International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores

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Committee of Experts on the Application
of Conventions and Recommendations (CEACR)
International Labour Office (ILO)
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IOE comments under Article 23.2 of the ILO Constitution concerning the application by Burundi, Chad, Cuba, Egypt, Ethiopia, Fiji, Guinea, Guyana, Haiti, Honduras, Indonesia, Kiribati, Nigeria, Panama, Peru, Philippines, Poland, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Swaziland, Syrian Republic, Tanzania (including Zanzibar), Trinidad and Tobago, Tunisia, Ukraine, United Kingdom (including Jersey), Yemen, Zambia, Zimbabwe of C 87 to be considered by the Committee of Experts in its forthcoming meeting.

November –December 2014

Introduction

These are the International Organization of Employers comments and observations on the application of Convention 87[1] in **Burundi, Chad, Cuba, Egypt, Ethiopia, Fiji, Guinea, Guyana, Haiti, Honduras, Indonesia, Kiribati, Nigeria, Panama, Peru, Philippines, Poland, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Swaziland, Syrian Republic, Tanzania (including Zanzibar), Trinidad and Tobago, Tunisia, Ukraine, United Kingdom (including Jersey), Yemen, Zambia, Zimbabwe** in light of the Committee of Experts' ("CEACR") 2013 observations respecting the implementation of that convention in these ILO Member States.

Comments: The non-recognition of a right to strike in Convention 87

The right to strike is not provided for in either Convention 87 or 98 and was not intended to be. The legislative history of Convention No. 87 is indisputably clear that "the proposed convention relates only to freedom of association and not to the right to strike"[2]. Furthermore, as was emphasized by the Employers' spokesperson during the final discussion of Convention No. 98 in 1949, "the Conference chairman declared unreceivable the two amendments aimed at incorporating a guarantee for the right to strike as they were not within the scope of the Convention. The speaker thus expressed the opinion that the passage in question constituted a factual error with respect to the historical basis of the right to strike being fundamentally inherent in these conventions"[3].
Despite this background, the CEACR maintains that the right to strike is based on Art. 3 of Convention No. 87, which states that *"Workers' and employers' organizations shall have the right… to organize their administration and activities and to formulate their programmes"*, taken with Art. 10 of the Convention which defines *"organization"* within the meaning of the Convention as any organization *"for furthering and defending the interests of workers or of employers"*[4].
The CEACR mentioned the right to strike for the first time in its third General Survey on the subject in 1959, in only one paragraph and only with respect to the public service. In the following surveys, the CEACR gradually expanded its views on the matter to seven paragraphs in 1973, then 25 in 1983 and with a separate chapter of no fewer than 44 paragraphs in 1994, including a number of new subjects.

[1] Freedom of Association and Protection of the Right to Organise Convention, 1948
[2] ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 129.
[3] ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 129. ILC: 32nd Session, 1949, Record of Proceedings, Third part, Appendix VII p.468.

Worryingly, the CEACR in its 1994 General Survey paragraph 145 stated that: " *in the absence of an express provision on the right to strike in the basic text, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject*". In its 2012 General Survey the CEACR devoted again numerous paragraphs to the right to strike.
On the basis of this interpretation, every year, the CEACR looks into numerous cases involving specific national provisions or practices restricting strike action. In approximately 90 to 98 per cent of all these cases, the experts conclude that restrictions on the right to strike, be they *de facto* or *de jure*, are not compatible with the Convention[5]. Thus they have formulated a comprehensive corpus of a minutely-detailed strike law which amounts to a far-reaching, almost unrestricted freedom to strike[6]. In practice, these restrictions are regarded as being hardly ever applicable to the actual situations reviewed.
However, to take Article 3 of Convention No. 87 which states in very general terms that "*Workers and Employers' organizations shall have the right …to organize their ..activities and to formulate their programmes*" as a basis for establishing very detailed rules regarding a right to strike is very **subjective and highly questionable**. It is also surprising, as one would have expected to find, for a right as fundamental as the right to strike, an express provision in the text of the Convention itself. If one adheres, even if only loosely, to the applicable **principles of interpretation in the Vienna Convention on the Law of Treaties[7], the right to strike cannot be adduced from the Convention**.
As the CEACR concedes, the wording of the Convention, the preamble of the ILO Constitution and the Declaration of Philadelphia do not refer to strikes. No wording, or any other instrument within the meaning of Art. 31, paras 1 and 2, of the Vienna Convention on the Law of Treaties can be said to aim at such an understanding between the parties to the Convention. Similarly, there is no subsequent practice in the application of the Convention which **establishes the agreement of the tripartite contracting Parties** to interpret its provisions as enshrining the right to strike (Art. 31, para 3, of the Vienna Convention on the Law of Treaties).[8] The International Labour Conference itself, at its 88th Session in 2000, pointed out that the Vienna Convention of 1969 was to be applied to the interpretation of ILO Conventions[9].

