

International Labour Standards: The Case of Freedom to Strike

By

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A study prepared for the International Labour Office



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Table of Contents

INTRODUCTION

1. Subject of the Study.....	1
2. Framework of the Study.....	3
2.1 Part I - Freedom to Strike as a Socio-economic Claim.....	3
2.2 Part II - The Right to Strike as a Positive Right Under International Law.....	4
2.3 Part III - The Scope and Extent of the Right to Strike.....	7
3. Contributions of the Study.....	7
3.1 Legal Regulation of Labour Relations.....	7
3.2 Changing Philosophy.....	8
3.3 The Judicial Hostility.....	10
3.4 Social Developments in Labour Relations.....	11

PART I. FREEDOM TO STRIKE AS A SOCIOECONOMIC CLAIM 13

1. The Argument.....	13
2. The Practicability Objection.....	16
2.1 The Simple and Negative Legislation Requirement.....	16
2.2 Freedom to Strike and the Simple Legislation Aspect.....	17
2.3 The Legislation Alone Requirement.....	18
2.4 Freedom to Strike and the Legislation Alone Aspect ...	19
2.5 The Definiteness Requirement.....	20
2.6 Freedom to Strike and the Definiteness Aspect.....	20
2.7 Summing up the Practicability Objection.....	21
3. The Justification Objection.....	21
3.1 The Objection.....	21
3.2 Freedom to Strike and the Paramount Importance Objection.....	23
3.2.1 Introduction.....	23
3.2.2 The Completing Rights Principle.....	23
3.2.3 Freedom to Strike and the Freedom from Slavery and Forced Labour Argument.....	24
3.2.4 Freedom to Strike and the Freedom of Association Argument.....	25

3.3 Summing up the Justification Objection	29
4. The Universality Objection	29
4.1 The Objection	29
4.2 Freedom to Strike and the Universality Objection	30
4.2.1 The 'Held by All Men' Aspect	30
4.2.2 The 'Held Against the World at Large' Aspect	31
4.3 Summing up the Universality Objection	33
 PART II. THE RIGHT TO STRIKE AS A POSITIVE RIGHT UNDER INTERNATIONAL LAW	35
 CHAPTER 1. FREEDOM TO STRIKE AS AN IMPLICIT LABOUR STANDARD	35
1. The Argument	35
2. The Legislative History	36
2.1 Introduction	36
2.2 The International Labour Conference, 30th Session, 1947	37
2.3 The International Labour Conference, 31st Session, 1948	39
2.4 The International Labour Conference, 32nd Session, 1949	42
2.5 The International Labour Conference, 33rd Session, 1950	44
2.6 The International Labour Conference, 34th Session, 1951	45
2.7 Concluding Remarks Related to the Legislative History	45
3. The Freedom of Association Committee (CFA)	46
3.1 Historical Background	48
3.2 Structure and Procedure	51
3.3 Competence	54
3.4 The Status of the Recommendations	57
3.4.1 Procedure at the Complaint Stage	57
3.4.2 Procedure at the Compliance Stage	61
3.5 Summing up the CFA procedure	64
4. Proposition A Related to Conventions Nos. 87 and 98 as the Source of an Implicit International Labour Standard	64
5. Proposition B Related to the ILO Constitution as the Source of an Implicit International Labour Standard	66
6. Summing up Propositions A and B	70
 CHAPTER 2. FREEDOM TO STRIKE AS AN EXPLICIT RIGHT UNDER INTERNATIONAL LAW	71
1. The Argument	71
2. The Historical Background	71
3. Legislative History	72

3.1 Legislative History Concerning the Commission on Human Rights	73
3.2 Legislative History Concerning the Third Committee	79
4. The Scope	83
4.1 Ratification and Accession	83
4.2 Derogation and Limitation	85
4.3 Implementation Procedures	89
5. Summing up Proposition C	92
 PART III. THE SCOPE AND EXTENT OF THE RIGHT TO STRIKE	93
1. Objectives of a Strike	93
1.1 Introduction	93
1.2 Economic and Social Objectives	94
1.3 Political Objectives	96
2. General Prohibition of Strikes and the Suspension of the Right to Strike	99
2.1 General Prohibition of Strikes	99
2.2 Temporary Suspension of the Right to Strike	101
3. Restrictions of the Right to Strike	103
3.1 Introduction	103
3.2 Reasonableness of the Restrictions	103
3.3 Compensatory Procedures	104
4. Public Service	106
5. Essential Services	109
6. Minimum Service and Restrictions Designed to Assure the Safety of the Undertaking	114
7. Requisitioning and Mobilisation	116
8. Restrictions Relating to the Methods Used	116
9. Procedural Restrictions	118
10. Dismissals, Penal and Other Sanctions	121
10.1 Dismissals	121
10.2 Reinstatement	123
10.3 Penal Sanctions	124
11. Police and Military Intervention	126
12. Strike Breaking	126
INDEX	129

Introduction

1. Subject of the Study

The phenomenon of the strike is one of the crucial problems of contemporary industrial relations because it lies at the very core of the legal regulation of industrial conflict. The strike is basic to the distribution of power between capital and labour, and also forms part of the problem of the autonomy of groups and their relationship to the State. The concept of the strike relates to issues which lie at the heart of the ideological conflicts of industrial relations. It gives rise to practical as well as to theoretical questions. Social and economic crises in virtually every part of the world, changes in the composition of the workforce, the integration of increasingly complex technologies, the expanding legal regulation of labour relations, changing attitudes towards trade unionism, and changes in the social significance of concerted action, collectively challenge the scope and extent of strikes.

Since the late 1940s, when the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), followed by the Right to Organise and Collective Bargaining Convention, 1949 (No. 98),¹ were adopted by the ILO, a basic consensus emerged, albeit slowly and somewhat grudgingly. The social partners' freedom of recourse to concerted activity gained recognition as an essential element of industrial relations without which freedom of association could not exist. Freedom of association is a fundamental human right, having been recognised as such by the ILO as early as 1919 in its Constitution, and later reaffirmed by the Declaration of Philadelphia. Hence, the freedom to strike has emerged as an essential tool for the implementation of such a basic freedom as freedom of association.

The freedom to strike, being a hallmark of any pluralist society, should in principle be applicable to all countries, developed as well as developing, and should not differ with regard to geography or history, culture or ideology. However, most socialist governments maintain that, due to their particular economic system, while there is a right to strike, trade unions in their countries have no need to resort to direct action in order to defend their members' interest.²

The freedom to strike has been recognised in numerous legal systems. A

1. Conventions Nos. 87 and 98.

2. In this context see ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 203.

review of the pertinent legislation in various countries reveals that some form of the strike is universally acknowledged, even if the legal framework in which such recognition is accorded, the particular acceptable objectives, and the nature, scope and extent of the strike, differ from country to country. Sometimes a basic right is explicitly provided for in a constitution or by statute, while in other systems, it has been established indirectly by case law as a freedom only. Further, the freedom to strike is variously restricted in scope and severity, on the one hand, and protected against certain claims by specific legal immunities on the other.

Until now, issues concerning the scope or extent of strikes have been raised in their national context. Thus, a question was typically posed with respect to a particular country, and in the light of its specific legal system. The analysis offered in such circumstances addressed neither a theoretical question nor an issue of international applications but rather the legal consideration obtaining in a given system - for example, whether United States, American law recognises secondary boycotts, or whether sympathy strikes are banned in the United Kingdom. Although the basic freedom to strike is guaranteed in some form by a considerable number of legal systems, to date no comprehensive analysis of the substance of the freedom to strike exists. Thus, an examination of the principles relating to strikes from an inclusive international vantage point is appropriate.

The point of departure for this book is whether viewing the freedom to strike internationally can yield an international labour standard as there is no explicit provision in this regard in any of the international labour Conventions and Recommendations that guarantees freedom to strike,³ nor indeed have commentators directed any sustained attention to the question whether such an international labour standard exists from an international perspective.⁴

Even if the existence of an international labour standard is accepted, its precise definition and the extent of its protection still need to be ascertained. Hence, it is appropriate that freedom to strike as an international labour standard be systematically explored.

We recognise that the counterpart of the workers' freedom to strike is the employers' freedom of lockout. While the freedom of lockout is certainly no less important than the freedom to strike, the examination of the scope

3. The right to strike was mentioned in ILO instruments in different cases but only dealing with specific instances. For example, the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), provides that it may not be interpreted as limiting in any way whatsoever, the right to strike, and the Employment Service Recommendation, 1948 (No. 83), provides that the employment service should observe strict neutrality in the case of employment available in an establishment where there is a labour dispute affecting such employment.
4. In Diana Vincent-Davis, 'Human rights law: A research guide to the literature - Part III: The International Labour Organisation and human rights', *New York University Journal of International Law and Politics*, Vol. 15, p. 211(1982), only one article is mentioned in relation to freedom to strike. The same can be learned from Colombia Human Rights Institute: *Human rights: A topical bibliography*, which was issued in 1984. This article is R. Ben-Israel: 'Is the right to strike a collective human right?' in *Israel Year Book of Human Rights*, Vol. 11, p. 195 (1981). There is one chapter dealing with freedom to strike in: C. W. Jenks, *The international protection of trade union freedom* (London, Stevens & Sons, 1957).

and extent of such a principle is not feasible in the context of this study. Still, perhaps this study will encourage scholars to pursue this important subject.

2. Framework of the Study

The analysis of the potential international perception of the freedom to strike will be dealt with in three parts, each of them focused upon a different aspect of this concept.

2.1 PART I - FREEDOM TO STRIKE AS A SOCIO-ECONOMIC CLAIM

From a theoretical and ideological viewpoint, freedom to strike should be classified among the socio-economic goals. Such a classification requires mention of the discussion concerning the absolute nature of socio-economic claims, which arose in the 1950s as a result of their recognition as human rights within Articles 22-27 of the Universal Declaration of Human Rights.⁵ Notwithstanding the fact that socio-economic human rights are nowadays already *lex lata*,⁶ it seems still interesting to analyse within Part I of this study the various theories and objections, voiced during the 1950s, to the inclusion of socio-economic claims within the general framework of human rights and their relevance to the recognition of the freedom to strike as a human right.

It should be remembered that the extension of the scope of human rights to include socio-economic claims as an additional layer of human rights was then a novelty which emerged from historical changes of the preceding decades. While this additional tradition of human rights became a general concept as a result of social and political revolutions in the early twentieth century,⁷ the development of this concept was promoted by the active contribution and experience of the ILO in this respect.⁸ It is useful to recall in this context that at first, the concept of human rights was concerned with the traditional civil liberties, and consequently, rights included in this tradition usually involved the right to oppose the government.⁹ The second generation, which concerned socio-economic human rights, was based not on the right to oppose the government, but rather on the right to impose upon the government.¹⁰ Generally speaking, this distinction between traditional civil liberties and socio-economic claims was the cause of the various objections to

5. Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

6. This matter is dealt with in Part II of this study.

7. The socio-economic rights came to be given legal form as the result of the Mexican and Russian Revolutions of 1917. They were expressed in the Mexican Constitution, of 1917, the Weimar Constitution of 1919 and the successive Constitutions of the RSFSR and the USSR. In this respect see C. W. Jenks, 'Human rights, social justice and peace, the broader significance of the ILO experience', in A. Eide and A. Schou (eds.): *International protection of human rights*, (Stockholm, Interscience Publishers, 1968), pp. 234-235.

8. Ibid.

9. See for example, H. Gros Espiell: 'The right of development as a human right' in *Texas International Law Journal* Vol. 16, p. 189 (1981), at p. 193, especially footnote 17.

10. Ibid.

the recognition of the socio-economic claims as human rights. Hence, it seems worthwhile, in order to be able to introduce a complete picture concerning freedom to strike, to analyse this aspect too, because the freedom to strike is classified among the socio-economic goals.

As already mentioned, there was much criticism of the attempt to enlarge the scope of human rights to include socio-economic goals, and a worldwide debate ensued concerning their inclusion within internationally recognised human rights. The arguments put forward by the critics bolstered a civil liberty theory of human rights. This theory will be introduced and analysed in Part I of this study, mainly focusing upon the following three objections:

- a. the practicability objection;
- b. the justification objection, and
- c. the universality objection.

Thus, in the light of the above mentioned civil liberty theory, Part I of this study will address itself to an examination of the implications which the various objections to the inclusion of socio-economic goals within the list of genuine human rights have upon the freedom to strike.

2.2 PART II - THE RIGHT TO STRIKE AS A POSITIVE RIGHT UNDER INTERNATIONAL LAW

Up to this point freedom to strike has been presented as a socio-economic claim. However, viewing it as a socio-economic claim actually means that freedom to strike is solely a moral right. Including the freedom to strike within the list of moral rights will remain legally ineffective unless this moral right is transformed, on the international plane, into a legal right, recognised under positive international law. It is only in this way that trade unions' right to have recourse to industrial action could be implemented on an international scale. The next step, then, is to examine whether freedom to strike is already a norm under positive international law, the answer to which should be sought in the recognised sources of general international law. Although the strata of international law consist of three layers¹¹ (international treaties, international custom, and general principles of law), freedom to strike can be transferred into a full legal obligation with a universal scope, if it is recognised by any one of these material sources.

In international law, the right to strike is explicitly recognised in Article

11. For the sources of International Law see Article 38(1) of the Statute of the International Court of Justice which states as follows:
 - (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognised by civilised nations;
 - (d) . . . judicial decisions and teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

8, para. 1(d) of the United Nations' International Covenant on Economic, Social and Cultural Rights which states as follows:

Article 8

1. The States Parties to the present Covenant undertake to ensure:

- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

At the regional level, the European Social Charter was the first international text to recognise explicitly the right to strike in the case of conflicts of interests, subject to any commitments under collective agreements in force. Part II, Article 6 of the Charter states as follows:

Article 6

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties

and recognise:

- 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

As already mentioned, freedom to strike can be transferred into a full legal obligation with a universal scope, if it is recognised by any one of the three material sources of international law. Within Part II of this study, the question whether the right to strike is a positive right under international law will be examined. For the purpose of this study, this question can be adequately answered by examining the right to strike in the light of international treaties only. Appropriate conclusions concerning the question whether the right to strike can be recognised as a positive right under international law can be adequately reached by analysing the various facts related to the relevant international treaties. In this context this study will address, for example, the above-mentioned fact that the right to strike is explicitly recognised in Article 8, para. 1(d) of the International Covenant on Economic, Social and Cultural Rights, and the large extent to which this Covenant was ratified, in addition to the fact that according to the decisions of the Freedom of Association Committee of the Governing Body of the ILO (CFA) a certain right to strike is secured by the ILO Conventions. Hence, Part II of this study will deal with the question whether the right to strike is a treaty-based international right. The question of whether the right to strike has hardened into an international custom or whether it can be recognised as a general principle of law will not be dealt with in this study.

The possibility that freedom to strike will be recognised as a positive right under international law will be examined in Part II of this study in the light of three hypothetical propositions. The analysis of these propositions

will be followed by specific conclusions, indicating whether any of them stands a chance of being accepted. The three propositions are the following:

- A. The right to strike is a treaty-based international labour standard inferred, according to the recommendations of the CFA, although tacitly, from Conventions Nos. 87 and 98, by which a legal obligation of a limited scope is imposed, and applies only to states which ratified these Conventions.
- B. The right to strike is a treaty-based international labour standard inferred, according to the recommendations of the CFA, also tacitly, from the freedom of association general concept secured within the ILO Constitution, by which a legal obligation of a universal scope is imposed, as these recommendations are applied to all the States, which as members of the ILO are bound by its Constitution.
- C. The right to strike is a treaty-based right under positive international law, conferred by Article 8, para. 1(d) of the International Covenant on Economic, Social and Cultural Rights, by which a legal obligation of a limited scope is imposed and applies only to States which ratified this Covenant.

While all three propositions deal with the freedom to strike from a treaty-based viewpoint, a distinction will be made between the consideration of ILO Conventions and the examination of the United Nations Covenant as possible sources for the recognition of an international labour standard concerning the right to strike. Propositions A and B, within which the freedom to strike is introduced as an implicit right inferred from ILO Conventions, will be dealt with in Chapter 1 of Part II. As these propositions are based mainly upon the interpretation of the freedom of association concept provided by the recommendations of the CFA, the historical and legal aspects of the CFA procedure, which is one of the ILO quasi-judicial bodies, will be presented in this chapter too. In the framework of proposition C, the right to strike is considered to be recognised as an explicit right secured by a United Nations Covenant. The express right to strike enunciated by the International Covenant on Economic, Social and Cultural Rights will be examined in Chapter 2 of Part II.

It makes sense to begin by analysing the right to strike inferred from ILO Conventions Nos. 87 and 98, as they were adopted before the International Covenant on Economic, Social and Cultural Rights, and therefore might have influenced its approach in the matter of the right to strike. The ILO is the international agency responsible for labour relations and is in charge of dealing with the right to strike which falls under its specific responsibility. Hence, the way in which such an international labour standard was developed, from an implicit right recognised within the ILO complex to an express right conferred by the International Covenant on Economic, Social and Cultural Rights, also justifies beginning the analysis with the propositions related to the ILO Conventions.

2.3 PART III - THE SCOPE AND EXTENT OF THE RIGHT TO STRIKE

This discussion is related to the substance of the international labour standard. The assumption is that the full and detailed content of the international labour standard concerning the right to strike may be derived by analysing the decisions of the CFA which concern the right to strike. The CFA has dealt with over 1,300 cases since it was set up in 1951 and has taken a series of decisions covering most aspects of freedom of association and protection of trade union rights, many of them related to the right to strike. In 1975, at the request of the Governing Body of the ILO, a Digest of decisions and principles of the Freedom of Associations Committee was published (hereafter: *Digest*).¹² By analysing the bulk of decisions issued in this respect by the CFA, we should be able to pinpoint the principles and definition of the right to strike, the boundaries of these patterns of behaviour which are not to be restricted, and the extent of limitations that can be imposed without infringing on the international labour standards, (In classifying the subject-matter we shall rely to some extent on the *Digest's* classification of the concept of the right to strike and its restrictions.) It is very likely that, once the survey is completed, various legal questions often raised in their national context will be provided with answers from the international aspect too (*e.g.*, answers concerning the lawfulness of strikes designed to inflict hardship on the community or coerce the government). The analysis of the substance of the international labour standard related to the right to strike will be presented within Part III of this study.

One concluding remark ought to be made. While the international labour standard comprises the main theme of this book, the analysis of the various cases decided by the CFA, from which the findings on the nature and content of the international labour standard will be taken, also requires the introduction of different approaches found in various legal systems. Therefore, although not intended as comparative research, the work will contain some comparative data concerning legal systems in various countries.

