above the national level. Yet, with an average pay at $8.69 an hour, many workers in the fast-food industry remain unable to generate enough income to support themselves or obtain an income at or above the official federal poverty level. A study released in October 2013 concluded that individuals working in the fast-food industry in the United States “are more likely to live in or near poverty” with “families of more than half of the fast-food workers employed 40 or more hours per week . . . enrolled in public assistance programs.”

In order to bargain collectively for higher wages, fast-food workers are seeking to unionize, but their efforts to organize face important hurdles. When employers do not voluntarily recognize a union, 30% of the workers may sign a petition demanding a union under the National Labor Relations Act (NLRA), which protects the right of workers to organize. The National Labor Relations Board (NLRB), the representatives, and has the power to propose a raise for any occupation where pay is judged to be too low to support the health or adequate maintenance of its workers. Id.; Fast Food Wage Board, N.Y. St., http://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm (last visited Nov. 3, 2015).


41. See supra, notes 8-21 and accompanying text.

independent executive agency that enforces the NLRA, will then conduct an election and if the majority of the voters choose the union, the NLRB will certify the union; once the union has been certified, the employer is required to bargain over the terms and conditions of employment with the union representatives. While elections can compel union recognition, this method of verifying majority support is time-consuming and, as highlighted by commentators, opens the door to the use of coercive and dilatory tactics by employers. In the present context, the franchising business model, which is highly prevalent in the fast-food industry, heightens such difficulties. The majority of fast-food restaurants are individually owned and operated by franchisees who enter into franchise agreements with fast-food corporations like McDonald's in order to sell the brand's products. McDonald's emphasized this point in a statement issued in December 2014 in response to the movement's actions: "approximately 90% of our U.S. restaurants are independently owned and operated by franchisees who set wages according to job level and local and federal laws. McDonald's does not determine wages set by our more than 3,000 U.S. franchisees." Due to the franchise structure, fast-food workers are considered employees of the franchisees; they are not, however, considered to be employed by the fast-food corporations. As a result, even if fast-food workers at a restaurant run by a franchisee were able to unionize, they would not be entitled to negotiate with the fast-food

43. 29 U.S.C. § 153 (a).
44. See Conduct Elections, supra note 42.
48. See McDonald's USA Minimum Wage Labor Statement, supra note 47.
corporation, but only with the owner of that individual franchise, whose leeway remains limited by the operating requirements set by the franchisor.⁵⁰

Beside its franchise structure, other characteristics of the fast-food industry make the unionization of workers' difficult. The franchise agreements, which often standardize all operations and establish royalty fees based on revenue, typically allow for comparatively small profit margins for the franchisees, who in turn are pressed to use the lowest-cost labor available.⁵¹ The work performed by fast-food employees is extremely standardized in order to keep costs low, justify low wages, and make the replacement and training of workers easier.⁵² The high turnover of workers, along with the prevalence of part-time work, and the precarious situation of workers who often juggle several jobs to make ends meet, are all challenges to union organizing efforts.⁵³

Finally, driven by their careful efforts to maintain a firm grip over all business operations including wages and working conditions,

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⁵³ *Id.* at 16. The rate at which fast-food workers quit or are dismissed in any given year, i.e., annual turnover rate, is controverted. While it will vary depending on the restaurant, some analyses evaluate this rate to be at 250% or higher. ERIC SCHLOSSER & CHARLES WILSON, *CHEW ON THIS* 278 n.76 (2006). “The National Restaurant Association estimates that ‘quick-service restaurants’ have 75% employee turnover rates, which implies that ‘three-quarters of its workers are completely new, year in and year out.’” Josh Sanburn, *Fast Food Strikes: Unable to Unionize, Workers Borrow Tactics From ‘Occupy,’* TIME (July 30, 2013), http://business.time.com/2013/07/30/fast-food-strikes-unable-to-unionize-workers-borrow-tactics-from-occupy/.
individual franchisees and fast-food companies strongly resist organizing attempts by workers. Because employment “at-will” remains a distinctive feature of U.S. labor law, employers may dismiss unrepresented workers at any time and for any reason not prohibited by law. Although the NLRA protects the right to form and join unions, and to engage in concerted activities aimed at improving working conditions, the statute has been “faulted for its paltry and easily delayed remedies for anti-union discharges. . . . [B]asically, reinstatement and back pay, minus wages earned in the interim may be seen as a minor cost of doing business by an employer committed to avoiding unionization.” As the NLRA does not include a private right of action, workers must file a charge with the general counsel of the NLRB, who then makes an unreviewable decision as to whether to file an unfair labor practice complaint. Moreover, while punishing or terminating employees because they engage in union or protected concerted activity is illegal, according to the so-called “permanent replacement,” or Mackay doctrine, referring to a 1938 decision of the U.S. Supreme Court, employers are allowed to hire workers to replace those engaging in a strike. As a result, strikers are effectively deprived


58. Id. at 1530.


60. Eym King of Michigan, LLC, d/b/a Burger King, N.L.R.B. JD-58-14, Case No. 7-CA-118835, at 13-14 (Sept. 29, 2014), https://www.nlrb.gov/case/07-CA-118835. A Burger King franchisee violated the law by threatening a worker for discussing protests during work hours and giving disciplinary warnings to union sympathizers, including sending home a pro-union worker for allegedly failing to put “pickles on sandwiches in perfect squares as she was supposed to” do. Id. at 4, 14-15.

of the protections afforded by the NLRA. The following description of the employment climate in the fast-food industry aptly captures the background conditions that eventually led to the workers’ protests:

The American fast-food industry was built on the promise of low prices. Profitability therefore depends in large part on keeping labour and other operating costs down. Low wages, minimal benefits, tight staffing, and efforts to intensify labour are the predictable results of strong competitive pressure in a legal and cultural setting that grants employers remarkable discretion and does not guarantee workers a voice in influencing employment conditions.62

III. THE FAST-FOOD WORKERS’ DEMANDS: RELEVANT PROVISIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND THEIR APPLICABILITY IN THE UNITED STATES

Fast-food workers are demanding higher wages “to afford at least the basic necessities” and seeking to unionize.63 Provisions in several international instruments are relevant to their demands.64 According to the Universal Declaration of Human Rights (UDHR), “[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity” as well as “the right to form and to join trade unions for the protection of his interests.”65 The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has a “right . . . to the enjoyment of just and favorable conditions of work” which ensures a remuneration providing workers with “fair wages” and a “decent living for themselves and their families.”66 The right to form and join trade unions is provided in the International Covenant on Civil and Political Rights (ICCPR) as well as in the ICESCR,67 which also guarantees the

62. Leidner, supra note 22, at 15-16.
65. G.A. Res. 217, supra note 64, art. 23, at 75.
66. G.A. Res. 2200A, supra note 64, art. 7, at 50.
Those two rights—the right to the enjoyment of just and favorable conditions of work and the right to form and join trade unions—also appear in several regional human rights instruments: the African Charter on Human and Peoples’ Rights, the European Convention on Human Rights, the Revised European Social Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Protocol of San Salvador, and the Arab Charter on Human Rights.

