

INTERNATIONAL TRADE UNION CONFEDERATION (ITUC)

THE RIGHT TO STRIKE AND THE ILO:

THE LEGAL FOUNDATIONS

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ABSTRACT

In June 2012, the Employers' Group brought the Committee on Application of Standards (CAS) to a sudden, unexpected (and unprecedented) halt. Why? The Employers' Group, under new leadership in the CAS, decided to challenge the very existence of an international right to strike, a right that had been recognised to exist in principle by all ILO constituents (employers, workers and governments) for many decades. Equally as fundamental, the Employers' Group also challenged the competency of the ILO Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) to interpret ILO conventions – attempting to open a door to future challenges to other ILO conventions. Rather than pursue the judicial options available to it under Article 37 of the ILO Constitution, the Employers' Group opted instead to hold hostage the ILO supervisory system, withholding the consensus necessary to allow it to function, until the Employers' Group's demands were met. Such demands included a "disclaimer" to be affixed to the front cover of the ILO Committee of Experts' Annual Report and General Survey that would state that the reports do not reflect the view of the tripartite constituents and therefore enjoy no legal authority. These demands have not changed since 2012.

This brief, written by an expert legal panel, is intended to examine and rebut the central legal arguments raised by the Employers' Group in support of their position. It is the authors' hope that the arguments will inform the debate on the existence of the right to strike in all relevant fora, including the ICJ, should that opportunity arise. The conclusion of the analysis is that there simply is no question but that ILO Convention 87 protects an international right to strike. Further, the ILO supervisory system, including the Committee of Experts, has relied upon well-established methods of treaty interpretation to arrive at this conclusion. Those methods could only lead to that conclusion. In line with its own jurisprudence, the ICJ should give substantial deference to the observations of the Committee of Experts. The right to strike is further buttressed by subsequent recognition of the right to strike in international and regional treaty instruments and by the decisions of regional and national courts; indeed, it must be concluded that the right to strike is now recognised under customary international law.

If the Employers' Group wishes to continue with its challenge on the right to strike, it has two options under the ILO Constitution – to seek a referral of the matter by the ILO Governing Body to the International Court of Justice for an Advisory Opinion (Article 37.1 of the ILO Constitution) or agree to the establishment of an internal, independent tribunal to provide for the expeditious determination of the "dispute or question" relating to the interpretation of Convention 87 (Article 37.2). Failure on the part of the Employers' Group to agree to resolve this matter before an independent judicial body will be viewed as an acceptance of the authors' arguments and conclusions as correct. It will also be viewed as illustrating the thesis of the Workers' Group, which is that the Employers' Group's strategy is to destabilise the ILO supervisory system and in so doing seek to force the adoption of debilitating changes to fundamental labour rights.

I. INTRODUCTION: THE EMPLOYERS' CHALLENGE TO THE RIGHT TO STRIKE

A. *The 2012 International Labour Conference*

At the commencement of the 2012 International Labour Conference, the spokespersons of the Employers' Group and the Workers' Group met to finalise a "short list" of 25 cases drawn from the Annual Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)¹ which would be discussed by the tripartite constituents the following week in the Conference Committee on the Application of Standards (CAS).² Although the spokespersons had been in dialogue since March, the Employer's Group spokesperson - without warning - announced at the International Labour Conference that the Employers' Group would refuse to agree to a negotiated final short list that included any case where the Committee of Experts' Annual Report contained observations regarding the right to strike. While there are frequently disagreements on specific cases between the Employers' Group and Workers' Group, this marked the first time that the Employers' Group flatly refused to discuss the application of an entire area of law, based on its own, unique beliefs as to legitimacy of the Committee of Experts' observations.

In this context, the Employers' Group also sought a "disclaimer" on the Committee of Experts' General Survey, which would state, "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." The purpose of this disclaimer appeared to be two-fold – to diminish the persuasive authority of the Committee of Experts' observations outside the ILO and to attempt to establish a (novel) hierarchy of the political, tripartite body - the CAS - over the independent Committee of Experts.

In 2012, the General Survey focused on the eight "fundamental" ILO conventions and, among others things, confirmed the long-standing legal analysis of the ILO that Convention 87 includes a right to strike. The competing arguments of the Employers' Group and

¹ In 1926, the International Labour Conference adopted a resolution establishing the Committee of Experts on the Application of Conventions and Recommendations. The Committee is normally composed of 20 members who are eminent jurists. The members are appointed by the tripartite Governing Body for a term of three years. The Committee meets annually to examine reports submitted by governments, as well as employers and workers, on, among other matters, the measures taken to give effect to ratified conventions. The work of the Committee is to indicate the extent to which the law and practice of each member state are in conformity with ratified conventions, which are published in annual reports. In so doing, the Committee is guided by principles of independence, objectivity and impartiality.

² The Conference Committee on the Application of Standards, also established in 1926, is a standing tripartite body of the International Labour Conference. Each year, it examines the reports published by the ILO Committee of Experts, including the General Survey and the Annual Report. Subsequent to the technical examination by the Committee of Experts, the tripartite constituents through the CAS have an opportunity to examine the manner in which states comply with their obligations under the conventions. The Employers' Group and Workers' Group negotiate a list of 25 cases to which the designated governments are called upon to provide additional information to the CAS. Based on the information supplied to the CAS, the Employers' Group and Workers' Group negotiate and adopt conclusions on those cases.

Workers' Group were both reported and evaluated in the Survey.³ The Employers' Group threatened to block any agreement over a list of cases unless the Workers' Group accepted the proposed disclaimer. These conditions made it impossible to proceed with the work of the CAS.

The Workers' Group endeavoured to find a solution, including proposing a "neutral" list of 25 cases taken in alphabetical order from the "long list" to which the Employers' Group and Workers' Group had already agreed. The Workers' Group also suggested early on that the dispute be put to the ILO Governing Body (GB), which the Employers' Group initially rejected emphatically. Instead, the Employers' Group insisted on the same set of demands and even walked out during the CAS while negotiations were still under way. In the end, the Employer's Group agreed to refer the matter to the GB, but only after several days and when any possibility to complete the work of the CAS had passed.⁴ In practical terms, it meant that workers from around the world were deprived of an important opportunity, in some cases their only opportunity, to have their claims heard in an international forum and acted upon.

B. What Were the Employers' Group's Central Arguments?

The Employers' Group distributed a short statement at the International Labour Conference on 4 June explaining its actions.⁵ The Employers' Group's text draws almost entirely upon the work of Alfred Wiskirchen, who had served as the Employers' Group spokesperson and Vice-Chairperson of the CAS from 1983 to 2004.⁶ The Employers' Group's statement made the following central claims:

1. The mandate of the Experts is to comment on the "application" of conventions, not to "interpret" them. Only the ICJ can provide a definitive interpretation.⁷
2. The General Survey and the Annual Report of the Committee of Experts are not agreed or authoritative texts of the ILO tripartite constituents. Specifically, the Committee of Experts does not supervise labour standards but rather the ILO tripartite constituents. Thus, it is the tripartite constituents which ultimately decide

³ Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008*, Report III (Part 1B), International Labour Conference, 101st Session, 2012 ("General Survey 2012") available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf.

⁴ See Provisional Record No. 19, ILC, 101st Session, Geneva, 2012, Part 1 Rev., p. 19/48-9.

⁵ See Employers' Statement in the Committee on the Application of Standards of the International Labour Conference on 4 June 2012, available online at http://www.uscib.org/docs/2012_06_04_ioe_clarifications_statement.pdf.

⁶ Wiskirchen's views have been expressed in several papers in German and English. See, e.g., Alfred Wiskirchen, *The standard-setting and monitoring activity of the ILO: Legal questions and practical experience*, 144 Int'l Lab. Rev. 253 (2005).

⁷ See Provisional Record, 2012, supra fn. 4 at p. 19/13.

upon the meaning of the ILO conventions.⁸

3. Convention 87 is silent on the right to strike and therefore it is not an issue upon which the Committee of Experts should express an opinion. Given the absence of any reference to a right to strike in the actual text of ILO Convention 87, the internationally accepted rules of interpretation require Convention 87 to be interpreted without a right to strike.⁹

The Workers' Group, several governments¹⁰ and the representative of the ILO Director-General¹¹ expressed sharp disagreement with the Employers' Group's views at the International Labour Conference. The Employers' Group subsequently asserted that the entire supervisory system was in fact "in crisis"¹² and called for a change to its functioning.¹³

C. Why Now?

For nearly 40 years after 1952, when the Committee on Freedom of Association began functioning, there was no challenge by the Employers' Group to ILO jurisprudence on the right to strike as developed by the ILO Committee on Freedom of Association (CFA) and the Committee of Experts.¹⁴ Indeed, the CFA had routinely issued conclusions, by tripartite consensus, affirming the right to strike and regulating its exercise. The Committee of Experts' observations on the right to strike were also regularly approved by the tripartite constituents at the International Labour Conference. Until the end of the Cold War, the Employers' Group did not question the existence of a right to strike protected by the ILO. With the end of the Cold War, however, the alliance between the Employers' Group and Workers' Group against Eastern Bloc repression of trade union rights was no longer relevant. The Employers' Group's acceptance of a right to strike recognized and protected by the ILO started to wane when striking Polish shipbuilders had won.¹⁵

Employers' Group complaints surfaced in 1989 and 1992. In 1994, with the publication of a General Survey on Freedom of Association and Collective Bargaining, the Employers' Group elaborated a lengthy critique on the right to strike as it had been developed by the

⁸ Id. at p 19/5.

⁹ Id. at pp. 19/34-6.

¹⁰ Id., p. 19/24 (right to strike was a fundamental right); pp. 19/42-3 (IMEC supporting mandate of experts and supervisory system).

¹¹ Id., pp. 19/44-5.

¹² See ILO, "Matters arising out of the work of the International Labour Conference (2013), Governing Body, 317th Session, GB.317/INS/4/1, para 19-20.

¹³ See IOE News Release, "Employers call for a change to the Functioning of the ILO Regular Supervisory System" (IOE, 2 February 2013).

¹⁴ See 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; Claire La Hovary, *Showdown at the ILO: A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 *Indus. L. J.* 338, 335 (Dec 2013).

¹⁵ For a description of how the end of the Cold War and the dominance of neo-liberalism have adversely impacted on trade union rights, see Susan Kang, *Human Rights and Labor Solidarity: Trade Unions in the Global Economy*, (U. of Penn. 2012), at 33-40.

supervisory system and in particular by the Committee of Experts.¹⁶ However, it is important to note that the Employers' Group had clarified 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."¹⁷ Of course, neither the CFA nor the Committee of Experts had ever posited an unlimited right to strike and have in fact recognised numerous limitations on the right over the years. Three years later, in 1997, the Employers' Group again "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."¹⁸ Not until 2012 did the Employers' Group argue that an international right to strike did not exist *at all*.

The Employers' Group's hard stance appears motivated in part by the fact that ILO jurisprudence, once largely self-contained within Geneva, was now taking on a life outside of the ILO. National and regional courts were now turning ever more frequently to the texts of the ILO supervisory system to understand the scope of freedom of association under their own instruments and laws. The drafters of business and human rights guidelines and principles were also incorporating the principles of the core ILO conventions, and taking into consideration the attendant body of jurisprudence. Human rights and labour rights NGOs increasingly cite decisions of ILO supervisory bodies to hold multinational companies accountable for practices that violate ILO freedom of association standards.¹⁹ Further, free trade agreements and trade preference programs are increasingly making explicit reference to the ILO conventions, the 1998 Declaration and the ILO supervisory system. Together, this has had the effect (in particular with national and regional courts and trade agreements) of slowly converting the "soft" law of the ILO supervisory system to "hard" law.²⁰

For example, and as explained in detail below, the European Court of Human Rights recognised the existence of a right to strike in the case of *Enerji Yapi-Yol Sen v Turkey*, and developed this in subsequent cases. The Court noted that the right to strike had been recognised by the supervisory bodies of the ILO as an essential corollary to the right of freedom of association protected by ILO Convention 87.²¹ *Enerji Yapi-Yol Sen* built upon *Demir and Baykara v. Turkey*, which had referred to ILO Conventions 87 and 98, as well as the observations of the CFA and the Committee of Experts, to find that Turkey had violated Article 11 of the European Convention by its interference with the right of municipal civil servants to form a trade union and to enter into a collective bargaining agreement.²² In *RMT v UK*,²³ the ECtHR extensively reviewed ILO Committee of Experts' and CFA findings under

¹⁶ Record of Proceedings No. 25, ILC, 81st Session, Geneva, 1994, pp. 25/31-37.

¹⁷ *Id.*, p. 25/33, para. 121.

¹⁸ Record of Proceedings No. 19, ILC, 85th Session, Geneva, 1997, p. 19/35.

¹⁹ See, e.g., Human Rights Watch, *Discounting Rights: Wal-Mart's Violation of US Workers' Right to Freedom of Association* (2007), available at <http://hrw.org/reports/2007/us0507/>

²⁰ Record of Proceedings 2012, *supra* n. 4, pp. 19/13, 34.

²¹ European Court of Human Rights, Third Section, *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009, Application No. 68959/01 at para. 24.

²² European Court of Human Rights, Grand Chamber, *Demir and Baykara v. Turkey*, 12 Nov. 2008, Application No. 34503/97.

²³ European court of Human Rights, Fourth Section, *National Union of Rail, Maritime and Transport Workers (RMT) v UK*, Application No. 31045/10, 8 April 2014.

ILO Convention 87,²⁴ concluding from them that secondary industrial action “is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter”²⁵ so that it “would be inconsistent with [the method prescribed by Article 31(3)(c) of the Vienna Convention] for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.”²⁶

In the Americas, the Inter-American Court of Human Rights, in *Case of Baena-Ricardo et al. v. Panama*,²⁷ relied on the observations of the Committee of Experts and the CFA in ruling that Panama had violated the right to freedom of association guaranteed by Article 16 of the American Convention on Human Rights when it issued a decree dismissing 270 striking workers.²⁸

The OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights also refer directly to the ILO core labour standards, including the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, which includes the principle of freedom of association.²⁹ Thus, the extent of a corporation’s duty under the OECD Guidelines or the UN Guiding Principles, and the assessment as to whether that duty was breached, would presumably be ascertained through resort to the jurisprudence of the ILO.

ILO core labour standards have also been incorporated into numerous trade agreements, some of which may impose fines or trade sanctions where national laws consistent with those standards are not adopted and effectively enforced.³⁰ Trade preferences may also be withdrawn in the case of serious and systematic violations of these standards.

D. 2012-2014

Following the 2012 International Labour Conference, the ILO established a schedule of informal tripartite discussions in addition to formal discussions at the regular sessions of the ILO GB in an effort to find a way out of the impasse. While the Employers’ Group did agree to discuss a list of cases in 2013, they did not back down on any of their demands and simply reiterated that the system was in crisis. The Employers’ Group also backed away from any

²⁴ See *RMT* paras. 27-33, likewise the review of the European Committee on Social Rights case-law, at paras. 34-37.

²⁵ *RMT* para.76.

²⁶ *Ibid.*

²⁷ *Case of Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights, *Merits, Reparations and Costs, Judgment of Feb. 2, 2001*, Series C No. 72.

²⁸ *Id.* at para. 162-63 and 214.

²⁹ See, e.g., OECD Guidelines, Commentary on Employment and Industrial Relations, pp. 43-46; UN Guiding Principles, Principle 12 and Commentary, stating that, “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

³⁰ See, e.g., ILO, *Social Dimensions of Free Trade Agreements*, Geneva, 2013, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_228965.pdf

resort to the judicial mechanisms under Article 37 of the ILO Constitution to examine the question of the right to strike. The Swiss Government facilitated bilateral meetings between the Employers' Group and Workers' Group to try and see if some consensus on the way forward could be reached between the social partners prior to resuming tripartite consultations. These meetings, held in May, June and September of 2013, also failed to resolve the issues.

At the 2013 International Labour Conference, the constituents were able to agree to a list of 25 cases to be discussed in the CAS. However, the Employers' Group insisted on including a statement in the conclusions of the cases related to freedom of association which read, "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 recognized in Convention No. 87."³¹ This of course did not stop the Employers' Group from subsequently raising and discussing the right to strike in the CAS. The Employers' Group also opened up new lines of attack, suggesting for example that the Committee of Experts had again exceeded its mandate in ascertaining a requirement to bargain collectively in good faith because the words "good faith" did not actually appear in the text of Convention 154 on the Promotion of Collective Bargaining.³²

In March 2014, the ILO Governing Body discussed potential ways forward from the dispute arising out of the 2012 International Labour Conference. Among the measures requested, the Governing Body authorised the Director General to "prepare a document for its 322nd Session (November 2014) setting out the possible modalities, scope and costs of action under articles 37(1) and 37(2) of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention."³³ In November, the Governing Body will review the report and will provide further direction to the ILO on which option, if any, the members wish to pursue.

E. The International Court of Justice (ICJ)

In October 2013, the General Council of the ITUC resolved to seek to refer to the ICJ the question as to whether the right to strike was protected by Convention 87. The Workers' Group chair had similarly challenged the Employers' Group over the course of 2012-13 to exercise the judicial options available to it including the ICJ.

In practice, the ILO may request an advisory opinion of the ICJ on the basis of its own constitution and the agreement between the UN and the ILO. Article 37.1 of the ILO Constitution provides:

Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

³¹ See Provisional Record No. 16, ILC, 102nd Session, Geneva, 2013, Part 2 Rev., pp. 16/30, 45, 50, 57, 64, 71.

³² See Provisional Record No. 16, ILC, 102nd Session, Geneva, 2013, Part 1 Rev., p. 1/31.

³³ Decision available online at http://www.ilo.org/gb/decisions/GB320-decision/WCMS_239960/lang-en/index.htm.

Article 9 of the Agreement between the UN and the ILO provides at subsection 2:

The General Assembly authorises the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.³⁴

It further specifies that a request may originate with “the Conference or by the Governing Body acting in pursuance of an authorisation by the Conference.”³⁵

The dispute over the interpretation of ILO Convention 87 as to the existence of the right to strike clearly meets the technical requirements for a reference to the ICJ – it concerns a question of interpretation of a convention, the ILO is authorised to request such an opinion, and it arises out of the scope of the ILO’s activities. Thus, a referral can be made by the GB to the ICJ on the basis of a simple majority vote.³⁶ The GB would need to settle upon an exact question or questions and send them in writing to the ICJ for its advisory opinion.³⁷

This brief considers the arguments surrounding ILO Convention 87 and the right to strike. It is hoped that these arguments will inform discussion of the right to strike in all relevant fora. It is proposed that this document might constitute the Workers’ Group’s submission to the ICJ if the question of the right to strike were to be referred to it by the ILO Governing Body.

II. THE ICJ AND THE ILO

In previous decisions, the ICJ has established a standard of deference to the interpretation of independent international bodies which have been given a mandate to supervise the

³⁴ Text of agreement available at <http://www.ilo.org/public/english/bureau/leg/agreements/nu.htm>.

³⁵ In 1949, the ILC authorised the Governing Body to request advisory opinions to the ICJ on behalf of the ILC. See Record of Proceeding, ILC, 32nd Session, Geneva, 1949, pp. 244, 391.

³⁶ There is some dispute as to whether this opinion would be legally binding. Advisory Opinions typically are just that – advisory, and thus do not have the force of law as would an opinion rendered under the contentious jurisdiction of the ICJ. See ICJ Statute Article 59 and 63 (explicitly providing that decisions in contentious cases are binding on the parties and any interveners). However, organisations seeking an advisory opinion may determine beforehand that such an opinion is nevertheless binding. The authors do not here attempt to explore this issue in depth. However, the fact that the ILO constitution refers to a “decision”, and that there is no further forum to appeal would lead to the conclusion that the ILO intended to treat the ICJ’s advisory opinion as binding. In any case, the effect would be to put an end to this dispute since the highest possible court would have rendered an opinion. See Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation* (Martinus Nijhoff Publishers 1985), p 203.

³⁷ Another ambiguity concerns the ability of the Workers’ Group or Employers’ Group to participate in the process once the question has been referred by the ILO to the ICJ. Under Article 66 of the ICJ Statute, only states and international organisations can participate in advisory proceedings. In the past, NGOs have presented Amicus Curiae briefs, though these are not considered as part of the official record of the case, though they are available to the justices for their review. Of course, the ILO as the organisation requesting opinion would present relevant information and could most likely send additionally the views of the three constituent bodies to the ICJ.

application of a treaty. Most recently, in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Judgement of 30 November 2010, the ICJ articulated a clear statement of the degree of deference it affords such supervisory bodies. In referring to the interpretive case-law of the Human Rights Committee with regard to the ICCPR, the Court held:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe **great weight** to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled....³⁸ (emphasis added)

The jurisprudence of the ILO supervisory system (described in detail below), and in particular that of the Committee of Experts, should be afforded the *great weight* described in *Diallo*. The Committee of Experts was set up by the Governing Body, in accordance with the resolution adopted by the International Labour Conference in 1926 (and as subsequently amended), for the purpose of examining government reports on the application of ILO Conventions (treaties) and other obligations relating to international labour standards set out in the ILO Constitution. Since then, the Committee has been called upon to examine:

1. The annual reports under article 22 of the Constitution on the measures taken by Members to give effect to the provisions of Conventions to which they are parties, and the information furnished by Members concerning the results of inspection;
2. The information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution;
3. The information and reports on the measures taken by Members in accordance with article 35 of the Constitution.

The Committee of Experts' task consists of pointing out the extent to which the law and practice in each State appear to be in conformity with the terms of ratified Conventions and the obligations which the State has undertaken by virtue of the ILO Constitution. Indeed:

Its function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country. In carrying out this work, the Committee is guided by the standards laid down in the Convention alone, mindful, however, of the fact that the modes of their implementation may be different in different States.³⁹

³⁸ AHMADOU SADIO DIALLO (Republic of Guinea v. Democratic Republic of the Congo) Judgement of 30 Nov. 2010, p. 664, para. 66, available at <http://www.icj-cij.org/docket/files/103/16244.pdf#view=FitH&pagemode=none&search=%22Ahmadou%22>.

³⁹ Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), ILC, 73rd Session, 1987, para. 24.

As the Committee of Experts is set up to supervise the application of labour standards reflected in Conventions such as ILO Convention 87, it falls into the category of independent bodies monitoring the application of an international standard, the observations, recommendations and considerations of which should, according to the ICJ, be ascribed “great weight”. As also discussed herein, these views went fundamentally unchallenged for decades by the ILO constituents. Since similar factors apply in relation to the creation, constitutional position and function (described below) of the CFA, its views too should be given “great weight”.

III. FREEDOM OF ASSOCIATION AND THE RIGHT TO STRIKE

On examination, the Employers’ Group’s argument relies on a deeply-flawed understanding of the right to freedom of association. The Employers’ Group takes a very narrow, conservative view, where freedom of association is a self-contained, individual right, wholly divorced from the context of industrial relations. For it, freedom of association confers no more than the right to gather together into organisations, be they book clubs or trade unions. However, the right to freedom of association has long been understood as a collective right, particularly in the context of industrial relations, and indeed is a bundle of rights exercised jointly and protected individually which enable those in the association to further the purposes for which it was formed. The right to associate in a trade union is commonly understood to include the right to strike (and to bargain collectively). Indeed, without the attendant derivative rights, the right to association in the industrial relations context would be wholly meaningless. This view, shared by the ILO and indeed the great majority of tribunals and scholars, is why the Committee of Experts is on solid footing in articulating a right to strike in the text of Convention 87.

A. *Freedom of Association in Theory*

Freedom of association has been espoused as a fundamental liberty which is the right of every human being,⁴⁰ but also as one which has particular significance and relevance to trade unions in the context of industrial relations. The *International Covenant on Civil and Political Rights* (ICCPR), Article 22 states that: “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.”⁴¹ The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) links within Article 8 the “right of everyone to form trade unions” with “the right of trade unions to establish ...federations”, “the right of trade unions to function freely”, and “the right to strike”.⁴² It is therefore not surprising that the ILO supervisory bodies, as part of

⁴⁰ See J.S. Mill, “On Liberty” in J.S. Mill, *Utilitarianism* (Glasgow, Fontana Place, 1962), p. 138; Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948), Art. 20.

⁴¹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. For virtually identical wording, see the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, 1950, *entered into force* Sept. 3, 1953, Article 11.

⁴² International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. Again, there is an analogy with the European Social Charter, 529 U.N.T.S. 89, 1961, Articles 5 and 6.

an institution devoted to concern with the “conditions of labour”⁴³ alongside “sustained progress” and “social justice”,⁴⁴ have taken a more substantive view of the rights and freedoms which follow from a bare guarantee of freedom of association.

The theory of freedom of association applied in the industrial relations context by the CFA, the Committee of Experts, the European Court of Human Rights⁴⁵ and even by the Court of Justice of the European Union⁴⁶ is specific to the context of the workplace and what Clyde Summers has described as “the special role trade unions play in our society”.⁴⁷ Combination in a trade union may be a function of individual liberty, but this liberty has little meaning if workers are unable to pursue their own interests through such organisations. Worker solidarity allows workers to overcome the limitations inherent in entering individual contracts of employment, to achieve fair conditions of employment and to participate in making decisions which affect their own lives and society at large. In the absence of a right to strike, it remains difficult (if not impossible) for workers to achieve these goals given the unequal power in the employment relationship. From this premise stems the view that freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing, but also the right to pursue collective activities for the defence of workers’ occupational, social and economic interests.

It is self-evident that freedom of association is essential to the tripartite constitutional structure of the ILO, which entails representation of both employers’ and workers’ organisations. It is therefore no surprise that Article. 427 (in Part XIII) of the Treaty of Versailles 1919 stated explicitly that, amongst the “methods and principles” that all industrial communities should endeavour to apply was, “The right of association for all lawful purposes by the employed as well as by the employers.” However, more than this, the adoption of the first Constitution of the ILO was a response to the realities of industrial relations of the time, namely that:

conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

Hence, one key way in which to improve them was explicitly said (in the Preamble to Part XIII) to be “recognition of the principle of freedom of association”.

⁴³ See ILO Constitution, 15 UNTS 40, preamble.

⁴⁴ See Declaration of Philadelphia 1944, Article I(b) and II (appended to the ILO Constitution).

⁴⁵ See *Demir & Baykara* and *Enerji Yapi-Yol Sen*, *supra n. 21-2*; see also Keith Ewing and John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 *Indus. L. J.* 2 (2010).

⁴⁶ Case C-438/05, *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line*, Judgment of 11 Dec. 2007 [2007] ECR I-10779, para 44; Case C-341/05, *Laval un Partneri v Svenska Byggnadsarbetareförbundet*, Judgment of 18 Dec. 2007 [2007] ECR I-11767 para 91(finding that, “[t]he right to take collective action, including the right to strike, must ... be recognised as a fundamental right which forms an integral part of the general principles of Community law.”).

⁴⁷ Clyde Summers, *Book Review: Sheldon Leader, Freedom of Association: A Study in Labor Law and Political Theory*, 16(2) *Comp. Labor L. & Pol’y. J.* 262, 268 (1995).

This was, of course, not only so that workers' organisations could participate in ILO standard-setting and other deliberative structures on an equal standing to that of employers but because, in the industrial setting, organisation in trade unions provided safety in numbers for those who sought to collectively negotiate terms and conditions of employment. Further, the proclamation of freedom of association alongside freedom of expression as a "fundamental principle" in the Declaration of Philadelphia can be seen as an assertion that trade unions are intrinsically linked to democratic processes. It also has to be read in tandem with the idea of social justice as well as the reference in Article III to "the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures", which blends the social, economic and political functions of trade unions.⁴⁸

While some have sought to argue that freedom of association should be regarded as a mere individual liberty without reference to its context, here the industrial context,⁴⁹ this is not a view which has held sway in academic⁵⁰ or judicial opinion.⁵¹

B. The Right to Strike and Collective Bargaining

The unquestioned (and unquestionable) international right to collective bargaining gives further support to the existence of the right to strike as a derivative right of freedom of association. Whilst the right to strike is not to be confined to the advancement or defence of collective bargaining,⁵² the right to collective bargaining is, on the workers' side, without practical effect in the absence of a right to strike. Without the latter right, a right to collective bargaining amounts to no more than a right to "collective begging."⁵³ As legal scholar Eric Tucker has noted, that notion has a very long history, which he traces back as

⁴⁸ For the development and explanation of these arguments, see J Bellace, *The ILO and the Right to Strike*, Int'l Labour Rev. Vol. 153, No. 1 (2014). See also La Hovary, *Showdown at the ILO*, *supra fn. 14*.

⁴⁹ Brian Langille, "Is There a Constitutional Right to Strike in Canada?" in (B Langille, ed) Special Symposium Issue (2010) 15(2) Canadian Labour and Emp. L. J. 129. See also FA Hayek, *Law, Legislation and Liberty* (London, Routledge, 1980) and FA Hayek, *1980s, Unemployment and the Unions*, 2d Ed. (London, Institute of Economic Affairs, 1984).

⁵⁰ See, e.g. Alan Bogg and Keith Ewing, *A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada*, 33 Comp. Lab L & Pol'y J. 379, 392-7 (2011-2012); see also Tonia Novitz, *Workers' Freedom of Association*, in James Gross and Lance Compa (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (Illinois, LERA, 2009), pp. 125-8.

⁵¹ See, e.g. *Wilson, Palmer, and others v UK*, Application No 30668/96, (2002) 35 EHRR 20, where the European Court of Human Rights held that, contrary to the ruling of the House of Lords in *Associated Newspapers Ltd v Wilson, Palmer and others* [1995] 2 A.C. 454, the right to trade union membership meant more than the right merely to hold a membership card and involved the right for the union to strive to be heard on behalf of its members, including the right to strike in order to do so: see paras. 44, 46.

⁵² As the jurisprudence of the European Convention on Human rights makes clear, see KD Ewing and J Hendy, *Days of Action, The Legality of Protest Strikes against Government Cuts*, 2011, Institute of Employment Rights, Liverpool at p. 19.

⁵³ German Federal Labour Court (Bundesarbeitsgericht) Judgment 10 June 1980 (Case 1 AZR 822/79): "Against the background of this conflict of interests collective bargaining without the right to strike in general would be nothing more than collective begging (Blanpain)." (Original German: Bei diesem Interessengegensatz wären Tarifverhandlungen ohne das Recht zum Streik im allgemeinen nicht mehr als kollektives Betteln (Blanpain)."

far as 1921, being popularised in the 1940s.⁵⁴ Given the palpable threats of dismissal and relocation which could be presented by an employer, the corresponding threat of temporary withdrawal of labour was all that most workers could offer in return. Certainly, as early as 1924, the ILO “Nicod” Report considered freedom of association in tandem with industrial action, self-evidently seeing the two as linked.⁵⁵ And, the stated view of the International Labour Office by 1927 was that there was an “intimate relationship between the right to combine for trade union purposes and the right to strike” with a strong case being made for international legislation relating to both.⁵⁶

This interdependence has been universally recognised. In the UK for example, as long ago as 1942, the House of Lords in *Crofter Hand Woven Harris Tweed v Veitch* held that the “right of workmen to strike is an essential element in the principle of collective bargaining”.⁵⁷ In *South Africa*, with its constitutional right to strike, the Constitutional Court has held that:

Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargaining effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.⁵⁸

And in another case, that:

...it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.⁵⁹

In *Canada*, the Supreme Court has pointed out that:

To take away an employee’s ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless.⁶⁰

⁵⁴ E Tucker, “Can Worker Voice Strike Back?” in Alan Bogg and Tonia Novitz, *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014, forthcoming) at n. 6.