3. Contributions of the Study

3.1 LEGAL REGULATION OF LABOUR RELATIONS

It is imperative to clarify the international notion of freedom to strike, especially as there is a growing tendency to administer labour relations in a legal framework. Changing economic and social situations almost worldwide, accompanied by a change in attitude as to what concerns trade unionism and collective bargaining, started a process by which law was playing an increasing role as a mechanism of social regulation. Consequently, any system of labour law which is meant to comply with the concept of freedom of association and collective bargaining needs a fundamental and fixed point of reference, that is a defined right to strike. But, as long as freedom to strike is

12. ILO: *Freedom of association*, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (Geneva, ILO, 3rd ed., 1985).

not explicitly provided for and detailed in the ILO Conventions and Recommendations (as is the case with other international labour standards), and as long as any other ILO guide-lines in this domain are not analysed and made publicly known, municipal legislation may be adopted without taking into consideration any of the guide-lines concerning the minimum standards related to strikes on the international level. Often such legislation is at variance with those standards, as is made obvious from the many cases brought before the CFA (which is the machinery of the ILO for examining complaints in this respect). Therefore, it is possible that an extensive survey of the ILO guide-lines concerning the phenomenon of strikes may contribute to reducing the instances of municipal legislation which conflicts with international norms.

3.2 CHANGING PHILOSOPHY

New trends regarding industrial relations are appearing worldwide, and this development calls for an examination of the international labour standard and guide-lines concerning strikes. The new trends are bringing about severe limitations upon freedom to strike. It might be thought that nowadays opposition to the basic objectives and activities of freedom of association and collective bargaining would be considered anachronistic, and that the basic notion accepted by the ILO requiring the promotion of collective bargaining would no longer be put to the test. The policy giving preference to trade unionism has been gradually accepted since the early 1950s, as shown by the numerous ratifications of Conventions Nos. 87 and 98.¹³ However, this policy is now being questioned, and it seems as if the wheels of history have turned somewhat. Consequently, by the 1980s a change in approach towards the concept of trade unionism and its tool, concerted activity, reached full swing. Such a change can be seen in socialist countries - as with the recent Solidarity movement in Poland, in authoritarian regimes where freedom of association never really gained a foothold, and in democracies whose traditions or former legislation were famous for their contribution to the promotion of collective bargaining.¹⁴

We seem to be nowadays in the midst of bi-phased process in which the philosophy concerning the concept of trade unionism is changing. In the first of the two phases this new philosophy still gave preference to trade unionism as is required by the international labour standard concerning freedom of association. At the same time, however, it was looking to protect not only the positive freedom of association but also the negative one, emphasising the worker's right not to be a member of a trade union. Up to now, this has been

13. In this context see, for example, ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983).

14. The United Kingdom can serve as an example of such a change of policy. In this respect see, Clark and Wedderburn, 'Modern labour law problems, functions and policies', in Lord Wedderburn (ed.): *Labour law and industrial relations: Building on Kahn-Freund* (Oxford, Clarendon Press, 1983), pp. 127-242.

carried out only in so far as thought necessary to maintain pluralist values. The *Young, James and Webster Case* demonstrates this approach.¹⁵ The case was heard and adjudicated by the European Court of Human Rights which interpreted Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case a closed shop provision was found to be in contradiction of the freedom of association right ensured in the European Convention for the Protection of Human Rights and Fundamental Freedoms. It must be stressed, however, that this changed attitude aims to weaken trade unions' muscle but not to obliterate unionism or strikes.

By contrast, at the second stage of this changing policy, the philosophy voiced turned into a preference for non-unionism.¹⁶ We are now dealing with a single-minded policy by which a positive preference for a non-unionised as against a unionised workforce is starting to gain hold.

This development can be illustrated in the United Kingdom case which was brought recently before the CFA.¹⁷ It was alleged in this case that on 25 January, 1984, the Foreign and Commonwealth Secretary announced in the House of Commons that staff employed at the Cheltenham Government Communications Headquarters (GCHQ) on civilian contracts, a majority of whom were members of trade unions, were to be deprived of their right to belong to a trade union. Each member of the staff received a circular and an option form which asked them either to agree to surrender their right to belong to a trade union and receive a cash payment of £1,000 in return, or to apply for a transfer to another unspecified job in the Civil Service. Staff who refused to complete the option form or who, after deciding to leave GCHQ, refused to accept an alternative posting were to be dismissed and have no right to redundancy payments.

The CFA found such an attitude unacceptable and therefore not in conformity with Conventions Nos. 87 and 98. But the mere fact that such unilateral action was taken by a government indicates the change of policy in relation to trade unionism.

Oddly enough, the organisational spirit and ideological beliefs that had marked the unions during the first half of the century are being transferred to other movements during the second half. Such deep convictions can be found in various groups such as civil rights groups, anti-nuclear or pacifist movements, or environmentalist organisations. It looks as if the worker's cause has lost some of its glamour even in countries where it had a stronghold in the past. This new trend contains a strong individualistic strand indicative of a fundamental hostility towards both trade unions and any concerted activities on their behalf. The idea of promoting collective bargaining is replaced by attempts sought to promote individual liberty, at the expense of trade union organisational strength and the stability of collective arrangements. The *Webster Case* mentioned above, where a closed shop provision was rejected,

15. *European Human Rights Reports* Vol 4, p. 38 (1981).

16. See Clark and Wedderburn, *op. cit.*

17. See ILO: Committee on Freedom of Association, 234th Report, Case No. 1261 (the United Kingdom) paras. 343-371.

is a good example of preference being given to the individual interest rather than to the collective one.¹⁸

Moreover, one finds strong opposition to trade unionism which turns out to be a prevalent attitude not only among leading exponents of individualist philosophies, but also of several leading personalities of the monetarist school of economics. According to this view, trade unions are seen as distorting the market relations between employee and employer, and the aspirations of trade unions to regulate jobs and labour are believed to be incompatible with individual liberty. This approach towards collective bargaining is conspicuous even in countries where employers attempt to undermine collective bargaining in what is called "preventive labour relations".¹⁹

The new opposition to organised labour has become a challenge to trade unions, particularly when those espousing the philosophy achieve political power and legally administer labour relations. The rights of trade unions have begun to be affected, and often the first step is restricting the freedom to strike. Consequently, the freedom to strike, which as Kahn-Freund maintained is the hallmark of a pluralist society, is undergoing changes expressed by restrictive legal measures. The question is whether such changes of policy concerning freedom to strike conform with the prevailing international labour standard. Thus, it is important to clarify the meaning of freedom to strike, and perhaps a clear understanding might have some preventive influence on the action of the public authorities.

3.3 THE JUDICIAL HOSTILITY

In some of the common law countries, the judiciary is often hostile to patterns of behaviour concerning collective labour relations, especially in cases where strikes are involved. As an institution, the judiciary generally represents one of the most insuperable problems for any labour law policy based upon the promotion of strong and independent trade unionism, which is the reason that specific labour courts were established in many countries.²⁰ It seems to be more natural for the judiciary to emphasise the loss of individual *laissez-faire* than to point out the advantages of collective *laissez-faire* when they adjudicate a case where a collective agreement is involved. Consequently, in such a case they might construe the collective circumstances in a very strict fashion. Furthermore, the same judges who are willing to accord a right to demonstrate to different social groups, for example civil rights movements, tend to undermine workers' demonstrations which usually take the form of strikes or pickets. This attitude renders it vital to clarify the international labour standard concerning freedom to strike. It is hoped that, once this standard is analysed and laid out, it may serve as a proper yardstick to be used by the

18. See note 15.

19. See in this respect 'Killing unions with kindness', in *The Guardian*, 4 January, 1982. See, Clark and Wedderburn, op. cit., p. 218 footnote 408.

20. In order to illustrate such a case one can cite Lord Diplock's words while hearing a case related to strikes and their legal immunities. See *Express Newspapers Ltd. v. McShana*, (1980) A.C. p. 672, at p. 687.

judiciary, and may guide it to respect the international labour standard concerning freedom to strike in the same way it considers other human rights.

3.4 SOCIAL DEVELOPMENTS IN LABOUR RELATIONS

Many changes have taken place since the 1960s. Social and economic crises, vast unemployment, the growth of the service sector, the introduction of new technologies, and rising standards of living, together with the changes in the quality of the social effect of strikes, caught freedom to strike in a perplexing situation which created an urgent dilemma.

On the one hand, the possibility of having recourse to industry-wide action became vital to trade unions. On the other hand, the mere idea of such action became more and more intolerable, not only to employers but to the public at large. Freedom to strike turned to be a challenge to governments and national economies. Furthermore, the service sector, organised on a non-competitive basis started to grow rapidly, accompanied by an increasing independence of different sectors of the economy from each other.²¹ Many of these services have become essential to the economic system, so that when the system is deprived of them, severed hardships are caused to the national economy and to the public. In this spiral of new trends and developments, governments found themselves involved in industrial disputes over essential services. This intervention could take a direct form, because very often such essential services were government owned. In other cases the intervention was indirect and derived its power from the fact that halting essential supplies inflicts severe hardships upon society, thus obliging governments, in their ruling capacity, to try to mitigate such hardships. As a result, gradually and perhaps even unintentionally, governments came to be a third party to industrial disputes which traditionally were kept outside its scope of intervention, and this exposed labour relations to increasing politicisation.

These trends and developments also changed some of the social functions of industrial strife. Some of the highlights of these changes are worthy of mention here. There is an obvious shift in the nature of the target and victims of many strikes.²² In place of the employer being the traditional primary target and supposed victim, while also being the one who could put an end to the strike, we are confronted with a new kind of victim, and many a time even with a primary target who is neither involved in the industrial dispute, nor is in the position to settle it. Strikes occurring in essential services victimise the public and might even threaten the whole economy. Sometimes, especially in the case of non-competitive and publicly owned services, the public is not meant to be a secondary victim but is promoted as the primary target. Trade unions very often, hope to create public pressure that will bring the authorities, whether directly involved in the dispute as owners, or in their ruling capacity, to intervene and settle the dispute.

21. See O. Kahn-Freund: *Labour relations: Heritage and adjustment*, (London, Stevens & Sons, 1979), p. 75.

22. Ibid.

There is no doubt that such a transformation in the nature and function of strikes raises serious problems and is accompanied by a change of attitude toward the concept of freedom to strike, so much so that it seems sometimes that a battle fought and won half of a century ago is reopened. Hence, there is an urgent need to re-examine the concept of freedom to strike, this time in the light of the changing social realities of the 1980s. In order to maintain freedom to strike it is vital to find the middle way between the interests of the trade unions, promoted and supported by the fundamental freedom of association, requiring to secure freedom to strike, and the public interest demanding the isolation of the damages inflicted by industrial strife so that it will be reserved to the disputant parties only. A proper solution to such a conflict of interests can be inferred by analysing the ILO guide-lines, and by studying the decisions of the CFA, which represent the ILO official interpretation of freedom to strike and which very likely have already dealt with such situations. The research carried out within the framework of this book is imperative to the identification of the appropriate international labour standard concerning freedom to strike, and how it applies to the new realities of the 1980s in the field of labour relations.

PART I. Freedom to Strike as a Socio-economic Claim

1. The Argument

The freedom to strike has become a right under International Law. The background to this development was the United Nations' adoption of the Universal Declaration of Human Rights, which demonstrated generally a willingness to transform basic moral rights into affirmative legal ones.¹ This trend expanded into the socio-economic area, and the International Covenant on Economic, Social and Cultural Rights transformed certain socio-economic claims, particularly the freedom to strike, into legally assertable rights.² Further recognition of the freedom to strike as a right under International Law has been accorded by the CFA,³ which has repeatedly ruled that there can be no true freedom of association without the freedom to strike.⁴

However, from a theoretical and ideological viewpoint, freedom to strike has been classified among the socio-economic goals. Such a classification requires mention of the discussion concerning the absolute nature of socio-economic claims, which arose in the 1950s as a result of their recognition as human rights within Articles 22-27 of the Universal Declaration of Human Rights.⁵ Article 22 of the Declaration, which comprises one of its cornerstones, served as a preamble to Articles 23-27 in which economic, social and cultural rights - the rights to which everyone is entitled 'as a member of society' - are prescribed. Rights which are enumerated within these articles are seen as indispensable for human dignity and the free development of personality.⁶ Notwithstanding the fact that socio-economic human rights are

1. On the Universal Declaration of Human Rights see The American Law Institute: *Restatement of the law* (Philadelphia, 1985), Tentative Draft No. 6, Vol. 1, pp 447, 462.

2. Article 8, para. 1(d) states:

'1. The State Parties to the present Covenant undertake to ensure:

(d) The right to strike, . . . '

On the origins and preparation of the International Bill of Human Rights see United Nations: *United Nations action in the field of human rights* (New York, 1980), pp. 8-10. On the legislative history of Article 8 see Part II, Chapter 2.

3. The CFA was established by the Governing Body of the ILO. The historical background of the CFA, its structure, procedure and competence are analysed in Part II, Chapter 1.

4. Such decisions can be found, for example, in ILO: *Freedom of association*. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (Geneva, ILO, 3rd ed., 1985). These decisions are analysed in Part III.

5. Such a classification can be learned from the fact that the right to strike was provided by the International Covenant on Economic, Social and Cultural Rights.

6. See *United Nations action in the field of human rights*, op. cit., p. 11. See also in this respect:

nowadays already *lex lata*, it still seems interesting to analyse within this part of the study, the various theories and objections, voiced during the 1950s, to the inclusion of socio-economic claims within the general framework of human rights, and their relevance to the recognition of the freedom to strike as a socio-economic human right.

The extension of the scope of human rights to include socio-economic claims as an additional layer of human rights was during the 1950s a novelty which emerged from historical changes of the preceding decades. While this additional tradition of human rights emerged as a general concept as a result of social and political revolutions in the early twentieth century,⁷ the development of this concept was promoted by the active contribution and experience of the ILO in this respect.⁸ It is useful to recall in this context that at first the concept of human rights was concerned with the traditional civil liberties, and consequently, rights included in this tradition were usually based on the right to oppose the government.⁹ The second generation, which concerned the socio-economic human rights, was based not on the right to oppose the government, but rather on the right to impose upon the government.¹⁰ Generally speaking, this distinction between traditional civil liberties and socio-economic claims was the cause of the various objections to the recognition of socio-economic claims as human rights. Hence, it seems worthwhile, in order to be able to introduce a complete picture concerning freedom to strike, to analyse this aspect too, because the freedom to strike is classified among the socio-economic goals.

As already mentioned, there was much criticism of the attempt to enlarge the scope of human rights to include socio-economic goals, and a worldwide debate concerning their inclusion within internationally recognised human rights ensued. All the literature concerning the authority of social claims as human rights dealt with Cranston's criticism which took the form of authenticity tests,¹¹ either by adhering to his opposing approach or by

J. W. Nickel: 'Equal respect and human rights' in *Human Rights Quarterly* Vol. 4, p. 1 (1982), at p. 76.

7. The socio-economic claims gained recognition as human rights as the result of the Mexican and Russian Revolutions of 1917. They were expressed in the Mexican Constitution of 1917, the Weimar Constitution of 1919 and the successive Constitutions of the RSFSR and the USSR. In this respect see C. W. Jenks, 'Human rights, social justice and peace, the broader significance of the ILO experience' in A. Eide and A. Schou (eds.): *International protection of human rights*, (Stockholm, Interscience Publishers, 1968), pp. 234-235. M. Cranston, *Human Rights Today* (New York, Ampresand Books, 1962), pp. 37-39, states that the inclusion of the socio-economic rights within the Universal Declaration of Human Rights represents a considerable diplomatic victory for the 'communist members' of the United Nations. He affirms that what the modern 'communists' have done is to appropriate the word 'rights' for the principles in which they believe. Cranston fears that although it may be thought as a mark of progress to consider socio-economic claims as human rights, there is a danger in such an inclusion of being misled by good intentions.
8. The creation of the ILO in 1919 provided a machinery for international efforts to promote socio-economic rights. See Jenks, op. cit.
9. See H. Gros Espiell: 'The right of development as a human right' in *Texas International Law Journal* Vol. 16, p. 189 (1981).
10. Ibid.
11. See in this respect: D. D. Raphael, 'Human rights, old and new', in D. D. Raphael (ed.):

providing counter-arguments.¹² Obviously such a restrictive theory of human rights was not universally accepted.¹³ Many theorists put forward counter-arguments in order to subvert the restrictive theory's foundation. Among these are Wellman, who ardently defended welfare rights as human rights,¹⁴ Nickel,¹⁵ van der Ven,¹⁶ van Dyke¹⁷ (who concentrated on the right to employment¹⁸), and Hook,¹⁹ (who analysed the question of socio-economic rights in general).

Perhaps the best way to present the 1950s debate and arguments which are relevant to the recognition of freedom to strike as a human right is to gather all the general objections put forward against the recognition of social

Political theory and the rights of man (Bloomington and London, Indiana University Press, 1967), p. 54; B. Mayo, 'What are human rights?', in D. D. Raphael (ed.): *Political theory and the rights of man* (Bloomington and London, Indiana University Press, 1967), p. 68; D. D. Raphael, 'The rights of man and the rights of citizen', in D. D. Raphael (ed.): *Political theory and the rights of man* (Bloomington and London, Indiana University Press, 1967), p. 101; S. Hook: *Philosophy and public policy* (Carbondale and Edwardsville, Southern Illinois Press, 1980), pp. 92-94; J. W. Nickel: 'Is there a human right to employment?' in *The Philosophical Forum*, Vol. X (1978-79), p. 163; C. Wellman: *Welfare rights*, (Totowa, New Jersey, Rowan and Littlefield), pp. 39-40; Vernon van Dyke: *Human rights, the United States and world community* (New York, Oxford University Press, 1970), pp. 53-54; C. Bay, 'Self-respect as a human right: Thoughts on the dialectics of wants and needs in the struggle for human community' in *Human Rights Quarterly* Vol. 4, p. 1 (1982).

12. Cranston, 1962, op. cit., defines a human right as a universal moral right which all people, everywhere, at all times ought to have simply because they are human beings. It must answer the following authenticity tests:

1. *The practicability test*, which deals with a certain aspect of the "right" element which is included in the definition of human rights. The meaning of such a test is that the particular moral right in question can be readily secured by legislation alone which is simple and therefore of a negative nature.

2. *The paramount importance test*, which is related to the "moral" element is included in the definition. In this context we are dealing with the justification which is needed in order to recognise a certain right as a morally justified right entitled to the status of a human right. According to Cranston, the significance of such a requirement is that any right in question cannot be granted recognition as a human right, unless its deprivation will be the cause of a grave affront to justice.