In examining the fast-food workers’ demands, the norms elaborated by the ILO must also come into consideration. Created in 1919 to secure “humane conditions of labor,” the ILO’s mandate includes the promotion of rights at work. Several ILO Conventions and

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68. G.A. Res. 2200A, supra note 64, art. 8, at 50.
70. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade union for the protection of his interests.”).
71. European Social Charter (revised), art. 4-6, opened for signature May 3, 1996, E.T.S. No. 163. Articles Four, Five, and Six address the “right to a fair remuneration,” the “right to organize,” and the “right to bargain collectively.” Id.
74. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 7-8, Nov. 17, 1988, O.A.S.T.S. No. 69. Article 7 is entitled, “Just, equitable and satisfactory conditions of work” and Article 8 is entitled “Trade union rights.” Id.
75. Arab Charter on Human Rights, art. 34 para. 2, art. 35, para. 1, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005), https://www1.umn.edu/humanrts/instree/loas2005.html (“Every worker has the right to the enjoyment of just and favourable conditions of work which ensure appropriate remuneration to meet his essential needs and those of his family ... Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interests.”).
77. Id. The ILO Declaration on Social Justice for a Fair Globalization which was unanimously adopted by the International Labour Conference at its ninety-seventh session in 2008
Recommendations are relevant to the fast-food workers' demands, including the 1970 Minimum Wage Fixing Convention (No. 131), and the 1970 Minimum Wage Fixing Recommendation (No. 135) according to which, "[m]inimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families." Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize, which was adopted in 1948, provides that workers "have the right to establish and... to join organisations of their own choosing without previous authorisation." In 1998, the ILO further distinguished four "fundamental" labor rights in its Declaration on Fundamental Principles and Rights at Work, among which is the "freedom of association and the effective recognition of the right to collective bargaining."

At present, however, there is limited recourse for workers to demand respect for these international norms in the United States. Although the United States is not a party to the ICESCR, it did ratify the ICCPR in 1992. However, the United States also specified in an interpretative declaration that the provisions of that treaty are not considered self-executing, meaning that the provisions will not be applied as provisions of domestic law without further legislative
measures, and that individuals may not bring actions in courts for the
direct enforcement of the treaty.\textsuperscript{85} The U.S. administration further
emphasized, with regard to the right to form and join trade unions set
forth in Article 22 of the ICCPR, that “[b]ecause the First Amendment
of the [U.S.] Constitution fully addresses the scope of Article 22, we
believe that ratification of the [ICCPR] has no bearing on and does not,
and will not, require any alteration or amendment to existing Federal and
State labor law.”\textsuperscript{86} The U.S. Constitution entails no specific mention of
workers’ rights to just and favorable conditions of work or to form and
join trade unions,\textsuperscript{87} but the U.S. Supreme Court has applied the First
Amendment, which guarantees freedom of expression and freedom of
assembly, to protect workers’ organizing actions.\textsuperscript{88} However, when the
NLRA faced legal challenge after its enactment, the Court did not
uphold the constitutionality of the NLRA based on fundamental rights,
instead the Court upheld it under the “Commerce Clause” in Article I,
Section 8 of the U.S. Constitution, according to which Congress has the
power to “regulate commerce . . . among the several States.”\textsuperscript{89} This
decision had important and long-lasting implications: according to one
commentator,

The choice of a narrow economic base stressing free flow of
commerce, rather than a broader rights-based framework, set [U.S.]
labor law on a path away from human rights as a guiding
principle. . . . Without a human rights foundation, employers could
argue that workers’ organizing and bargaining were themselves
“burdens” on the free flow of commerce.\textsuperscript{90}

The consequences of this approach are apparent in the prevalence
of so-called “Right to Work” laws, which have been enacted in twenty-

\textsuperscript{85} Medellin, 552 U.S. at 504-05, 505 n.2.
\textsuperscript{87} See James Gray Pope, The Thirteenth Amendment Versus the Commerce Clause: Labor
(describing labor’s unsuccessful efforts to construe the Thirteenth Amendment which abolished
slavery and involuntary servitude as protecting workers’ freedom from “wage slavery”); see
generally U.S. CONST. (illustrating that unions and workers’ rights are not included within the four
corners of the document).
\textsuperscript{88} See, e.g., Thomas v. Collins, 323 U.S. 516, 532, 534 (1945); Thornhill v. Alabama, 310
U.S. 88, 103-05 (1940).
\textsuperscript{89} See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-30, 43 (1937); U.S. CONST.
art. I, § 8.
\textsuperscript{90} See Compa, supra note 54, at 299-300.
four States. In seeming contrast to their nomenclature, such laws deprive unions of funding by forbidding negotiation of agreements “by which employers promise to hire or retain only employees who pay union fees.”

As one of its largest member states and donors, the United States maintains “a leading role” in the ILO, and has included provisions on workers’ rights and ILO standards in many of its international trade agreements. For instance, the North American Agreement on Labor Cooperation (NAALC) in force since 1993, between the United States, Canada, and Mexico sets forth eleven “labor principles” that the parties “are committed to promote,” including the right to organize, the right to strike, and the establishment of a minimum wage. These principles, however, “do not establish common minimum standards for [the parties’] domestic law”; the parties’ obligations are restricted to undertaking measures to strengthen the enforcement of their respective labor laws in order to realize these principles. Since the conclusion of the NAALC, the United States has almost always included labor provisions in its trade agreements. The trade agreement between the United States and Chile, for instance, emphasizes the parties’ “obligations as members of the [ILO] and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.” It further sets forth a list of “internationally recognized labor rights” which the parties must guarantee, including “the right to


92. Id.

93. The United States contributes “22 percent of the ILO’s regular budget each biennium.” See The US: A Leading Role in the ILO, INT’L LAB. ORG., http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang--en/index.htm (last visited Oct. 7, 2015). But see Jeffery S. Vogt, Trade and Investment Arrangements and the Labor Rights, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 121, 121-22 (Lara Bleecher et al. eds., 2015), for an analysis of the inclusion of labor rights in trade and investment arrangements. While the author finds that results have overall been “mixed,” he also concedes that some of the trade preference programs established by the United States have “secured some important legislative reforms and created opportunities to resolve specific labor violations . . . .” Id.


95. See id. A dispute settlement mechanism is provided if one party considers that another has systematically failed to effectively enforce the agreed labor standards. Id. at art. 27, ¶ 1.

