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**THE STUDENT-ATHLETE’S RIGHT TO  
ORGANIZE: HOW THE UNITED STATES IS  
VIOLATING THE INTERNATIONAL LABOR  
ORGANIZATION CONSTITUTION AND  
DECLARATION OF FUNDAMENTAL RIGHTS**

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## I. INTRODUCTION

For decades, student-athletes have been at the center of a contentious debate regarding their status as students versus employees.<sup>1</sup> The United States court system has ruled both ways on the issue, at times finding that student-athletes are employees, and at other times, finding that they are not.<sup>2</sup> Determining whether student-athletes are employees is significant because the United States Supreme Court declared in its 1995 ruling in *NLRB v. Town & Country Elec., Inc.*<sup>3</sup> that only employees have the right to unionize.<sup>4</sup>

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1. See Ian Crouch, *Are College Athletes Employees?*, NEW YORKER (Mar. 27, 2014), <http://www.newyorker.com/news/sporting-scene/are-college-athletes-employees> (commenting on the dispute regarding whether the scholarship players on the Northwestern University football team are employees of the university); see also John P. Crecine, *Student Athletes Are Students as Much as Athletes*, N.Y. TIMES (Sept. 17, 1988), <http://www.nytimes.com/1988/09/17/opinion/1-student-athletes-are-students-as-much-as-athletes-860988.html> (arguing against treating student-athletes as employees).

2. See *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953) (holding that Nemeth was an employee of the university who could obtain worker's compensation because his employment was directly connected to his position on the university's football team); see also *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 175 (Cal. App. 2d 1963) (holding the Commission incorrectly determined that the widow of a California State Polytechnic College football player could not receive worker's compensation benefits for her husband who was killed in a plane crash returning from a football game because there was no employer-employee relationship). *Contra* *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (affirming that the former scholarship football player was not an employee of the university); *Shepard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 835-36 (Cal. Ct. App. 2002) (holding that the member of the university women's basketball team could not sue under the Fair Employment and Housing Authority Act because she was a student and not an employee).

3. 516 U.S. 85, 89 (1995).

4. See *id.* at 98 (holding NLRB's interpretation of the term "employee" to be lawful).

This right is critical to maintaining safe work conditions, fair compensation, and other basic rights in the workplace.<sup>5</sup> In the United States, the right to unionize is a basic tenant for adequately protecting workers' rights.

Recently, the National Labor Relations Board ("NLRB") issued a surprising ruling that denied a group of Northwestern University football players the opportunity to organize into a union.<sup>6</sup> The decision overturned a prior ruling by the local NLRB chapter that permitted the players to organize.<sup>7</sup> The earlier decision determined that the scholarship football players were employees of Northwestern and should be allowed to organize into a union and hold union elections.<sup>8</sup> The 2015 overturning of this decision has been the latest blow to the efforts of student-athletes to organize and receive compensation for the work they perform for their colleges and universities.<sup>9</sup>

The International Labor Organization ("ILO") is a United Nations agency that serves to globally promote workers' rights, encourage employment opportunities, enhance social protection, and strengthen

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5. Donna Brazile, *What have unions done for us?*, CNN (Sept. 4, 2012), <http://edition.cnn.com/2012/09/04/opinion/brazile-unions/>.

6. See *Nw. Univ. Emp'r & Coll. Athletics Players Ass'n (CAPA) Petitioner*, 13-RC-121359, 362 N.L.R.B. 167, at 1 (Aug. 17, 2015) (declining jurisdiction over the case regarding whether to allow grant-in aid scholarship players to unionize because it would not effectuate the policies of the National Labor Relations Act ("NLRA") and would not promote stability in labor relations).

7. See Melanie Trottman, *NLRB Sacks Northwestern Football Players' Unionizing Drive*, WALL ST. J. (Aug. 17, 2015), <http://www.wsj.com/articles/nlrbd-clines-to-decide-whether-northwestern-football-players-can-unionize-1439828380> (discussing Northwestern's appeal of a decision by an NLRB Regional Director, which determined that the student-athletes were employees).

8. See *Nw. Univ. Emp'r & Coll. Athletics Players Ass'n*, 362 N.L.R.B. 167, at 13 (ruling that the football players are employees within the definition of employee under the NLRA and should be allowed to organize; the NLRA definition of employee is based on the common law definition that regards individuals as employees when they are under the "strict and exacting" control of their employer, are not primarily students, have athletic duties that are not a core element of their degree requirements, do not have faculty overseeing their athletic activities, and are not temporary employees).

9. Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 743 (2007-2008) (noting that the NLRB denied graduate assistants at Brown University employee status because allowing the status would encroach on traditional academic freedom).

dialogue on work-related issues.<sup>10</sup> The ILO Declaration of Fundamental Rights requires all members to “respect,” “promote,” and “realize” in good faith the right of “freedom of association and the effective recognition of the right to collective bargaining.”<sup>11</sup> The United States has been a member of the ILO since 1934.<sup>12</sup> During that time, the United States has ratified only fourteen of the ILO’s 189 conventions, but contributes twenty-two percent to the ILO’s budget every two years.<sup>13</sup> As a member of the organization, the United States is bound to its core labor standards, including the right of freedom of association.<sup>14</sup>

The ILO Constitution offers a process for remedying violations of its Constitution and core labor standards.<sup>15</sup> Malaysia, Myanmar, and Uzbekistan are all recent examples of countries who have faced

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10. *Mission and Objectives*, ILO, <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm> (last visited Mar. 29, 2016).

11. See *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, ILO (June 18, 1998), <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm> (declaring that all ILO member states must respect collective bargaining rights regardless of whether those states have signed any specific treaties on the matter).

12. See *Brief History and Timeline*, ILO, <http://www.ilo.org/washington/ilo-and-the-united-states/brief-history-and-timeline/lang—en/index.htm> (last visited Mar. 29, 2016) (acknowledging that the United States joined the ILO, which was the only League of Nations organization the United States was affiliated with and which later became a specialized agency of the United Nations in 1946).

13. See *The US: A Leading Role in the ILO*, ILO, <http://www.ilo.org/washington/ilo-and-the-united-states/the-usa-leading-role-in-the-ilo/lang—en/index.htm> (last visited Mar. 29, 2016) [hereinafter *The US: A Leading Role*] (describing the United States’ role in the ILO and noting that the United States is a signatory of two of the ILO’s core labor standards: the Abolition of Forced Labor and the Elimination of the Worst Forms of Child Labor).

14. See *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, *supra* note 11 (stating that all members, regardless of whether they have ratified the Convention, are obligated through membership in the ILO to promote and realize fundamental rights principles such as “freedom of association” which is subject to the ILO).

15. See *International Labor Organization Constitution* art. 29-33, ILO (May 10, 1944), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> (stating that after a complaint has been submitted to the Commission, it will adopt a report embodying its findings and if that report is not followed, the matter can be referred to the governing body; any decision by the International Court of Justice (“ICJ”) is final; the ICJ may affirm, reverse, or modify recommendations; if an ICJ ruling is not followed, the governing body may recommend action).

criticism from the ILO for not following its fundamental standards.<sup>16</sup>

This Comment argues that student-athletes are in fact employees entitled by international law to collectively bargain, and the United States violates international labor law by failing to recognize their status as employees and preventing them from forming unions. Section II explains the worker's basic right of freedom of association, and why this is a fundamental right that all ILO member nations must respect.<sup>17</sup> It highlights examples of actions taken against nations that violated this right and other fundamental values of the ILO.<sup>18</sup> It also explains the legal framework for determining who is an employee and why student-athletes are employees.

Section III argues that student-athletes meet the legal definition of employees, and therefore should be allowed to unionize pursuant to the ILO Constitution and 1998 Declaration of Fundamental Rights.<sup>19</sup> It also argues that the United States violates this international labor law by denying student-athletes the right to organize. Finally, section IV offers possible solutions so student-athletes may organize to receive the compensation and benefits they deserve.<sup>20</sup>

## II. BACKGROUND

The controversy surrounding whether student-athletes should be employees, or at least receive compensation, has been swirling for decades, but recently hit its peak as television contracts, sports

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16. See *Employers and Unions Unite at World Forum to Condemn "Worst Form" of Child Labor in Uzbekistan*, ITUC-CSI (June 10, 2011), <http://www.ituc-csi.org/employers-and-unions-unite-at> (mentioning that the ILO requested Uzbekistan to allow an independent committee to oversee its cotton harvest to ensure Uzbekistan's compliance with fundamental labor rights); see also *Complaint (article 26) - 1996 - MYANMAR - C029*, ILO (1996), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2508280,en](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2508280,en) (complaint against Myanmar for practicing forced labor); *Case No 2717*, ILO (May 22, 2009), [https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001\\_COMPLAINT\\_FILE\\_ID:2897703](https://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:2897703) (complaint against Malaysia for inadequately protecting workers' rights to organize).