Nevertheless, questions connected with freedom of association do occupy an inordinate amount of the CEACR's report every year, with strikes figuring prominently among these questions. In practice, the type of industrial action fitting the detailed notions in the observations, is reflected in hardly any national rules on industrial action, or in practice. In these circumstances, it cannot be assumed that a customary right has developed for a particular concept of the right to strike.
Interpretation according to Art. 31 of the Vienna Convention on the Law of Treaties therefore leads to the conclusion that strikes are not regulated in Convention No. 87. This conclusion is confirmed by the preparatory work of the treaty and the circumstances of its conclusion. It is rightly pointed out by the Experts in the 1994 General Survey that the right to strike was referred to several times during the preparatory work, but no explicit proposal on that subject was put forward during the debate in Conferences[10]. However, the Experts' comments on the genesis of the Convention are incomplete, as the Office's preparatory report on the planned Convention on freedom of association excluded regulation of the right to strike after analysing governments' answers[11]: *"Several governments, while giving their approval to the formula, have nevertheless emphasized, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances it has appeared to the Office to be preferable not to*

[5] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 283; see also Wisskirchen/Hess, Employers' handbook on ILO standards-related activities, Geneva 2001, p. 35.
[6] The 1994 General Survey on this subject devotes 44 paragraphs to strikes. By contrast, in their 1959 report the experts referred to the possibility of a right to strike in only one paragraph, ILC, 43rd Session, 1959, Report III (Part IV), para 68.
[7] Of 23 May 1969, United Nations, Treaty Series, Vol 1155, p. 331.
[8] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 284.
[9] ILC, 88th Session, 2000, Record of Proceedings, Vol. I , pp. 5/2-5/3, paras 7 and 11.
[10] General Survey 1994, para 142.
[11] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 284.

include a provision on this point in the proposed Convention concerning freedom of association"[12]*.* This was again confirmed during the debates in plenary. During the ILC discussion of 1948, *"The Chairman stated that the Convention was not intended to be a 'code of regulations' for the right to organize, but rather a concise statement of certain fundamental principles.The States would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of industrial organisations."*[13]

When the Right to Organise and Collective Bargaining Convention No. 98 was adopted in 1949, this subject was again examined *expressis verbis.* In the course of the subsequent discussions, two Workers' delegates and one Government delegate vainly tabled proposals to have the right to strike guaranteed in the Convention. Both proposals were rejected. The record of proceedings noted: *"The Chairman ruled that this amendment was not receivable, on the ground that the question of the right to strike was not covered by the proposed text, and that its consideration should therefore be deferred until the Conference took up item V of its agenda relating, inter alia, to the question of conciliation and arbitration."*[14] Paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation No. 92 of 1951 refers to strikes and lockouts in neutral language and does not attempt to regulate them[15].

In 1994 the CEACR made a very vague allusion to the fact that strikes are mentioned in other international instruments[16]. Art. 22, para 1, of the International Covenant on Civil and Political Rights[17] and Art. 8, para 1 (d), of the International Covenant on Economic, Social and Cultural Rights[18] are more apposite. For several years, the texts of the two Covenants formed the subject of negotiations aimed at drafting a single United Nations Human Rights Covenant. A motion to introduce a right to strike alongside freedom of association was, however, rejected. After the text was split into the two above-mentioned Covenants, Art. 8 was given the wording quoted in footnote 15. On the whole, these rules have less binding force and the monitoring machinery is weaker than those of ILO Conventions[19]. The United Nations Human Rights Committee, in its decision of 18 July 1986[20], which expressly relied on the interpretation rules of the Vienna Convention on the Law of Treaties, concluded that the right of freedom of association embodied in Art. 22 of the International Covenant on Civil and Political Rights did not necessarily imply the right to strike and the authors of the Covenant did not have the intention of guaranteeing the right to strike. A comparative analysis of this Art. 8, para 1 (d), confirmed that the right to strike could not be regarded as an implicit element of the right to form and join trade unions. And the right to strike under Art. 8, para 1, was clearly and expressly subordinated to the law of the country[21].

In these proceedings before the United Nations Human Rights Committee, the complainants asserted that ILO organs had arrived at the conclusion that, in the light of ILO Convention No. 87, the right of freedom of association necessarily presupposed the right to strike. The United Nations Human Rights Committee replied that every international treaty had a life of its own and must be interpreted by the body entrusted with the monitoring of its provisions. In addition to these clearly accurate observations, the Committee stated that *"it has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned".* Coming after the correct allusions of the United Nations Human Rights Committee to the separate lives of international treaties and to the fact that they must be interpreted by the competent body, this remark about ILO standards "*can only be described as an*

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[12] Report VII, 31st Session of the International Labour Conference, 1948, p. 87.

