



The Global Voice of Business

INTERNATIONAL ORGANISATION OF EMPLOYERS



DO ILO CONVENTIONS
87 AND 98 RECOGNISE
A RIGHT TO STRIKE?

October 2014

DEAR MEMBERS,

In 2012, the International Labour Conference Committee on the Application of Standards (CAS) witnessed a “deadlock” which arose from the differing views of the Employers’ and Workers’ Groups on the issue of the right to strike.

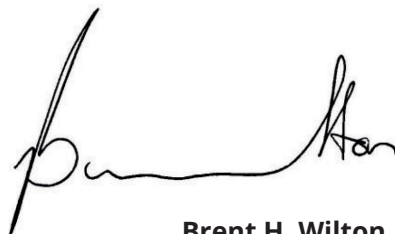
The controversy related to the way in which the right to strike is extensively interpreted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the basis of the 1949 “Freedom of Association and Protection of the Right to Organise” Convention (No. 87). For many years, the Employers have challenged the extension of the CEACR’s mandate to provide interpretations of ILO Conventions, particularly Conventions 87 and 98, which in the Employers’ view neither contain nor implicitly recognise any right to strike.

This paper aims to set out in detail the Employers’ Group position vis-à-vis the CEACR’s extensive interpretations on the right to strike and related regulation. For those entering this area of discussion for the first time, you may find it useful to refer to the glossary at the end of the paper, which defines many of the more technical terms used.

In the coming months, important discussions will take place in the ILO Governing Body to explore whether the constituents should resolve this issue by making recourse to the International Court of Justice, by establishing an ad-hoc internal tribunal, or by addressing the controversy through tripartite dialogue in line with the inherent structure of the Organization.

I hope you will find the paper useful in your engagements in this debate. Your comments and feedback are most welcome.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brent H. Wilton', with a stylized flourish at the end.

Brent H. Wilton
Secretary-General



ILO Conventions 87 and 98

A RIGHT TO STRIKE IS NOT PROVIDED FOR IN ILO CONVENTIONS 87 OR 98 – NOR DID THE TRIPARTITE CONSTITUENTS INTEND THERE TO BE ONE AT THE TIME OF THE INSTRUMENTS' CREATION AND ADOPTION.

The legislative history of Convention No. 87 is indisputably clear. The 1948 preparatory ILO report states that *“the proposed convention relates only to freedom of association and not to the right to strike”*¹. Moreover, in the discussions on C. 87 at the International Labour Conference (ILC) of 1947 and 1948, no amendments relating to a right to strike were adopted or even submitted.² Furthermore, when the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) was adopted, this subject was again examined *expressis verbis*.

In the course of subsequent discussions, the Chairman considered “not receivable” amendments tabled

by two Workers and one Government delegate aimed at having a right to strike guaranteed in the Convention 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.”*³ This question was not pursued the following year.

Paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation No. 92 adopted in 1951 refers to strikes and lockouts in neutral language and does not attempt to regulate them.⁴ Paragraph 7 of that Recommendation states that

“A right to strike is not provided for in ILO Conventions 87 or 98 – nor did the tripartite constituents intend there to be one at the time of the instruments’ creation and adoption.”

¹ ILC: 31st Session, 1948, Report VII, p. 87.

² ILC, 81st session, 1994, Report III (Part 4B), para. 142.

³ ILC, 32nd Session, Record of Proceedings, 1949, p. 468.

⁴ See text of Recommendation 92 of 1951 http://www.ilo.org/dyn/normlexen/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312430:NO

“No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.”⁵ However, in addition to the fact that it is not binding, it does not itself recognise or regulate the right to strike. Convention No. 105 contains a reference to “strikes”, but not to a “right to strike”.

The Employers do not therefore dispute that references to strike action have been inserted in subsequent ILO Conventions, Recommendations and Resolutions. However, this does not alter the fact that there is no regulation of strike action in C. 87 or any other ILO instrument.