17. *Infra* note 21.

18. *Infra* note 22.

19. *Infra* notes 86-87.

20. *Infra* notes 144-45.

attendance, and advertising budgets exploded.<sup>21</sup>

#### A. HISTORY OF STUDENT-ATHLETES' EMPLOYMENT STATUS

College athletes are called “student-athletes,” a term coined in the 1950s by the National Collegiate Athletic Association (“NCAA”) when the widow of Ray Dennison, who died from a head injury while playing football for the Fort Lewis A&M Aggies, filed to receive workers’ compensation death benefits.<sup>22</sup> The Supreme Court of Colorado denied Dennison’s wife the benefits, holding that there was no evidence that Dennison was hired under contract to play football when he was injured.<sup>23</sup> This holding contradicted an earlier ruling by the Colorado Supreme Court where a college football player at the University of Denver was permitted to receive workers’ compensation benefits because his employment with the university was directly connected to his playing on the football team.<sup>24</sup>

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21. See *Introduction and Background*, NAT’L COLLEGIATE PLAYERS ASS’N, [http://www.ncpanow.org/research/body/Introduction\\_and\\_Background.pdf](http://www.ncpanow.org/research/body/Introduction_and_Background.pdf) (last visited Mar. 29, 2016) (highlighting several lucrative television broadcasting deals including the NCAA’s deal with CBS and Turner Sports to broadcast the NCAA Men’s Basketball Tournament (\$10.8 billion for 14 years) and the aggregate 34 million fans who attended home games for the 2010 Football Bowl Subdivision); see also Steve Siebold, *It’s Time to Pay College Athletes*, HUFFINGTON POST (Oct. 13, 2014), [http://www.huffingtonpost.com/steve-siebold/its-time-to-pay-college-athletes\\_b\\_5672988.html](http://www.huffingtonpost.com/steve-siebold/its-time-to-pay-college-athletes_b_5672988.html) (arguing that college athletes should be paid because the athletes drive the \$11 billion annual industry). *Contra* Theodore Ross, *Cracking the Cartel: Don’t pay NCAA football and basketball players*, NEW REPUBLIC (Sept. 1, 2015), <http://www.newrepublic.com/article/122686/dont-pay-college-athletes> (arguing the current system is not real amateurism and that money must be removed from the equation).

22. See Taylor Branch, *How the Myth Of The NCAA “Student-Athlete” Was Born*, DEADSPIN.COM (Feb. 20, 2014), <http://deadspin.com/how-the-myth-of-the-ncaa-student-athlete-was-born-1524282374> (writing that the NCAA’s first Executive Director, Walter Byers, claimed “we crafted the term student-athlete” to aid the NCAA in its objections to workers’ compensation insurance claims for injured football players).

23. See *State Comp. Ins. Fund v. Indus. Comm’n of Colo.*, 314 P.2d 288, 289 (Colo. 1957) (holding there was no employer-employee relationship to support a claim under the Workmen’s Compensation Act).

24. See *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953) (holding that the athlete was an employee of the university and arguing his back injury during a spring football practice arose “out of and in the course of his employment”).

Since these early cases, courts have been split on whether to consider student-athletes employees.<sup>25</sup> Whether these athletes are designated employees is significant because under the law of the United States, only employees are allowed to unionize, and thus, collectively bargain for their rights, such as fair compensation, benefits, and working conditions.<sup>26</sup>

In 2014, a group of Northwestern football players formed the College Athletes Players Association (“CAPA”) to represent student-athletes in negotiations with their respective colleges and universities.<sup>27</sup> CAPA’s goals include guaranteeing coverage of sports-related medical expenses for current and former players, minimizing the risk of sports-related traumatic brain injury, improving graduation rates, increasing athletic scholarships, allowing players to receive compensation for commercial sponsorships, and securing due process rights.<sup>28</sup> The United Steelworkers agreed to provide CAPA with the necessary resources, provide a legal team, and represent them before the NLRB.<sup>29</sup>

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25. See *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 169 (Cal. App. 2d 1963) (awarding worker’s compensation benefits to the widow of a California State Polytechnic College football player who was killed in a plane crash returning from a football game). *Contra Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 835-36 (Cal. Ct. App. 2002) (holding that Shephard could not sue under the Fair Employment and Housing Authority Act because she was a student and not an employee).

26. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995) (granting certiorari to hear the case to decide on the meaning of “employee” because only “employees” are permitted to organize under the NLRA).

27. See Leo W. Gerard, *Northwestern University Football Players Form Their Own Team*, HUFFINGTON POST (Apr. 5, 2014), [http://www.huffingtonpost.com/leo-w-gerard/northwestern-football-players-union\\_b\\_4712802.html](http://www.huffingtonpost.com/leo-w-gerard/northwestern-football-players-union_b_4712802.html) (supporting the cause of the Northwestern football players and highlighting the NCAA’s statistics that, respectively, the Football Bowl Subdivision players and Division I men’s basketball players spent 43.3 and 39.2 hours a week in training, yet 43% of football players and 53% of men’s basketball players do not graduate).

28. See *What We’re Doing*, CAPA, <http://www.collegeathletespa.org/what> (last visited June 21, 2016) (highlighting the organization’s goals to reduce contact in practices, use independent concussion experts and establish uniform “return to play” protocols concerning head injuries, advocate for consistent punishments for rule violations across college campuses, establish an educational trust fund to help former players finish their degrees, and reward players for completing their degrees on time).

29. See *id.* (discussing that the goal behind the United Steelworker’s legal

The regional board of the NLRB found the CAPA players to be “employees” under the National Labor Relations Act (“NLRA”) and ordered a union election in which all eligible scholarship football players could vote.<sup>30</sup> The national NLRB board overturned this decision, however, by declining jurisdiction and claiming the decision would not effectuate the policies of the NLRA and would not promote stability in labor relations.<sup>31</sup>

### B. BASIC EMPLOYMENT TESTS

There are two basic tests for determining whether a person is an employee.<sup>32</sup> The first test is the control test, which asks whether the employer has the right to control the employee.<sup>33</sup> Under the control test, the court reviews whether the employer controls the physical conduct of the employee, the employee’s compensation, and the intent of the parties.<sup>34</sup>

The second test is the nature of the employee’s work as related to the employer’s business.<sup>35</sup> Here, courts examine whether an

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representation is to prove that the NLRB covers student-athletes).

30. See *Nw. Univ. Emp’r & Coll. Athletics Players Ass’n (CAPA) Petitioner*, 13-RC-121359, 362 N.L.R.B. 167, at 1 (Aug. 17, 2015) (holding that the football players were employees because they were not primarily students, their athletic commitments were not a core part of their academic responsibilities, the academic faculty did not oversee their athletic commitments, the grant-in-aid players’ compensation was not financial aid, and the players were not temporary employees); see also National Labor Relations Act, 29 U.S.C.A. § 152(3) (1935) (stating the term “employee” shall include individuals “whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment”).

31. See *Nw. Univ. Emp’r & Coll. Athletics Players Ass’n*, 362 N.L.R.B. 167, at 6-7 (noting that the court asserting jurisdiction over one team would destabilize labor relations because of the interconnectedness between teams and the conferences and that a labor issue involving one team would have ramifications for other teams and players).

32. Sean Alan Roberts, Comment, *College Athletes, Universities, and Workers’ Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315, 1322 (1996).

33. *Id.*

34. See *id.* (comparing the “control test” with the “master-servant” test under the Restatement (Second) of Agency, which uses the same criteria).