⁵⁵ J Nicod, *Freedom of Association and Trade Unionism: An Introductory Survey*, 9 *I. L. Rev.* 467 (1924).

⁵⁶ *Freedom of Association: Report and Draft Questionnaire* (Geneva: ILO, 1927), ILC, 10th Session at 75, 138 and 143.

⁵⁷ [1942] AC 43, Lord Wright, p. 463.

⁵⁸ *In re Certification of the Constitution of South Africa* 1996 (4) SA 744, at para.66.

⁵⁹ *NUMWSA v Bader POP (pty) Ltd and Minister of Labour* 2003 (2) BCLR 182 (CC).

⁶⁰ *SEIU, Local 204 and Broadway Manor Nursing Home* (1983) 44 O.R. (2d) 392 (SC). See dissent of Dickson CJ (now restored to legitimacy by *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391) in *Reference re Public Service Employee Relations Act* [1987] 1 SCR 460 at paras.94-96.

IV. The ILO and the Right to Strike

By 1947, the American Federation of Labor (AFL) wrote to the Economic and Social Council (ECOSOC) of the United Nations and explicitly raised the question: “to what extent is the right of workers and their organizations to resort to strikes recognized and protected?”⁶¹ However, the answer was assumed rather than explicitly stated in the two interlinking instruments subsequently adopted by the ILO, namely ILO Convention 87 1948 and ILO Convention 98. Rather, there was a consensus that the right to strike was encompassed in these provisions, a consensus borne out by subsequent interpretation of these guarantees by the tripartite CFA and subsequently the Committee of Experts (see below).

It is notable that there was no challenge made by the Employers’ Group to ILO jurisprudence on the right to strike as developed by the Committee of Experts and CFA in relation to Convention 87 for nearly 40 years. Nor was there any apparent basis for such a challenge, given that CFA cases are decided by tripartite consensus, that is, CFA findings have always required the consent of the employer representatives. As there has been no disparity between CFA case law and the findings of the Committee of Experts, the principles espoused by the latter were also understood to meet with the approval of employers represented at the ILO.

However, the Employers’ Group began to change its stance at the end of the Cold War, asserting that it did not believe that the text of Convention 87 could give rise to such a global, detailed, and precise entitlement to take industrial action as had been adopted by the Committee of Experts. Though this was identical to CFA jurisprudence, the Employers’ Group did not challenge the CFA’s support for the right to strike – perhaps unsurprisingly considering that one third of its membership were drawn from the Employers’ Group. As they have now done, the Employers’ Group raised this concern not in the CFA, but in the CAS, which comments on the findings of the Committee of Experts.⁶² The Employers’ Group stated, however, that far from challenging the right to strike, they merely wished to see the right submitted to “reasonable restrictions”.

By 1993, Wisskirchen, as vice-Chairman of the CAS and employers’ member for Germany, was asserting that “the right to strike developed by the Committee of Experts was virtually unlimited”.⁶³ At the same time, employer representatives in the Governing Body requested that a proposal for a Convention on Dispute Settlement be placed on the agenda of the International Labour Conference. They wanted this instrument to elaborate upon mechanisms for the settlement of industrial disputes so as to set more extensive limits on industrial action.⁶⁴ The explanation would seem to be that the strength of the employer lobby was increasing at the end of the Cold War, in a climate in which free market capitalism was seen to have prevailed over forms of state control. However, the Employers’ Group did

⁶¹ Reported and discussed by Ruth Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Deventer: Kluwer, 1988), 38-9.

⁶² Provisional Record No 26, ILC, 76th Session, Geneva, 1989, Part I, p. 26/43.

⁶³ Provisional Record No. 28, ILC, 80th Session, Geneva, 1993, p. 28/11.

⁶⁴ *Minutes of the 262d Session of the Governing Body of the International Labour Organization*, GB.262/PV/Rev (Geneva: ILO, 1995), 1st Sitting, 1/3.

not seek to deny that a right to strike could arise by virtue of Convention 87. This only emerged in 1994, although even then it was accepted that “they did not challenge the principle of the freedom to strike and lock-out”.⁶⁵ This was said to emerge from the ILO Constitution but not the Convention.⁶⁶ A “generalized right to strike” was still recognised by 2008, though they maintained that Convention 87 did not provide a basis for regulating the right to strike.⁶⁷ The employers’ tone and opposition grew more strident leading to their walkout of the CAS in 2012. At this stage, they offered the novel assertion that a right to strike could not be derived from any of the provisions of Convention 87 (whether or not it was protected by the Constitution), on the basis that it was neither expressly mentioned in its text, nor had it been the intention of the signatory parties to include it, nor could it be derived by legitimate means of interpretation, including the relevant rules of the Vienna Convention on the Law of Treaties (VCLT).⁶⁸

A. The Committee of Experts and the CFA Find the Right to Strike Enshrined in Convention 87

From Article 3 of Convention 87, which makes provision (among other entitlements) for workers’ organisations to “organise their administration and activities and formulate their programmes”, both the CFA and the Committee of Experts have, since the 1950s, regarded Article 3 as encompassing protection of a right to strike, albeit a circumscribed and carefully defined entitlement, which seeks to balance the needs of employer, worker and citizen.

1. Committee of Experts

The Employers’ Group maintains that the Committee of Experts has incorrectly concluded that the right to strike is derived from Convention 87. According to the Employers’ Group’s position paper submitted to the International Labour Conference in 2013:

Employers have always asserted that article 3 of the ‘Freedom of Association and Protection of the Right to Organise Convention’, No. 87, does not contain, nor implicitly recognise, a right to strike. Strong support for this view can be found in the historical background of the Convention, in which it is evident from the Conference reports that “the proposed Convention relates only to the freedom of association and not to the right to strike”. An extensive interpretation of Convention 87, which includes the right to strike, has however been developed over time by the ILO ‘Committee of Experts on the Application of Conventions and Recommendations’ (Committee of Experts).

⁶⁵ Provisional Record No. 25, ILC, 81st Session, Geneva, 1994, Part 1, p. 31-32. See also p. 33, “The Employer members also felt it important to note 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.”

⁶⁶ Provisional Record No 19, Part II, ILC, 89th Session, Geneva, 2001, 19/46.

⁶⁷ Provisional Record No 19, ILC, 97th Session, Geneva, 2008, p. 19/38, 51.

⁶⁸ Statement of Christopher Syder, Employers’ Spokesperson at the meeting with the Committee of Experts in Geneva on 1 December 2012 available at http://payamekarfarmayan.com/IMG/pdf/2012-12-14_G-134_ANNEX_II_Highlights_of_1_December_Employer_Statement_to_the_ILO_CEACR.pdf.

This is a flawed analysis, as will be seen.

The Committee of Experts has explained its position on a number of occasions. By 1959, less than a decade after Convention 87 came into force, the Committee of Experts, 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.”⁶⁹ The Committee of Experts also found that prohibitions on the right to strike run counter to Articles 8 and 10 of Convention 87.⁷⁰

In the 1983 *General Survey*, the Committee of Experts reiterated a conclusion that the CFA had already reached, namely that “the right to strike is one of the essential means available to workers and their organisations for the promotion of their social and economic interests”.⁷¹ This met with no opposition from employers at that time. Indeed, the tripartite CFA shortly afterwards stressed again the connection to be made between Convention 87 and the right to strike.⁷²

In its 1994 General Survey on Freedom of Association, the Committee of Experts stated:

147. As early as 1959, the Committee expressed in its General Survey the view that the prohibition of strikes by workers other than public officials acting in the name of the public powers "... may sometimes constitute a considerable restriction of the potential activities of trade unions ... There is a possibility that this prohibition may run counter to Article 8, paragraph 2, of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)". This position was subsequently reiterated and reinforced: "a general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organize their activities"; "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. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers". The Committee's reasoning is therefore based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87).

⁶⁹ Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 43rd Session, 1959, Part I, Report III, p. 114.

⁷⁰ *Id.*, p. 115.

⁷¹ *General Survey on the Freedom of Association and Collective Bargaining*, Report III (Part 4B), ILC, 69th Session, 1983, p. 62.

⁷² See CFA, *Digest of Decisions* 3rd ed. (1985) paras. 361, 363.

148. The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions... [early on the Committee was led] to the view that the right to strike is one of the essential means available to workers and their organizations to promote their economic and social interests.⁷³

The Committee of Experts has repeated and expanded upon the same position several times, most recently in the 2012 *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalizations, 2008*,⁷⁴ which was the proximate cause for the Employers' Group to withhold its cooperation in the selection and discussion of cases and to launch its present campaign. Though the Committee of Experts have repeated and developed the position stated in the 1994 General Survey above, they have not changed it.

The Committee of Experts' position is thus that the terms of Convention 87 are broadly stated and encompass the right to strike, as well as other means of promoting and protecting the economic and social interests of workers. The right to strike is also derived from the very concept of freedom of association. The Committee also recognises that the right to bargain collectively is dependent on the right to strike.

The Employers' Group argues that the preparatory materials for Convention 87 show conclusively that "the right to strike is not provided for in either Convention 87 or Convention 98, and was not intended to be" and that because the CAS has not reached consensus on the existence and extent of this right, it cannot be held to exist. As concerns the adoption of Convention 87, there was only occasional reference to the right to strike during the preparatory stages, and it appears clear that the Conference refrained from including a mention of this right in the instrument. The Office analysis of replies to the questionnaire for the adoption of Convention 87 included the following:

It may be observed, in this latter connection, that the Governments were also consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudice the question of the right of such officials to strike. 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.

⁷³ Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994 (*General Survey 1994*), p.66, para.148.

⁷⁴ *General Survey 2012*, supra n. 3, pp. 46 et seq.

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.⁷⁵

This is, however, a much more limited decision than is implied by the Employers' Group and may be argued to show the opposite. The question put to the constituents in the questionnaire related only to whether the right of association of public officials would prejudice the question of the right of such officials to strike. There was a presumption of the existence of the right to strike inherent in this question, which was intended to address only the right of public officials to strike and not to address the right of all workers to strike.

As to the second presumption – that the lack of consensus in the CAS means that there is no right to strike implied by Convention 87 as the Committee of Experts has contended – this appears instead to be evidence of exactly the contrary conclusion. If the Committee of Experts has been stating since 1959 that Convention 87 can be fully applied only if the right to strike is an inherent part of the right to freedom of association, and if the CAS as a whole has been discussing general surveys and individual cases on the basis of the Experts' comments every year since then, then the conclusion must be that the CAS as a whole does not dispute the Committee of Experts' findings. If some members disagree, but their opinions are not followed, then it is only by stopping the work of the CAS (ironically, by staging what is analogous to a strike) that the Employers' Group is able to stop the CAS from continuing its acceptance of the Committee of Experts' position.

The relevance of the VCLT is discussed fully in Section VII. Clearly there is no provision in the text stating that the right to strike is not covered by Convention 87. Moreover, Bernard Gernigon, Former Chief of the Freedom of Association Department of the ILO, has noted that at no point in the proceedings prior to the adoption of Convention 87 was the right to strike ever expressly denied.⁷⁶ Were there any uncertainty, the "subsequent agreement between the parties" and the "subsequent practice" in the application of the treaty' (Article 31(3) of the Vienna Convention) that are dispositive. Again, the ILO Committee of Experts has addressed this point. In particular, it found:

With regard to the views put forward that the preparatory work would not support the inclusion of the right to strike, the Committee would first observe that the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose. While the Committee considers that the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties).⁷⁷

⁷⁵ Report VII, ILC, 31st Session, Geneva, 1948, p. 87. Provisional Record, ILC, 97th Session, Geneva, 2008, p. 19/38, 51.

⁷⁶ Gernigon, et al, "ILO Principles Concerning the Right to Strike", 137 Int'l Labour Rev. Vol. 4, p. 8, fn. 4 (1998).

⁷⁷ *General Survey 2012*, p. 48.

2. The Committee on Freedom of Association

In a number of cases the CFA has made a direct reference to Article 3 of Convention 87 as forming part of its own reasoning.⁷⁸ Indeed, according to a 1988 study by Ruth Ben-Israel,

In approximately 500 cases dealt with by the CFA since 1951, the CFA relied upon [a] three-dimensional concept to infer from Article 3 of the convention that workers organizations shall have the right to organize their administration and activities and to formulate their programs without the interference of public authorities which might restrict this right or impede the lawful exercise thereof. The CFA recognized the right to strike as being included within these activities, and determined its limits.⁷⁹

It is unsurprising, of course, that the CFA relied on Conventions 87 and 98 in considering the concept of freedom of association. Prior to 1953, the Office had been giving advice on what freedom of association meant. In 1953, the Director-General informed the Governing Body that the Office would no longer perform this function, as this was now entrusted to the CFA.⁸⁰ The current view of the CFA (arrived at by tripartite consensus from 1952 onwards and as set out in their *Digest of Decisions* in its fifth revised edition of 2006) is as follows:

135. Protests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87.

523. The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.

555. With regard to the majority vote required by one law for the calling of a legal strike (two-thirds of the total number of members of the union or branch concerned), non-compliance with which might entail a penalty by the administrative authorities, including the dissolution of the union, the Committee recalled the conclusions of the Committee of Experts on the Application of Conventions and Recommendations that such legal provisions constitute an intervention by the public authorities in the activities of trade unions which is of such a nature as to restrict the rights of these organizations, contrary to Article 3 of the Convention.

669. The Committee considered that some of the temporary measures taken by the authorities as a result of a strike in an essential service (prohibition of the

⁷⁸ See, ILO, Committee on Freedom of Association, *Digest of Decisions* (2006) paras. 135, 555 and 669. The CFA Digest available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf

⁷⁹ Ruth Ben Israel, *supra* n. 57, p. 66

⁸⁰ See Minutes of the Governing Body, 122nd Session, May-June 1953, p. 110.

trade union's activities, cessation of the check-off of trade union dues, etc.) were contrary to the guarantees provided for in Article 3 of Convention No. 87.

B. The ILO Constitution

The right to strike can be derived not only from Convention 87 but more directly from the provisions in the Constitution setting out the priority to be given to freedom of association (as the Employers' Group previously recognised). The Constitution has long been established as the source of the CFA mandate to address issues relating to "freedom of association", certainly following the constitutional challenge to the competence of the CFA made by the then South African government in *Case No. 102 (South Africa)*.⁸¹ The South African government had not ratified Conventions 87 and 98 and therefore objected to a complaint being heard before the CFA. The Committee responded that, by virtue of the Constitution, all ILO Members were bound to abide by the principle of freedom of association. The CFA also relied upon Article 19(5) of the ILO Constitution which states that ILO Members can be required to report to the Director-General on the position of their law and practice in relation to unratified Conventions.⁸² This was obviously a decision adopted by tripartite consensus between the government, employer and worker representatives and has since been reiterated repeatedly.⁸³ The CFA has made direct reference to the ILO's constitutional objectives when interpreting the constitutional provision for freedom of association.⁸⁴

Examination of the ILO Constitution goes some way to explaining how the CFA came to draw this link between freedom of association and the right to strike. The primary aim of the ILO under the Constitution is "social justice", which is to take precedence over other economic goals.⁸⁵ It is apparent from the ILO Constitution that social justice involves the improvement of conditions of work and the ability of workers to participate in making the decisions which affect their working lives, either by means of collective bargaining or tripartite consultation. While the Constitution makes no explicit reference to the right to strike, it recognises the principle of freedom of association in the preamble. Further, the Organization is obligated under Part III of the Declaration of Philadelphia to further:

(e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

Given that the right to strike is recognised by the CFA as having a constitutional foundation, it would be truly remarkable if the International Labour Conference had adopted a convention which they knew to be narrower than the corresponding rights afforded under the Constitution and would weaken those rights. There is no evidence that drafters intended

⁸¹ *Case No. 102 (South Africa)*, 15th Report of the CFA (1955), para. 128.

⁸² *Id.*, paras. 130-2.

⁸³ See, e.g., *Case No. 2524 (US)*, 349th Report (2008), para. 846.

⁸⁴ See *Digest of Decisions*, 5th ed. (Geneva: ILO, 2006), paras. 1, 2, 8, 11, 12.

⁸⁵ See Preamble to Part XIII of the Treaty of Versailles 1919 and Declaration of Philadelphia 1944, Art. II(c).

Convention 87 to be narrower than the corresponding provisions of the ILO Constitution. It is relevant to bear in mind that Article 19.8 of the ILO Constitution provides:

In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

The idea that ratifying Convention 87 materially reduces the rights available under the Constitution is patently unsustainable.

1. CFA History

Following an agreement between the UN Economic and Social Council (ECOSOC) and the ILO, the ILO created the Fact Finding Conciliation Commission on Freedom of Association (FFCC) in 1950, with near unanimous support from the International Labour Conference, to receive complaints regarding violations of freedom of association. The CFA was created the following year to undertake the preliminary examination of allegations concerning violations of freedom of association, which would then be referred to the FFCC.⁸⁶ It was not long before these bodies found that the right to strike was clearly within their jurisdiction.

2. CFA Jurisprudence

The CFA, as early as their second meeting in 1952, held that the right to strike was an “*essential [element] of trade union rights*”.⁸⁷ In Case 28 (UK-Jamaica), for example, the CFA held that:

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.⁸⁸

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, generated no controversy at the time. The same report also examined several other cases where legislation related to the right to strike was noted.

⁸⁶ The FFCC was a body of independent experts empowered to perform a quasi-judicial function, namely the examination of specific allegations concerning violations of trade union rights. However, as the FFCC could only act with the infrequently-given consent of the party complained against (absent ratification of the relevant conventions, which could then lead to referral to a commission of inquiry under Art 26), the CFA began to evolve as the pre-eminent body.

⁸⁷ *Second Report*, 1952, Case No.28 (Jamaica), para.68; endorsed in *23rd Report*, 1956, Case No.111 (USSR) paras.4, 227, and many other cases, more recently *327th Report*, 2002, Case No.1581 (Thailand), para.111.

⁸⁸ CFA Report No. 2 (1952), Case No. 28 (UK-Jamaica), para. 68.

The CFA in subsequent cases was explicit in asserting its competence to address complaints regarding the right to strike. In 1958, 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.”⁸⁹ 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.”⁹⁰

The FFCC, in a case filed against Chile following the 1973 coup d’état, also affirmed the right to strike and discussed how various measures taken and laws proposed by the regime of Augusto Pinochet violated that right. It concluded that, “the Government should recognise in law and in practice ... the right to bargain collectively and to strike, so that trade unions may effectively further and defend the rights of the workers”⁹¹ – echoing Article 10 of Convention 87. The FFCC also concluded that the right of freedom of association had “become a customary rule above the conventions” taking note that the “the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice.”⁹²

In case after case in the subsequent decades, the CFA has found that the right to strike by workers and their organisations is not only a legitimate but an essential means for defending occupational interests. This jurisprudence is summarised in the various editions of the *Digest of Decisions*, and thoroughly discussed in ILO publications including “*ILO Principles Concerning the Right to Strike*”⁹³ and “*The Committee of Freedom of Association: Its impact over 50 years.*”⁹⁴

Below are citations in the latest edition of the CFA’s *Digest of Decisions*, which summarises this Committee’s findings on the right to strike:

521. The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.

522. The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.

523. The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.

⁸⁹ CFA Report No. 27 (1958), Case No 163 (Burma), para. 51.

⁹⁰ Id.

⁹¹ Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Case of Chile, GB 196/4/9 (May 1975), p. 118, para. 524.

⁹² Id. at p. 108, para. 466.

⁹³ Gernigon, et. al., *ILO Principles Concerning the Right to Strike*, Int’l Labour Rev., Vol. 137 (1998), No. 4.

⁹⁴ See Gravel et. al., *The Committee of Freedom of Association: Its Impact Over 50 Years*, (ILO Geneva) 2001.

524. It does not appear that making the right to call a strike the sole preserve of trade union organizations is incompatible with the standards of Convention No. 87. Workers, and especially their leaders in undertakings, should however be protected against any discrimination which might be exercised because of a strike and they should be able to form trade unions without being exposed to anti-union discrimination.

Thus the basis on which the CFA has found that the right to strike exists is the general recognition of the rights to organise in order to promote and protect workers' economic and social interests – essentially the same recognition, in less detail, as is contained in Convention 87. The Employers' Group's participation in the work of the CFA, and its explicit endorsement over many years of the right to strike as a necessary corollary of the rights to organise and bargain, cannot easily be reconciled with their reasoning in relation to the Committee of Experts.

3. Commissions of Inquiry

From a constitutional point of view it is necessary to consider also ILO Commissions of Inquiry, which decide complaints under Articles 26 of the ILO Constitution. This is all the more important because the ILO itself lacks any more authoritative interpretative organ given that, as noted elsewhere in this brief, no tribunal pursuant to Article 37(2) of the ILO Constitution currently exists and no interpretative question on the right to strike has been put to the ICJ under Article 37(1).

It is therefore of great relevance to note that in the complaint against *Poland*, the Commission of Inquiry explicitly shared the views of the Committee of Experts in respect of the right to strike:

Convention No. 87 provides no specific guarantee concerning strikes. The supervisory bodies of the ILO, however, have always taken the view - which is shared by the Commission - that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members. An absolute prohibition of strikes thus constitutes, in the view of the Commission, a serious restriction on the right of trade unions to organise their activities (Article 3 of the Convention) and, moreover, is in conflict with Article 8, paragraph 2, under which "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for (by the Convention)."⁹⁵

⁹⁵ *Report Of The Commission Of Inquiry* instituted under Article 26 of the Constitution of the International Labour Organization to examine the complaint on the observance by *Poland* of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Vol. LXVII, 1984, Series B, Special Supplement), para. 517. See also *Report Of The Commission Of Inquiry* appointed under article 26 of the Constitution of the International Labour Organization to examine the complaints concerning the observance by *Greece* of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Vol. LIV, 1971, No. 2, Special Supplement) "261. The Commission

In the case against *Zimbabwe*, a very recent Commission of Inquiry, the Commission made an important statement concerning the right to strike:

The Commission wishes to confirm that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87.⁹⁶

C. *The Right to Strike in Subsequent ILO Instruments*

Subsequent ILO instruments, adopted by the tripartite constituents, contain supplementary provisions affirming the existence of a right to strike protected by the ILO. This is wholly inconsistent with the Employers' Group's contention to the contrary. For example, Article 7 of the Voluntary Conciliation and Arbitration Recommendation No. 92 of 1951 states that none of its provisions should be interpreted as limiting the right to strike.⁹⁷ Article 1 of the Abolition of Forced Labour Convention 105 of 1957 specifies that forced or compulsory labour is prohibited "as a punishment for having participated in strikes". In addition, various resolutions of the International Labour Conference have referred (with the support, of course, of the Employers' Group) to the right to strike.⁹⁸ These subsequent instruments and resolutions are directly relevant to how the Vienna Convention, explored below, applies to this situation.

In addition, the large majority of States that have ratified Convention 87 have done so since the CFA (in 1952) and the Committee of Experts (in 1959) recognised the right to strike contained within that convention. Indeed, of the 152 Member States that have ratified Convention 87, 138 did so after 1952 when the CFA first established its jurisprudence on the right to strike. Furthermore, 116 out of those 152 ratifications were made after the publication by the Committee of Experts of the first General Survey on Freedom of Association in 1959 mentioned above. Those States may thus be presumed to have accepted that the right to strike is inherent in Convention 87.

observes that Convention No. 87 contains no specific guarantee of the right to strike. On the other hand, the Commission accepts that an absolute prohibition of strikes would constitute a serious limitation of the right of organisations to further and defend the interest of their members (Article 10 of the Convention) and could be contrary to Article 8, paragraph 2, of the Convention, under which " the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention ", including the right of unions to organise their activities in full freedom (Article 3)."]

⁹⁶ *Report Of The Commission Of Inquiry* appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of *Zimbabwe* of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Vol. XCIII, 2010, Series B, Special Supplement), para. 575.

⁹⁷ Available at <http://www.ilo.org/global/standards/lang--en/index.htm>

⁹⁸ Resolutions of the International Labour Conference referring to the right to strike include the Resolution concerning the Abolition of Anti-Trade Union Legislation 1957, and the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties 1970. These are discussed in ILO General Survey (1994), p. 63.

V. ILO Supervisory Machinery and the Mandate to “Interpret” ILO Conventions

A. *Brief Introduction to the Supervisory System*⁹⁹

Article 22 of the ILO Constitution provides for regular reporting from all Member States on every Convention each has ratified. These reports are due at intervals ranging between one and five years. With over 7,900 ratifications, this means the ILO receives over 2,000 reports each year. Under Article 23 of the Constitution, each government report is to be sent to the representative organisations of employers and workers, which may make their own comments on what the government says – or fails to say.

The reports are examined by the Committee of Experts which, as noted above, is a committee of 20 independent and prestigious legal experts. It meets in an annual session and may make two kinds of comments: *observations* (more serious questions, published in the Committee of Experts’ annual report) and *direct requests* (usually questions of detail or less important queries, and published only on the ILO web-site after the following session of the ILO Conference). Several hundred comments are made each year. In addition, the Committee of Experts carries out an annual General Survey on one or a group of Conventions and Recommendations, in which it examines the global application of these instruments and explains in detail the instruments’ requirements.

A second element of regular supervision is the Committee on the Application of Standards (CAS), a tripartite committee established at each session of the International Labour Conference. It examines the report of the Committee of Experts, though the report is not put before it for approval, and selects 25 of the Experts’ observations to examine in detail, through discussions with the representatives of the governments concerned. It also discusses the General Survey. The CAS arrives at conclusions on each case, which are then referred back to the Committee of Experts for further examination.

There are also two complaints mechanisms provided for in the ILO Constitution. *Representations* (Article 24 of the Constitution) may be made by employers’ or workers’ organisations alleging that a government is failing to apply correctly a ratified Convention. These are examined in an ad hoc tripartite committee of the ILO Governing Body, which must approve their reports. *Complaints* (Article 26 of the Constitution) may be made by governments that have ratified the same Convention, delegates to the International Labour Conference, or the Governing Body itself. These are examined by a specially appointed three-member group of independent experts, and their reports are final - unless the government concerned appeals to the International Court of Justice (Article 37). Reports on both representations and complaints are referred back to the Committee of Experts for follow-up.

The final main element of ILO supervision is the CFA, composed of nine titular and nine deputy members of the Governing Body, three titular and three deputies from each of the government, worker and employer members, with an independent chair. This committee

⁹⁹ A full description of these various supervisory structures is set out in Annex 2.

was formed in 1951 by agreement with the UN Economic and Social Council. It can examine complaints of violations of freedom of association filed by employers' or workers' organisations, *regardless of whether the country concerned has ratified any relevant Convention*. Although it bases its work on the ILO Constitution, it frequently refers to the ILO's Conventions on freedom of association and collective bargaining. Its decisions are compiled in its *Digest of Decisions*.

One of the central contentions of the Employers' Group is that the supervisory system, and in particular the Committee of Experts, has no constitutional mandate to provide binding interpretations of ILO conventions, and that rather it is the tripartite constituents, in the form of the CAS and the International Labour Conference, that have the final say as to what conventions mean. While it is true that only the ICJ may issue binding interpretations of ILO Conventions, it is not the case that the CAS or the International Labour Conference are the ultimate arbiters of the meaning of ILO conventions. There is no constitutional support for this notion.

Further, the Committee of Experts' role, to assess the application of conventions and recommendations, is one which necessarily requires a degree of interpretation – a point that the Employers' Group has previously recognised. Many ILO conventions (and recommendations) set forth broad principles and require some amount of interpretation will be required in order to assess their application.¹⁰⁰

The ILO operates a varied, multi-layered and mutually reinforcing supervisory system. It is by far the most complex and thorough system at the international level, with elements dating from the 1919 Constitution, with a reform of the system in 1926, and a further set of updates after World War II.

It is important to understand the place the ILO system occupies in the panoply of international supervisory systems. The ILO is the oldest and longest-functioning of the international systems, so that the way other international systems function is based in part on the ILO model (or at least these other systems were established with the ILO model taken into account).

B. Mandates of ILO Supervisory Bodies

The mandates of the two main bodies of the regular supervisory system were adopted, and have developed, in tandem, and it is difficult to consider them entirely separately. Until

¹⁰⁰ Whether the Committee of Experts' interpretation is binding or not is a secondary question as to whether their task involves interpretation at all. The answer to the primary question is obviously in the positive. As to the status of the Committee's interpretations of conventions and recommendations, it appears to the authors of this brief that, given the status of the Committee in the ILO Constitution, its distinguished composition, the global respect given to its conclusions, the elegance of its reasoning, and the concordance of its Observations with the findings of other bodies both within and without the ILO, its interpretations are at the least persuasive and must be regarded as binding unless and until the ICJ rules to the contrary.

1926 the plenary of the Conference reviewed governments' reports on ratified Conventions, but this quickly became too heavy a burden. The Committee of Experts and the CAS were created following a decision of the International Labour Conference in 1926. The resolution reads as follows:

Proceedings of the International Labour Conference, 8th session, 1926, Appendix VII

(1) Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles, submitted by the Committee on Article 408.¹⁰¹

The Eighth Session of the International Labour Conference,

Considering that the reports rendered by the State Members of the Organisation under Article 408 of the Treaty of Versailles are of the utmost importance,

And that careful examination of the information contained therein is calculated to throw light upon the practical value of the Conventions themselves and to further their general ratification,

Recommends that a Committee of the Conference should be set up each year to examine the summaries of the reports submitted to the Conference in accordance with Article 408,

And requests the Governing Body of the International Labour Office to appoint, as an experiment and for a period of one, two or three years, a technical Committee of experts, consisting of six or eight members, for the purpose of making the best and fullest use of this information and of securing such additional data as may be provided for in the forms approved by the Governing Body and found desirable to supplement that already available, and of reporting thereon to the Governing Body, which report the Director, after consultation with the Governing Body, will annex to his summary of the annual reports presented to the Conference under Article 408.

1. Committee of Experts

The Committee of Experts was to - and still does - examine the actual reports received from governments, while the CAS was to examine *summaries* of reports and the report of the Committee of Experts. Today the CAS works on the basis of the report of the Committee of Experts, but it also considers any supplementary information governments may put before it directly in response to comments by the Committee of Experts. Governments' reports are

¹⁰¹ See *Proceedings*, pp. 238-244, 247-260 and Appendix V. Article 408 of the Treaty of Versailles provided for the reporting requirement on ratified Conventions, and corresponds to article 22 of the present ILO Constitution.

no longer seen by the CAS.¹⁰² When a report submitted by a government directly to the CAS is detailed or contains technical questions, the CAS refers it to the Committee of Experts for examination.