The ILO *“Resolution concerning trade union rights and their relation to civil liberties”*, adopted in 1970, invited the ILO Governing Body to undertake a study on the right to strike. It is noteworthy that worker and government members of the drafting committee stated that: *“while the right to strike was provided for in certain instruments adopted by other international organisations, no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO”⁶*.

Despite this background, the ILO Committee of Experts on the Application of Conventions and Recommendations (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”*, and Art. 10 which defines *“organization”*, within the

meaning of the Convention, as any organization *“for furthering and defending the interests of workers or of employers”*.

The CEACR mentioned a 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 public services. In subsequent surveys, the CEACR gradually expanded its views on the matter to seven paragraphs in 1973, 25 in 1983 and with a separate chapter of no fewer than 44 paragraphs in 1994 and 2012, including a number of new subjects. 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”*. Such an assumption of prerogative has never been approved by either the Governing Body or the International Labour Conference (ILC).

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 these cases, the Experts conclude that restrictions on strike action, be they *de facto* or *de jure*, are not compatible with the Convention⁸. Thus they have formulated a comprehensive corpus of minutely-detailed strike law which amounts to a far-reaching, almost unrestricted, freedom to strike⁹. The occasional, theoretical restrictions are regarded as being hardly ever applicable to the actual situations reviewed.

“On the basis of this interpretation.... the CEACR looks into numerous cases involving specific national provisions or practices restricting strike action.”

⁵ See text of Recommendation 92 of 1951 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312430:NO

⁶ ILC record of Proceedings, 54th Session, 1970, Seventh Item on the Agenda, paragraph 12 and 25

⁷ See in detail CEACR General Survey 1994 paras 136-179 and CEACR General Survey 2012 para 117

⁸ 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.

⁹ The 2012 and 1994 CEACR General Surveys devote 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.

The conclusion that strikes are not regulated by Convention 87 is confirmed by the preparatory work of the Convention 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 in the preparatory work, but there was no explicit proposal during the debate in the Conference¹⁰. 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' responses¹¹. *"Several governments, while giving their approval to the formula, have nevertheless emphasised, 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 include a provision on this point in the proposed Convention concerning freedom of association"*¹². This was again confirmed during debates in plenary. *"The Chairman stated that the Convention was not intended to be a 'code of regulations' for the right to organise, but rather a concise statement of certain fundamental principles."*¹³

As stated above, when the Right to Organise and Collective Bargaining Convention was adopted, this subject was again examined *expressis verbis*. In the course of subsequent

discussions, two Workers' delegates' and one Government delegate's proposals to have the right to strike guaranteed in the Convention 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 This question was not pursued the following year.

It is also worth noting that the CEACR in its 2013 General Survey entitled "Collective bargaining in the public service: a way forward", covering the Labour Relations (Public Service) Convention, 1978 (No. 151), recalled that during the preparatory work for Convention No. 151 it was established that the Convention does not cover the right to strike.¹⁵

The CEACR also recalled that concerning the question of the right to strike and Convention No. 154, during the preparatory work for that Convention in 1980, an amendment was proposed by the Worker members and sub-amended by the Government member for Italy, adding: "The right to strike should not be affected by any measure taken by the public authorities with a view to promoting collective bargaining." However, it was rejected following a record vote requested by the Employers' members.¹⁶

At the time of the discussion of the General Survey in the Conference

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.

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 International Labour Conference (ILC), 64th Session, 1978, Record of Proceedings, p. 25/9, report of the Committee on the Public Service, para. 62. See also the text of the CEACR General Survey 2013 ILC.102/III/1B, Para. 88 308 and 406

¹⁶ See ILC, 66th Session, 1980, Record of Proceedings p. 41/9, Report of the Committee on Collective Bargaining, para. 66). See also the text of the CEACR General Survey 2013 ILC.102/III/1B, Para. 88 308 and 406

Committee on the Application of Standards (CAS) in 2014, the Employers' Group highlighted that it was positive to see that the CEACR considers the preparatory work in its explanations on the scope of the Convention. However, **Employers**

made it clear that they fail to understand why the CEACR did not consider the preparatory work on the same issue for C. 87, according to which it was also established that C. 87 would not deal with the right to strike.