13. Within the ongoing polemic related to the acceptance of the socio-economic human rights, a certain pattern was fashioned which was set forth by Cranston. Accordingly, the most essential liberty rights were usually compared with the least essential socio-economic rights. Most of the critical articles compared the right to life which comprises one of the most essential civil rights with the right to paid holidays which is one of the least social rights, although in some of the articles the question was related also to the right to employment or the right to social security. However, these last two social rights were not used in order to deny socio-economic rights, but on the contrary, they were used in order to defend their human rights status and recognition. It is worth mentioning in this respect too that the question of the authenticity of freedom to strike as a human right was not analysed in the general polemic which took place in this context.

14. Wellman, op. cit.

15. Nickel, 1978, op. cit.

16. J.J. van der Ven: 'The right to work as a human right' in *Howard Law Journal* Vol. 11, p. 397(1965).

17. Van Dyke. op. cit.

18. While the right to strike and the right to employment are both socio-economic rights, they are different in nature. On this argument see *infra*.

19. Hook, op. cit.

claims as human rights and to analyse them with respect to three general objections which have their basis in Cranston's arguments. Hence, these general objections to the recognition of socio-economic claims as human rights, as a general restrictive theory, will be introduced. Recourse to a general restrictive theory seems prudent as no specific debate concerning the freedom to strike is found in the literature,²⁰ and because it appears that denying *prima facie* the inclusion of all the socio-economic goals within the list of human rights, would necessarily reject the freedom to strike too.

This study will attempt to prove the authenticity of freedom to strike as a basic human right, not by attacking the restrictive theory, but rather by accepting it for the sake of argument and demonstrating that its reasoning does not apply to the freedom to strike. Although the counter-arguments brought against the restrictive theory in general might be very interesting *per se*, they will not be developed further. This part of the study will address itself only to those necessary defences which might support the recognition of the freedom to strike as a human right despite the civil liberty theory of human rights, and it is not intended to refute the civil liberty theory in its entirety.

2. The Practicability Objection

The first objection to the inclusion of socio-economic claims in the list of human rights can be explained as lack of practicability, if one chooses to use for this purpose Cranston's terminology (although in this context the practicability test is wider than contemplated by him).²¹ The objection is in fact three-faceted and can be better introduced by indicating the three distinct aspects which together comprise the full practicability objection.

2.1 THE SIMPLE AND NEGATIVE LEGISLATION REQUIREMENT

The first facet of the practicability objection concerns the required legislation by which human rights can be secured. Accordingly, only those rights which can be secured by simple legislation (typically legislation of a negative form) can be recognised as human rights.²² Furthermore, any other rights which require legislation of another form, mainly of a positive form ("to do" or "to have"), fail the practicability objection.²³

20. Van der Ven, *op. cit.*, mentions the right to strike on p. 405, but suggests to put aside any examination of such a right.

21. M. Cranston: *What are human rights* (New York, Taplinger Publishing Co., 1973), pp. 40-41.

22. Van Dyke, *op. cit.*, on pp. 53-54, explains such a distinction against a historical background, although he perceives that this attitude is challenged even in the United States. On p. 63, he states that it is a question of definition of the notion of 'rights'. If one defines as a right only claims which can or cannot be enforced by law then freedom of speech differs from the right to employment. On the negative aspect see also Hook, *op. cit.*, pp. 88-92; Raphael 1967, *op. cit.*, p. 60.

23. See van Dyke, *op. cit.*, p. 54, which explains that such a distinction is supported by the fact that the International Covenant on Economic, Social and Cultural Rights, requires in

The legislation by which civil rights are secured is generally very simple. Since those rights for the most part protect against government interference with a person's activities, a large part of the legislation has to do no more than restrain the government's own executive arm.²⁴ However, this is not the case with respect to the right to social security, employment or to other socio-economic rights. A government must do more than simply make the laws to provide social security,²⁵ it must also act in a positive manner, rather than simply restraining its executive arm.²⁶ Hence, according to this aspect of the practicability objection, socio-economic claims cannot be considered as authentic human rights, because they impose upon the government a duty to act positively, as is the case with the right to employment, or the right to social security.

2.2 FREEDOM TO STRIKE AND THE SIMPLE LEGISLATION ASPECT

The requirement that the specific claim in question be secured by simple and negative legislation is met, without any doubt, in the case of the freedom to strike. The objection that the securing legislation will be of a negative nature and conceived only as assurance against interference on the part of the state can easily be addressed in the case of freedom to strike.²⁷ The state's role in

general only to promote its rights, while under the International Covenant on Civil and Political Rights it is required to ensure its rights.

24. See van Dyke, *op. cit.*, p. 53.
25. Some of the socio-economic claims are of a mixed nature. Such is the case of the right to employment which includes also a negative feature in the form of freedom of choice of employment. See van Dyke, *op. cit.*, pp. 60-61.
26. Another approach, a broader one, is adopted by L. Henkin: *The rights of man today* (Boulder, Colorado, Westview Press, 1978), pp. 2-3. By widening the scope of the human rights he discerns certain aspects of the practicability objection. According to Henkin, the restricting negative requirement of such a test is removed and thus he includes within the human rights framework, in addition, rights which impose duties 'to do' or 'to have' upon governments and their officials. Hence, Henkin's definition that human rights are rights against society as represented by the government and its officials, and as such embrace the right to be free, and not only 'free to', and therefore include not only rights to do, but also rights to have and to be. A different approach is offered by Mayo, *op. cit.*, p. 75. In contrast to Cranston or even to Henkin, he removes most of the restrictions arising from the above mentioned objection. Accordingly he defines a human right as a claim, on behalf of all people, to corporate action on the part of whatever institution is in a position to satisfy the claim. Hook, *op. cit.*, at pp. 76-77, analyses this definition, and he states that such a broad definition can apply in fact to any claim whether it is practical or not.
27. Notwithstanding the aforesaid, it should be noted that the negative nature of the legislation is ascertained only as long as we speak about the freedom to strike. But, when a right to strike is provided: *e.g.* in the case of the preamble of the French Constitution of 1946 which was incorporated in the present Constitution of 1958, or in the case of Article 40 of the Italian Constitution of 1947 the required legislation is still simple, but no longer negative. In such a case it is meant to grant a right to strike in the same way as we speak of a right to employment. But even so, there is still a difference between these two social rights. Such a difference will become relevant when the second facet of the practicability objection is analysed, and the question of "legislation alone" is considered. Moreover, the question whether we speak of a right or of a freedom can also be raised in relation to any other civil liberty.

this respect is not different from its role in relation to any of the other civil liberties, such as in the case of the freedom of opinion,²⁸ freedom of thought,²⁹ or freedom of peaceful assembly and association, because all the state must do in this context is to not interfere with the workers' self-initiated strike action.³⁰ Therefore, the assumption may be made that the freedom to strike, although classified as a social goal, is distinguishable from many of the other social goals. The freedom to strike differs from the claim to employment or the claim to social security because these latter claims impose upon the state a duty "to do" and not, as in the case of the freedom to strike, a duty to refrain from interfering with the workers' freedom.

2.3 THE LEGISLATION ALONE REQUIREMENT

The second facet of the practicability objection is concerned with the legislation alone requirement. This means, as noted by Cranston, that those claims under consideration for inclusion as human rights can be secured by legislation alone and do not require any other additional measures, especially not financial ones.³¹ Where the case of socio-economic claims is concerned, the government's provisions for social security, employment or any other welfare claim demand additional legislation and necessitate access to great wealth.³² However, most governments in the world today are poor and cannot raise the needed money. Hence, according to the legislation alone argument, the fact that securing socio-economic claims by legislation requires financial resources disqualifies such claims for inclusion in the list of the genuine human rights.

Wellman explains very clearly the reasoning behind such an argument by using the formula of the claim-duty correlation.³³ Any genuine human right would have to be a claim right, and every claim right logically implies a correlative duty to fulfill the content of the core claim. However, there cannot be any duty to do the impossible. Given the limited resources available to governments, it is often impossible to provide socio-economic claims, and therefore in such a case it does not make sense to claim any corresponding socio-economic human rights.³⁴ Feinberg concludes that most of the socio-economic claims cannot yet be treated plausibly as claims, that is, as ground for any other peoples' duties.³⁵ In other words, the argument is that to recognise claims which are impossible to realise as human rights because of lack of financial resources is to confuse rights with mere ideals.³⁶ Human

28. Universal Declaration of Human Rights, Article 19.

29. Ibid., Article 18.

30. Ibid., Article 20.

31. M. Cranston, 'Human rights, real and supposed', in D. D. Raphael (ed.): *Political theory and the rights of man* (Bloomington and London, Indiana University Press, 1967), pp. 50-51.

32. Ibid.

33. Wellman, op. cit., p. 36.

34. Ibid.

35. J. Feinberg: *Rights, justice and the bounds of liberty* (Princeton, New Jersey, Princeton University Press, 1980). p. 153.

36. In this respect see Nickel, 1978, op. cit., p. 76. Moreover, compare with Bay, op. cit., pp. 61-62. who emphasises what is not yet achieved rather than the rights which have already

rights, it should be remembered, are not mere aspirations but inalienable rights.³⁷

2.4 FREEDOM TO STRIKE AND THE LEGISLATION ALONE ASPECT

Legislation alone, as mentioned above, means that one can secure the specific claim by simple legislation and that its implementation does not impose upon the state any financial burden whatsoever. Securing freedom to strike can be attained by legislation alone and does not impose upon the state's budget any additional burden. It is in this aspect that a difference between various types of socio-economic claims can be observed. One might suppose that social claims can be sorted into two distinct groups. One group of social claims is comprised of claims which can be secured by legislation alone, such as the freedom of association, freedom of collective bargaining or freedom to strike. The second group includes social claims which require additional measures, notably financial ones, such as the claim to employment or the claim to social security.

With respect to these additional means, especially financial ones, it is worthwhile to note one of the typical developments of labour relations in the second half of the twentieth century, which is the growth of the public sector. An implication of this development is that in many countries, the state has become one of the biggest employers. Consequently, the state now faces strikes in the public sector in a double capacity: as the ruler in charge of law and order and as an employer. The state, as the employer, suffers, from financial losses whenever there is a strike in the public sector. Under such circumstances, securing the freedom to strike in the public sector, although it does not impose immediate financial expenditures upon the state, might still cause the state some financial loss.

been attained. Hook. op. cit., p. 92, distinguishes between the question of practicability and that of impossibility. Furthermore, J. E. S. Fawcett, 'The international protection of human rights', in D. D. Raphael (ed.): *Political theory and the rights of man* (Bloomington and London, Indiana University Press, 1967), pp. 119, 127-129, notes that in this regard the Secretary General of the United Nations explained that the difference between the civil human rights and the socio-economic ones was that 'civil and political rights were enforceable, or justifiable, or of an absolute character, while economic, social and cultural rights were not, or might not be, that the former were immediately applicable, while the latter were to be progressively implemented . . . '.

37. One reservation concerning the logic of the objection ought to be made. In this respect see J. Donnelly: 'Human rights as natural rights' in *Human Rights Quarterly* Vol. 4, p. 393 (1982). It seems as Donnelly puts it, that to infer that there is no right because certain states lack the financial ability, is to beg the question. The question whether something is fundamental to human dignity has to be answered from a general point of view, without taking into consideration the possible implementation of such a right in a specific country at a specific time. Human rights by their very definition are rights which are undeniable. They are supposed to be natural ones justified in any period and everywhere. Therefore the possible local realisation is immaterial. As Donnelly wrote, such an argument mistakenly assumes that the ability to realise such claims, either because of physical incapacity, or higher competing claims, necessarily implies that one does not have such a right in the full sense of the term.

A Norwegian case which was brought recently before the CFA can illustrate this point.³⁸ In this instance negotiations in the petroleum-producing sector in Norway were deadlocked, and *ad hoc* legislation prohibiting the workers' right to strike was introduced by the Government. The Norwegian Government justified the prohibition before the CFA, by pointing out the considerable loss of revenue in the form of taxes, rates and dues from oil production. The CFA rejected this reasoning. Such a situation is not unique to the oil industry and can arise in relation to many industries and services, whether they are state or privately owned. Losses of taxes and dues might occur even when the private industry is on strike.

Notwithstanding the aforesaid, it seems that the legislation alone objection does not apply to such cases which concern losses of revenue. The objection is a positive one. It refers to claims such as social security, which require a specific budget without which the right cannot be implemented. Therefore, despite the potential loss of government revenue, the freedom to strike does not fail the legislation alone objection.

2.5 THE DEFINITENESS REQUIREMENT

The third facet of the practicability objection is the definiteness requirement. One could say, as does Wellman, that the socio-economic claims fail the definiteness test because of the incongruity between the definiteness essential to any genuine human right and the ineradicable indefiniteness of the content of any socio-economic claim.³⁹ It is impossible in principle to determine what must be done to realise a socio-economic claim. Wellman explains that in cases of welfare claims as in other socio-economic claims, the indefinite content is an inherent ingredient of such claims. Such indefinite content gives credence to the argument that socio-economic claims are not, and cannot, become genuine human rights.⁴⁰

2.6 FREEDOM TO STRIKE AND THE DEFINITENESS ASPECT

There is no question of degree or amount as regards the freedom to strike. There might be perhaps a question of restrictions only. From this aspect too, the freedom to strike can be distinguished from other socio-economic claims, for example, the claim to welfare, and it is closer to such civil liberties as the

38. ILO: Committee on Freedom of Association, 253rd Report, Case No. 1255 (Norway), paras. 171-192.

39. Wellman, *op. cit.*

40. Jenks, *op. cit.*, pp. 249-250, explains that 'none of the economic and social rights is, or can be, self executing. They all require the adjustment of conflicting interests and positive measures of implementation by legislation or administrative action. To give any definable international content to these rights, conventions and recommendations which provide the common core of uniform or at least comparable legislation and administrative action, are necessary. This common core exists in the international labour Conventions and Recommendations which constitute the *International Labour Code*'.

freedom of expression or the freedom of peaceful assembly. In such instances the basic principle only is stated within the accepted standards of international human rights. The restricting features of such basic principles, should a conflicting situation exist, do not impair the definiteness of the basic principle secured within the human right.

Furthermore, where the freedom to strike is concerned, such a claim can be secured by legislation and include in this respect even certain guidelines as shown for example by the way it was ensured by Article 8, para. 1(d) of the International Covenant on Economic, Social and Cultural Rights. This Article provides that 'The States Parties . . . undertake to ensure . . . the right to strike provided that it is exercised in conformity with the laws of the particular country'. Article 4 of the same Covenant guarantees that 'the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with . . . promoting the general welfare in a democratic society'. Therefore, there is no reason to exclude the freedom to strike from being recognised as a genuine human right from the definiteness aspect.

2.7 SUMMING UP THE PRACTICABILITY OBJECTION

Freedom to strike overcomes the practicability test. Such a proposition is supported by the following:

First, social claims are not made of one piece and, therefore, ought to be sorted into two distinct groups, in so far as the various facets of the practicability objection are concerned.

Second, the above-mentioned division of the socio-economic claims creates a group of socio-economic claims which are definite and can be secured by negative legislation and by legislation alone.

Third, the particular group of socio-economic claims under discussion resembles more the features of the civil rights than the features of the other socio-economic claims, at least where the various aspects of the practicability objection are concerned.

Finally, the freedom to strike is one of the socio-economic claims which resembles more the civil rights, at least as far as the three-faceted practicability objection is concerned.

3. The Justification Objection

3.1 THE OBJECTION

The second objection to the inclusion of the socio-economic claims within the accepted list of human rights is related to the element of justification, which requires that a claim be justified, that is, it must be shown that its denial would result in some sort of injustice to qualify it as a human right. While socio-economic claims are moral rights, obviously not all of these moral rights can be endorsed as human rights. The question arises as to the proper

yardstick to be used for this purpose.⁴¹ Various criteria have been offered, such as social justice,⁴² basic need,⁴³ new interpretations of human dignity and self-respect,⁴⁴ or according to the *Restatement of the law* human rights refer to freedoms, immunities and benefits which, by widely accepted contemporary values, every human being should enjoy.⁴⁵ The socio-economic claims can be defended by either one of these criteria and the legitimacy of so doing has been accepted by international institutions. For example, Article 22 of the Universal Declaration of Human Rights has been interpreted as characterising the socio-economic rights as indispensable to human dignity and the free development of the human personality. Furthermore, the Constitution of the International Labour Organisation, in the preamble, affirms objectives of social justice,⁴⁶ and these were reaffirmed in the Declaration of Philadelphia,⁴⁷ and in the European Social Charter too.⁴⁸

Notwithstanding these international dictates, during the 1950s' debate, the opponents to the inclusion of the socio-economic claims held another opinion and offered a different test. With respect to such opposition, Cranston's *paramount importance* test is noted. Accordingly, only those claims whose deprivation would cause grave affront to justice are entitled to be recognised as authentic human rights.⁴⁹ Wellman introduces the same general attitude by using the "just" and "unjust" distinction.⁵⁰ Exponents of this approach claim that while the denial of the socio-economic claims may be harmful and even wrong, it is at worst uncharitable but not unjust.⁵¹ Cranston, in expounding his version about the non-importance of the socio-economic claims, is assisted by the parallel between rights and duties. He argues that it is a paramount duty to relieve distress, but it is not a paramount duty to give pleasure,⁵² and classifies the socio-economic claims within the "pleasure giving" ones. Raphael remarks that importance is a matter of degree, and thus the prevention of murder is of more paramount importance than the prevention of starvation,⁵³ although the degree of importance does

41. Hook, op. cit., pp. 83-87, 93-96, elaborates the various aspects of the justification of human rights. He examines *inter alia* three generic ways in which human rights have been, or can be justified: by logic, by immediate intuition, or by empirical inquiry.

42. On social justice as justification see C. R. Beitz, 'Human rights and social justice' in P. G. Brown and D. Maclean (eds.) *Human rights and United States foreign policy* (Lexington, Mass., Lexington Books, 1979), pp. 45-63. On this subject see also Donnelly op. cit.

43. See Bay, op. cit.

44. See M. S. McDougal, H. D. Lasswell and Lung-Chu Chen: *Human rights and world public order* (New Haven and London, Yale University Press, 1980).

45. American Law Institute: *Restatement of the law*, op. cit., p. 457.

46. On the objective of social justice and its inclusion in the ILO Constitution see Jenks, op. cit., p. 228.

47. For the Declaration of Philadelphia see Annex to the ILO Constitution.

48. The European Social Charter is in a certain sense the continuation and keystone of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because this Charter lists the socio-economic rights extensively, whereas the Convention had laid them aside. See van der Ven, op. cit., p. 402.