96. See Vogt, supra note 93, at 121-22.

organize” and “acceptable conditions of work with respect to minimum wages”; the latter, however, solely pertains to enforcing the level of the established minimum wage, and not to the setting of its level.98 However, although the United States has undertaken international obligations on workers’ rights in connection with those instruments, it has only ratified 14 of the 189 Conventions elaborated by the ILO.99 Additionally, it is not a party to the Minimum Wage Fixing Convention No. 131, nor to ILO Convention No. 87.100

While the United States has refrained from ratifying many of the international instruments related to workers’ rights, an existing federal statute does enable foreign plaintiffs to bring civil suit in U.S. domestic courts for violations of international law, including customary international norms: the Alien Tort Statute (ATS).101 This statute has been used to demand reparation for violations of workers’ rights committed abroad.102 For instance, in Flomo v. Firestone Nat’l Rubber Co., twenty-three children from Liberia filed suit against rubber-maker Firestone for utilizing child labor on their rubber plantation in Liberia,103 and in Licea v. Curacao Drydock Co., victims of a forced labor scheme sought damages from the company that extracted their labor in concert with the totalitarian regime in Cuba.104 The requirements to bring a claim under the ATS, however, are exacting.105 While ATS cases have

98. Id. at art. 18.8.
103. Flomo, 643 F.3d at 1015. The case was dismissed because the court found that it has not been “given an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court’s insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute.” Id. at 1024.
104. Licea, 584 F. Supp 2d at 1359-61, 1366 (entering an $80 million default judgment against the defendant-company).
105. See Beth Stephens, Human Rights Litigation in U.S. Courts against Individuals and Corporations, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 179, 192-94 (Lara Knuchel: Examining Workers’ Rights in International Human Rights Law: The

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been filed against corporations,\(^\text{106}\) according to a recent U.S. Supreme Court decision, the "mere corporate presence" of a corporation in the United States is not sufficient to confer jurisdiction, because such presence does not displace the presumption against extraterritoriality which applies to claims under the ATS.\(^\text{107}\) While this would not likely present a problem in relation to the U.S. fast-food industry, another requirement relative to customary norms could present much more serious obstacles to a potential ATS claim: in 2004, the U.S. Supreme Court made clear that the statute's scope is limited to customary international norms that are "specific, universal, and obligatory" and "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.\(^\text{108}\) Demonstrating the existence of a custom fulfilling the criteria laid down by the Supreme Court with respect to the right to form and join trade unions appears difficult, even if this right belongs to the set of fundamental labor rights singled out by the ILO.\(^\text{109}\) The right of workers to a remuneration providing a decent living would seem to raise even greater difficulties given the persisting doubts regarding its existence as a legal right.\(^\text{110}\)

Aside from these specific hurdles, overall prospects for ultimate success on the merits of an ATS claims are far from certain; according to one commentator's analysis, as of 2014, "[n]o case brought against a corporation under the [ATS] for violation of human rights has yet resulted in a merits decision in favor of the plaintiff."\(^\text{111}\)

Thus, while international law includes several norms relevant to the claims of the fast-food workers, the United States' dichotomous approach to human rights at work, which seems characteristic of what has been referred to as "American exceptionalism,"\(^\text{112}\) has set enduring hurdles to the application of such norms within the United States.\(^\text{113}\) On the one hand, the United States remains a driving force behind the
development and enforcement of international norms on workers’ rights abroad. One could cite as an example the bilateral agreement concluded between the United States and Cambodia on trade in textile, “which linked the increase in Cambodia’s export quotas with an improvement in working conditions through the effective implementation of national legislation and fundamental rights at work”; this agreement was the basis for the establishment of the ILO’s “Better Factories Cambodia” project, which, according to the ILO, “led to a substantial improvement in working conditions, including compliance with minimum wage legislation.”

On the other hand, the United States tends to resist the application of those same norms to itself, notably by declining to assume international human rights obligations that would require changes in its domestic practice. This pattern hampers workers’ efforts to rely on international norms to improve their working conditions, as illustrated by the endurance of the permanent replacement doctrine. In 1991, the ILO Committee on Freedom of Association, which may review complaints against ILO member States even when they have not ratified ILO Convention No. 87 because freedom of association is considered a “fundamental” ILO constitutional principle, reviewed the permanent replacement doctrine in a complaint filed by the union federation AFL-CIO. Its conclusion was clear: the right to strike “is not really

116. See Minimum Wage Systems, supra note 78, para. 29, at 15.
117. See Philip Alston, Labor Rights as Human Rights: The Not So Happy State of the Art, in LABOUR RIGHTS AS HUMAN RIGHTS 1, 3-4 (Philip Alston ed., 2005) (“The United States has indeed sought to encourage other countries to accept various obligations designed to ensure that those countries will respect core labour standards. . . . But within the United States itself the situation is not so straightforward.”); Estlund, supra note 57, at 1531 (“Resistance to transnational legal authority, endemic to American law, has insulated labor law from the potential influence of international human rights . . . .”).
guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally.”

Meanwhile, despite the introduction of several bills to abrogate the Mackay decision, striking workers in the United States may still be subject to permanent replacement, and this even if, as lately as February 2015, the United States reiterated in relation to the right to strike its “full support of the dedicated work of... the Committee on Freedom of Association,” as well as its resolve to “strengthen, not diminish, the effectiveness, credibility, and integrity of the ILO supervisory system.” The decisions and recommendations issued under that system highlight the need for the United States to embrace the full scope of the obligations set forth under international law which require more from the State than merely refraining from interfering with workers’ rights. In particular, as precarious employment relationships such as those existing in the fast-food industry are becoming more common, the ILO Committee on Freedom of Association has repeatedly emphasized that “[t]he right of workers to establish and join organizations of their own choosing in full freedom cannot be said to exist unless such freedom is fully established in law and in fact.” Further, the ILO Committee of Experts on the Application of Conventions and Recommendations has made clear, in relation to ILO Convention No. 87, that the right to organize must apply to all workers.

120. Id.
“irrespective of the existence of a labour relationship,” so without regard to the type of contractual arrangements by which workers are bound. This point is of particular resonance in the context of the franchising business structure prevalent in the fast-food industry, which deprives the workers of “direct access to the real decision-makers on the employer side.”

IV. THE FAST-FOOD WORKERS’ DEMANDS: NORMATIVE PERSPECTIVE

The question of whether fast-food workers should appeal to human rights in support of their demands reignites fundamental debates about workers’ human rights, the existence of which is repeatedly questioned on the grounds that they are not realized in practice. For example, in commemorating Human Rights Day 2013, the ILO issued a news release drawing attention to the challenges faced by low-wage workers. While this statement emphasized that “[o]ne of the fundamental human rights is the right to a just remuneration that ensures an existence worthy of human dignity,” it also expressed concern that “[e]ven in advanced economies . . . the aspiration of an adequate living wage is not always fulfilled.” This language encapsulates the concern: although the right to the enjoyment of just and favorable conditions of work is included both in the UDHR as well as in the ICESCR, the struggles of millions of “working-poor” around the world cast doubt upon the existence of such a right.

The claim that workers’ rights do not qualify as human rights—that


126. FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED, GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AT WORK, INT’L LABOUR ORG. [ILO], ¶ 77, at 21 (2008), http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096 122.pdf (stating that the lack of access to decision makers resulting from the change in organization of production and business relationships, such as the franchising of fast food industries, has been identified by the ILO as a structural change with adverse consequences for collective bargaining).

