

The ILO and the right to strike

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Abstract. *The author argues that the June 2012 challenge by the ILO Employers' group to the hitherto generally accepted view regarding the right to strike under the Freedom of Association Convention, No. 87, is at odds with the historical understanding of the framework in which the Convention is embedded. She demonstrates how the ILO constituents have consistently recognized that there is a positive right to strike, which is inextricably linked to – and an inevitable corollary of – the right to freedom of association. The article also analyses the relative roles of the ILO supervisory bodies in this regard.*

This article will address several issues that bear directly on international standards on freedom of association, and on the role of the International Labour Organization (ILO) in setting and monitoring this fundamental right. These topics have taken on additional relevance in the light of views expressed by the Employers' group during the session of the Committee on the Application of Standards at the June 2012 International Labour Conference (ILC). The views enunciated by the Employers' group surprised many of those involved in the ILO's activities by appearing to suggest that the meaning of the right to strike under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), was narrower than many understood and, to a large extent, outside the purview of the Committee of Experts.¹ Furthermore, the Employers' group attributed a role to the Committee of Experts and its relationship to the Committee on the Application of Standards that appeared at variance with accepted wisdom.

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¹ The Employer members "objected in the strongest terms" to what they perceived as "the interpretation by the Committee of Experts of Convention No. 87 and the right to strike, to the use of the General Survey with regard to the right to strike and to being placed in such a position by the General Survey" (ILO, 2012a, Record 19, Part I, p. 22, para. 82).

These views related to matters that had seemed settled for many years, and had been confirmed in the most recent comprehensive surveys on the topic dating from the 1990s (ILO, 1994a; Gernigon, Odero and Guido, 1998). However, the existence of differing views on these subjects does serve to highlight that the lack of any explicit, declarative statement of the right to strike in an international instrument can lead to differing views on what the contours of such a right are. In addition, the relationship of the Committee of Experts to the Committee on the Application of Standards has not previously been the subject of extensive discussion.

This article examines three major issues: the right to strike in the context of freedom of association; the driving forces in defining the parameters of the right to strike; and the relative roles of the Committee of Experts and the Committee on the Application of Standards.²

These topics will be examined historically in the light of the ILO Constitution, relevant Conventions, and discussions of the respective roles of the parts of the ILO (the International Labour Conference, the Governing Body, and the Office). From this, the article will seek to determine what the tripartite constituents meant when they adopted instruments guaranteeing freedom of association, and will describe the establishment of the Committee on the Application of Standards, examining its relationship to the Committee of Experts.

The analysis will indicate that the comments of the Employers' group reflect a lack of historical understanding of the process that has provided the framework for determining the response to these issues. In particular it will show that:

- Over the past 60 years the ILO constituents have recognized that there is a positive right to strike that is inextricably linked to – and an inevitable corollary of – the right to freedom of association;
- The contours of this right have been shaped to a large extent by the Governing Body's Committee on Freedom of Association. The Committee of Experts on the Application of Conventions and Recommendations, in its technical supervision function, has based the right to strike on Articles 2, 3, 8 and 10 of Convention No. 87, which gives workers full freedom to join organizations of their own choosing, bestows upon those organizations the right to organize their own activities and formulate programmes, and deems the purpose of the organizations to be that of furthering and defending the interests of their members.
- The Committee of Experts has a role within the ILO that is in no sense subordinate to the Committee on the Application of Standards, but is designed to provide a different type of analysis and information for the benefit of the tripartite constituents.

² This article does not examine in depth the mandate of the Committee of Experts. For a discussion of this issue, see Swepston (2013).

Historical review

A review of the actions of the International Labour Conference (ILC), the Governing Body, the Committee on Freedom of Association and the Committee of Experts does not produce one explicit statement proclaiming that workers have a right to strike. Nor is there an express statement in the two Conventions dealing with freedom of association, Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). While the lack of an explicit, declarative statement is not conclusive regarding the existence of such a right, it does necessitate an inquiry to determine whether a right to strike exists and if so, to identify its origins.

It should come as no surprise that the notion that there is a right to strike has developed over time, thus requiring a historically based description of its evolution that goes back to the earliest days of the ILO. To undertake such an inquiry in a fruitful manner, one must be alert to how terminology was used at particular times and by persons from different countries. The ILO is nearly 100 years old, and terms that were used in 1919 or 1948 may have a different connotation today. Because the context for the terminology used reflected the mindset of the day, it is vital to identify correctly the meanings shared by the tripartite members of the ILO at a given point in time. As a result, it is easiest and most useful to go back to the beginning and move forward in time, identifying what people understood to be the issue at the time they spoke. The task of understanding the history of freedom of association is rendered more complex by the differences in terminology between the main languages used by the ILO, and even between British and American usage of the English language.

The Treaty of Versailles and freedom of association

In March 1919, Part XIII of the Treaty of Versailles, which established the ILO,³ was agreed. The preamble to Part XIII, Section I, “Organisation of Labour”, points to conditions of labour that 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 declares that “an improvement of those conditions is urgently required”. Certain terms and conditions of employment are listed as needing improvement. Included in this list is “recognition of the principle of freedom of association”.⁴ In the Treaty itself, there is no amplification of the meaning of this term beyond the reference in Article 427 relating to General Principles of “the right of association for

³ The Treaty of Versailles established an organization which has as its supreme organ the International Labour Conference, which currently meets annually in Geneva in June. The Governing Body, established as the executive arm, meets three times a year in Geneva. The Treaty deemed the International Labour Office (the Office) as the organization’s secretariat. It is headquartered in Geneva. This article describes the subsequent establishment of committees relevant to freedom of association and the right to strike.

⁴ The text of Part XIII was published in the *Official Bulletin* of the ILO, April 1919 to August 1920 (Geneva, 1923), pp. 332–343. It can be accessed online at: <http://www.ilo.org/public/english/bureau/leg/download/partxiii-treaty.pdf>.

all lawful purposes by the employed as well as by the employers". The Treaty provisions do not specify how improvements will be achieved, although conventions were clearly envisioned as being one way of doing this.⁵

The question then arises of what the drafters of the preamble to Part XIII meant by "freedom of association". The Paris Peace Conference, which opened in January 1919, established the Commission on International Labour Legislation, which drafted the text that became Part XIII of the Treaty. Nine countries⁶ were represented on the Commission. Of the nine, the United States and the United Kingdom played a key role, as the President of the Commission was Samuel Gompers, the president of the American Federation of Labor (AFL), and the Vice-President was George Barnes, the British Government delegate. While the French were supportive,⁷ it was the British who took the lead in the discussions on what became Part XIII, in large part because they were the only delegation that had come to the peace conference with a draft of a specific proposal. As a result, the British proposal formed the basis for the Commission's deliberations.⁸

The ILO in its early years had two official languages, French and English, further complicating the question of what "freedom of association" meant in 1919. Years later, a very prominent and long-standing Worker member of the Governing Body would make a telling observation about how the term "freedom of association" was used. In 1947, commenting on discussions he had had that year in New York with members of the United Nations Economic and Social Council (ECOSOC), Léon Jouhaux,⁹ of France, observed that:

The discussions had related largely to the interpretation of certain terms, and in particular, to the difference between "freedom of association" and "trade union freedom". It had been maintained that freedom of association was a general freedom which had a certain relationship to trade union freedom, but that the term did not relate expressly to trade union rights. It would appear that two somewhat different interpretations were involved and that in the English language freedom of association corresponded more closely to trade union freedom than in French (ILO, 1947a, p. 23).¹⁰

In this comment, Jouhaux pinpoints the close link those in the ILO understood there to be between "freedom of association" and "trade union free-

⁵ Article 405 of the Treaty of Versailles sets out the method by which conventions will be adopted.

⁶ Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

⁷ Léon Jouhaux, a French delegate, had proposed in 1916, at a gathering of trade unions in Leeds, England, that there be established some sort of international workers' parliament (Reynaud, 1975, p. 293).

⁸ This is related by Edward Phelan, who later became director of the ILO but in 1919 was on the staff of the British delegation to the Peace Conference. See "The birth of the International Labour Organization" (ILO, 2009, Chapter 6, pp. 137–183).

⁹ Jouhaux was elected secretary general of the French Confédération générale du travail (CGT) in 1909. A Worker member of the Governing Body from 1919 to 1947, he received the Nobel Peace Prize in 1951 (http://www.nobelprize.org/nobel_prizes/peace/laureates/1951/jouhaux-bio.html).

¹⁰ This comment was made at the December 1947 session of the Governing Body, during consideration of the fourth item on the agenda, *Relations with Other International Organisations, fourth supplementary note "Freedom of Association (Trade Union Rights)"*.

dom” or “trade union rights”. In light of the fact that Jouhaux was an early advocate of an international labour organization, had been at the Paris Peace Conference and had become a member of the ILO’s Governing Body in 1919, his insight into the meaning of the term “freedom of association” as used in English¹¹ can be deemed authoritative. One scholar acknowledged this nexus between freedom of association and trade union freedom, appealing to everyday experience when she observed: “The very point of joining a trade union is to have more impact in bargaining, with its clearly detrimental effect on the interests of the employer” (Novitz, 2009, p. 126).

The choice by the British delegates of the term “freedom of association” in 1919 relates to their experience with the legal treatment of unions. Britain had experienced the world’s first industrial revolution, and as such had the longest experience with labour conflict. The initial reaction had been to ban unions. In 1799 and 1800, the British Parliament passed the wide-ranging Combination Acts, under which workers in all industries were prohibited from combining and seeking higher wages, since this would disturb the arrangement of prices and wages. The Webbs note that workers’ “combinations were regarded as being in the nature of mutiny against their employers” and “destructive of the ‘discipline’ necessary to the expansion of trade” (Webb and Webb, 1920, p. 69).¹² *The Times* newspaper, in more straightforward language, stated that the proposed 1800 statute would “be for the prevention of conspiracies among journeymen tradesmen to raise their wages. All benefit clubs and societies are to be immediately suppressed” (ibid., pp. 70–71). The word “combination” was used to denote the problem the legislature saw; namely, that workers would join together, or combine, seeking to obtain better wages or shorter working hours, and would encourage colleagues to stop work in order to secure their demands. To prevent the potential for action by workers in support of their aims, Parliament decided that workers’ associations would be banned entirely and offenders sentenced to hard labour. Thus, the illegality arose not from the mere fact that workers joined together, but from the reason they joined together.

In 1824, the Combination Acts were repealed, but throughout the nineteenth century the British legal treatment of trade union activity continued to be hostile. The 1901 House of Lords decision in the *Taff Vale* case,¹³ which

¹¹ The original text of the ILO Constitution was in English. It was translated into French by a British employee of the Foreign Office, which resulted in a French version that many felt did not accurately capture fully the meaning of certain provisions (Jenks, 1934, p. 577).

¹² Chapter II, “The Struggle for Existence,” covers the period 1799–1825, from the enactment of the Combination Acts to their repeal.

¹³ *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426. The union went on strike to protest against the company’s treatment of a worker who had demanded higher pay. When the Taff Vale Railway Company hired strike replacements, the strikers engaged in a sabotage campaign, greasing the rails and uncoupling the carriages. At this point, the company decided to bargain collectively with the union and the strikers were returned to their jobs. The company, however, decided to sue the unions in tort for damages and won. The House of Lords upheld the decision. Previously it had been thought that under the law of trusts a trade union (versus an individual) could not be sued, because it was an unincorporated entity.

held that a union could be liable for damages, threatened the existence of unions. It is critical to understand why the decision was perceived as having this impact. Under a narrow view of “freedom of association”, the decision might be considered favourable to trade unions, since the House of Lords did not challenge the lawfulness of workers joining together to demand better terms of employment. However, it was generally recognized that when workers joined together to do so, if the employer did not agree to their demands the workers might resort to some form of industrial action (such as strikes, picketing or boycotts) to put pressure on the employer to agree to their demands. The foreseeable result of the union’s action was that the employer would suffer some economic loss as a result of industrial action. If the union itself could be ordered to pay damages, unions would quickly go bankrupt. Following massive protests, *Taff Vale* was effectively overturned by the Trade Disputes Act 1906, which stated: “An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.” Thus, to the British at the 1919 Paris Peace Conference, “freedom of association” for workers was understood as more than simply the ability to join together lawfully; rather, it was inextricably linked to the right of unions to formulate collective bargaining demands and to take industrial action without being put out of existence by having to pay damages resulting from industrial action. It is in this context that one can understand why many in the ILO would later use the term “trade union rights” as synonymous with “freedom of association”.