49. Cranston, 1962, op. cit., p. 42.

50. Wellman, op. cit., pp. 39-40.

51. Ibid.

52. Cranston, 1962, op. cit., p. 42.

53. Raphael, 1967, op. cit., p. 63.

not automatically place all the rights of liberty before all the socio-economic claims.

Hook, too, gives preference to civil and political claims over socio-economic claims, but for other reasons than Cranston's.⁵⁴ The civil and political claims are of paramount importance to all other claims in that without them all the other claims could be easily ignored, abused, corrupted and ultimately lost. Without them the social claims become a weapon of tyranny. In short, civil and political claims are primary to all others in the same way that political democracy is basic to all other forms of democracy. But, Hook adds, it is also true that the history of the last two centuries has shown that respect for civil liberties has not in itself been sufficient to achieve a decent minimum level of welfare for all, and changes are needed in the economic order and the traditional concept of the role of government in the socio-economic field.⁵⁵

3.2 FREEDOM TO STRIKE AND THE PARAMOUNT IMPORTANCE OBJECTION

3.2.1 Introduction

It is difficult to assess the freedom to strike within the confines of Cranston's test. The freedom to strike will fail to pass the justification threshold outlined by the opponents of the socio-economic claims, unless it can be shown that its absence will be the cause of a grave affront to justice, rather than merely a harmful event. The difficulty is that the accurate criterion to be used for such a test is unclear and less definite than that of the previous objection.⁵⁶ Therefore, as Cranston suggested, the only possible criterion left is plain common sense.⁵⁷ According to the approach of the International Covenant on Economic, Social and Cultural Rights, simple common sense requires an acceptance of the proposition that the deprivation of the freedom to strike causes serious injustice. Nevertheless, it seems that at this stage of the debate, a more persuasive argument in support of this statement is needed. Hence, it is necessary to bolster such an approach by using arguments that will be considered common sense even to the socio-economic claims opponents. This purpose will be achieved through a completing rights principle proposition that requires further elaboration by using a kind of mathematical formula.

3.2.2 The Completing Rights Principle

The completing rights principle states that the claim in question is in fact complementary to another right, which already possesses the authority of a

54. Hook, *op. cit.*, p. 93.

55. *Ibid.*, p. 94.

56. This is because moral rights cannot be proven but only justified. *See* Cranston, 1962, *op. cit.*, p. 14.

57. *Ibid.*, p. 42.

human right. That is to say that the two share a common goal which cannot be attained unless both, the basic human right and the complementary claim, are recognised. In other words, the deprivation of the complementary claim causes the violation of the basic human right because the common goal cannot be attained by either one of them alone. Consequently, the results caused by the deprivation of the complementary claim are similar to those caused by the deprivation of the basic human right.

By defining the basic right as an accepted human right even according to the civil liberty theory, we already know that its deprivation is the cause of a grave affront to justice. Thus, as the result of depriving someone of either one of these rights or claims is similar, it follows as a corollary that the deprivation of the complementary claim causes grave affront to justice too. If we prove that the freedom to strike is complementary to another basic human right, such as the universally accepted principles of the abolition of forced labour or of the freedom of association, then the freedom to strike passes the paramount importance objection. Two ways whereby freedom to strike can be considered as a completing claim of human right will now be examined.

3.2.3 Freedom to Strike and the Freedom from Slavery and Forced Labour Argument

Certainly the freedom from slavery and the abolition of forced labour are among the fundamental human rights,⁵⁸ a proposition which is accepted even by the civil liberty theory. The withholding of either one of them is the cause of a grave affront to justice. Moreover, this proposition is supported nowadays for example, by the antislavery principle which is expressed in Article 4 of the Universal Declaration of Human Rights, which proclaims that "no one shall be held in slavery or servitude . . .". Another related issue is the need to abolish any form of forced labour. Although the Universal Declaration does not specifically mention forced labour, it is clear from the records of discussions which preceded the adoption of Article 4 that systems of forced compulsory or "corrective" labour were considered by the drafters of the Declaration to be new forms of slavery or servitude which were emerging in modern society. They were, therefore, assumed to be included among the institutions and practices prohibited by Article 4.⁵⁹

The abolition of slavery and forced labour was achieved in two phases. First there was a transition from slavery to a status whereby the worker, while not a slave any more, was not yet a freeman in the full sense of the word.

58. As for measures to abolish slavery and slavery-like practices see United Nations: *United Nations action in the field of human rights*, op. cit., pp. 148-154, especially the following provisions: Articles 4 and 6 of the Universal Declaration of Human Rights; Article 8 of the International Covenant on Civil and Political Rights; Slavery Convention of 1926; Protocol amending the Slavery Convention of 1929; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; ILO Abolition of Forced Labour Convention 1957 (NO. 105). In this context see also Jenks, op. cit., pp. 242, 252; and Fawcett, op. cit., pp. 120-121.

59. See United Nations: *United Nations action in the field of human rights*, op. cit., p. 154.

During that period, labourers were not allowed to terminate relationships with their masters at will. The second step was the transition from that status to one of contract, a transition which formed the employer-employee relationship in a contractual mould and therefore enabled the employee as a party to the contract to work or to stop working at will. It is worth noting that many legal systems today refuse to enforce the individual contract of employment, on the ground that it might force employees to work against their will, thus creating a situation contrary to the freedom from slavery and to the freedom from forced labour.

The same can be said about the deprivation of the freedom to strike. The deprivation of such a freedom means that employees will not be allowed to stop working at will, and can be forced to work contrary to their will. This situation is much akin to certain aspects of forced labour and, therefore, of slavery too.⁶⁰ In this light it can be seen that the deprivation of the freedom to strike could cause employees a denial of their right to stop to work at will, depriving them of their freedom from forced labour and constituting a grave affront to justice. In fact, it can be said that the freedom to strike is a complementary claim of the freedom from slavery and freedom from forced labour.

It might be argued that there is a distinction between the situation whereby employees would like to resign and finally stop working for a specific employer and that where they would like to stop working only temporarily, as is the case of strikers, where the workers are only suspending their contracts of employment during the strike period. The argument could be made that only in the first situation features of slavery or forced labour are involved. In the second situation the workers are allowed to resign at any moment, but not to stop working temporarily in order to strike. The fact that they can resign is enough to reject the slavery and forced labour argument. Such an argument is unacceptable, because whenever workers are denied their freedom to strike they are forced to work against their better judgment and this is the nature of slavery or forced labour.

3.2.4 Freedom to Strike and the Freedom of Association Argument

Freedom of association is a well-grounded principle nowadays. Freedom of association, including trade unions' rights, is unique in that it is dealt with not only in the International Covenant on Economic, Social and Cultural Rights as a socio-economic right, but also in the International Covenant on Civil and

60. It is perhaps interesting to note that this argument was mentioned during the deliberations of the Commission on Human Rights, while the question of the inclusion of the right to strike within the draft of the international Covenant on Economic, Social and Cultural Rights was considered. Mr. Jevermovic, the Yugoslav representative said that he 'had been surprised, in view of the decision on forced labour taken at the Commission's sixth session, to note the reservations expressed in connection with the right to strike. In light of that decision, the Commission could not justify the exclusion from the Covenant of the right to strike.' See United Nations Doc. ECOSOC. E/CN.4/SR.225, p. 6.

Political Rights as a civil right.⁶¹ Therefore, at least from the civil liberty aspect, if not from its socio-economic aspect, there is no doubt that its deprivation causes injustice. Hence, if we can show that there is no freedom of association without the freedom to strike, we will have sufficient ground to claim that the deprivation of the freedom to strike itself creates a serious injustice. First, however, the meaning of the freedom to strike in the field of labour relations must be defined. In order to understand the significance of the freedom to strike in the field of industrial relations it is necessary to appreciate the historical developments that led to the recognition of such a freedom. These developments focus on the transition from individual activity to collective activity which took place in the realm of labour as a result of the Industrial Revolution.

At the beginning of this period workers were in inferior positions and defenceless when confronted by the power of the employer.⁶² This power stemmed from the employer's capital and his prerogative to hire and fire employees at will. This state of affairs, which infringed on the right of the employee to equality and on his right to work, was changed to some extent when the collective agreement replaced the individual contract. This transition from individual to collective bargaining balanced the relationship between the employer and employee by placing it on a basis of equality.⁶³ The collective power of the workers, which was reflected in their being organised within trade unions, enabled them to stop working simultaneously and in a co-ordinated manner and thus to counterbalance the employer's power to hire and fire workers at will. This organised stoppage of work performed jointly by all the workers was later labelled as a strike.

A better explanation of these developments, aims and goals is provided by Kahn-Freund.⁶⁴ Accordingly, the claim of the workers to collective bargaining, which becomes possible once they are organised, is the first condition for balancing the labour relations system. However, this condition, while necessary, is not sufficient. Recourse to concerted activity is a complementary element to the claim of collective bargaining, as the latter also includes the claim to refuse collectively to work. In other words, the principle of reci-

61. For measures to ensure freedom of association see United Nations: *United Nations action in the field of human rights*, op. cit., pp. 187-188. See especially the following provisions: Articles 20 and 23 of the Universal Declaration of Human Rights; Article 8 of the International Covenant on Economic, Social and Cultural Rights; Article 22 of the International Covenant on Civil and Political Rights; the ILO Constitution; Conventions Nos. 87 and 98. When freedom of association was considered by the Commission on Human Rights, there was some debate as to whether trade union rights should be treated in the Economic, Social and Cultural Rights draft Covenant, or in the Civil and Political Rights draft Covenant. On the one hand, it was claimed that they were an aspect of the right of association, and on the other, the direct relevance of trade unions rights to the socio-economic matters was pointed out. See United Nations Doc, ECOSOC, E/2256; E/CN.4/669; Commission on Human Rights, Report of the Eight Session (14 April to 14 June 1952), para. 140, ECOSOC Off. Rec, Fourteenth Session, Supp. No. 4.

62. See W. Friedman, *Law in a Changing Society*, 2nd ed. (London, Stevens & Sons, 1972), p. 128.

63. *Ibid.*, p. 130.

64. O. Kahn-Freund, *Labour and the Law*, (London, Stevens & Sons, 1972), pp. 224-225.

procuity in labour relations forces recognition of the claim of the workers to stop working in an organised and collective manner in order to serve as a counterweight to the power of the employer to hire and fire workers or to close his plant.⁶⁵ Thus the process of the balancing of the labour relations system, which began with the organisation of the workers in trade unions, was completed by their gaining the freedom to strike.⁶⁶

By presenting the concept of freedom of association in a three-dimensional manner, as set forth below, the completing rights principle tends to the conclusion that denial of the freedom to strike is a grave affront to justice. The organised and collective power of the workers within the framework of trade unions by itself is not sufficient in order to balance the labour relations system, and therefore it must be supplemented by two complementary freedoms. The first of these two freedoms is the freedom of collective bargaining. It is only by collective bargaining that the workers can make use of their combined power, which stems from the fact that they are organised within a trade union, in order to improve their working conditions.⁶⁷ It follows that the recognition of the freedom of association must signify that there is also a simultaneous recognition of the complementary freedom to conduct collective bargaining. But that, too, is insufficient. The freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom to strike.⁶⁸ Hence, freedom to strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.

It is only in light of such interpretation of the freedom of association concept that the CFA has taken the view that allegations relating to the freedom to strike are not outside its competence in so far as they concern the exercise of trade union rights.⁶⁹ This is noteworthy, as the CFA was set up in 1951 in order to deal with complaints of infringement on the freedom of

65. On the strike as an instrument of pressure in collective bargaining, see N. Chamberlain and J. Kuhn, *Collective Bargaining*, 2nd ed., (New York, McGraw-Hill, 1965), p. 391.

66. See Kahn-Freund, *op. cit.*, p. 8. On the tri-dimensional aspect of freedom of association see U.N. Doc, General Assembly Eleventh Session, Off. Rec., A/C.3/SR.719, para. 24, where Mr. Brena, the representative of Uruguay to the Third Committee of the United Nations claimed: 'The right to form trade unions was inherent in the wider idea of freedom of association. That freedom comprised several individual rights: the right to form and join trade unions, the right of everyone not only to protect his economic and social interests, but also to promote them, and finally the right to strike.'

67. Van der Ven, *op. cit.*, p. 400, treats freedom of association as a completing right of the right to work. The connection between the right to work and the right to strike was raised during the deliberations of the United Nations Third Committee. Mr. Townsend Ezcurra, the representative of Peru, claimed that the right to strike was a corollary to the right to work embodied in Article 6 of the draft Covenant. See United Nations Doc, General Assembly Eleventh Session, Off. Rec. A/C.3/SR.719, para. 40.

68. Speaking of equality in the labour relations field raises the question of lockouts. Only the European Social Charter of 18 October, 1961 recognises the right to resort to collective action for employers too. See in this respect Part II, article 6, para. 4 and Appendix of the European Social Charter.

69. For the many cases concerning this view see Part III.

association concept, the standards of which were set forth in Conventions Nos. 87 and 98.⁷⁰ Although the freedom to strike is not explicitly provided for in these two Conventions, such an approach is supported also by the 1983 General Survey of the Committee of Experts on the application of Conventions and Recommendations, which dealt with these Conventions which concern freedom of association and collective bargaining.⁷¹ The Committee of Experts considered the freedom to strike as one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.⁷²

To some extent the three-dimensional perspective of the freedom of association concept has also been considered by the European Court of Human Rights. The first step in this direction was taken in the *National Union of Belgian Police Case*, where it was decided that the European Convention for the Protection of Human Rights and Fundamental Freedoms safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the contracting States must both permit and make possible.⁷³

In the *Schmidt Case* the idea was further elaborated.⁷⁴ In this case the applicants considered that a certain clause in the collective agreement which was under consideration tended to discourage them from availing themselves in the future of their right to strike. However, such a right was claimed according to their submission to be an "organic right" included in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which, as in the case of the International Labour Conventions, does not explicitly provide a right to strike.⁷⁵ Therefore, such a right could be inferred only as part and parcel of the general concept of freedom of association which is enshrined by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission, although confronted by the claim, did not find it necessary to consider the question whether Article 11, para.1 can be interpreted as implying a right to take industrial action, more particularly, a right to strike.⁷⁶ In this context, however, the Court recalled its previous decision concerning the *National Union of Belgian Police Case*, where it was found that the European Convention safeguards the freedom to take trade union actions, and pointed out that Article 11, para.1 leaves each state a free choice of the means to be used toward this end. The Court affirmed that granting a right to strike represents without any doubt one of the most important of means, although there are

70. On this aspect see Part II, Chapter 1.

71. See *ILO: Freedom of association and collective bargaining*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983).

72. See *ibid.*, para. 200.

73. Eur. Court H.R., *National Union of Belgian Police Case*, judgment of 27 October, 1975, Series A. vol. 19, p18, §39.

74. Eur. Court H.R., *Schmidt and Dahlstrom Case*, judgment of 6 February, 1976, Series A, vol. 21.

75. *Ibid.*, p. 16.

76. Eur. Court H.R., Series B No. 19, *Schmidt and Dahlstrom Case*, p. 41, para. 71.

others.⁷⁷ Consequently, although the Court did not explicitly rule that freedom to strike is essential to freedom of association, it provided powerful support for that intention.

3.3 SUMMING UP THE JUSTIFICATION OBJECTION

It seems that freedom to strike can pass the threshold of the justification objection for the following reasons:

First, it was supported by the approach that the freedom to strike must be looked upon not independently, but rather as part and parcel of a more general principle which involves authentic human rights.

Second, the freedom to strike was first acknowledged as a socio-economic claim complementary to another right, which is indisputably accepted as a human right even according to a civil liberty approach to human rights. In this context the freedom to strike was introduced as a complementary freedom either to the freedom from slavery and forced labour, or to the freedom of association.

4. The Universality Objection

4.1 THE OBJECTION

The third objection voiced during the 1950s to the inclusion of the socio-economic claims within the accepted list of human rights is related to the matter of universality. In this respect, a distinction was made between the genuine human rights which are universal rights and citizen rights which are local rights and therefore, cannot pass the universality objection.⁷⁸ Donnelly explained this argument by stating that human rights are rights *in rem*,⁷⁹ but this statement has two aspects: First, the affirmation that human rights are rights *in rem* means that they are held universally and equally by all people and, therefore, nobody needs to qualify in order to acquire such a right. Socio-economic claims fail to pass this aspect of the universality test, because they are viewed as claims *in personam*, that is, they may be claimed only by members of a specific class of persons because these people are members of that class.⁸⁰ In other words, these are claims which are enjoyed by some people only, and these people had to qualify in order to acquire them. The basis of the claim of these people according to Cranston, is "desert",⁸¹ that is something that must be earned, and therefore does not match the universality requirement.

The second aspect is that human rights are considered rights *in rem*, as

77. Eur. Court H.R., *Schmidt and Dahlstrom Case*, judgment of 6 February, 1976, Series A, vol. 21, p. 16, §36.

78. See Raphael, 1967, op. cit., p. 66; Cranston, 1967, op. cit., p. 98.

79. See Donnelly, op. cit., pp. 399-401.

80. See Cranston, 1973, op. cit., p. 67; Cranston, 1967, op. cit., p. 51.

81. See Cranston, 1967, op. cit., p. 98.

these rights hold also against the world at large.⁸² The socio-economic claims are considered to be *in personam* also because they may be claimed only against a specific class of persons whether that class is the state, an employer or any other group, but are not held against the world at large. Therefore Cranston treats the socio-economic claims as local ones which are citizen rights rather than universal rights.⁸³

4.2 FREEDOM TO STRIKE AND THE UNIVERSALITY OBJECTION

The universality objection indicates that a human right is a right which all people, everywhere and at all times, ought to have simply because they are human beings. The question is whether freedom to strike can be considered as such. Because of the double concern of the universality test this is a twofold threshold, and therefore, it is advisable to examine each of the two aforementioned aspects separately.

4.2.1 The 'Held by All Men' Aspect

Let us start by analysing the question whether freedom to strike can overcome the "held by all men" aspect of the universality objection. The simple implementation of the rule underlined in this respect tends no doubt toward a conclusion that freedom to strike fails this test, because it is a class right rather than a universal one. Such a conclusion is founded upon the following reasoning: Freedom to strike is a conditional freedom. It is operational for salaried employees only, and therefore it is irrelevant and immaterial to all other people who are not salaried employees. Thus, only those who qualify as employees are free to stop working in order to further their interests as employed persons. Consequently, freedom to strike is a limited freedom which is related to the working class only, and as such fails the "held by all men" requirement of the universality test.⁸⁴

However, there seems to be a certain fallacy in such a reasoning, as the universality test can also be interpreted differently. Before the varying interpretation of the universality test can be introduced, a certain illustration

82. See Donnelly, *op. cit.*, pp. 399-401.

83. Nickel, *op. cit.*, p. 165, sets forth another argument by which the socio-economic claims lack the universality feature. Accordingly, human rights deal with universal broad problems rather than with contemporary specific claims. Socio-economic claims are directed to problems of contemporary economics and are therefore too limited to have the universality that the concept of human rights implies. A similar approach was adopted by Mrs. Mehta, the Indian Representative, during the deliberations of the Commission on Human Rights. See United Nations Doc, ECOSOC, E/CN.4/SR.225, p. 25. Mrs. Mehta argued that the right to strike was very much restricted, and hence, could not be included among the fundamental rights, the test of which was that they must be universal.