In 1946, the ILO Constitution was revised, and among the revisions was the addition of responsibility for reporting on unratified as well as ratified Conventions (now article 19 of the Constitution). In consequence the Governing Body approved an expansion of the responsibilities of the CAS,¹⁰³ and decided also to expand the responsibilities of the Committee of Experts for the same reason. When this was considered at the December Session of the Governing Body in 1947, the explanation given to the Governing Body by the Assistant Director-General was:

With regard to the terms of reference of the Committee of Experts, it was suggested in the Office note that, in order to take account of the amendments to Article 7 of the Standing Orders of the Conference and of the consequent broadening of the functions both of the Conference Committee on the Application of Conventions and of the Committee of Experts, the latter should, in future, be known as the "Committee of Experts on the Application of Conventions and Recommendations ". The functions of the Committee would include an examination of the annual reports made under Article 22 of the Constitution, the information concerning Conventions and Recommendations communicated in accordance with Article 19 of the Constitution, and the information and reports on the measures taken by States Members in accordance with Article 35 of the Constitution.¹⁰⁴ The Committee of Experts would make a report which, as at present, would be communicated to the Governing Body and the Conference.¹⁰⁵

This decision was based on a note by the Office to the Governing Body, which was approved in the above-mentioned decision. That note read in relevant part:

36. It was in pursuance of a Resolution adopted by the Conference in 1926 that the Committee of Experts was set up by the Governing Body in the following year, as part of the mechanism of supervision of the application of Conventions, to carry out an examination of the annual reports submitted by Governments under Article 22 of the Constitution in preparation for the examination of these reports from a wider angle by the Conference, with the assistance of the three groups represented at the Conference. It has been recognised from the outset

¹⁰² Governments' reports are not now put before the Conference Committee, though they were until 1924. From then until the 1970s the Office forwarded summaries of governments' reports to the Conference, but this practice was discontinued for reasons of economy, as well as the fact that the Conference never examined them. This constitutional requirement is now met by forwarding a list of the reports requested and received, and by making the reports available to the Conference Committee should they wish to consult them. In practice, this occurs rarely if ever.

¹⁰³ ILO Governing Body, Minutes, 102nd Session, June-July 1947, p. 49.

¹⁰⁴ Article 35 refers to reports on the application of Conventions and Recommendations in non-metropolitan territories.

¹⁰⁵ ILO Governing Body, Minutes, 103rd Session, Dec. 1947, p. 57.

that the technical examination of the annual reports carried out by the Experts is an indispensable preliminary to the over-all survey of application conducted by the Conference through its Committee on the Application of Conventions. With the approval of the Governing Body, the report of the Committee of Experts is communicated to Governments and to the Conference.

37. It is accordingly suggested that, as from the coming into force of the amendments to the Constitution adopted by the Conference at its Montreal Session, 1946, the Committee of Experts on the Application of Conventions should be known as the "Committee of Experts on the Application of Conventions and Recommendations", and that the Committee should be called upon to examine:

(a) the annual reports under Article 22 of the Constitution on the measures taken by Members to give effect to the provisions of Conventions to which they are parties, and the information furnished by Members concerning the results of inspections;

(b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with Article 19 of the Constitution;

(c) information and reports on the measures taken by Members in accordance with Article 35 of the Constitution.

The Committee of Experts would make a report which the Director-General would submit in due course to the Governing Body and to the Conference.¹⁰⁶

This remains today the mandate of the Committee of Experts. The Committee of Experts described its view of its responsibilities in its report to the 2013 Session of the Conference:¹⁰⁷

The task of the Committee of Experts is to indicate the extent to which each Member State's legislation and practice are in conformity with ratified Conventions and the extent to which Member States have fulfilled their obligations under the ILO Constitution in relation to standards....

The Experts' comments on the application of conventions therefore require it from time to time to find that a government is or is not in compliance with the convention's requirements.

¹⁰⁶ Id., Appendix XII, pp. 167 *et seq.*

¹⁰⁷ Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), ILC, 102nd Session, 2013, p. 2.

2. Conference Committee on the Application of Standards

At the same time that it created the Committee of Experts in 1926, the ILO Governing Body created the *Conference Committee on the Application of Conventions and Recommendations*, a tripartite committee of the Conference. Its original mandate is described in the 1926 Conference resolution quoted above. Its mandate today, following the 1946 revision of the Constitution, is described as follows in Article 7 of the Standing Orders of the Conference:

Committee on the Application of Conventions and Recommendations

1. The Conference shall as soon as possible appoint a Committee to consider:

(a) the measures taken by Members to give effect to the provisions of Conventions to which they are parties and the information furnished by Members concerning the results of inspections;

(b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with Article 19 of the Constitution;

(c) the measures taken by Members in accordance with Article 35 of the Constitution.

2. The Committee shall submit a report to the Conference.

As will be evident, this is very similar to the mandate of the Committee of Experts, though in fact the CAS does not examine governments' reports directly. It was described in the 1947 note quoted above as being responsible for the "over-all survey of application" and not with detailed supervision. The CAS bases its work on the Committee of Experts' report but, as evident from Article 7 above, the CAS does not occupy a superior role in relation to the Committee of Experts. The CAS normally calls about twenty-five governments to provide it with oral explanations on the basis of the Committee of Experts' observations (from among several hundred observations made each year), and a certain number of governments also submit additional written information. A high proportion of the cases selected concern the freedom of association Conventions.

Although neither committee is explicitly tasked with determining the extent of compliance with ratified Conventions, both of them have elected over time to do so. The CAS adopts conclusions on each of the cases it discusses, which involve judgments of compliance with the conventions concerned. It may class some of cases as "continued failure over several years to eliminate serious deficiencies in the application of ratified Conventions". For instance, in 2010 its report contained the following paragraph:¹⁰⁸

¹⁰⁸ Record of Proceedings No. 16, Part I, ILC, 99th Session, Geneva, 2010, p. I/62.

222. The Committee recalled that its working methods provide for the listing of cases of continued failure over several years to eliminate serious deficiencies, previously discussed, in the application of ratified Conventions. This year the Committee noted with great concern that there had been continued failure over several years to eliminate serious discrepancies in the application by **Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)**.

3. Relationship Between Mandates

The Employers' Group is maintaining that the Committee of Experts' judgments should be subordinated to those of the CAS. In the report of the 2012 Session of the Conference Committee, the Employers' group is reported as having stated:

12. Moreover, while the Employer members recognized that the Committee of Experts was an independent body composed of legal experts, they recalled once again that the overall responsibility for the supervision of international labour standards lay with the International Labour Conference (ILC), through this Committee, which had to establish to this end an effective framework, including rules and methods. The Committee of Experts had a mandate to undertake preparatory tasks in this context – that were delegated to the Office – and to facilitate, not to replace, the tripartite supervision of this Committee. The supervision of international labour standards should be at the service of the ILO's tripartite constituents and reflect their needs, including the needs of workers and employers.

And, in a position paper at the 2013 Session of the Conference, the Employers' Group stated: "The Committee of Experts has the task of preparing the supervisory work of the Committee on the Application of Standards (CAS) of the International Labour Conference (ILC)."¹⁰⁹

However, the mandate of neither committee indicates a hierarchy between them, and neither is called upon by its mandate to approve or disapprove the findings of the other. The essential task of the Committee of Experts is to assess the conformity of national law and practice with the Conventions each State has ratified, while the Conference Committee is "to consider ... the measures taken by Members to give effect to the provisions of Conventions to which they are parties."¹¹⁰ The Committee of Experts works on the basis of the governments' reports and analyses their legislation and practice for conformity, taking into account any information furnished either by the government or by employers' and workers' organisations, or which is revealed by the research of the Committee's secretariat, the International Labour Office – this is the analytical function, and it is for this reason that the members of the Committee of Experts are eminent jurists.

¹⁰⁹ 102nd Session of the International Labour Conference (ILC) 5 – 20 June 2013, Committee on the Application of Standards (CAS), 27 May 2013, Briefing Note for Governments.

¹¹⁰ Article 7(1)(a) of the Standing Orders of the International Labour Conference, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc-so.htm#Article 7>.

The task of the CAS, which is composed of government delegates and representatives of employers and workers, is to add a public and political element of direct discussions with a small selection of governments in a tripartite setting to gather additional information and put additional pressure on them in a public setting to implement the Conventions they have ratified. Once the CAS has considered an individual case, it returns it to the Committee of Experts for further consideration, and cases may go back and forth between the two committees for many years. Each Committee bases its work in large part on the work of the other, in a circular and complementary way. This relation between two independent but complementary supervisory bodies is one that is found nowhere else in the UN system.

It cannot be maintained convincingly that the Committee of Experts' work is merely preparatory for the Conference Committee's discussions, and that the Conference thus has the last word. Only a tiny portion of the Committee of Experts' observations are discussed in the Conference, and none of its direct requests (which constitute by far the largest portion of its comments). Until the Employers' Group began criticising the views of the Committee of Experts on the right to strike, the CAS simply took all the Committee of Experts' observations as established, and added an element of public discussion to a very few of them.

Indeed, during the Cold War, when the right of the ILO to pass judgments on the application of Conventions on freedom of association, forced labour and other subjects by the Soviet Union and its allies was questioned, the Employers' Group supported the ILO's supervision through the Committee of Experts.

C. Interpretation of Conventions

As explained by legal scholar Claire La Hovary, "While it is clear to everybody that the Committee of Experts does not have the legal mandate to interpret conventions, it is also clear that the Committee of Experts needs to interpret provisions of the conventions in the process of its work of evaluating the implementation of conventions. Indeed, a body that is created to verify the application of conventions must interpret these conventions, for the same reason that 'here is no application of law without interpretation.'"¹¹¹ It is accepted by all concerned that no entity other than the International Court of Justice is empowered to issue a final, binding interpretation of Conventions under Article 37 of the ILO Constitution. However, all the ILO bodies involved in supervision necessarily interpret the meaning of its standards. It is important to attempt to divorce the ordinary meaning of the word from its juridical counterpart for the sake of discussion.

It is inevitable that all the supervisory bodies, and in particular the Committee of Experts, reach conclusions on the meaning of Conventions in carrying out their supervision, including whether the law and practice of a Member State falls within the ambit of the Convention.¹¹²

¹¹¹ See La Hovary, *Showdown at the ILO*, supra fn. 14, p. __, citing G. Scelle, *Precis de Droit de Gens* (vol 2, Paris: Sirey, 1932), p. 488.

¹¹² As to the interpretive role of the Committee of Experts, the commentary by legal scholar Nicolas Valticos is important to consider. «Ce rôle interprétatif ne se base sur aucune autorité expresse, mais découle logiquement de son mandat et de la nature de sa tâche. Il a d'ailleurs augmenté au cours des années, au fur et

This is also the case with the CAS, with Article 24 representation ad-hoc committees, and with commissions of inquiry. Their understandings of the scope and effect of ILO standards are usually based in the first instance on the Committee of Experts' findings either in accumulated individual examinations or in General Surveys, and each in practice accepts the findings of the other bodies as to the meaning of Conventions. The CFA and Fact-Finding and Conciliation Commissions, though their mandates do not cover the Conventions themselves, regularly refer to the jurisprudence developed in the supervision of the Conventions that correspond to the freedom of association obligations. All these understandings are developed with the reservation, usually explicitly stated, that the International Court of Justice retains final authority, even though it has never been found necessary to invoke it.

It is worth mentioning that the CAS as a whole has never attempted to develop a distinct statement of the scope and effect of Conventions. The identification of the content and extent of obligations have been compiled by the Committee of Experts, discussed and regularly endorsed by the Conference Committee and by the Committee on Freedom of Association in its *Digest of Decisions*.

This is far from the first time the issue of the right to interpret conventions in connection with the right to strike, and the relations between the Committee of Experts and the Conference Committee, have arisen. The issue arose with some frequency in the Governing Body early in the Organization's life. See, for instance, an extract from the Minutes of the Governing Body in 1930:

5. Interpretation of Conventions.

The Director said that he hoped there would not be, in connection with this question, a recrudescence of the discussions with which the Governing Body was familiar concerning the power of interpretation of the Governing Body and the Conference, and the functions of the Office in giving information concerning the interpretation of Conventions. It had, however, been thought useful, in connection with the question now under consideration, to recall the fact that, according to Article 423 of the Treaty of Peace, the Permanent Court of International Justice alone was qualified to give authoritative interpretations of Conventions. All other interpretations, even those given by the Conference, might give rise to dispute. It might therefore be well to remind States of the possibility of appealing to the Permanent Court of International Justice.

à mesure que, dans un souci de souplesse, l'Organisation adoptait des textes rédigés en termes délibérément généraux. La généralité croissante des termes utilisés dans les conventions internationales du travail a eu pour conséquence d'accroître le rôle interprétatif de la Commission d'experts qui est appelée, pour apprécier si une convention est effectivement respectée, à en apprécier plus exactement le sens et la portée. Alors que la nécessité et la marge d'interprétation sont minimales dans le cas de conventions techniques rédigées en termes précis, comme celles, par exemple, qui prévoient un âge minimum précis d'admission au travail ou une certaine durée de congé de maternité ou de congés payés, elles sont considérables dans le cas des conventions établissant des principes en termes généraux, qui sont aussi du reste généralement celles qui portent sur des questions fondamentales.» *Droit International du Travail*, Dalloz, 1983, p. 136, para. 176.

It had been said that this was an expensive and cumbersome procedure, but even if the procedure were slow and costly, it was better to apply to the Court than to remain in a state of uncertainty.

The note of the Office also pointed out that the procedure for revision of Conventions offered an opportunity of interpreting them.¹¹³

The question flared up most prominently in 1990 and 1991 when the Committee of Experts stated in its report:

The Committee has already had occasion to point out that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by Article 37 of the Constitution of the ILO. Nevertheless, in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee 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. It therefore appears to the Committee that, in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognised. The situation is identical as regards the conclusions or recommendations of commissions of inquiry which, by virtue of Article 37 of the Constitution, may be affirmed, varied or reversed by the International Court of Justice, and the parties can only duly contest the validity of such conclusions and recommendations by availing themselves of the provisions of Article 29, paragraph 2, of the Constitution. The Committee considers that the acceptance of the above considerations is indispensable to maintenance of the principle of legality and, consequently, for the certainty of law required for the proper functioning of the International Labour Organisation.

The Employers' members of the Conference Committee reacted to this in 1990, in a discussion reported in the report of the Conference Committee that year:¹¹⁴

22. The Employers' members [...] feel that the opinion of the Committee of Experts that its evaluations are binding unless corrected by the International Court of Justice, could not be correct. One obvious reason was that, if this were the case, the present Committee would lose its fundamental purpose, and so would the Conference. A legal reason was that this was contradicted by the ILO Constitution and by the Standing Orders of the Conference concerning the submission of governments' reports and the terms of reference of the Conference Committee, which had an independent competence to examine reports.

¹¹³ ILO Governing Body, Minutes, 50th Session, Oct. 1930, pp. 656, 657.

¹¹⁴ Record of Proceedings No. 27, ILC, 77th Session, Geneva, 1990, p. 27/6.

The Office (the ILO secretariat) attempted to bring this discussion to a close in wrapping up the discussion in the Conference on this point:¹¹⁵

The Conference Committee is not an appellate tribunal called upon to examine the opinion of the Committee of Experts, and its evaluations are not judgements. They arise instead from a spirit of dialogue with the ILO's constituents, based on the prior technical and legal advice given by the Committee of Experts, to achieve a better application of international labour standards.

The Committee of Experts, in its 1994 report explained:

26. . . . The Conference Committee has never operated as a review or appeals body vis-à-vis the Committee of Experts. The two bodies have different functions: the Committee of Experts is responsible for technical supervision, whereas the Conference Committee, which is tripartite, provides an opportunity for direct dialogue between governments, employers and workers, and can even mobilize international public opinion.

The Employers' members then returned to this issue in 1996 in the Conference Committee:

10. The Employers' members noted that, although the present Committee had to take into account new information every year, its task remained the same. In accordance with Article 7 of the Standing Orders of the International Labour Conference, it was responsible for examining whether Member States were discharging their obligations under the ILO Constitution, as well as the obligations they had assumed through the ratification of Conventions. The Committee had been carrying out this task for around 70 years. The Committee's role concerned legal issues, and it was for this reason that the comments contained in the report of the Committee of Experts were important. However, the Conference Committee needed to make its own evaluation and arrive at its own conclusions. Its task was not confined to repeating the work of the Committee of Experts.¹¹⁶

This position, that the CAS had to act independently of the Committee of Experts, was not taken up by other members. The employers added a new element to the discussion in 2002:¹¹⁷

The point of conflict was not over whether the Committee of Experts had to interpret law, since the determination of whether or not a Member State complied with the obligations arising out of the provisions contained in ILO Conventions cannot be done without applying legal standards; it was whether

¹¹⁵ Id., p. 27/9.

¹¹⁶ Record of Proceedings No. 14, ILC, 83rd Session, Geneva, 1996, p 14/4.

¹¹⁷ Record of Proceedings No. 28, ILC, 90th Session, Geneva, 2002, p. 28/12.

these unavoidable interpretations were binding. In this respect, the Committee of Experts had rightly corrected in 1991 its opinion set out in 1990. Only the International Court of Justice had the authority to make binding interpretations of Conventions and Recommendations, which clearly derived from Article 37 of the ILO Constitution and the founding instruments, as well as the stringent consideration that the competence of the Committee of Experts cannot exceed that of the body which created it (the *ultra vires* doctrine). This would not hinder the fruitful collaboration between the Conference Committee and the Committee of Experts.

One obvious limitation of the Employers' Group's position is that the CAS as a whole has not endorsed it. The complementarity of the roles of the two committees appears generally to be accepted by other ILO constituents without a need to decide whether one committee has ascendancy over the other. And indeed, the opinion expressed by the Committee of Experts in 1990 is in fact the way in which the committees have interacted. The accumulation of the legally non-binding interpretations by all the ILO supervisory bodies has been so gradual, and so thorough, that it is difficult to imagine a challenge to the authority of the Committee of Experts to flesh out the words of Conventions and to adapt their understanding of the meaning of these standards to new situations, sometimes nearly a century after the Convention in question was adopted, unless a similar position was adopted by all the ILO supervisory bodies, and for all conventions.

Similar points can be made concerning the constitutional complaint procedures. There is the same circular relation among these bodies and the "regular" supervisory machinery. Representations committees and Commissions of Inquiry carry out functions that are more similar to the Committee of Experts than to the CAS, by examining individual situations in relation to a given Convention (or occasionally a set of Conventions). One major difference is that neither the Committee of Experts nor the Commissions of Inquiry submits their conclusions for approval by a higher body, in spite of the employers' assertions concerning the relationship between the Committee of Experts and the CAS. Both the Committee of Experts and Commissions of Inquiry - the bodies with independent, expert legal membership - arrive at their own conclusions, which are then noted and acted upon by other bodies without being subject to challenge except by the International Court of Justice. The other two committees, with tripartite, non-expert composition, adopt conclusions that must be approved, by the plenary of the Conference and by the Governing Body respectively.

D. Conclusion

The Employers' Group has challenged the right of the Committee of Experts to "interpret" conventions, specifically in relation to the question of the right to strike, a position adopted by no other part of the ILO structure. Their insistence on their own point of view without following the wider consensus threatens the operation of machinery that has functioned well since 1927. All the ILO's supervisory bodies perform an interpretive function, subject to any binding interpretation being issued by the ICJ. This includes both those bodies that supervise Conventions and those that supervise the implementation of the Constitution – which after all is also an international treaty. As is demonstrated in the next section, this is

the case also for the supervisory bodies of all international organisations. The most analytically authoritative interpretive function is confided to the two ILO supervisory bodies composed of independent jurists (the Committee of Experts and Commissions of Inquiry). The extent to which the Conference has the last word on interpretation derives from its “legislative” power. Under the Constitution, the conference has the right to revise Conventions to express exact meanings which the supervisory bodies would have to follow, subject to ratification of the revised instruments.

VI. The Right to Strike Outside the ILO

The right to freedom of association and collective bargaining is well established in international instruments other than those adopted by the ILO. They are indicia of the international context in which ILO Conventions are located and are a reflection of the law and practice of States.

A. United Nations

Consistent, though not necessarily identical, approaches on human rights have historically been taken between the ILO and the United Nations. The Universal Declaration of Human Rights, which was adopted a few months after the adoption of Convention 87 and a few months before the adoption of Convention 98, contains a brief but robust statement on trade union rights in Article 23(4): “Everyone has the right to form and to join trade unions for the protection of his interests.” This was given greater articulation in the two Human Rights Covenants adopted in 1966, with the remarkable inclusion in both Covenants of a clause providing for respect of ILO Convention 87 (see e.g., Article 8(3) of the ICESCR). And, before the adoption of the Covenants, the UN Economic and Social Council asked the ILO to adopt measures to deal with complaints of violations of trade union rights on behalf of both organisations.

1. International Covenant on Economic, Social and Cultural Rights

This Covenant provides as follows in Article 8:

1. The States Parties to the present Covenant undertake to ensure:
 - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of a particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

It is plainly apparent that this provision was closely based on ILO Convention 87, and the basic drafting was completed very shortly after the adoption of the ILO Convention. Paragraph 3, found in both Covenants, further attests the close relationship between the ILO and UN standards.

While it is broadly compatible with the ILO standards, there are some differences.¹¹⁸ In the first place, the Covenant does not cover employers, as do the ILO standards.¹¹⁹ Second, it explicitly protects the right to strike, though with the caveat that it should be “exercised in conformity with the laws of a particular country.” (Art. 8(1)(d)) This supplements the concern in Art. 8(1)(c) that States parties shall ensure “The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” These calls for respect for the national legal order are not accompanied by the countervailing provision found in Art. 8(2) of ILO Convention 87 that “The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”

The UN instruments set the conditions for the exercise of a certain class of human rights, but do not explore the uses to which these rights might be put, except that the ESCR Covenant provides that the right of everyone to organise is “for the promotion and protection of his economic and social interests”. In spite of minor differences, the ICESCR and ILO standards obviously cover the same ground, and are intended to be compatible.

¹¹⁸ Keith Ewing, *Myth and Reality of the Right to Strike as a “Fundamental Labour Right”*, 29(2) *IJCLIR* 145, 146 (2013).

¹¹⁹ The reasons for this omission were essentially that the USSR and its allies did not want the forces of capital to be covered. See the detailed analysis of this history in H. Dunning: *The origins of Convention No. 87 on Freedom of Association and the right to Organise*, *Int’l Labour Rev.* Vol. 137, No. 2, (Geneva, ILO, 1998), p. 160.

As concerns supervision of the ICESCR, this is carried out by the Committee on Economic, Social and Cultural Rights (CESCR) which reviews the compliance of ratifying States on a cyclical basis.¹²⁰ From time to time the CESCR publishes “General Comments” which are authoritative interpretations of the text of the ICESCR. There is no specific General Comment on Article 8; however, *General Comment No. 3* (1990) lists Article 8 amongst others which “would seem to be capable of immediate application by judicial and other organs in many national systems” and *General Comment No.9* (1998) requires that the ICESCR provisions should be enforceable in the domestic legal system of ratifying States. Thus, immediate implementation of Article 8 is required where this is legally possible. The Concluding Observations of the CESCR (the UN equivalent of the ILO Committee of Experts), in its review of States’ compliance show how the CESCR on individual cases to deduce how the Committee understands the meaning of this Article.

From the Concluding Observations it may be determined that this Committee applies the same methods which the Employers’ Group criticises when used by the ILO Committee of Experts. It is evident that the CESCR has developed its jurisprudence on the meaning of Article 8 of the Covenant beyond the words alone on the page. In doing so, it has taken care to retain compatibility with the jurisprudence of the ILO. The right to strike itself need not be inferred, since it is textually in the Covenant, but the CESCR has carried out the same process as the ILO supervisory bodies in using the bare words of the Covenant as a platform for laying down what is required to implement the right fully.

Extracts from recent (2011) “Concluding Observations” of the CESCR show that that Committee’s comments closely resemble the observations of the ILO Committee of Experts, though less detailed:

Estonia:

17. The Committee notes with concern that the legislation in force in the State party prohibits civil servants from participating in strikes, including those who do not perform essential services. (Art. 8) The Committee calls on the State party to ensure that the provisions on civil servants’ right to strike in the Public Service Act comply with Article 8 of the Covenant by restricting the prohibition of strike to those discharging essential services.¹²¹

Germany:

20. The Committee reiterates its concern . . . that the prohibition by the State party of strikes by public servants other than those who provide essential services constitutes a restriction of the activities of trade unions that is beyond the purview of the restrictions allowed under Article 8 (2) of the Covenant (Art. 8). The Committee once again urges the State party to take measures to ensure

¹²⁰ Since the Committee’s first meeting in 1987; before the Committee was established, supervision was carried out directly by a Working Group of ECOSOC.

¹²¹ UN Doc. E/C.12/EST/CO/2, 16 Dec. 2011.

that public officials who do not provide essential services are entitled to their right to strike in accordance with Article 8 of the Covenant and ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise (1948).¹²²

Previous concluding observations have criticised Jamaica for reading Article 8(1)(d) as giving the freedom but not the right to strike and concern has been expressed about various restrictions on the right to strike in Morocco, Senegal, the Dominican Republic, and Panama.¹²³ The UN Committee regularly goes beyond merely noting that there is or is not a national law on the subject, as a strict reading of the Covenant would suggest, often indicating what the content of that law should be. In considering a proposal to give some legal protection (where previously there was none) against dismissal for official strikers in the UK, the Committee held:¹²⁴

11. The Committee considers that failure to incorporate the right to strike into domestic law constitutes a breach of Article 8 of the Covenant. The Committee considers that the common law approach recognising only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of an employment contract...

23. The Committee recommends that the right to strike be established in legislation, and that strike action does not entail any more the loss of employment, and it expresses the view that the current notion of freedom to strike, which simply recognises the illegality of being submitted to an involuntary servitude, is insufficient to satisfy the requirements of Article 8 of the Covenant...

By way of further example, no mention of essential services is included in the Covenant – this is an interpolation by the Committee, drawing on the principles developed by the ILO Committee of Experts. Indeed, this understanding of the possibility for excluding essential services from the right to strike, in spite of the lack of language to this effect in the Covenant, was developed already by ECOSOC itself before the Committee was created. See the following extract from the proceedings of the ECOSOC Working Group at its third session in 1989:¹²⁵

¹²² UN Doc. E/C.12/DEU/CO/5, 12 July 2011.

¹²³ J Morsink, *Inherent Human rights; Philosophical Roots of the Universal Declaration* (U. of Penn., 2009), p. 241.

¹²⁴ Concluding observations of the Committee on Economic, Social and Cultural Rights (on the Third Periodic Report of the UK), 4th December 1997, E/C 12/1/Add.19, at paras. 11 and 23. This was reiterated in 2002: E/C 12/1/Add/79 (2002).

¹²⁵ Report on the Third Session, (6-24 February 1989), UN Doc E/1989/22 and E/C.12/1989/5. In the same report, see also the exchange concerning Canada in paragraph 109 of the same report. At this point the

Trinidad and Tobago

Article 8: Trade union rights

289. Members of the Committee wished to know to which extent the right to strike was afforded to trade unions in the public and private sectors.

290. Referring to the provision according to which strikes in essential public services could be prohibited, members wished to know who decided whether a service was essential, and what procedures were used in that respect.

Thus the UN bodies have, like the ILO, taken the position that the words of the treaty in isolation are insufficient to allow the fullest application of the rights contained in it, and that additional requirements must be inferred in order to ensure full implementation. It may be noted at the same time from the comment concerning Germany, above, that the UN Committee accepts that the right to strike is inherent in ILO Convention 87.

2. International Covenant on Civil and Political Rights

Article 22 of the Covenant on Civil and Political Rights covers part of the same ground as the ICESCR, but is less extensive. In particular, it does not spell out the right to strike:

1. 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.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The Human Rights Committee that supervises the implementation of this Covenant applies the same basic methodology as the Committee on Economic, Social and Cultural Rights. However, the HRC examines the protection of the right to freedom of association mostly in relation to non-governmental organisations and political parties, and for the most part does

Working Group had not yet evolved the later practice of drawing conclusions from the information submitted, as was the case later; but the assumptions it had reached concerning the contents of the rights are evident from the questions posed.

not explore the workers' rights aspect of the right to freedom of association, apparently preferring to leave this to the ICESCR. There are nevertheless exceptions. Originally the HRC did not consider that the ICCPR protected the right to strike.¹²⁶ However, since 1999, it has done so, and monitors States protection of this right.¹²⁷

For example, in its concluding observations on the report of Estonia in 2010, the Committee included the following:

15. While noting that the present draft Public Service Act presented to Parliament includes a provision restricting the number of public servants not authorized to strike, the Committee is concerned that public servants who do not exercise public authority do not fully enjoy the right to strike (art. 22).

The State party should ensure in its legislation that only the most limited number of public servants is denied the right to strike.¹²⁸

The HRC has developed its own understanding that, even in the absence of a stated right to strike in this Covenant, the right nevertheless exists as an inherent part of the right to freedom of association, and that it is the Committee's obligation to examination not only the existence of that right but also the conditions under which it is exercised.

B. European Instruments

1. The European Convention on Human Rights

The right to strike is not expressly protected by the European Convention on Human Rights (ECHR).¹²⁹ However, ECHR, art 11 provides that:

11(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

11(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¹²⁶ See, e.g. *JB v Canada*, 1986

¹²⁷ Concluding Comments on Chile, 1966; see P Maclem, *The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?* in P Alston (ed), *Labour Rights as Human Rights* (Oxford, 2005).

¹²⁸ Human Rights Committee, Ninety-ninth session, Geneva, 12–30 July 2010, UN Doc, CCPR/C/EST/CO/3.

¹²⁹ See K D Ewing and J Henty QC, *The Dramatic Implications of Demir and Baycara*, 39 ILJ 2 (2010).

In a series of cases decided in the 1970s, the European Court of Human Rights took the view that this provision did not require Member States of the Council of Europe to protect any particular form of trade union action.¹³⁰ In these cases, the Court expressed and repeated the mantra that Article 11 simply imposed a duty on States to have in place mechanisms to enable trade unions to represent their members, but did not guarantee any particular means by which this was to be done.

Thus the failure of a State to provide a specific mechanism for unions to be heard in order to protect their members' interests would not breach Art 11(1) if other means were permitted by which the union could be heard. Part of the justification for this was the existence of the European Social Charter of 1961 (ESC), in relation to which States are free to select which paragraphs of which Articles they are prepared to accept. Thus it is open to a State to refuse to accept (by way of example) the obligations relating to the right to organise, the right to bargain or the right to strike (arts 5 and 6). According to the tortuous reasoning of the Court, if Art. 11 of the Convention was to be read to include these rights, it would mean that in 1961 the Council of Europe would have taken a step backwards by creating a Charter in which such rights were optional.¹³¹

However, the position of the ECtHR has evolved over the years. In *UNISON v United Kingdom*,¹³² the court was beginning to soften its position on the right to strike. It is true that in that case it was held the restrictions on the right to strike did not constitute a violation of ECHR, art 11. But it was no longer suggested that the right to strike as such was unprotected by ECHR, art 11(1), though the restrictions in this case were found to have been justified under ECHR, art 11(2).