To the Americans at the Paris Peace Conference, the domestic legal situation was more complex and, for workers, even less favourable than in Britain.¹⁴ The first American labour law case, the Philadelphia Cordwainers trial of 1806, presents freedom of association starkly. Journeymen cordwainers, or shoemakers,¹⁵ had become aware that the master cordwainers – the largest purchasers of shoes who bought shoes for resale in South Carolina – were lowering the price they would pay the shoemakers. Rather than compete among themselves for work by lowering the price they would accept, the journeymen cordwainers agreed not to sell their shoes below a certain price. As a result, the buyers – who faced an inadequate supply of shoes and could not fulfil their contractual commitments – brought suit, arguing that the workers’ joint action harmed them and harmed the city, since the work would likely move elsewhere if the price they had to pay for shoes increased. The court held that the journeyman cordwainers had engaged in an unlawful conspiracy because they

¹⁴ In part this was due to the fact that labour cases were typically litigated on a torts or contracts theory, and this is a matter for state, not federal (national) law. The states varied greatly on how they viewed the legality of specific manifestations of industrial action.

¹⁵ Technically these persons were not employees. They were members of a guild, and worked individually in their homes. However, this case became recognized as the first instance when the workers who made a product banded together to maintain the price for which they were paid for their labour.

had joined together and were restraining trade. Although there was no statute similar to the Combination Acts, American courts in the nineteenth century used the reasoning of eighteenth century British common law.¹⁶ Courts found the act of joining together for the purpose of seeking better terms of employment to be unlawful – even when it would be lawful for an individual to engage in the same behaviour – on the ground that the collective activity restrained trade. Thus, it was not the mere act of joining together that caused the illegality, but the fact that workers took action to defend their occupational interests.

By 1919, the most prominent American labour leader was Samuel Gompers. He strongly advocated that unions should focus on improving their members' terms and conditions of employment through collective bargaining, not through political activity or government regulation. Gompers recognized that to achieve gains, workers would have to rely on their own bargaining power, which led him to focus on those workers who could engage in effective strikes and boycotts (Kaufman, 1973). Gompers was acutely aware of the practical difficulties workers in America faced in seeking better conditions of employment. Gompers himself, in the years just before the First World War, had narrowly escaped being jailed for contempt when he refused to cease publishing a list of unfair employers for consumers to boycott.¹⁷

These examples illustrate that those on the Commission on International Labour Legislation that drafted Part XIII of the Treaty of Versailles understood “freedom of association” to mean the joining together of workers in associations called trade unions, for the purpose of collective bargaining. At the time the Commission was meeting, strikes were occurring all over Europe, and in particular in Germany. Those on the Commission understood that workers who are engaged in collective bargaining routinely support their demands by threatening to engage in industrial action, and on occasion by resorting to the use of economic weapons such as picketing and going on strike. Thus, the term “freedom of association” was not meant merely to describe freedom of association and freedom of speech applied to the workplace. It had a broader meaning, extending to actions taken by workers to further their occupational interests.

¹⁶ Until federal legislation in 1935, American labour law casebooks typically referred also to British decisions to explain how the law regulated such behaviour. See, e.g., James M. Landis, *Cases on Labor Law*, Chicago, Foundation Press, 1934. On page ix, Professor Landis lists many British reference works.

¹⁷ In 1906, workers at a company in St Louis, Missouri, went on strike in support of their demand for a nine-hour day. The American Federation of Labor (AFL), of which Gompers was president, put the company on its “unfair list” which was circulated to union members asking them to boycott companies on the list. The company went to court and was granted an injunction forbidding the publication of this list. Gompers and several other AFL leaders refused to comply and were sentenced to prison for contempt. The sentence was overturned by the US Supreme Court on technical grounds. *Gompers v. Bucks Stove and Range Company*, 221 U.S. 418 (1911). The defendants were tried again a year later, and once again were found guilty of contempt and sentenced to prison. The Supreme Court overturned these convictions on grounds relating to the statute of limitations. *Gompers v. United States*, 233 U.S. 604 (1914).

The 1920s: Seeking to define freedom of association

In its first two years of operation, the International Labour Conference (ILC) dealt with several issues that were listed in the preamble to Part XIII, such as hours of work, night work for women, maternity protection, unemployment compensation, and protection of children in employment. Several of these applied only to industrial enterprises. In 1921, the ILC turned its attention to agricultural workers, since in many countries their legal status was quite different from workers in industry, who were deemed employees. Although the French Government objected, the ILC adopted three Conventions that expressly extended rights to workers in agriculture (ILO, 1921). Two of these touched on issues that had already been addressed for industrial workers: the Minimum Age (Agriculture) Convention, 1921 (No. 10), covered the issue of minimum age for agricultural workers, and the Workmen's Compensation (Agriculture) Convention, 1921 (No. 12), addressed workers' compensation for personal injuries. In contrast, the third – the Right of Association (Agriculture) Convention, 1921 (No. 11) – had no precedent.

Article 1 of Convention No. 11 states: "Each Member ... which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture." This is the only substantive article in Convention No. 11. From reading this provision, one can only assume that the delegates at the 1921 ILC believed that industrial workers did have rights of association and that they were able to act in concert lawfully. If this were not the case, Article 1 would be meaningless. If industrial workers did not have rights of association, one would assume that the ILC would first have adopted a Convention that guaranteed the right of association to industrial workers before turning its attention to agricultural workers. Instead, the ILC focused solely on eliminating the difference in law between industrial and agricultural workers with regard to the right of freedom of association, further underscoring the fact that the ILC assumed industrial workers had rights of association. There is also an implication that the right of association is not simply a philosophical concept but an operative one. Not only do workers have the right to associate but they have a right of combination,¹⁸ that is, to act together.

For a member State to apply Convention No. 11 to agricultural workers, it had to recognize that industrial workers had rights of association and combination. The matter was not without controversy within the ILO. As the Office noted, the question of freedom to combine for trade purposes¹⁹ had

¹⁸ "Combination" is the British word used in the nineteenth century to refer to workers acting together. As noted above, the Combination Acts of 1799 and 1800 made unlawful the formation of combinations, or trade unions, and thus had the practical effect of outlawing strikes.

¹⁹ Today the word "trade" usually refers to commerce or commercial exchange. In the nineteenth and early twentieth century, it also referred to occupational groupings. As a result, to act in furtherance of a "trade purpose" meant what we mean today by "in defence of occupational interests".

been “repeatedly discussed at sessions of the International Labour Conference and the Governing Body ever since the International Labour Organisation came into existence” (ILO, 1927a, p. v). Complaints were being made to the Office that actions prejudicial to trade unionists’ rights were being taken in certain member States and it became more difficult to ignore the fact that the delegates to the ILC disagreed on the meaning of a fundamental right, in part because they viewed the right not only from the perspective of the government, employer or worker, but also through the lens of their own national experience. In addition, some governments believed it an aspect of national sovereignty to maintain the ability to regulate workers’ associations and their activities, because workers engaged in demonstrations and strikes for political purposes (ILO, 1926a, pp. 106–107).²⁰ At its 20th Session in 1923, the Governing Body engaged in a discussion of the right of association and the “freedom to combine for trade purposes”, and concluded that further detailed study was needed. The initial study considered freedom of association as linked to industrial action, surveyed the practice and laws of several countries and sought a middle ground,²¹ but at the ILC the stumbling block was the question of whether workers had the right not to join a union. The ILC concluded with a call for further study. The Governing Body directed the Office to “[collect] the most complete documentary evidence with reference to the position in all countries which are members of the International Labour Organisation with regard to the application of this principle” (ILO, 1927a, p. vi).

In 1927, the Office prepared a report on freedom of association for the ILC, in which it proposed a draft questionnaire for the purposes of obtaining information as a basis for considering whether an instrument on freedom of association should be drafted. However, many Worker and Employer representatives in the ILC were opposed to such a questionnaire, fearing that the mere formulation of a question might be the basis for a restriction or extension of the right of freedom of association.²² As such, no questionnaire was approved,²³ and the idea of an instrument on freedom of association was dropped. Although rarely commented upon, a difference pinpointed by the Office in the report highlights an underlying problem in attempting to reach an internationally acceptable definition of freedom of association; namely, that

²⁰ At the January 1926 session of the Governing Body, the Director commented specifically on this point in his report on the study of freedom of association.

²¹ The survey, called the “Nicod Report”, was published in the April 1924 issue of the *International Labour Review* (Nicod, 1924).

²² This fear was not baseless, since Article 427 of the Treaty stated: “Among these methods and principles ... of special and urgent importance [is] the right of association for all lawful purposes by the employed as well as by the employers.” The questionnaire would have probed what were deemed lawful purposes. Another contentious question sought to determine whether there was a right to join a union and a right not to join a union in the member State.

²³ The tripartite Committee on Freedom of Association produced its report on the draft questionnaire, which indicates the differences between the Worker and Employer representatives (ILO, 1927b, pp. 638–655).

“many of the legal conceptions which have governed the development of Continental law and jurisprudence on the subject are foreign to Anglo-Saxon law and jurisprudence” (ILO, 1927a, p. 9).

Even though the Office accepted that the ILC did not wish to proceed with a questionnaire, it persisted with its study, pointing out that it might “help to dispel the uncertainty still existing with regard to the meaning of this right, the implications of which are so complex” and also hoped that once the meaning was understood, “the ground will be clear for ... regulation on international lines” (ibid., p. x). The Office was not blind to the difficulty of reaching a common understanding. In discussing the deliberations of the committee the ILC had appointed to draft the questionnaire, the Office noted that “the employers were mainly concerned to delimit the freedom of combination for trade purposes, to emphasize rather the principle of individual liberty and to define more narrowly the right of combined action” (ibid., pp. viii–ix). In contrast, the workers “were anxious to specify more precisely the rights implied in freedom to combine for trade purposes” (ibid., p. ix).

Regardless of the failure to agree on a questionnaire – let alone on a draft instrument – on freedom of association, the activity undertaken in the 1920s was valuable. From a research perspective, the Governing Body’s 1923 instruction for a comprehensive study produced a remarkable snapshot of national law and practice in the 1920s with regard to freedom of association. In 1927 the Office produced a report of its study, Volume I of which consisted of a comparative analysis.²⁴ The five volumes in the study are also evidence of what the tripartite partners came to acknowledge as the scope of freedom of association. This can be considered an intended result of the exercise, since the Office considered, based on resolutions of the ILC and the Governing Body between 1923 and 1927, that the purpose of “the enquiry ... was to bring out the predominant conception of freedom to combine for trade purposes and to find suitable means for securing this freedom” (ibid., p. vii).

From the outset, industrial action²⁵ was considered important to an understanding of freedom of association. In discussions with the Conference Committee on Freedom of Association²⁶ over the wording of potential questions to be asked, the Office trod carefully but gave an indication that it was interested in information regarding industrial action. For instance, the questionnaire asked about the “right of workpeople and of employers alike to combine for the collective defence of their ... interests” and further asked whether the respondent considered that “the right of combined action for trade pur-

²⁴ Volumes II – V contain national reports.

²⁵ The author uses the British English expression that denotes joint action undertaken by workers to support their demands. In American English, the term would be “concerted activity”. The most common forms are strikes, picketing, leafleting and boycotts. But there are other forms with labels specific to a particular country (such as “work-to-rule”, “go slow” and “sick outs”).

²⁶ This ILC committee, dating from before the Second World War, is not to be confused with the Governing Body committee of the same name, which was established in 1951.

poses” would be adequately defined as the right “to pursue their objects by all such means as are not contrary to the interests of the community and to the maintenance of public order” (ibid., p. ix).

