

## **ITUC OBSERVATIONS TO THE ILO COMMITTEE OF EXPERTS ON CONVENTION 87 AND THE RIGHT TO STRIKE**

1. Since June 2012, the IOE has claimed repeatedly that to the extent a right to strike exists it exists only at the national level - not at the international level. To the contrary, the right to strike does exist at the international level and it is firmly rooted in ILO Convention 87 and the ILO Constitution. Moreover, the ILO supervisory mechanisms, and most importantly the Committee of Experts, were justified in making observations and conclusions with regard to that right. While the observations and conclusions of these supervisory bodies are not legally binding, as only the International Court of Justice can issue a legally binding interpretation of an ILO Convention under the ILO Constitution, the work of the Committee of Experts is recognized as having persuasive validity and therefore accepted, absent a contrary decision of the “judicial” bodies referred to in Article 37 of the Constitution.

2. Longstanding jurisprudence and established practice have recognised and supported the existence of the right to strike in connection with ILO Convention 87. Despite the IOE’s claim, the recognition of the right to strike has been the consistent view of the ILO and its tripartite constituents for decades. As noted labour law scholar Tonia Novitz explained,

In the 40 years from 1952 to 1992, there was no challenge made by the employer lobby to ILO jurisprudence on the right to strike as developed by the CFA and CEACR.<sup>1</sup>

3. From the beginning, the different ILO supervisory mechanisms have recognized the right to strike. These bodies have discerned the right to strike from the ILO Constitution and Convention 87, among other instruments. The right to strike has also been referred to in various, subsequent ILO resolutions<sup>2</sup> and indeed in other ILO conventions and recommendations – which enjoyed tripartite support.<sup>3</sup> Increasingly, regional and national tribunals have recognized the fundamental nature of the right to strike, citing ILO Convention 87.

4. The right to strike and the right to freedom of association are inextricably linked. The former can be viewed as an indirect, instrumental means of exercising the latter - the strike being an essential tool for a trade union to be effective in its activities - or as an

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<sup>1</sup> Tonia Novitz, *Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact*, 15 Canadian Lab. & Emp. L.J., 2009-2010, p. 476.

<sup>2</sup> See, e.g., “Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation”, adopted in 1957, which called for the adoption of “laws ...ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers ” (ILO , 1957,p. 783); ILO Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, 1970 (calling upon the Director General to take action “to ensure full and universal respect for trade union rights in their broadest sense” including the “right to strike”).

<sup>3</sup> See, e.g., Forced Labour Convention, No. 105 (1957) and the Voluntary Conciliation and Arbitration Recommendation, No. 92 (1951).

independent right directly stemming from the right to freedom of association.<sup>4</sup> Others scholars suggest that the right to strike is best viewed as one of a bundle of rights, namely the right to associate, to bargain collectively and to strike, and which together constitute the right to freedom of association<sup>5</sup>

5. Indeed, as far back as 1927, the ILO reported that the right to freedom of association and the right to strike are inextricably linked. It stated, "[I]t would seem that the relation between the right to strike and the right to combine for trade purposes is exceedingly close. Many affirm that the two rights are identical, while others contest this view. It would seem, in effect, that distinction between the two is impossible."<sup>6</sup>

6. The IOE notes that the word "strike" is neither found in Convention 87 nor in the ILO Constitution. However, it is far from "indisputably clear" from the preparatory work that the convention excluded the right to strike. To the extent the issue of the right to strike was raised at the time the convention was being debated, it was most often in the context of whether public officials should enjoy that right<sup>7</sup> or in reference to dispute settlement.<sup>8</sup> There is nothing conclusive to be found in the preparatory work establishing that the right to strike was not contemplated. It may have been the case that some governments expressed a view on this question; however, that alone is not dispositive.

7. Indeed, in examining the record of debates leading up to the elaboration of Conventions 87 and 98 (and the related recommendations), labour law scholar Ruth Ben-Israel concluded that the Office had at the time taken the position that the whole of the right to freedom of association had been guaranteed and thus there was no need to articulate a specific right to strike - it was already assumed to be protected by the convention.<sup>9</sup>

8. Bernard Gernigon, former Chief of the Freedom of Association Branch of the ILO, notes that at no point in the proceedings prior to the adoption of Convention 87 was the right to strike ever expressly denied.<sup>10</sup>

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<sup>4</sup> See, e.g., Leader, Sheldon. *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University 1992); Leader, Sheldon, 'Can You Derive the Right to Strike from the Right to Freedom of Association?' *Canadian Labor and Employment Law Journal*, Vol. 15, No. 2 (2010); Zou, Mimi, *A Freestanding Right or a Means to an End? The Right to Strike in the ILO and EU Legal Frameworks*, 15 *Trinity C.L. Rev.* 101 (2012).