In *Wilson, Palmer and others v UK*¹³³ the issue was discrimination against trade union members who refused to surrender trade union representation. Amongst other things, the ECtHR held:

... the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests (paragraph 46).

This evolution was brought to a climax in *Demir and Baycara v Turkey*,¹³⁴ a case about the annulment of a collective agreement in Turkey. In holding unanimously that there had been a breach of art 11, the Grand Chamber expressly repudiated the jurisprudence of the 1970s, emphasising that "the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to

¹³⁰ *National Union of Belgian Police v Belgium* [1979] 1 EHRR 578; *Swedish Engine Drivers v Sweden* (1979) 1 EHRR 617; *Schmidt and Dahlstrom v Sweden* (1979) 1 EHRR 632.

¹³¹ See *Belgian Police*, para 38; *Swedish Engine Drivers*, para 39; and *Schmidt*, para 34.

¹³² [2002] IRLR 497.

¹³³ Application No 30668/96, (2002) 35 EHRR 20.

¹³⁴ [2008] ECHR 1345.

reflect the increasingly high standard being required in the area of the protection of human rights”.¹³⁵ In holding that the right to bargain collectively was now an *essential element* of the right to freedom of association, the Court took into account a wide range of international treaties (including ILO Convention 98, the European Social Charter, and the EU Charter of Fundamental Rights), as well as the constitutional and labour law and practice of the Member States of the Council of Europe.¹³⁶

Taking these different factors into account, the ECtHR concluded that

The absence of the legislation necessary to give effect to the provisions of the International Labour Conventions already ratified by Turkey, and the Court of Cassation judgment of 6 December 1995 based on that absence, with the resulting *de facto* annulment *ex tunc* of the collective agreement in question, constituted interference with the applicants’ trade-union freedom as protected by Article 11 of the Convention.¹³⁷

As a result, the question for the respondent government was whether the restrictions could be justified under ECHR, Article 11(2), a claim that was dismissed by the Court. In response to this latter question the Court said:

There is no evidence in the case file to show that the applicants’ union represented “public servants engaged in the administration of the State”, that is to say, according to the interpretation of the ILO Committee of Experts, officials whose activities are specific to the administration of the State and who qualify for the exception provided for in Article 6 of ILO Convention No. 98.¹³⁸

This passage is significant because it reveals that ILO Conventions are important in informing not only the content of ECHR, Article 11, but also the circumstances in which restrictions may be imposed. *Demir and Baykara* is important not just for its reliance on ILO Conventions (and the European social Charter) but also for its deployment of the jurisprudence of the Committee of Experts and the CFA (as well as the European Committee on Social Rights). The arguments that led the ECtHR to conclude that the right to collective bargaining is protected by ECHR, Article 11 apply with equal force to right to collective action – namely Article 11 as a living instrument, the importance of other international treaties, and the rising standards of protection which the Convention must reflect. It is thus not surprising that since *Demir and Baykara*, the ECtHR has more fully recognised and developed the right to strike.

*Enerji Yapi-Yol Sen v Turkey*¹³⁹ concerned a circular from the Prime Minister’s Public-Service Staff Directorate prohibiting public sector employees from taking part in a national one-day strike organised by the Federation of Public Sector Trade Unions “to secure the right to a collective bargaining agreement”. The first question was whether such conduct of the State

¹³⁵ Id., para. 146.

¹³⁶ Id., para. 147 – 154.

¹³⁷ Id., para. 157.

¹³⁸ Id., para. 166.

¹³⁹ Application No 68959/01, Judgment dated 21 April 2009.

violated the Convention rights of the union, the Court taking the view that:

The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests [reference made to *Schmidt and Dahlström*; *Belgian police*; *Swedish engine drivers*]. Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests (*Schmidt and Dahlström*, cited above, § 36). The Court also observed that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir and Baykara*, cited above). It recalled that the European Social Charter also recognised the right to strike as a means of ensuring the effective exercise of the right to collective bargaining. As such, the Court rejected the Government's preliminary objection [that the trade union was not a victim].¹⁴⁰

The reference to *Demir and Baykara* as support for reliance on the ILO and the European Social Charter to establish strike action as a corollary to the essential right to collective bargaining protected by Article 11 strongly suggests that the Court was accepting that the right to strike is equally "essential." The passage cited above also makes clear that the Court accepted the ILO position that the right to strike is "an indissociable corollary of the right of trade union association". Again, there was no discernible disharmony between the international treaties, of which Convention 87 was one, and the law and practice of the member States as to the existence of the right to strike. It was not necessary therefore for the ECtHR to consider whether the other means by which the union might be heard on behalf of its members were sufficient: breach of the right to strike alone was a breach of Article 11(1).

UNISON and *Enerji Yapi-Yol Sen v Turkey* were distinguished by the fact that the victims were trade unions. *Wilson and Palmer* though only peripherally touching on the right to strike, is notable as a case where the victims were both individuals and unions. The ECtHR has also upheld strike cases involving individual victims penalized in various ways because of their engagement in collective action.

The 2009 judgment of the ECtHR in *Danilenkov v Russia* concerned 32 dockers,¹⁴¹ members of a small union at Kaliningrad docks, which had taken industrial action. Following the strike the employer discriminated against the members so that they were assigned less work, received reduced income, and were subject to discriminatory selection for redundancy. Domestic criminal legal proceedings succeeded but failed to compensate the losses suffered, so an application was made to ECtHR, relying principally on Article 14 rather than Article 11 of the Convention.¹⁴² Again the Court relied heavily on the ESC (including the jurisprudence of the

¹⁴⁰ Id, para. 24 (unofficial translation).

¹⁴¹ Application No. 67336/01, 30 July 2009.

¹⁴² Article 14 provides that 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other

European Committee of Social Rights) and ILO Conventions 87 and 98 (including the *Digest of Decisions of the ILO Freedom of Association Committee* and a decision involving the Dockers' Union of Russia and the Russian Federation), in upholding the complaint. In so doing the Court said that:

the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of trade union membership which, according to the Freedom of Association Committee, constitutes one of the most serious violations of freedom of association capable to jeopardize the very existence of a trade union (see paragraph 107 above).¹⁴³

The Court continued by saying that it was:

crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to have the right to take legal action to obtain damages and other relief. Therefore, the States are required under Articles 11 and 14 of the Convention to set up a judicial system that would ensure real and effective protection against the anti-union discrimination'.¹⁴⁴

The right to strike, also protected in *Saim Özman v Turkey*¹⁴⁵ and *Urcan v Turkey*¹⁴⁶, involved secondary school teachers in the public sector who took part in a national strike day aimed at improving terms and conditions of employment and were prosecuted for having abandoned their places of work and sentenced to imprisonment, commuted to a substantial fine. In the latter case, the conviction was subsequently set aside. Both were barred from teaching for significant periods. Not surprisingly, the ECtHR held that the imposition of the penalties was a breach of Article 11(1), unjustifiable under Article 11(2).

More significant is the trilogy of *Karacay v. Turkey*¹⁴⁷, *Kaya and Seyhan v Turkey*¹⁴⁸ and *Çerikçi v Turkey*¹⁴⁹, in which public servants each participated in days of strike action called by their union. Each was subjected to a disciplinary inquiry (a process governed, in the public service, by law) and subsequently disciplined for leaving their workplaces without authority. Each was given a written warning "to be more attentive to the accomplishment of his/her functions and in his/her behaviour".¹⁵⁰ The Court held that this constituted a breach of their right of

opinion, national or social origin, association with a national minority, property, birth or other status'.

¹⁴³ *Danilenkov*, at para. 123.

¹⁴⁴ *Id.*, para 124.

¹⁴⁵ Application 22943/04, 15 Sept. 2009, judgment in French only.

¹⁴⁶ Application 23018/04 etc., 17 July 2008, definitive judgment 17 October 2008.

¹⁴⁷ Application 6615/03, 27 March 2007, definitive version of the judgment on 27 June 2007.

¹⁴⁸ Application 30946/04, 15 Sept. 2009.

¹⁴⁹ Application 33322/07, 13 Oct. 2010.

¹⁵⁰ *Kaya and Seyhan*, supra, para. 12. It appears that subsequently an amnesty was granted in respect of certain disciplinary sanctions on public servants but not, it seems, in relation to warnings. The applicants were thus 'victims', para. 22.

freedom of association under Article 11(1),¹⁵¹ emphasising once again that a restriction on the right to strike will infringe Article 11(1).

This in itself is a remarkable conclusion with wide implications, given the subject matter of the strikes, which do not appear to have been directly related to collective bargaining.¹⁵² So far as the Court was concerned, such a restriction could only be warranted by reference to Art 11(2). The Turkish government submitted that, for failing to do their jobs and absenting themselves from work without informing their employer and without justification, a warning was necessary in response to a pressing social need and was proportionate.¹⁵³ The ECtHR rejected this holding that:

Or, la sanction incriminée, si minime qu'elle ait été, est de nature à dissuader les membres de syndicats de participer légitimement à des journées de grève ou à des actions pour défendre les intérêts de leurs affiliés.¹⁵⁴

There was no pressing social need for a disciplinary sanction and thus the warning was not necessary in a democratic society.¹⁵⁵

In *Dilek et al v Turkey*¹⁵⁶ public employees staffing roadside toll booths struck for 3 hours during a working day to join a demonstration organised by their union to protest against their conditions of work. The government sued them and was awarded damages and interest representing the loss of revenue for the hours during which traffic passed through without paying the tolls. The ECtHR held that there was an infringement of Article 11.¹⁵⁷ In relation to Article 11(2), the Court found that though the penalty was prescribed by law¹⁵⁸ and pursued a legitimate goal,¹⁵⁹ the imposition of civil liability on the applicants was not necessary in a democratic society.¹⁶⁰

In *Trofimchuk v Ukraine*¹⁶¹ the applicant was dismissed from employment as a boiler engine operator in a municipal heating supply plant on the grounds that she had failed to comply with certain of her safety duties and that she took 2 hours unauthorised absence in order to join a

¹⁵¹ *Id.*, para. 24.

¹⁵² In *Karaçay v Turkey* the object of a national day of strike action was to defend the purchasing power of public servants; in *Çerikçi v Turkey* the activity was participation in a May Day rally; in *Kaya and Seyhan v Turkey* the national day of strike action was to protest against a proposed law on the organisation of the public service then before Parliament. For a discussion of the right to strike for the protection of the interests of workers beyond merely furtherance of collective bargaining see KD Ewing and J Hendy, *Days of Action, the legality of protest strikes against government cuts*, 2011, Institute of Employment Rights, Liverpool.

¹⁵³ *Kaya and Seyhan*, supra, para 27.

¹⁵⁴ *Id.*, para. 30.

¹⁵⁵ *Id.*, para. 31.

¹⁵⁶ On 17 July 2007 the judgment was under the name of *Satlimiş v Turkey* and the final version was dated 30 January 2008. This was rectified on 28 April 2008 when the name was corrected to *Dilek v Turkey*, Application Nos 74611/02, 26876/02, and 27628/02.

¹⁵⁷ *Dilek*, para. 74.

¹⁵⁸ *Id.*, para. 69.

¹⁵⁹ *Id.*, para. 70.

¹⁶⁰ *Id.*, para. 73.

¹⁶¹ Application 4241/03, 28 Jan. 2011.

peaceful picket over wages unpaid by her previous municipal employer from whom the plant had been taken over by her current municipal employer. The absence caused some disruption in that a colleague on an earlier shift had to work 2 extra hours to cover her absence. The ECtHR held that dismissal partly on the ground of unauthorised absence whilst participating in the Article 11 protected activity of peaceful picketing was a restriction of her right of peaceful assembly and must be justified by reference to Article 11(2).¹⁶² On the facts of the case there was such justification.¹⁶³

The foregoing cases plainly demonstrate that the right to strike is protected by the ECHR, Article 11(1).¹⁶⁴ It is significant that in reaching this position, the Court has been fully aware of its obligations under the Vienna Convention:

In accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder*, cited above, § 29; *Johnston and Others*, cited above, § 51; and Article 31 § 1 of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (see Article 32 of the Vienna Convention).¹⁶⁵

Most recently, in *RMT v UK*¹⁶⁶ the right to strike, indeed the right to solidarity action (i.e. industrial action against an employer which is not a direct party to the dispute), was held to be protected by Article 11(1) of the Convention.¹⁶⁷ The judgment, like that in *Demir and*

¹⁶² *Trofimchuk*, para. 39.

¹⁶³ Ukrainian law prescribed a right to strike with immunity against disciplinary action for exercising it. The applicant had not followed the apparently straightforward procedure required as a condition for exercise of this right. The ECtHR held that the dismissal was prescribed by law and pursued the legitimate aim of protecting the rights of others (the employer). The ECtHR did not refer to necessity in a democratic society but held that, since the applicant had not followed the specified procedure to make her action lawful and protected and had not given notice to her supervisor of her intended absence and its duration so as to prevent “serious disruption to workplace processes”, she had failed to take “all necessary steps to ensure that she exercised her freedom of peaceful assembly in accordance with the due respect to the rights and interests of her employer” (para 46). In those circumstances the dismissal was held not to be disproportionate (para 4). The basis of the decision may be thought to lie in the ease with which Ms Trofimchuk could, under Ukrainian law, have regularised and protected her strike action from all disciplinary consequences and her failure to do so (without suggesting that she had been prevented from so doing). Furthermore, “the applicant did not challenge the conformity of the procedure made available in domestic law to the requirements of Article 11”. The procedure appears on the face of it to be straightforward and informal (see para 29) and would not seem sufficiently restrictive or oppressive to represent lack of conformity to Article 11 had Ms Trofimchuk elected to make that challenge – perhaps the reason why she did not.

¹⁶⁴ For a review, see F Dorssemont, *The Right to take Collective Action under Article 11 ECHR* in F Dorssemont, K Lörcher, and I Schömann, *The European Convention on Human Rights and the Employment Relation*, 2013, Hart Publishing.

¹⁶⁵ *Trofimchuk*, supra, para. 65.

¹⁶⁶ Application No. 31045/10, 8 April 2014.

¹⁶⁷ The RMT union wished to call out on strike its members employed by a main contractor in railway maintenance and renewal in support of a strike by a small number of members employed by a small hived-off

Baykara, contains an extensive review of the ILO Committee of Experts' and CFA materials relevant to the right to strike.¹⁶⁸ This enabled the ECtHR to conclude that "secondary action is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter."¹⁶⁹ The Court brushed aside criticism of the status of the ILO Committee of experts holding that it had no need "to reconsider this body's rôle¹⁷⁰ as a point of reference and guidance for the interpretation of certain provisions of the [European] Convention". The Court therefore concluded, applying Article 31(3)(c) of the Vienna Convention (discussed below), that:

76. It would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law. In addition, such an understanding of trade union freedom finds further support in the practice of many European States that have long accepted secondary strikes as a lawful form of trade union action.

1. It may well be that, by its nature, secondary industrial action constitutes an accessory rather than a core aspect of trade union freedom, a point to which the Court will revert in the next stage of its analysis. Nonetheless, the taking of secondary industrial action by a trade union, including strike action, against one employer in order to further a dispute in which the union's members are engaged with another employer must be regarded as part of trade union activity covered by Article 11.

2. The Court therefore concludes that the applicant's wish to organise secondary action in support of the [primary employer's] employees must be seen as a wish to exercise, free of a restriction imposed by national law, its right to freedom of association within the meaning of Article 11 § 1 of the Convention. It follows that the statutory ban on secondary action as it operated in the example relied on by the applicant constitutes an interference with the applicant's rights under this provision.

As to the right to strike in general, the ECtHR reviewed some of its case law on the right to strike (all included amongst those considered in the text above) and held:

More generally, what the above-mentioned cases illustrate is that strike action is clearly protected by Article 11. The Court therefore does not discern any need in the present case to determine whether the taking of industrial action should

smaller contractor in order to increase the industrial pressure on the latter to resist cuts in terms and conditions. UK law precluded such secondary industrial action. The RMT application to the ECtHR challenged that prohibition.

¹⁶⁸ See paras. 27-33, likewise the review of the European Committee on Social Rights case-law, at paras. 34-37.

¹⁶⁹ *RMT* para.76.

¹⁷⁰ Paras. 96-97 at 97. The ECtHR equally brushed aside criticism of the European Committee on Social Rights, see paras. 94-95.

now be accorded the status of an essential element of the Article 11 guarantee.¹⁷¹

In the *RMT* case the ban on secondary action was, on the facts of the case, held to be justified under Article 11(2).¹⁷²

2. The European Social Charter

As complementary instrument to the European Convention on Human Rights, the European Social Charter (ESC – CETS No. 35) was adopted in 1961 and revised in 1996 as “Revised European Social Charter” (RESC – CETS No. 163).¹⁷³ Both instruments contain an explicit guarantee of the right to collective action, including to strike, in the same wording:

Article 6 –The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ...
and recognise:

¹⁷¹ *RMT* at para.84.

¹⁷² *Id.* at paras. 79-105. The Court emphasised that the margin of appreciation was wide in the context of industrial and economic policies of the state. However, it noted factors counting in favour of the RMT. One was the practice across European States, illustrating that the UK was one of a small group of European countries which adopted an outright ban on secondary strikes, at the far end of the spectrum. Another was the repeated criticisms of the UK’s prohibition of sympathy action by the ILO Committee of Experts and by the decisions of the European Committee on Social Rights on the Social Charter. The Court also referred to how a ban on secondary action could in some contexts, such as an out-sourced workforce, severely hamper trade unions’ efforts to protect their members. But having decided that the interference with freedom of association in the small contractor was not especially far-reaching, and in light of the breadth of the margin of appreciation in this area, the Court decided that the cogent arguments adduced by the RMT on trade union solidarity and efficacy were not sufficient to persuade it that the ban was disproportionate. The case leaves open the possibility that in other circumstances restrictions (including the ban on secondary action) will not be justifiable under Article 11(2). It is likely that some commentators will conclude that the judgment represents +++nothing short of an appeasement by the ECtHR of the UK government’s threats to withdraw from European Convention and its repeated attacks on the ECtHR so evident in the UK stance at the 2013 Committee of Ministers’ meeting in Brighton which lead to the Brighton Declaration and the subsequent inclusion of the references to ‘margin of appreciation’ and ‘subsidiarity’ in the Preamble to the Convention. Certainly, parts of the judgment could be seen in that way and there is no doubt that the judges of the ECtHR have been eager to reassure the UK government, British judges and elements of the English media that little or no threat is posed to the autonomy of the British legal system by the ECtHR or the Convention. The official visit by the President and Vice-Presidents of the ECtHR to the British judges in March 2014 (with the President giving a lecture at University College, London on ‘the Margin of Appreciation’) and the recent article by the former President (N Bratza, “Living Instrument or Dead Letter – the Future of the European Convention on Human rights”, (2014) EHRLR 116) might be thought to be illustrative of the Court’s concern to reassure. The cynical commentator might say that the judgment is a timely demonstration of that reassurance. Whether the trade union movement in the UK or in Europe will view the Court’s treatment of the right to strike in the case as reassuring is doubtful.

¹⁷³ Out of the 47 Council of Europe Member States only four have ratified neither the ESC nor the RESC (Liechtenstein, Monaco, San Marino and Switzerland).

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.

This right has become one of the most important elements in the collective rights protection from the human rights perspective. It is, however, not without limits, with the ESC, Art 31(1), RESC, Appendix G(1) providing that:

The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

Before considering the substance of Art 6(4), it should be recognised that the ESC was the first treaty explicitly to “recognise” the “right to strike”.¹⁷⁴ Moreover, in the context of the Charter this right is important because of the use of the formulation whereby States undertake to ‘recognise’ the right to strike in contrast to more diluted formulations in relation to other Charter rights. Indeed this formulation of the right was thought to be especially significant by the Hoge Raad, by which Art 6(4) has been incorporated into domestic law to form the basis of the right to strike in the Netherlands. The Hoge Raad took this step in view of the wording of the Charter and the undertaking of the Dutch government to “recognise” the right to strike in Art 6(4), in contrast to more equivocal wording used in relation to other rights.¹⁷⁵

a) *Principles Relating to the Right to Strike*

Being entrusted to supervise the implementation of the Charter’s provisions, the European Committee of Social Rights (ECSR) publishes its “Conclusions” in respect of its cyclical reporting system, and its “Decisions” in the complaints procedure – based on an Additional Protocol Providing for a System of Collective Complaints (CCPP - CETS No. 158) – to which 15 Council of Europe Member States have agreed to be bound. This Committee has developed an extensive case-law on the right to strike.¹⁷⁶ In its most recent decision on the right to strike based on a complaint filed by Swedish trade unions,¹⁷⁷ the ECSR made several general statements by referring to the Charter itself:

From a general point of view, the Committee considers that the exercise of the right to bargain collectively and the right to collective action, guaranteed by

¹⁷⁴ See ESC, *Conclusions I*, p. 34; but at that time already an established case-law in the ILO concerning the right to strike and ILO Convention No 87 as well as the Declaration of Philadelphia existed.

¹⁷⁵ *NV Dutch Railways v. Transport Unions FNV, FSV and CNV* (1986) 6 *International Labour Law Reports* 3.

¹⁷⁶ The most important elements of its case-law are summarised in a ‘Digest’ (Council of Europe, *Digest of The Case Law of The European Committee of Social Rights*, 1 September 2008). Collective complaints are reported on the Council of Europe’s website.

¹⁷⁷ *Complaint No 85/2012, LO and TCO v Sweden*, ECSR Decision 3 July 2013.

Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter...¹⁷⁸

More importantly, it also referred to international standards such as ILO Convention 87:

In addition, the Committee notes that the right to **collective bargaining and action** receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and EU level. In this respect, reference is made *inter alia* to Article 8 of the International Covenant on Economic, Social and Cultural Rights (see paragraph 37 above), the relevant provisions of the **ILO conventions Nos. 87, 98 and 154** (see paragraph 38 above)¹⁷⁹ as well as the EU Charter of Fundamental Rights, Directive 2006/123/EC on services in the internal market (cf. Article 1§7) and the Directive 2008/104/EC on temporary agency work -recital 19 (see paragraphs 36 above). [Emphasis added]¹⁸⁰

Finally, the ESC has emphasised in strong terms “the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers”, noting in the Swedish case that:

In this context, within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.¹⁸¹

b) Scope of the Right to Strike

As will be considered below, the right to strike protected by the Charter is not unlimited. However, the Charter protects action of a wide and varied kind, and so far as (i) *the parties* are concerned, the right to strike ought not to be confined to representative or most representative trade unions. So far as (ii) *the subject matter* is concerned, in the Swedish case referred to above the Committee considered that:

national legislation which prevents *a priori* the exercise of the right to collective action, or permits the exercise of this right only in so far as it is necessary to obtain given minimum working standards would not be in conformity with Article 6§4 of the Charter, as it would infringe the fundamental right of workers and trade unions to engage in collective action for the protection of economic

¹⁷⁸ Id., para. 109.

¹⁷⁹ ILO Convention 87 was ratified by Sweden on 25 Nov. 1949.

¹⁸⁰ *Complaint No 85/2012, LO and TCO v Sweden*, supra, para. 110.

¹⁸¹ Id., para. 120.

and social interests of the workers.¹⁸²

And so far as (iii) *participants* are concerned, any employee concerned, irrespective of whether he is a member of the trade union having called the strike or not, has the right to participate in the strike.¹⁸³ The Committee has also said that as to (iv) *methods adopted* in the course of a dispute, “Article 6§4 encompasses other types of action taken by employees or trade unions, including *blockades* or *picketing*”.¹⁸⁴

As noted above, the treaty allows for restrictions to be imposed on the right to strike. Thus, the Committee has pointed out that the protection in Art 6(4) applies only to “conflicts of interest”.¹⁸⁵ According to the Committee, “it follows that it cannot be invoked in cases of conflicts of right, i.e., in particular in cases of disputes concerning the existence, validity or interpretation of a collective agreement, or its violation, e.g., through action taken during its currency with a view to the revision of its contents”.¹⁸⁶ Otherwise, however, the Committee has narrowly construed the scope of restrictions permitted by Article 31 (ESC) and Appendix G (RESC),¹⁸⁷ emphasising that:

The Committee considers that in accordance to the Appendix to the Charter relating to Article 6§4 “[E]ach Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G”. This means that even though the right of trade unions to collective action is not an absolute one. Nevertheless, a restriction to this right can be considered in conformity with Article 6§4 of the Charter only if, as set forth by Article G, the restriction: a) is prescribed by law; b) pursues a legitimate purpose - i.e., the protection of rights and freedoms of others, of public interest, national security, public health or morals – and, c) is necessary in a democratic society for the pursuance of these purposes, i.e., the restriction has to be proportionate to the legitimate aim pursued.¹⁸⁸

¹⁸² Ibid. It is not permissible to restrict strikes not aimed at concluding a collective agreement: ESC, *Conclusions IV, Germany*: ‘It does not, however, seem possible to accept that there should be no other type of collective bargaining in labour relations other than that aimed at concluding a collective agreement. There are many circumstances which, apart from any collective agreement, call for “collective bargaining”, such as when dismissals have been announced or are contemplated by a firm and a group of employees seeks to prevent them or to serve the re-engagement of those dismissed. Any bargaining between one or more employers and a body of employees (whether ‘de jure’ or ‘de facto’) aimed at solving a problem of common interest, whatever its nature may be, should be regarded as ‘collective bargaining within the meaning of Article 6’ (p. 50).

¹⁸³ See Council of Europe, *Digest of The Case Law of The European Committee of Social Rights*, above, p 169 (‘Group entitled to call a collective action’).

¹⁸⁴ *Complaint No. 85/2012, LO and TCO v Sweden*, above, para 117. See also *Complaint No 59/200, ETUC/CGSLB/CSC/FGTB v Belgium*, ECSR Decision 13 Sept. 2011, para 29.

¹⁸⁵ T. JASPERS, “The Right to Collective Action in European Law” in F. DORSEMONT, T. JASPERS en A. VAN HOEK (eds.), *Cross-Border Collective Actions in Europe: A Legal Challenge*, Antwerpen-Oxford, Intersentia, 2007, 56.

¹⁸⁶ *Complaint No 85/2012, LO and TCO v Sweden*, above, para 117.

¹⁸⁷ *Complaint No 32/2005, ETUC/CITUB/Podkrepa v Bulgaria*, ECSR Decision 16 Oct. 2006.

¹⁸⁸ *Complaint No 85/2012, LO and TCO v Sweden*, above, para 118.

Consistently with the foregoing, it is clear, from the *Digest* and the Collective Complaints relating to the right to strike, that the ECSR has thus developed a rich case-law on the explicitly recognised right to strike in Article 6(4) ESC/RESC referring inter alia to ILO Convention 87. It has stressed that:

- the fundamental right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers,
- trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and the scope of the right should not be limited by legislation to the attainment of minimum conditions,
- a general ban on the right to strike, even in essential sectors is not permissible since it cannot be regarded as being necessary in a democratic society,
- the right to strike encompasses not only the right to withhold work but also other relevant means, inter alia, the right to picket,
- prohibiting strikes not aimed at concluding a collective agreement is not in conformity with the right to strike.

c) *The Right to Strike and EU Law*

The Committee has most recently considered the right to strike in the complaint from Sweden referred to above. In that case the Committee adopted a very robust view of the ESC, Article 6(4)/RESC, Article 6(4), and held that restrictions on those rights could not be justified in order to give effect to EU Treaty provisions that guarantee the freedom of any business based in an EU State to provide its services in another EU State. On the contrary, the Committee considered that:

legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.¹⁸⁹

According to the Committee, the economic freedoms of business protected by the Treaty on the Functioning of the European Union “cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers”.¹⁹⁰

¹⁸⁹ Id., para. 121.

¹⁹⁰ Id., para. 122.

3. The European Union

The right to strike has been recognised in EU law in two ways: first by the EU Charter of Fundamental Rights (EU Charter), and more recently by the ECJ/CJEU.

a) *The EU Charter of Fundamental Rights*

The Charter was agreed by the Treaty of Nice in 2000, and has since been given, by the Treaty of Lisbon in 2007, equal legal value to the EU Treaties themselves.¹⁹¹ Article 12(1) provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

Article 28 provides that:

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, 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.

Article 52(3) provides that:

Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The *Explanations relating to the [EU] Charter of Fundamental Rights*¹⁹² (prepared originally by the Presidium of the Committee which drafted the EU Charter) and which describes itself as “a valuable tool of interpretation intended to clarify the provisions of the [EU] Charter”, states that Article 12(1) of the EU Charter corresponds to Article 11 ECHR and that Article 28 of the EU Charter is based on Article 6 of the European Social Charter and notes that “the right of collective action was recognised by the ECtHR as one of the elements of trade union rights laid down by Article 11 of the ECHR.”

Thus, the primary source of the right to strike in EU law is twofold, both Article 12 and Article 28 of the EU Charter since both invoke Article 11 of the ECHR and must, by Article 52(3) of the EU Charter be construed consistently with Article 11 of the ECHR, which as the *Explanations* observe includes the right to strike. To the extent that Article 28 of the EU Charter refers to

¹⁹¹ Treaty of European Union, Article 6(2).

¹⁹² 2007/C 303/02

the right to strike in accordance with “Community” (i.e. EU) law, the relevant EU law for this purpose must include the right to strike to the extent permitted under Article 11 of the ECHR, for the reasons stated. The latter in turn is informed in part by ILO standards, leading the way to ILO standards percolating through the ECHR to become part of EU law.

b) The ECJ/CJEU

The right to strike has also been recognised in two important decisions of the Court of Justice of the European Union (CJEU, formerly the European Court of Justice). The first of these cases is the *Viking* case,¹⁹³ in which the court said that

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices.

Although it recognised the right to strike, the Court also introduced a number of contested restrictions deriving from the four business freedoms protected by the EU Treaties¹⁹⁴ before it could lawfully be exercised in accordance with EU law.¹⁹⁵ Thus collective action such as that at issue in the *Viking* case, which sought to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction [on freedom of establishment] within the meaning of the relevant Article of the EU Treaty. That restriction may, in principle, be justified by an overriding

¹⁹³ *Case C-438/05, ITF and FSU v Viking Line ABP* [2008] IRLR 143.

¹⁹⁴ Freedom of movement of capital, freedom of movement of labour, freedom of an EU business to provide services in another EU State, and freedom to establish a business in another EU State.

¹⁹⁵ *Viking*, supra, para. 90.

reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

These restrictions giving precedence to business freedoms over fundamental human rights are contested in the sense that they are not consistent with ILO principles,¹⁹⁶ they breach the provisions of the European Social Charter,¹⁹⁷ and they are difficult to reconcile with the recent strike cases by the ECtHR.