84. During the deliberations of the Commission on Human Rights, Mrs. Mehta, the Indian representative, argued that the right to strike applies to certain categories of people, and therefore, does not have the status of a universal human right. See United Nations Doc, ECOSOC, E/CN.4/SR.225, p. 24.

dealing with another human right, which already possesses the authority of an authentic human right according to the civil liberty theory must first be presented. The illustration is related to the right to a fair trial. Although this right is held by all people, its implementation is conditional upon specific pre-existing circumstances: Mr. X is entitled to a fair trial only if and when he is accused of performing a felony. In other words, we could define such a human right by stating that: "Everyone charged with a penal offence has the right to a public trial at which he has had all guarantees necessary for his defence." Such a definition fits exactly the definition of the human right which entitles everyone to a fair trial, as secured in Article 11, para.1 of the Universal Declaration of Human Rights. Thus we realise that the need "to be charged with a penal offence" is an element which is included in the definition of the right in question, and turns out to be a prerequisite of the right to a fair trial. Such a conditional prerequisite does not mean that the right to a fair trial is not "held by all men" because, on the one hand, it is relevant only to accused persons, and on the other hand, it is immaterial to those who are not accused.

The simple meaning of such a precondition is that only when some specific facts materialise is the person in question entitled to be protected by the specific human right relevant to the case. Examples of such preconditions are:

- (a) being a worker in the case of freedom to strike, and
- (b) being charged with a penal offence in the case of the right to a fair trial.

Therefore, if the above reasoning is applied with respect to the case of the freedom to strike, a theorem may be devised. Accordingly, the need to qualify as a worker does not change the freedom to strike from a human right to a class right, as such a requirement is only one element of the circumstances which enable us to implement the protection of the freedom to strike.

In both cases, in the case of the right to a fair trial and in that of the freedom to strike, there are preconditions that have to be fulfilled in order to create the situation where the human right in question is operational. These preconditions, according to such an interpretation, do not classify the rights in question as class rights rather than universal rights. Consequently, the freedom to strike can be considered as a claim 'held by all men' and thus passes the first step of the universality objection. Such an interpretation is in contradiction to the traditional approach as expressed by Cranston and even by Raphael.

4.2.2 The 'Held Against the World at Large' Aspect

The denial of the authenticity of the socio-economic claims from this viewpoint goes as follows: In order to be recognised as a human right the correlative duty must be imposed upon the world at large. With socio-economic claims, on the other hand, the correlative duty is held not against the world at large but against a particular class only. This class can take the form of a state, of employers or of any other agent. Therefore, according to

this objection socio-economic claims cannot be accepted as authentic human rights. In order to be able to answer this challenge, it is necessary to distinguish between two kinds of socio-economic claims. The first group includes claims which impose a correlative duty directly upon the government. The second group is related to such claims which impose a corresponding duty upon employers. Freedom to strike belongs to the first group, while the claim to paid holidays, for example, is considered part of the second group. However, even in this case there is a certain duty which is still imposed upon the government, as it is the government's duty to see to it, probably through legislation, that the workers will be entitled to such payment, while the financial burden is imposed upon the employers.

As to the first group of socio-economic claims, it seems that the fact that the state is responsible for providing such a protection does not exclude those claims from being genuine human rights. The *Restatement of the law*⁸⁵ for example, states that the contemporary international law of human rights reflects general acceptance that every individual should have rights in his or her society which the state should recognise, respect and ensure.⁸⁶ All that is meant by it is that as long as there is not a world at large government it is the responsibility of each particular government to see to it that these claims are met. If and when there will be a world government, the responsibility will be shifted from each state's government to the world government. Such an Utopian attitude can be inferred from the Universal Declaration of Human Rights, as was very well expressed by Mayo.⁸⁷ He stated that it is a fact of political history that there is no world government. Moreover, Mayo inverts the order of priority by making what is usually termed the "rights of citizens" the prime ingredient in a typical list of human rights.⁸⁸ He holds the opinion that human rights are claims of or against certain agents rather than against all people. These agents are the national governments. From this point of view there is no difference between the freedom to strike and any other civil right, such as the freedom of expression. In both cases it is the duty of each particular government to provide the specific right or freedom in question. One could say that these freedoms in both cases can be seen as held against the world at large, although under the prevailing situation it is still the government in each state which is, in practice, responsible to ensure that the freedom to strike as well as the freedom of expression, are provided without any government interference.

85. American Law Institute: *Restatement of the law*, op. cit., p. 446.

86. *Ibid.*, at p. 450 it is therefore stated that violations of international law of human rights, generally injure the inhabitants of the violating state; and therefore, ordinarily, other States are not directly affected by such violations.

87. See Mayo, op. cit., p. 78, where he states that the Universal Declaration of Human Rights virtually announces a right to a world government.

88. *Ibid.*

4.3 SUMMING UP THE UNIVERSALITY OBJECTION

Generally speaking, the freedom to strike can be accepted as a universal human right. Such a proposition is supported by the following:

First, it has been shown that even civil liberties are sometimes preconditioned upon the realisation of certain facts, as is the freedom to strike which is preconditioned by the need to qualify as a worker. It was assumed that in both cases such preconditions do not eliminate the possibility of treating those rights or claims as universal rather than local ones.

Second, it was suggested that today, as long as there is no world government, it is still the responsibility of the states to provide and protect human rights. This fact cannot be regarded as a reason to deny the fact that these rights or claims are held against the world at large.

PART II. The Right to Strike as a Positive Right Under International Law

Chapter 1. Freedom to Strike as an Implicit Labour Standard

1. The Argument

Strangely enough, none of the international labour Conventions and Recommendations safeguards explicitly the right to strike, although the right to strike is mentioned or implied in certain specific ILO instruments. For example, Article 4 of the Recommendation concerning Voluntary Conciliation and Arbitration 1951 (No. 92), provides that if a dispute has been submitted to conciliation procedure with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation[^] in progress. Other instances are Article 7 of the same Recommendation which states that no provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike; Article 12 (a) of the Employment Service Recommendation 1948 (No. 83), which provides that the employment service should observe strict neutrality in the case of employment available in an establishment where there is a labour dispute affecting such employment. Finally, there is Article 69 (i) of the Social Security (Minimum Standards) Convention 1952 (No. 102), which provides that unemployment benefit to which a person protected would otherwise be entitled in compliance with the Convention may be suspended where the person concerned has lost his employment as a direct result of a stoppage of work due to a trade dispute.

Hence, an examination is required of the legislative history of the various ILO Conventions and Recommendations concerning the concept of freedom of association, in which freedom to strike could have been secured. Such an analysis is necessary in order to understand what caused the fact that within the ILO complex of Conventions and Recommendations, the freedom to strike was not explicitly guaranteed. The legislative history to be analysed will have to include not only Conventions Nos. 87 and 98, which together comprise the appropriate ILO instruments in which the freedom to strike could have been expressly secured, but also the legislative history of the two Recommendations which guarantee additional aspects of the freedom of association concept: the Recommendation concerning Collective Agreements

1951 (No. 91), together with the one concerning Voluntary Conciliation and Arbitration 1951 (No. 92).

Despite the fact that there are no explicit provisions to be found in any of the ILO instruments freedom to strike, there exist, in fact, ILO standards regulating in detail the matter of freedom to strike. Such standards may be inferred from the decisions of the Committee on Freedom of Association of the Governing Body of the ILO (CFA). These decisions, which provide the official ILO interpretation of the freedom of association concept, also effectively secure the freedom to strike. There are two possible legal sources of the freedom to strike secured by the CFA recommendations, based upon alternative treaties, which will be discussed by this study within the framework of the following two propositions. According to the first one the freedom to strike is a positive treaty-based international labour standard inferred, although tacitly, from Conventions Nos. 87 and 98. According to the second, the freedom to strike is inferred tacitly from the ILO Constitution in which the freedom of association concept was guaranteed. These propositions are analysed below, but first the legislative history of the ILO Conventions Nos. 87 and 98 is presented to provide a background in support of the propositions.

2. The Legislative History

2.1 INTRODUCTION

The legislative history of Conventions Nos. 87 and 98 and Recommendations Nos. 91 and 92, shows that at the time when these Conventions and Recommendations were drafted, the question of the freedom to strike was considered. Consequently, the fact that freedom to strike was not provided by these Conventions and Recommendations was not an error of omission. Rather, it was a calculated action on the part of the drafting committees that took into account the approach to the freedom of association concept expressed by participants in the various International Labour Conferences in which the entire matter of the freedom of association concept was regulated.¹ The reasons for failure to include an explicit right to strike may be determined by studying the various developments which took place during the five International Labour Conferences in which the Conventions and Recommendations related to the concept of freedom of association were adopted.

Actually, the problem of freedom to strike was never raised as a separate issue, but was regarded as being one aspect of the freedom of association, which has been in the forefront of the ILO activities from its inception. Freedom of association, as stated from the outset, is one of the fundamental principles of the organisation.² There was a growing need, particularly among

1. For the full list of the international sources of law respecting trade union rights see ILO: *Freedom of association and collective bargaining*. General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session, Geneva, 1983, paras. 4-19.

2. The ILO recognised in its Constitution of 1919 the principle of freedom of association as one of the objectives of its programme of action. The preamble to Part XIII of the Treaty of Versailles mentioned recognition of the principle of 'Freedom of Association' among the

the workers' representatives, to develop a precise definition of this general concept of freedom of association and to incorporate the said definition into an ILO instrument where its application could be promoted and supervised effectively.³ In 1927 the International Labour Conference discussed a draft of the international instrument on freedom of association, but results were not forthcoming.⁴ Nor was this item placed on the agenda of the 1928 Session of the International Labour Conference. It was rejected by the Workers' group, mainly because of questions relating to closed shop provisions and other legal formalities to be observed by workers' organisations.⁵ During the interval between the two World Wars, the ILO spared no efforts to attain international regulation of various aspects of the problem of freedom of association. All these efforts were in vain until 1947, because of the paralysing effect of politicisation on the ILO. After the Second World War these political differences diminished considerably as the result of the defeat of the totalitarian countries, and therefore it seemed that the time was ripe for a new attempt to regulate freedom of association. The discussion of the history below is an attempt to show that the right to strike was indeed considered an integral part of the freedom of association. Nevertheless, the matter was never specifically promulgated due to various reasons such as: procedural delay, a widely held belief that a specific promulgation was unnecessary as the proposition was self apparent, as well as the workers' fears that providing a right to strike would lead inevitably to the restriction of their scope of activity.

2.2 THE INTERNATIONAL LABOUR CONFERENCE, 30TH SESSION, 1947

In 1947, the question of freedom of association was first raised within the United Nations at its Fourth Session (February-March 1947). The Economic and Social Council (ECOSOC) was called upon to examine the question of

objects promoted by the Organisation, and the general principles set forth in Article 427 contained a provision concerning 'the right of association for all lawful purposes by the employed as well as by employers'. Ibid paras. 4-7.

3. Especially the two following events: First, the Hungarian government's complaint submitted to the ILO Governing Body in June 1920. and the complaint of the General Federation of Spanish Workers submitted in December that same year. These two complaints and the inquiries which followed demonstrated that a mere affirmation of the principle of freedom of association by the Constitution of the ILO was not sufficient to ensure its observance. For more details see *Freedom of association and industrial relations*. Report VII, International Labour Conference, 30th Session, Geneva, 1947, pp. 14-15. A comparative and comprehensive enquiry into freedom of association was taken by the ILO, and its results were published in the following five volumes: *Freedom of association*, International Labour Office, Studies and Reports, Series A (Industrial relations), Nos. 28-32, Geneva, 1927, 1928 and 1930.
4. Legislation concerning trade associations differed considerably in detail and in form from country to country. Therefore, instead of submitting to the Conference a draft scheme of detailed regulations which would have obliged the majority of countries to amend their legislation, the Office preferred to frame essential elements of the problem in a number of precise formula, the adoption of which would have constituted a sufficient guarantee for the free functioning of employers' and workers' associations. See *Freedom of association and industrial relations*. Report VII. 1947, op. cit., p. 17.
5. Ibid., pp. 17-18.

"guarantees for the exercise and development of trade union rights," which had first been referred to in a memorandum submitted by the World Federation of Trade Unions (WFTU) and again in a memorandum submitted by the American Federation of Labor (AFL).⁶ At the conclusion of its discussions, the ECOSOC adopted a resolution according to which the two memoranda were transmitted to the ILO with a request that the question regarding trade unions' rights be placed on its agenda for its next session.⁷

However, the International Labour Conference held in 1947 was unable to deal with this project, because, according to the ILO Constitution there had not been enough time to include it in the agenda.⁸ Therefore, that year the International Labour Office submitted to the Conference only the following two items:

- a. a resolution concerning various aspects of the problem of freedom of association,⁹
- b. a list of points which referred to the first four headings of the above proposed resolution.¹⁰

Beyond a doubt, while the Office was drafting the proposed resolution or list of points mentioned above, there was an awareness of the need to consider the possibility of regulating the right to strike in this framework too. The general approach of the ILO, according to which the freedom of association concept includes also the freedom to strike, was re-enforced by the memorandum of the AFL which was transmitted to it by ECOSOC's request to put the matter of trade unions' rights on its agenda.¹¹ The AFL memorandum contained a recommendation for the early consideration of the problem of trade unions' rights with reference to several questions, one of which was put

6. For these memoranda see *ibid.*, Appendix A, pp. 136-143.

7. Resolution 52 IV of 24 March 1947. The question was referred to the ILO under the terms of the agreement between the United Nations and the ILO which was rectified both by the Assembly of the United Nations and by the ILO. See text of the agreement: *Official Bulletin*, (Geneva, ILO) Vol. 29, No. 4, 1946, p. 293. Freedom of industrial association is but one aspect of a general freedom of association, which must itself form part of the whole range of fundamental human liberties. The ECOSOC referred the question of freedom of occupational association to the ILO, and the general freedom of association was referred to the Commission on Human Rights, which at that point was contemplating the drafting of a universal bill of human rights. This is one of the first examples of the ECOSOC referring to a specialised agency a question which was technically within the competence of the agency and in respect of which the agency could be expected to make more substantial and effective progress in an atmosphere thought to be relatively more free of political controversy. In this respect see ILO: *The ILO and the United Nations: Twenty-five years of a partnership of service*. Supplement to the Report of the Director-General to the International Labour Conference, 54th Session, Geneva, 1970, p. 24.

8. Article 15 of the ILO Constitution provides that the agenda shall be transmitted so as to reach each member four months before the opening of the Session.

9. For the proposed Resolution see *Freedom of association and industrial relations*. Report VII, 1947, op. cit., pp. 127-131.

10. For the list of points see *ibid.*, pp. 131-135.

11. See Resolution 52 IV of March 1947.

as follows:¹² "To what extent is the right of workers and of their organisations to resort to strikes recognised and protected?"

When the Office introduced freedom of association within the proposed resolution, the right to strike was mentioned only to explain that the granting of such a right to public servants would in no way determine the question of the right of such officials to strike. This issue was something quite apart from the question under consideration.¹³ But, in para. 2 of the Proposed Resolution, which purports to define the freedom of association of the collective entity, and which is the proper place to speak about the right to strike as being a collective right, such a right was not expressly proposed. It was only proposed that the workers' organisations should have the right to organise their activities without interference on the part of the public authorities. Furthermore, in para. 20, which is included in the part dealing with conciliation and arbitration, strikes and lockouts only are mentioned when stating that from the moment voluntary conciliation procedures begin, all parties concerned should be obliged to refrain from recourse to the strike or lockout.¹⁴ The same viewpoint was expressed by the International Labour Office in relation to the list of points. Strikes and lockouts were mentioned only in relation to voluntary conciliation.¹⁵

This approach, as we shall see in the forthcoming analysis, was closely followed not only by the 30th Session of the International Labour Conference and its Committees held in 1947, but also by the following 31st to 34th Sessions of the Conference in which Conventions Nos. 87 and 98, and the Recommendations concerning Collective Agreements (No. 91) and Voluntary Conciliation and Arbitration (No. 92) were adopted. That is also the reason that in its Report the McNair Committee,¹⁶ considered that the right to strike did not lie within its terms of reference and preferred to "regard the matter as an aspect of the procedures of conciliation and arbitration in force in the various countries which were examined within that Report."¹⁷

2.3 THE INTERNATIONAL LABOUR CONFERENCE, 31ST SESSION, 1948

At this Conference a draft on Freedom of Association and Protection of the right to Organise had already been presented and considered by the Conference

12. For the memorandum see *Freedom of association and industrial relations*. Report VII, 1947, op. cit., Appendix A pp. 136-143.

13. Ibid., p. 109.

14. Ibid., p. 130.

15. See para. 25 of the List of Points, *ibid.*, p. 134.

16. For the Report of the Committee on freedom of employers' and workers' organisations from government domination and control (McNair Committee) see *Official Bulletin* (Geneva, ILO), Vol. 39, No. 9, 1956, pp. 475-578 (hereinafter: *McNair Report*). This Committee, which convened under the chairmanship of Lord McNair, was appointed by the Director-General of the International Labour Office in pursuance of a Resolution adopted by the Governing Body on 4 March 1955. For the development which brought about the creation of this Committee see C. W. Jenks, *The international protection of trade union freedom*, (London, Stevens & Sons, 1957), pp. 174-179.

17. *McNair Report*, op. cit., para. 318.

Committee on Freedom of Association and Industrial Relations,¹⁸ and was finally adopted by the Conference.¹⁹ Generally speaking, concerning the matter of the right to strike, our examination of the Records of Proceedings of the Conference Session did not prove to be very enlightening, due to the concise nature of the Reports of the various Conference Committees.²⁰ For example, in the three Reports of the 1948 Conference Committee on Freedom of Association and Industrial Relations, the right to strike was occasionally mentioned only as a side issue to the discussion concerning the right not to be organised.²¹ Under such circumstances, unfortunately much is left to guesswork and inferences from the available evidence.