Other international instruments

IN 1994, THE CEACR MADE A VAGUE ALLUSION TO THE FACT THAT STRIKES ARE MENTIONED IN OTHER INTERNATIONAL INSTRUMENTS¹⁷.

However, the Universal Declaration of Human Rights of 1948 is not relevant to this issue. Although it sets out many fundamental rights in general terms, these are only recommendations, and compliance is not obligatory¹⁸.

Art. 22, para 1 of the International Covenant on Civil and Political Rights¹⁹, and Art. 8, para 1 (d) of the International Covenant on Economic, Social and Cultural Rights²⁰ are more apposite. For several years, these 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 Conventions²¹. The United Nations Human Rights Committee, in its decision of 18 July 1986²², 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 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 country²³.

"In 1994, the CEACR made a vague allusion to the fact that strikes are mentioned in other international instruments.... However, the Universal Declaration of Human Rights of 1948 is not relevant to this issue."

¹⁷ 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".

¹⁸ See Brupbacher, *Fundamentale Arbeitsnormen der Internationalen Arbeitsorganisation, Eine Grundlage der sozialen Dimension der Globalisierung*, Bern 2002, p. 10.

¹⁹ 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"*.

²⁰ 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."*

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

²² United Nations Human Rights Committee: Report of the Human Rights Committee, General Assembly, 41st Session, Document A41/40, New York, 1986.

²³ Wisskirchen, *The standard-setting and monitoring activity of the ILO*, International Labour Review, Vol 144 (2005), No. 3. p. 286.

In proceedings before the United Nations Human Rights Committee, the complainants asserted that ILO organs had arrived at the conclusion that, in light of ILO Convention No. 87, the right of freedom of association necessarily presupposed the right to strike. The 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 clear observations, the Committee stated that *“it has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned”*. The observations of the United Nations Human Rights Committee as to the separate lives of international treaties and that they must be interpreted by the competent body, can only be described as an amicable diplomatic statement without any binding force²⁴. 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 alone can give binding interpretation of ILO standards.

In para 35 of the 2012 General Survey the CEACR stated *“it is also noteworthy that the right to strike is recognised in the Charter of the Organization of American States (Article 45(c)) and the Charter of Fundamental Rights of the European Union (Article 28), as well as in Article 27 of the Inter-American Charter of Social Guarantees, Article 6(4) of both the European Social Charter and the European Social Charter (Revised), Article 8(1)(b) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (“Protocol of San Salvador”, 1988) and Article 35(3) of the Arab Charter on Human Rights”*.

Without exception, these international instruments state that the right to strike is to be

regulated by national laws and regulations, thus none constitute a source of authority for the recognition internationally of a right to strike, let alone one inhabiting C 87:

- **Charter of the Organisation of American States** Article 45 - The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:... c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defence and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [emphasis added];
- **Charter of Fundamental Rights of the European Union** Article 28 - Right of collective bargaining and action - Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices [emphasis added], the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.
- **Inter-American Charter of Social Guarantees** Article 27 - Workers have the right to strike. The law shall regulate the conditions and exercise of that right [emphasis added].
- **European Social Charter and European Social Charter**

“Without exception.... international instruments state that the right to strike is to be regulated by national laws and regulations.”

²⁴ Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 286.

(Revised) Article 6 – The right to bargain collectively - With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ...3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, *subject to obligations that might arise out of collective agreements previously entered into* [emphasis added].