Despite the controversy surrounding the *Viking* judgment, it is nevertheless important to acknowledge that the Court, at the European level, recognised the existence of the right to strike. In the *Laval* judgment, published a week later,¹⁹⁸ the Court held:

the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.¹⁹⁹

Thus, the Court again reaffirmed the existence of the right to strike, but again held that the

¹⁹⁶ “The Committee observes with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised. While taking due note of the Government’s statement that it is premature at this stage to presume what the impact would have been had the court been able to render its judgement in this case given that BALPA withdrew its application, the Committee considers, to the contrary, that there was indeed a real threat to the union’s existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless.” ILO Committee of Experts, *Observations 2010 (United Kingdom)* (BALPA case), p200; “The Committee wishes once again to recall the serious concern it raised as to the circumstances surrounding the BALPA proposed industrial action, for which the courts granted an injunction on the basis of the *Viking* and *Laval* case law and where the company indicated that, should the work stoppage take place, it would claim damages estimated at £100 million per day. The Committee recalls in this regard that it has been raising the need to ensure fuller protection of the right of workers to exercise legitimate industrial action in practice and considers that adequate safeguards and immunities from civil liability are necessary to ensure respect for this fundamental right, which is an intrinsic corollary of the right to organize. While taking due note of the Government’s observations in relation to its obligations under EU law, the Committee considers that protection of industrial action in the country within the context of the unknown impact of the ECJ judgments referred to by the Government (which gave rise to significant legal uncertainty in the BALPA case), could indeed be bolstered by ensuring effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action. The Committee further considers that a full review of the issues at hand with the social partners to determine possible action to address the concerns raised would assist in demonstrating the importance attached to ensuring respect for this fundamental right. *The Committee therefore once again requests the Government to review the TULRA, in full consultation with the workers’ and employers’ organizations concerned, with a view to ensuring that the protection of the right of workers to exercise legitimate industrial action in practice is fully effective, and to indicate any further measures taken in this regard.*” ILO Committee of Experts, *Observations 2011 (United Kingdom)* (BALPA case), p187.

¹⁹⁷ See *Complaint No. 85/2012, LO and TCO v Sweden*.

¹⁹⁸ *C -341/05, Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160.

¹⁹⁹ *Id.*, para. 91.

restriction (on the business freedom) caused by the industrial action may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

This judgment is also highly controversial for the same reasons. In this case, the Court held that the industrial action in that case was not protected. It took the view that there was no protection for action that was designed to compel a foreign service provider to comply with terms and conditions of employment more beneficial to the workers than those required by the Posted Workers' Directive of 1996.²⁰⁰ For the purpose of this brief, the controversial restrictions on the right to strike permitted by the CJEU's deference to business freedoms over human rights are immaterial to the argument. The crucial point is that *Viking* and *Laval* recognise the fundamental right to strike.

C. *The Inter-American System*

The basic instruments of the Inter-American Human Rights System protect the right to freedom of association, including the right to collective bargaining and the right of workers to strike.

1. *The Charter of the Organization of American States provides:*

Article 45

2.(c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense 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;

(g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;

2. *The American Declaration of the Rights and Duties of Man*²⁰¹ provides:

Article 22

²⁰⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. It is also important to note that it is not only industrial action to force standards higher than those required by the PWD that is prohibited by EU law. See *C-346/06 Rüffert v Land Niedersachsen* [2008] ECR I-1989, *C-319/06 Commission v Luxembourg* [2008] ECR I-4323.

²⁰¹ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

3. The *American Convention on Human Rights*²⁰² provides:

Article 16: Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

4. The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador"*²⁰³ provides:

Article 8: Trade Union Rights

1. The States Parties shall ensure:
 - a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
 - 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.

²⁰² O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

²⁰³ O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

3. No one may be compelled to belong to a trade union.

The Inter-American Court of Human Rights has considered trade union rights and its clearest articulation to date on the right to freedom of association and the right to strike is found in *Ricardo Baena et. al. v. Panama*. There, the Court held:

[i]n labor union matters, freedom of association consists basically of the ability to constitute labor union organizations, and to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the exercise of the respective right.²⁰⁴

The Court further explained that:

freedom of association is of the utmost importance for the defense of the legitimate interests of the workers, and falls under the *corpus juris* of human rights.²⁰⁵

In *Baena*, the Court concluded that Panama violated the right to freedom of association enshrined in Article 16 of the American Convention to the detriment of 270 workers who were dismissed for participating in a peaceful demonstration as a means to obtain reforms to the national labour legislation. In that case, the State Enterprise Workers Union submitted a petition on a number of labour-related issues to the government. Following the rejection of that petition, unions called for a march on December 4, 1990, and a 24-hour work stoppage the following day. The march took place peacefully; however, the demonstration coincided with the takeover of the central police station by a colonel together with a group of military troops. The work stoppage planned for December 5 was eventually suspended to prevent it being associated with the colonel's actions.

Although the Government had not decreed a state of emergency or the suspension of guarantees, the Minister of the Interior forwarded a draft bill to the Legislative Assembly on 6 December proposing the dismissal of all public servants who had participated in the 5 December work stoppage on the grounds that it was intended to subvert the democratic constitutional order. Before this law was enacted, the state dismissed hundreds of workers by written notice. Under the then prevailing law, the employer had to notify the worker in advance and in writing about the date and cause for the dismissal and with the right to appeal such a decision. Labour leaders could not be dismissed without authorization from the labour courts. On 14 December, 1990, the Legislative Assembly passed Law 25. Article 6 of Law 25 provided that the law would be retroactive effective to December 4, 1990. On 23 January, 1991, the Cabinet Council established that the work stoppages in the public sector were attempts against democracy and the constitutional order, and that "any public servant who, as of 4 December, 1990, had

²⁰⁴ *Case of Baena-Ricardo*, supra fn. 22, p. 98.

²⁰⁵ *Ibid.*

promoted, convoked, organized or participated in, or who would in the future promote, convoke, organize, or participate in work stoppages without complying with the established procedures and restrictions established in the Law, or in abrupt collective interruptions of the work in the public sector, would be subject to dismissal for cause.

The Inter-American Court concluded that:

the entirety of the evidence in the instant case shows that, in dismissing the State workers, labor union leaders who were working on a number of claims were dismissed. In addition, the members of workers organizations were dismissed for acts that were not causes for dismissal according to the legislation in force at the time of the events. This proves that the intention in making Law 25 retroactive in compliance with orders from the Executive Branch, was to provide a basis for the massive dismissal of public sector trade union leaders and workers, such actions doubtlessly limiting the possibilities for action of the trade union organisations in the cited sector.²⁰⁶

The Court's conclusions were bolstered by the decision of the ILO Committee on Freedom of Association, which had found that the mass dismissal of trade union leaders and workers in the public sector on account of the strike of 5 December 1990 was a measure which could seriously compromise the ability of public sector trade union organisations to take action in the institutions in which they operate and was a serious violation of ILO Convention 98.²⁰⁷

Subsequent cases, both concerning the assassination of union leaders, have further clarified that the right to freedom of association includes not merely the recognition of trade unions but the ability to exercise that freedom. For example, in *Pedro Huilca Tecse v. Peru*,²⁰⁸ the General Secretary of the CGTP was murdered on December 18, 1992. The Court determined that the killing was motivated by the fact he was a trade union leader who opposed and criticized the policies of the Government. The Court explained that Article 16 conferred not only the individual right and freedom "to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right," but also the collective right "to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose."²⁰⁹ The Court further explained that,

labor-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom. When the Convention proclaims that freedom of association includes the right to freely associate "for [... any] other purposes," it is emphasizing that the freedom to associate and to pursue certain collective goals are indivisible, so that a

²⁰⁶ Ibid.

²⁰⁷ ILO CFA, Report No. 281, Case No. 1569 (1992), para. 143.

²⁰⁸ Inter-American Court of Human Rights, Case of Huilca-Tecse v. Peru, Judgment of March 3, 2005 (Merits, Reparations and Costs).

²⁰⁹ Id., p. 23.

limitation of the possibilities of association represents directly, and to the same extent, a limitation of the right of the collectivity to achieve its proposed purposes. Hence the importance of adapting to the Convention the legal regime applicable to trade unions and the State's actions, or those that occur with its tolerance, that could render this right inoperative in the practice.²¹⁰

D. African Charter on Human and Peoples' Rights

Though far less developed, the African Charter on Human and Peoples Rights also protects freedom of association. Relevant Provisions include:

Article 10 – Freedom of Association

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.²¹¹

Unlike other international instruments with similar provisions,²¹² Article 10 does not explicitly recognize the right to form trade unions as a corollary of the right to free association.²¹³ However, when this provision is read in conjunction with other international instruments that member states may have adopted, including ILO Convention 87, the right to freedom of association guaranteed by Article 10 must necessarily include the right to form a trade union.²¹⁴ Further, a trade union is, by definition, an association and therefore the right to form a trade union is necessarily guaranteed by a State's obligation to uphold the rights enshrined in Article 10.²¹⁵ In any case, the somewhat vague language of the Charter does not release States from the stricter obligations of other international treaties to respect the formation of trade unions.²¹⁶

Article 15 – Conditions of Work

"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."²¹⁷

Notwithstanding the express language of this provision²¹⁸, Article 15 appears to have been intended as a vehicle for trade union rights as well. Under Article 62 of the Charter, States

²¹⁰ *Ibid.*

²¹¹ Text available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

²¹² See, e.g., Second Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 7, Art. 22(1).

²¹³ Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) at 170.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ African Charter, *supra* n. 211, Art. 15.

²¹⁸ Ouguergouz, *supra* n 213, at 183.

must submit periodic reports to the African Commission on Human and Peoples' Rights detailing how the state implements and safeguards the fundamental rights guaranteed by the Charter.²¹⁹ The African Commission published an initial General Guidelines document setting out what states should contain in their periodic reports, and in this document the Commission has located the rights of trade unions squarely within the purview of Article 15.²²⁰ Under Section II, General Guidelines "Regarding the Form and Contents of Reports on Economic and Social Rights," paragraph 10 stated that nations submitting a periodic report to the Commission must make note of the "[p]rincipal laws, administrative regulations, collective agreements and court decisions designed to promote, safeguard or regulate trade union rights in their various aspects as defined in this Article."²²¹

On the right to form and join trade unions, the Guidelines required States to note "the legal or other provisions governing the right to join and form the trade union of one's choice."²²² If the State adopted formal provisions on the right to form and join trade unions, the report should also include "a description of how the right is ensured in practice; any restrictions which are placed upon the exercise of this right, with precise details of the legal provisions prescribing such restrictions."²²³ Importantly, the Guidelines mentioned the right to strike, and required states to report "legal or other provisions governing or affecting the exercise of the right to strike," and, "if no formal provisions exist, description of the position in practice in regard to this right."²²⁴

These Guidelines were subsequently (and unfortunately) replaced with more cursory requirements in 1998 at its 23rd ordinary session.²²⁵ This does not obviate the fact that the Commission has interpreted its Charter to include a right to strike derived from Article 15, if not also Article 10.

VII. CONVENTION 87, THE RIGHT TO STRIKE AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

The ILO Committee of Experts states that the right to strike is contained in Articles 3, 8 and 10 of Convention 87. On examination of the text of convention, this proposition is undoubtedly correct. The Employers' Group asserts that there is no right to strike to be found in Convention 87 because such a right is not expressed explicitly in those terms. This is, however, not a legally tenable position.

Convention 87 is an international treaty. There are international legal rules for the proper interpretation of such treaties, namely the Vienna Convention on the Law of Treaties (VCLT).

²¹⁹ *Charter, supra* n 211, Art. 62. For a discussion of the importance of these period reports, see the below section on the African Commission.

²²⁰ DOC ACHPR/RPT (II), Annex IV, reprinted in *DOCUMENTS OF THE AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS* 49 (Rachel Murray & Malcolm Evans eds. 2001).

²²¹ *Id.* at 55.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Id.* at 56.

²²⁵ *Ibid.*

The VCLT has been elaborated within the framework of the United Nations as a set of rules defining the legal framework for international treaties.²²⁶ The VCLT contains, inter alia, rules on the interpretation of international treaties (in Section 3, “Interpretation of Treaties” consisting of Articles 31- 33). These and other relevant provisions of the VCLT are set out in Annex III to this brief but it is convenient to reiterate Articles 31 and 32 here:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

²²⁶ Gardiner, *Treaty Interpretation*, (Oxford 2008), p. 5

(b) leads to a result which is manifestly absurd or unreasonable.

Importantly, the objective criteria (Article 31 VCLT) are given priority over the history oriented “travaux préparatoires” (Article 32 VCLT). The Employers’ Group argue that the ILO supervisory system, and the Committee of Experts in particular, have failed to obey the relevant rules of the VCLT on treaty interpretation in observing a right to strike in Convention 87 and thereafter regulating its exercise.²²⁷ Like other arguments advanced by the Employers’ Group, this too cannot be sustained. Both the Committee of Experts and the CFA have recognized the existence of a right to strike in a manner which, on analysis, is entirely consistent with the rules of interpretation.

A. The Applicability of the VCLT and its Rules of Interpretation

There is a preliminary question as to whether the VCLT, or at least its rules of interpretation, applies to the ILO. This question raises issues of retroactivity (*ratione temporis* - Article 4 VCLT)²²⁸, material scope (*ratione materiae* - Article 5 VCLT)²²⁹ and the personal scope (*ratione personae* – Articles 81 ff VCLT). As the rules of interpretation are now considered customary international law, they do apply to the ILO, though the ILO internal rules remain relevant. The Committee of Experts has specifically referred to the VCLT in formulating its observations and its practice demonstrates an adherence to the rules of interpretation.

1. Retroactivity

Article 4 VCLT provides for the general rule of non-retroactivity. According to this rule, the VCLT would not apply. Indeed, Convention 87 was adopted in 1948; the VCLT was signed on 23 May 1969 and entered into force on 27 January 1980. However, Article 4 provides an exemption so that the rules enshrined in the VCLT apply to a treaty “under international law independently of the Convention”. Thus, if the interpretation rules contained in Articles 31 – 33 VCLT are to be considered as “international law” (as indeed they are, as explained below), then the principle of non-retroactivity of the VCLT would not apply. In any event, as noted below, the requirement to give the ordinary meaning to the terms of an international

²²⁷ “While in 1990, the Employers criticized a statement in the Committee’s report that they viewed as saying in substance that competence to interpret Conventions absent an ICJ submission rests solely with the Committee (paragraph 22), following extended discussion involving workers and governments as well, the Employers emphasized their view of the Vienna Convention as ‘the appropriate – in fact the only – yardstick to be used in interpreting ILO Conventions. It was this yardstick that they invited the Committee to use in their interpretation of international labour standards’” (paragraph 30, emphasis added).” Committee of Experts Report 2013, Part I, para. 34 (b).

²²⁸ “Non-retroactivity of the present Convention:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”

²²⁹ “Treaties constituting international organizations and treaties adopted within an international organization: The present Convention applies to any treaty which is the constituent instrument of any international organization and to any treaty within an international organization without prejudice to any relevant rules of the organization.”

treaty has been continuously observed for more than a century before the VCLT entered into force.

2. Material Scope

Article 5 VCLT defines the relationship between the VCLT and international treaties elaborated in the framework of international organisations. This provision provides a reservation²³⁰ (indeed priority) in respect of the "relevant rules of the organization". The term "rules" is to be understood in a broad sense.²³¹ The ILO is an international organisation²³² and Convention 87 is a treaty adopted²³³ within the ILO. Therefore the reservation applies. It follows that, as a principle, the rules of the ILO take precedence over the rules contained in the VCLT.

3. Personal Scope

The Vienna Convention is itself legally binding neither on the ILO in general nor on any of its supervisory bodies in particular. As international organisations/institutions, they are not (and cannot be) contracting parties to the VCLT. Indeed, Articles 81 et. seq. of the VCLT provide for the ratification and accession by States (only).

²³⁰ Concerning the history of this Article: "The draft articles, as provisionally adopted at the fourteenth, fifteenth and sixteenth sessions, contained a number of specific reservations with regard to the application of the established rules of international organizations. In addition, in what was then part II of the draft articles and which dealt with invalidity and termination of treaties, the Commission had inserted an article (article 48 of that draft) making a broad reservation in the same sense with regard to all articles on termination of treaties. On beginning its re-examination of the draft articles at its seventeenth session, the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a *general reservation* covering the draft articles as a whole. It considered that this would enable it to simplify the drafting of the articles containing specific reservations. It also considered that such a general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked." (Wetzel/Rauschnig, Art. 5 Commentary (1) p. 91).

²³¹ "At the first session of the Conference his delegation had proposed (A/CONF.39/C.1/.39) the addition of the words 'and established practices' after the word 'rules' in order to make it clear that the term "rules" was not to be understood in too restrictive a sense. His delegation had not pressed that amendment to the vote, because, as the Chairman of the Drafting Committee has pointed out at the 28th meeting of the Committee of the Whole, the Drafting Committee had taken the view that the term 'rules' applied both to written and to unwritten customary rules." (Sir Francis Vallat, United Kingdom, United Nation (Hrsg.), United Nations Conference on the Law of Treaties, Second Session Vienna, 9 April - 22 May 1969, Official Records, New York 1970, p. 4.

²³² See the definition in Article 2 letter i): "'international organization' means an intergovernmental organization" (see also the reference in Article 9(2) VCLT: "The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.").

²³³ "Certain Governments, in their comments upon what was then part III of the draft articles (application, effects, modification and interpretation), expressed the view that care must be taken to avoid allowing the rules of international organizations to restrict the freedom of negotiating States unless the conclusion was part of the work of the organization, and not merely when the treaty was drawn up within it because of the convenience of using conference facilities. Noting these comments, the Commission revised the formulation of the reservation at its present session so as to make it cover only 'constituent instruments' and treaties which are '**adopted** within an international organization'. ..." (Wetzel/Rauschnig, Art. 5 Commentary (3)).

4. VCLT Rules of Interpretation as Customary International Law²³⁴

The rules of interpretation have played an important role during the process of elaboration of the VCLT. The ICJ in the *Kasikili/Sedudu Island Case* (1999) held that Article 31 of the VCLT on treaty interpretations reflected customary international law and that therefore applied despite the facts that (i) neither Botswana nor Namibia were parties to the VCLT and that (ii) the treaty in question entered into force in 1890:

As regards the interpretation of that Treaty, the Court notes that neither Botswana nor Namibia are parties to the Vienna Convention on the Law of Treaties of 23 May 1969, but that both of them consider that Article 31 of the Vienna Convention is applicable inasmuch as it reflects customary international law. The Court itself has already had occasion in the past to hold that customary international law found expression in Article 31 of the Vienna Convention (see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I. C. J. Reports 1994, p. 21, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I. C. J. Reports 1996 (II), p. 8 12, para. 23). Article 4 of the Convention, which provides that it "applies only to treaties which are concluded by States after the entry into force of the . . . Convention with regard to such States", does not, therefore, prevent the Court from interpreting the 1890 Treaty in accordance with the rules reflected in Article 31 of the Convention.²³⁵

The ICJ clearly considers that the "rules reflected in Article 31 of the Convention" constitute customary international law and applies them irrespective of any limitation against retroactivity under Article 4 VCLT. This general proposition is confirmed by other international (regional) courts which have considered that the interpretation rules, in particular Article 31 VCLT have to be considered as "international law". Indeed, in an Advisory Opinion the Inter-American Court of Human Rights (IACHR) stated:

48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply the rules of interpretation set out in the **Vienna Convention**, which may be deemed to state

²³⁴ Customary international law refers to international legal obligations binding on all states which arise from 1) established state practice and 2) *opinio juris* – meaning that states view the custom as obligatory, not as a mere courtesy or moral obligation. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. USA)* ICJ Reports 1986 pp. 87-8, paras 183-187. See also *Continental Shelf (Libyan Arab Jarnahiriyu v. Malta)*, I. C.J. Reports 1985, pp. 29-30, para. 27.

²³⁵ Judgment 13 December 1999 *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1045, para. 18.

the relevant **international law principles** applicable to this subject."²³⁶ (Emphasis added)

At the European level, the European Court of Human Rights (ECtHR) extensively refers to the VCLT's rules of interpretation. In an important number of judgments it refers to the principles of these provisions,²³⁷ albeit employing formulations which make it clear that these principles are not intended to be a direct and totally binding instrument, in particular as regards matters of interpretation. By formulating certain qualifications such as "guided mainly by the rules"²³⁸ or "in the light of the rules"²³⁹ of interpretation provided for in Articles 31–33 VCLT or qualifying them as a "backbone for the interpretation",²⁴⁰ the Court obviously seeks to ensure that some degree of flexibility is retained. It would appear that the ECtHR has in mind use of Article 5 VCLT (without referring to it directly). This is, no doubt, to preserve the primacy of the ECHR as the "relevant rules of the organisation."

5. ILO Practice

As for the ILO's "internal rules", there is in practice a tendency for the Committee of Experts to refer expressly to Article 31 VCLT.

[T]he Committee constantly bore in mind all different methods of interpreting treaty law, especially the Vienna Convention."²⁴¹

With regard to the views put forward that the preparatory work would not support the inclusion of the right to strike, the Committee would first observe that the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose. While the

²³⁶ 8.9.1983 - OC-3/83 - para. 48; in the following para 49 it quoted the relevant rules as follows: "These rules specify that treaties must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" [Vienna Convention, Art. 31(1).] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. (Id., Art. 32.)" It goes on in para. 50: "This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, " are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States; 'rather' their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States." (*The Effect of Reservations*, supra 42, para. 29.)"

²³⁷ See ECtHR (Grand Chamber) judgment (18 February 2009), App No 55707/00, *Andrejeva v Latvia*, para. 18; see also paras. 19–20; ECtHR (Third Section) judgment (15 September 2009), App No 798/05, *Mirojubovs and others v Latvia*, para. 62; ECtHR (First Section) judgment (7 January 2010), App No 25965/04, *Rantsev v Cyprus and Russia*, para. 273–4.

²³⁸ ECtHR (Grand Chamber [GC]) (12 November 2008), App No 34503/97, *Demir and Baykara v Turkey* [2008] ECHR 1345, para. 65.

²³⁹ ECtHR (Grand Chamber) judgment (23 March 2010), App No 15869/02, *Cudak v Lithuania*, para. 56.

²⁴⁰ ECtHR (Grand Chamber) judgment (18 February 2009), App No 55707/00, *Andrejeva v Latvia*, para. 19.

²⁴¹ Committee of Experts Report 2013, Part I, para. 27; emphasis added

Committee considers that the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties).²⁴²

In responding to the request to clarify the methods followed when expressing its views on the meaning of the provisions of Conventions, the Committee reiterates 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 Committee 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 Article 31 of the Vienna Convention, giving equal consideration to the two authentic languages of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 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."²⁴³

Further, in its General observation - Indigenous and Tribal Peoples Convention, 1989 (No. 169) the Committee of Experts used nearly the same wording.²⁴⁴ The analysis of the applicability of the VCLT's interpretation rules has shown that they are "international law independently of the Convention" in the sense of Article 4 VCLT and are to be applied, in general, without any restriction *ratione temporis*. Equally, it is therefore irrelevant that the ILO is not (and cannot) be a party to the VCLT (*ratione personae*). However, there remains a

²⁴² General Survey 2012, at para. 118.

²⁴³ Committee of Experts Report 2011, Part I, para. 12 (emphasis added).

²⁴⁴ See also General observation - Indigenous and Tribal Peoples Convention, 1989 (No. 169), *ibidm.* p. 783 ("The Committee of Experts has, on a number of occasions, stated that, although its mandate does not require it to give definitive interpretation of ILO Conventions, 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 legal scope and meaning of the provisions of Conventions, where appropriate. In doing so, the Committee 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 Article 31 of the Vienna Convention on the Law of Treaties, giving equal consideration to the two authoritative texts of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 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 the tripartite constituents play in standard setting."). Endnote 1: "1 - See ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 32; ILC, 73rd Session, 1987, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 21; ILC, 77th Session, 1990, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 7; ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras. 11 and 12."

question as to the extent which the interpretation rules enshrined in Articles 31 – 33 VCLT have to be altered or nuanced by the ILO ‘internal rules’ (Article 5 VCLT – *ratione materiae*).

In 2007, the Committee of Experts made note of the different methods of interpreting conventions. In interpreting Convention 29 as to questions of modern day 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. Indeed, a review of the committee of experts’ methodology confirms a more flexible approach to interpretation, including the actual terms in their own context and in light of the purpose of the convention, as well as preparatory work, the views of the Office and the other supervisory mechanisms.²⁴⁵

The Committee of Experts 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 Committee of Experts 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 Article 31 of the Vienna Convention. In addition and in accordance with Articles 5²⁴⁶ 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.²⁴⁷

The most important ILO supervisory body referring to the VCLT is the Committee of Experts. For many years it has confirmed that its interpretation of Convention 87 as including of the right to strike was in conformity with (and indeed required by) the VCLT’s rules of interpretation. The Committee of Experts appears to be the only supervisory body in the ILO which has considered the VLCT in any detail. However, Commissions of Inquiry have endorsed Committee of Experts findings and expressly recognised the right to strike.

²⁴⁵ Provisional Record No. 22, ILC, 96th Session, Geneva, 2007, Part I, p. 22/40, para. 133.

²⁴⁶ 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 organisations and any treated adopted within an international organisation 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.

²⁴⁷ CEACR Report, 100 Session, ILC 2011, (Part I A, Report III), para. 12.

B. Application the VCLT to Convention 87

1. Article 31 VCLT - General Rule of Interpretation

a) “ordinary meaning” (Article 31(1) VCLT)

The principles are to be understood as the “starting point”²⁴⁸ for interpretation purposes. There are two main functions: The first is the discovery of the ordinary meaning of the term. The second is the identification of a “functional” meaning, in the sense of a meaning appropriate to the subject matter.²⁴⁹ Thus the primary element in the rules of interpretation of Article 31 of the VCLT is that “the ordinary meaning [is] to be given to the terms of the treaty in their context and in the light of its object and purpose”.

Recognition of the requirement to interpret international treaties in accordance with the “plain and obvious meaning” of words is longstanding and dates from well before the VCLT and was recorded as long ago as 1855.²⁵⁰ “The plain meaning of the words” was observed to be the primary guide for the interpretation of treaties in 1895.²⁵¹ Judicial practice giving primacy to the ordinary meaning of words in international treaties was noted in 1936.²⁵²

The principle was illustrated in the *Acquisition of Polish Nationality* case where the Permanent Court of International Justice stated that it was:

bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it... To impose an additional condition not provided for in the Treaty [under consideration] would be equivalent not to interpreting the Treaty but to reconstructing it.²⁵³

However, the literal rule is subject to exceptions. Thus in the *Polish Postal Services in Danzig* case the Court stated (at paragraph 113) that:

It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.²⁵⁴

²⁴⁸ Gardiner, supra n. 226 at p. 162.

²⁴⁹ Id., p. 166. (The third function mentioned relates to the authoritative language versions dealt with in Article 33 VCLT and will therefore not be discussed here.)

²⁵⁰ See Sir Robt. Phillimore, *Commentaries on International Law*, 1855, Vol II at p. 73.

²⁵¹ W E Hall, *A Treatise on International Law*, 1895, at p. 350.

²⁵² M Jokl, *De l'Interpretation des traits normatifs d'après de la doctrine et la jurisprudence internationals*, 1936, p. 24.

²⁵³ Advisory Opinion of 15 Sept. 1923, PCIJ Series B, 6 at 20.

²⁵⁴ Advisory Opinion of 16 May 1925 PCIJ Series B, No 11, 39.

This was the basis for the forceful dissent of judges Anzilotti and Huber in the *Wimbledon* case.²⁵⁵ There, the minority were only prepared to reject the literal meaning preferred by the majority on the basis that words cannot be presumed “to express an idea which leads to contradictory or impossible consequences”. Even those sceptical of the literal rule concede that so long as no other common intention can be found, then the words must be given their literal meaning.²⁵⁶

With this venerable guidance in mind the text of Convention 87 must be considered in the light of the VCLT.

Article 2 of ILO Convention provides that:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

And Article 3 provides that:

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

The only limitations on the rights described in Article 3 are found in Articles 8 and 9. Article 8 provides that in exercising those rights, those concerned “shall respect the law of the land” though the latter “shall not be such as to impair, nor shall it be so applied as to impair” those rights. Article 9 allows derogation by national law in the cases of the armed forces and the police.

Article 10 is an interpretation clause and significantly provides that:

In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

The words of Article 3 provide the right to draw up constitutions and rules, organise activities and formulate programmes. As written, the words of Article 3 confer on trade unions (and employers' associations) the right to draw up their **rules and constitutions** on

²⁵⁵ 1923 PCIJ Series A No 1, 36.

²⁵⁶ Julius Stone, *Fictional Elements in Treaty Interpretation – A study in the International Judicial Process*, 1 *Sydney Law Rev.* 344, 355-6 (1953-5).

any subject matter whatever. The first five meanings of the noun “rule” given by the Oxford English Dictionary (further meanings are irrelevant to the current discussion) are²⁵⁷:

- (i) a principle, regulation, or maxim governing individual conduct;
- (ii) the code of discipline or body of regulations observed by a religious order or congregation;
- (iii) a principle regulating practice or procedure;
- (iv) an order made by a judge or court (hence irrelevant here);
- (v) a regulation framed or adopted by a corporate body, public or private, for governing its conduct and that of its members.

In relation to the word “constitution”, only the third, sixth and seventh meanings in the OED have any relevance:

- (iii) a decree, ordinance, law, regulation: usually, one made by a superior authority, civil or ecclesiastical;
- (vi) the mode in which a state is constituted or organised...;
- (vii) the system or body of fundamental principles according to which a nation, state, or body politic is constituted or governed.

Legal dictionaries shed no further light. In relation to “rules”, both Duhaime’s Legal Dictionary and Stroud’s Judicial Dictionary identify only a variety of sets of rules of law or procedure. As to “constitution” Duhaime’s 100 references are almost without exception references to the constitutions of nations, and states and provinces within them save for a reference to *United States v. White*²⁵⁸ in which Justice Murphy in the US Supreme Court held of the typical labour union:

It normally operates under its own constitution, rules and bylaws, which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of the members.

²⁵⁷ The authors of this brief have considered the meanings of the relevant words in some of the non-English translations of Article 3(1) of Convention 87 but to the best of their understanding there are no relevant distinctions between the languages so far as the relevant meaning of the relevant words is concerned. The phraseology of Article 3(1) in some of the principal European languages is: Les organisations de travailleurs et d'employeurs ont le droit d'élaborer leurs statuts et règlements administratifs, d'élire librement leurs représentants, d'organiser leur gestion et leur activité, et de formuler leur programme d'action; Las organizaciones de trabajadores y de empleadores tienen el derecho de redactar sus estatutos y reglamentos administrativos, el de elegir libremente sus representantes, el de organizar su administración y sus actividades y el de formular su programa de acción; Die Organisationen der Arbeitnehmer und der Arbeitgeber haben das Recht, sich Satzungen und Geschäftsordnungen zu geben, ihre Vertreter frei zu wählen, ihre Geschäftsführung und Tätigkeit zu regeln und ihr Programm aufzustellen; As organizações de trabalhadores e de entidades patronais têm o direito de elaborar os seus estatutos e regulamentos administrativos, de eleger livremente os seus representantes, organizar a sua gestão e a sua actividade e formular o seu programa de acção; Организации работников и работодателей имеют право выработать свои уставы и административные регламенты, свободно выбирать своих представителей, организовывать свой аппарат и свою деятельность и формулировать свою программу действий.