[13] ILC: 31st Session, 1948, Record of Proceedings, Appendix X, p. 477.

[14] ILC: 32nd Session, Record of proceedings, 1949, p. 468.

[15] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 285.

[16] General Survey, 1994, para 143: Art. 8 (1) of the International Covenant on Economic, Social and Cultural Rights refers to "…the right to strike, provided that it is exercised in conformity with the laws of the particular country".

[17] United Nations: Human rights: A compilation of international instruments, Vol. I (First Part), Universal Instruments, Centre for Human Rights, ST/HR/Rev. 5 (Vol. I/Part 1), Geneva, 1994, p 28. Art. 22, para 1, reads "*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests*".

[18] United Nations: Human rights: A compilation of international instruments, Vol. I (First Part), Universal Instruments, Centre for Human Rights, ST/HR/Rev. 5 (Vol. I/Part 1), Geneva, 1994, p. 11. Art. 8, para 1 (d) reads: "*The States Parties to the present Covenant undertake to ensure: … (d) The right to strike, provided that it is exercised in conformity with the laws of the particular countries."*

[19]Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 286.

[20] United Nations Human Rights Committee: Report of the Human Rights Committee, General Assembly, 41st Session, Document A41/40, New York, 1986.

[21] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 286.

amicable diplomatic statement without any binding force"[22]. It was an *obiter dictum* from a committee which was, by its own avowal, not competent to deal with this matter. This is all the more true given that, according to Art. 37 of the ILO Constitution, the International Court of Justice can alone give binding interpretation of ILO standards.

Nevertheless, the CEACR assumes that there is a general principle allowing an extensive right to strike in C87. In its opinion, limitations require special justification which must be interpreted restrictively[23]. Two examples can be recalled in this connection: limitation of the right to strike by *"essential services"* is regarded as permissible **only** when the interruption of these services endangers the personal safety or health of the whole population or sections of the population. Thus, the national legislator is denied the right, in respect of the consequences of strikes, to fulfill a wider duty to protect and provide for the welfare of its citizens extending beyond their life and health (another example: transport; financial services). While the CEACR basically considers the right to all forms of strikes to be guaranteed, it believes that an exception might be possible in the case of purely political strikes[24]. This wording is virtually meaningless in findings concerning actual cases. The CEACR contends that strikes against government policy (strikes entailed essentially for political reasons, beyond the specific protection of workers conditions) should always be permissible and that in practice this right to strike also encompasses strikes against a law on the day it is discussed in parliament[25]. The Experts are silent about the questionable nature of strikes against a freely elected parliament in a State governed by the rule of law.

From time to time, the CEACR relies on statements from the Committee on Freedom of Association (CFA) to underpin its views. This tripartite body was set up in 1951 by the Governing Body of the ILO. Its official duties are more or less identical to those of the Fact-Finding and Conciliation Commission on Freedom of Association, which was established in 1950. The latter consists of independent experts, but as it can act only with the consent of the government concerned, it has not gained particular importance[26]. Its job is to ascertain facts and to try to act as mediator and conciliator. The Committee also concerns itself with questions of freedom of association in member States which have not ratified the relevant Conventions, i.e. Nos 87 and 98. For this reason, its recommendation cannot be deemed to be *"case law"* in the sense of an interpretation of the standards laid down in Conventions. The work of the Committee on Freedom of Association is based on the call in the ILO Constitution to recognize the principle of freedom of association[27] (beyond the ratification or not of Convention 87). Moreover its members do not act as representatives of a constituent, but on their own personal responsibility. As had also been rightly pointed out by Mr. Nicolas Valticos, the conclusions of the Committee on Freedom of Association were not limited to determining the meaning of the freedom of association Conventions and that, not being bound by the terms of these Conventions but more generally inspired by the principles of freedom of association, the CFA was led to formulate the principles which on various points extended the express provisions of the Convention[28]. The regular reliance on decisions which went beyond anything contemplated by the provisions and legislative history of Conventions 87 and 98, undercut the credibility of the Committee of Experts[29]. In short, the CFA has a broader political brief and can in no sense be seen to be either legislating or restricting itself to the disciplines of interpretation that would establish jurisprudence or a true application of the Convention as enacted.

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[22] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 286.

[23] General Survey 1994, para 159.

[24] In paragraph 165 of the 1994 General Survey the CEACR stated: " The Committee has always considered that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers;….."

[25] See Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 287.

[26] Minutes of the 110th Session of the Governing Body, 3-7 Jan. 1950, Appendix VI, para 4; ILC: 33rd Session, Record of Proceedings, 1950, pp 172 and 254-255.

[27] See Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 288.