Two incidents which took place during the deliberations of this Committee, concerning two amendments which had been submitted in relation to the draft Convention, are worth mentioning. Because of the concise and thus incomplete form of the 1947 Committee's Report, the connection between the two proposed amendments and the right to strike is somewhat tenuous, and the study will rely to some extent upon inference and educated guesswork, as the Record of Proceedings of this Conference does not report the content of the proposed amendments.

The first incident is related to Article 3 of the draft Convention on Freedom of Association and Protection of the Right to Organise. What is documented within the First Report of the Conference Committee in this respect, is that an amendment proposed by the Argentine Government member was submitted and later on withdrawn. It was understood that the proposer could bring it up again during the discussion on Item VIII of the agenda which concerned the application of the principles of the right to organise and bargain collectively.²² No details as to the content of this amendment are provided within the Report, and as there is no documentation in the Third Report of the Conference Committee of a new attempt made by the Argentine Government to re-introduce the amendment, we are left in the dark in this respect.

The second incident is very similar, the only difference being that this

18. For the two Reports of the Conference Committee on Freedom of association and protection of the right to organise see ILO: *Record of Proceedings*, International Labour Conference, 31st Session. Geneva, 1950, Appendix X, Seventh Item on the Agenda: Freedom of association and protection of the right to organise, pp. 473-488, and for the third Report of the Committee see Appendix XI, Eighth Item on the Agenda: Application of the principles of the right to organise and to bargain collectively (First discussion), pp. 489-493.

19. For the Final Record vote on the Convention concerning freedom of association and protection of the right to organise see *ibid.*, p. 268.

20. A typical incident in this respect which clearly illustrates the problem is the case of Mr. O'Brien (Employers' delegate from Ireland). When he addressed the Conference he said *inter alia*: 'It came therefore as a shock to us when the report for this year was presented to the Committee. Gone was the detail . . . it did not cover the subject. Our difficulty was that in this report there was little, if anything, to indicate the work and the effort and the arguments which were put into the whole subject for a period of more than three weeks.' See ILO: *Record of Proceedings*, International Labour Conference, 34th Session, Geneva, 1952, pp. 371.

21. See ILO: *Record of Proceedings*, International Labour Office, 31st Session, Geneva, 1950, pp. 489, 490.

22. *Ibid.*, p. 477.

time the proposed amendment was submitted by the Uruguayan Workers' member and related to Article 8 of the draft Convention.²³ Although from the Report we know that this amendment dealt with the application of the principle of the right to organise and to bargain collectively, we do not know whether the right to strike was included therein. Again, the amendment was withdrawn with the understanding that it could be taken up again during the discussion of the next Item on the agenda.

It seems as if one of these amendments could be, in one way or another, related to the right to strike. Three arguments support such a hypothesis.

According to the first argument, Articles 3 and 8 of the draft Convention comprise the appropriate Articles whereby a right to strike could be provided. The fact is, that only a few years later, when the CFA recognised such a right as inferred from this Convention, these Articles served as the primary source for such a recognition.²⁴ Therefore, the fact that both these amendments were submitted in relation to Articles 3 and 8 creates a reasonable assumption that these proposed amendments were connected with the right to strike.

Another argument supporting the afore-mentioned hypothesis, relates to the procedure according to which these amendments were withdrawn. These amendments, in contrast to others, were not rejected but were only asked to be withdrawn by the Chairman of the Committee, because in his opinion they had been proposed at the improper time. The requests for withdrawal carried with them the permission to re-introduce the amendments again at a more suitable moment. In this respect the tactics adopted by the Chairman of the Committee very much resemble the attitude which was adopted by the International Labour Office, and as we shall see shortly, also by the various Conference Committees which functioned in the following 32nd to 34th Sessions of the Conference. Whenever the matter of the right to strike was raised, attempts were consistently made to consider the right to strike only in relation to the voluntary conciliation and arbitration procedure, thus avoiding any discussion of such a right in relation to any other subject.²⁵ For example, as will be shown in detail later on, this attitude continued to prevail during the following International Labour Conference, in relation to amendments which expressly proposed to secure the right to strike, a fact which can be verified from the Reports of the 32nd Session of the Conference, which contain the full documentation concerning such amendments.²⁶

Finally, it is worthwhile to note an additional event which took place a few years later and might have a vague connection with the Uruguayan amendment which was submitted and withdrawn. Not only was it the Uruguayan representative involved in both cases, but his involvement concerned

23. Ibid., p. 478.

24. See in this respect ILO: *Freedom of association*. An international survey by the Committee of Experts on the application of Convention and Recommendations, International Labour Conference, 59th Session, Geneva 1973, p. 22.

25. Such an attitude is adopted by the Office, for example, in *Freedom of association and industrial relations*. Report VII, 1947, op. cit.

26. See ILO: *Record of Proceedings*, International Labour Conference, 32nd Session, Geneva, 1951, pp. 468 and 470.

the submission of amendments in similar circumstances, since in both cases the general concept of freedom of association was being codified. In the latter case, when the inclusion of the right to strike within the draft of the International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations' Third Committee, it was due to the adoption of an amendment that was submitted *inter alia* by the Uruguayan representative.²⁷ Moreover, whenever the inclusion of the right to strike within the draft of the International Covenant on Economic, Social and Cultural Rights was contemplated, whether in the Commission on Human Rights or by the United Nations' Third Committee, the Uruguayan delegates were very active and creative.²⁸ Hence, it is quite possible and more than likely, that within the ILO the Uruguayan involvement concerned the right to strike.

2.4 THE INTERNATIONAL LABOUR CONFERENCE, 32ND SESSION 1949

While the exact contents of the two proposed amendments of the 1948 Conference are not clear, we find ourselves on more solid ground in the 1949 International Labour Conference. During this Conference a draft Convention on the Right to Organise and to Bargain Collectively was considered by the Conference Committee and finally adopted.²⁹ The Report of the 1949 Conference Committee on Industrial Relations provides a clear presentation of the proposed amendments, although not of the full discussions that took place.³⁰ Here we are already faced with two proposed amendments which attempted to secure expressly the right to strike within the draft Convention on the Right to Organise and Bargain Collectively.

First, an amendment submitted by the Polish and Czechoslovak Workers' members proposed the addition to Article 1 of the draft Convention of a new Article as follows:³¹

The right to strike is guaranteed to workers. Collective cessation of work is therefore not to be regarded as a breach of contract of employment and shall not give rise to any repressive measure on the part of employers or of public authorities.

The Chairman of the Committee ruled that this amendment was not receivable, on the ground that the question of the right to strike was not covered by the proposed text, and that consideration of this amendment should therefore

27. For the joint amendment see United Nations Doc., General Assembly, Third Committee, A/C.3/L552/Rev. 1.

28. As to the the Uruguyan amendment submitted to the Third Committee see *ibid.*, and as to the the Uruguyan amendment submitted to the Commission on Human Rights see United Nations Doc., ECOSOC, E/CN.4/L.78.

29. For the Report of the Conference Committee on Industrial relations see ILO: *Record of Proceedings*, International Labour Conference, 32nd Session, Geneva, 1951, Appendix VII, Fourth and Fifth Items on the Agenda: Industrial relations, pp. 464-478.

30. On the first amendment which concerns the right to strike see *ibid.*, p. 468; as to the second one see p. 470.

31. *Ibid.*, p. 468.

be deferred until the Conference took up Item V of its agenda relating, *inter alia*, to the question of conciliation and arbitration.³² In this case, Committee Chairman Thorn, the government Member of New Zealand, adopted the Office approach that the right to strike ought to be considered, if at all, only in relation to the voluntary conciliation and arbitration procedures. It is to be regretted that the Report does not include the discussions which followed the Chairman's ruling, since the proposers must undoubtedly have put forward various arguments in order to justify their proposal and its relation to the Convention on the Right to Organise and Bargain Collectively.

An additional incident is recorded within the Report. This time the Czechoslovak Government member proposed that a new Article relating to the guarantee of the right to strike should be placed between Articles 3 and 4 of the draft Convention.³³ This amendment, which was identical to the amendment already submitted by the Polish and Czechoslovak Workers' members in respect to Article 1, was declared not to be receivable for the reasons already mentioned in connection with the former amendment.³⁴

Apart from these two specific proposals, the right to strike is mentioned within the Committee's Report, as was the case in the previous year, only occasionally and in connection with the question of guaranteeing the right not to be organised.³⁵

The refusal to discuss the afore-mentioned amendments might have been the result of differences in the ideological approach of the three groups which participate in the ILO, relating to the proper place of the amendment on the right to strike. But it also might have been partially a result of the Cold War. If one considers the developments which occurred a few years later when the inclusion of the right to strike within the draft of the International Covenant on Economic, Social and Cultural Rights was contemplated, an explanation relevant to the present refusal emerges. It was the Socialist countries, which proposed to secure the right to strike,³⁶ while Western countries such as the United Kingdom, France or the United States, rejected the Socialist countries' proposal.³⁷ Only when the inclusion of the right to strike was proposed by an amendment submitted jointly by three South American countries, during the deliberations which had already taken place in the United Nations' Third Committee, did the Western countries' remove their resistance to the recognition of the right to strike.³⁸ In fact this attitude of the Socialist and the

32. Ibid.

33. Ibid., p. 470.

34. Ibid.

35. Ibid., p. 466.

36. In the Commission on Human Rights the inclusion of the right to strike was proposed by the USSR and by Yugoslavia. For the USSR proposal see United Nations Doc, ECOSOC, Commission on Human Rights, E/CN.4/L.50/Rev. 1, and for the Yugoslav proposal see United Nations Doc., ECOSOC, Commission on Human Rights, E/CN.4/L.78.

37. In this respect see United Nations Doc, ECOSOC, Commission on Human Rights, E/CN.4/SR.300, p. 13, for the report of the vote which was taken in the Commission on Human Rights by roll-call when the USSR proposal was considered.

38. In this respect see United Nations Doc, General Assembly, Third Committee, A/C.3/SR725 para. 30, for the report of the vote which was taken in the United Nations Third Committee by roll-call when the three-power amendment was considered. This time

Western countries concerns not only the question of the right to strike, but the very idea of recognising socio-economic claims as human rights. This idea was raised by the Socialist countries and met some very strong opposition from the Western world.

2.5 THE INTERNATIONAL LABOUR CONFERENCE, 33RD SESSION, 1950

At the 33rd Session of the International Labour Conference, in 1950, draft Recommendations concerning Collective Agreements and Voluntary Conciliation and Arbitration were discussed by the Conference Committee on Industrial Relations.³⁹ This time, at least as far as the Recommendation on Voluntary Conciliation and Arbitration was concerned, the right to strike had to be discussed, and the argument that it was outside its context was unacceptable. But the Office-proposed text presented to the Committee did not provide a right to strike at all.⁴⁰ The only references it contained regarding the right to strike were the provisions in Articles 4 and 6 that while voluntary conciliation and arbitration were in progress, the parties to such proceedings should abstain from strikes and lockouts. Examination of the minutes of the Committee's Report indicates again that it does not reflect the full and detailed discussions which took place in regard to the right to strike. The only details we can learn from this Report are first, that the Government member from the United Kingdom submitted an amendment according to which the parties to a voluntary conciliation procedure which is in progress should be encouraged to abstain from strikes and lockouts, and not compelled to abstain as had been proposed in the Office draft.⁴¹ This amendment was adopted by 54 votes to 46.⁴² Furthermore, the Employers' members submitted an amendment proposing that the words 'strikes and lockouts' be replaced by the words 'strikes, lockouts and all forms of action designed to exert pressure on the other party or parties'.⁴³ This amendment was rejected by 52 votes to 46.⁴⁴ It is perhaps worthwhile to add that the 1950 Conference did not amend Article 6 of the draft Recommendation on Voluntary Conciliation and Arbitration which still required abstention from strikes and lockouts during the time that voluntary arbitration was in progress, as opposed to the previous conciliation procedure where it was proposed only that the parties be encouraged to abstain from such actions.

The Conference Committee's Report in relation to the Recommendation which concerns Collective Agreements contains no reference whatsoever to

countries like Canada, the United Kingdom or the United States of America did not vote against but abstained only.

39. For the Report of the Conference Committee on Industrial relations see ILO: *Record of Proceedings*, International Labour Office, 33rd Session, Geneva, 1951, Appendix VM, Fourth Item on the Agenda: Industrial relations, pp. 487-499.

40. For the Office proposed text see *ibid.*, pp. 496-499.

41. *Ibid.*, p. 498.

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*

the right to strike.⁴⁵ During the 1950 Conference, neither the draft Recommendation on Voluntary Conciliation and Arbitration, nor the draft Recommendation on Collective Agreements was adopted, and consequently, the discussion of these drafts Recommendations was to be continued during the 34th Session of the International Labour Conference.

2.6 THE INTERNATIONAL LABOUR CONFERENCE, 34TH SESSION, 1951

In 1951, the Conference Committee's Report was even more concise than the previous Reports had been.⁴⁶ It is reported only that after a short discussion the proposed Recommendation which had been submitted to it was adopted with two important changes, one of which concerned the right to strike.⁴⁷ As it is reported, the Committee, desiring to emphasise the purely optional character of the procedures, adopted by 74 votes to 5 an amendment submitted by the Workers' members suggesting the addition of a final paragraph which became Article 7 of the Recommendation:⁴⁸

No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.

What is not reported is that Article 6 was also amended by the Committee, so that the parties to the arbitration would be encouraged to abstain from strikes and lockouts so long as the arbitration was in progress.⁴⁹ It is regrettable that even the short discussion which took place in relation to the addition of Article 7 was not reported and detailed in the Conference Committee's Report.

2.7 CONCLUDING REMARKS RELATED TO THE LEGISLATIVE HISTORY

That there was a need for securing the right to strike goes without saying. Yet, for some reason or another, the subject was handled with undue delicacy, creating the anomaly of avoiding the matter. The Office took the stand that since the whole concept of freedom of association was guaranteed, there was no specific need to secure the right to strike. Unfortunately, the reasons for this attitude are not documented, and apart from some hints which can be gleaned from informal channels, all this study can suggest as an explanation are, as mentioned, procedural difficulties, political differences,

45. Ibid., pp. 487-495.

46. On this matter *see supra*, note 20.

47. For the Report of the Conference Committee on Industrial relations *see* ILO: *Record of Proceedings*, International Labour Conference, 34th Session, Geneva, 1952, Appendix VIII, Fifth Item on the Agenda: Industrial relations, including Collective agreements and voluntary conciliation and arbitration, pp. 601-606, at p. 604.

48. Ibid.

49. Ibid., p. 606.

the feeling that specific elaboration was unnecessary, and workers' fears that specifying a right to strike would also lead to its restriction.

The phenomenon of strikes, at the time when the whole complex of the freedom of association and collective bargaining concept was regulated by Conventions and Recommendations which were adopted in this respect, was a most significant matter, and a most difficult and controversial one.⁵⁰ Interestingly, informal channels reveal that the main opposition to the inclusion of a right to strike within Conventions Nos. 87 and 98, came from the Workers' members, who presumably, would have been the ones to fight for a recognition of this right. The reason behind such an objection rested, upon the fears of the Workers' group that the safeguarding of the right to strike within the ILO Conventions would inevitably require setting its limitations. The tripartite structure of the ILO, which makes the adoption of a Convention dependent upon the consent of the Employers' group, would most likely have led to the safeguarding of a restricted right to strike. The Employers' group would have been willing to support the right to strike, but only if they could set limits on its use, which would have diluted its strength. Therefore, it seems as if the Workers' group was left with no alternative but to leave out the whole subject of strikes and lockouts.

When the developments which occurred a few years later within the Commission on Human Rights are analysed, it becomes apparent that the assumed hesitations of the Workers' group, as mentioned-above, had been fully justified. Within the deliberations of the Commission, which dealt directly with the right to strike, the center of the debate was not concerned with the question of whether the right to strike was or was not a universal phenomenon, but rather to what extent it should be restricted by the draft Covenant. The question is whether the situation in which the right to strike was not secured expressly within the ILO Conventions was better than having a limited right guaranteed. In making the choice between two alternatives the workers had to question whether or not the choice made was the correct one. As it turned out, when the CFA started to submit its recommendations, a new channel by which the freedom to strike was recognised was found. This will be presented by the forthcoming analysis of the two propositions which were earlier introduced.

3. The Freedom of Association Committee (CFA)

Propositions A and B, which will be analysed in this chapter, are based mainly upon the interpretation of the freedom of association concept derived from the recommendations of the Freedom of Association Committee of the Governing Body of the ILO (CFA), which comprises one of the ILO quasi-judicial institutions.⁵¹ Although there are other quasi-judicial bodies provided by the ILO supervisory machinery,⁵² the scope of this analysis of the freedom

50. See Jenks, op. cit., pp. 484-485.

51. On the CFA see Jenks, op. cit., pp. 187-195.

52. For the general ILO supervisory machinery see A. Valticos, 'International Labour Law', in R. Blanpain (ed.): *International encyclopaedia for labour law and industrial relations*,

to strike as a right under positive International Law, will be limited to the practice which has developed over the years by the CFA only.

A quantitative comparison of the activities of the CFA, to other ILO quasi-judicial bodies reveals the extremely rare use of the other ILO institutions. For example, very little use has been made of the Representation procedure for many years - as no more than 14 representations have been made to the ILO up to 1984.⁵³ Although, since that year a certain change is taking place in this respect. The Representation procedure under Article 24 of the Constitution has been used by workers' organisations on quite a large number of occasions during the years 1984-1986. The Complaint procedure has been used mostly in the last two decades, during which time 13 Complaints have been received, as compared to 1 Complaint during the first 40 years since the ILO was founded.⁵⁴ It should be noted in this respect that not all Complaints under Article 26 of the Constitution have led to the establishment of Commission of Inquiry. The Fact-Finding and Conciliation Commission on Freedom of Association was called upon on five occasions only.⁵⁵ By contrast, the CFA, which was founded in 1951, had heard 1,284 cases by May 1984, making it the obvious choice for this analysis.

As already mentioned, the CFA practice will serve as a basis for the analysis of two different propositions. The analysis of each proposition requires consideration of some of the same characteristic features of this quasi-judicial, including its competence, structure, composition and procedure. Therefore, before discussing the propositions, the study will begin by presenting an historical background of the CFA, which will enlighten the later discussion.