127. See infra notes 128-29 and accompanying text.


129. Id. (emphasis added).

130. Id.; G.A. Res. 217, supra note 64, art. 23, at 75; G.A. Res. 2200A, supra note 64, art. 7, at 50.
is, high priority rights which belong to all human beings in virtue of their humanity—because they are not fully realized entails many layers of analysis which must be carefully distinguished. For example, this claim could be aimed at critiquing the feasibility of such rights, but it could also be prompted by the lack of remedies available to workers to enforce their rights. Still another line of reasoning could maintain that workers’ rights lack the same urgency as other human rights because work is not significant enough to generate duties on the part of others. Addressing workers’ rights requires confronting these reservations, which are part of a wider debate concerning the existence of economic and social rights generally; this section discusses some of the most pressing considerations facing the fast-food workers’ demand for higher wages.

In response to frequent reservations concerning the urgency of workers’ rights, numerous arguments can be advanced to emphasize the importance of the right of workers to a remuneration ensuring a decent living, chief among them is that it enables workers “to live in dignity.” Such remuneration is indispensable not only to workers’ well-being, but also to their social and family life, which is compromised by material deprivation. Decent wages safeguard workers’ autonomy and contribute to the enjoyment of other human rights, such as the right to health, or the right to take part in cultural life. Considerations of fairness further require that workers be provided with decent wages, as they should be duly rewarded for their work. While the right to work


132. See Guy Mundlak, The Right to Work - The Value of Work, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 341, 341-43 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007) (discussing the various arguments contending that “work is hardly a thing to strive for”).

133. While the right to form and join trade unions would warrant similar analysis, this article takes remuneration as its focus. See for example John Pearson, Trade Unionism and Theories of Global Justice, in LABOR AND GLOBAL JUSTICE: ESSAYS ON THE ETHICS OF LABOR PRACTICES UNDER GLOBALIZATION 55, 55-84 (Mary C. Rawlinson et al. eds., 2014), for an analysis of how different theories of global justice understand the role of trade unions.


135. See id. at para. 1 & 13 n.1.

136. See Comm. on Econ., Soc., & Cultural Rights, Right to Just and Favourable Conditions of Work on Its Fifty-Fourth Session, U.N. Doc. E/C.12/55/R.2, para. 2 (Feb. 23- Mar. 6, 2015) [hereinafter Right to Just and Favourable Conditions of Work]. The Draft Comment on Article 7 currently prepared by the Committee emphasizes that “[t]he enjoyment of the right to just and favourable conditions of work is also a pre-requisite for . . . the enjoyment of other Covenant rights, for example . . . in enabling an adequate standard of living through a decent remuneration.” Id.
guaranteed in the ICESCR "implies not being forced in any way whatsoever to exercise or engage in employment," the right to a remuneration ensuring a decent living provides additional protection against workers' exploitation.

Stressing the importance of the claims of workers, however, says nothing of the existence of corresponding duties. As explained by one commentator, the case for a "human right is not complete when one has shown the great importance of its object. This only gets the case started. The harder parts are justifying the duties the right will impose and showing that they are feasible..." The feasibility of the right of workers to a remuneration ensuring a decent living may be called into question, as illustrated by the ILO's statement mentioned earlier characterizing workers' right to a remuneration ensuring a decent living as a mere aspiration or an ideal. Yet, this view errs in taking the reality of the working poor to deny the existence of the right to a remuneration ensuring a decent living: it relies on something which "is" (i.e. the prevalence of working poor) to deny the existence of something which ought to be realized (i.e. the right to a remuneration ensuring a decent living). Asserting a right to a remuneration ensuring a decent living, however, implies that the provision of such a remuneration is possible: the right's very existence depends on the feasibility of the corresponding obligation to which it gives rise, in accordance with the "ought implies can" maxim.

A feasibility objection to the right of workers to a remuneration ensuring a decent living may be countered in a number of ways. To

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137. See CESCR Draft Comment on Article 7, supra note 134, at para. 4, 6. While Article 8 of ICCPR prohibits slavery, servitude, and forced or compulsory labor in explicit terms; see ICCPR, supra note 67, 999 U.N.T.S. at 175, Article 6 of ICESCR entails an implicit prohibition on forced labor. See G.A. Res. 2200A, supra note 64, art. 6, at 50.

138. For the Supreme Court of India, "[w]here a person provides labour or services to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour'..." People's Union for Democratic Rights v. Union of India, (1982) 1983 SCR 456, 464 (India).


140. See A Fair Wage: A Human Right, supra note 128.


143. Tasioulas, supra note 142, at 81.
begin with all human rights, including those qualified as "civil and political rights," give rise to positive obligations; it is not unique to the right of workers to a remuneration ensuring a decent living. In accordance with the classification initially developed by Henry Shue, human rights give rise to: (i) negative duties to respect (to refrain from acting in a way that deprives people of the guaranteed right), (ii) positive duties to protect (to ensure that third parties do not deprive people of the guaranteed right), and (iii) positive duties to fulfill (to take action to facilitate the enjoyment of the guaranteed right).

The Committee on Economic, Social and Cultural Rights (the Committee), which is responsible for monitoring States' implementation of their obligations under the ICESCR, has addressed the feasibility objection as follows. At first, the programmatic language of Article 2 of the ICESCR, which provides that each State party merely "undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . . ." would seem to cast doubt upon the possibility that the rights guaranteed under the Covenant, including workers' right to a remuneration ensuring a decent living, ever be fully realized. Yet, the Committee has explained that progressive realization "should not be misinterpreted as depriving the obligation of all meaningful content. It is . . . a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights." In addition, according to the Committee, State parties not only have "an obligation to move as expeditiously and effectively as possible" towards the rights' realization, but also "a minimum core obligation to ensure the satisfaction of, at the very least,

144. See Samantha Besson, The Allocation of Anti-Poverty Rights Duties, in POVERTY AND THE INTERNATIONAL ECONOMIC LEGAL SYSTEM 408, 423 (Krista N. Schefcr, ed., 2013) ("The first consideration to dispel is the idea that anti-poverty rights give rise to more positive duties than other (negative) rights and hence raise more questions of allocation of cost."); Conor Gearty, Against Judicial Enforcement, in DEBATING SOCIAL RIGHTS 1, 18 (2011); Virginia Mantouvalou, In Support of Legislation, in DEBATING SOCIAL RIGHTS 85, 110-11 (2011); Dinah Shelton & Ariel Gould, Positive and Negative Obligations, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 562, 565-68 (Dinah Shelton, ed., 2013).

145. HENRY SHUE, BASIC RIGHTS 52-53, 60 (2d ed. 1996). The treaty bodies responsible with monitoring States' implementation of their obligations under the two human rights Covenants follow this classification. CESCR Draft Comment on Article 7, supra note 134, para. 22.