- **Additional Protocol to the American Convention on Human Rights** in the area of Economic, Social and Cultural Rights Article 8 - Trade Union Rights - 1. The States Parties shall ensure: ...b. The right to strike. 2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law [emphasis added].
- **Arab Charter on Human Rights** Article 35 - 3. Each State Party shall ensure the right to strike provided that it is exercised in conformity with its laws [emphasis added].

In 2002, the European Court of Human Rights (ECHR) deemed inadmissible a court case brought by the (Norwegian) Federation of Offshore Workers' Trade Unions

against a negative decision by the Norwegian Supreme Court. The Norwegian Supreme Court determined that neither Convention No. 87, nor the International Covenant on Civil and Political Rights, contained detailed standards limiting State restrictions on the right to strike.²⁵

The fact is that, when it came to setting standards in the ILO, a clear distinction was made between “freedom of association” on the one hand, and the “right to strike” on the other, to quote just the preparatory Office report regarding standard-setting on Convention 87: “... Several Governments, while giving their approval to the formula, have nevertheless emphasised, 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 include a provision on this point in the proposed Convention concerning freedom of association.”²⁶

Nevertheless, the CEACR assumes that there is a general principle allowing an extensive regulation on a right to strike. In its opinion, limitations require special justification which must be interpreted restrictively²⁷. Two examples can be recalled: 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. While the CEACR basically

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²⁵ Federation of Offshore Workers' Trade Unions v. Norway, Case No. 38190/97

²⁶ International Labour Conference, Record of Proceedings, 1948, Report VII, page 87

²⁷ General Survey 2012 para 127 and General Survey 1994, para 159.

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 strikes²⁸. This wording is, however, virtually meaningless in findings concerning actual cases. The CEACR contends that strikes against government policy

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 parliament²⁹. The Experts are silent about the questionable nature of strikes against a freely elected parliament in a State governed by the rule of law.

“By applying this assumed right of interpretation, the CEACR is putting itself in the role of the constituents in determining the content of an international labour standard.”

CEACR and the Committee on Freedom of Association

THE CEACR RELIES ON STATEMENTS FROM THE COMMITTEE ON FREEDOM OF ASSOCIATION (CFA) TO UNDERPIN ITS VIEWS.³⁰

“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 1950.³¹ The Fact-Finding Commission consisted of independent experts. Its job was to ascertain facts and to try to act as mediator and conciliator. However, as it could act only with the consent of the government concerned, it did not acquire the weight it was intended to have and was abandoned.

The CFA 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 CFA is based on the call in the ILO Constitution to recognise the principle of freedom of association³². Even the representative of the World Federation of Trade Unions, Mr. Fischer, during the discussion prior to the creation of the CFA in 1950, stated that *“the proposed commission should have no connection, either as regards its terms of reference or as regards its activity, with the Convention concerning freedom of association adopted by the ILC. The World Federation of Trade Unions had persistently drawn attention to the inadequacy of these Conventions, which had in fact been ratified by only a very small number of countries. The Commission should carry out its work quite apart from these Conventions in such a manner as to afford an effective guarantee for the observance of trade union rights”*³³.

In short, the CFA has a broader political brief and cannot be seen to be either legislating or restricting itself to the disciplines of interpretation that would establish jurisprudence or a definitive application of the Convention as enacted.

“In 1994, the CEACR made a vague allusion to the fact that strikes are mentioned in other international instruments.... However, the Universal Declaration of Human Rights of 1948 is not relevant to this issue.”

²⁸ 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;....”

²⁹ See Wisskirchen, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No. 3. p. 287.

³⁰ See 2014 CEACR Report III (Part 1A) para 92 and 2012 General Survey para 117

³¹ 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.

³² See Wisskirchen, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No. 3. p. 288.