[28] N Valticos: "Les méthodes de la protection internationale de la liberté syndicale," in Recueil des cours, 1975, Vol. I, pp. 89-90, cited in J Hodges-Aeberhard and A Odero de Dios.

[29] ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 128.

The Employers protested unambiguously at an early stage against incipient deviations[30]. For obvious reasons, no issue was made of this and many other differences during the long years of Cold War. This changed very fast after the great turning point in world politics. The Employers' Spokesperson of the Applications Committee has repeatedly explained the Employers' position on this matter in the Conference Committee and in the plenary of the Conference and did so in very great detail in 1994 when the CEACR General Survey was discussed[31]. At the time, it was suggested that, after careful preparation, this subject should be removed from the grey-zone of non-binding *extra* or *contra legem* interpretations and officially submitted for discussion by the real legislator of the ILO, in other words, the full International Labour Conference. So far this proposal has gone unanswered. It is also astonishing that the Experts have never addressed the numerous Employers' arguments regarding the subject, which have been put forward in ILO bodies and in legal writings. Instead, the Experts persist in reiterating their observations from their earlier reports and General Surveys, which are quoted unchanged as if they were the texts of law[32].
As recently as June 2011, 2012 and 2013, the Employers' spokespersons in the Conference Committee on the Application of Standards in their plenary speeches regretted the fact that the Experts continually ignore the Employers' representations on the right to strike and requested that this be rectified without further delay.

We noted the response by the CEACR in the Introduction of its 2013 according to which the CEACR refuses to reconsider its position on this matter. We also noted that the CEACR indeed continued its interpretation practice on the "right to strike" without any visible change. In its 2013 Report, out of 63 CEACR observations on C. 87, 55 concern the "right to strike" and the related detailed rules that the CEACR has developed over time on its own. This share, is similar to the share of preceding years and shows that the "right to strike", although not contained in C. 87, has now become one of the major cornerstones of the CEACR` s supervision of C. 87.
We noted that the CEACR, in its response in the Introduction to its 2013 Report, did not even seek to address the substance of the employers` position. The main reason the CEACR gives in para. 31 for maintaining its position is that, once it had recognized the "right to strike" in principle as protected by C. 87, it had to determine its limits. This is of deep concern to the Employer GB Members and we trust that the CEACR will approach and reconsider this delicate issue with extreme care in its forthcoming meeting.
We find that if this argument was true, the CEACR would have far-reaching competences to set international labour regulation, thus by-passing ILO constitutional rules on standard-setting undermining the responsibility of Constituents and their governance role (Art. 19 of the ILO Constitution). The CEACR would just have to consider certain rights as covered in principle by a particular Convention and could then derive from this unjustified step further competence to regulate the matter in detail. The Employers find it concerning that the CEACR, rather than distancing itself from an error and trying to correct it, even seeks to legitimize it.
We trust that the CEACR will reconsider its views on this subject considering the consequences that the CEACR`s views on the right to strike have for the discussion in the CAS, in particular the CAS conclusions. It should be recalled that in the 2013 CAS, the following wording was inserted in the conclusions of all the (discussed) cases in which the right to strike was commented by the Experts (Bangladesh, Canada, Egypt, Fiji, Guatemala and Swaziland): "*The Committee did not address the right to strike in this case as the Employers do not agree that there is a right to strike recognised in Convention 87*". Furthermore, in order to stay consistent with their position, the Employers did not support proposals for conclusions which, explicitly or implicitly, call upon governments to bring their law and practice in line with the "right to strike" rules of the CEACR. We believe in the fundamental role that the Committee of Experts plays in the regular standards supervision and trust that this issue will be comprehensively addressed.

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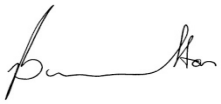
[30] See the statements of Mr. Waline. International Labour Office, Minutes of the 121st Session of the Governing Body, 3-6 Mar. 1953, pp. 37 et seq.
[31] ILC: 81st Session, 1994, Record of Proceedings, pp 25/31-25/37, paras 115-134 and pp. 28/9-28/10.
[32] Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3, p. 288.

Concluding remarks

IOE trusts that the Committee of Experts will consider in full the comments presented in this document when examining the application in law and practice of Convention 87 in **Burundi, Chad, Cuba, Egypt, Ethiopia, Fiji, Guinea, Guyana, Haiti, Honduras, Indonesia, Kiribati, Nigeria, Panama, Peru, Philippines, Poland, Romania, Russian Federation, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Swaziland, Syrian Republic, Tanzania (including Zanzibar), Trinidad and Tobago, Tunisia, Ukraine, United Kingdom (including Jersey), Yemen, Zambia, Zimbabwe** in its forthcoming meeting in November-December 2013 and in preparation of the 2014 CEACR report. IOE trusts these comments will be forwarded to the Governments concerned for its consideration.

Yours faithfully,



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