147. G.A. Res. 2200A, supra note 64, art. 2, at 49 (emphasis added).

minimum essential levels of each of the rights" protected under the Covenant. While the Committee has not specifically elaborated on the minimum core obligation raised by the right of workers' to a remuneration ensuring a decent living (it is currently drafting a General Comment on Article 7), this minimum core obligation presumably consists of ensuring that workers obtain a remuneration fulfilling their most basic needs, and likely, in wealthier States, the remuneration would exceed mere subsistence levels in accordance with the principle of progressive realization. Because the core obligation entailed in the right to a remuneration ensuring a decent living must be immediately realized, this right eschews the qualification of mere aspiration whose fulfillment may be deferred.

Even such a core obligation, however, is not immune to the feasibility critique, as one may still question whether realizing the right of every worker to a remuneration covering his or her most basic needs is realistic. Yet, although the cost of human rights must be taken into account in order to confront the feasibility critique, such costs are difficult to evaluate. As explained by one commentator:

> [C]ost estimates are often hard to make, particularly because they require comparisons with hypothetical alternatives and count different kinds of costs that are difficult to bring together on a single scale. There is often controversy about how much weight should be attached to particular kinds of costs. Finally, it is hard to determine a country’s level of resources or what portion of these resources should be used to comply with and implement the human rights of all residents.

The difficulty of estimating the costs is heightened by a feature referred to by theorists as the “justificatory priority of rights over duties.” Human rights are grounded in universal interests deemed

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149. *Id.* at para. 9-10.
150. The Committee’s Draft General Comment currently provides that the core obligation entailed in Article 7 with respect to remuneration requires States to:

> [e]stablish in legislation and in consultation with workers and employers, their representative organizations and other relevant partners, minimum wages that are non-discriminatory and non-derogable, fixed taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families.

151. *Right to Just and Favourable Conditions of Work, supra* note 136, para. 64(c).
152. *Id.* at 24-26, for a discussion of the difference between rights and goals.
important enough to justify the imposition of correlative obligations, but the specification of those obligations, i.e., the identification of their content, occurs in context, at a specific time and place. While human rights give rise to concrete obligations for their duty-bearers, the fact that human rights may be recognized before specifying which duties correspond to them complicates the assessment of the reasonableness of their cost. The right of workers to a remuneration ensuring a decent living is no exception. In accordance with the classification mentioned above, this right implies that States have an obligation to provide their employees with wages ensuring a decent living (duty to respect), an obligation to intervene in the private sector when employees do not receive such wages (duty to protect), and an obligation to take legislative, administrative, budgetary, judicial, and other measures facilitating the provision of such wages to all employees (duty to fulfill). Identifying the content of such duties, however, calls not only for a definition of the notion of “decent living,” but also for an appraisal of the level of remuneration necessary to afford such a living and an understanding of the means which will enable workers to earn such a remuneration, all of which are complex and controversial questions.

Such complexity is reflected in the Committee’s supervision of the ICESCR. In addressing labor issues, the Committee can draw on the ILO’s expertise; in accordance with Article 22 of the ICESCR, the Committee regularly provides the ILO with information on the realization of the rights of workers guaranteed in the ICESCR, and, in turn, frequently refers to the standards elaborated on by this specialized agency which provides its interpretation of the Covenant’s provisions.

154. The “interest-based” theory of human rights espoused by the present analysis is one of several approaches developed in the literature. See for example Martha Nussbaum, Capabilities and Human Rights, 66 FORDHAM L. REV. 273, 274-75 (1997), for an alternative approach to human rights based on capabilities.

155. See, e.g., JAMES GRIFFIN, ON HUMAN RIGHTS 108-09 (2008); Tasioulas, supra note 142, at 94.

156. See CESCR Draft Comment on Article 7, supra note 134, para. 22.

157. See G.A. Res. 2200A, supra note 64, art. 22, at 52 (“The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.”).

The ILO, whose constitution, adopted in 1919, already recognized the necessity that workers earn a "living wage," characterizes this notion as "the level of wages sufficient to meet the basic living needs of an average-sized family in a particular economy." Yet, as explained by a former ILO senior economist, "[a]t present, however, there is neither a generally accepted definition of what a living wage is, nor is there a generally agreed methodology on how to measure it." This point has become evident in the context of the fast-food workers' movement. While fast-food workers demand to be paid $15 an hour to support themselves and their families, the use of this fixed dollar figure is regularly questioned, for example, on the ground that $15 does not represent the same purchasing power everywhere in the United States. For example, "$15 in Detroit is not the same as $15 in New York City or Los Angeles; likewise, cities in different regions are subject to unique price and wage pressures that can subtly or drastically shift the living-wage discussion." Nor is there any agreement as to which particular measures might ensure that all workers be provided with a living wage, especially given that some economists argue that employment regulation itself hampers the market forces which would otherwise lead to increased economic growth.

Even in the face of these complexities, pursuant to Article 2 of the ICESCR, States must use "all appropriate means" to "the maximum of [their] available resources" to realize the rights guaranteed under the
Covenant.\textsuperscript{164} As made clear by the Committee, they enjoy a “margin of appreciation” to “adopt measures most suited to their specific circumstances.”\textsuperscript{165} While Article 7 is silent as to how to achieve compliance with the right of workers to a remuneration ensuring a decent living, the Committee has interpreted this provision as requiring States to establish an “adequate minimum wage-fixing machinery” or facilitate its establishment.\textsuperscript{166} This requirement is highlighted in its Draft General Comment on Article 7 currently in preparation: “States parties should prioritize the adoption of a periodically reviewed minimum wage, indexed to the cost of living, and maintain a mechanism to do this.”\textsuperscript{167} In their periodic reports to the Committee, States must indicate:

\begin{itemize}
\item[\ldots] whether a national minimum wage has been legally established . . . .
\end{itemize}

(a) Whether a system of indexation and regular adjustment is in place to ensure that the minimum wage is periodically reviewed and determined at a level sufficient to provide all workers, including those who are not covered by a collective agreement, and their families, with an adequate standard of living; and

(b) Any alternative mechanisms in place, in the absence of a national minimum wage, to ensure that all workers receive wages sufficient to provide an adequate standard of living for themselves and their families.”\textsuperscript{168}

In reviewing States’ reports, the Committee has criticized minimum wages that were “far below the level of the official poverty line,” unable to “match the minimum consumer budget,” or too low to “enable workers to meet their families’ essential needs.”\textsuperscript{169} The Committee has

\textsuperscript{164} G.A. Res. 2200A, \textit{supra} note 64, art. 2, at 49.
\textsuperscript{166} See \textsc{Ben Saul, Et Al., The International Covenant on Economic, Social and Cultural Rights} 412-13 (2014).
\textsuperscript{167} Right to Just and Favourable Conditions of Work, \textit{supra} note 136, at para. 22.
\textsuperscript{169} See U.N., Econ. & Soc. Council, Concluding Observations of the Committee on
also repeatedly stated that the “basic food basket” should be taken into account when determining the minimum wage, and criticized States which did not raise the minimum wage despite economic growth, as is currently the case in the United States.\footnote{170} The Committee has suggested that States apply a system of indexation which adjusts the minimum wage to the cost of living,\footnote{171} emphasized that the minimum wage should be adjusted “annually” or “from time to time,”\footnote{172} and urged States to ratify ILO Convention No. 131 on Minimum Wage-Fixing.\footnote{173} It has not, however, elaborated more specifically on the kind of measures that may foster the provision of a living wage to workers.\footnote{174} Regulating work raises a wide range of interrelated economic issues; as explained by one commentator, “[i]t is difficult to separate employment from such related and sometimes competing policy areas and priorities as economic