35. *Id.* at 1324.



employee's duties are a substantial and recurring part of the employer's business.<sup>36</sup> Courts look at the employee's work, the skill involved, the degree to which the employee maintains a separate occupation or business from the employer, and the extent to which the employee is expected to carry his or her own insurance and regularly pay out-of-pocket business expenses.<sup>37</sup>

### C. INTERNATIONAL LABOR ORGANIZATION

The ILO was formed to protect the rights of workers around the world.<sup>38</sup> There are currently 186 member countries of the ILO, including the United States, which joined in 1934.<sup>39</sup> The ILO investigates and issues reports of member states that reportedly do not uphold its tenants.<sup>40</sup> Governments must then report the status of their laws and practices regarding compliance with the ILO's report.<sup>41</sup> Several countries have been the subject of these investigations and reports, including Zimbabwe, China, Brazil, and Uzbekistan.<sup>42</sup>

The ILO was created as a tripartite system in which the governments, employers, and employees have representatives in the

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36. *Id.*

37. *See id.* (noting that the "relative nature of work" test is increasingly being used in more jurisdictions that once adhered to the control test due to its flexibility).

38. *See Mission and Objectives*, *supra* note 10 (emphasizing the organization's devotion to promoting social justice and international human and labor rights).

39. *The US: A Leading Role*, *supra* note 13; *see Alphabetical List of ILO Member Countries (186 Countries)*, ILO, <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited Mar. 29, 2016); *see generally Mission and Objectives*, *supra* note 10 (stating that post World War II, the number of ILO Member States doubled and industrialized countries became a minority among developing countries).

40. *See ILO Supervisory System / Mechanism*, ILO, <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang-en/index.htm> (last visited Mar. 21, 2016) (discussing the ILO's supervisory system which involves regular examination of member states' standards and recommendations as to how to develop more effective standards application).

41. *Applying and Promoting International Labour Standard*, ILO, <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm> (last visited Mar. 29, 2016).

42. *Infra* notes 62-63, 74-75.

ILO's executive body.<sup>43</sup> It was established by the Treaty of Versailles in 1919,<sup>44</sup> and its Constitution was drafted the same year.<sup>45</sup> The preamble of the ILO Constitution recognizes that "universal and lasting peace can be established only if it is based upon social justice," and lists a number of tenants that should be followed to achieve these goals, including the freedom of association.<sup>46</sup> The ILO established the Committee of Experts (the "Committee") in 1926 to supervise the application of ILO standards.<sup>47</sup>

In 1946, the ILO became a special agency of the United Nations and adopted convention 87 on freedom of association.<sup>48</sup> Conventions are legally binding international treaties that may be ratified by member states.<sup>49</sup> If they are ratified, the country commits itself "to applying the convention in national law and practice and regularly reporting on its application."<sup>50</sup> Even if not ratified, all member countries must respect the eight fundamental core principles.<sup>51</sup>

The ILO's governing body has identified certain conventions as "fundamental" principles and rights at work, and in 1998, collated them into the Declaration on Fundamental Principles and Rights at

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43. See *Origins & History*, ILO, <http://www.ilo.org/global/about-the-ilo/history/lang—en/index.htm> (last visited Mar. 29, 2016) (claiming to be the only tripartite organization of its kind in the world due to this unique structure of bringing together diverse representatives in its executive bodies).

44. See *id.*

45. See *id.* (noting that the Constitution was drafted by the tripartite organization and a commission of representatives from Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United States, and the United Kingdom).

46. *International Labor Organization Constitution* art. 29-33, ILO (May 10, 1944), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>.

47. *Origins & History*, *supra* note 43 (stating that the Committee still exists today as a supervisory system for the application of ILO standards and is composed of independent jurists who examine governmental reports and present the annual reports to the Peace Conference).

48. *Id.*

49. *Conventions and Recommendations*, ILO, <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm> (last visited Mar. 19, 2016).

50. *Id.*

51. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, *supra* note 11 (stating that the ILO fundamental principles apply to all States in the ILO even if they have not ratified the core Conventions).

Work (“ILO Declaration”).<sup>52</sup> These fundamental principles are: freedom of association, the right to collective bargaining, elimination of all forms of forced or compulsory labor, abolition of child labor, and elimination of discrimination in respect to employment and occupation.<sup>53</sup> Significantly, the ILO declares that all member states have an obligation to respect, promote, and realize these fundamental principles and rights, regardless of whether they ratified the individual conventions.<sup>54</sup>

#### D. ILO MEMBER COUNTRIES THAT VIOLATED ILO CONVENTIONS

If an ILO member country violates a convention, ILO Constitution articles 24 and 25 permit the workers or employers to present the case before its governing body.<sup>55</sup> Then, a tripartite committee investigates the case and files a report.<sup>56</sup> This is the case for all fundamental conventions covered under the ILO Declaration, regardless of whether the ILO member country ratified the specific convention relating to the violation. The examples below illustrate this point: China had not ratified all of the fundamental conventions in the ILO Declaration, yet was investigated and reported by the ILO for alleged violations. Similarly, Zimbabwe, Brazil, and Uzbekistan are ILO member countries that ratified and then violated specific conventions, and were also investigated by the ILO.

##### 1. China

China has not ratified all of the ILO fundamental conventions, and today, it still has not ratified conventions 87 and 98 on the freedoms

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52. *Conventions and Recommendations*, *supra* note 49.

53. See ILO, FUNDAMENTAL CONVENTIONS 1, 7 (2d ed. 2003) [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_095895.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf) (noting that these principles are representative of rights and conventions that are recognized as fundamental within the ILO and outside the organization).

54. See *id.* at 8 (specifying that the standards apply to all countries in the ILO).

55. *International Labor Organization Constitution* art. 24-25, ILO (May 10, 1944), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>.

56. See INT’L LABOUR OFFICE, RULES OF THE GAME, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_108393.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf) [hereinafter RULES OF THE GAME] (providing that a panel report submitted to a governing body includes an explanation of the legal and practical aspects of the case, an examination of the information, and recommendations).

of association and collective bargaining, respectively.<sup>57</sup> Nonetheless, in 1998, the ILO Commission investigated China for alleged violations of convention 87.<sup>58</sup> Allegations included arbitrary and secret detention of trade unionists and their families; re-education sentences for workers engaged in regular union activities; torture and denial of medical treatment to detained unionists; and dismissal of workers for trade union activity.<sup>59</sup>

The Commission recommended that China make changes to its labor laws to permit the autonomy of parties in collective bargaining, limit the violation of minimum labor standards, and ensure the right of workers to strike to defend their social and economic interests.<sup>60</sup> China responded to the recommendations by citing various parts of its laws that it felt were within the ILO's guidelines.<sup>61</sup> Unsatisfied with this response, however, the Committee recommended that China take additional steps to bring its laws in conformity with the ILO's standards.<sup>62</sup> The ILO made these recommendations despite the fact that China had not ratified the specific convention it violated.

## 2. Zimbabwe

From 1998 through 2003, Zimbabwe ratified all of the ILO fundamental conventions, including conventions 87 and 98, the rights to freedom of association and collective bargaining.<sup>63</sup> In November 2008, the ILO Commission visited Zimbabwe to

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57. *See Ratifications for China*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404) (last visited Mar. 19, 2016).

58. *Report No. 316*, ILO (Jun. 4, 1997) [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002\\_COMPLAINT\\_TEXT\\_ID:2904319#1](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2904319#1) [hereinafter *Report No. 316*].

59. *Id.*

60. *See id.* (discussing specifically the requests by the Committee that the government take necessary steps to amend sections 79 and 83 of the Labour Law).

61. *Id.* (explaining that section 33 of the Labour Law and the supplementary provisions in the Regulations on Collective Contracts both "filled in a gap in the development of the country's legal system").

62. *Id.* (requesting that China establish independent investigations into all of the allegations of ill-treatment and harassment and to punish those responsible).

63. *See Ratifications for Zimbabwe*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103183](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103183) (last visited Mar 21, 2016) (demonstrating that Zimbabwe ratified all eight of the fundamental conventions).

investigate alleged violations of union rights.<sup>64</sup> The allegations included violations of civil liberties against trade union leaders and members who were trying to engage in workers' rights campaigns.<sup>65</sup> The ILO Commission found that Zimbabwe had not institutionally protected trade union rights.<sup>66</sup> The army and police often used violence against the unions, and because there was no guarantee of judicial independence in ruling on such matters, they did so with impunity.<sup>67</sup>

The Commission made a number of recommendations to Zimbabwe: immediately cease anti-union practices; train the police, security forces, and social partners on freedom of association, collective bargaining, civil liberties, and human rights; and harmonize its legislation with ILO conventions 87 and 98.<sup>68</sup>

### 3. Brazil

In 2007, allegations were submitted to the ILO, alleging IGL Industrial Ltd. ("IGL"), a large Brazilian power plant, violated the right of freedom of association. IGL allegedly used authoritarian practices with the Unified Trade Union of Chemical Industry

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64. See *Complaint Procedure*, ILO, ¶ 2, [https://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2508373,en:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2508373,en:NO) (last visited Mar. 19, 2016) (discussing that the Commission of Inquiry was established to examine the complaints filed on behalf of a number of delegates in regards to the Zimbabwe government's observance of conventions 87 and 98).