³³ See Mr. Fischer intervention in Minutes of the 110th session of the GB, 3-7 January 1950, p. 75

The Employers protested unambiguously at an early stage against deviations³⁴. To provide two examples, in 1953, the CFA report stated concerning Mr Pierre Waline, Employer member of the Governing Body Committee on Freedom of Association (CFA): *"(...) Thirdly, the Committee had also had to deal with cases which, while they appeared to involve events of a social complexion, did not relate directly to freedom of association but rather to the right to strike, and whereas there were existing Conventions in the field of freedom of association, even though they could serve only for guidance and not as absolute rules, there were no provisions concerning the right to strike either in the Constitution or in any of the Conventions adopted by the International Labour Conference. In many cases the right to strike was the basic justification of the demands made by the workers. Personally he did not oppose it, but it was legitimate to take the view, which had in fact been taken by those responsible for drafting the French Constitution, that the right to strike should be subject to regulation. There was, however, no international instrument regulating the right to strike which would authorise bodies related to the ILO to pass judgment on the national regulations in force in any given country (emphasis added). That being so, he was bound to oppose any attempt by the Committee of Freedom of Association to depart from the field of freedom of association proper and to encroach on that of the right to strike, which in his view should be considered only in so far as it affected freedom of association."*³⁵. Also in 1953, in a case regarding Turkey (No. 59), the Committee on Freedom of Association considered:

*".... admittedly, Convention No. 87 does not deal with the right to strike..."*³⁶.

For obvious reasons, no issue was made of strike action during the Cold War in the ideological conflict between Western democracies and the Communist Eastern bloc, which also strongly influenced discussions in the ILO. However, even during this period, the Employers never agreed with the CEACR views on the "right to strike". The Workers' claim of the Employers' silence on this question is not only inaccurate – in any case, silence does not equal consent – but is also arbitrary and inadmissible. Workers also withhold the fact that since 1992, i.e. more than two decades, the Employers have regularly reminded the CAS - and have provided supporting arguments - that strike action is not regulated in C. 87 or any other ILO instrument. Employers explained their position in very great detail in 1994 when the CEACR General Survey was discussed³⁷. At that 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 legitimate legislator of the ILO: the International Labour Conference. So far, this proposal by the Employers has gone unanswered. It is also astonishing that the Experts have never addressed the numerous Employers' arguments on 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 as if they were the texts of law³⁸.

³⁴ 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.

³⁵ International Labour Office, Minutes of the 121st session of the Governing Body, Geneva, 3-6 March 1953

³⁶ Sixth Report of the Committee on Freedom of Association, 1953, para. 864

³⁷ ILC: 81st Session, 1994, Record of Proceedings, pp 25/31-25/37, paras 115-134 and pp. 28/9-28/10.

³⁸ Wisskirchen, The standard-setting and monitoring activity of the ILO, International Labour Review, Vol 144 (2005), No. 3. p. 288.

CEACR and the Committee on the Application of Standards

FOR MANY YEARS THERE WAS AGREEMENT BETWEEN THE EMPLOYERS' AND WORKERS' SPOKESPERSONS OF THE CAS NOT TO DISCUSS RIGHT TO STRIKE CEACR OBSERVATIONS, OR INDEED HAVE THIS ISSUE REFLECTED IN THE CONCLUSIONS, BECAUSE OF THE PROFOUND DISAGREEMENT ON THIS ISSUE.

The 2012 CEACR General Survey destroyed this agreement because of the Experts' response to the Employers' objection, which led to the Employers publicly reaffirming their long held objection.

In 2012, CAS witnessed a "deadlock" which arose in relation to strike action and the way in which it has been extensively interpreted by the CEACR on the basis of Convention 87. The 2012 General Survey, which dealt with the eight fundamental Conventions, contained a comprehensive compilation of the Experts' interpretations on a "right to strike" and the specific modalities of its exercise. For many years, Employers have challenged the extension of the mandate of the CEACR to give interpretation to ILO Conventions, and particularly to Convention 87. Therefore, the 2012 discussion on the General Survey was fundamental for Employers, and the Group reiterated their longstanding position at the 2012 ILC by strongly rejecting the Experts' views on a "right to strike". The Employers' rejection of the CEACR approach extended to a refusal to cooperate in the supervision of cases that included the Experts' interpretations on right to strike cases, unless a clarification of the Experts' mandate was inserted in the first page of the Experts' General Survey and General Report. Employers and Workers reached a provisional agreement on the following text: *"The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an agreed or determinative text of the ILO tripartite constituents"*. However, subsequent negotiations were unsuccessful and no list of individual cases to be discussed during the Conference was agreed.