<sup>5</sup> Ruth Ben-Israel, *International Labour Standards: The Case for a Right to Strike* (Kluwer Law 1988), Part I.

<sup>6</sup> International Labour Office, *Freedom of Association, A Comparative Analysis*, 1927, Volume I, p. 101.

<sup>7</sup> See, e.g., Record of Proceedings (1948), ILC 31<sup>st</sup> Session, 15<sup>th</sup> Sitting. Mr. Viega, Government Delegate of Portugal ("we should avoid drafting anything which might imply the idea that we were granting public servants the right to strike.").

<sup>8</sup> Record of Proceeding (ILO 1947) App. X, 563, 565; Record of Proceeding (ILO 1947) App. X.

<sup>9</sup> See Ruth Ben-Israel, *International Labour Standards: The Case for the Right to Strike* (Kluwer Law 1988), p45.

<sup>10</sup> Gernigon, et al, *ILO Principles Concerning the Right to Strike*, *International Labour Review*, Vol 137 (1998), p 8, fn. 4.

9. Notably, the Employers' Group had also previously stated, in the 1994 Records of Proceedings for example, that "they were not so much criticizing the fact that the Committee of Experts wanted to recognize the right to strike in principle, but rather that it took as a point of departure a comprehensive and unlimited right to strike."<sup>11</sup> Of course, neither the CFA nor the CEACR have ever put forth an unlimited right to strike and have in fact identified numerous limitations on the right. Three years later, in 1997, the Employers Group "acknowledged that the principle of industrial action, including the right to strike and lockouts, formed part of the principles of freedom of association as set out in Convention No. 87."<sup>12</sup>

10. For decades, the right to strike has been viewed by the CEACR and CFA as rooted in Articles 3 and 10 of Convention 87. The first of these two articles establishes the right of workers to "organize their administration and activities and to formulate their programmes." The second notes that the aims of such organizations are "furthering and defending the interests of workers or of employers." It is on the basis of these articles, as well as the ILO Constitution, that the relevant ILO supervisory machinery (discussed in the section below) have founded their competency to review questions concerning the right to strike and, over many decades, have issued observations and recommendations on the right to strike. Given the imbalance in power between the employer and the worker, the right to freedom of association and to bargain collectively would be impossible to exercise in the absence of the ability to withhold one's labour.

11. The Committee of Experts has repeatedly found that the right to strike is one of the essential means for workers and their associations to promote and protect their economic and social interests. As early as 1953, the CEACR was reporting on national legislation concerning the right to strike in the reports dealing with Convention 87. By 1959, less than a decade after Convention 87 came into force, the CEACR, in the first General Survey to review in detail freedom of association, provided analysis on the right to strike in the section corresponding to Article 3 of the convention. It found in particular that the "prohibition of strikes by workers other than public officials acting in the name of public powers... may sometimes constitute a considerable restriction of the potential activities of trade unions."<sup>13</sup> Over time, the experts expanded on these views in the General Surveys of 1983,<sup>14</sup> 1994<sup>15</sup> and 2012.

12. The Committee on Freedom of Association has also found a right to strike derived from freedom of association as far back as 1952 in Case 28 (UK-Jamaica):

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<sup>11</sup> Record of Proceedings (ILO 1994), ILC 81<sup>st</sup> Session, 25/33, para 121.

<sup>12</sup> Record of Proceedings (ILO 1997), ILC 85<sup>th</sup> Session, 19/35.

<sup>13</sup> CEACR Report, 43<sup>rd</sup> Session, ILC 1959, (Part I, Report III), p. 114.

<sup>14</sup> General Survey, ¶ 200, (finding that, "The Committee considers that the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests.")

<sup>15</sup> General Survey, ¶ 151 (finding that "the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87); ¶ 141 (reaffirming with regard to the right to strike that "The ILO instrument are the primary source of law.")

The right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes.<sup>16</sup>

13. That the CFA observed that the right to strike was an essential element of the right to freedom of association, thus giving it competency to review the case, did not generate significant controversy at the time. The CFA in subsequent cases was explicit in asserting its competence to address complaints regarding the right to strike. In Case No. 163 (Burma), the CFA declared “allegations relating to prohibitions to the right to strike are not outside its competence when the question of freedom of association is involved.”<sup>17</sup> It further stated “the right of workers and workers' organisations to strike as a legitimate means of defence of their occupational interests is generally recognised.”<sup>18</sup>

14. The IOE has made much of the claim that there is no agreement between the Committee on Application of Standards and the Committee of Experts on the question as to whether freedom of association includes a right to strike. However, the CAS as a whole has not agreed with the IOE's position. To the extent there is discord between these two committees, it is because of one of the constituents, the Employers' Group.