65. See *id.* at ¶ 6 (detailing specific civil rights violations against union members and leaders, including quasi-systemic arrest, detention, harassment, and intimidation).

66. See *id.* (investigating alleged violations of the right to strike and demonstrate; arrests, detentions, assault, and torture; intimidation of unionists, especially teachers, farm workers, and business people; interfering in trade union affairs and discrimination; collective bargaining and social dialogue; and the institutional protection of trade union rights).

67. See *id.* at ¶ 8 (explaining the calculated and systematic attempts to take action against unionists, most notably against the Zimbabwe Congress of Trade Unions ("ZCTU") that manifested in violence, the targeting of ZCTU officials, and the passing of a law that would give the government control over the ZCTU's events).

68. See *id.* at ¶¶ 9-17 (recommending additional measures such as rendering the Zimbabwe Human Rights Commission operable as soon as possible, and through reinforcement of the rule of law and the role of the courts in the country by providing for adequate resources, appropriate training, and the proper support).

Workers, which represented 2,000 of IGL's employees in Vinhedo, Brazil.<sup>69</sup> Alleged violations included IGL's request to the Sao Paulo military police to diffuse a strike outside its plant; requesting security to cut barbed wire so strike breakers could avoid the picket line; and establishing an organization parallel to the union within the workplace that acts as an enterprise trade union—which is not permitted under Brazilian labor law.<sup>70</sup> In addition, there were allegations that the company sent its managers into workers' meetings, filmed demonstrations, and telephoned threats.<sup>71</sup> In January 2005, the company allegedly went so far as to coerce workers into leaving the union by offering assistance in filling out union resignation forms.<sup>72</sup>

The ILO Committee found the allegations to be troubling, stating that actions such as the parallel group to improve the workplace environment would be allowed if the union could be involved.<sup>73</sup> It also determined that the toll-free hotline that explained how to leave the union and the distribution of union resignation forms interfered in the union's affairs, while urging Brazil's government to investigate UNILEVER's refusal to recognize the nationwide union.<sup>74</sup>

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69. See *Report No. 344*, ILO, ¶¶ A4-6 (Mar. 2007) [http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002\\_COMPLAINT\\_TEXT\\_ID:2909926](http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2909926) [hereinafter *Report No. 344*].

70. See *id.* (explaining that, on a larger scale, UNILEVER allegedly refused to recognize the National Trade Union Committee of UNILEVER Brazil, which encompasses all of the trade unions representing the plants across Brazil).

71. See *id.* (noting a contradiction in the statements between the company and the unionists as company representatives denied the existence of any alleged anti-union practices).

72. See *id.* at ¶ A7 (explaining the “serious interference in the legitimate activities of the Union” for which workers were encouraged by the company to call an 0800 telephone number whereupon they were asked whether they would like to leave the union and if selected, a company agent would fill in their resignation forms and send them to the union).

73. See *id.* at ¶ C1 (noting that workers who are members of the union may participate in the group, but union officials who do not work for the company are left out).

74. See *id.* at ¶ C14 (noting that UNILEVER contended that only three other trade unions were part of the national trade union, while the eleven other trade unions that consist of ninety-five percent of the staff, considered the company's refusal to recognize the national trade union as a threat to their organization).

#### 4. Uzbekistan

Most recently, Uzbekistan violated a fundamental convention it had ratified when it forced children, ages ten to sixteen, to assist in the cotton harvest.<sup>75</sup> Reports suggest that children and families who did not work in the cotton harvest were punished by cutting off gas and welfare subsidies, and beating or expelling children from school for not meeting quotas.<sup>76</sup> In doing so, Uzbekistan blatantly ignored its own domestic laws and the ILO's fundamental conventions against child labor.<sup>77</sup>

The violations were brought to the ILO's attention in 2004.<sup>78</sup> In 2009, the ILO Committee issued a report on Uzbekistan acknowledging the country's violations of the convention on the Worst Forms of Child Labor.<sup>79</sup> The Committee's report is a scathing account of Uzbekistan's continued practices of forced labor,

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75. INT'L TRADE UNION CONF., EMPLOYERS AND UNIONS UNITE AT WORLD FORUM TO CONDEMN "WORST FORM" OF CHILD LABOR IN UZBEKISTAN (June 10, 2011), <http://www.ituc-csi.org/employers-and-unions-unite-at?lang=en> [hereinafter CHILD LABOR IN UZBEKISTAN].

76. *See id.*; *see also* ANTI-SLAVERY, FORCED LABOUR IN UZBEKISTAN'S COTTON INDUSTRY (July 2009) (detailing further abuses and hardships such as how older students would live in dorms, schools, or windowless barracks with insufficient food or water during the two to three-month cotton picking season).

77. *See* CHILD LABOR IN UZBEKISTAN, *supra* note 75 (detailing how Uzbekistan's ignorance of its own domestic laws and the protections of the ILO's fundamental conventions resulted in increased dangers facing children including heavy lifting, exposure to pesticides, and the risk of disease such as rashes, respiratory illnesses, meningitis, and hepatitis); *see Ratifications for Uzbekistan*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103538](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103538) (last visited Mar. 19, 2016) (stating that the Forced Labor Convention defines forced labor as "work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" and the Abolition of Forced Labor Convention states that compulsory labor is illegal if for economic development as well as other reasons).

78. *See Observation (CEACR)*, adopted 2009, published 99th ILC session (2010), ILO, (Aug. 26, 2009), [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2310639](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2310639) (acknowledging the original report, which alleged that public sector workers, children, and university students were mass-organized to assist in the country's cotton industry and that, despite the existence of legal frameworks against such practices, reports by NGO's and media outlets continued to surface regarding the use of forced labor).

79. *Id.*

especially of children, and notes the detrimental plight of Uzbekistan children as reported by the International Organization of Employers.<sup>80</sup> Additional observations supplemented reports that children were being taken out of school in mass numbers to assist in the harvest.<sup>81</sup> The ILO expressed its “serious concern” with Uzbekistan and made a number of recommendations that the country end its use of forced labor and child labor.<sup>82</sup> In 2014, Uzbekistan responded that no one under eighteen would be involved in the cotton harvest.<sup>83</sup> It took serious steps to raise awareness of its stance, including starting after-school programs as alternatives to labor in the cotton fields and monitoring the cotton harvest using the ILO’s recommended methods.<sup>84</sup> The ILO’s report has led Uzbekistan to take steps to reduce the number of children working in the cotton harvest, although many reports still show children being used in the harvest, and adult employees in other professions being sent to the fields to compensate for the loss of child workers.<sup>85</sup>

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80. *Id.* (alleging that hundreds of thousands of Uzbekistan school children are forced to spend up to three months harvesting cotton in the fields away from school, which disproportionately affects the rural children’s educational development).

81. *See id.* (observing that children were being continuously used in the cotton harvest and that they were being subjected to serious health problems, such as intestinal and respiratory infections, meningitis, and hepatitis).

82. *Id.* (noting that this comes in spite of national legislation that prohibits forced labor and hazardous work conditions and recommending that Uzbekistan take effective, “time-bound” measures to end the forced labor of children under the age of eighteen such as through commitments by the government to take immediate measures to investigate and prosecute the offenders and to enforce effective and dissuasive sanctions).

83. U.S. DEPT. OF LABOR, FINDINGS ON THE WORST FORMS OF CHILD LABOR (2014), <http://www.dol.gov/ilab/reports/childlabor/uzbekistan.htm>.

84. *See id.* (revealing that the monitoring effort resulted in a finding of forty-one remaining child laborers and penalized nineteen school officials and farm managers for using child labor, subsequently resulting in the removal of those children from the fields).