(Deventer, Kluwer, 1979), paras. 606-630. This machinery includes: 1. The examination of Periodical Reports; 2. The examination of complaints: a. Representation procedure according to Articles 23-25 of the ILO Constitution; b. Complaints procedure according to Articles 26-34 of the ILO Constitution. The ILO supervisory machinery includes also special machinery in the field of freedom of association. In this respect see *Ibid.*, paras. 631-638. The special machinery in the field of freedom of association includes: a. the Committee on Freedom of Association of the Governing Body of the ILO (CFA); b. the Fact-Finding and Conciliation Commission (FFCC). In this respect see also F. Wolf 'Human rights and International Labour Organisation', in Th. Meron (ed.): *Human rights in International Law: Legal and philosophical issues*, (Oxford, Clarendon Press, 1984) Vol. II, pp. 276-293.

53. See Valticos. op. cit., para. 630; Wolf, *ibid.*, p. 286.

54. See Valticos, op. cit., paras. 621-629; Wolf, *ibid.*, p. 288.

55. These cases concern: Japan, *Official Bulletin*, (Geneva, ILO), Vol. 54, No. 1, 1966, (Special Supp.); Greece, *Official Bulletin*. (Geneva, ILO), Vol. 54, No. 3, 1966, (Special Supp.); Lesotho, which is a case related to a state which is a member of the United Nations and not of the ILO, but the Government of which gave its consent to the procedure. The Report of the Commission in this case was transmitted by the Governing Body to the United Nations. For the Report of the Lesotho case see: ILO Doc.. GB. 197/3/5 [1975]; Chile, for the report see ILO: 'The trade union situation in Chile', *Report of the Fact-Finding and Conciliation Commission*, (Geneva, 1975); United States of America, about trade union matters in Puerto Rico: At the time when the complaint was submitted the United States of America was not a member of the ILO. In this case the ECOSOC of the United Nations decided, with the consent of the United States Government, to refer the case to the ILO Fact-Finding and Conciliation Commission. In this respect see Valticos, op. cit., paras. 636-638; Wolf, op. cit., p. 292.

3.1 HISTORICAL BACKGROUND

In the late 1940s, the question of finding ways and means on the international arena for safeguarding the freedom of association was dealt with by the United Nations and by the various organs of the ILO. At that time, allegations concerning violations of trade unions' rights were presented in both these international institutions. At that time a number of important states were not yet members either of the ILO or the United Nations (*e.g.* Japan or Spain), or were already members of the United Nations but not yet members of the ILO (as was the case of the USSR).

The question of freedom of association was raised within the United Nations at its Fourth Session (February-March 1947) when the ECOSOC was called upon to examine the question of 'guarantees for the exercise and development of trade union rights', which had been raised first by a memorandum of the WFTU and afterwards by another memorandum submitted by the AFL.⁵⁶ At the conclusion of its discussion the ECOSOC adopted a Resolution that both memoranda be transmitted to the ILO accompanied by a request that the question regarding trade union rights be placed on the agenda of its next session.⁵⁷

Consequently, the 1948 ILO Conference, which adopted the Freedom of Association and the Right to Organise Convention (No. 87), also adopted a Resolution requesting the Governing Body of the ILO to enter into consultation with the competent organs of the United Nations for the purpose of examining what changes in existing international machinery were necessary to ensure the safeguarding of freedom of association.⁵⁸ Hence, the ECOSOC at its Ninth Session in 1949, considered two documents: The first one was a Report prepared by the Secretary-General of the United Nations after consultation with the Director-General of the ILO, in which he recommended the setting up of a joint United Nations-ILO commission of inquiry and conciliation.⁵⁹ The second document was a letter from the Director-General of the ILO to the Secretary-General of the United Nations, informing him that the Governing Body of the ILO had adopted a Resolution in which it approved the establishment of a Fact-Finding and Conciliation Commission on Freedom of Association whose function would be the international supervision of that freedom.⁶⁰

In response, the ECOSOC requested the ILO to proceed, on behalf of the United Nations and in accordance with the relationship agreement be-

56. The WFTU memorandum (United Nations Doc, ECOSOC, E/C.2/28); the AFL memorandum (United Nations Doc., ECOSOC, E/C.2/32).

57. Resolution 52 (IV) of 24 March 1947. On this matter see United Nations: *United Nations action in the field of human rights* (New York, 1980), p. 188. The question was referred to the ILO under the terms of the agreement between the United Nations and the ILO which was formally rectified both by the Assembly of the United Nations and by the ILO. For the text of the agreement see *Official Bulletin*. (Geneva, ILO), Vol. 29, No. 4, 1946, p. 293.

58. ILO: *Record of Proceedings*, International Labour Conference, 31st Session, Geneva, 1950, pp. 544-545, adopted on 9 July 1948.

59. United Nations Doc, ECOSOC, E/1405.

60. On these developments see United Nations: *United Nations action in the field of human rights*, op. cit., p. 189.

tween the ILO and the United Nations, as well as on its own behalf, with the establishment of the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC).⁶¹ Moreover, the ECOSOC also requested that the United Nations Secretary-General and the ILO Director-General consult each other with a view to exchanging information and formulating a procedure which would make the FFCC available to the appropriate organs of the United Nations and to those of its members that were not members of the ILO.⁶²

A procedure concerning the treatment of violations of trade union rights was established by the ECOSOC during its Tenth Session in 1950,⁶³ and has since been followed by the United Nations and the ILO. It was decided that the ECOSOC would forward to the Governing Body of the ILO, for consideration regarding referral to the FFCC, all allegations regarding infringement of trade unions' rights received from governments, trade unions or employers' organisations against member States of the ILO. Furthermore, the ILO was requested to refer to the ECOSOC any allegations regarding infringement of trade union rights against member States of the United Nations which were not members of the ILO.⁶⁴

The 110th Session of the Governing Body of the ILO, held in Mysore in January 1950, established the FFCC on behalf of itself and the United Nations. The FFCC procedure was based upon a series of decisions of the Governing Body.⁶⁵ This procedure empowered a body of independent persons to perform a quasi-judicial, impartial examination of allegations concerning violations of trade unions rights.⁶⁶ However, this procedure contained

61. Resolution 239 (IX) of 2 August 1949.

62. See United Nations: *United Nations action in the field of human rights*, op. cit., p. 189.

63. ECOSOC Resolution 277 (X) of 17 February 1950.

64. At the same time the ECOSOC requested the Secretary-General to bring such allegations to the attention of the ECOSOC, and recommended that the General Assembly should also refer such allegations to the ECOSOC for action in accordance to the above-mentioned procedure. In this respect see United Nations: *United Nations action in the field of human rights*, op. cit., p. 189. The ECOSOC was called four times to refer allegations of violations of trade unions rights which concern states which were members of the United Nations but not members of the ILO. The first case concerned Lesotho. The Permanent Representative of Lesotho to the United Nations informed the Secretary-General, in a note dated 21 March 1972, that the Government of Lesotho had no objections to having the complaint forwarded to the FFCC. See ILO Doc, GB. 197/3/5. The second case concerned allegations against the Government of the Bahamas. But, as in the meantime the Bahamas became a member of the ILO the material was transmitted to the ILO for further action. The same occurred in relation to allegations against the Government of Bahrain. For detailed information on these three cases see United Nations: *United Nations action in the field of human rights*, op. cit., pp. 189-190. The fourth time concerned the United States of America (Puerto Rico) which was not a member of the ILO in 1980 at the time the complaint was submitted. See ILO: *Freedom of association and collective bargaining*. General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session. Geneva, 1983, para. 28.

65. Governing Body 109th, 110th, 111th and 112th Sessions of June 1949 and January, March and June 1950. See Jenks, op. cit., p. 180.

66. As to the FFCC procedure see E.B. Haas, *Beyond the Nation-State functionalism and international organisation*. (Stanford, Stanford University Press, 1964), p. 381; ILO: *77th ILO and the United Nations: Twenty-five years of a partnership of service*, op. cit., p. 26.

a built in limitation that it could be initiated only with the consent of the government named in the allegations since such consent was required according to the agreement with the ECOSOC. However, if an infringement of freedom of association was alleged to have occurred in a state that had ratified Conventions Nos. 87 and 98, the Governing Body could decide under Article 26 of the ILO Constitution, to refer the matter to a Commission of Inquiry instead of a FFCC. In this case no specific government's consent was required and it was sufficient that this government had ratified either one of the aforesaid Conventions. But, it should be emphasised that, unlike the restrictions evoked by the Commission of Inquiry procedure, the FFCC could also deal with situations confined not only to alleged violations of freedom of association standards inferred from ratified conventions, but also with violations of the general concept of freedom of association which were included in and secured by the ILO Constitution.

The basic aim and purpose in creating the FFCC procedure was to provide a facility for the impartial examination of facts in an atmosphere free of political prejudice or propaganda.⁶⁷ There were, however, differences of opinion as to whether or not retention of the consent requirement would curtail the effectiveness of the operation of the FFCC. But when a minority of the Governing Body led by Leon Jouhaux, leader of the Workers' group, objected to the inclusion of the consent requirement, the majority of the Governing Body over-ruled them, and the procedure adopted did retain the consent prerequisite.⁶⁸ Interestingly, the unforeseen difficulties which the consent requirement presented eventually resulted in a structural change, whereby the CFA was effectively substituted for the FFCC. This is discussed below.

In order to be able to understand the course of the following events, the procedure of referral to the FFCC must first be introduced. Any communication which contained allegations making it a subject for examination by the FFCC, would first be examined by a Committee of the Governing Body.⁶⁹ This Committee was called the Freedom of Association Committee of the Governing Body of the ILO (CFA) and its function was essentially to determine whether or not the communication in question required the consideration by the Governing Body. If so, the CFA would then recommend seeking the concerned government's consent, which, if granted would pave the way for examination by the FFCC.⁷⁰ However, if such consent were refused, the Governing Body would then be required to take other appropriate action in order to safeguard the freedom of association alleged to be

67. ILO: *The ILO and the United Nations: Twenty-five years of a partnership of service*, op. cit., p. 26.

68. See Jenks, op. cit., p. 182.

69. Originally the procedure initiated was different and less practicable. The allegations were referred to the Officers of the Governing Body instead of being referred to a Committee. If the Officers found that a *prima facie* case had been made, their Report was circulated to all the members of the Governing Body for suggestions to refer the matter to a FFCC. This procedure was changed in November 1951 at the 117th Session of the Governing Body when the Officers were replaced by the Committee. In this respect see ILO: *Fifth Report of the ILO to the United Nations*, (Geneva, 1951), pp. 253-264. See also Jenks, op. cit., p. 187.

70. Jenks, op. cit., p. 188.

violated by the complainant trade union.⁷¹ In 1950 the first allegations were submitted.⁷² They included a series of allegations in which the ICFTU and the AFL accused the Government of Peru of violating trade unions' rights. However, the Peruvian Government refused to consent to the examination and thus, at the very outset, brought the new procedure of the FFCC to a halt.

Gradually, as it became obvious that the needed consent was almost never to be given, a shift of emphasis took place: for practical purposes, the preliminary examination performed by the CFA, of whether or not consent for reference to the FFCC should be sought, began to take the place of the formal examination by the FFCC. Although the FFCC remained available, in substance all examinations began to be performed by the CFA.⁷³ Within a few months, the CFA, acting on behalf of the Governing Body, effectively became the parent Commission hearing and disposing of the complaints that had begun arriving in large numbers.⁷⁴

3.2 STRUCTURE AND PROCEDURE

The CFA is a tripartite body composed of nine regular Members, and nine substitute Members drawn from the Governments, Employers' and Workers' groups of the Governing Body of the ILO. Representatives or nationals of a state against which a complaint has been made, or persons occupying an official position in a national association of employers or workers which has filed a complaint, are disqualified from participating in the CFA procedure when it is examining the cases in which they are concerned.⁷⁵ Because of the quasi-judicial feature of the CFA procedure, its Members participate in a personal capacity and not as representatives of their governments or organisations.⁷⁶ The deliberations of the CFA are held in private.

The CFA has to deal with complaints of infringement of freedom of association which, to be eligible for consideration, must be submitted either by governments or by organisations of employers or workers. Complaints emanating from occupational organisations are receivable only if they are presented by a national organisation having a direct interest in the matter, or by international organisations of employers or workers having consultant status with the ILO, or by other international organisations of employers or workers where the allegations relate to matters directly affecting their

71. Ibid., p. 181.

72. On these allegations and the following developments see Haas, op. cit., p. 353.

73. See Jenks, op. cit., pp. 187-200.

74. E. B. Haas, *Human rights and international action, the case of freedom of association*, (Stanford, Stanford University Press, 1970), p. 26.

75. See Jenks, op. cit., pp. 187-188.

76. See ILO: *Freedom of association*. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (Geneva, ILO, 3rd ed., 1985), p. 1. For the CFA structure, procedure and competence see also R. Blanpain, "Committee on Freedom of Association (ILO)". in R. Blanpain (ed.): *International encyclopaedia for labour law and industrial relations, case law* (International Labour Law), (Deventer, Kluwer, 1985).

affiliated organisations.⁷⁷ Complaints may be presented against a government whether or not it has ratified Conventions Nos. 87 and 98.⁷⁸

When a complaint is received it is passed along to the government concerned for its observation. The complaining organisation is allowed a stipulation period in which to supply further information in substantiation of its complaint, and this information, too, is then transferred to the government concerned. It was decided by the Governing Body that when the government's observation is to reject the complaint and there is no convincing evidence included in the complaint or the observation, the CFA, without disclosing the government's reply, was authorised to request further information from the complainant in writing.⁷⁹

Gradually the CFA decided to make more use of asking the complainant for additional comments or details after it had received the observation of the government. Then the CFA decided to inform the complainants, in appropriate cases, of the substance of the government's observations and invited them to submit their comments thereon within a given period of time.⁸⁰ The Governing Body approved this procedure and the Director-General was authorised to seek such comments directly in the name of the CFA, without waiting for the CFA's next meeting. He could request the desired information, comments or observations by a given date, it being understood that the government as defendant would have the opportunity to reply to any new information or comments submitted by the complainant.⁸¹

In the beginning the CFA did not conduct oral hearings. But, in several cases, the Governing Body accepted the suggestion made by the CFA to afford an opportunity to the government concerned to discuss the matters at issue with the CFA.⁸² In 1979 it was decided that the CFA would be able to conduct oral hearings in the following cases:⁸³

77. See Committee on Freedom of Association, 29th Report, *Official Bulletin*, (Geneva, ILO), Vol. 43, No. 3, 1960, paras. 2-15, in particular para. 9.

78. See ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, op. cit/para. 29. In this respect see *infra* text related to notes 94-95.

79. Decisions taken by the Governing Body at its 123rd Session of November 1953; see Committee on Freedom of Association, 9th Report, §§2-40, in particular para. 29, published in the *Eighth Report of the ILO to the United Nations*, (Geneva, ILO, 1954), Appendix II, p. 117, at pp. 170-171.

80. See Committee on Freedom of Association, 111th Report, *Official Bulletin*, (Geneva, ILO), Vol. 52, 1969, Supplement, p. 3, para. 15.

81. See Committee on Freedom of Association, 127th Report, *Official Bulletin*, (Geneva, ILO), Vol 55, 1972, Supplement, pp. 8-10, paras. 9-28, in particular para. 15.

82. There were two cases in which the CFA suggested that the Governing Body should authorise it to afford an opportunity to the Governments concerned, to discuss with the Committee the questions at issue before the CFA attempts to formulate any further recommendations. See Committee on Freedom of Association, 1st Report, para. 142, published in the *Sixth Report of the ILO to the United Nations*, (Geneva: ILO, 1952), Appendix V, p. 169, at p. 196. In Case No. 763, the CFA recommended *inter alia* to invite the Minister of Labour to supply to the Committee detailed oral information. This invitation was extended to the principal complainant organisations involved in the case. See Committee on Freedom of Association, 179th Report, *Official Bulletin*, (Geneva, ILO), Vol. 61, Series B, No. 2, 1978, p. 99, para. 20.

83. See Committee on Freedom of Association, 193rd Report, *Official Bulletin*, (Geneva, ILO),

- a. In appropriate cases where the statements of the complainants and the government contradict and the CFA is of the opinion that it might be useful to furnish orally detailed information.
- b. In cases in which the CFA might consider it useful to have an exchange of views with the government and the complainants in question, in order to appreciate more fully the factual situation and the eventual developments in the situation, which might lead to a solution of the problem involved, and to seek to conciliate on the basis of the principle of freedom of association.
- c. Where particular difficulties have arisen in the examination of questions involved or in the implementation of its recommendations, and where the CFA might consider it appropriate to discuss the matters with the representative of the government concerned.

A new development in the CFA procedure has been the inclusion of a direct contact procedure. The direct contact procedure was originally possible only at the invitation of the government concerned, or at least with its consent.⁸⁴ In no case can the consent requirement be by-passed or avoided. Although in all cases involving direct contacts the consent of the government is indispensable, recently it was decided to adopt a more efficient procedure of direct contacts.⁸⁵ Accordingly, the Director-General upon receipt of a complaint containing allegations of a particularly serious nature, and after having received the prior approval of the Chairman of the CFA, may appoint a representative whose mandate it is to carry out preliminary contacts. Such a task includes the need to explain to the authorities the principles of freedom of association involved and to obtain their initial reaction, as well as any comments and information with regard to the matters raised in the complaint. This task also necessitates explaining to the authorities the special procedure in cases of alleged infringements of trade unions' rights, and in particular to introduce the direct contact method, which may subsequently be requested by the government in order to facilitate a full appraisal of the situation by the CFA and the Governing Body. Moreover, the special representative was authorised to request and encourage the authorities to answer as soon as possible with a detailed reply containing the observations of the government on the complaint.⁸⁶ The report of the representative would be submitted to the CFA at its next meeting for consideration together with all the other information made available in the interim.

Once in possession of all this information, the Committee makes its recommendations to the Governing Body. The CFA may recommend the

Vol. 62, Series B, No. 1, 1979, para. 32, approved by the Governing Body at its 210th Session, May 1979.

84. See Committee on Freedom of Association, 127th Report, *Official Bulletin*, (Geneva, ILO), Vol 55, 1972, Supplement, paras. 20-21.

85. See Committee on Freedom of Association, 193rd Report, *Official Bulletin*, (Geneva, ILO), Vol. 62, Series B, No. 1, 1979, para. 29.

86. *Ibid.*, para. 28.

Governing Body to refer it to the FFCC, or decide to recommend that the attention of the government concerned be drawn to anomalies noted with a view to steps being taken to remedy the situation. The CFA recommendations are in the form of a report which includes in the introduction matters related to questions of procedure, a list of governments which did not submit their observations on time, cases pending before the CFA, cases adjourned, cases for which direct contacts have been requested, urgent appeals, and effect given to the recommendations of the CFA and to the decisions of the Governing Body.