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\item[174.] The Draft Comment on Article 7 presently provides that “States parties should prioritize the adoption of a periodically reviewed minimum wage, indexed to the cost of living, and maintain a mechanism to do this” in which workers and employers should “participate directly.” Right to Just and Favourable Conditions of Work, supra note 136, at para. 22. Further, “the minimum wage should be above the poverty line,” “realistic,” “recognized in legislation, fixed with reference to the requirements of a decent living, and applied consistently.” Id. at para. 23-24.
\end{footnotes}
development, technology and industrial policies, fiscal and monetary measures, social insurance, and education and training." The intricacy of labor regulation can be seen in the debates surrounding the fast-food workers’ movement. In particular, many economists maintain that raising the minimum wage may ultimately reduce the number of employment opportunities that an employer may be able to afford, thus leading to higher unemployment levels, or increase the pressure on fast-food corporations to use automation to further reduce labor costs. This raises the issue of potential trade-offs between the right of workers’ to a remuneration ensuring a decent living and the right to work, since the latter is also guaranteed in the ICESCR and requires States to adopt national policies furthering employment creation. For some commentators, this tension between the right to work “pure and simple” and the right to the enjoyment of just and favorable conditions of work lies “at the heart of the regulatory dilemmas which confront labour law.” The current version of the Committee’s Draft Comment on Article 7, however, does not address this issue apart from mentioning that minimum wages must be “realistic” to be effective, and that:


176. See infra notes 177-78 and accompanying text.

177. See James Sherk, Higher Fast-Food Wages: Higher Fast-Food Prices, HERITAGE FOUND. (Sept. 4, 2014), http://www.heritage.org/research/reports/2014/09/higher-fast-food-wages-higher-fast-food-prices. A Senior policy analyst on labor economics at the Heritage Foundation found that: Raising the minimum wage in the fast-food industry to $15 an hour would hurt consumers and workers. Without major operational changes, fast-food restaurants would have to raise prices by 38 percent while seeing their profits fall by 77 percent. This would cause many restaurants to close and many others to make extensive use of labor-saving technology—eliminating many of the entry-level jobs that inexperienced workers need to get ahead.


179. G.A. Res. 2200A, supra note 64, art. 6, at 50 ("The steps to be taken by a State Party ... to achieve the full realization of [the right to work] shall include ... policies and techniques to achieve steady economic, social and cultural development and full and productive employment ... ").

180. Mark Freedland & Nicola Kountouris, The Right to (Decent) Work in a European Comparative Perspective, in THE RIGHT TO WORK: LEGAL AND PHILOSOPHICAL PERSPECTIVES 123, 124 (Virginia Mantouvalou ed., 2015); see Nickel, supra note 139 at 137, for an analysis questioning the status of the right to work as a "fully-fledged legal human right."
[e]conomic factors such as the requirements of economic and social development and the achievement of a high level of employment . . . need to be considered, but . . . such factors should not be used to justify a minimum wage that does not ensure a decent living for workers and their families.  

While economists’ enduring disagreements about the merits of labor regulation cannot be taken to imply that the provision of wages ensuring all workers with a decent living is beyond reach, lack of consensus as to the means that would allow workers to be provided with a living wage is likely to sideline a rights-based approach to workers’ remuneration. The exclusion of the right to a remuneration ensuring a decent living from the list of fundamental rights identified by the ILO in its 1998 Declaration on Fundamental Principles and Rights at Work offers an illustration. The four rights retained by the ILO, which are meant to warrant priority attention from governments, are those which do not raise comparable questions of labor regulation and, ultimately, relative economic advantages: “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.” Partly in response to the criticisms raised by the limited content of this list, the ILO developed the concept of “decent work,” which it defines as “[p]roductive work in which rights are protected, which generates an adequate income, with adequate social protection.” The ILO’s “decent work agenda,” while retaining the list of labor rights singled out by the 1998 Declaration, further provides that ILO members must strive to achieve three other “strategic objectives.” One of these objectives consists in developing measures of social

181. Right to Just and Favourable Conditions of Work, supra note 136, paras. 23, 25. Nor did the Committee address the potential trade-offs between the right to work and workers’ right to a remuneration ensuring a decent living in its General Comment on Article 6 of the ICESCR. G.A. Res. 2200A, supra note 64, art. 6, at 50.
182. See ILO Declaration on Social Justice for a Fair Globalization, supra note 77, at 2.
183. See ILO Declaration on Fundamental Principles and Rights at Work, supra note 81, at 1237-38.
184. Id.
186. ILO Thesaurus, supra note 123 (search in the search bar for “decent work,” then follow “decent work” hyperlink under “search results”).
187. See Declaration on Social Justice for a Fair Globalization, supra note 77, at 1-2, 9-11.
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protection, including policies “designed to ensure . . . a minimum living wage to all employed and in need of such protection.”\(^{188}\) While the struggles of low-wage workers regained prominence after the decent work agenda was placed “at the core of the [ILO]’s policies to reach its constitutional objectives” by the 2008 Declaration on Social Justice for a Fair Globalization,\(^ {189}\) the provision of living wages is envisioned as a goal to strive for, and not as a right.\(^ {190}\)

While the decent work agenda was formulated by the ILO to reflect States’ social, economic and political priorities,\(^ {191}\) a full consideration of the fast-food workers’ demands also requires an examination of the duties of the corporate sector with respect to workers. As the Committee euphemistically noted, while “[t]he corporate sector in many instances contributes to the realization of economic, social and cultural rights . . . through *inter alia* input to economic development, employment generation, and productive investment . . . Corporate activities can [also] adversely affect the enjoyment of Covenant rights,”\(^ {192}\) The question of the duties of businesses to provide their employees with a living wage, which appears particularly pressing given that most fast-food companies are able to make substantial profits,\(^ {193}\) raises the issue of the identification of human rights duty-bearers. In 2003, the U.N. Sub-Commission on the Promotion and Protection of Human Rights proposed a set of “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” pursuant to which corporations would have been held directly accountable under international human rights law.\(^ {194}\) With regard to

188. *Id.* at 9-10.

189. *Id.* at 1.