85. *See Uzbekistan Ban on Child Labour Forces More Adults into Cotton Workforce*, THE GUARDIAN NEWSPAPER (Nov. 13, 2014), <http://www.theguardian.com/globaldevelopment/2014/nov/14/uzbekistanbanchild-labourforcesadultscottonwork> (highlighting a report from the Cotton Campaign indicating that four million adults were used in the 2014 cotton harvest and as a result, schools, hospitals, and local administrations had to send as many as sixty percent of their staff into the cotton fields to compensate for the loss of labor force).



### III. ANALYSIS

As discussed below, student-athletes meet the control and nature of work tests, and therefore, should be considered employees of their respective universities. As employees, they have the right to organize under international labor law.<sup>86</sup> By not respecting this right, the United States is violating the ILO's fundamental convention of freedom of association. Like China, the United States may be held accountable even though it has not ratified the specific ILO convention on freedom of association.<sup>87</sup>

#### A. STUDENT-ATHLETES ARE EMPLOYEES, AND THUS, SHOULD BE PERMITTED TO UNIONIZE

Student-athletes meet the requirements for both employment tests.<sup>88</sup> First, scholarship athletes are in a position where their employers, the colleges and universities, have complete control over the athletes' physical conduct. Therefore, they meet the control test.

In the initial regional NLRB ruling on this question, the board meticulously explained the routine for Northwestern's football players.<sup>89</sup> Their routines included mandatory fitness tests, meetings, medical treatment, practices, a trip to a training camp in Wisconsin, as well as wake-up times and curfews.<sup>90</sup> In total, Northwestern players devoted fifty to sixty hours per week to football related activities during training camp, forty to fifty hours per week during the regular season, and forty to fifty hours per week if the team attended a post-season bowl game.<sup>91</sup> The athletes were compensated

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86. *Freedom of Association and Protection of the Right to Organise Convention* art. 2-3, ILO (1948), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C087](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087).

87. *Ratifications for United States*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871) (last visited Mar. 22, 2016).

88. See Roberts, *supra* note 32, at 1322-27.

89. See Nw. Univ. Emp'r & Coll. Athletics Players Ass'n (CAPA) Petitioner, 13-RC-121359, 362 N.L.R.B. 167, at 4-8 (Aug. 17, 2015).

90. See *id.* (adding that players had to do mandated stretches before games, that the starting lineup was determined by the coaches, that some players were made available to the media after games, and all players had to attend a required injury check a day after every game).

91. *Id.*

for their services through athletic scholarships, and although the compensation may not have been adequate, for the purposes of this test, the scholarships were compensation controlled by the universities.<sup>92</sup>

Second, similar to the football players at Northwestern, student-athletes meet the relative nature of work test.<sup>93</sup> Colleges and universities use competitive scholarships to recruit the best possible athletes because they want to win games and, in turn, build their reputation. Although Northwestern argued that its main business was education, and the student-athletes' first priority are to be students,<sup>94</sup> according to Northwestern's report to the Department of Education, its football team generated \$235 million in revenue between 2003 and 2012.<sup>95</sup> In 2012 alone, Northwestern's football program generated \$30.1 million in revenue and incurred only \$21.7 million in expenses.<sup>96</sup>

Harvard Business School Assistant Professor of Marketing, Doug Chung, has written about how an athletic program's success increases the quantity and quality of students the school attracts, a phenomenon known as the "Flutie Effect."<sup>97</sup> Professor Chung found

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92. *See id.* at 2 (explaining that players in their first two years must live on campus, so they are provided with dorm housing and meal cards for the school's cafeteria, while upperclassmen who elect to live off campus are given a monthly stipend between \$1,200 and \$1,600 to cover their living expenses, but any additional compensation is forbidden by the NCAA, although they are allowed to set up a Student Assistance Fund to cover health insurance expenses, dress clothes required to be worn when traveling to games, the cost of traveling to a family member's funeral, and fees for graduate school admittance and tutoring).

93. Roberts, *supra* note 32.

94. *See* Post-Hearing Brief for Petitioner, Nw. Univ. Employer & Coll. Athletics Players Ass'n (CAPA), No. 13-RC-121359 (Nat'l Labor Rel. Bd. 2014) (displaying Northwestern's assertion that its players should not be permitted to organize as they are "first and foremost, students as opposed to employees"). *But see* Nw. Univ. Emp'r & Coll. Athletics Players Ass'n, 362 N.L.R.B. 167, at 1 (rejecting Northwestern's argument that their relationship with their football players is primarily academic since the players receive no academic credit for playing football and the football team's activities are not supervised by faculty).

95. *See* Nw. Univ. Emp'r & Coll. Athletics Players Ass'n, 362 N.L.R.B. 167, at 11 (generating revenue through ticket sales, television broadcast contracts, and the sale of football merchandise).

96. *See id.* (utilizing this revenue to subsidize the university's non-revenue sports).

97. *See* Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts*

that admission applications increase by 18.7% when schools go from mediocre to great in football, and that schools become more academically selective with athletic success.<sup>98</sup>

Two specific examples of the Flutie Effect are the forty-five percent jump in admissions applications to Georgetown University between 1983 and 1986 when the school was in the midst of its basketball prominence, and the twenty-one percent jump in Northwestern's applications after it won the Big Ten Football Championship.<sup>99</sup> These examples illustrate that colleges and universities with scholarship student-athletes have a distinct business interest in athletic success that carries over into its academic goals.

Other factors that are examined in the nature of work test are accident coverage, specialized skills required, and compensation paid.<sup>100</sup> The NCAA requires schools to provide student-athletes with health insurance coverage up to a \$90,000 deductible.<sup>101</sup> Undoubtedly, scholarship athletes are highly skilled, as only approximately 460,000 athletes compete in NCAA competitions — a relatively small number compared to the eight million high school students that participate in athletics.<sup>102</sup>

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*College Applications*, FORBES (Apr. 29, 2013), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/> (stating that the rise in applications for colleges following on-field success is named after legendary quarterback Doug Flutie, whose 48-yard Hail Mary touchdown pass to beat the University of Miami in 1984 is credited with causing applications to Boston College to rise 30%).

98. *See id.* (explaining that according to Chung's report, a school would have to lower tuition by 3.8% or hire more quality faculty, who are paid 5% more than their peers to achieve similar gains in applications to football success).

99. *Id.*; *see Men's Basketball Media Guide*, GEO. U., (2014-2015) [http://grfx.cstv.com/photos/schools/gu/sports/m-baskbl/auto\\_pdf/2014-15/misc\\_non\\_event/2014-15\\_MBB\\_Media\\_Guide.pdf](http://grfx.cstv.com/photos/schools/gu/sports/m-baskbl/auto_pdf/2014-15/misc_non_event/2014-15_MBB_Media_Guide.pdf). (detailing that from 1983-1986, Georgetown basketball amassed a 93-14 record, complete with two Big East Tournament Titles, two trips to the Final Four, and one National Championship).

100. *See Roberts, supra* note 32, at 1324.

101. *See* Jon Solomon, *College Athletes' Rights: NCAA requires health insurance, but schools decide what to pay*, (Feb. 19, 2012, 7:55AM), [http://www.al.com/sports/index.ssf/2012/02/college\\_athletes\\_rights\\_ncaa\\_r.html](http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html) (contrasting stories of collegiate athletes whose entire medical care for injuries were covered, as compared to other athletes such as former Oklahoma basketball player Kyle Hardrick, whose family was forced to pay \$10,000 for medical care due to a condition discovered while he was playing basketball for Oklahoma).

102. *See Probability of competing in sports beyond high school*, NCAA,

Regarding compensation, although student-athletes do not earn wages per se, Professor Chung's findings about the "Flutie Effect" — that the success of schools' athletic programs correlate to the funds the schools raise— support the conclusion that scholarships paid to student-athletes is compensation.<sup>103</sup>

While NCAA regulations permit student-athletes to work and earn money elsewhere,<sup>104</sup> the athletes are prevented from earning more than \$2,000 over their scholarship amounts, from receiving endorsements, and from making money for their likeness.<sup>105</sup> These limitations, and essentially monopolization of the student-athletes' time and budget, further illustrate that the scholarships serve as compensation for the athletes' work in athletic programs.