15. The IOE has argued that the right to strike may only be discussed if at all in the CFA and that the Experts' conclusions are not legally valid unless specifically endorsed by the CAS. Indeed, the IOE has suggested that the CAS stands in a superior position to the other supervisory mechanisms. This is incorrect. The mandate of these two committees suggests no hierarchy between them. Neither has a role to pass judgment on the findings of the other. The CAS simply adds a political element of debate with selected governments in a tripartite setting to gather additional information and put additional pressure on them to implement the conventions they have ratified. The fact that the most political of supervisory bodies, the CAS, may from time to time disagree with the independent, technical views of the Committee of Experts does nothing to diminish the persuasive authority of the views of the latter.

16. Indeed, as the ILO explained in 1990,

The deliberations of the [Conference Committee on the Application of Standards] offer to the ILO constituents the possibility of participating democratically in the examination of how ratified Conventions are followed up. The Conference Committee is not an appellate tribunal called upon to examine the opinion of the Committee of Experts, and its evaluations are not judgments. They arise instead from a spirit of dialogue with the ILO's constituents, based on the prior technical and legal advice given by the

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<sup>16</sup> CFA Report No. 2 (1952), Case No. 28 (UK-Jamaica), para 68.

<sup>17</sup> CFA Report No. 27 (1958), Case No 163 (Burma), para 51.

<sup>18</sup> Id.

Committee of Experts, to achieve a better application of international labour standards.<sup>19</sup>

17. The IOE also argues that the Vienna Convention precludes the Committee of Experts from deriving a right to strike from Convention 87. Rules for treaty interpretation are contained in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT). The central provision for treaty interpretation is found in Article 31(1) VCLT, which contains several elements. First, a treaty shall be interpreted in ‘good faith’. Further, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty, in their context (in view of the whole instrument). This shall be done in light of the object and purpose of the treaty. Paragraph 2 of Article 31 provides that for the purpose of interpreting a treaty, the ‘context’ of a treaty includes not only the text but also its preamble and annexes, any agreement or instrument in connection with the conclusion of the treaty and any subsequent agreement and practice regarding its interpretation.

18. The ILO supervisory bodies, in finding that a right to strike is an integral part of the right of freedom of association (both Convention 87 and the Constitution), has acted consistent with both customary international law norms of treaty interpretation (applicable prior to the ratification of the VCLT) and the VCLT.

19. The 2012 General Survey found that the absence of a concrete provision is not dispositive, as the terms of the convention must be interpreted in light of its object and purpose. It also notes that one should look to other interpretive factors, including the consistent subsequent practice over 52 years.<sup>20</sup>

20. In 2007, the CEACR also made note of the different methods of interpreting conventions. In interpreting Convention 29 as to questions of modern slavery, it stated,

[I]n interpreting conventions, the terms and purposes had to be taken into consideration, as they were living instruments which had not to be solely interpreted in the context of prevailing conditions which existed at the time of their adoption.<sup>21</sup>

21. The CEACR referred to these issues again in 2011, responding to the request to clarify the methods followed when expressing its views on the meaning of the provisions of conventions. It reiterated that

it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the CEACR has always paid due regard to the textual meaning of the words in light of the Convention’s purpose and object as provided for by

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<sup>19</sup> ILO, Report of the Committee on Application of Standards, 1990, p 27.

<sup>20</sup> ILO, Committee of Experts, General Survey 2012, p. 48.

<sup>21</sup> ILC, 96<sup>th</sup> Session, Provisional Record No. 22, ¶ 133.

Article 31 of the Vienna Convention. In addition and in accordance with Articles 5<sup>22</sup> and 32 of the Vienna Convention, the Committee takes into account the Organization's practice of examining the preparatory work leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting.<sup>23</sup>

22. Finally, the “living instrument” concept of interpretation is a common means of interpretation, particularly in the interpretation of human rights instruments. The importance of such an interpretative method is the consequence of the overriding object and purpose of human rights treaties. The interpretation of the text in light of the object and purpose is required to make human rights provisions ‘practical and effective’ and to take into account ‘present-day conditions’ for the protection of the individual.

23. The mandate of the Committee of Experts as established by the Conference in 1926 and amended by the Governing Body in 1947 is indeed the starting point of any analysis of its functions. It is useful to note however that the scope of its mandate has evolved over the years at the request of the Conference or with its consent. Thus, for example, although the primary function of the CEACR was to ascertain the degree of conformity between national legislation and ratified conventions, today it attaches much importance to the effective application of the Conventions in practice.