The organization of the report of the study reveals the refined thinking of its authors. Following the purpose of “promoting a proper understanding of the problem”, it was thought best “to enlarge the scope of the enquiry” beyond the “right of combination in its narrow sense” (ibid., p. x). The Office organized its report in three parts: (1) the individual’s right to combine for trade purposes; (2) the law of trade unions; and (3) activities of trade combinations. Of most relevance is Part III, Chapter III: The Trade Dispute, and in particular Section I: The Right to Strike (ibid., pp. 75–96). The Office pointed out that it was impossible to discuss the right to strike from an individual rights perspective since by its very nature a strike requires collective action, but while “there is no difficulty in deciding what a strike is, considered purely as a social phenomenon; its legal definition is, however, still a matter of considerable obscurity” (ibid., p. 76). Nonetheless, the Office found that except where strikes involve violence or material damage, “[i]n the majority of countries strikes are, generally speaking, permitted” (ibid., p. 75).²⁷ Having said this, the Office commented that “[i]n most cases, the right to strike is not specifically recognised in formal terms, but is derived from the repeal of legislation” (ibid., p. 78), i.e. the repeal of laws or judicial decisions that had made strikes unlawful. The Office considered as critical the question of “how far activities which are inseparably connected with strikes qua strikes can be regarded as unlawful, so as to involve liability” for the union. Here the legal picture in the member States was very mixed, and the Office concluded that only Britain had legislation which drew the distinction clearly and satisfactorily addressed this issue.²⁸

The Office did find differences between countries with regard to lawful purposes, for instance to enforce a closed shop or pursue political tactics such as sympathy strikes. At the heart of the differences was the way in which countries weighed competing rights, which the report listed as: “(1) the right of the employer to enjoy the free use of his property; (2) the right of the organised workers to take combined action for the defence of their particular interests; and (3) the right of third parties to join or not to join an organisation and to work or not to work for a particular employer” (ibid., p. 82). The Office concluded that, while generally speaking the right to strike was recognized, in practically all cases the law recognized the first and third rights but in a number of countries “the right to take joint action [was] not yet recognized” or was not yet well protected (ibid.).

²⁷ One exception to this general observation concerns agricultural workers, which may explain the need for Convention No. 11. The report states: “in some cases agricultural workers are still, as in the days of serfdom, not permitted to cease work” (ILO, 1927a, p. 77).

²⁸ The Report specifically noted the British Trade Disputes Act, 1906, p. 91.

Post-Second World War Conventions: Enshrining the right of freedom of association

As one commentator has observed, although the phrase “recognition of the principle of freedom of association” was included in the ILO Constitution in 1919, it was in the Preamble only; gradually, however, the principle was strengthened by practical application (Dunning, 1998).

The crushing of independent trade unions in the 1930s by totalitarian regimes, and the massive destruction to civil society during the Second World War, moved the ILO to take an affirmative, declaratory stance on the right of freedom of association. In 1944, the ILC proclaimed freedom of association as a right in the Declaration of Philadelphia, when it was listed as the second of four “fundamental principles on which the Organization is based”.²⁹ The principles set out in the Declaration of Philadelphia became embodied in the ILO Constitution, a critically important development, as membership of the ILO requires that a member State formally accept the obligations stated in the Constitution.³⁰

The landscape of international organizations changed rapidly at the end of the Second World War. The United Nations was established in June 1945, and the UN Economic and Social Council (ECOSOC) in January 1946. With the mandate of the latter body to some extent seemingly overlapping with that of the ILO, and the relationship of the two bodies not defined, significant concern was voiced within the ILO regarding this unsatisfactory state of affairs.³¹ At the same time, the influence of major countries such as the Soviet Union and the United States, and of political ideologies in eastern and central Europe, was a source of tension. In 1947, the World Federation of Trade Unions (WFTU) asked ECOSOC to consider the guarantees relating to the exercise of trade union rights. This referral to ECOSOC, rather than to the ILO, was strongly opposed by the American Federation of Labor (AFL), which considered the WFTU to be Communist dominated. The AFL made its own referral to ECOSOC on the same subject, so that it could present its framing of the issue while also arguing that this matter was properly within the competence of the ILO.

At its February–March 1947 session, ECOSOC decided to refer the matter to the ILO and asked for action and a prompt report back. A reading of the 1947 session of the Governing Body reveals that its members were united in a desire to ensure the autonomy of the ILO with regard to the determination

²⁹ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), I(b).

³⁰ Article 1, para. 3 of the Constitution of the International Labour Organisation.

³¹ It is noted in the minutes of this session of the Governing Body that, since the two bodies were meeting at the same time (but the Governing Body in Geneva and ECOSOC in New York), collaboration was hindered, and calls were made to have a coordination of meeting times (ILO, 1947b, pp. 49–55).

of a matter so central to its existence as freedom of association.³² Spurred on by the perceived need to respond quickly or else risk having ECOSOC take back the issue, the ILO “took very rapid action in the matter”,³³ such that ECOSOC was “astonished at the speed with which the International Labour Organisation had discussed, drafted and voted on the texts”³⁴ that would become Convention No. 87.

The speed at which this took place should be highlighted. In March 1947, ECOSOC asked the ILO to place the item on the agenda of the next ILC session (scheduled for June) and report back to ECOSOC by its next session (scheduled for July). The request was not formally transmitted to the ILO until mid-April, and the Office drafted the preparatory paper in a matter of weeks. The item “Freedom of association and industrial relations” was placed on the agenda of the 30th Session of the ILC in June 1947. By the end of the Conference, in early July, the general principles on freedom of association that would form the basis of Convention No. 87 had been agreed, some points for further discussion noted, and the proposed Convention placed on the agenda for the 1948 Conference.³⁵ Thus, within four months, the tripartite constituents had accomplished the task that had eluded them for more than 20 years.

The key to the dispatch with which the Conference was able to deal with this issue was the preparatory paper, written by the Office, which guided the discussion. The paper reviewed the history of freedom of association at the ILO and the failure in the past to reach agreement on an instrument in exhaustive detail (ILO, 1947d). It was blunt in analysing the reasons for the failure to reach agreement on an instrument in 1927, noting that it was “necessary to recall the chief reasons for the failure of the first attempt to deal with the question, if only to apprehend the lesson taught by that failure” (*ibid.*, p. 16). In the preparatory paper’s survey of labour legislation, there is no explicit mention of the right to strike, but instead an observation that at times trade unions “are obliged to resort to economic pressure” (*ibid.*, p. 55), followed by a discussion of the process used in various countries to deal with labour conflict. In the preparatory paper, the Office focused on positions that undermined the entire notion of freedom of association, most particularly those dealing with the autonomy of workers’ and employers’ associations, and the lack of political will to deal with this (*ibid.*, p. 18). The preparatory paper put forward two ways of securing a guarantee of freedom of association: one that would set forward a list of detailed regulations and another that would present essential

³² In early 1947, the relationship of the ILO to the new United Nations was still unclear, and some members of the Governing Body were surprised and dismayed by the prospect that the UN might regulate in the area of freedom of association. They saw a threat to the “autonomy” of the ILO, that is, its power to act on its own in setting and defining international standards.

³³ These are the words of Director-General Edward Phelan at the December 1947 session of the Governing Body describing the events of 1947 (see ILO, 1947a, p. 20).

³⁴ This is how French Worker representative, Léon Jouhaux, described to the Governing Body ECOSOC’s reaction at its July 1947 session, which he had attended (see ILO, 1947a, p. 23).

³⁵ For the complete record of the Committee’s report, see ILO (1947c, Appendix X, pp. 561–578).

principles and provide a sufficient guarantee for the free function of employers' and workers' organizations (ibid., p. 17). The Office preferred the approach of setting forth essential principles, an approach adopted by the Conference committee dealing with the item, the Committee on Freedom of Association and Industrial Relations.

The Committee on Freedom of Association and Industrial Relations was chaired by David Morse, the United States Government representative (who would be elected ILO Director-General the following year). As Dunning notes, there was only one serious disagreement within the Committee, over whether there should be express mention of a right not to join a union, which had been proposed by the Employers and rejected. There was also a proposal from the Governments of two eastern European States that "employers" be deleted from the text, so that the Convention would only provide for workers' rights. The Workers' group supported the Employers and this proposal was rejected. As one commentator has noted: "Possibly as a *quid pro quo*, the Employers did not reintroduce the 1947 amendment to add 'or not to join'" (Rodgers et al., 2009, p. 48). Thus, the 1947 draft produced by the Committee essentially became the text of Convention No. 87, which was adopted by the ILC the following year.

Although the right to strike is not explicitly mentioned in Convention No. 87, it is important to note that in the 1947 and 1948 discussions, neither Governments nor Employers proposed that there be a limitation on the right to strike in the Convention, nor made any statement about it at all.³⁶ It is not that the issue went unnoticed. In the Office's preparatory paper, the introductory section reproduced parts of the WFTU and the AFL submissions to ECOSOC. Both listed the right to strike, with the AFL, in a numbered list of 14 issues that should be considered, asking succinctly in number eight: "To what extent is the right of workers and of their organizations to resort to strikes recognized and protected?" (ILO, 1947d, p. 6).

As one scholar has noted, the express provision in Convention No. 87 that workers' organizations have the right to organize their activities raises an important question, that of the right to strike (Valticos and von Potobsky, 1995, p. 96). This issue manifested itself when some Government representatives proposed that the text of Convention No. 87 include the qualifier that employers' and workers' associations could act but only in a lawful manner. This proposal, which would have permitted a member State to set conditions on the formation of associations and the activities in which they could engage, was not accepted. If such a proposal had been successful, it would have undermined the idea of a right to engage in industrial action, since in 1948 it was evident that the laws in some countries banned forms of industrial action

³⁶ At the 31st Session of the ILC in San Francisco in June 1948, there was very little discussion at all about the text of Convention No. 87, beyond the statements strongly supporting the proposed Convention made by the Workers' and Employers' reporters on the Committee on Freedom of Association and Industrial Relations that had produced the report. The vote was: 127 in favour, 0 against, with 11 abstentions.

that the Convention was designed to permit. This point was emphasized by the Worker Vice-Chairperson, Léon Jouhaux, who in announcing that the Workers' group supported the proposed Convention, observed that it was "unusual to hear arguments regarding national sovereignty in 1948" at the ILO, because the ILO "presupposes the abandonment to some extent of national sovereignties" in that it is "absolutely necessary to make national sovereignty give way" in order for an international standard, applied by all member States, to exist³⁷ (ILO, 1948, p. 230). Jouhaux's comment highlighted a point made by the Office in its preparatory paper when it listed some of the reasons for the failure in 1927 to reach agreement on freedom of association; namely, that some governments wanted to retain their "prerogatives" to regulate workers' and employers' associations and that "a Convention which did not include any precise undertaking ... would have left the States free to interpret it as they chose" and consequently would have "lost its purpose" (ILO, 1947d, pp. 17–18). Thus, the delegates to the 1948 ILC could hardly have been unaware of the implications of the right of trade unions to organize their activities, but it seems they decided not to dwell on this issue.

In light of the time pressure under which the Committee on Freedom of Association and Industrial Relations operated, its tripartite members indicated that they were united in a strong desire to agree on a text to meet the deadline of the ILC, and acknowledged that what was produced did not, in all respects, meet their notion of a perfect statement on freedom of association.³⁸ It appears that the tripartite members of the Committee took the pragmatic view that a right to strike was implied in the right of freedom of association but wished to avoid the quagmire of delineating the exact contours of the right to strike.

In 1949, the ILC adopted the Right to Organise and Collective Bargaining Convention (No. 98), which was viewed not as granting new rights, but rather stating a principle that had already been accepted; namely, that workers and employers in exercising their right of freedom of association must be able, if they chose, to form associations that are independent and capable of representing their interests for the purposes of collective bargaining. As Otero and Travieso observe, the adoption of Conventions Nos 87 and 98 represented the culmination of 30 years of development regarding freedom of association, with the long delay explained by the lack of political will until the end of the Second World War (Otero and Travieso, 2004, p. 177). They add, however, that this

³⁷ Government and Employer representatives put forth the view that national governments have the right to determine what constitutes lawful conduct in their country. The term "national sovereignty" is the phrase used in the 1940s to denote this view.