#### B. STUDENT-ATHLETES IN THE UNITED STATES FACE CHALLENGES SIMILAR TO WORKERS IN OTHER NATIONS THAT HAVE NOT RATIFIED ILO CONVENTIONS IN FAVOR OF UNION RIGHTS

College athletes in the United States face circumstances similar to workers in other nations who are members of the ILO, but have not ratified convention 87 on the freedom of association.<sup>106</sup> While

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<http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (providing statistics that show the few number of high school athletes that will play in college by sport, including football (6.5% of 1,093,234), men's basketball (3.4% of 541,054), and women's basketball (3.8% of 433,344)).

103. Silverthorne, *supra* note 97 (citing a study by Doug Chung that finds that when a college goes from good to great on the football field or basketball court, undergraduate applications increase dramatically, a phenomenon known as the "Flutie Effect").

104. See Darren Ivy, *New NCAA rule allows student-athletes to work*, THE DAILY NEBRASKAN (Dec. 1, 1998), [http://www.dailynbraskan.com/new-ncaa-rule-allows-student-athletes-to-work/article\\_c6eab9fd-12d8-5494-824b-0332006f1a55.html](http://www.dailynbraskan.com/new-ncaa-rule-allows-student-athletes-to-work/article_c6eab9fd-12d8-5494-824b-0332006f1a55.html) (reporting that many athletes said their schedules were completely devoted to their sport and their studies, so finding a job to work around that schedule would be difficult).

105. See *id.* (citing a study by Doug Chung that finds that when a college goes from good to great on the football field or basketball court, undergraduate applications increase dramatically, a phenomenon known as the "Flutie Effect").

106. See *C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*, ILO, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO::P11310\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO::P11310_INSTRUMENT_ID:312232) [hereinafter *Freedom of Association Convention*] (listing the signers of the convention, but notable countries missing include the United States, China, India, Brazil, and Uzbekistan).

college athletes may not face the harassment, torture, and detention faced by workers in places like China, they do face challenges in terms of their ability to organize.<sup>107</sup>

First, United States student-athletes face similar challenges to the Brazilian workers in the Unified Trade Union of Chemical Industry Workers. The Brazilian workers found that the company they worked for, IGL Industrial Ltd., and in some ways, the larger transnational corporation, UNILEVER, was working against them by interfering in the union's activities.<sup>108</sup> The ILO found that a national union was not being supported or recognized in Brazil,<sup>109</sup> and UNILEVER responded that unionization only hurts its industry.<sup>110</sup>

Similarly, Northwestern and many other colleges have vehemently denied the ability of student-athletes to organize, as illustrated in Northwestern's appeal to the NLRB when it stated student-athletes are students first, and designating them employees would upset the competitive balance in college sports.<sup>111</sup>

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107. See *Truth, Reconciliation and Justice in Zimbabwe*, ILO, Meetings-2009-Zimbabwe C of I-2009-12-0035-3-En.doc/v3, (Dec. 2009) (explaining that in Zimbabwe, trade union members and leaders faced civil rights violations for basic workers' rights actions which included systematic arrests and detention in response to public demonstrations); ILO, FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED at 24, Report I (B), (2008) [hereinafter LESSONS LEARNED].

108. See *Report No. 344*, *supra* note 69 (explaining that the company distributed union resignation forms, set up a toll-free hotline in which a company representative would fill out a union resignation form for the employee and submit it on the employee's behalf, and created a parallel organization within the company).

109. See *id.* (explaining that UNILEVER refused to recognize the National Trade Union Committee of UNILEVER Brazil, citing that only four groups, including the organization in Vinhedo belonged to the larger organization).

110. ILO, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO 65 (5th revised ed. 2006) [hereinafter FREEDOM OF ASSOCIATION DIGEST] ("The 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 and respected in law and in fact").

111. See Post-Hearing Brief for Petitioner, *supra* note 94 (arguing that the scholarship student-athletes on Northwestern's football team are students first, thus, should not be allowed to organize; that allowing unionization would upset the competitive balance of college football; allowing organization would have a negative impact on non-revenue sports; and unionization would hurt Title IX compliance).

The ILO emphasizes that workers must have the free choice to create and join labor organizations, and according to ILO values of freedom of association, more than one union is perfectly fine.<sup>112</sup> Such freedom cannot be impeded simply because some workers choose not to join an organization or create multiple organizations.<sup>113</sup> For example, while the Northwestern case dealt only with players at private institutions, student-athletes at public colleges could attempt to create their own unions as long as state law permits public unions. Any law against unionization may violate ILO regulations because such a law fails to institutionally protect the right to organize.<sup>114</sup>

The NCAA, which oversees college athletics for its member institutions, including Northwestern, is also actively interfering in the creation of unions by student-athletes, a blatant violation of the ILO.<sup>115</sup> The NCAA issued a statement after the regional NLRB ruling that allowed Northwestern athletes to unionize, claiming that the attempt to unionize “undermines the purpose of college: an education,” emphasizing that college sports are “voluntary,” and that the organization stands for all student-athletes and not just the ones “the unions want to professionalize.”<sup>116</sup> Working for a company, as

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112. See e.g., ILO, FUNDAMENTAL RIGHTS AT WORK AND INTERNATIONAL LABOUR STANDARDS 6, 15 (2003) [hereinafter FUNDAMENTAL RIGHTS AND LABOUR STANDARDS]; FREEDOM OF ASSOCIATION DIGEST, *supra* note 110.

113. See FREEDOM OF ASSOCIATION DIGEST, *supra* note 110, at 66 (emphasizing that the “existence of an organization in a specific occupation should not constitute an obstacle to the establishment of another organization, if the workers so wish” and the “right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create – if the workers so choose – more than one workers’ organization per enterprise”).

114. See LESSONS LEARNED, *supra* note 107 (stating governments need political will, strong legislation, and the technical and administrative capacity to uphold obligations).

115. See Donald Remy, *NCAA responds to union proposal*, NCAA, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> (last visited June 21, 2016) (acknowledging the NCAA’s stance that “student-athletes are not employees within any definition of the NLRA).

116. See Steven Muma, *NCAA, Northwestern have very different responses to player union movement*, SB NATION (Jan. 28, 2014), <http://www.sbnation.com/college-football/2014/1/28/5354568/ncaa-response-northwestern-college-players-union> (reporting on the statement from NCAA Chief Legal Officer who wrote that turning student-athletes into employees undermines the purpose of college: an education; that student-athletes are not employees as their participation is voluntary; and that the scholarships provided are among many

the union members in Brazil did, is also “voluntary,” but the rights of those groups are still protected.<sup>117</sup> Like the ILO’s recommendations to Brazil, it falls on the United States to investigate the NCAA’s anti-union actions.<sup>118</sup> As long as the NLRB claims that the NLRA does not cover student-athletes, thus denying jurisdiction, the athletes are not properly protected.<sup>119</sup>

The NLRB also stated in its opinion that since many of the schools affected are public institutions, which do not fall under their jurisdiction, issuing a ruling would do the opposite of promoting stability in labor relations.<sup>120</sup> This statement blatantly buys into Northwestern’s policy arguments concerning competitiveness, which has nothing to do with actually protecting the right of freedom of association at the expense of the student-athletes.<sup>121</sup> Similar to China, where the ILO ruled that China’s national legislation did not sufficiently protect its unions,<sup>122</sup> here, the NLRB’s statement that the

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benefits for their participation).

117. See Christina Pedreira, *How’s possible Brazil still accept the Union Unity?* 13 (July 2012) (University Presbyterian Mackenzie, Faculty of Law, Sao Paulo, Brazil), <http://ilera2012.wharton.upenn.edu/RefereedPapers/PedreiraChristina.pdf> (noting the difference between a trade union monopoly that is maintained by law as different from one created by voluntary choice, which still retains its voluntary character).

118. Sean Gregory, *Here’s the Road Ahead for College Athletes After Union Setback*, TIME (Aug. 18, 2015), <http://time.com/4002245/after-union-setback-heres-the-road-ahead-for-college-athletes/> (highlighting that Congress has the power to lift the current restrictions on student-athletes, but appears to be unwilling to do so).

119. See Nw. Univ. Emp’r & Coll. Athletics Players Ass’n (CAPA) Petitioner, 13-RC-121359, 362 N.L.R.B. 167 (Aug. 17, 2015) (deferring jurisdiction, stating that because determining the unionization of college football players at Northwestern did not effectuate the NLRA, “we conclude, without deciding whether the scholarship players are employees under Section 2(3), that it would not effectuate the policies of the Act to assert jurisdiction in this case”).