190. *See supra* note 149 and accompanying text.


workers, those norms would have specifically required corporations to “provide workers with remuneration that ensures an adequate standard of living for them and their families”; such remuneration was to “take due account of [workers’] needs for adequate living conditions with a view towards progressive improvement.”\textsuperscript{195} The corporate sector and certain governments, however, were critical and strongly opposed those norms which were ultimately not adopted.\textsuperscript{196} Instead, a newly appointed Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises engaged with businesses, civil society, and governments during a six-year process to formulate a new set of principles: the “Guiding Principles on Business and Human Rights” (Guiding Principles), which were endorsed by the U.N. Human Rights Council in July 2011.\textsuperscript{197} These principles, which have been widely lauded (including, notably, by the Organization for Economic Cooperation and Development (OECD) when it revised its Guidelines for Multinational Enterprises in 2011),\textsuperscript{198} do not enumerate specific human rights which corporations are responsible to protect.\textsuperscript{199} Rather, according to these Guiding Principles,

\begin{footnotes}
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The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.200

More crucially, and unlike the previous proposed set of norms, the Guiding Principles confirm that States are the primary duty-bearers under international human rights law and that corporations may not be held directly accountable for its breaches; unlike States, corporations have responsibilities for human rights which are not correlative to a right.201 The responsibility to respect human rights requires that business enterprises “[a]void causing or contributing to adverse human rights impacts through their own activities,” and “[s]eek to prevent ... adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”202 Conversely, “States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.”203 This approach is in line with an institutional model of human rights duties, which acknowledges the unique capacity of institutions to realize human rights, by “spreading the burden or cost of respecting human rights on the members of the community in a feasible manner and a way that centralizes the resources available.”204 As highlighted by one commentator, States fulfill their human rights duties “by using their regulatory powers or by providing public services to the population, relying on the tool of taxation and following a ranking of the priorities—education, health, public utilities, national defence, and so forth—that is settled through democratic debate”; such tools, however, are not at the disposal of corporations.205

Pursuant to the Guiding Principles, in order to meet their

200. Id.
201. See id. at princ. 4, cmt, 13, princ. 11.
202. Id. at princ. 13.
203. Id. at princ. 1, cmt.
204. Besson, supra note 144, at 420 (reiterating an argument developed by Henry Shue).
responsibility to respect human rights, business enterprises should, among other measures, establish policies and processes, including publicly available statements reflecting their commitments.\textsuperscript{206} McDonald’s has adopted and released such a statement which appears in its Standards of Business Conduct, which were last updated in 2013:

At McDonald’s, we conduct our activities in a manner that respects human rights as set out in The United Nations Universal Declaration of Human Rights. We do not use any form of slave, forced, bonded, indentured or involuntary prison labor. We do not engage in human trafficking or exploitation, or import goods tainted by slavery or human trafficking. We support fundamental human rights for all people. We will not employ underage children or forced laborers. We prohibit physical punishment or abuse. We respect the right of employees to associate or not to associate with any group, as permitted by and in accordance with applicable laws and regulations. McDonald’s complies with employment laws in every market where we operate.\textsuperscript{207}

According to the company, its standards and policies relating to human rights are informed by reference to the UNDHR, the ICCPR, the ICESCR, the U.N. Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.\textsuperscript{208} While some multinational companies have adopted corporate codes of social responsibility that include a living wage,\textsuperscript{209} McDonald’s statement, however, omits any reference to the right to just and favorable conditions of work included in the ICESCR.\textsuperscript{210} Moreover, McDonald’s also concedes that its standards apply solely to the company and its

\textsuperscript{206} Guiding Principles, supra note 199, at princ. 15-16.


\textsuperscript{208} McDonald’s, Report of the Sustainability and Corporate Responsibility Committee of the Board of the Directors of McDonald’s Corporation annex 1, at 1 (2014), http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202014/HumanRights.pdf.

\textsuperscript{209} See, e.g., Novartis, Corporation Responsibility Guideline 2 (2014), http://www.novartis.com/downloads/corporate-responsibility/resources/cr-guideline-2014.pdf ("We care for our associates, and work to provide them with a safe and healthy workplace, a living wage and opportunities to enhance their careers. . . .") (emphasis added).

\textsuperscript{210} See generally Report of the Sustainability and Corporate Responsibility Committee of the Board of Directors of McDonald’s Corporation, supra note 208.
employees, but not to its franchisees, which represent about 90% of the company’s restaurants and are merely “encouraged” to adopt similar standards.211

V. CONCLUSION

The fast-food workers’ movement draws attention to some of the most controversial questions raised by human rights in the context of work: Is it plausible to argue that working conditions are matters of human rights? Do workers’ claims for higher wages remain “mere aspirations for the good life masquerading as something more fundamental?”212 What is the scope of the obligations to which workers’ rights give rise and which responsibilities are incumbent upon States or upon employers in realizing those rights? The current struggles of the fast-food workers further highlight the critical consequences of the non-incorporation of international law in domestic legal orders: as “the United States does not embrace the full scope of the obligations that international law imposes” and in the absence of mechanisms for the enforcement of international norms, the traction that international human rights law should provide for the protection of workers appears hampered.213 While this might explain why in the United States the labor movement and the human rights movement remain on discrete tracks which appear unlikely to merge, the fast-food workers can be said to have started to bring the two tracks closer by triggering a newly-robust public debate about the definition of a decent living, about the method for calculating a living wage, and about the means for guaranteeing it. Addressing these issues is indispensable in confronting the feasibility objection to the right of workers to a remuneration ensuring a decent living and, thereby, resisting the common critique that “human rights promises more than it can deliver.”214

In the course of exposing the ingrained challenges to unionization posed by new business models, the fast-food workers have found innovative ways to circumvent the problems resulting from the NLRA’s

211. Id. at 2-3; McDonald’s USA Minimum Wage Labor Statement, supra note 47.
application to a franchised industry.\(^{215}\) Even though the NLRA does not oblige franchisors to bargain with workers, the campaign has placed relentless pressure upon the profitable fast-food corporations, which define the operating constraints imposed upon the franchisees.\(^{216}\) Such efforts to press for the accountability of the fast-food corporations in the court of public opinion have already led to significant success. On July 22, 2015, the Fast-Food Wage Board in the State of New York—the birthplace of the movement—voted to increase the minimum wage to $15 over the next few years for the employees of fast-food chains.\(^{217}\) This increase was put into effect by an order of the State’s Commissioner of Labor on September 10, 2015.\(^{218}\) Moreover, prior to that decision, in

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215. See Sanburn, supra note 53 (showing how fast-food workers used nonconventional means to approach increasing their wages, including public gatherings to raise awareness and to initiate legal change).