³⁸ At the 1948 ILC in San Francisco, during the First Report of the Committee on Freedom of Association and Industrial Relations, the Worker Vice-Chairperson and Committee Reporter, Léon Jouhaux, said that the text of Convention No. 87 did not go far enough, and specified areas that were lacking, but said that the Workers' group would vote in favour of adoption (ILO, 1948, p. 229). In the Third Report of the Committee, the Employers' spokesperson, Louis Cornil of Belgium, who had also been a reporter for the Committee, stated that the text was "a compromise between two sections of opinion" and indicated that the Committee had decided to leave certain questions for the future (*ibid.*, p. 284).

long delay allowed for the development of an innovative mechanism designed to respond to the issues that application of these two Conventions would raise; namely, the Governing Body's Committee on Freedom of Association.

1950s: Safeguarding freedom of association

At the time Conventions Nos 87 and 98 were adopted, it was apparent that the ILO needed a mechanism whereby it could respond quickly to complaints related to the suppression of trade union organizations and restrictions on industrial action,³⁹ with some incidents reflecting the broader political tensions of the immediate post-war period. The Governing Body was aware that many complaints would arise that could not be easily accommodated by the existing supervisory mechanisms. For example, the Committee of Experts was charged with reviewing governments' compliance with their obligations to apply ratified Conventions, not with an examination of specific incidents. Yet the obligation to respect freedom of association now arose from membership of the ILO itself⁴⁰ and not solely from the ratification of a Convention. As such, it was expected that complaints would arise in member States that had not ratified Conventions Nos 87 and 98. In addition, the Committee of Experts convened only once a year, and its process of review typically meant that there would be a substantial time gap between the incident complained of and the Committee of Experts' review. Moreover, the Committee of Experts' review focused on the law and practice in the member State rather than on an analysis of specific incidents.

Establishment of the Committee on Freedom of Association

At the March 1949 session of the Governing Body, several members raised the issue of the pressing need to deal with complaints of grave violations of trade union rights, but the discussion produced no suggestion that seemed effective and practicable. The discussion at the June 1949 session of the Governing Body was unusually heated, in large part because an observer from the WFTU spoke and expressed the very strong view that ECOSOC should deal with violations of trade union rights.⁴¹ He asserted that the ILO was not competent to deal

³⁹ In the paper prepared by the Office for the 1947 ILC, the Office anticipated that the Conference, in adopting any Convention on freedom of association, would not be able to list detailed regulation of the conduct of the parties. The Office thus suggested that the Conference establish a mechanism for dealing with disputes, and suggested that the Governing Body appoint "a Committee on Freedom of Association, to establish the facts of the case whenever the guarantee of freedom of association is in dispute" (ILO, 1947d, p. 106).

⁴⁰ The Declaration of Philadelphia, adopted by the ILC in 1944, was incorporated into the ILO Constitution. By virtue of the 1945 amendment to the ILO Constitution, membership of the ILO was open to all members of the United Nations, provided that they formally accepted the obligations listed in the ILO Constitution. Thus, the ILO can impose obligations upon member States in so far as the member State has voluntarily agreed to them (Bartolomei de la Cruz, von Potobsky and Swebston, 1996, pp. 5–6).

⁴¹ During the course of 1949, some affiliates of the WFTU became convinced that the federation was dominated by Communist unions. They decided to leave the WFTU and form a new entity. In December 1949, the International Confederation of Free Trade Unions (ICFTU) was formed.

with violations of freedom of association and alleged that this was due to the role Employers played in the Organization. He took the position that action under Convention No. 87 would be unsatisfactory for several reasons, including the fact that the Convention “did not recognise the right to strike, the only effective weapon which the workers had to defend their rights” (ILO, 1949, p. 67) and that the Committee of Experts had “no power to impose their views” and could act only with regard to ratified conventions (*ibid.*). In the ensuing discussion, the US Worker representative commented that “the ILO should set up the necessary machinery to put an end to the violation of trade union rights” and that “the question should cease to be used as a political football between the ILO and the Economic and Social Council” (*ibid.*, p. 73). This view met with general approval. The UK Worker and Employer representatives then proposed the concept of the establishment of “a fact-finding and conciliation commission on freedom of association for the purpose of international supervision of freedom of association”, which the Governing Body approved, directing the Office to draw up a detailed proposal (*ibid.*, p. 84).

In 1950, when the Governing Body considered a specific proposal to set up a fact-finding and conciliation commission (ILO, 1950, Appendix VI, p. 173), the Workers’ group emphasized that the “fundamental object” of setting up such a commission was to give effect to the principle of “freedom of association”, but doubted that the commission would be effective, since its ability to engage in its work depended upon the willingness of the government against whom the complaint had been made to accept such a commission. The Workers’ group urged that the commission should have the power to carry out supervision and enquiry without the consent of the government concerned and that the Organization take action to ensure that supervisory efforts were effective (*ibid.*, pp. 62–66). This 1950 discussion changed the direction of the thinking of the Office and opened the possibility of having a more activist body respond to freedom of association complaints.

In June 1951, the Governing Body considered the report by the Director-General⁴² on his consultations with the Officers of the Governing Body on this subject (ILO, 1951a, p. 58). In the ensuing months, the Office prepared a draft proposal for a special committee that would deal with these issues. One major change between the early and final proposal was the character of the members of this committee. Originally, the Office had considered that the members would be impartial, and either members of the judiciary or of that calibre, and would be experienced in examining and evaluating evidence. The final proposal was that the members be from the Governing Body and reflect its tripartite composition. In November 1951, the Governing Body, after discussions with

⁴² It was agreed that this discussion should be held in private and thus the minutes of this Governing Body session do not reveal what was discussed. This subject was so highly charged that the Governing Body decided to change the name of the report from that listed on the agenda; an officer of the Governing Body who could not be present for the Governing Body’s June session complained that the matter was being moved forward without due consideration and wanted this placed on record (ILO, 1951a, p. 80).

ECOSOC had taken place, established the Committee on Freedom of Association as a tripartite committee of the Governing Body that would consider complaints regarding infringement of the principle of freedom of association arising in any member State.⁴³

Over two years, the proposed membership of the Committee had changed from one consisting of impartial jurists to one consisting of persons with practical experience and reflecting the tripartite composition of the Governing Body. This change also indicates that the Governing Body desired a somewhat different approach to reaching a decision, one not strictly judicial and independent. It appears that at no time was the Conference Committee on the Application of Standards considered the right vehicle to examine complaints in the first instance, even when there was a complaint about events in a member State that had ratified Convention No. 87. Rather, the Governing Body favoured the proposed nine-person tripartite committee consisting of members drawn from the Governing Body, which would convene three times a year and evaluate complaints to determine whether freedom of association had been respected.

By June 1951, no action had been taken to follow up on a proposed action step made in 1948, at the time Convention No. 87 was adopted. During consideration of the third and final report of the Committee on Freedom of Association and Industrial Relations at the ILC in 1948, only one person spoke: Louis Cornil, Committee Reporter and Employer representative. Cornil said that the text of the Convention was “intended to give employers and workers, and their organisations, effective protection against all restrictions on the free exercise of their rights to organise and to bargain collectively” (ILO, 1948, p. 284). He noted that the text did not meet the wishes of those who wanted the text to be “extremely precise” nor those who were “anxious to safeguard national sovereignty”. Cornil stated that the Committee “thought that the Conference next year should decide whether the regulations should take the form of a Convention or of a Recommendation” and observed that the text of Convention No. 87 would serve as a “useful basis for next year’s discussion” (*ibid.*). Despite this expectation, no action was taken to draft regulations that would further delineate the scope of freedom of association. Yet, by 1951, it was increasingly evident that the ILO quickly had to devise a way to determine whether freedom of association had been infringed in specific cases. It may be that there was a pragmatic acceptance of the common law approach that does not require an express definition of a right or principle. Since the discussion on this point at the June 1951 Governing Body meeting was off the record, one can only speculate that the Governing Body wished to retain the ability to fashion the shaping of the right of freedom of association through the decisions that the Committee on Freedom of Association would make in specific cases.

⁴³ That is, by virtue of membership of the ILO, a member State subscribes to the conditions of membership, one of which is observance of the principle of freedom of association.

At the November 1951 session of the Governing Body, some Employer and Government members expressed concerns about how the new committee would operate, what exactly it would be expected to do, and how it would relate to the Governing Body and the Office (ILO, 1951b, p. 46). Curiously, there was no discussion about the relationship between this new Committee on Freedom of Association and the Committee of Experts, let alone a discussion about the potential for conflicting views regarding the meaning of freedom of association or of specific provisions of Conventions Nos 87 and 98. Although there was no such discussion, it is clear that the Conference and the Governing Body proceeded on the assumption that the Committee of Experts would continue to maintain a supervisory function with regard to Conventions Nos 87 and 98, since there had been no suggestion whatsoever that the Committee of Experts' role with regard to Article 19 reports on ratified Conventions might be restricted.

1950s: First explicit recognition of a right to strike

In 1952, at its first session, the Committee on Freedom of Association did not expound on the meaning of freedom of association.⁴⁴ Rather, in its general comments the Committee noted that, in examining the cases pending before it, it had been “impressed by the extent to which the same questions constantly recur in different cases”. The Committee noted that it had applied certain criteria to these cases, and would continue to do so, subject to the views expressed by the Governing Body (ILO, 1952, p. 175, para. 26). Although the Committee stated that it had applied certain criteria, it did not list them. The criteria could only be gleaned by reading the cases the Committee had decided.

The Committee proceeded on the basis that a right to strike is implied in Conventions Nos 87 and 98. For instance, in its first year, in a case dealing with a strike in Jamaica that had led the Government to ban union meetings,⁴⁵ the Committee stated: “The right to strike and that of organizing union meetings are essential elements of trade union rights” (*ibid.*, p. 210, para. 68). The Committee then went on to consider, in light of the facts of the case, whether a limitation on the right to strike, as imposed by the Government, was justified. The Committee did not expound on the origin of the right to strike, nor did it state expressly the source of the right to strike, although in this particular case that was not an issue.⁴⁶ As this

⁴⁴ The reports of the Committee on Freedom of Association were published as an appendix to the ILO's report to the United Nations for the first five years. The report for 1952 is Appendix V in ILO: *Sixth Report of the International Labour Organisation to the United Nations* (Geneva, 1952), pp. 169–237.

⁴⁵ Case No. 28, Complaint presented by the World Federation of Trade Unions against the Government of the United Kingdom (Jamaica).

⁴⁶ The United Kingdom had ratified Convention No. 87, so the Committee on Freedom of Association did not have to indicate whether the basis for the right to strike was the Constitution or Convention No. 87. Since they did not comment on this, one can only assume that they saw no difference between the guarantee as expressed in the two instruments.

Governing Body Committee decided the case only four years after the adoption of Convention No. 87, it is reasonable to conclude that its members believed that a right to strike was implicit in the Convention's guarantee of freedom of association.

This approach typified the *modus operandi* of the Committee on Freedom of Association. Over the years, it has decided cases strictly on the facts of the case, and does not make general statements about freedom of association. However, a review of the cases demonstrates that the Committee has proceeded on the basis that there is a right to strike, but not an unlimited right.⁴⁷ Effectively, ILO law⁴⁸ on the right to strike has been constructed on a case-by-case basis (Hodges-Aeberhard and Odero de Dios, 1987). For those interested in ILO law on the right to strike, the main way of understanding the relevant criteria is to consult the *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, which is published periodically.⁴⁹ The *Digest* is a reference volume, not a commentary on freedom of association. Each paragraph takes a single principle and then lists the cases the Committee on Freedom of Association has decided where this principle was applied. In the 2006 *Digest*, part 10 is titled "Right to Strike" and, from paragraph 520 to 676, sets forth principles and criteria the Committee has deemed relevant (ILO, 2006). At no point is there any indication that the Committee sees the guarantee of freedom of association in the ILO Constitution as being in some way different from the guarantee of freedom of association in Convention No. 87. This is consistent with the view expressed by the Governing Body in 1953. At that time, the Governing Body noted in its conclusions that the Director-General had "considered that it would be inappropriate to express an opinion" regarding Convention No. 87 and Convention No. 98 "owing to the existence of a special procedure laid down by the Governing Body for dealing with complaints concerning alleged infringements of freedom of association" (ILO, 1953, p. 110).