120. *Id.*

121. See Post-Hearing Brief for Petitioner, *supra* note 94 (reasoning that at least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees, thus, asserting jurisdiction would not promote stability in labor relations).

122. See *Report No. 316*, *supra* note 58 (finding that China’s Trade Union Act and its 1995 legislation did not protect workers’ fundamental rights to form and join organizations of their choosing without previous authorization, while also infringing on trade unions’ rights to establish their constitutions and organize their

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NLRA does not deal with the issue at hand, then United States law clearly does not sufficiently protect these employees, meaning the United States should make appropriate changes to its laws to allow for this.

While the issues in Uzbekistan and Zimbabwe are rather extreme compared to what is at hand here, nations can put pressure on a country to take action, as the United States did when it designated Uzbekistan as a Tier 3 country in its 2014 “Trafficking In Persons” report, published by the State Department.<sup>123</sup> The report made a number of recommendations, including giving the ILO and NGO’s complete access to the cotton harvest, improving screening of vulnerable populations, developing procedures to identify trafficking victims, providing in-kind support to anti-trafficking NGO’s and much more.<sup>124</sup> A similar report from the ILO on the inability of United States student-athletes to unionize could lead other nations to make reports that could change United States policy, and possibly could lead to the passage of laws that would consider student-athletes employees that would fall under the NLRA, therefore allowing the NLRB to feel it can exercise jurisdiction in allowing the athletes to unionize.<sup>125</sup>

C. BY NOT PERMITTING STUDENT-ATHLETES TO COLLECTIVELY BARGAIN, THE UNITED STATES VIOLATES THE ILO’S CORE VALUE OF FREEDOM OF ASSOCIATION

According to the ILO, freedom of association means workers can set up and join their own organizations without interference from the state, and that they should determine how to best promote and defend

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programs).

123. U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT, NO. 226849 404-405 (Jun. 2014), <http://www.state.gov/documents/organization/226849.pdf> (acknowledging the same issues cited in earlier reports, such as children facing expulsion from school, but also providing additional information such as issues involving the concealment of forced labor by filling empty classrooms with students).

124. *See id.* (recommending that Uzbekistan permit foreign funding of NGO’s, stop using contracts with college students that require those students to pick excessive amounts of cotton to satisfy enrollment in the university, refrain from restricting repatriated trafficking victims from future travel, and continue efforts to investigate and prosecute suspected human traffickers under due process).

125. *See id.*



their own interests.<sup>126</sup> The ILO explains that collective bargaining allows organizations and employees to negotiate their relations.<sup>127</sup> To realize freedom of association and the right to collective bargaining, there must be: (1) a legal basis which guarantees workers' rights are enforced; (2) an enabling institutional framework which can be tripartite or between employers' and workers' organizations; (3) protection from discrimination against people who wish to be heard; and (4) workers' and employers' associations agreeing to work together to solve problems.<sup>128</sup>

A country accepts the ILO's core values, including the right to freedom of association, when it joins the ILO.<sup>129</sup> The United States, a member of the ILO since 1934, is thus obligated to obey the right to freedom of association.<sup>130</sup>

Despite the United States' domestic laws that protect unions, such as the NLRA which provides similar protections to the ILO's core values, the United States has hardly been a champion of unionization.<sup>131</sup> Companies in the United States, including the fast-food industry and Wal-Mart, have pushed back against unions. Wal-

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126. See FUNDAMENTAL RIGHTS AND LABOUR STANDARDS, *supra* note 112, at 6, 15 (explaining that the organizations must respect the law, but the law must respect the basic principle of freedom of association).

127. See *id.* at 10 (explaining that collective bargaining also includes the phase before negotiations, namely information sharing, consultation, joint assessments, as well as the implementation of collective agreements after negotiations).

128. *Id.*

129. See FREEDOM OF ASSOCIATION DIGEST, *supra* note 110 (detailing that membership in the ILO carries an obligation to respect freedom of association in national legislation and conventions, and the ultimate responsibility of ensuring such respect lay with the government); *International Labor Organization Constitution Annex I*, ILO (May 10, 1944), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> (stating that the members of the ILO agreed that "the fundamental principles on which the Organization is based and . . . [includes] freedom of expression and of association.").

130. See *Origins & History*, *supra* note 43 (stating that the United States joined the ILO in 1934 despite not joining the League of Nations).

131. See National Labor Relations Act, 29 U.S.C.A. § 152(3) (1935), §§ 151-69 (explaining the important role that labor unions play in the United States); see also John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651, 651-75 (2006) (arguing that management consultants have developed tactics to help companies avoid the creation of unions, while management law firms, industrial psychologists, and strike management firms have all contributed to the prevention of unionization in the United States).

Mart, for example, reportedly instructed its store managers to be aware of the creation of unions and provided slides on how to combat unionization.<sup>132</sup>

The refusal of the NCAA and colleges, such as Northwestern, to allow their players to unionize goes one step further than the anti-union practices of McDonald's and Wal-Mart. The NCAA and colleges refuse to even recognize the players as employees.<sup>133</sup> Northwestern's policy arguments against CAPA ranged from the athletes being students first, to the university having to raise more revenue to provide equal opportunities for women via Title IX, are similar to the complaints many employers have about unionization.<sup>134</sup> When private entities, such as Northwestern and the NCAA, violate statutes protecting employees, it is the NLRB's job to protect those employees.<sup>135</sup> The NLRB's decision to decline jurisdiction in a

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132. See Alan Pyke, *Here's Walmart's Internal Guide To Fighting Unions And Monitoring Workers*, THINK PROGRESS (Jan. 16, 2014), <http://thinkprogress.org/economy/2014/01/16/3171251/walmart-leaked-powerpoint-unions/> (detailing leaked internal documents in which store managers were instructed to stay alert for signs of unionization and dissuade employees from joining, including statements such as: "For a Walmart associate, I think unions are a waste of money," and presenting PowerPoints warning about the risks of unionization); see also Ben Rooney, *McDonald's: 'Union Attack' on the brand*, CNN (June 9, 2015), <http://money.cnn.com/2015/05/21/news/mcdonalds-fast-food-protest/> (describing a protest by the Service Employees International Union outside of McDonald's annual shareholder meeting, demanding that McDonald's raise its wages to \$15/hour, but McDonald's called the protest a "union attack").

133. See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited June 21, 2016) (detailing that the NCAA considers student-athletes students first and athletes second, and therefore, must refrain from signing contracts with professional sports teams, receiving a salary for participating in athletics or prize money, playing with professionals, trying out, practicing, or competing with a professional team, receiving benefits from an agent or prospective agent, or delaying their initial full-time college enrollment to participate in an organized competition); see also Post-Hearing Brief for Petitioner, *supra* note 94, at 40-41 (summarizing Northwestern's argument against CAPA).

134. See Post-Hearing Brief for Petitioner, *supra* note 94 (stating that Northwestern's arguments that unionization would be bad for business and that the arguments are "greatly exaggerated").

135. Beryl Lief Benderly, *U.S. National Labor Relations Board rejects student athlete unionization*, SCIENCE (Aug. 24, 2015), <http://www.sciencemag.org/careers/2015/08/us-national-labor-relations-board-rejects-student-athlete-unionization> (reporting that deciding the case on procedural grounds left the main question regarding the status of student-athletes unanswered and therefore without

legitimate case, then, flies in the face of that duty. As a result, the United States violates international labor law concerning the freedom of association by not protecting the rights of these employees despite the presence of domestic statutes that would protect them.<sup>136</sup>

In addition, the United States is obligated to follow the ILO's core values expressed in documents like the ILO Declaration of Fundamental Rights via the Vienna Convention on the Law of Treaties' Interpretation Clause.<sup>137</sup> Vienna Convention article 31(1) states that a treaty should be read in "good faith" with the ordinary meaning to the terms of the treaty in their context in light of their object and purpose.<sup>138</sup> The declaration states that members of the ILO must "respect," "promote," and "realize" the right of freedom of association.<sup>139</sup> "Respect" is defined by Merriam-Webster Dictionary as "an act of giving particular attention" and "high or special regard."<sup>140</sup> "Promote" is defined as "to advance station, rank, or honor," as well as "to contribute to the growth or prosperity of."<sup>141</sup> "Realize" is defined as "to bring into concrete existence: Accomplish."<sup>142</sup> Reading these in their plain meaning, the United

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the protections that may otherwise be afforded to them had the court made such a determination).