²⁵⁸ *U.S. v. White*, 322 U.S. 694 (1944).

There is nothing inherent therefore in the ordinary meaning of “constitution” or “rules” which would preclude making whatever provision in such instruments as those drafting it and the members thereof desire.

Of course, Article 3 is not dealing with constitutions or rules at large but those of voluntary organisations of civil society. Any lawyer familiar with trade unions and employers’ associations (and, indeed, any longstanding member of such bodies) would agree that the rules and constitutions of trade unions and employers’ associations (indeed, practically every kind of organisation) invariably set out (amongst many other fundamentals) the structure of those organisations, their objects and their powers. Some of these may, of course, be implicit.

It cannot therefore be seriously argued that Article 3, in referring to constitutions and rules, does other than give trade unions and employers’ associations the right to prescribe in their governing documents at least the structure by which they will operate and make and implement decisions, their purposes and, if not all, then some of the ways in which they have agreed to seek to achieve their purposes.

It is striking that the words of Article 3 impose no limitations on the above by requiring the inclusion of certain rules or constitutional provisions or by specifying that certain rules or constitutional provisions are impermissible. On a literal reading therefore trade unions (and employers’ associations) may draw up their constitutions and rules so as to make any provision they wish – without limitation.²⁵⁹ The words are therefore not merely capable but do mean that both organisations may provide, for example, that one of their objects is to bargain collectively. By the same token the words also mean that unions have the right to draw up constitutions which provide that their purposes or some of them may be achieved by organising and supporting industrial action and the right to have rules which prescribe the conditions under which industrial action will be organised or supported. Indeed, the words mean that a trade union may have, not merely as a means to an end, but as an objective in itself the organisation and support of industrial action.

The contrary submission would be that since the right under Article 3 to draw up rules and a constitution does not specify that they may include provision for the organisation or support of industrial action, there is no right to have such rules. However, if that curious construction was correct then neither trade unions nor employers’ associations could have a rule or constitutional provision about anything at all since no particular rules are specified by Article 3. Thus an employers’ association, for example, could not have any particular object or, specifically, the purpose of collective bargaining. It could not even have rules for the admission of members. No rules would be permitted for raising funds by subscriptions from members, and none for lobbying governments. Such a construction by which a general right is interpreted as having no effect in the absence of specification of particular rights is

²⁵⁹ Of course, it is not suggested that trade unions could adopt any rules whatsoever, particularly rules that would limit workers’ rights, such as racially discriminatory membership rules.

not merely untenable but absurd. A literal construction of the words simply cannot sustain an interpretation which negates any content being given to an express right.

The right to organise their administration and **activities** is the second feature of Article 3 to require consideration. Leaving aside administration, “activities” is a word of wide compass. The first meaning of “activity”, according to the OED, is ‘the state of being active; the exertion of energy, action’. The fourth (and only other relevant) meaning given is “anything active; an active force or operation”. The nature of the actions encompassed in “activity” is notably not specified in the dictionary meaning. The case of *White* above gives a natural and wide scope to the notion of trade union activities. It is significant, though, that in UK law, for example, protection is given against discrimination by an employer against an employee for participating in the “activities of an independent trade union”.²⁶⁰ Such activities have been held (without controversy) to include both planning and participation in industrial action²⁶¹.

The literal meaning of activities thus leaves open to trade unions and employers’ associations a free and unlimited election as to which activities they choose to organise. However, it is probably implicit from the juxtaposition of the right to draw up constitutions and rules, that the right to organise administration and activities is confined to those permitted by the rules and constitution. This would be normal and accord with law in most, if not every, jurisdiction. It follows that trade unions have the right to organise, amongst other of their activities, the activities of industrial action and collective bargaining.

The contrary proposition advanced by the Employers’ Group is that since the right to organise industrial action is not specified as one of the activities a trade union has the right to organise, there is no right to organise industrial action. But again, as pointed out above, if such a rule of construction was tenable and applied, since Article 3 does not specify *any* particular activities, it must follow that the right conferred on trade unions and employers’ associations to organise their activities contained no right to organise any specific activity. This conclusion is, of course, risible and would empty Article 3 of any meaning or effect.

The right of trade unions and employers’ associations to formulate their **programmes** needs consideration next. The OED offers the following relevant meanings of “programme”:

- (i) a public notice;
- (ii) a descriptive notice, issued beforehand, of any formal series of proceedings... a prospectus, syllabus,... a definite plan or scheme of any intended proceedings; an outline or abstract of something to be done (whether in writing or not).

²⁶⁰ Sections 146 and 152 Trade Union and Labour Relations (Consolidation) Act 1992.

²⁶¹ *Winnett v Seamarks Bros Ltd* [1978] IRLR 387, [1978] ICR 1240, EAT; *Britool Ltd v Roberts* [1993] IRLR 481, EAT (though the legislative constraint that the activity must take place ‘at an appropriate time’ means that no successful claim has thus far been recorded in relation to participation in a strike). This analysis is fortified by s.170(1) of the 1992 Act which entitles a union member, in certain circumstances, to be permitted time off work to engage in “trade union activity” but in that context it is specifically enacted that there is no right to claim time off for “activities which themselves consist of industrial action” (s.170(2)). The inescapable inference is that, but for that proviso, union “activity” in that context would naturally include industrial action. It must follow that the expression, “the activities of an independent trade union”, in the absence of a similar exclusionary proviso must include participation in a strike.

The literal meaning of the words thus confers an unqualified right on the part of unions and employers' associations to include whatever they wish in their plans for the future. This must include the right, for example to plan for collective bargaining and, for trade unions, the right to plan for industrial action. There is no basis within the words used for excluding from the right of a trade union to formulate within its programme, a plan which includes the organisation of or support for industrial action.

Once again the contrary proposition is that because Article 3 does not specify the right to plan industrial action, no such right is to be found in the right to formulate a union's programme. Once again, however, the words are incapable of bearing such a meaning which would, if correct, have the consequence that the right to formulate a plan about any particular matter or to make a plan to do any particular thing was necessarily excluded from the protection of Article 3, since the Article does not authorise a plan to do any particular thing. This would mean that the right of employers' associations and unions to formulate their programmes was devoid of substance since every particular plan would fall foul of the proposed canon of construction.

b) "context"(Article 31(1) VCLT)

Article 31(1) of the VCLT provides that the words of a term of a treaty must be construed in its "context and in the light of its object and purpose". The context of a treaty term had been used for interpretation purposes well before the VCLT (the latter merely codified customary international law). Indeed, the Permanent Court of International Justice in an early Advisory Opinion had used context for interpretation purposes and already stressed that the context is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.²⁶²

The PCIJ also stated, inter alia, that Part XIII of the Treaty of Versailles - the Constitution of the ILO - expressly declared that the design of the Contracting Parties was to establish a permanent labour organisation, and that fact strongly militated against the argument that agriculture, which was the most ancient and the greatest industry in the world, employing more than half of the world's wage earners, was to be considered as left outside the scope of the ILO, merely because it was not expressly mentioned by name²⁶³. The Court concluded that it was unable to find in Part XIII of the Treaty, read as a whole, any ambiguity, and it had no doubt that agricultural labour was included therein²⁶⁴.

²⁶² *Competence of the ILO to Regulate Agricultural Labour*, P.C.I.J. (1922), Series B, Nos. 2 and 3, p. 23 (http://www.icj-cij.org/pcij/serie_B/B_02/Competence_OIT_Agriculture_Avis_consultatif.pdf)

²⁶³ See PCIJ Advisory Opinion pp. 23, 25

²⁶⁴ See *Ultra Vires Acts in International Organizations – The experience of the International Labour Organization*. Eber Odieke, 1977, p. 265. <http://bybil.oxfordjournals.org/content/48/1/259.short>

The context in which the relevant words are found (and the object and purpose of the provisions in question) can be considered at a number of levels.

First, it is necessary to bear in mind that Article 3 of Convention 87 is the creation of the ILO, the Constitution of which provided and provides in its Preamble for “recognition of the principle of freedom of association”. Given the other concrete measures included in the Preamble it is not conceivable that the endorsement of the freedom of association did not recognise that trade union membership (as an aspect of freedom of association) involved trade union action towards attaining those concrete objectives, including the use of strike action.²⁶⁵

Freedom of association was reiterated in the Declaration of Philadelphia of 1944, by which time many countries in the developed world had encouraged collective bargaining as an important means of overcoming the Great Depression of the 1930s.²⁶⁶ Whilst mechanisms to avoid strike action and to resolve disputes were common, it was recognised on all sides that strikes were inherent in collective bargaining. This was clearly also part of the context of Convention 87.

Freedom of association is part of the title of Convention 87 of 1948, the “*Freedom of Association and Protection of the Right to Organise Convention*”. Freedom of association is reiterated in its Preamble. Indeed the Preamble reinterprets the ILO Constitution by stating that:

The Preamble to the Constitution of the International Labour Organisation declares ‘recognition of the principle of freedom of association’ to be a means of improving conditions of labour...

It would appear to be self-evident that freedom of association was intended to comprehend actions by which such conditions could be improved; equally obviously this was by way of collective bargaining and, where necessary, strike action. This too is part of the context of Convention 87.²⁶⁷

²⁶⁵ The primary purpose of trade union membership (as the membership of many other associations) is to influence the “outside world” and in the case of trade unions - most particularly the employers.

²⁶⁶ The re-emergence of Joint Industrial Councils in Britain was a reflection of this. The Ministry of Labour’s Annual Report for 1934 (p 74) affirmed that, “It has been the policy of the Department to take every opportunity of stimulating the establishment of joint voluntary machinery or of strengthening that already in existence.” During the World War II, the collective bargaining system was heavily relied upon to enhance Britain’s war effort with the introduction of Order 1305, a compulsory measure which provided the legal machinery to extend collective agreements to non-parties. In the USA the National Labor Relations Act of 1935 also promoted collective bargaining. In France the 1936 Matignon Accords provided for both the rights to strike and to bargain collectively.

²⁶⁷ The first signatory to Convention 87 was the British Foreign Secretary, Ernest Bevin, on behalf of the UK. The idea that he, former General Secretary of the giant Transport and General Workers Union, signed Convention 87 under the impression that it did not confer the right to strike on his former members is hard to accept. Equally significantly, the Australian Government by reason of its legislative system of collective awards which thereby limited access to industrial action considered that, for that reason, it could not initially ratify ILO Convention 87 or 98; only doing so in 1973.

Article 10 of Convention 87 also forms part of the context for Article 3. It specifies the objective of workers' organisations: to further and defend the interests of workers. Trade union constitutions, rules, activities, and programmes must therefore be capable of furthering and defending workers' interests.

The context also requires reference to Article 3(2) of Convention 87 which prohibits "any interference which would restrict this right or impede the lawful exercise thereof". In a more general way (concerning all the rights contained in the Convention) Article 8(2) confirms this approach by stating that the "law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention". The breadth of the right conferred is thus emphasised by the drafters' insistence on prohibiting restriction or impairment of it.

With these aspects in mind, the question to be asked is whether the literal meaning of Article 3 which contains within it the right to strike, as identified above, when set in context, must be expanded, contracted or otherwise adapted. The answer must be a resounding "no". There is nothing which suggests that the literal meaning of those rights must be expanded, contracted or otherwise adapted by the reiteration of the concept of freedom of association as it would have been understood in 1919, 1944, 1948 or, indeed, any time subsequently, nor in the notion that the trade unions to which are given the rights in Article 3 have as their purpose that of furthering and defending workers' interests. Indeed the context only fortifies the literal meaning adduced above.

The other side of the coin is that there is certainly nothing in the context which could conceivably support the proposition for which the Employers' Group contend namely that Article 3 is to be read as meaning that:

- (i) though trade unions have the right to draw up their constitutions and rules, that right specifically excludes the right to draw up constitutional provisions permitting the organising or supporting of strikes;
- (ii) though trade unions have the right to organise their activities, that right specifically excludes the right to organise or support strike action;
- (iii) though trade unions have the right to formulate their programmes, that right specifically excludes the right to formulate a programme of strike action.

Those exclusions could have been written into Convention 87 but they were not. It must be presumed that such exclusions were not intended. Accordingly recourse to the words of Convention 87 leads inevitably to the conclusion that it guarantees the right to strike.

*c) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions"
(Article 31(3)(a) VCLT)*

This Article of the VCLT makes it necessary to take into account, together with the context of Convention 87, any subsequent agreement between the parties as to the interpretation

or application of Convention 87. The parties to the ILO have, as noted above, on many occasions and over many years, agreed in the CFA (and elsewhere in the ILO), that Convention 87 includes the right to strike. For 60 years the CFA has applied this mutual agreement in determining the cases before it. The significance of this to the application of the VCLT cannot be underestimated.

d) “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (Article 31(3)(b) VCLT)

This Article makes it necessary to take into account any subsequent practice which establishes the agreement of the parties regarding the interpretation of Convention 87. It is important to note that the predecessor of the ICJ, the PCIJ, looked to the ILO as a guide to construction long before the advent of the VCLT. In its opinion on the *Competence of the ILO to Regulate Agricultural Labour* stated:

If there were any ambiguity, the Court might for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty.²⁶⁸

As for the substance of the subsequent practice, the PCIJ referred to the practice of the ILO Member States (in confirmation of the meaning which it had deduced from the text and which it considered to be unambiguous):

The Treaty was signed in June, 1919, and it was not until October, 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organization. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form and another. All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity.²⁶⁹

If case-law of the supervisory bodies had already existed at that time, there can be little doubt that the Court would have referred to it in its consideration of subsequent practice.

This is now even more apparent. In both the academic field²⁷⁰ and in judicial practice,²⁷¹ it is recognised that this ILO case law is indeed to be taken into consideration in cases to which it

²⁶⁸ P.C.I.J. (1922), Series B, No. 2, p. 39.

²⁶⁹ Id., pp. 40-1.

²⁷⁰ See, e.g., N Ando, “The Development of the Human Rights Committee’s Activities under the ICCPR and its Optional Protocol through My Twenty-Year Experience as a Committee Member” in G Venturini and S Bariatti (eds), *Liber Fausto, Pocar* (Milan, Giuffrè Editore, 2009), p 15 (No 6.2) referring to the case of the application of the term “territory” in respect of the US’s report on Guantanamo (outside US “territory”); to a certain extent also R Gardiner, *Treaty Interpretation* (Oxford, University Press, 2008) 246.

²⁷¹ See, e.g., Constitutional Court of South Africa, judgment 13 December 2002, CCT 14/02, *National Union of Metalworkers of South Africa*: “[32] Although none of the ILO Conventions specifically referred to mentions the right to strike, both committees engaged with their supervision have asserted that the right to strike is essential to collective bargaining ... [33] These principles culled from the jurisprudence of the two ILO committees are directly relevant to the interpretation both of the relevant provisions of the Act and of the

is relevant. Any systematic approach to the international context would be incomplete if the practice of the competent bodies tasked with applying the relevant international standards were left aside. Insofar as these bodies have their own case law demonstrating consistency and continuity in interpretation, reference to that case law reflects state-of-the-art practice by national and regional courts across the globe.

At regional level, the example of the ECtHR demonstrates this approach of taking into account the relevant case-law of the supervisory bodies (albeit related more to Article 31(3)(c)), by interpreting the comparable Article 11 ECHR. In the *Demir and Baykara* judgment, the ECtHR in interpreting this provision in relation to the right to bargain collectively referred to much relevant case law of the competent organs such as the ILO Committee of Experts and CFA as well as the European Committee of Social Rights (ECSR).²⁷² And the ECtHR in its judgment *Enerji Yapi-Yol Sen* recognised the right to strike as included in Article 11 ECHR by explicitly referring to the relevant ILO case-law:

La Cour note également que le **droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT)** comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical (pour la prise en compte par la Cour des éléments de droit international autres que la Convention, voir *Demir et Baykara*, précité).²⁷³ (Emphasis added)

From a constitutional point of view, it is important to reiterate that Commissions of Inquiry, which decide complaints under Articles 26 of the ILO Constitution, have confirmed this view. This is described in Section IV above. This is all the more important as the ILO lacks any more authoritative interpretative organ. Indeed, as noted elsewhere in this brief, no tribunal pursuant to Article 37(2) of the ILO constitution currently exists and no interpretative question on the right to strike has been put to the ICJ under Article 37(1) of the ILO Constitution.

Again, the subsequent practice for decades within the ILO, particularly in the CFA, as explored in Section IV above overwhelmingly confirms the agreement of the parties to the existence of the right to strike in Convention No. 87.

e) “any relevant rules of international law applicable in the relations between the parties” (Article 31(3)(c) VCLT)

Constitution”; or Supreme Court of Canada, judgment, *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391: “76 ... Convention No. 87 has been the subject of numerous interpretations by the ILO’s Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the ‘cornerstone of the international law on trade union freedom and collective bargaining’”; “79. In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association”.

²⁷² ECtHR (Grand Chamber) Judgment 12 November 2008 – No. 34503/97 – *Demir and Baykara v Turkey*: CEACR in paras. 38, 43, 101, 147, 166; CFA in paras. 39, 102, ECSR in paras. 50, 149.

²⁷³ ECtHR (Third Section) Judgment 21 April 2009 – No. 68959/01 - *Enerji Yapi-Yol Sen v Turkey*, para. 24.

This Article requires account to be taken of other relevant rules of international law. This element of interpretation is not limited to the time of the adoption of the instrument concerned. The submission is made below in Section VIII that the right to strike is recognised under “customary international law”.

The ECtHR has applied this element of interpretation in a wider sense. In its *Demir and Baykara* judgment, it referred in a general way to Article 31(3)(c) of the VCLT²⁷⁴ and applied it in the following words:

“The Court observes that these considerations find support in the majority of the relevant international instruments...”²⁷⁵

This is followed by explicit references to many relevant international instruments (concerning the right to organise) such as the UN Covenants (Article 8 ICESCR, Article 22 ICCPR), ILO Convention 87 (Article 2), and the European Social Charter (Article 5). In referring also to the instruments mentioned in the *Demir and Baykara* judgment, the ECtHR recognised the right to strike in its judgment *Enerji Yapi-Yol Sen*.²⁷⁶

As has been noted above, in *RMT v UK*²⁷⁷ the ECtHR applied Article 31(3)(c) of the Vienna Convention after an extensive review of the ILO Committee of Experts’ and CFA materials relevant to the right to strike²⁷⁸ had led it to conclude that secondary industrial action “is recognised and protected as part of trade union freedom under ILO Convention No. 87 and the European Social Charter”²⁷⁹ so that it “would be inconsistent with this method [i.e. that prescribed by Article 31(3)(c) of the Vienna Convention] for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.”²⁸⁰

f) “A special meaning shall be given to a term if it is established that the parties so intended” (Article 31(4) VCLT)

It is a matter of fact that the parties to Convention 87 did not intend at the time of drafting that the right to strike was to be excluded from the bundle of rights conferred by that

²⁷⁴ ECtHR (Grand Chamber) Judgment 12 November 2008 – No. 34503/97 – *Demir and Baykara*, “In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Saadi*, cited above, § 62; *Al-Adsani*, cited above, § 55; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention).”

²⁷⁵ *Id.*, para. 98.

²⁷⁶ ECtHR (Third Section) Judgment 21 April 2009 – No. 68959/01 - *Enerji Yapi-Yol Sen v Turkey*, para. 16 referring to the description of international law in *Demir and Baykara* (paras. 31, 34-52); see the further reference to *Demir and Baykara* in para. 31.

²⁷⁷ Application No. 31045/10, 8 April 2014.

²⁷⁸ See *RMT* paras. 27-33, likewise the review of the European Committee on Social Rights case-law, at paras. 34-37.

²⁷⁹ *RMT* para.76.

²⁸⁰ *Ibid.*

Convention. It is, of course, simply beyond argument that the Workers' Group had no intention of excluding the right from Convention 87. But the same absence of intention appears also true of the other parties since, had their intention been to do so, it would have been simple to draft words to limit the broad rights conferred by the convention so as to specifically exclude the right to strike. There was apparently no attempt to do so by *any* party.

The main argument advanced by the Employers' Group is the rejection, during the drafting process of what became Convention 87, of two amendments asking for the inclusion of the right to strike in the Convention.²⁸¹ However, this is not sufficient to "establish that the parties... intended" (i.e. *all* the parties intended) to exclude the right to strike. Given that the plain meaning of Convention 87 comprehended the right to strike, a specific inclusion of it was unnecessary and impractical.²⁸² The reality is that there is no sufficient evidence to *establish* an intention on the part of the parties to exclude the right to strike from the broad and ordinary words which, as submitted above, plainly includes that right amongst others.

g) Further Interpretation Principles

Obviously, rules or principles of interpretation not mentioned in Articles 31 – 33 VCLT may also be taken into account in the interpretative process. In the *Georgia v Russian Federation (CERD)* case, the Court referred to PCIJ jurisprudence (i.e. before the VCLT) in order to introduce an interpretation element not (directly) mentioned in the VCLT's interpretation rules:

In the *Free Zones of Upper Savoy and the District of Gex* case, the Permanent Court of International Justice had occasion to apply the well-established principle in treaty interpretation that words ought to be given appropriate effect.²⁸³

Taking into account the element of effectiveness, an interpretation of the word "activities" in Article 3(1) Convention 87 as excluding the right to strike would not give it the appropriate effect. This additional principle even strengthens the result of the interpretation process on the basis of Article 31 of the VCLT. The Employers' Group do not and cannot point to any other rule of construction which would defeat the long standing rules now

²⁸¹ In any event, the argument of the Employers' Group comes close to proposing that the supplementary means of interpretation (Article 32 VCLT) would displace the primary means (Article 31 VCLT).

²⁸² Indeed, had it been included specifically it would have had to have been enveloped with clumsy protective words to prevent Article 3 being confined only to the right to strike or to rights construed *eiusdem generis* with the right to strike. So phraseology such as "...including, for the avoidance of doubt and without prejudice to the generality of the foregoing, the right to strike or organise, support or take other forms of industrial action" would have been required. No doubt even such language would have given rise to subsequent questions as to whether the unexpressed right to collective bargaining (on the part of employers' associations and trade unions), political lobbying, organising marches and demonstrations and other activities were included.

²⁸³ ICJ Judgment 1 April 2011 - *Georgia v Russian Federation (CERD)*, para. 133.

contained in Article 31 of the VCLT which could conceivably lead to the conclusion that Article 3(1) of ILO Convention 87 is to be interpreted as excluding the right to strike.²⁸⁴

2. Article 32 VCLT - Supplementary Means of Interpretation

From the outset, the main principle of the structure of the interpretation rules is that Article 32 of the VCLT, allowing recourse to the preparatory works of a treaty, only applies if at least one of the conditions of (a) or (b) are fulfilled. These are that the meaning derived from the instrument under Article 31 of the VCLT (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. If the primary meaning is neither, then the justification for the use of the supplementary means of interpretation under Article 32 of the VCLT is simply unjustifiable.

a) Does the meaning of Article 3 of Convention 87 as containing the right to strike leave that meaning ambiguous or obscure or does it lead to a result which is manifestly absurd or unreasonable?

Having established, by application of the canons of construction of Article 31 of the VCLT, that the meaning of Article 3 of ILO Convention 87 is that trade unions have the right to draft rules and make constitutional provision for the organisation of or support for industrial action, the right to organise activities including the organisation of or support for industrial action and the right to formulate programmes which include plans to organise or support the taking of industrial action, the question is whether that meaning is ambiguous or obscure or leads to results which are manifestly unreasonable or absurd.

As to ambiguity or obscurity, the existence of a right to strike deriving from Convention 87 is neither. It is stark and clear. Only permissible restrictions upon it require any further elaboration but that task cannot render the existence of the right itself ambiguous or unclear.

As to manifest absurdity or unreasonableness, the practice of the ILO, its Conference, its Governing Body, its CFA, its Committee of Experts, its Commissions of Inquiry and its CAS all show, as demonstrated elsewhere in this brief, that the grant to trade unions of the right to strike is the antithesis of absurdity – the right to strike is manifestly reasonable. That this is so is demonstrated by multiple other international instruments protecting the right to strike.

Furthermore, the notion that trade unions collectively bargain and that collective bargaining involves (on occasion) industrial action is a commonplace proposition to which anyone

²⁸⁴ E.g., the “living instrument” concept of interpretation is also a common means of interpretation, particularly in the interpretation of human rights instruments, e.g., in *Demir and Baykara v. Turkey*: “the ‘living’ nature of the Convention, which must be interpreted in the light of present-day conditions, [takes] account of evolving norms of national and international law in its interpretation of Convention provisions” (App. No. 34503/97, ECtHR) and *Case of the Mapiripán Massacre v. Colombia*: the interpretation of human rights treaties “must go hand in hand with evolving times and current living conditions” (Inter-American Court of Human Rights, Sept. 15, 2005, para 106). Given the near-universality of the right to strike in international law, if Convention 87 did not include the right to strike in 1949, it must do so now.

familiar with industrial relations the world over would accede. As the Committee of Experts have noted:²⁸⁵

Although the exercise of the right to strike is in most countries fairly commonly subject to certain conditions or restrictions, the principle of this right as a means of action of workers' organizations is almost universally accepted.

So, whilst there may be arguments as to the extent and scope of the freedom which trade unions have to engage in industrial action, it cannot be argued (save perhaps by the most repressive dictatorships) that granting trade unions the rights to do such things is unreasonable or absurd. The fact that so many countries in the world have a legal right to strike is all but conclusive on the point.²⁸⁶ Therefore, the conditions necessary before resort may be made under Article 32 of the VCLT to supplementary means of interpretation such as the *travaux préparatoires* of Convention 87 to determine the meaning of Article 3(1) of that Convention, are non-existent.

b) *Would the application of Article 32 VCLT change the situation even were it to be applied?*

Even assuming that Article 32 VCLT would apply, it should be recalled as Janice Bellace has pointed out that the British draft which led to the adoption of the ILO's founding instrument in 1919 (in which the concept of "freedom of association" was embedded) was understood by the draftsman as necessarily protecting the activities of collective bargaining and industrial action in the light of the momentous industrial, legal and political events which led to the Trade Disputes Act of 1906 in Britain which specifically protected trade union freedom to organise and support strike action.²⁸⁷ She could have added that the British draftsman would also have had well in mind that since 1871 the British legislature had defined trade unions by reference to their purpose of collective bargaining²⁸⁸ and the British government and employers had by 1919 adopted the conclusions of the "Whitley" *Committee on Relations between Employers and Employed* of 1917²⁸⁹ recommending that "the government should propose, without delay, to the various associations of employers and employed, the formation of Joint Standing Industrial Councils in each industry"²⁹⁰ consisting of representatives of employers' associations on the one side and trade unions on

²⁸⁵ *General Survey 2012*, at p. 50, para. 123.

²⁸⁶ See Section VIII of this document on customary international law, as well as Annex IV.

²⁸⁷ J Bellace, *The ILO and the Right to Strike*, supra n. 48.

²⁸⁸ S.23 Trade Union Act 1871 defined a trade union as "such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or ..." The requirement that to be a trade union the organisation must have as one of its principle purposes "the regulation of relations between workers ... and employers or employers' associations" is still found in s.1 Trade Union and Labour Relations (Consolidation) Act 1992.

²⁸⁹ Originally set up by the Ministry of Reconstruction as part of the planning for reconstruction after the First World War, its task was to 'make and consider suggestions for securing a permanent improvement in the relations between employers and workmen', *Whitley Committee*, Final Report (1 July 1918), Cmd 9153 (1918), para 1.

²⁹⁰ *Whitley Committee*, Interim Report on Joint Standing Industrial Councils (8 March 1917), Cmd 8606 (1917), para 6. These were subsequently known as 'Joint Industrial Councils' ("JICs").

the other for the purpose of industry-wide collective bargaining in order to avoid the widespread and damaging strikes that had marked the previous 50 years.²⁹¹ The objective, adopted by government, was to “constitute a scheme designed to cover all the chief industries of the country and to equip each of them with a representative joint body capable of dealing with matters affecting the welfare of the industry in which employers and employed are concerned”.²⁹² An analogous provision was made in Germany in 1919.²⁹³ In this way, it was hoped that reliance of industrial action would be diminished. In Britain, strike action had always been regarded as inherent in collective bargaining as the Combination Acts of 1799 and 1800 (and their repeal in 1824) showed.²⁹⁴

The preceding analysis has shown that the practice of the ILO supervisory bodies recognising the right to strike as being included in Article 3(1) of ILO Convention 87 is not only in conformity with the interpretation rules contained in Articles 31 – 33 VCLT but is required by application of those principles. The “circumstances of the conclusion” of the founding instrument of the ILO in 1919 do not support an argument that the right to strike was excluded from it. Neither, as is explained earlier, would the travaux préparatoires support the thesis. So even were Article 32 of the VCLT to be engaged (which it is not), it would lead to no different conclusion to that reached under Article 31.

3. Inadmissible “Creative interpretation”?

²⁹¹ Where such Joint Committees did not already exist, the second report recommended ‘an adaptation and expansion of the system of trade boards’ working under an amended Trade Boards Act 1909 to conduct bipartite collective bargaining with the presence of government appointees to facilitate negotiations, *Whitley Committee*, Final Report.

²⁹² *Whitley Committee*, Final Report.

²⁹³ Article 159 of the German *Weimar Constitution* of 1919 protected the right to form unions and to improve conditions at work declaring “all agreements and measures limiting this right are illegal”, while Article 165 provided that: “Workers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces. The organizations formed by both sides and their mutual agreements are recognized. Workers and employees are granted, in order to represent their social and economic interests, legal representations in Enterprise Workers’ Councils as well as in District Workers’ Councils, organized for the various economic areas, and in a Reich Workers’ Council...”

²⁹⁴ In *Hilton v Eckersley* (1855) 6 E&B 47, for example, the court (Alderson B at 76) refused to countenance giving “legal effect to combinations of workmen for the purpose of raising wages, and make their strikes capable of being enforced at law. We think that the Legislature have been contented to make such strikes not punishable: [but] certainly they never contemplated them as being the subject of enforcement by a suit at law, on the part of the body of delegates.” In *Hornby v Close* (1867) 19 Cox CC 393 the court held that a trade union was not a friendly society, Mellor J pointing out that “Some of the substantial objects of the society are those of a trades’ union, and for the maintenance of its members when on strike, and these objects cannot be separated from the other objects, if any, of the society. Nor can I doubt that many members joined the society on the very footing that there were such rules and for the very sake of the illegal objects.” The infamous case of *Taff Vale Railway v ASRS* [1901] AC 426 turned on trade union liability for a strike in support of a collective bargaining objective. There Farwell J pointed out that “The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of a strike; the undertaking such management and direction is one of the main objects of the defendant society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the strike is carried out.”