It is the Committee on Freedom of Association that has been overwhelmingly responsible for the development of case law in this area, simply because it is the body that has been presented with specific cases that raised questions about the extent of the right to strike and required a decision. At present, the Committee has decided nearly 2,900 cases since its first session in 1952.

Because of the need to respond to specific complaints, it is not surprising that the Committee on Freedom of Association, in its very first year,

⁴⁷ Discussing the gradual evolution of Committee on Freedom of Association jurisprudence, Professor Novitz has observed that "by 1960 if not before, the Committee was adamant that the right to strike is a necessary aspect of freedom of association and that therefore all complaints relating to industrial action come within its jurisdiction" (Novitz, 2003, p. 192).

⁴⁸ The author does not use the term "law" in the strict sense, but to show that the Committee on Freedom of Association has adopted the common law approach, whereby pronouncements in individual cases, and respect for the views expressed over previous years, indicate the Committee's view regarding the contours of the right to strike.

⁴⁹ The most recent *Digest*, the fifth (revised) edition, was published in 2006 and covers the Committee's decisions through November 2005.

stated that the right to strike is a fundamental right of workers, whereas the Committee of Experts did not directly address the right to strike until seven years later, in the 1959 General Survey on freedom of association. In its comments on the application of Convention No. 87, the Committee of Experts directly addressed issues relating to strikes in one paragraph (ILO, 1959, pp. 114–115, para. 68). After commenting that the “prohibition of strikes by workers other than public officials acting in the name of the public powers raises questions which are often complex and delicate”, it observed that “such a prohibition may sometimes constitute a considerable restriction of the potential activities of trade unions”. The Committee of Experts mentioned issues that recurred, such as the prohibition of strikes in essential services, the imposition of compulsory conciliation procedures, and the prohibition on the right to use the strike weapon by certain workers’ organizations. It expressed the view that there was a “possibility” that such prohibitions and restrictions might “run counter to Article 8, paragraph 2” of Convention No. 87, according to 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 the Convention, and in particular “the freedom of action of trade union organisations in defence of their occupational interests”. The Committee of Experts noted that “it is therefore necessary that, in every case in which certain workers are prohibited from striking, adequate guarantees should be accorded to such workers in order fully to safeguard their interests”. In reaching this conclusion, the Committee of Experts pointed out that this principle had been “emphasised on numerous occasions by the Governing Body of the ILO on the recommendation of its ‘Committee on Freedom of Association’”. In 1959, the Conference Committee on the Application of Standards held 15 sittings, but in its eight-page report it reviewed the remarks of the Committee of Experts regarding the application of Convention No. 87 in only four paragraphs, commenting only in a general manner and with no reference at all to the right to strike (see ILO, 1960, pp. 674–675, paras 44–47). Similarly, the comments of the Committee of Experts regarding how Article 8, paragraph 2, of Convention No. 87 should be understood evoked no comment during the discussion on the report at the Conference (see ILO, 1960, pp. 708–709).

The Committee of Experts had stated for the first time that it understood Convention No. 87 to mean that workers, in defending their occupational interests, had the right to strike, and that where prohibitions on strikes existed, governments were to devise guarantees that would fully safeguard workers’ interests.⁵⁰ It also indicated that its understanding was the same as that of the

⁵⁰ Professor Novitz notes that the Committee on Freedom of Association can draw the attention of the Committee of Experts to Committee on Freedom of Association cases where a legislative problem exists – for instance, an overly broad definition of essential services, when the member State concerned has ratified Convention No. 87. The Committee of Experts will then follow the development of the situation during the regular examination of the reports submitted by the government concerned (Novitz, 2003, p. 199).

Committee on Freedom of Association. This provoked no comment – let alone disagreement – in 1959, in the Committee on the Application of Standards or the Conference, a situation that was to prevail for three decades.

1970s: Freedom of association and the resolution on civil liberties

An external event occasioned another review of the meaning of freedom of association in the 1970s. When the Universal Declaration of Human Rights was adopted in December 1948, it was contemplated that there would be more detailed instruments that would spell out more precisely the nature of the rights enumerated. In 1966, the UN General Assembly adopted the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The latter, in Article 8, para. 1(d), states that States Parties undertake to ensure the “right to strike, provided that it is exercised in conformity with the laws of the particular country”, and in Article 8, para. 3, provides that this should be interpreted in accordance with Convention No. 87.⁵¹

The adoption of the International Covenant on Economic, Social and Cultural Rights led to the establishment of the Committee on Trade Union Rights and their Relation to Civil Liberties, which was to report to the ILC at its 1970 session (ILO, 1970, p. 578). In particular, the Committee was to consider the inter-relationship between the rights expressed in Conventions Nos 87 and 98 and the civil liberties expressed in the two international covenants. In the discussion at the ILC, many members pointed out that trade union rights could not be effectively safeguarded unless civil liberties were recognized and protected. As this discussion occurred during the Cold War, differences of opinion among the delegates reflected East–West fault lines rather than Employer–Worker differences. There was general agreement that the ILC should express its views in a resolution that would strongly support ratification of the two covenants and renew the ILO’s commitment to freedom of association.

The Workers’ group submitted a draft resolution calling upon the Governing Body to instruct the Director-General to undertake further studies and prepare reports on law and practice in matters concerning freedom of association, with a view to the adoption of further instruments. Paragraph 10 of the draft resolution stated that “[p]articular attention should be given to specific

⁵¹ See Swepston (2013, p. 206), where he points out that the Covenant on Economic, Social and Cultural Rights contains a unique provision in international law, one linking a right expressed in a UN covenant to an ILO Convention. Article 8, para. 3, of the Covenant states that nothing in the article authorizes States Parties to Convention No. 87 “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”. Professor Ewing argues that Article 8, para. 3, strongly suggests that the right to strike is protected by ILO Convention No. 87, asking “[o]therwise, why would it be appropriate to tell states that it is not permissible to fall below ILO standards on the right to strike, if the right to strike is not protected by these ILO standards in the first place?” (Ewing, 2013, p. 146).

trade union rights, including ‘the right to strike’” (ibid., p. 582). The Employers’ group submitted a draft resolution which was similar in many respects, but which placed “special emphasis” on certain civil liberties, as defined in the Universal Declaration of Human Rights, “which are essential for the normal exercise of trade union rights”. Although “freedom of peaceful assembly” was on the Employers’ list, the right to strike was not. In the discussion, Worker members pointed out that although “certain civil liberties might be a necessary prerequisite for the exercise of trade union rights, not all civil liberties were in a positive relationship to trade union rights” (ibid., p. 583, para. 25). The Workers highlighted that the “right to property was a case in point”, recalling that the “whole history of workers’ struggles for better wages and working conditions was concerned with limiting this right” (ibid.). The Worker representatives took the position that individual and collective rights can at times conflict and that such conflicts should be resolved in favour of trade union rights. The Workers’ group concluded that it would “be a mistake for the ILO to develop a new ideology concerning the inter-relationship between trade union rights and civil liberties” (ibid.), preferring instead that trade union rights be strengthened. The Employers’ group did not contest this, but simply noted that in different countries there were different attitudes about the relationship of civil liberties and the effectiveness of trade union rights, and that these wide differences in national law and practice “were particularly apparent as regards the extent to which the relevant international instruments ... had been ratified and applied” (ibid., para. 26). The Employer representatives expressed support for Conventions Nos 87 and 98, noting the cases before the Committee on Freedom of Association, but also noting the evidence of how these Conventions were not applied in practice. The Employers’ group called for ratification of these Conventions and the UN Covenants.

It is significant that at no point in the discussion did an Employer representative raise the issue of the right to strike, let alone query its existence or meaning. In fact, when Worker members, debating the proposed Employers’ resolution, objected to the wording of a sub-clause on the ground that the reference to the protection of the property of organizations and their members might be understood to protect the property rights of employers and “thus restrict the right to strike,” the Employer members agreed to delete the words “and their members” (ibid., p. 587, para. 46). From this, one can only assume that the Employers accepted that there is a right to strike.

Overall, there were two main points in the discussion which sparked differences among the tripartite constituencies. The first was the viewpoint expressed by some Government representatives – resurrecting the issue of national sovereignty – that the right to strike could not be granted without limitation, with some stating that it should be subject to national law (ibid., p. 590, para. 65). The second was the reaction to any proposed phrase that might be perceived as limiting the right to strike. For instance, when the Employer members proposed that workers’ and employers’ organizations in the exercise of their rights, must respect the civil rights of others who might not

be members of their organizations, the Worker members opposed this, stating that the proposed text “might imperil rights already acquired by workers and might in particular be interpreted as limiting the right to strike” (ibid., p. 587, para. 47). The Worker members pointed out that deference to the property rights of the employer would restrict workers in the exercise of their rights. The Employers’ members withdrew this proposed amendment.

At the conclusion of the deliberations of the Committee on Trade Union Rights, the draft resolution that was approved was essentially the one that had been proposed by the Workers’ group (ibid., pp. 591–594). The Government member of France pinpointed the main point of tension in the discussion, when he observed that it was necessary “to distinguish between a general affirmation of a right, on which everyone might agree, and the conditions for exercising a right, on which there were bound to be considerable differences of opinion” (ibid., p. 590, para. 66).

This 1970 resolution reflected the general sentiment in the Conference in this period. For instance, the Conference in 1972 considered the situation in Portugal’s African colonies with regard to the exercise of freedom of association. The Conference adopted a resolution stating in the preamble: “Considering that the workers of Angola, Mozambique and Guinea (Bissau) are thereby denied basic trade union rights including, above all, the right to set up free and democratic trade unions and to join them, the right of assembly, the right to elect their officers freely and the right to strike.”⁵²

Freedom of association was the subject of the 1973 General Survey by the Committee of Experts. This would have presented an opportunity for the Conference to express any difference in view it might have with the Committee of Experts regarding the right to strike. However, while the General Survey did cover the right to strike, there was only one mention of the right to strike in the discussion. Notably, this mention indicates that the speaker believed that the right to strike was an aspect of freedom of association: the Employer Vice-Chairperson of the Committee on the Application of Standards commented that it was “somewhat of a pity” that in the Committee on the Application of Standards’ consideration of freedom of association, the Committee devoted too much time to difficulties “surrounding the right to organize and to strike in the public service”, adding that while the Employers’ group agreed that this was an important aspect of the subject, there were “more fundamental questions at issue, deserving detailed attention and discussion” (ILO, 1973, p. 703). The Employer Vice-Chairperson went on to stress the importance of the “basic right of freedom of association” and emphasized that the member State’s obligation did not change, regardless of the economic and social system.

The Reporter of the Committee on the Application of Standards similarly stressed that the tripartite ILO was founded on the principle of freedom

⁵² Resolution concerning the Policy of Colonial Oppression, Racial Discrimination and Violation of Trade Union Rights Pursued by Portugal in Angola, Mozambique and Guinea (Bissau), *Record of Proceedings*, International Labour Conference, 57th Session, Geneva, 1972, pp. 707–708. The vote was: 211 in favour, 0 against, with 84 abstentions.

of association, whereby workers and employers must have full freedom to establish and to join organizations of their own choice, “which in turn have full freedom to further and defend their interests”, and noted that these “principles of freedom of association ... are foundation parts of the growing body of internationally recognized fundamental human rights” (ibid., p. 702).

The 1980s: Freedom of association and the Cold War

In 1983, freedom of association was once again the subject of the General Survey by the Committee of Experts. The record of the 1983 session of the Committee on the Application of Standards at the ILC contains a section expressly titled “Right to strike”. The Workers’ group set forth its view that “without recognition of the right to strike, freedom of association did not exist” and added that “they welcomed the fact that the Committee of Experts had considered that this right constituted one of the essential means at the disposal of the workers for the defence and promotion of their interests” (ILO, 1983a, p. 31/13, para. 61).⁵³ The Workers’ comments are followed by Government comments, but there are no comments whatsoever by Employers noted in the record. Following this is a section on “Collective bargaining” where it is noted that the “Committee as a whole emphasized the close links which existed between freedom of association and collective bargaining” (ibid., p. 31/14, para. 63). This indicates that there was disagreement within the Committee on the Application of Standards regarding the exact meaning of freedom of association.