136. See *Nw. Univ. Emp'r & Coll. Athletics Players Ass'n (CAPA) Petitioner*, 13-RC-121359, 362 N.L.R.B. 167 (Aug. 17, 2015) (declining jurisdiction of the case and thereby refusing to rule that the players are not employees); National Labor Relations Act, 29 U.S.C.A. § 153 (1935) (describing that the five NLRB board members are to be appointed by the President of the United States with the advice and consent of the Senate); FREEDOM OF ASSOCIATION DIGEST, *supra* note 110 (explaining that for a member to respect freedom of association, it must do so in national legislation).

137. *The US: A Leading Role*, *supra* note 13 (reiterating the importance of the ILO and its mandate to the United States' mission of promoting democracy and outlining the shared goals of the ILO and the United States in promoting human rights).

138. See Vienna Convention on the Law of Treaties (with annex) art. 31(1), May 23, 1969, 1155 U.N.T.S. 18232.

139. See FUNDAMENTAL RIGHTS AND LABOUR STANDARDS, *supra* note 112, at 3.

140. See *Definition of Respect*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/respect> (last visited June 21, 2016).

141. See *Definition of Promote*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/promote> (last visited June 21, 2016).

142. See *Definition of Realize*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/realize> (last visited June 21, 2016).

States is bound to give particular attention to the right of freedom of association, contribute to the growth and prosperity of the right to freely organize, and bring the right to freely organize into concrete existence.<sup>143</sup>

#### IV. RECOMMENDATIONS

Student-athletes have both legal and non-legal remedies available to them. They can make their appeal public with the hope that pressure from the public will push the universities, colleges, and the NCAA to make changes that would incorporate the ILO's core labor standard of the freedom of association into their own charters.<sup>144</sup> These actions would be most effective if the student-athletes could appeal to the NCAA and colleges' advertising partners, who could withhold advertising dollars, forcing the employers to change their policies.<sup>145</sup>

Legally, the athletes must exhaust all of their domestic options before going to the ILO.<sup>146</sup> Then, the athletes could attempt to get a member of a workers' union, such as the American Federation of Labor and Congress of Industrial Organizations (the United States' largest union) or the United Steelworkers, who have been assisting

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143. ADAM GREENE, U.S. RATIFICATION OF ILO CORE LABOR STANDARDS (U.S. Council for Int'l Business, 2007) ("As a member of the ILO, the United States is obliged 'to respect, to promote and to realize' the principles contained in the 1998 Declaration, as distinct from the specific legal details of the eight conventions themselves").

144. See RULES OF THE GAME, *supra* note 56.

145. See John Consoli, *MBPT Spotlight: CBS, Turner Say They've Taken In Record Amount Of Ad Dollars For NCAA Men's Championship Tournament*, BROADCASTING & CABLE, (Mar. 11, 2015, 2:20 PM), <http://www.broadcastingcable.com/news/upfront-central/mbpt-spotlight-cbs-turner-say-they-ve-taken-record-amount-ad-dollars-ncaa-men-s-championship-tournament/138693> (reporting that advertising costs for the 2015 NCAA Tournament during the regional finals was between \$700,000 and \$800,000 for a 30 second TV spot and around \$1.6 million for the National Championship Game on April 6); Darren Heitner, *The March Madness Advertising Business Is Booming*, FORBES (Mar. 17, 2015), <http://www.forbes.com/sites/darrenheitner/2015/03/17/the-march-madness-advertising-business-is-booming/> (anticipating the annual revenue of the NCAA Men's Basketball Tournament to generate around \$7.5 billion, second to only the NFL Playoffs in total TV revenue for post-season sports).

146. See *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA) Petitioner*, 13-RC-121359, 362 N.L.R.B. 167 (Aug. 17, 2015).

CAPA, to file a complaint with the International Labor Office.<sup>147</sup> The United States government will get an opportunity to answer, pursuant to article 24 of the ILO Constitution, but if the response is not sufficient, the ILO's governing body may publish the representation and reply.<sup>148</sup>

Based on the decision by the NLRB and its reasoning, the ILO could make several recommendations that would help the athletes.<sup>149</sup> The ILO would most likely recommend that the United States bring its labor laws into compliance with convention 87, the Freedom of Association and Protection of the Right to Organize Convention, as it did when dealing with China's national legislation.<sup>150</sup> The ILO recommended that China's laws comply with convention 87 even though China never signed it, showing that the ILO does not view not signing a specific convention as a way out of protecting the organization's core values.<sup>151</sup> Based on this and other rulings, it appears the ILO would recommend that its laws be adjusted to protect the student-athletes as would be required by convention 87, even though the United States is not a signatory to that specific convention. As a member, the United States must still respect the core values of the ILO, which include the right of freedom of association.<sup>152</sup> Such changes would have a lasting effect on the NLRB, especially if the NLRA itself was changed. The ILO would most likely find that the NLRB must act with greater independence,

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147. See *International Labor Organization Constitution* art. 24, ILO (May 10, 1944), <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>

148. See *id.* arts. 24-25.

149. See *Nw. Univ. Emp'r & Coll. Athletics Players Ass'n*, 362 N.L.R.B. 167; *ILO Statement on Reform of Bangladesh Labour Law*, ILO (July 22, 2013), [http://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS\\_218067/lang—en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_218067/lang—en/index.htm) (providing recommendations to Bangladesh regarding which changes the country would need to make to be in full compliance with ILO convention).

150. See *Report No. 316*, *supra* note 58 (recommending that China make its laws, including the Trade Union Law and the 1995 Labour Law, comply with convention 87 and the ILO's core labor standards).

151. See *Freedom of Association Convention*, *supra* note 106 (listing the signers of convention 87, of which China and the United States are noticeably absent).

152. Heiko Sauer, *International Labour Organization (ILO)*, OXFORD PUB. INT'L L. (Aug. 2014), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e490>.

citing the concern about creating instability for other state institutions by approving unions for student-athletes at private universities as an example of the organization allowing other organizations to wield influence over it.<sup>153</sup> Finally, similar to its ruling in the case of Brazil and UNILEVER, the ILO would most likely recommend that the NCAA and its respective institutions must immediately stop interfering with the student-athletes' basic right to organize freely.<sup>154</sup> Such actions by the ILO and any subsequent reports by other nations that would lead to remedies of the United States' blatant disregard of the right to organize would raise the ILO's credibility, allowing it to more forcefully protect the rights of workers in other countries.<sup>155</sup> A change in United States policy toward these athletes could signal to other countries, including those who similarly have not ratified specific treaties, to make adjustments in their domestic laws and policies in order to meet the ILO's core labor standards.

## V. CONCLUSION

College sports have become one of the largest industries in the United States, earning millions of dollars in revenue for their respective colleges and universities. Meanwhile, the student-athletes that risk their health and wellbeing to play these sports get little in return. While the Northwestern football team's fight to unionize before the NLRB was the key case used in support of this Comment, it should be noted that the issues articulated in the case are repeated

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153. See *Nw. Univ. Emp'r & Coll. Athletics Players Ass'n*, 362 N.L.R.B. 167 (reinforcing that the Board was concerned that the decision would negatively affect the stability of labor relations because the NLRB and NLRA only have control over private entities and not public ones).

154. See *Freedom of Association Convention*, *supra* note 106 (ruling that the company took actions to interfere with the union operations, which is against the principles of the ILO convention, therefore, such actions should cease immediately).

155. See *The ILO to the Rescue?*, PETERSON INST. INT'L ECON., [http://www.piie.com/publications/chapters\\_preview/338/5iie3322.pdf](http://www.piie.com/publications/chapters_preview/338/5iie3322.pdf) (discussing how after the United States' withdrawal from the ILO in 1977 due to the seating of a Palestinian delegate, the ILO regained its credibility by harshly criticizing labor practices in the Soviet bloc, namely Czechoslovakia and the Soviet Union, which prompted the United States' quick return to membership in the ILO, and since the 1990's the ILO has taken greater focus on globalization and labor standards).

in hundreds of collegiate athletics programs around the United States. Permitting student-athletes the basic right to organize into a union, to fight for basic rights such as medical care, is fair and just, and must be protected as a core value of the ILO.