24. The CEACR has often recalled that its terms of reference do not require it to give definitive interpretations of Conventions but it has said that in order to carry out its function of determining whether the requirements of Conventions are being respected, it has to consider and express its views on the content and meaning of the provisions of Conventions and to determine their legal scope, where appropriate. This is particularly true when the text espouses broad principles rather than technical rules. The experts in such cases must engage in a greater degree of interpretation in order to give effect to the text.<sup>24</sup>

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<sup>22</sup> Article 5 of the VCLT, included at the insistence of the ILO, provides that the rules of the convention shall apply to the constituent instruments of international organizations and any treaty adopted within an international organization without prejudice to any relevant rules of the organization. Indeed, then-ILO Director General Mr Jenks, who attended the UN Conference on the Law of Treaties, stated that “ILO practice on the interpretation had involved greater recourse to preparatory work than was envisaged” in the draft convention. The ILO supervisory bodies have indeed developed interpretive practices under which the preparatory work, as well as the comments of other supervisory bodies, has a role.

<sup>23</sup> CEACR Report, 100 Session, ILC 2011, (Part I A, Report III), ¶ 12.

<sup>24</sup> See ILO, General Survey concerning labour relations and collective bargaining in the public service, Report III (Part 1B), 2013, para. 8 (“It has stated, nevertheless, that in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee has to consider the content and meaning of the provisions of Conventions, to determine their legal scope, and where appropriate to express its views on these matters. The Committee has consequently considered that, in so far as its views are not contradicted by the International Court of Justice, they should be considered as valid and generally recognized. The Committee considers the acceptance of these considerations to be indispensable to maintaining the principle of legality and, consequently, to the certainty of law required for the proper functioning of the International Labour Organization.); See also, Nicolas Valticos, *Droit International du Travail*, Dalloz Paris (1983), p. 136, para. 176. (“This interpretive role is not based on any express authority, but the logical consequence of its mandate and the nature of its task. It has also increased

25. The jurisprudence developed by the CEACR ensures that member states have a better understanding of the requirements of Conventions in order to apply them and non-ratifying states have a better idea of the scope of the obligations in the Conventions that they are proposing to ratify.<sup>25</sup> Legal uncertainty will only discourage participation in the international labour mechanisms, as nations are unsure of what they are obliged to do.<sup>26</sup>

26. Of the 151 member states that have ratified Convention No. 87, 137 did so after 1952 when the CFA first established its jurisprudence on the right to strike. Furthermore, 115 out of those 151 ratifications were made after the publication of the first General Survey on Freedom of Association in 1959 mentioned above. There can be little question that these states understood that the Convention included a right to strike and ratified the Convention accepting that such a right existed.

27. Finally, it is worth remembering that the central arguments raised by the IOE have been carefully considered over the last years by the Committee of Experts and in numerous tripartite consultations. Concerning the right to strike, all of the key arguments raised had been provided to the ILO Committee of Experts in advance of the preparation of the Experts' 2012 General Survey. That Survey carefully considered those views, as well as the views of the Workers' Group, and reaffirmed that the right to strike does in fact flow from Convention 87.

28. The General Survey also found that employers were content to cite the views of the very supervisory system it now criticizes when the observations on the right to strike favoured the employers. "The Committee further observes that employers' organizations also sometimes invoke the principles developed by the supervisory bodies concerning strikes and very tangible related matters, particularly with regard to the freedom to work of non-strikers, the non-payment of strike days, access of the management to enterprise installations in the event of a strike, the imposition of compulsory arbitration by unilateral

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over the years, as and when, for the sake of flexibility, the Organization adopted texts in deliberately general terms. Increasing generality of the terms used in international labor conventions has resulted to increase the interpretive role of the Committee of Experts which is called to determine whether an agreement is effectively enforced, to assess more accurately the meaning and scope. While the need and scope for interpretation are minimal in the case of technical agreements drafted in precise terms, such as, for example, which provide an accurate minimum age for admission to employment or a certain period of maternity leave or paid leave, they are significant in the case of agreements establishing principles in general terms, which are also the remains generally those on fundamental issues."(translation).

<sup>25</sup> With regard to the idea of international jurisprudence, again Valticos provides useful insight. See, Valticos N., *Le développement d'une jurisprudence internationale au sujet des normes établies par les organisations internationales (spécialement à propos des normes relatives au travail*, In memoriam Sir Otto Kahn Freund, (Munich 1980), p. 718. ("Between the formulation of the rule by the international standard-setting body (the Conference) and its application to particular cases, several stages of successive concretization should intervene, at the international and national levels, their number and importance depending on the greater or lesser degree of generality of the international standard. (...) This international concretisation can be construed as constituting an international jurisprudence in the widest sense, that is to say, insofar as it completes the international legal order by the information it provides about the scope of international standards.")

<sup>26</sup> *Supra*, fn. 44, p.8

decision of trade unions and protest action by employers against economic and social policy.”<sup>27</sup>

29. Thus, the ITUC believes that the Committee of Experts is well within their mandate to make observations on the right to strike, which is derived from ILO Convention 87.

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<sup>27</sup> Id. at p. 49.