The 1983 General Survey (ILO, 1983b, Part 4B) was written during the period when martial law was still in effect in Poland, and all trade union activities were suspended.⁵⁴ At the 1983 session of the Committee on the Application of Standards, Soviet bloc countries criticized the Committee of Experts for its report on the application of Convention No. 87.⁵⁵ The Government member of Hungary asserted that “socialist and developing countries had become the main targets for criticism” and complained that the ILO supervisory machinery “refused to take into account the objective realities of the contemporary world, made tendentious and one-sided assessments of the legislation and practice of socialist and developing countries, and arbitrarily expanded its functions in an

⁵³ The Committee on the Application of Standards at that time was called the Committee on the Application of Conventions and Recommendations.

⁵⁴ Following the emergence of the trade union *Solidarnosc*, at the Gdansk Shipyard, union leader Lech Walesa was arrested. Martial law was imposed in December 1981 and remained in effect until July 1983.

⁵⁵ The 1983 Report of the Committee of Experts contained an Observation on Poland that noted that certain aspects of the 1982 Trade Union Act restricted workers’ rights under Convention No. 87, including several provisions relating to strikes (ILO, 1983b, Parts 1, 2 and 3, pp. 147–148). At the outset of the Committee’s report on Observations regarding Convention No. 87, members of the Committee from socialist countries dissociated themselves from the Committee’s Observations on Poland and the USSR, on the grounds that the Committee did not take into account varying circumstances. The Committee stated that while it noted differing political, social and economic circumstances, it applied the Convention uniformly in an objective manner (ibid., pp. 111–113).

effort to become a kind of supranational tribunal” (ILO, 1983a, p. 31/4, para. 14). In response, the “Workers’ and Employers’ members, as well as several Government members, insisted on the need to apply the standards concerning freedom of association universally, whatever the political, social or economic system” (ibid., p. 31/10, para. 44). The dissatisfaction the Soviet bloc governments felt at the views of the Committee of Experts with regard to events in Poland was expressed in another way. The Government member of Hungary, speaking on behalf of several Soviet bloc governments, stated that the Committee of Experts had been established in 1926 “for technical reasons and not as a judicial body” and complained that it now “sought to interpret Conventions and Recommendations, contrary to article 37 of the ILO Constitution” (ibid., p. 31/4, para. 14). The Employers’ and Workers’ groups stated that they disagreed with the criticism of the supervisory system and “expressed their confidence in the objectivity and effectiveness of that system” (ibid., para. 15).⁵⁶

1990s: Globalization and the ILO Declaration on Fundamental Principles and Rights at Work

Until the end of the Cold War, there was little debate about freedom of association and the right to strike. It appeared that the tripartite constituents had reached a political accommodation. It may be that the collapse of Communism in eastern and central Europe reduced the desire of some members of the ILC to defend freedom of association and the right to strike.⁵⁷ It may also be that increasing globalization intensified competitive pressures on employers seeking to remain in business and continue to be profitable at a time when manufacturing was shifting from the advanced market economies to low wage Asian countries. Almost immediately following the fall of the Berlin Wall in 1989, the Employers in the Committee on the Application of Standards pressed the point that the Committee of Experts was exceeding its mandate, alleging that the Experts were impermissibly interpreting Convention No. 87, although the discussion focused on the relative roles of the two bodies.⁵⁸ In 1994, on the occasion of the 75th anniversary of the ILO, the subject of the General Survey was, appropriately, freedom of association. At the 1994 session of the Committee on the Application of Standards, the discussion on the chapter of the General Survey on the right to strike was unusually exten-

⁵⁶ The spokespersons of these two groups indicated that they were speaking for the majority of their members as clearly this was not the view of the Employer and Worker members from the Soviet bloc countries.

⁵⁷ Alfred Wisskirchen, who was a member of the Committee on the Application of Standards from 1969 to 2004, has written that “[f]or obvious reasons, no issue was made of this and many other differences during the long years of the Cold War” (Wisskirchen, 2005, p. 288).

⁵⁸ See Swepston (2013, pp. 210–211) for a discussion of the 1990–91 interchanges between the Committee on the Application of Standards, the Committee of Experts and the Office. The Employers’ criticism of the Committee of Experts is detailed in an article by Alfred Wisskirchen, who was Vice-Chairperson of the Committee on the Application of Standards during 1983–2004 and as such, the Employers’ spokesperson (Wisskirchen, 2005).

sive, with the stance of the Employers in marked contrast to that of 1983, at the time of the last General Survey on freedom of association (ILO, 1994b, p. 25/31, paras 115–148). During the Committee on the Application of Standards' discussion of the 1994 General Survey, the Employers agreed with most of the Experts' comments but expressed reservations about certain issues, in particular the chapter on the right to strike (*ibid.*, p. 25/22, para. 85). For the first time, they directly challenged the view that a right to strike was implied in Convention No. 87 (*ibid.*, p. 25/31, para. 115). The Employers stressed that there was no explicit statement of a right to strike.⁵⁹ They stated, however, that they “did not challenge the principle of the freedom to strike and lock-out, but they absolutely could not accept” that the Committee of Experts had fashioned a right “so universal, explicit and detailed” where the Convention did not state such a right expressly (*ibid.*, p. 25/32, para. 116).

It was at the 1994 ILC that the Employers at the Committee on the Application of Standards also for the first time challenged the relationship of the Committee on the Application of Standards to the Committee of Experts (*ibid.*, pp. 25/7–9, paras 20–27). The Employers acknowledged that the Committee on the Application of Standards made regular use of the preparatory work of the Committee of Experts but stated that the Committee on the Application of Standards was not bound by the comments of the Experts, and observed that only the International Court of Justice could give binding interpretations. The Employers did agree with the Committee of Experts on one point, stating that the two committees are “complementary with no hierarchical relation between them” (*ibid.*, p. 25/8, para. 21). Perceiving that the Employers were seeking to diminish the authority of the Committee of Experts, Worker delegates criticized the Employers' argument, pointing out that the Employers' position differed from the position they had taken during the discussion on the Committee's working methods in 1979–80 and the discussion on the Director-General's Report on standards in 1984; the Workers “reflected on the reasons for such a change of attitude” (*ibid.*, p. 25/9, para. 25).

It was during this decade that the Conference took a major step when, in 1998, it adopted the Declaration of Fundamental Principles and Rights at Work. This came after a decade when the Employers' group often criticized the Organization for churning out a new Convention every year, even though the ratification rate for Conventions adopted since 1970 was very low. This led to an effort to identify those values that are at the heart of the ILO's mission, as a way of signalling the ILO's emphasis on renewing and deepening its commitment to those values. In addition, the Office embarked on a ratification campaign to emphasize to the member States the importance of committing to applying the rights embodied in these core Conventions.

⁵⁹ Interestingly, the Employers cited the comments of Government representatives in 1948 (ILO, 1994b, p. 25/32, para. 118). As noted earlier, Government representatives were focused on national sovereignty and wanted any right to strike to be subject to national law (ILO, 1948, p. 477). The Office itself had expressed a preference for a Convention that set out general principles and not detailed regulation.

Since the identified fundamental principles were already embodied in Conventions, it was decided that the device of a promotional declaration would be utilized to highlight their importance (Trebilcock, 2001, p. 106). In the 1998 Declaration, four fundamental principles were proclaimed, concerning freedom of association, the prohibition against forced labour, the elimination of child labour and non-discrimination in employment.

The 1998 Declaration extends the approach previously used with regard to freedom of association when the Committee on Freedom of Association was established; namely, that all member States of the ILO, by virtue of joining the Organization, are bound to respect the fundamental principles of ILO regardless of whether they have ratified a given Convention. To make this commitment meaningful, the Conference agreed to institute a new mechanism – that of “follow up” procedures – by which there would be a global report summarizing the reports by member States on their implementation of the principles, regardless of whether they had ratified the pertinent Conventions (Bellace, 2001, pp. 280–283). In the very long debate at the 1998 ILC on the proposed declaration,⁶⁰ there was no discussion at all on whether freedom of association should be included as a fundamental principle and right at work, or what it meant.⁶¹ It appears that on the fiftieth anniversary of the adoption of Convention No. 87, it was accepted that freedom of association would be included in the declaration, and would be listed first.

This does not, however, mean that the Employers’ group had retreated from its position. The issue continued to simmer. For instance, in 2002 at the Committee on the Application of Standards, the Employers observed that the “point of conflict was not over whether the Committee of Experts had to interpret law” because a determination of whether a member State had complied with its obligations under a Convention “cannot be done without applying legal standards”. Rather, the Employers identified the point of conflict as a disagreement over “whether these unavoidable interpretations were binding” (ILO, 2002, p. 28/13, para. 45).

2012: Disagreement within the Committee on the Application of Standards

The topic selected for the 2012 General Survey of the Committee of Experts was unusually broad: the eight fundamental Conventions. Part II of the General Survey covered freedom of association and collective bargaining (ILO, 2012b, pp. 17–100), which included a discussion of the right to strike (*ibid.*, pp. 46–65). The organization of the material on freedom of association, and much of the text,

⁶⁰ The discussion runs 111 pages (see ILO, 1998, pp. 20/1–111).

⁶¹ The only mention concerned the Spanish translation of “freedom of association” with the Employers’ group taking the view that “*libertad sindical*” did not cover the full English meaning, which includes both workers and employers. There followed some discussion of how “freedom of association” was translated into Spanish in certain documents, such as the ILO Constitution (ILO, 1998, pp. 20/65–66, paras 207–213).

was taken from the previous General Survey on this topic, in 1994. In a striking departure from its usual practice, the Committee of Experts highlighted in two text boxes the very different views of the Employers and the Workers regarding the right to strike (*ibid.*, pp. 47–48). The Employers' views had been set out in a July 2011 communication from the International Organisation of Employers (IOE), which recalled points that had been made earlier, and in particular during the 1994 discussion by the Committee on the Application of Standards of the 1994 General Survey, when the Employers had expressed their disagreement with the Committee of Experts; namely, that “neither the preparatory work for Convention No. 87, nor an interpretation based on the Vienna Convention on the Law of Treaties, offers a basis for developing, starting from the Convention, principles regulating in detail the right to strike” and that “the right to strike has no legal basis in the freedom of association Conventions” (*ibid.*, p. 47). The Committee of Experts noted the Employers' view that Convention No. 87 “at most contains a general right to strike, which nonetheless cannot be regulated in detail under the Convention” (*ibid.*).

At the beginning of the 2012 session of the Committee on the Application of Standards, the Employer Vice-Chairperson expressed the Employers' dissatisfaction with parts of the General Survey. The Employers' group took the position that a right to strike could not be interpreted from Convention No. 87 and, in a departure from past practice, refused merely to register an objection. Instead, the Employers refused to examine any case of serious non-compliance by a ratifying member State that involved Convention No. 87. The Workers' group refused to accept this condition and thus the two groups were unable to draw up a list of cases to examine. As a result, for the first time since 1927, the Committee on the Application of Standards examined no individual cases during the 2012 Conference.

The Employer Vice-Chairperson stated that the 2012 General Survey contained “highly contentious views on the right to strike within Convention No. 87” and he noted that 86 per cent of the 73 observations on Convention No. 87 in the report of the Committee of Experts dealt in part with the right to strike. The Employer Vice-Chairperson then set out the crux of their objection:

The Employers' position is that Convention No. 87 is silent on the right to strike because there was no agreement at the time of its negotiation to include it in the Convention and, in the view of the Employers, it is therefore not an issue upon which the experts should express any opinion.

...