Despite the deadlock, the Employers noted that the CEACR continued as usual its practice of interpretation on a "right to strike". In its 2013 Report, out of 63 CEACR observations on C. 87, 55 concerned the "right to strike" and the related detailed rules that the CEACR unilaterally developed over time. This share was similar to that of preceding years and showed that a "right to strike", although not contained in C. 87, has become a cornerstone of the CEACR's supervision of C. 87. What is more, in the Introduction to its 2013 Report, the CEACR, did not address the substance of the Employers' position. The main reason given for maintaining its position (para. 31) was that, once it had recognised a "right to strike" in principle as protected by C. 87, it had to determine its limits.

This was rejected by the Employers. If it were indeed the case, the CEACR could upset the consensus inherent in the adoption of a Convention and have far-reaching consequences for the setting of international labour regulation, effectively by-passing ILO constitutional rules on standard-setting and undermining the responsibility of Constituents and their governance role (Art. 19 of the ILO Constitution).

The Experts' job is to look at the application of the Convention, as it is written, against law adopted to give it force and practice - not to add obligations that were explicitly excluded from the text by the social partners at the time of adoption.

The Employers trust that the CEACR will reconsider its views on this subject considering the consequences for the right to strike discussion in the CAS, and in particular the conclusions.

It should be recalled that, in the 2013 CAS, the following wording was

"For many years there was agreement between the Employers' and Workers' spokespersons ... not to discuss right to strike CEACR observations, or indeed have this issue reflected in the conclusions, because of the profound disagreement on this issue."

"The Employers trust that the CEACR will reconsider its views on this subject considering the consequences for the right to strike discussion in the CAS, and in particular the conclusions."

inserted into 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 remain 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. The Employers no longer accept any ambiguity on this point.

As recently as June 2014, the CAS disappointingly could not adopt conclusions for 19 of the cases discussed because of the Workers’ refusal to insert the sentence agreed in 2013 into the conclusions of three cases. The Employers also made it clear that, while CAS

conclusions should reflect consensus recommendations whenever possible, differing views by Employers and Workers must be transparent and be reflected in the conclusions.

It is important to clarify that the Employers did not propose a new approach in the 2014 CAS. Rather, given that the non-recognition of a right to strike in Convention 87 and the extensive CEACR interpretation of this issue remained unresolved before the ILO Governing Body, the Employers expected the sentence quoted above to be used again. The Employers went so far as to make alternative proposals which were systematically rejected by the Workers (including wording that provides equivalent recognition of the Workers’ position, or wording contained in paragraph 91 of the CEACR Report which states that the views of the two Groups on the issue “continue to be diametrically opposed”).

Conclusions

THE EMPLOYERS’ GROUP DOES NOT QUESTION THE DIVERSE WAYS IN WHICH DIFFERENT JURISDICTIONS HAVE PROTECTED STRIKE ACTION OR RECOGNISE A RIGHT TO STRIKE.

Employers recognise that strike action is a real issue in the world of work and that countries have established specific legislative processes and practices to deal with it.

However, the Employers have consistently argued that a right to strike is not provided for in the text of ILO Conventions 87 and 98 and, according to all applicable methods of interpretation stated in the Vienna Convention on the Law of Treaties, it would be difficult to consider it to be implicit or customary law.