A further criticism by the Employers' Group which may be conveniently dealt with here is that the Committee of Experts (and presumably, the CFA) has created a right to strike by "interpreting" Convention 87. In one sense this is correct - the ascertainment of the meaning of words is a process of interpretation. But the Employers' Group imply something more in their criticism – namely that the use of interpretation as a creative tool has gone beyond the literal meaning of the words. But, as seen above, the suggestion that the ILO bodies have been creative in their interpretation of Convention 87 as containing the right to strike is simply factually wrong. The right to strike is found, as shown above, in the very words of Convention 87; no process of creative interpretation is required to find it.

It is true, however, that the ILO Committees have used a process of creative interpretation in relation to one feature of the right to strike in Convention 87. The ILO bodies have created *limitations* on the right to strike. It will be observed that Convention 87 contains no limiting words or context at all.²⁹⁵ There is no parallel to the wording of Article 11(2) of the European Convention on Human Rights which permits restrictions on freedom of association:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Many other international human rights provisions have analogous wording. The ILO Committees therefore have, by construing Convention 87, constructed limitations on what would otherwise be an unfettered right to strike. The Committee of Experts (and the CFA) has accepted a wide variety of limitations on the right to strike. For example, as the CFA has ruled as follows:

The Committee has considered that the occupation of plantations by workers and by other persons, particularly when acts of violence are committed, is contrary to Article 8 of Convention No. 87. It therefore requested the Government, in future, to enforce the evacuation orders pronounced by the judicial authorities whenever criminal acts are committed on plantations or at places of work in connection with industrial disputes.²⁹⁶

In so interpreting Convention 87, these two supervisory bodies have not *created a right to strike*; on the contrary, they have done the very opposite. They have *created permissible restrictions* on what would otherwise be an unfettered right to strike created, not by them, but by the very words of Convention 87.

²⁹⁵ Save perhaps for Article 8, the requirement of conformity to national law balanced by the requirement that national laws must not impair Convention 87 rights, and Article 9 which permits restrictions in relation to armed forces and police.

²⁹⁶ CFA Digest of Decisions (5th ed. 2006) para. 546.

VIII. The Right to Strike Is Recognized under Customary International Law²⁹⁷

The trajectory of international discourse on the right to strike strongly suggests the existence of a customary international law norm.²⁹⁸ State practice reflected in most countries' constitutions, laws, and decisions of national courts confirm the right to strike. The limits may vary from country to country, but underlying them is an international consensus that the right exists, and that limits must be reasonable. Further, States respect this right out of a sense of legal obligation, not merely a moral one.

The right to strike is recognised in extensive and diverse sources, including those set forth in Section VI above. To this could be added international economic agreements. In adopting the North American Free Trade Agreement (NAFTA), the United States, Canada, and Mexico included among their agreed Labor Principles "The right to strike – The protection of the right of workers to strike in order to defend their collective interests."²⁹⁹

Further, in the 2012 General Survey, the ILO found that:

Although the exercise of the right to strike is in most countries fairly commonly subject to certain conditions or restrictions, the principle of this right as a means of action of workers' organizations is almost universally accepted. In a very large number of countries, the right to strike is now explicitly recognized, including at the constitutional level.³⁰⁰

The ILO cited 89 countries from all regions of the world (Asia, Africa, Americas, Europe and Middle East) whose constitutions incorporate the right to strike. The complete list is attached in Annex IV.

Further, in practically every other country in the world without a constitutional provision, the right to strike is nevertheless recognized in legislation. Space considerations preclude

²⁹⁷ Customary international law refers to international legal obligations binding on all states which arise from 1) established state practice and 2) *opinio juris* – meaning that states view the custom as obligatory, not as a mere courtesy or moral obligation. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. USA)* ICJ Reports 1986 pp. 87-8, paras 183-187. See also *Continental Shelf (Libyan Arab Jarnahiryu v. Malta)*, I. C.J. Reports 1985, pp. 29-30, para. 27.

²⁹⁸ There is academic support for the argument that fundamental ILO principles have become part of customary international law. See, e.g., C W Jenks, *The International Protection of Trade Union Freedom* (1957) at pp 561-2; P. O'Higgins, "International Standards and British Labour Law", in R Lewis (ed), *Labour Law in Britain* (1986), at p 577; Creighton, "The ILO and protection of Freedom of Association in the UK", in Ewing, Gearty and Hepple (eds.) *Human Rights and Labour Law*, 1994, p.2, and see ILO, *International Labour Standards*, 3rd ed., 1990 at p.106. The logic adopted by the ECtHR in resting on international law standards is consistent with the common law principle of legality explained by Lord Hoffman in *R v Secretary of State for the Home Dept, ex p Simms* [2000] 2 AC 115 at p 131; followed by Gleeson CJ in *Electrolux etc v Australian Workers Union* (2004) 221 CLR 309 at p 329.

²⁹⁹ North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Annex 1, *Labor Principles* (1993).

³⁰⁰ General Survey 2012, p. 50, para 123.

recounting them all. Two examples at polar opposites in political and economic terms are sufficient:

- In the United States, Section 13 of the National Labor Relations Act (NLRA) states, “Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.”³⁰¹
- In Vietnam, Article 5 of the Labour Code adopted in 2012 states, “The employees are entitled to . . . be on strike.” Article 209 states, “The strike is the temporary, voluntary and organizational stopping of work of the labour collective in order to meet the requirements in the process of settlement of labour disputes.”³⁰²

Both countries’ laws and regulations set out various procedural requirements for engaging in strikes such as time frameworks for bargaining, mandatory use of mediation, advance notice of strikes, maintaining minimum services and so on. To a greater or lesser degree, such requirements are common to the laws of all countries, but always resting on the foundational premise that workers have a right to strike.

China, although it removed the right to strike from its Constitution in 1982, adopted a trade union law that implicitly acknowledges the right to strike in saying:

In case of work-stoppage or slow-down strike in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultation with the enterprise or institution or the parties concerned, present the opinions and demands of the workers and staff members, and put forth proposals for solutions. With respect to the reasonable demands made by the workers and staff members, the enterprise or institution shall try to satisfy them. The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.³⁰³

The ILO has been compiling a Compendium of court decisions invoking Conventions 87 and 98 and decisions of the Committee on Freedom of Association regarding the right to strike.³⁰⁴ While by no means complete, it includes the following rulings:

- In 1995, Russia’s Constitutional Court found that a law prohibiting strikes in the civil aviation sector was unconstitutional. The Court acknowledged that “proceeding from the regulations of the International Covenant on Economic, Social and Cultural Rights, the prohibition of the right to strike is admissible with regard to persons who are the complement of the armed forces, police and administration of the state . . . In addition, the international legal acts on human rights ascribe the regulation of the

³⁰¹ National Labor Relations Act of 1935 § 13, 29 U.S.C. § 163 (2006).

³⁰² Labour Code of Vietnam, Law No. 10/2012/QH13 (2012).

³⁰³ Trade Union Law of the People's Republic of China, Article 27 (2001).

³⁰⁴ <http://compendium.itcilo.org/en/decisions-by-subject>.

right to strike to the sphere of internal legislation. But this legislation must not go beyond restrictions permitted by these acts.” The Constitutional High Court concluded that any restriction of the flight personnel’s right to strike was illegal.³⁰⁵

- In 2006, a Burkina Faso appeals court found that private sector workers who went on strike in support of a general labour protest movement were unlawfully dismissed, and ordered their reinstatement. The court considered that the strike, which was a general strike based on professional and economic interests aiming to find solutions to issues of social policy, was legitimate and lawful in accordance with the statements of the Committee on Freedom of Association of the Governing Body of the ILO as expressed in its Digest of Decisions. Interpreting the provisions of national law relating to strikes in the light of ILO Convention No. 87 and the Digest of Decisions, the Appeal Court ruled that the strike was legitimate and legal and declared that each of the appellants had been wrongfully dismissed.³⁰⁶
- In 2006, the Fiji Arbitration Tribunal, in *Fiji Electricity & Allied Workers Union v. Fiji Electricity Authority*, 9 May 2006, [2006] FJAT 62; FJAT Award 24 of 2006, found that a constitutional provision guaranteeing the right to freedom of association and collective bargaining must also include a qualified right to strike, relying on the ILO Committee of Experts.
- In a 2008 decision, Colombia’s Constitutional Court upheld restrictions on strikes of a political nature, but in so doing reaffirmed the right to strike. The court said that “organizations whose role is to defend the socio-economic and professional interest of workers should, in principle, be able to have recourse to strike action to support their positions in search of solutions to problems deriving from important economic and social policy issues, which have immediate consequences for their members and workers in general, in particular in the sphere of employment, social protection and living conditions.”³⁰⁷
- In another 2008 decision involving the dismissal of a worker for joining a strike, Brazil’s Higher Labour Court ruled that the employer’s argument that the dismissal had been due to the worker’s refusal to carry out duties was an invalid one, since an absence from duties is inherent in strike action, and the behaviour of the employer in violating the principle of freedom of association and the free exercise of the right to strike could not be tolerated.³⁰⁸
- Botswana’s High Court recognised the right to strike in a 2012 decision finding that the government’s list of “essential services” in which strike were prohibited violated

³⁰⁵ Constitutional Court of the Russian Federation, On the case concerning the verification of constitutionality of Article 12 of the Law of the USSR of 9 Oct., 1989 “On the Order of Settlement of Collective Labour Disputes (Conflicts)”, 17 May 1995.

³⁰⁶ Bobo – Dioulasso Appeal Court, Social Chamber, Messrs. Karama and Bakouan v. Société Industrielle du Faso (SIFA), 5 July 2006, No. 035.

³⁰⁷ Constitutional Court, 3 Sept. 2008, Decision No. C-858/08.

³⁰⁸ Higher Labour Court, *Zavascki, Roberto Antonio v. Companhia Minuano de Alimentos*, Brasilia, 15 February 2012, Case No. TST-RR-77200-27.2007.5.12.0019.

the Constitution. The court said, “it is incumbent upon this court ... to interpret the said section in a manner that is consistent with international law” and it noted that “[t]he right to freedom of association in international law includes the right to strike.” Moreover, “international law does not accept the prohibition of strike action to safeguard economic interests as a limitation that is reasonably justifiable in a democratic society”, which was the alleged justification for most of the added categories of essential services, and “the ILO Committee of Experts (...) seems to accept that it is reasonably justifiable in a democratic society to restrict the right to strike only to the extent that meets its definition of ‘essential services’”.³⁰⁹

Many other high national courts have also recognised the right to strike based on their own laws, without necessarily invoking ILO conventions. For example, the US Supreme Court, while denying states’ ability to grant food stamps (publicly funded food assistance according to a salary-based means test) to strikers on the grounds that it would put the government on one side in a labour dispute instead of remaining neutral, acknowledged workers’ right to strike and linked it to freedom of association. The Court said, “Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps.”³¹⁰

In a 2012 decision involving non-union workers who had been dismissed for joining a strike without identifying themselves individually with 48 hours advance notice, South Africa’s Constitutional Court ruled:

[W]e should not restrict the right to strike more than is expressly required by the language of the provision [requiring advance notice], unless the purposes of the Act and the section on “a proper interpretation of the statute ... imports them.” The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used. . . . to hold otherwise would place a greater restriction on the right to strike of non-unionised employees and minority union employees than on majority union employees.³¹¹

High courts in Spain and Brazil also have affirmed the right to strike in their national jurisprudence. In a landmark 1981 decision, Spain’s Constitutional Tribunal said that the strike is:

. . . un instrumento de presión que la experiencia secular ha mostrado ser necesario para la afirmación de los intereses de los trabajadores en los

³⁰⁹ High Court of Botswana, *Botswana Public Employees’ Union and others v. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012.

³¹⁰ *Lyng v. Auto Workers*, 485 U.S. 360, 367 (1988).

³¹¹ *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* (CCT128/11) [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) (21 September 2012).

conflictos socioeconómicos, conflictos que el Estado social no puede excluir, pero a los que sí puede y debe proporcionar los adecuados cauces institucionales; lo es también con el derecho reconocido a los sindicatos en el art. 7 de la Constitución, ya que un sindicato sin derecho al ejercicio de la huelga quedaría, en una sociedad democrática, vaciado prácticamente de contenido; y lo es, en fin, con la promoción de las condiciones para que la libertad y la igualdad de los individuos y grupos sociales sean reales y efectivas (art. 9.2 de la Constitución). Ningún derecho constitucional, sin embargo, es un derecho ilimitado. Como todos, el de huelga ha de tener los suyos, que derivan, como más arriba se dijo, no sólo de su posible conexión con otros derechos constitucionales, sino también con otros bienes constitucionalmente protegidos. Puede el legislador introducir limitaciones o condiciones de ejercicio del derecho, siempre que con ello no rebase su contenido esencial.³¹²

The Federal Supreme Court of Brazil similarly declared in a 2007 decision:

A greve, poder de fato, é a arma mais eficaz de que dispõem os trabalhadores visando à conquista de melhores condições de vida. Sua auto-aplicabilidade é inquestionável; trata-se de direito fundamental de caráter instrumental. A Constituição, ao dispor sobre os trabalhadores em geral, não prevê limitação do direito de greve: a eles compete decidir sobre a oportunidade de exercê-lo e sobre os interesses que devam por meio dela defender. Por isso a lei não pode restringi-lo, senão protegê-lo, sendo constitucionalmente admissíveis todos os tipos de greve.³¹³

And, whilst no argument is made that papal encyclicals are binding sources of law, the recognition of the right to strike by the Catholic Church is further evidence of the universally accepted nature of the right. In Encyclical *Rerum Novarum* – *On the Rights and Duties of Capital and Labour* (1891), Pope Leo XII explained:

When work people have recourse to a strike and become voluntarily idle, it is frequently because the hours of labor are too long, or the work too hard, or because they consider their wages insufficient. The grave inconvenience of this not uncommon occurrence should be obviated by public remedial measures... The laws should forestall and prevent such troubles from arising; they should lend their influence and authority to the removal in good time of the causes which lead to conflicts between employers and employed.³¹⁴

³¹² Tribunal Constitucional de España, Sentencia 11/1981, April 8, 1981, available at <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/11>.

³¹³ Supremo Tribunal Federal, MI 712/PA-PARÁ, Mandado de Injunção, Relator(a) Min. Eros Grau, Julgamento 25/10/2007, Órgão Julgador: Tribunal Pleno, available at <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28greve%2C+conquista%29&base=baseAcordaos&url=http://tinyurl.com/pf4f2rk>

³¹⁴ See para. 39. Text available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

Nearly 100 years later, John Paul II, in *Laborem Exercens* (1981), Section 20 “The Importance of Unions”, explained:

One method used by unions in pursuing the just rights of their members is *the strike* or work stoppage, as a kind of ultimatum to the competent bodies, especially the employers. This method is recognized by Catholic social teaching as legitimate in the proper conditions and within just limits. In this connection workers should be assured the *right to strike*, without being subjected to personal penal sanctions for taking part in a strike.³¹⁵

Again, we do not argue that the right to strike is an absolute right under customary law. Most of the international instruments, national laws and decisions impose some procedural requirements of greater or lesser stringency. These are characterised variously as “necessary in a democratic society,” “not jeopardizing public health,” “in accordance with national law,” and so on. This last is perhaps the most restrictive on its face, though national law cannot become an excuse to nullify basic rights.

Between the extremes of an unconditional right to strike and an absolute prohibition on strikes “in accordance with national law,” the international community is converging on the general principle of the right to strike within reasonable limits. The authors of this document acknowledge the tension between countries’ varying degrees of limitations on the right to strike and the normal requirement of uniformity of state practice to find customary international law. It is believed that the tension can be resolved by distinguishing between divergence in detail and convergence in principle. Procedural requirements in national law are details; the right to strike within reasonable limits is the common principle.

Importantly, customary international law does not require absolute uniformity of practice. As the International Court of Justice said in the Nicaragua Case:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules...³¹⁶

All states recognise the right to strike within reasonable limits, and their conduct is consistent with this rule.

What limits are reasonable? The ILO is the best placed and most appropriate forum to articulate such limits. It is the specialised agency of the United Nations and the entity

³¹⁵ Text available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html.

³¹⁶ Military and Paramilitary Activities (Nicaragua/United States of America) Merits. J. 27.6.1986 I.C.J. Reports 1986, p. 14.

charged by the international community with promoting “recognition of the principle of freedom of association.”³¹⁷

As set forth in previous sections of this document, the ILO has created the Committee of Experts and the CFA to oversee application of Conventions 87 and 98. These oversight committees give detail and substance to the international consensus on the general principle of the right to strike within reasonable limits. Customary international law supports the right to strike within reasonable limits. The Employers’ Group argument to the contrary notwithstanding, the ILO is the competent international entity, and inside the ILO the two oversight committees are the competent bodies, to articulate the parameters of the customary law principle.

IX. CONCLUSION

This brief establishes that the right to strike is enshrined in ILO Convention 87, as well as within the broader international legal framework. Indeed, it can be said that the right to strike is now customary international law. The supervisory system of the ILO was correct in observing that the right to strike exists, and acted within their constitutional mandate and in conformity with the rules of treaty interpretation in so holding. Were the matter to be considered by the ICJ it is submitted that the latter should defer to the well-reasoned views of the ILO supervisory system, and in particular the Committee of Experts, and find that C87 protects the right to strike.

In addition to the legal reasoning herein, the ICJ should also support the observations of the ILO for policy reasons. A finding contrary to the decades-long uncontested “jurisprudence” of the supervisory system would throw it into complete disarray and dispel any legal certainty or coherence upon which the tripartite constituents rely. The Committee of Experts in particular would emerge as a severely weakened body whose observations would be perpetually open to question. It would also serve to undermine the instruments and jurisprudence of other intergovernmental institutions as well as regional and national courts that have relied on the ILO for guidance. Further, an opinion in the negative would upend industrial relations worldwide, opening a door for governments to (further) restrict or limit the right to strike – as the matter would be perceived to be one for national law only. Employers would have an enormous and unforeseen advantage over labour, as collective bargaining would essentially become a dead letter.

Dated April 2014

³¹⁷ ILO Constitution, Preamble

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ANNEX I: CONVENTION 87

C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Entry into force: 4 Jul 1950

Adoption: San Francisco, 31st ILC session (09 Jul 1948)

Status: Up-to-date instrument (Fundamental Convention)

Preamble

The General Conference of the International Labour Organisation,

Having been convened at San Francisco by the Governing Body of the International Labour Office, and having met in its Thirty-first Session on 17 June 1948;

Having decided to adopt, in the form of a Convention, certain proposals concerning freedom of association and protection of the right to organise, which is the seventh item on the agenda of the session;

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation;

Considering that the General Assembly of the United Nations, at its Second Session, endorsed these principles and requested the International Labour Organisation to continue every effort in order that it may be possible to adopt one or several international Conventions;

adopts this ninth day of July of the year one thousand nine hundred and forty-eight the following Convention, which may be cited as the Freedom of Association and Protection of the Right to Organise Convention, 1948:

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term **organisation** means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

PART III. MISCELLANEOUS PROVISIONS

Article 12

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946, other than the territories referred to in paragraphs 4 and 5 of the said article as so amended, each Member of the Organisation which ratifies this Convention shall communicate to the Director-General of the International Labour Office with or as soon as possible after its ratification a declaration stating:

- (a) the territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;
- (b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
- (c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
- (d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 13

1. Where the subject-matter of this Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory may, in agreement with the government of the territory, communicate to the Director-General of the International Labour Office a declaration accepting on behalf of the territory the obligations of this Convention.

2. A declaration accepting the obligations of this Convention may be communicated to the Director-General of the International Labour Office:

(a) by two or more Members of the Organisation in respect of any territory which is under their joint authority; or

(b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

3. Declarations communicated to the Director-General of the International Labour Office in accordance with the preceding paragraphs of this Article shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications it shall give details of the said modifications.

4. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

5. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 16, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

PART IV. FINAL PROVISIONS

Article 14

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 16

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 17

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 18

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 19

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 20

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 16 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 21

The English and French versions of the text of this Convention are equally authoritative.

ANNEX II: ILO SUPERVISORY MACHINERY

ILO supervision of obligations under the Organization's constitution and the standards it adopts is composed of a series of complementary procedures that form a unified supervisory process.

Tripartism: A unique feature of ILO supervision arises from the tripartite nature of the Organization. Unlike all other international supervisory procedures, the ILO's non-governmental constituents – organizations of employers and of workers – have standing under article 23 of the ILO Constitution to submit their own reports on governments' performance under a ratified Convention, and these comments form an important part of the supervisory process.³¹⁸ They may also file complaints under articles 24 and 26 of the Constitution (see under Complaints Procedures below), and they form an important part of several of the ILO's supervisory procedures. It is important to recognize that this is a full right of participation, and is not limited to providing additional information or informing supervisory bodies, as is the case in purely inter-governmental organizations.

A. Regular supervisory process

When a government ratifies an ILO Convention, the regular supervisory mechanism comes into operation. According to the Constitution,³¹⁹ each government is required to submit a report each year on each ratified Convention, covering 'the measures which it has taken to give effect to the provisions of Conventions to which it is a party.' Originally, these reports were examined directly by the plenary of International Labour Conference. This quickly became impractical as the number of conventions, ratifications and Members grew, and gradually greater intervals were introduced, while the ILO created other bodies to examine governments' reports. Today, reports on some more important conventions are required on a three-year basis, and all others are due at five-year intervals.³²⁰ The ILO supervisory bodies can also call for more frequent reports if needed, for instance when violations are noted or suspected, or when a government consistently fails to provide full information.

The *Committee of Experts on the Application of Conventions and Recommendations* is the main supervisory body. It is composed of 20 independent experts on labour law and social questions, appointed by the Director-General with the approval of the Governing Body. It meets annually to examine reports received from governments – more than 2,000 reports are examined each year. If the Committee notes problems in the application of ratified

³¹⁸ In a typical year, some 15 per cent of governments' reports under article 22 are commented on by employers' and workers' organizations, either from the country concerned or from another country – including international trade union federations such as the International Trade Union Confederation (ITUC).

³¹⁹ ILO Constitution, Article 22.

³²⁰ The 12 Conventions to which the three-year interval applies are the eight fundamental human rights conventions (Conventions Nos. 87 and 98 on freedom of Association and collective bargaining, Nos. 29 and 105 on forced labour, Nos. 100 and 111 on discrimination, and Nos. 138 and 182 on child labour), plus two Conventions on labour inspection (Conventions Nos. 81 and 129), the Employment Policy Convention, 1964 (No. 122) and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Note that this system is under continuous review, and is subject to change. See the ILO website for the latest position.

Conventions, it may respond in two ways. In most cases it makes "Direct Requests", which are sent directly to governments and to workers' and employers' organizations in the countries concerned, to seek corrective measures or simply to ask for more information. These are not immediately published,³²¹ and if governments furnish the information or take the measures requested, the matter goes no further. For more serious or persistent problems, the Committee of Experts makes "Observations", which are published as part of the Committee's annual report to the International Labor Conference.³²²

The *Conference Committee on the Application of Conventions and Recommendations* is established each year by the International Labour Conference. It reflects the ILO's tripartite structure of governments and of workers' and employers' representatives. The Conference Committee holds a general discussion on the report of the Committee of Experts. It then selects 25 especially important or persistent cases and requests the governments concerned to appear before it and explain the reasons for the situations commented on by the Committee of Experts. Discussions by the Conference Committee are in turn taken into account by the Committee of Experts when it next examines the application of the Convention concerned. The Conference Committee's report is published in the *Proceedings of the International Labor Conference* each year, along with the Conference's discussion of the Committee's report.

B. Complaint Procedures

There are also procedures to consider complaints that ILO conventions or basic principles are not being adequately applied, two of which are provided for in the constitution and the other established by agreement with the United Nations.

1. Representations Under Article 24 of the ILO Constitution

Under article 24 of the ILO Constitution, a representation may be filed if a country "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party."

A representation thus may be filed only against a State that has ratified the Convention concerned. Representations relating to freedom of association issues will normally be referred to the Committee on Freedom of Association (see below). A representation may be submitted by "an industrial association of employers or of workers", that is, a trade union or an employers' organization. They may be local or national organizations, or regional or international confederations.

The Constitution provides only that the Governing Body decide whether or not it is satisfied with the government's reply to the representation, but in fact a rather elaborate procedure has been developed in this respect. After a representation has been declared receivable, a

³²¹Direct requests are made public about six months after their adoption, in the ILO's data base on standards and supervision, NORMLEX, which is available on-line at www.ilo.org, under "Labour Standards". All other supervisory material is also published in this manner.

³²²Report III (Part 1A) at each session of the Conference.

special tripartite committee appointed by the Governing Body from among its members examines the substance of the representation. The committee communicates with the filing organization and with the government concerned. The government is asked to comment on the allegations and to “make such statement on the subject as it may think fit”. When all the information from both parties has been received, or if no reply is received within the time limits set, the committee makes its findings on compliance and makes recommendations to the Governing Body.

If the Governing Body decides that the government's explanations are not satisfactory, it may decide to publish the representation and the government's reply, along with its own discussion of the case — i.e., to give it wider publicity than simply including the case in its records. The questions raised in a representation are followed up by the ILO's regular supervisory machinery, i.e., by the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations.

2. Complaints Under Article 26 of the ILO Constitution

As with representations, a *complaint* must be based on allegations that the country is not ‘securing the effective observance of any Convention’ it has ratified. A complaint may be filed against any Member State of the ILO. In fact, even if a State has withdrawn from the ILO but still has obligations under a Convention it ratified while a Member, a complaint may be filed. The complaint procedure may be instituted by *Governments that have ratified the same Convention*, by *delegates to the International Labor Conference*, or by *the Governing Body on its own motion*.

The Governing Body forwards the complaint to the government for its comments. It then normally establishes a Commission of Inquiry, composed of three prominent and independent personalities.³²³ Commissions of Inquiry are free to set their own rules and procedures, but certain practices have gradually become established. Commissions of Inquiry usually hear representatives of the parties and witnesses presented by them and sometimes summon witnesses themselves. They often also conduct on-site visits to the countries concerned.

A Commission arrives at conclusions and may make recommendations to the parties (article 28 of the Constitution). A report of the case is communicated to the ILO Governing Body and published. Note that it is submitted for information, and not for adoption – i.e., the Commission of Inquiry has the entire authority to make findings of compliance or failure to comply once appointed subject to article 29 (see below). A Commission of Inquiry may even address broader questions, such as the necessity of ending a state of emergency in order to promote civil liberties.

A report of a Commission of Inquiry is communicated to the Governing Body and to each of the governments concerned and published in the ILO's *Official Bulletin*; it is also published

³²³ There have been 13 Commissions of Inquiry in the ILO's history.

on the ILO's data base on standards and supervision, and made available on the Internet.³²⁴ In most cases, the Committee of Experts and the Conference Committee will continue to examine implementation of the Conventions concerned, with reference to the findings of the Commission of Inquiry, as is done in connection with representations.

Under article 29(2) of the ILO Constitution, any government concerned in a complaint may refer the complaint to the International Court of Justice if it does not accept the Commission's recommendations. The decision of the International Court of Justice in such cases is final (Article 31), and the Court 'may affirm, vary, or reverse the findings or recommendations of the Commission of Inquiry' (Article 32). Article 33 of the Constitution contains the only provisions allowing the ILO take action on the application of a Convention other than providing evaluation or assistance:

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 33 has been used only once in the history of the ILO, concerning Myanmar and forced labour.

3. Special Procedures for Complaints Concerning Freedom of Association

The most widely used ILO petition procedure is the special procedure established for complaints concerning violations of freedom of association. These procedures are not specifically provided for in the ILO Constitution but were established in 1951 by agreement between the ILO and the UN Economic and Social Council. The Committee on Freedom of Association has considered nearly 3,000 cases.

There are two bodies that consider complaints in this area: the Governing Body's *Committee on Freedom of Association* (CFA), and the *Fact-Finding and Conciliation Commission on Freedom of Association* (FFCC).

a) The Committee on Freedom of Association

This Committee was established in order to make a preliminary examination of complaints submitted to the Fact-Finding and Conciliation Commission (FFCC) (below). It shortly became evident that the requirement that governments agree to the referral of complaints to the FFCC would allow very few complaints to be considered as to their substance, and fairly quickly the CFA began making its own examination of such complaints.

³²⁴ See NORMLEX on the ILO web site.

The basic authority for the examination of complaints lies in the ILO Constitution itself, which consecrates the principle of freedom of association.³²⁵ A complaint may therefore be made against any Member of the ILO, whether or not the Conventions adopted on this subject have been ratified, and no formal relationship exists between the Conventions and the CFA procedures, though the CFA often refers to these Conventions.

The Committee's members are drawn from the Governing Body, and it meets as a committee of the Governing Body. It has nine members, three from each group, and is chaired by an independent person.

The CFA has gradually developed a set of principles developing its understanding of the requirements of the ILO Constitution, which have been summarized in a publication entitled *Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, most recently updated by the International Labor Office in 2006.³²⁶

A government may submit complaints to the CFA alleging violations by another government, but no government has ever done so. Three categories of employers' and workers' organizations may file complaints: national organizations directly concerned with the matter; international organizations which have consultative status with the ILO; and other international organizations without consultative status, if the allegations relate to matters directly affecting their affiliated organizations.

If the CFA finds that no violation has been committed or that the alleged violation has ceased, it will halt further examination. If it finds that violations have occurred, it will make recommendations to the parties to correct the situation. The CFA may ask the government concerned to continue reporting to it, or it may refer the case to the Committee of Experts on the Application of Conventions and Recommendations (if the relevant Conventions have been ratified). In exceptional cases, the CFA may recommend referral of the case to the Fact-Finding and Conciliation Commission.

b) *The Fact-Finding and Conciliation Commission*

The FFCC is an *ad hoc* body of independent experts appointed by the Governing Body to examine allegations of infringement of freedom of association. It was established in 1951 at the same time as the CFA, and was intended to be the primary vehicle for examining such complaints, before it became clear that it could not function easily and the CFA gradually took over the responsibility for most complaints. It then became a forum for the

³²⁵ The preamble of the Constitution provides for "recognition of the principle of freedom of association", and section I of the Declaration of Philadelphia provides that "freedom of expression and of association are essential to sustained progress." It also provides that '(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.'

³²⁶ ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed., 2006).

examination of the more serious cases of violations of freedom of association. Although it has been convened only rarely,³²⁷ it has been utilized in cases of particular political delicacy. As in the case of complaints before the CFA, cases before the FFCC deal with freedom of association. A complaint may be submitted against any State, whether or not it has ratified the freedom of association Conventions or is a Member of the ILO. If a State is not a member of the ILO but is a Member of the United Nations, a complaint concerning it may be referred to the FFCC by ECOSOC. In all cases, however, the State concerned *must consent to the referral of the case* to the FFCC. The only exception to this rule is when a complaint under article 26 of the ILO Constitution concerns ratified freedom of association Conventions and is referred to the special procedures on this subject.