Let me be clear. The Employers' group acknowledges that a right to strike exists at the national level in many jurisdictions, but we fundamentally do not recognize that the meaning of a right to strike should be the one being developed by the experts. The determinative body to decide any rules for a right to strike recognized by the ILO is the Conference. Otherwise it is up to the national legal systems to do so (ILO, 2012a, Record 27, pp. 27/3 and 27/4).⁶²

⁶² This quote is from the end of the session of the Committee on the Application of Standards; the same point was also made at the beginning of the session (*ibid.*, Record 19, Part I/35, para. 147).

The Employers also disagreed with the contention that the Committee of Experts derived their understanding of the right to strike from the tripartite Committee on Freedom of Association, arguing that the Committee on Freedom of Association “creates non-binding recommendations on a case-by-case basis, based on constitutional obligations regarding freedom of association, not the freedom of association Conventions” (*ibid.*, p. 27/4).

In light of the Employers’ firm views, the failure to reach any accommodation at the 2012 Committee on the Application of Standards session was to be expected. Although the Employers had voiced some of these objections for 20 years, what was surprising was how the Employers viewed the internal relationships within the ILO. If one accepts this view, the thousands of cases decided by the Committee on Freedom of Association over 60 years have produced no coherent approach to freedom of association that can be relied upon by other parts of the Organization; similarly, the Committee of Experts, when applying Convention No. 87, cannot be guided by the Committee on Freedom of Association’s understanding of the constitutional guarantee of freedom of association.⁶³ Moreover, although industrial relations scholars agree that the ability of workers to organize and to defend their occupational interests usually rests upon their ability to apply economic pressure, and thus the right to strike and engage in other industrial action is integral to the right of freedom of association, the Employers believe that the Committee of Experts can express no “opinion” on this when examining whether a member State has respected its obligations under Convention No. 87. The Employers take the position that since the Conference has not agreed to a precise statement of the right to strike, the matter is left to national law. Thus, from this perspective, it is unclear exactly what the Committee of Experts is expected to examine under Convention No. 87, since a member State could enact any law regulating industrial action regardless of how the law might undercut the ability of workers to organize and engage effectively in collective bargaining.

It was the firm stance the Employers took to support their views that was unexpected, since their views were already known. As the Worker Vice-Chairperson characterized the discussion, the Workers were “brutally confronted with the fact that the Employers’ group was challenging the mandate of the experts, particularly with regard to their interpretation both of Convention No. 87 and of the right to strike” (ILO, 2012a, Record 27, p. 27/6). Discussing the impasse at the Committee on the Application of Standards session, the Worker Vice-Chairperson pointed out that “as far as the Employers were concerned, the experts’ interpretation of the right to strike was totally unacceptable because it did not fit in with the Employers’ viewpoint” (*ibid.*, p. 27/7).

The Employers’ strongly expressed position may have been prompted by the perceived need to send a message to an audience outside the ILO. The

⁶³ Ewing comments that it is “eccentric” to regard the right to strike as an “essential feature of the legal principle of freedom of association” set forth in the ILO Constitution, but not in the Convention on the same subject, especially when the preamble to Convention No. 87 specifically references the guarantee in the Constitution (Ewing, 2013, p. 164).

Employer Vice-Chairperson expressed the view that the Committee on the Application of Standards was “the apex of the supervisory system” and opined that “outside of the ILO, this important distinction is either misunderstood or forgotten” (ibid., p. 27/3). He complained that the General Surveys are “seen as being the position of the Organization which they are not” and commented that it would be “damaging” if the views of the Committee of Experts were taken as the views of the ILO in other United Nations or international forums (ibid.). In this regard, the Employer Vice-Chairperson stated that the Employers were conscious that the fundamental ILO Conventions are “embedded into” the UN Global Compact, the UN Human Rights Council’s Ruggie Principles,⁶⁴ and other prominent guidelines for multinational enterprises (ILO 2012a, Record 27, p. 27/3). The Employer Vice-Chairperson implied that other entities that are influential actors in the human rights arena, and can bring pressure on employers to adhere to certain standards, were consulting the reports of the Committee of Experts and deeming these to be informative statements on the meaning of the right to strike.

The role of the supervisory system

At the 2012 session of the Committee on the Application of Standards, the Employer members made an unexpected observation. They recalled that “overall responsibility for the supervision of international labour standards lay with the International Labour Conference (ILC), through [the] Committee [on the Application of Standards]”, and that 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” (ILO, 2012a, Record 19, Part I/5, para. 12). The Employers’ group added that 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” (ibid.). This was an unusual view of the place of the supervisory system at the ILO which, admittedly, is itself quite unusual.

Two committees to advise the Conference on the application of standards

Rather than a hierarchical arrangement, with the Committee on the Application of Standards above the Committee of Experts, a reading of the Governing Body’s minutes of 1926 reveals that the Governing Body instead saw the two committees as separate and distinct, with no specific inter-relationship. At

⁶⁴ The Guiding Principles on business and human rights are found in the Annex to the March 2011 report to the UN Human Rights Council, authored by Professor John Ruggie (United Nations, 2011, pp. 6–27). Principle II.A.12 expressly states that businesses are to respect internationally recognized human rights, including “the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work” (http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

the January 1926 session of the Governing Body, the British Government had put forward the idea that a special committee should be set up to examine the reports submitted on ratified Conventions, since these reports demanded careful examination. This met with widespread approval, and the Governing Body set up a committee to draft a proposal (ILO, 1926b).⁶⁵ The drafting committee's report, presented to the Conference in June 1926, outlined the thinking behind the proposal, and detailed how the committee's discussions led to a proposal which in some respects was significantly different from the original suggestion. The committee's proposal was accepted by the Conference.

It was evident that as the number of Conventions and ratifications increased, the Conference itself was finding it difficult to undertake the time-consuming and technical examination, which required juridical knowledge. But at the same time, the drafting committee recognized that it was "of the utmost importance" that the reports be carefully examined or risk losing the value of such an examination; namely, "to throw light upon the practical value of the Conventions themselves and to further their general ratification" (*ibid.*, p. 393). It was also observed that the Conference and its committees were "essentially deliberative and political bodies", not well suited for technical, juridical work (*ibid.*, p. 396). After considering the functions of the three component parts of the ILO (the Conference, the Governing Body and the Director) as set forth in the Treaty provisions, the committee noted that Article 408 of the Treaty of Versailles imposed the duty upon the Conference itself to review the reports, but the Conference also noted that the Director was charged with preparatory work. The committee reasoned that it could comply with the stipulated division of powers by inserting an additional step: have a committee of experts undertake preparatory work and forward its report to the Director. It concluded that a committee of independent, impartial experts, who were knowledgeable in labour legislation and labour relations, could "be called upon to perform, as a first step in preparation for the work of the Conference, a purely technical task, namely, the impartial and objective examination of the reports" (*ibid.*).

There was some concern that this proposed committee of experts might encroach on the rights of other bodies. The drafting committee stressed that the "Committee of experts would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Conventions", nor could it "encroach upon the functions of the Commissions of Enquiry and of the Permanent Court of International Justice" (*ibid.*, p. 405).

Having determined that a specialist, independent Committee of Experts would prove useful to the Conference in discharging its responsibilities, the

⁶⁵ The history of the deliberations and the proposals is found in Appendix V, "Article 408 of the Treaty of Versailles", of the Record of the Proceedings of the ILC (ILO, 1926b, pp. 393–408). The report in the Record has the heading "Suggestions submitted by the Governing Body regarding the appointment by the Conference of a special Committee to examine the reports rendered under Article 408 of the Treaty of Versailles". It is signed by Humbert Wolfe, Chairperson and Reporter of the Committee on Article 408. When the report was presented to the conference, H. Wolfe, the Government representative of the British Empire, noted that the Committee vote was 23 votes to six, but gave no indication of whether any one group of the constituents was opposed (*ibid.*, p. 238).

drafting committee considered how the Conference would deal with the reports of this new committee. Here, the drafting committee's proposal deviated somewhat from the Governing Body's resolution. The drafting committee concluded that the Conference would preserve "its proper political functions, but ... would be advised as to the facts by this technical expert Committee", and added that "it would, either directly, or through one of its own Committees, decide upon its attitude and upon what appropriate action it might take or indicate" (ibid., p. 398). This change led the drafting committee to consider whether the Conference itself should deal with the detailed report from the Committee of Experts. The drafting committee noted the suggestion that "the Director should submit the report of this Committee of experts to the Conference together with his summary of the annual reports, and that a Committee of the Conference should be appointed each year to consider this technical report and the summary" (ibid., p. 405).

The idea of appointing two committees, rather than one as originally proposed by the Governing Body, led members of the drafting committee to express various concerns. The drafting committee concluded that it "seemed desirable that the Director should be aided in a task which must inevitably be at times difficult and delicate, by a completely impartial body" (ibid., p. 406). A motion that the Conference should likewise be aided in its task of considering the summary of the reports of the member States by appointing a committee of the Conference met with overwhelming support in the drafting committee (ibid., p. 407). The Conference accepted the report of the drafting committee, and established two committees, the Committee of Experts and the Committee on the Application of Standards.

The Committee of Experts was to do one thing, and the Committee on the Application of Standards another, which raised the possibility that the Committee on the Application of Standards and the Committee of Experts might view a government's record quite differently, and both views would go to the ILC. Although this might seem strange and troublesome to those accustomed to thinking of a judicial system with appellate levels, it does not pose an insurmountable problem within the ILO. The supervisory system is not the equivalent of a judicial system. The ILC is more akin to a political body that deliberates, and in 1926 it devised an arrangement whereby it would take inputs from different sources, one reflecting the tripartite nature of the Organization and the other reflecting the more formal, precise standard-setting aspect of the Organization.

Two committees considering respect for freedom of association

The Employer members at the Committee on the Application of Standards in 2012 took umbrage at the views of the Committee of Experts with regard to the right to strike, yet they did not mention, let alone criticize, the Governing Body's Committee on Freedom of Association. This is a curious omission, since

a reading of the reports of the Committee of Experts and the Committee on Freedom of Association since 1952 reveals that the Committee on Freedom of Association has taken the lead role in delineating the meaning of the right to strike. This is to be expected since the Committee on Freedom of Association decides an average of 60 cases a year, and these cases involve specific factual issues. Rather than discussing in general terms what freedom of association means, or what the parameters of the right to strike are, the Committee on Freedom of Association is confronted with the task of deciding a specific case. Moreover, the Committee on Freedom of Association is a tripartite committee of the Governing Body, with members having practical experience of labour issues. Thus, it is particularly well placed to grapple with factual issues of a specific complaint. In contrast, the Committee of Experts is a committee of independent, impartial jurists who consider whether a member State has complied with its obligations as a signatory to Conventions No. 87 or No. 98. Although it is possible that an issue related to freedom of association might first come before the Committee of Experts, most often an issue arises for the first time in a particular case before the Committee on Freedom of Association.

Both the Committee on Freedom of Association and the Committee of Experts consider what the other has said, in large part to gain insight into the meaning of the Conventions. For example, in addition to being aware of the Committee on Freedom of Association's decisions as published in the *Digest*,⁶⁶ the Committee of Experts, when drafting an observation or direct request to the government of a member State regarding Conventions Nos 87 and 98, does consider carefully what the Committee on Freedom of Association has said about events in that country in light of a particular complaint that has been brought before the Committee on Freedom of Association. Similarly, the Committee on Freedom of Association will keep abreast of the views of the Committee of Experts, as expressed in relevant General Surveys⁶⁷ and its statements in observations and direct requests.

The Committee on Freedom of Association and the Committee of Experts also consider what the other has said because of a felt need to maintain coherence in the supervisory system of the ILO. Addressing this objective, the Committee of Experts has observed that while the two committees "differ in terms of their composition, the nature of their functions and their procedure, they apply the same principles, which are universal and cannot be applied selectively" (ILO, 1994a, p. 8, para. 20). Moreover, the Committee of Experts has recognized that, because of the sheer volume of complaints the Committee on Freedom of Association has examined, the Committee on Freedom of As-

⁶⁶ The decisions of the Committee on Freedom of Association are published in the *Official Bulletin* following each meeting of the Committee. A summary of the decisions taken by the Committee have been published in what is called "the Digest" (see, for example, ILO, 2006).