The Employers’ objections have been accompanied by various requests for clarification. For instance, for the CEACR to explain how it arrived at its interpretations of a right to strike in its 2012 General Survey using the

applicable methods of interpretation; and for a review of the circumstances which create such sustained and profound inconsistency between the views of the Experts and the practice of governments and legislatures.

Moreover, from the time of the 2012 deadlock, the CEACR has continued to provide national governments with observations based on the view that a right to strike is a fundamental right of workers and their organisations and that it is part of C. 87. This view has been incorporated into ILO training materials and advice to governments on labour law and has had a direct impact on legal thinking across jurisdictions. As a result, confusion has been spread over obligations arising from a ratified Convention *vis-à-vis* legal developments of

“The Employers’ Group does not question the diverse ways in which different jurisdictions have protected strike action or recognise a right to strike.”

strike action at national level. This confusion also impacts non-ratifying ILO Member States' obligations to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights at work and has undermined the role of the constituents of the Organization to set international labour standards.

In addition to the confusion, national authorities have to face the intrinsic difficulty of how to regulate strikes while reconciling the conflicting interests of the strikers and those of others and the public interest. ILO Member States have to find adequate solutions in line with their respective situations. Whether, and to what extent, there is a need for rules on strike action at international level has not been determined by the ILO's own constituents. In the process of elaborating C. 87 and a number of subsequent ILO Conventions and Recommendations, such a need has however been expressly rejected. In this regard, paragraphs 115 to 134 of report No. 25 (Provisional Record) of the 81st ILC session 1994, document that the Employers' Group proposed to discuss the question of whether a right to strike should be included in an ILO instrument at the ILC. There was no follow up.

In paragraph 92 of its 2014 Report, the CEACR accepts that the diversity of views on strike action requires a more flexible approach when it states: *"The committee recognises that these observations [on strike action] can be*

questioned by the tripartite constituents or recourse may be made to article 37 of the ILO Constitution". The Employers will continue to question any observations relating to strike action in the context of Convention No. 87.

As matters stand, the Workers' Group has rejected all options for reaching an agreement on a possible solution on strike action at ILO level, despite the fact that, with its unique tripartite structure, the ILO would be the appropriate and legitimate arena for solving this issue.

The Employers reiterate their concern over the differences of opinion between the CAS and the CEACR, which is compromising the authority of the ILO supervisory system as a whole. In this context, the Employers have expressed their disagreement with the CEACR that the following sentence, included in most of the C. 87 conclusions adopted by the CAS in 2013, just *"contains a statement of the position of the Employers"*.

"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."³⁹

The sentence makes it explicitly clear that "right to strike" issues have been excluded from the CAS conclusions, which are traditionally adopted by tripartite consensus.

For further information or advice, please contact IOE Secretary-General Mr. Brent Wilton, at wilton@ioe-emp.org

"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."

³⁹ Extract from the official Conclusions of the Committee on the Application of Standards at the 2013 International Labour Conference on cases citing ILO Convention 87

Glossary of Key Terms

THIS GLOSSARY PROVIDES DEFINITIONS OF MANY OF THE TERMS USED IN THIS PAPER.

INTERNATIONAL LABOUR CONFERENCE (ILC)

The ILC is the “General Assembly” of the ILO. It takes place annually and comprises government, worker and employer representatives from ILO Member States (currently 185 countries). The ILC has various functions, including: the adoption of international labour standards (ILS); the supervision of their implementation (performed in collaboration with other ILO supervisory bodies); the discussion of social and labour issues of global importance; and the adoption of the general policies of the ILO.

INTERNATIONAL LABOUR STANDARDS (ILS)

ILS are legal instruments which set international rules on social and working conditions. ILS take the form of International Labour Conventions and Recommendations. ILO Conventions are international treaties that impose legally-binding obligations upon the ILO Member States that choose to ratify them. ILO Recommendations are non-binding guidelines, although they may be influential in the interpretation of international and domestic labour law.