Cases may be referred to the FFCC in four ways, each of which requires the participation of a government or international body: *by the Governing Body, on the recommendation of the CFA; by the Governing Body, on the recommendation of the International Labor Conference; at the request of the government concerned; and by the UN Economic and Social Council.* With the consent of the government concerned, ECOSOC can even refer allegations against states that are Members of the United Nations but not of the ILO. (This has been done in cases concerning Lesotho and the United States, both of which had been ILO members but which had withdrawn at the time of the complaint. This process was used most recently with respect to South Africa. In all three cases, examination of a case by the FFCC preceded the country's return to the ILO.³²⁸)

The mandate of a Commission is to ascertain the facts and to discuss the situation with the governments concerned, with a view to resolving the difficulties by agreement or friendly settlement. In its dual role of investigator and conciliator, it makes a thorough examination of the facts and formulates recommendations designed to provide a common ground for the resolution of a dispute. In doing so, it makes findings on compliance with the principles of freedom of association. Once a decision is reached, it is published in a special report on the case.

Like all international complaints procedures, a commission's recommendations have no "enforcement" measures available to ensure that its recommendations are implemented. Since a commission is convened to examine a particular case, it does not itself monitor the effect of its recommendations. However, compliance with the FFCC's recommendations is monitored by other ILO bodies. If the country concerned has ratified the ILO Conventions on freedom of association, the regular supervisory bodies continue to examine the effect given to FFCC recommendations and may refer to the FFCC's conclusions in subsequent comments on implementation of the convention in question. The situation also may be followed by the Conference Committee on the Application of Conventions and Recommendations, by the International Labor Conference in plenary session, and by the Governing Body. If the relevant Conventions have not been ratified, FFCC recommendations are followed up by the CFA.

³²⁷ The FFCC has been convened only 6 times, most recently in 1992.

³²⁸ See reports of FFCC cases at http://www.ilo.org/global/standards/information-resources-and-publications/WCMS_160778/lang--en/index.htm.

ANNEX III: VIENNA CONVENTION ON THE LAW OF TREATIES (VCLT) - RELEVANT SECTIONS

Article 4: Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5: Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable

ANNEX IV: THE RIGHT TO STRIKE IN CONSTITUTIONS OF THE WORLD

Country	Reference to 'Right to Strike' in the Constitution
Albania (1998)	<i>Article</i> 51 1. The right of an employee to strike in connection with work relations is guaranteed. 2. Limitations on particular categories of employees may be established by law to assure essential social services.
Algeria (1989)	<i>Article</i> 57 - <i>Le droit de grève est reconnu.</i> Il s'exerce dans le cadre de la loi. Celle-ci peut en interdire ou en limiter l'exercice dans les domaines de défense nationale et de sécurité, ou pour tous services ou activités publics d'intérêt vital pour la communauté.
Angola (2010)	<i>Article</i> 51 (<i>Right to strike and prohibition of lock-outs</i>) 1. Workers shall have the right to strike . 2. Lock-outs shall be prohibited and employers may not bring a company totally or partially to standstill by forbidding workers access to workplaces or similar as a means of influencing the outcome of labour conflicts. 3. The law shall regulate the exercise of the right to strike and shall establish limitations on the services and activities considered essential and urgent in terms of meeting vital social needs.
Argentina (1994)	<i>Artículo</i> 14 Queda garantizado a los gremios: concertar convenios colectivos de trabajo; recurrir a la conciliación y al arbitraje; el derecho de huelga . Los representantes gremiales gozarán de las garantías necesarias para el cumplimiento de su gestión sindical y las relacionadas con la estabilidad de su empleo.
Armenia (1995)	<i>Article</i> 32 Employees shall have the right to strike for the protection of their economic, social and employment interests, the procedure for and limitations thereon shall be prescribed by law.
Azerbaijan (1995)	<i>Article</i> 36. <i>Right to strike</i> I. Everyone has the right to be on strike , both individually and together with others. II. Right to strike for those working based on labor agreements might be restricted only in cases envisaged by the law. Soldiers and civilians employed in the Army and other military formations of the Azerbaijan Republic have no right to go on strike. III. Individual and collective labor disputes are settled in line with legislation.
Belarus (1994)	<i>Article</i> 41 Citizens shall have the right to protection of their economic and social interests, including the right to form trade unions and conclude collective contracts (agreements), and the right to strike .
Benin (1990)	<i>Article</i> 31 L'État reconnaît et garantit le droit de grève . Tout travailleur peut défendre, dans les conditions prévues par la loi, ses droits et ses intérêts soit individuellement, soit collectivement ou par l'action syndicale. Le droit de grève s'exerce dans les conditions définies par la loi.

Plurinational State of Bolivia (2009)	<i>Artículo</i> Se garantiza el derecho a la huelga como el ejercicio de la facultad legal de las trabajadoras y los trabajadores de suspender labores para la defensa de sus derechos, de acuerdo con la ley.	53
Brazil (1988)	<i>Article</i> The right to strike is guaranteed, it being the competence of workers to decide on the advisability of exercising it and on the interests to defend thereby.	9
Bulgaria (1991)	<i>Article</i> Workers and employees shall have the right to strike in defence of their collective economic and social interests. This right shall be exercised in accordance with conditions and procedures established by law.	50
Burkina Faso (1991)	<i>Article</i> Le droit de grève est garanti. Il s'exerce conformément aux lois en vigueur.	22
Burundi (2005)	<i>Article</i> Le droit de fonder des syndicats et de s'y affilier, ainsi que le droit de grève , sont reconnus. La loi peut réglementer l'exercice de ces droits et interdire à certaines catégories de personnes de se mettre en grève. Dans tous les cas, ces droits sont interdits aux membres des corps de défense et de sécurité ainsi qu'aux magistrats.	37
Cambodia (1993)	<i>Article</i> Les droits de grève et de manifestations pacifiques doivent s'exercer dans le cadre de la loi.	37
Cameroon (1972)	La liberté d'association, la liberté syndicale et le droit de grève sont garantis dans les conditions fixées par la loi.	
Cape Verde (1992)	<i>Article 66. The Right to Strike and Prohibition of Lock-Out</i> (1) The right to strike shall be guaranteed; workers have the right to decide on the occasions to strike and the interests which the strike is intended to defend. (2) The law shall regulate the exercise of the right to strike. (3) Lock-outs shall be prohibited.	
Central African Republic (2004)	<i>Article</i> Le droit syndical est garanti et s'exerce librement dans le cadre des lois qui le régissent. Tout travailleur peut adhérer au syndicat de son choix et défendre ses droits et intérêts par l'action syndicale. Le droit de grève est garanti et s'exerce dans le cadre des lois qui le régissent et ne peut, en aucun cas, porter atteinte ni à la liberté de travail, ni au libre exercice du droit de propriété.	10
Chad (1996)	<i>Article</i> Le droit de grève est reconnu. Il s'exerce dans le cadre des lois qui le réglementent.	29

Colombia (1991)	<i>Artículo</i> 56 Se garantiza el derecho de huelga , salvo en los servicios públicos esenciales definidos por el legislador. La ley reglamentará este derecho. Una comisión permanente integrada por el Gobierno, por representantes de los empleadores y de los trabajadores, fomentará las buenas relaciones laborales, contribuirá a la solución de los conflictos colectivos de trabajo y concertará las políticas salariales y laborales. La ley reglamentará su composición y funcionamiento.
Congo (2002)	<i>Article</i> 25 A l'exception des agents de la force publique, les citoyens congolais jouissent des libertés syndicales et du droit de grève dans les conditions fixées par la loi.
Democratic Republic of the Congo (2005)	<i>Article</i> 39 Le droit de grève est reconnu et garanti. Il s'exerce dans les conditions fixées par la loi qui peut en interdire ou en limiter l'exercice dans les domaines de la défense nationale et de la sécurité ou pour toute activité ou tout service public d'intérêt vital pour la nation.
Costa Rica (1949)	<i>Artículo</i> 61 Se reconoce el derecho de los patronos al paro y el de los trabajadores a la huelga , salvo en los servicios públicos, de acuerdo con la determinación que de éstos haga la ley y conforme a las regulaciones que la misma establezca, las cuales deberán desautorizar todo acto de coacción o de violencia.
Côte d'Ivoire (2000)	<i>Article</i> 18 Le droit syndical et le droit de grève sont reconnus aux travailleurs des secteurs public et privé qui les exercent dans les limites déterminées par la loi.
Croatia (1990)	<i>Article</i> 61 The right to strike shall be guaranteed. The right to strike may be restricted in the armed forces, the police, the civil service and public services as specified by law.
Cyprus (1960)	<i>Article</i> 27 1. The right to strike is recognised and its exercise may be regulated by law for the purposes only of safeguarding the security of the Republic or the constitutional order or the public order or the public safety or the maintenance of supplies and services essential to the life of the inhabitants or the protection of the rights and liberties guaranteed by this Constitution to any person. 2. The members of the armed forces, of the police and of the gendarmerie shall not have the right to strike. A law may extend such prohibition to the members of the public service.
Czech Republic (1992)	<i>Article</i> 27 (1) Everyone has the right to associate freely with others for the protection of his economic and social interests. (2) Trade unions shall be established independently of the state. No limits may be placed upon the number of trade union organizations, nor may any of them be given preferential treatment in a particular enterprise or sector of industry. (3) The activities of trade unions and the formation and activities of similar associations for the protection of economic and social interests may be limited by law in the case of measures necessary in a democratic society for the protection of the security of the state, public order, or the rights and freedoms of others.

	(4) The right to strike is guaranteed under the conditions provided for by law; this right does not appertain to judges, prosecutors, or members of the armed forces or security corps.	
Djibouti (1992)	<i>Article</i> Tous les citoyens ont le droit de constituer librement des associations et syndicats sous réserve de se conformer aux formalités édictées par les lois et règlements. Le droit de grève est reconnu. Il s'exerce dans le cadre des lois qui le régissent. Il ne peut en aucun cas porter atteinte à la liberté du travail.	15
Dominican Republic (2010)	<i>Artículo</i> 6) Para resolver conflictos laborales y pacíficos se reconoce el derecho de trabajadores a la huelga y de empleadores al paro de las empresas privadas, siempre que se ejerzan con arreglo a la ley, la cual dispondrá las medidas para garantizar el mantenimiento de los servicios públicos o los de utilidad pública.	56
Ecuador (2008)	<i>Article</i> 14. Se reconocerá el derecho de las personas trabajadoras y sus organizaciones sindicales a la huelga . Los representantes gremiales gozarán de las garantías necesarias en estos casos. Las personas empleadoras tendrán derecho al paro de acuerdo con la ley.	326
El Salvador (1983)	<i>Article</i> se reconoce el derecho de los patronos al paro y el de los trabajadores a la huelga , salvo en los servicios públicos esenciales determinados por la ley. Para el ejercicio de estos derechos no será necesaria la calificación previa, después de haberse procurado la solución del conflicto que los genera mediante las etapas de solución pacífica establecidas por la ley. Los efectos de la huelga o el paro se retrotraerán al momento en que éstos se inicien. La ley regulará estos derechos en cuanto a sus condiciones y ejercicio.	48
Equatorial Guinea (1991)	<i>Artículo</i> El derecho a la huelga es reconocido y se ejerce en las condiciones previstas por la Ley.	10
Estonia (1992)	<i>Article</i> Everyone may freely belong to unions and federations of employees and employers. Unions and federations of employees and employers may uphold their rights and lawful interests by means which are not prohibited by law. The conditions and procedure for the exercise of the right to strike shall be provided by law.	29
Ethiopia (1994)	<i>Article</i> 1. (a) Factory and service workers, farmers, farm labourers, other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well-being. This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests. (b) Categories of persons referred to in paragraph (a) of this sub-Article has the right to express grievances, including the right to strike . (c) Government employees who enjoy the rights provided under paragraphs (a) and (b) of this sub - Article shall be determined by law.	42

France (1958)	<p style="text-align: center;"><i>Préambule,</i> C 1946</p> <p>La loi garantit à la femme, dans tous les domaines, des droits égaux à ceux de l'homme.</p> <p>Chacun a le devoir de travailler et le droit d'obtenir un emploi. Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances.</p> <p>Tout homme peut défendre ses droits et ses intérêts par l'action syndicale et adhérer au syndicat de son choix.</p> <p>Le droit de grève s'exerce dans le cadre des lois qui le réglementent.</p> <p>Tout travailleur participe, par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises.</p> <p>La Nation garantit l'égal accès de l'enfant et de l'adulte à l'instruction, à la formation professionnelle et à la culture. L'organisation de l'enseignement public gratuit et laïque à tous les degrés est un devoir de l'Etat.</p>
Georgia (1995)	<p style="text-align: center;"><i>Article</i> 33</p> <p>The right to strike shall be recognised. Procedure of exercising this right shall be determined by law.</p> <p>The law shall also establish the guarantees for the functioning of services of vital importance.</p>
Greece (1975)	<p style="text-align: center;"><i>Article</i> 23</p> <p>1. The State shall adopt due measures safeguarding the freedom to unionise and the unhindered exercise of related rights against any infringement thereon within the limits of the law.</p> <p>2. Strike constitutes a right to be exercised by lawfully established trade unions in order to protect and promote the financial and the general labour interests of working people.</p> <p>Strikes of any nature whatsoever are prohibited in the case of judicial functionaries and those serving in the security corps. The right to strike shall be subject to the specific limitations of the law regulating this right in the case of public servants and employees of local government agencies and of public law legal persons as well as in the case of the employees of all types of enterprises of a public nature or of public benefit, the operation of which is of vital importance in serving the basic needs of the society as a whole. These limitations may not be carried to the point of abolishing the right to strike or hindering the lawful exercise thereof.</p>
Guatemala (1985)	<p style="text-align: center;"><i>Artículo</i> 104</p> <p>Derecho de huelga y paro. Se reconoce el derecho de huelga y para ejercido de conformidad con la ley, después de agotados todos los procedimientos de conciliación. Estos derechos podrán ejercerse únicamente por razones de orden económico social. Las leyes establecerán los casos y situaciones en que no serán permitidos la huelga y el paro.</p> <p style="text-align: center;">ARTICULO 116</p> <p>Se reconoce el derecho de huelga de los trabajadores del Estado y sus entidades descentralizadas y autónomas. Este derecho únicamente podrá ejercitarse en la forma que preceptúe la ley de la materia y en ningún caso deberá afectar la tensión de los ser vicios públicos esenciales.</p>

Guinea (2010)	<p><i>Article</i> 20</p> <p>Le droit au travail est reconnu à tous. L'État crée les conditions nécessaires à l'exercice de ce droit. Nul ne peut être lésé dans son travail en raison de son sexe, de sa race, de son ethnicité, de ses opinions ou de toute autre cause de discrimination. Chacun a le droit d'adhérer au syndicat de son choix, et de défendre ses droits par l'action syndicale. Chaque travailleur a le droit de participer par l'intermédiaire de ses délégués à la détermination des conditions de travail. Le droit de grève est reconnu. Il s'exerce dans le cadre des lois qui le régissent. Il ne peut en aucun cas porter atteinte à la liberté du travail. La loi fixe les conditions d'assistance et de protection auxquelles ont droit les travailleurs.</p>
Guinea-Bissau (1984)	<p><i>Article</i> 47</p> <p>1 - It is recognized workers' right to strike under the law which is responsible for defining the scope of professional interests to defend through the strike, and its limitations in essential services and activities in the interest of the pressing needs of society.</p> <p>2 - It is forbidden to lock out.</p>
Guyana (1980)	<p><i>Article</i> 147</p> <p>(1) Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly, association and freedom to demonstrate peacefully, that is to say, his or her right to assemble freely, to demonstrate peacefully and to associate with other persons and in particular to form or belong to political parties, trade unions or other associations for the protection of his or her interests.</p> <p>(2) Except with his or her own consent no person shall be hindered in the enjoyment of his or her freedom to strike.</p> <p>(3) Neither an employer nor a trade union shall be deprived of the right to enter into collective agreements.</p>
Haiti (1987)	<p><i>Article</i> 35.5</p> <p>Le droit de grève est reconnu dans les limites déterminées par la loi.</p>
Honduras (1982)	<p>Artículo 128</p> <p>Las leyes que rigen las relaciones entre patronos y trabajadores son de orden público. Son nulos los actos, estipulaciones o convenciones que impliquen renuncia, disminuyan, restrinjan o tergiversen las siguientes garantías:</p> <p>13. Se reconoce el derecho de huelga y de paro. La Ley reglamentará su ejercicio y podrá someterlo a restricciones especiales en los servicios públicos que determine.</p>
Hungary (1949)	<p><i>Article</i> 70/C</p> <p>(1) Everyone has the right to establish or join organizations together with others with the objective of protecting his economic or social interests.</p> <p>(2) The right to strike may be exercised within the framework of the law regulating such right.</p> <p>(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to strike.</p>
Italy (1947)	<p>Art. 40</p> <p>The right to strike shall be exercised in compliance with the law.</p>

Kazakhstan (1995)	<i>Article</i> 24 3. The right to individual and collective labor disputes with the use of methods for resolving them, stipulated by law including the right to strike , shall be recognized.
Kenya (2010)	<i>Article</i> 41 (1) Every person has the right to fair labour practices. (2) Every worker has the right— (a) to fair remuneration; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike. (3) Every employer has the right— (e) to form and join an employers organisation; and (f) to participate in the activities and programmes of an employers organisation.
Kyrgyzstan (2010)	<i>Article</i> 43 Everyone shall have the right to strike .
Latvia (1922)	<i>Article</i> 108 Employed persons have the right to a collective labour agreement, and the right to strike . The State shall protect the freedom of trade unions.
Lithuania (1992)	<i>Article</i> 51 While defending their economic and social interests, employees shall have the right to strike . The limitations of this right and the conditions and procedure for its implementation shall be established by law.
Luxembourg (1868)	<i>Article</i> 11 (4) La loi garantit le droit au travail et l'Etat veille à assurer à chaque citoyen l'exercice de ce droit. La loi garantit les libertés syndicales et organise le droit de grève .
the former Yugoslav Republic of Macedonia (1991)	<i>Article</i> 38 The right to strike is guaranteed. The law may restrict the conditions for the exercise of the right to strike in the armed forces, the police and administrative bodies.
Madagascar (2010)	<i>Article</i> 33 Le droit de grève est reconnu sans qu'il puisse être porté préjudice à la continuité du service public ni aux intérêts fondamentaux de la Nation. Les autres conditions d'exercice de ce droit sont fixées par la loi.
Maldives (2008)	<i>Article</i> 31 Every person employed in the Maldives and all other workers have the freedom to stop work and to strike in order to protest.
Mali (1992)	<i>Article</i> 21 Le droit de grève est garanti. Il s'exerce dans le cadre des lois et règlements en vigueur.
Mauritania (1991)	<i>Article</i> 14 Le droit de grève est reconnu. Il s'exerce dans le cadre des lois qui le réglementent. La grève peut être interdite par la loi pour tous services ou activités publics d'intérêt vital pour la Nation.

Mexico (1917)	<i>Artículo</i> 123 XVII. Las leyes reconocerán como un derecho de los obreros y de los patronos, las huelgas y los paros ; XVIII. Las huelgas serán lícitas cuando tengan por objeto conseguir el equilibrio entre los diversos factores de la producción, armonizando los derechos del trabajo con los del capital. En los servicios públicos será obligatorio para los trabajadores dar aviso, con diez días de anticipación, a la Junta de Conciliación y Arbitraje, de la fecha señalada para la suspensión del trabajo. Las huelgas serán consideradas como ilícitas únicamente cuando la mayoría de los huelguistas ejerciera actos violentos contra las personas o las propiedades, o en caso de guerra, cuando aquéllos pertenezcan a los establecimientos y servicios que dependan del Gobierno.
Republic of Moldova (1994)	<i>Article 45. Right to strike</i> (1) The right to strike shall be acknowledged. Strikes may be unleashed only with the view of protection the employees' professional interests of economic and social nature. (2) The law shall set forth conditions governing the exercise of the right to strike, as well as the responsibility for illegal unleash of the strikes.
Montenegro (2007)	<i>Article 66-Strike</i> The employed shall have the right to strike . The right to strike may be limited to the employed in the Army, police, state bodies and public service with the aim to protect public interest, in accordance with the law.
Morocco (2011)	<i>Article 29</i> The freedoms of reunion, of assembly, of peaceful demonstration, of association and of syndical and political membership [appartenance], are guaranteed. The right to strike is guaranteed. An organic law establishes the conditions and the modalities of its exercise.
Mozambique (2004)	<i>Article 87</i> 1. Workers shall have the right to strike , and the law shall regulate the exercise of this right. 2. The law shall restrict the exercise of the right to strike in essential services and activities, in the interest of the pressing needs of society and of national security. 3. Lock outs shall be prohibited.
Nicaragua (1987)	<i>Artículo 83</i> Se reconoce el derecho a la huelga .
Niger (2010)	<i>Article 34</i> L'État reconnaît et garantit le droit syndical et le droit de grève qui s'exercent dans les conditions prévues par les lois et règlements en vigueur.
Panama (1972)	<i>Artículo 69</i> Se reconoce el derecho de huelga . La Ley reglamentará su ejercicio y podrá someterlo a restricciones especiales en los servicios públicos que ella determine.
Paraguay (1992)	<i>Artículo 98 - DEL DERECHO DE HUELGA Y DE PARO</i> Todos los trabajadores de los sectores públicos y privados tienen el derecho a recurrir a la huelga en caso de conflicto de intereses. Los empleadores gozan del derecho de paro en las mismas condiciones. Los derechos de huelga y de paro no alcanzan a los miembros de las Fuerzas

	Armadas de la Nación, ni a los de las policiales. La ley regulará el ejercicio de estos derechos, de tal manera que no afecten servicios públicos imprescindibles para la comunidad.
Peru (1993)	<p><i>Artículo</i> 28° El Estado reconoce los derechos de sindicación, negociación colectiva y huelga. Cautela su ejercicio democrático:</p> <ol style="list-style-type: none"> 1. Garantiza la libertad sindical. 2. Fomenta la negociación colectiva y promueve formas de solución pacífica de los conflictos laborales. La convención colectiva tiene fuerza vinculante en el ámbito de lo concertado. 3. Regula el derecho de huelga para que se ejerza en armonía con el interés social. Señala sus excepciones y limitaciones. <p><i>Artículo</i> 42° Se reconocen los derechos de sindicación y huelga de los servidores públicos. No están comprendidos los funcionarios del Estado con poder de decisión y los que desempeñan cargos de confianza o de dirección, así como los miembros de las Fuerzas Armadas y de la Policía Nacional.</p>
Philippines (1987)	<p><i>Section</i> 3 The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.</p>
Poland (1997)	<p><i>Article</i> 59 Les syndicats ont le droit d'organiser des grèves et autres formes de protestation dans les limites prévues par la loi. Celle-ci peut limiter le droit de grève ou interdire la grève de certaines catégories de travailleurs ou dans des secteurs déterminés, dans l'intérêt public.</p>
Portugal (1976)	<p><i>Article 57 (Right to strike and prohibition of lock-outs)</i></p> <ol style="list-style-type: none"> 1. The right to strike shall be guaranteed. 2. Workers shall be responsible for defining the scope of the interests that are to be defended by a strike and the law shall not limit that scope. 3. The law shall define the conditions under which such services as are needed to ensure the safety and maintenance of equipment and facilities and such minimum services as are indispensable to the fulfilment of essential social needs are provided during strikes. 4. Lock-outs shall be prohibited.
Romania (1991)	<p><i>Article</i> 43 (1) The employees have the right to strike in the defence of their professional, economic and social interests. (2) The law shall regulate the conditions and limits governing the exercise of this right, as well as the guarantees necessary to ensure the essential services for the society.</p>

Russian Federation (1993)	<i>Article</i> 37 4. The right of individual and collective labour disputes with the use of the methods for their resolution, which are provided for by federal law, including the right to strike , shall be recognized.
Rwanda (2003)	<i>Article</i> 39 Le droit de grève des travailleurs est reconnu et s'exerce dans les conditions définies par la loi, mais l'exercice de ce droit ne peut porter atteinte à la liberté du travail reconnue à chacun.
San Marino (1974)	<i>Article</i> 9 Le travail est un droit et un devoir de tous les citoyens. La loi assure au travailleur une rétribution juste, les fêtes, le repos hebdomadaire et le droit de grève .
Sao Tome and Principe (1975)	<i>Article 42: Rights of workers</i> All the workers have rights: a) To recompense for work, according to quantity, nature and quality, observing the principal of equal salary for equal work, so as to guarantee a deserved living; b) To labour-union freedom, as a means of promoting their unity, defending their legitimate rights and protecting their interests; f) To strike , under terms to be regulated by law, taking into account the interests of the workers and of the national economy.
Senegal (2001)	<i>Article</i> 25 Le droit de grève est reconnu. Il s'exerce dans le cadre des lois qui le régissent. Il ne peut en aucun cas ni porter atteinte à la liberté de travail, ni mettre l'entreprise en péril.
Serbia (2006)	<i>Article</i> 61 The employed shall have the right to strike in accordance with the law and collective agreement. The right to strike may be restricted only by the law in accordance with nature or type of business activity.
Seychelles (1993)	<i>Article</i> 35 g) sous réserve des restrictions jugées nécessaires dans une société démocratique et nécessaires à la protection de l'ordre public, de la santé, des moeurs et des droits et libertés d'autrui, à protéger le droit des travailleurs de constituer des syndicats et à garantir le droit de grève .
Slovakia (1992)	<i>Article</i> 37 (4) The right to strike is guaranteed. The conditions shall be laid down by law. Judges, prosecutors, members of the armed forces and armed corps, and members and employees of the fire and rescue brigades do not have this right.
Slovenia (1991)	<i>Article 77 (Right to Strike)</i> Employees have the right to strike . Where required by the public interest, the right to strike may be restricted by law, with due consideration given to the type and nature of activity involved.
Somalia (2004)	<i>Article</i> 19 RIGHT TO ASSEMBLE AND FREEDOM TO STRIKE. 1. Every person shall have the right to : - (a) Assemble freely with other persons and in particular to form or belong to trade unions or other associations for the protection of his/her interests; 2. The workers of the Transitional Federal Government of Somalia shall have the right to form Trade Unions for the protection of their interests as specified by law.

South Africa (1996)	<p><i>Article</i> 23. <i>Labour relations</i></p> <p>1. Everyone has the right to fair labour practices.</p> <p>2. Every worker has the right</p> <p>a. to form and join a trade union;</p> <p>b. to participate in the activities and programmes of a trade union; and</p> <p>c. to strike.</p> <p>3. Every employer has the right</p> <p>a. to form and join an employers' organisation; and</p> <p>b. to participate in the activities and programmes of an employers' organisation.</p> <p>4. Every trade union and every employers' organisation has the right</p> <p>a. to determine its own administration, programmes and activities;</p> <p>b. to organise; and</p> <p>c. to form and join a federation.</p>
Spain (1978)	<p><i>Section</i> 28</p> <p>(2) The right of workers to strike in defence of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services.</p>
Suriname (1987)	<p><i>Article</i> 33</p> <p>The right to strike is recognized subject to the limitations which stem from the law.</p>
Switzerland (1999)	<p><i>Article</i> 28. <i>Liberté syndicale</i></p> <p>1 Les travailleurs, les employeurs et leurs organisations ont le droit de se syndiquer pour la défense de leurs intérêts, de créer des associations et d'y adhérer ou non.</p> <p>2 Les conflits sont, autant que possible, réglés par la négociation ou la médiation.</p> <p>3 La grève et le lock-out sont licites quand ils se rapportent aux relations de travail et sont conformes aux obligations de préserver la paix du travail ou de recourir à une conciliation.</p> <p>4 La loi peut interdire le recours à la grève à certaines catégories de personnes.</p>
Timor-Leste (2002)	<p><i>Section 51 (Right to strike and prohibition of lock-out)</i></p> <p>1. Every worker has the right to resort to strike, the exercise of which shall be regulated by law.</p> <p>2. The law shall determine the conditions under which services are provided, during a strike, that are necessary for the safety and maintenance of equipment and facilities, as well as minimum services that are necessary to meet essential social needs.</p>
Togo (1992)	<p><i>Article</i> 39</p> <p>Le droit de grève est reconnu aux travailleurs. Il s'exerce dans le cadre des lois qui le réglementent.</p> <p>Les travailleurs peuvent constituer des syndicats ou adhérer à des syndicats de leur choix.</p> <p>Tout travailleur peut défendre, dans les conditions prévues par la loi, ses droits et intérêts, soit individuellement, soit collectivement ou par l'action syndicale.</p>

Turkey (1982)	<p><i>Article</i> 54</p> <p>Workers have the right to strike if a dispute arises during the collective bargaining process. The procedures and conditions governing the exercise of this right and the employer's recourse to a lockout, the scope of both actions, and the exceptions to which they are subject shall be regulated by law. The right to strike, and lockout shall not be exercised in a manner contrary to the principle of goodwill to the detriment of society, and in a manner damaging national wealth.</p> <p>During a strike, the labour union is liable for any material damage caused in a work-place where the strike is being held, as a result of deliberately negligent behaviour by the workers and the labour union.</p> <p>The circumstances and places in which strikes and lockouts may be prohibited or postponed shall be regulated by law.</p> <p>In cases where a strike or a lockout is prohibited or postponed, the dispute shall be settled by the Supreme Arbitration Board at the end of the period of postponement. The disputing parties may apply to the Supreme Arbitration Board by mutual agreement at any stage of the dispute.</p> <p>The decisions of the Supreme Arbitration Board shall be final and have the force of a collective bargaining agreement.</p> <p>The organisation and functions of the Supreme Arbitration Board shall be regulated by law.</p> <p>Politically motivated strikes and lockouts, solidarity strikes and lockouts, occupation of work premises, labour go- slows, and other forms of obstruction are prohibited.</p> <p>Those who refuse to go on strike, shall in no way be barred from working at their work-place by strikers.</p>
Ukraine (1996)	<p><i>Article</i> 44</p> <p>Those who are employed shall have the right to strike in order to protect their economic and social interests.</p> <p>A procedure for exercising the right to strike shall be established by law taking into account the necessity to ensure national security, public health protection, and rights and freedoms of others.</p> <p>No one shall be forced to participate or not to participate in a strike.</p> <p>The prohibition of a strike shall be possible only on the basis of the law.</p>
Uruguay (1967)	<p><i>Artículo</i> 57</p> <p>La ley promoverá la organización de sindicatos gremiales, acordándoles franquicias y dictando normas para reconocerles personería jurídica. Promoverá, asimismo, la creación de tribunales de conciliación y arbitraje. Declárase que la huelga es un derecho gremial. Sobre esta base se reglamentará su ejercicio y efectividad.</p>
Bolivarian Republic of Venezuela (1999)	<p><i>Artículo</i> 97</p> <p>Todos los trabajadores y trabajadoras del sector público y del privado tienen derecho a la huelga, dentro de las condiciones que establezca la ley.</p>