216. In the 1980s, the SEIU used a similar combination of strikes, media outreach, and political pressure against commercial real estate owners in an effort to organize janitors employed by service contractors. See John Howley, Justice for Janitors: The Challenge of Organizing in Contract Services, 15 LAB. RES. REV. 61, 61-62 (1990); Josh Eidelson, The Lessons Unions Learned from the ‘Justice for Janitors’ Protests, BLOOMBERG POL. (June 16, 2015 5:55 AM), http://www.bloomberg.com/politics/articles/2015-06-16/the-lessons-that-unions-learned-from-the-justice-for-janitors-protests. More recently Florida tomato farmworkers used similar methods to advocate for higher wages: through public pressure, this group of farmworkers concluded agreements directly with major restaurant chains and retailers (including McDonald’s) pursuant to which the latter pledged to pay a penny more per pound of tomato to the farm owners, who in turn agreed to dedicate that increase to paying higher wages to “pickers.” See Steven Greenhouse, In Florida Tomato Fields, a Penny Buys Progress, N.Y. TIMES (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html. See About CIW, COALITION IMMOKALEE WORKERS, http://ciw-online.org/about/ (last visited Oct. 27, 2015) for information about the so-called Fair-food Program launched by the Coalition of Immokalee Workers. However, in contrast to the case of the Immokalee Workers, fast-food corporations have so far refused to acknowledge the fast-food workers as negotiating partners.

217. Patrick McGeehan, New York Plans $15-an-Hour Minimum Wage for Fast Food Workers, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html. The raise will apply to all workers in fast-food restaurants that are part of chains with at least thirty outlets, and wages should increase sooner in New York City to account for the cost of living which is higher than in the rest of New York. Id.

218. N.Y. DEP’T OF LABOR, ORDER OF ACTING COMMISSIONER OF LABOR MARIO J. MUSOLINO ON THE REPORT AND RECOMMENDATIONS OF THE 2015 FAST FOOD WAGE BOARD (Sept. 10, 2015), http://labor.ny.gov/workerprotection/laborstandards/pdfs/FastFood-Wage-Order.pdf. After its initial challenge to the fast food minimum wage order was rejected by the Industrial Board of Appeals (an administrative agency within the New York State Department of Labor), the National Restaurant Association filed an appeal to the New York Supreme Court’s appellate division on 18 December 2015. “The brief argues that the labor commissioner exceeded his authority, violated the state’s separation of powers and violated the commerce clause of the U.S. Constitution because the raise ‘unfairly discriminates against businesses affiliated with national chains, for the benefit of New York-only chains.’” Marie J. French, Restaurant Group Files Appeal to Challenge $15 an Hour Fast-food Minimum Wage, N.Y. BUS. J. (Dec. 18, 2015 5:28PM), http://www.bizjournals.com/newyork/news/2015/12/18/restaurant-group-files-minimum-wage-
April 2015, McDonald’s announced that it would increase its wages one dollar over the locally mandated minimum wage.219 This raise, however, is applicable only to the company-owned restaurants, and not to the approximately 90% of McDonald’s restaurants in the United States which are operated by franchisees.220 Yet, even the strength of the franchise business model as a shield from liability may have begun to erode under workers’ persistent pressure.221 In a potentially landmark finding in December 2014, the NLRB determined that there was merit in unfair labor practice charges against McDonald’s restaurants, including allegations of “discriminatory discipline, reductions in hours, discharges, and other coercive conduct directed at employees” in the context of the movement’s protests.222 In an unprecedented move, the NLRB decided to hold McDonald’s responsible for the alleged charges as a “joint employer” with its franchisees:

Our investigation found that McDonald’s, USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees’ operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act. This finding is further supported by McDonald’s, USA, LLC’s nationwide response to franchise employee activities while participating in fast food worker protests to improve their wages and working conditions.223

While litigation of this matter has just begun and a final decision
remains years away, another decision issued by the NLRB on August 27, 2015 further increased the likelihood that McDonald’s may ultimately be found to be a joint-employer of workers at its franchised restaurants. In Browning-Ferris, the NLRB characterized its own joint-employment jurisprudence, which required that the exercise of “direct and immediate control” over workers to be deemed a joint employer, as “increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.” As a result, the NLRB decided that it would “no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but also exercise that authority”; nor will it be necessary that “to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately.” This restatement of the standard for assessing joint-employer status under the NLRA, which focuses on the “[r]eserved authority to control terms and conditions of employment,” represents a crucial step toward reforming the regulatory approach to the franchise business model in a way that better supports workers’ exercise of their right to organize as well as the provision of wages ensuring a decent living, as it makes it easier to hold fast-food and other corporations accountable for the working conditions prevailing in their franchised locations. Such a change, which is consistent with the ILO experts’ recommendations to preserve collective bargaining irrespective of workers’ contractual arrangements, would be in line with States’ obligations under international human rights law to protect and fulfill the right of workers to organize and to favorable

224. The cases have been referred for trial before administrative law judges, whose decisions may be appealed to the U.S. Courts of Appeals and ultimately the U.S. Supreme Court. The NLRB Process, NLRB, https://www.nlrb.gov/resources/nlrb-process (last visited Dec. 31, 2015).


228. Id. at 2.

229. Id.

conditions of work.\footnote{G.A. Res. 2200A, \textit{supra} note 64, art. 7-8, at 50.}

The fast-food workers’ challenge to corporate power comes at an auspicious moment for the United States. At the national level, the movement raises the question of the government’s obligations in relation to labor and wages at the outset of the 2016 Presidential campaign, placing this issue squarely on the national political agenda.\footnote{Patrick McGeehan, \textit{Push to Lift Minimum Wage is Now Serious Business}, \textit{N.Y. Times} (July 23, 2015), http://www.nytimes.com/2015/07/24/nyregion/push-to-lift-hourly-pay-is-now-serious-business.html; Zachary Roth, \textit{Hillary Clinton Throws Support Behind Fast-Food Workers in Surprise Call}, MSNBC (June 8, 2015, 8:51 AM), http://www.msnbc.com/msnbc/hillary-clinton-support-fast-food-workers.} At the international level, in September 2014, the U.N. Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises applauded President Barack Obama’s announcement that the United States would “develop a national action plan to promote responsible and transparent business conduct in line with the U.N. Guiding Principles on Business and Human Rights.”\footnote{\textit{See UN Expert Group Welcomes US Plan on Responsible Business and Calls for an Inclusive Process}, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RIGHTS (Oct. 1, 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15129&LangID=E. Twenty other States are in the process of developing such a national action plan or have committed to doing one, and eight States have already produced one. \textit{State National Action Plans}, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (last visited Oct. 21, 2015).} At a time when the rise of precarious employment challenges traditional organizing models and leaves countless workers hard pressed to sustain themselves, the fast-food workers’ movement, under the banner “We Are Worth More,”\footnote{\textit{See} Steven Greenhouse, \textit{Strong Voice in “Fight for 15” Fast Food Wage Campaign}, \textit{N.Y. Times} (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/business/in-fast-food-workers-fight-for-15-an-hour-a-strong-voice-in-terrance-wise.html.} reminds the public and policy-makers alike that the employment relationship goes beyond the mere satisfaction of supply and demand, or, as phrased by the 1944 Declaration of Philadelphia annexed to the ILO Constitution, that “labour is not a commodity.”\footnote{[ILO], \textit{CONSTITUTION}, \textit{supra} note 76, annex.} The movement’s efforts have highlighted compelling concerns concerning human rights at work; it is yet to be seen whether these questions will be met by similarly compelling answers.