ILO SUPERVISORY MECHANISMS

The ILO system for monitoring standards is composed of regular and special procedures. Although the ILO has no real enforcement measures at its disposal, political and moral pressure exerted through the public discussions can play an important role in encouraging the implementation of ILS by governments.

The regular procedures – carried out by the CAS and the CEACR (see

below) – allow for legal assessment and scrutiny of the information furnished by States through the submission of reports. The special procedures complement the regular ones and are contentious in character: representations and complaints of non-observance of ratified Conventions are submitted to the ILO Governing Body (GB) which may decide to set up a tripartite Committee or a special commission (Commission of Inquiry) to examine the matter and present their recommendation. In addition, the ILO Committee on Freedom of Association (see below) was set up specifically to deal with freedom of association matters. The examination of complaints under this procedure may be carried out simultaneously with the examination under the regular supervisory mechanisms.

CONFERENCE COMMITTEE ON THE APPLICATION OF STANDARDS (CAS)

The CAS is a standing tripartite body of the ILC vested, together with the Committee of Experts (see below), with the responsibility for the regular supervision of compliance with ILS. It examines measures taken by ILO Member States to give effect to the Conventions they have ratified, and discusses a General Survey that compiles more detailed information on a group of selected Conventions on a particular topic.

COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS (CEACR)

The CEACR is a group (currently 16) of legal experts from around the world tasked with providing an impartial and technical evaluation of the state

of application of international labour standards (ILS). The CEACR issues an annual report, which is presented in the first instance to the ILO Governing Body (GB) and then to the International Labour Conference (ILC).

This Report is published each year in March and consists of three parts:

1. GENERAL REPORT

The General Report provides the CEACR's comments on matters of general interest, such as the application of fundamental Conventions; the ratification and denunciations of Conventions; cases of progress; Governments' compliance with reporting obligations; information on technical assistance the ILO provides on ILS, and the role of employers' and workers' organisations.

2. OBSERVATIONS CONCERNING PARTICULAR COUNTRIES

This is the Experts' assessment of Governments' reports submitted to the ILO on the effect given, in law and in practice, to the ratified Conventions (Art. 22 of the ILO Constitution), and of employers' and workers' organisations' comments on the implementation of specific Conventions. These observations provide the basis for the CAS to discuss at the ILC some 25 individual national cases – generally of failure to comply with ILO Conventions.

3. GENERAL SURVEY

This is a survey of Member States' national law and practice on specific subjects chosen

by the ILO Governing Body. Under Article 19 of the ILO Constitution, Member States are required to report at regular intervals on measures they have taken to give effect to any provision of certain Conventions or Recommendations, and to indicate any obstacle which has prevented or delayed the ratification of a particular Convention. The General Survey allows the CEACR to examine the impact of Conventions and Recommendations, to analyse the difficulties indicated by governments as impeding their application, and to identify means of overcoming these obstacles.

COMMITTEE ON FREEDOM OF ASSOCIATION (CFA)

The CFA was set up in 1950-51 by the GB to examine complaints on or allegations of the violation of the principles of freedom of association contained in the ILO Constitution and the Declaration of Philadelphia. It has a tripartite composition and receives complaints submitted by workers' and employers' organisations, even where the country in question has not ratified the relevant freedom of association Conventions.

The Committee presents to the GB a report containing conclusions and recommendations for action. These findings are highly influential with governments, employers and trade unions, and can succeed in changing law and practice at the national level.

For further information, please visit the International Labour Standards page of the IOE website or contact the IOE directly at ioe@ioe-emp.org

Notes

Notes

The IOE is the largest network of the private sector in the world.
With 150 business and employer organisation members in 143
countries, it is the global voice of business.



The Global Voice of Business

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71 Av. Louis-Casali
1216 Cointrin/ Geneva
T: +41 22 929 00 00
ioe@ioe-emp.org
www.ioe-emp.org