⁶⁷ There have been six General Surveys devoted entirely to freedom of association and collective bargaining: in 1956, 1957, 1959, 1973, 1983 and 1994. In 2012, the topic was included in a General Survey that covered all eight fundamental Conventions. The Governing Body selects the topic for each year's General Survey.

sociation “has established a series of principles which constitutes a veritable international law on freedom of association” (*ibid.*, para. 19).

Notwithstanding this, a fundamental disagreement about the functioning of the supervisory system can occur. At the 2012 session of the Committee on the Application of Standards, the Employer members claimed that “tripartite ownership of ILO standards supervision had been lost sight of” because “the role of ILO tripartite constituents had been reduced to providing information and giving more visibility to the supervisory activities of the Committee of Experts and the Office” (ILO, 2012a, Record 19, Part I/13, para. 48). In expressing their view in this fashion, the Employer members apparently perceive that there is a *de facto* hierarchy in the supervisory system, and that if one part is acknowledged as useful by others for the work it produces, then this somehow implies that another part has been downgraded or “replaced” (*ibid.*, Record 19, Part I/17, para. 61). There is also the implication that the visibility of the Committee of Experts outside the ILO somehow results in the tripartite constituents having less “ownership” of standards. Another interpretation might simply be that at times some people may want to understand what a Convention means by reading the observations of a technical supervisory body but at other times they may wish to read the discussion of a tripartite committee about the meaning of the same Convention.

A more troubling implication of the comments made by the Employer members at the 2012 session of the Committee on the Application of Standards is that the tripartite constituents can decide what a Convention means, ILO standards supervision should be at their service, and “the outcome of ILO standards supervision should reflect their needs” (*ibid.*, para. 48). This is troubling for several reasons. First, it implies that the supervisory bodies should consider what the tripartite constituents want the result to be, rather than what a Convention dictates. Secondly, it implies that whatever the drafters of a Convention thought it meant, and whatever was understood by those who voted to adopt the Convention and subsequently by those who over the years have ratified the Convention, must give way to what the tripartite constituents of the day say the Convention means. This would inject great uncertainty into the entire ILO system, with governments wondering whether a Convention they ratified decades ago still means what everyone thought it meant at the time it was adopted. Moreover, fundamental Conventions are most likely to express timeless values, in contrast to technical Conventions, which may relate to specific working methods and scientific knowledge regarding safety and health at a given point in time.

In 2012, the Employer members of the Committee on the Application of Standards also expressed the view that Conventions are “politically negotiated texts” (*ibid.*, para. 49), which is undoubtedly correct. One of the main reasons for the durability of these standards in a tripartite organization is the fact that they were politically negotiated rather than imposed on adamantly opposed members. This is quite different from Conventions whose meaning is subjected to a supervisory system that is sensitive to the political views of one or more of the tripartite constituents at a given time.

The twenty-first century: Freedom of association in a new environment

It is a fact that in an organization nearing its centenary, some Conventions are outdated. However, there are methods for dealing with this when a consensus is reached; a Convention can be withdrawn, deemed obsolete, or revised. These actions, however, require deliberate, formal and transparent action based on detailed study, and are subject to robust debate. Rather than having supervisory bodies such as the Committee of Experts hold back from fully applying Conventions because they perceive that a certain view is unacceptable to one or more of the tripartite constituents, it is surely preferable for those who seek a modification of a Convention to bring this to the Conference for discussion.

To do otherwise would also place an unwarranted expectation on the Committee of Experts. The Committee of Experts is not empowered to interpret a Convention to mean something that has no basis in the Convention itself.⁶⁸ Rather, the Committee is limited to conducting an examination to determine if a member State has applied a ratified Convention. A recent observation of the Committee involving the right to strike illustrates this point. In its 2010 Observation on the application of Convention No. 87 addressed to the United Kingdom, the Committee considered a particular incident that was alleged by a UK union to infringe freedom of association. In this dispute, the employer, British Airways, had engaged in negotiations with the British Airline Pilots Association (BALPA) about the terms of employment of its members working out of London Heathrow. The employer decided to establish a fully owned subsidiary company, and to have that company use an airport in Paris, France, from where the company would be able to fly customers from Europe to North American locations. The union, fearing loss of work for its members at Heathrow to pilots at the new location, threatened to strike. The employer stated that if the union did strike, the employer would seek to enjoin the strike on the ground that it would win a lawsuit based on the law the UK court would apply.⁶⁹ The employer also stated that as any disruption at London Heathrow would cause substantial economic loss, it would ask for damages of at least £100 million per day. Facing bankruptcy if it went on strike for one day, the union decided not to strike.⁷⁰ The Committee of Experts was of the opinion that the United Kingdom had infringed freedom of association

⁶⁸ At the 2012 session of the Committee on the Application of Standards, the Employers took the position that neither the preparatory work for Convention No. 87 nor an interpretation based on the Vienna Convention on the Law of Treaties offers a basis for the Committee of Experts to develop a detailed right to strike. This article does not examine the question in light of the provisions and jurisprudence arising under the Vienna Convention. For a discussion, see Bruun and Lörcher (2011, pp. 358–361).

⁶⁹ The employer based its argument on recent cases of the Court of Justice of the European Union regarding the right to freedom of establishment and the freedom to provide services. For a discussion, see Papadopoulos and Roumpakis (2013, p. 264).

⁷⁰ The reasons for this relate to the practicalities of litigating this issue through the British courts. For a discussion, see Ewing and Hendy (2010, pp. 44–46).

by failing to provide sufficient legal protection for workers acting in defence of their occupational interests (ILO, 2010, pp. 208–209).

What is interesting about this 2010 Observation is whether the Committee of Experts somehow pushed the boundaries of the understanding of the right to strike under Convention No. 87. Analysing this dispute reveals that it was a traditional industrial dispute, a threatened primary strike over work preservation. The facts are reminiscent of the 1806 *Philadelphia Cordwainers* case; namely, workers who wanted to maintain their wage rates and retain the work at their location threatened to withhold their labour in order to place economic pressure on the employer not to move the work to a location where labour would be cheaper. This dispute also echoed the 1901 *Taff Vale* case with the damages assessed bankrupting the union and thus being seen as undermining freedom of association. But there was a new factor in this dispute, one that had not cropped up in any freedom of association case since 1948. The location the work was to move to was not within the United Kingdom. Rather, it was elsewhere in the European Union, and the British Government responded that any adverse effect would be the result of EU law guaranteeing freedom of establishment and freedom of services, which it was bound to apply. This may be a correct reading of EU law, but the reasoning of the Committee of Experts did not change, because to do otherwise would have meant exceeding its mandate. Nothing in Convention No. 87, the ILO Constitution or ILC Records of Proceedings exempts a member State from its obligation to apply ratified Conventions in cases where that obligation conflicts with the member State's obligations to a regional, supranational body. Whether the Committee of Experts should take into account a member State's obligation to apply a ruling of a supranational court,⁷¹ and how it should weigh a member State's conflicting obligations, are questions for the ILC to decide.

The Committee of Experts' 2010 Observation regarding the United Kingdom does highlight the fact that as the ILO approaches its centenary, Conventions that express fundamental principles will be applied in a new environment that was not envisioned in 1919 or 1948. Accordingly, the tripartite constituents may find it useful, if not necessary, to arrive at a consensus on how existing understandings should be modified. This could engender a new debate on national sovereignty in an era of regional and trading bloc organizations, and even on the autonomy of the ILO in the face of other UN instruments such as the UN Global Compact or the Ruggie Principles.

Such debates would not be new, and in the past, the tripartite constituents did reach agreement, albeit sometimes only after a lengthy period. Perhaps one of the most insightful comments regarding this process in the context of a

⁷¹ Most recently this question has been considered in the context of cases decided by the Court of Justice of the European Union. The European Convention on Human Rights (of the Council of Europe) in Article 11(1) guarantees all persons freedom of association "including the right to form and to join trade unions for the protection of his interests". For a discussion of the jurisprudence of the European Court of Human Rights with regard to workers' rights, and its possible impact on the Court of Justice of the European Union, see Dorsemont, Lörcher and Schömann (2013).

discussion on freedom of association was made at the 1948 Conference, when the text of Convention No. 87 was presented for adoption. The Employer Reporter of the drafting committee, Louis Cornil, recalled a simile that Albert Thomas, the first Director of the ILO, had used to describe the ILO: the simile of the train, where the Director was the train driver, the Employers were the brakemen wanting to slow down the train and the Workers were the firemen wanting the train to go faster. Using this simile, Cornil recalled the rough start on the journey to agreeing on an instrument guaranteeing freedom of association:

The brakemen, apprehensive of the unknown, sometimes applied their brakes too hard. On the other hand, the firemen and drivers, over-exalted by the thrill of getting under way, ignored the most obvious obstructions and would have been quite happy to shake off the brakemen. Little by little, each one adapted himself to his own role and learned to appreciate and respect the role of others. The brakemen acquired a taste for travelling, the firemen realised the necessity of controlling the pressure, and the drivers concentrated on the job of keeping the train on the rails. A spirit of team work came into being, and all the team, however contradictory their respective activities might seem, kept the common objective before them (ILO, 1948, p. 231).

Cornil then ventured that opinions on the progress the ILO had made with regard to freedom of association were still very varied. He concluded by observing:

There will always be some who reproach the brakemen for over-caution and the firemen will threaten to blow up the boiler in revenge. These differences are inevitable and even necessary. They are not dangerous so long as everyone is determined to make the journey. Here, it seems to me, is the surest guarantee of the future of our Organisation. The common determination to make the journey together has never been more clearly shown than when we drafted the text of the proposed Convention on freedom of association (*ibid.*).

Since 1919, freedom of association has been viewed as including the right of workers to act in defence of their occupational interests, and in 1948 this view was explicitly set forth in Convention No. 87. Over the past 60 years, this right has been expressly referred to as “the right to strike” by the Committee on Freedom of Association, a recognition that continues to this day.⁷² As the ILO nears the centenary of its founding, the tripartite constituents have recognized that freedom of association is a fundamental principle and have enshrined it in a Convention. They have erected supervisory machinery to ensure

⁷² For instance, at its November 2011 session, the Governing Body reviewed the 362nd Report of the Committee on Freedom of Association. Among the cases reviewed was the Committee on Freedom of Association's interim report on Case No. 2723, *Fiji*, wherein the Committee on Freedom of Association notes its concern regarding a decree that contains a very expansive definition of “essential national industries” and which provides for substantial civil and penal sanctions for those seeking to influence the outcome of negotiations. In its conclusions the Committee on Freedom of Association observed: “By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded. While the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service ‘essential’, and thus the right to strike should be maintained” (ILO, 2011, para. 842(vii)).

that workers' and employers' rights are respected. They have crafted a committee system so that the Conference is not only informed by the Committee of Experts but also advised by the Committee on the Application of Standards with regard to complaints of infringement of freedom of association.

It is likely that these same committees will continue to grapple with the tensions regarding the delimitation of the contours of the right to strike, which have been historically present – namely, the different views among the tripartite constituents about national sovereignty and the ILO's autonomy.⁷³ In the twenty-first century, the greater challenge to the ILO's ability to set an international standard may arise not from national sovereignty but from regional, supranational organizations. With the increasing number of players in the human rights space, the challenge to the ILO's autonomy and primacy in defining freedom of association may arise not from UN bodies but from the multiple entities, both governmental and non-governmental, that seek to impose their notion of freedom of association on employers doing business globally. The question will be whether the ILO will be able, on its own, to determine the meaning of rights embodied in the ILO Constitution and Conventions, and whether its determination will be accepted worldwide by relevant actors. These challenges will spark debate as to how the ILO should respond, and there will be differences of opinion. As Cornil, the Employers' spokesperson, said in 1948, differences among the tripartite constituents are necessary, and they are not dangerous, so long as everyone is determined to reach the goal of ensuring protection of the right of freedom of association.

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⁷³ The term "autonomy" is used here in the sense historically used at the ILO; that is, the ability of the Organization to determine, on its own, the meaning of rights embodied in the Constitution and in Conventions.

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