The decisions of the CFA are taken in light of the special circumstances prevailing in each case and should be considered within the context in which they appear. In addition, the CFA usually makes reference to decisions which it has taken previously, when it is faced with circumstances similar to those in the case under examination, so that a certain continuity as regards the criteria employed by it in reaching its conclusions may be maintained.⁸⁷ Accordingly, in ILO: *Freedom of association*, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, in which a summary of the decisions submitted by the CFA is presented, reference is made to cases in which the relevant decision forms an integral part of the final conclusions of the CFA and also to cases in which the CFA has confined itself to mentioning this decision as an aspect of its line of argument, although its conclusion might be different as a result of the special circumstances of the case in question.⁸⁸

3.3 COMPETENCE

From the outset the FFCC was authorised to investigate allegations which concern violations of freedom of association in general. Its competence was not restricted solely to complaints concerning infringement of ratified Conventions Nos. 87 and 98. Therefore, the FFCC could investigate complaints which referred to any of the ILO member States, even if certain States had not ratified the above-mentioned Conventions. Consequently, the CFA, which in the beginning had been designated as a preliminary procedure of the FFCC only, gradually also became competent to issue recommendations related to any of the member States of the ILO. Hence, it could be said that its jurisdiction became universal as it included all the States members of the ILO.⁸⁹ The Reports of the CFA verify this statement, as many of the allegations concern states which had not ratified Conventions Nos. 87 and 98.[^]

87. See ILO: *Freedom of association*. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, op. cit., p. 3.

88. The ILO: *Freedom of association*, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, op. cit., was issued according to a Resolution adopted by the International Labour Conference at its 54th Session (Geneva, 1970), Resolution VIII.

89. For example, according to the ILO record of March 1984 the ILO membership amounted at that time to 150 states.

90. It is stated at the head of each case reported whether the specific state against which the complaint was brought, did ratify Conventions Nos. 87 and 98.

The universality of the FFCC was not easily accepted. The question was raised in 1950 at the 33rd Conference of the ILO,⁹¹ when the Government of the Union of South Africa and the Government of Australia objected to the creation of the FFCC procedure and its universal scope.⁹² Among the several arguments was the claim that the creation of the FFCC and its universal scope were both unconstitutional. The main contention was that rights and obligations under International Law arise principally from Conventions. The ILO Constitution expresses the same principle. Therefore, no state is internationally obliged to accord trade unions' rights, unless it is bound to do so by a Convention. Moreover, if the state is not so bound, trade unions' rights remain solely matters of domestic jurisdiction. Hence, the argument was that any machinery like the FFCC procedure, designed to investigate violations of freedom of association, should have jurisdiction only as it applies to states bound by the ILO Conventions Nos. 87 and 98. Consequently, any procedure which permits investigation of violations of trade union rights by states which did not ratify Conventions 87 and 98 is unconstitutional.

The ILO Conference appointed a Subcommittee to consider the matter.⁹³ The objections were rejected by the Subcommittee which concluded that the establishment of the FFCC procedure of investigation and its universal scope were both in conformity with the ILO Constitution. These conclusions were supported both by Article 10 of the Constitution and by the consent requirement which is a prerequisite to the FFCC procedure. According to Article 10, the Governing Body of the ILO or the Conference are authorised to collect information or to conduct special investigations. This is particularly the case when the information concerns all subjects related to the international adjustment of conditions of industrial life and labour, or when such information concerns subjects which are brought before the Conference with a view to the conclusion of international Conventions. Although it was also stated that the aims of the ILO could be enforced only by way of ratified Conventions, it was possible to promote those aims in other ways.

Therefore, the Subcommittee found that the creation of the new FFCC procedure was constitutional, as it fell under the 'special investigation' authorisation of Article 10, a tool which was meant to promote freedom of association on the one hand, and as the procedure could not be put into motion in the case of complaints concerning states which did not ratify Conventions Nos. 87 and 98, unless a specific consent was first obtained on the other. Furthermore, the FFCC procedure cannot be seen as an enforcement procedure, because the FFCC is not a judicial institution which can promulgate decrees compelling compliance from the states against which allegations were made. It is only a fact-finding and conciliation body charged with enlightening the Governing Body of the ILO on matters of fact by attempting to verify the material accuracy, or inaccuracy, of the alleged facts. The Report of the Subcommittee was adopted by the Conference.

91. See ILO: *Record of Proceedings*, International Labour Conference, 33rd Session, Geneva, 1950.

92. See Jenks, *op. cit.*, pp. 191-193, for detailed information which concerns all other arguments.

93. *Ibid.*

The natural outcome of this conclusion was that when the CFA procedure was established later on, as a preliminary procedure of the FFCC, its competence was similar to the competence of the former. The legality of the CFA universal competence was challenged several times during its early years.⁹⁴ The arguments which were brought forth in this respect can best be illustrated by the complaint which was submitted against the Government of the Union of South Africa in Case No. 102.⁹⁵

In this case the Government contended that a new constitutional issue was raised by the fact that the ICFTU (the complainant) based certain of its allegations on a number of provisions of Conventions Nos. 87 and 98, since the Government had not ratified these Conventions and was not, therefore, legally bound by their provisions. For this reason the Government considered the allegations to be irrelevant.⁹⁶

The CFA ruled that, in view of the statements it made in two earlier cases, one relating to Argentina (Case No. 12)⁹⁷ and the other relating to the Union of South Africa (Case No. 63),⁹⁸ as well as the decision taken on this matter by the International Labour Conference at its 33rd Session in 1950, it was not necessary to further examine the question of the competence of the ILO to establish this procedure.⁹⁹ In addition, the CFA considered it appropriate that it should, in discharging its responsibility to promote the objectives of the ILO which had been entrusted to it which include, *inter alia*, the principle of collective bargaining, be guided in its task by the relevant provisions approved by the Conference and embodied in Conventions Nos. 87 and 98. These Conventions afforded a useful guide when examining particular allegations, even when the allegations related to governments which had not ratified these Conventions.¹⁰⁰ Furthermore, the CFA bolstered its argument by relying on Article 19 (5) (e) of the ILO Constitution. Article 19 (5) (e) states that ILO members have an obligation to report to the Director-General, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to matters dealt with in unratified Conventions; detailing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise; and

94. In this respect see Committee on Freedom of Association, 6th Report, Case No. 12 (Argentine Republic), para. 186; 12th Report, Case No. 633 (Union of South Africa), para. 268; 15th Report, Case No. 102 (Union of South Africa), paras. 128-132; 22nd Report, Cases Nos. 58 and 148 (Poland), paras. 87-89.

95. ILO: Committee on Freedom of Association, 15th Report, Case No. 102 (Union of South Africa), paras. 128-132.

96. *Ibid.*, para. 129.

97. See in this respect, Committee on Freedom of Association, 6th Report para. 186, published in the *Seventh Report of the ILO to the United Nations*, (Geneva: ILO, 1953), p. 267.

98. See in this respect, Committee on Freedom of Association, 12th Report para. 268, published in the *Eighth Report of the ILO to the United Nations*, (Geneva: ILO, 1954), p. 250.

99. See ILO: Committee on Freedom of Association, 15th Report, Case No. 102 (Union of South Africa), para. 128. The CFA repeated its ruling which concerned the matter of the constitutionality of its competence in a later case too, see in this respect Committee on Freedom of Association, 22nd Report, Cases Nos. 58 and (Poland), paras. 87-89.

100. See ILO: Committee on Freedom of Association, 15th Report, Case No. 102 (Union of South Africa), paras. 130-131.

stating the difficulties preventing or delaying the ratification of such Conventions.¹⁰¹ The CFA decision went on to state that the Government of the Union of South Africa was one of the Governments which were required to comply with this obligation at the request of the Governing Body, regarding Conventions Nos. 87 and 98. The CFA therefore considered that, while recognising that the provisions of these Conventions were not binding upon the Union of South Africa, it should examine the allegations relating to these Conventions with a view to ascertaining the facts and reporting them to the Governing Body.¹⁰²

The scope of the CFA procedure was thus established and accepted even when its function was in reality re-defined and when, in fact, the CFA replaced the FFCC.¹⁰³ The reasoning in the Union of South Africa case, that the principles enunciated in the Constitution of the ILO are applicable to all the member States of the Organisation, is today a well established principle accepted by the Committee of Experts on the Application of Conventions and Recommendations in its 1983 Report.¹⁰⁴ Therefore, as freedom of association is included among those fundamental principles, all member States of the ILO are bound to apply this principle. Hence, there is ground to state that violations of trade unions' rights are not solely a matter of domestic jurisdiction, even in the case of states which are members of the ILO but did not ratify Conventions Nos. 87 and 98.

3.4 THE STATUS OF THE RECOMMENDATIONS

That CFA recommendations are of a binding nature can be shown by procedures adopted by the CFA over a period of years, which are similar to standard legal proceedings. There are two important examples. First is the procedure followed in the case of recalcitrant defendant governments, when they fail to forward their observations relating to the complaint against them. Second is the procedure applied to ensure compliance with the decisions. As set forth below, the analysis of these two procedures additionally shed light upon the reactions of states, which did not ratify Conventions Nos. 87 and 98, to the CFA judicial process.

3.4.1 Procedure at the Complaint Stage

The CFA laid out several rules which were meant to encourage defendant governments to take part in its proceedings without any delay. The main rules

101. Ibid., para. 132, the CFA noted with satisfaction that the Government, while maintaining its express reservations as to the competence of the Committee, has nevertheless seen fit to present its observations on the substance of the complaint.

102. Ibid., paras. 130-131.

103. On the reshaping of the CFA procedure see Jenks, op. cit., pp. 199-200.

104. ILO: *Freedom of association and collective bargaining*. General survey by the Committee of Experts on the application of Conventions and Recommendations, op. cit., para. 5.

were introduced by the CFA in its 127th, 164th and 193rd Reports.¹⁰⁵ It was decided that in cases where governments delayed in forwarding their observations or the information requested from them, the CFA would mention those governments in a special paragraph of its Reports, and would address them with a pressing appeal for their co-operation.¹⁰⁶ If the special paragraph procedure proved to be futile it was decided that these governments would be warned that at its next session the CFA might submit a report on the substance of the matter, even if the information requested from such governments had not as yet been received.¹⁰⁷ In its 193rd Report, the CFA expressed its opinion that it ought to consider more frequently the possibility of submitting a report on the substance of the case, even if there were no observations or information from the government concerned.¹⁰⁸ A third step was also provided: where the governments were obviously unwilling to co-operate, the CFA decided that it might recommend, as an exceptional measure, that wider publicity be given to the allegations, to the recommendations of the Governing Body, and to the obstructive attitude of the government concerned.¹⁰⁹

It is enlightening to examine whether the phenomenon of governments who do not co-operate with the CFA is a widespread one, and whether there is a difference in this respect between states which ratified Conventions Nos. 87 and 98 and states which did not ratify these Conventions. The examination of several of the CFA Reports which were issued after the special paragraph procedure was adopted, provides a picture of widespread co-operation. For example, of the eight Reports (Nos. 222-229) which were issued in 1983,¹¹⁰ only two of them No. 222 and No. 226 contain special paragraphs. Each of the other six Reports (Reports Nos. 223-225, and Reports Nos. 227-229), is concerned with reporting one case only.

This study will consider a government to not be co-operating under three circumstances - if it is in a special paragraph, if the direct contact procedure is invoked, or if an urgent appeal has been requested. A country is placed in a special paragraph if after repeated requests it fails to provide its observations. If the special paragraph fails to force co-operation, direct contact may be suggested. Similarly, urgent appeals only arise if a prolonged government failure to co-operate produces an urgent need for CFA action. Consequently, cases that are adjourned once, or even twice, will not be considered to indicate failure to co-operate.

To take one example at random, according to paragraph 3 of the CFA

105. See Committee on Freedom of Association, 127 Report, *Official Bulletin*, (Geneva, ILO), Vol. 55, 1972, p. 6, at pp. 8-10; 164th Report, *Official Bulletin*, (Geneva, ILO), Vol. 60, 1977, p. 1, at pp. 5-7; 193rd Report, *Official Bulletin*, (Geneva, ILO), Vol. 62, 1979, pp. 155-166, at p. 156.

106. See Committee on Freedom of Association, 127 Report, *Official Bulletin*, (Geneva, ILO), Vol. 55, 1972, paras. 16-19.

107. *Ibid.*

108. See Committee on Freedom of Association, 193rd Report, *Official Bulletin*, (Geneva, ILO), Vol. 62, 1979, para. 20.

109. *Ibid.*, para. 16.

110. See *Official Bulletin*, (Geneva, ILO), Vol. 66, Nos. 1-2, 1983.

222nd Report, the Committee had before it seventy-eight cases,¹¹¹ in which the complaints had been submitted to the governments concerned for observation. The Committee reached final conclusions in eleven cases and interim conclusions in eight, the remaining cases were adjourned for varying reasons. First, paragraph 4 of the Report relates that the Committee adjourned until its next meeting ten cases for which it was awaiting information or observations from the government concerned. However, all these cases concerned complaints brought since the Committee's last meeting, and therefore, the delay could not be attributed to the government's unwillingness to co-operate.

In contrast, paragraph 5 of the Report mentions fourteen adjourned cases concerning eight governments in which the Committee had not received the observations or information requested, though the Committee had had the cases before it at its previous meeting. These cases concerned the following countries: El Salvador (Cases Nos. 953, 973, 987, 1016 and 1150), Brazil (Case No. 958), Nicaragua (Cases Nos. 1007 and 1129), Bahrain (Case No. 1043), Greece (Cases Nos. 1082 and 1167), Morocco (Case No. 1116), the Dominican Republic (Case No. 1118) and Colombia (Case No. 1140). These cases were adjourned for the first time and were not placed in a special paragraph. According to paragraph 7, another six cases, all of which concern Bolivia, were adjourned because a change of government had taken place. In paragraphs 6 and 8-15 of the Report the Committee mentions various other cases which were adjourned for reasons irrelevant to the present context.

There were only four cases in the Report evidencing real failure to co-operate. First, in paragraph 16, Case No. 1054 concerning Morocco is seen to merit the procedure of direct contact which was requested. Second, paragraph 17 which contains the special paragraph, lists three cases in which an urgent appeal was submitted. Regarding these - Grenada (No. 963), Honduras (No. 1166) and El Salvador (No. 1168) - the Committee noted that, in spite of the time which had elapsed, the observations of the governments concerned had not yet been received. Hence, the Committee decided that, in conformity with the procedural rules set forth in paragraph 17 of its 127th Report, it would present a report at its next meeting on the substance of these cases even if the governments' observations had not been received by then.

In summary, Report No. 222 shows that out of seventy-eight cases which were brought before the Committee, only four could be considered as cases in which the government concerned refused to co-operate, or delayed in co-operating. These include the one case in which the direct contact procedure was requested and the three cases mentioned in the special paragraph.

Similar conclusions result from an analysis of Report 226. This time, the Committee had before it eighty-six cases,¹¹² in which the complaints had been

111. This figure includes the cases relating to Argentina (Case No. 842), Turkey (Cases Nos. 997, 999 and 1029) and Poland (Case No. 1097) which are examined in the 223rd, 224th and 225th Reports, respectively.

112. This figure includes the cases relating to Argentina (Case No. 842), Turkey (Cases Nos. 997, 999 and 1029) and Poland (Case No. 1097) which are examined in the 227th, 228th and 229th Reports, respectively.

submitted to the governments concerned for observations. At the meeting the Committee examined thirty of the cases, and the rest were adjourned for various reasons. In fourteen of the cases, mentioned in paragraph 4, although the governments' observations had not been received, the delay was considered reasonable as the complaints had been submitted close to the time the Committee convened. In ten other cases, mentioned in paragraphs 5 and 7, the governments in one way or another informed the Committee that observations would be submitted in the near future. However, paragraph 5 also details another seven cases where there is a delay, as the Committee had already had those cases before it in its previous meeting. These cases are related to the governments of Sri Lanka (Cases Nos. 988 and 1003), Morocco (Case No. 1116), Nicaragua (Case No. 1169), Canada/Quebec (Case No. 1171), and the Dominican Republic (Cases Nos. 1177 and 1179).

In paragraph 15 there are six urgent appeal cases, relating to the governments of Brazil (Case No. 958), Nicaragua (Cases Nos. 1007 and 1129), Bahrain (Case No. 1043), Iraq (Case No. 1146) and Guatemala (Case No. 1176). These governments were notified by the Committee that it would present a report at its next meeting on the substance of these cases even if the governments' observations were not received.

The examination of Report 226 can be summarised by stating that in fact only six cases out of the eighty-six which had been before the Committee concerned governments that were reluctant to co-operate with the CFA. Moreover, summing up the work of the CFA during 1983 from this point of view, it seems that the number of non-co-operative governments is quite small, as in only 10 of the 164 cases brought before the CFA during that year was serious action taken. The special paragraph procedure is quite effective, and as a result the governments are providing the required observations or information. Thus, in the 234th Report of the CFA, several cases which in 1983 had been mentioned in a special paragraph, had been adjudicated by the CFA after the government's observations were received. Examples are Iraq (Case No. 1146) or Brazil (Case No. 958).

During 1983, there were sixteen governments which delayed, or did not provide in one way or another their observations or other required information. They are Brazil, Bahrain, Bolivia, Canada/Quebec, Central African Republic, Colombia, the Dominican Republic, El Salvador, Greece, Grenada, Guatemala, Honduras, Iraq, Morocco, Nicaragua and Sri Lanka. While *prima facie* it seems as if this group of governments is comprised of non-co-operating governments, it may be recalled that in some cases there are valid reasons for delays in responding to complaints on the one hand, and that all countries in this group have co-operated sooner or later in the procedures of the CFA on the other hand. It is interesting to inquire as to what extent this group of governments was comprised of states which did not ratify Conventions Nos. 87 and 98. Only two, El Salvador and Bahrain, did not ratify any of these Conventions. Eight of the governments ratified both Conventions Nos. 87 and 98: Bolivia, Central African Republic, Colombia, the Dominican Republic, Greece, Guatemala, Honduras and Nicaragua, and the remaining six ratified one of the two Conventions: Brazil, Canada, Grenada, Iraq,

Morocco and Sri Lanka. Hence, it seems that the phenomenon of non-co-operation is not related to the question of whether the state ratified Conventions Nos. 87 and 98. The analysis clearly indicates that states which did not ratify the Conventions Nos. 87 and 98 are behaving as if they had, and regard the CFA procedure as legally binding upon them. Consequently, they participate in the proceedings without raising any doubts in this respect.

3.4.2 Procedure at the Compliance Stage

The second procedural area which demonstrates the legally accepted nature of the CFA recommendations, is that of the follow-up action taken by governments on the recommendations made to them. The CFA maintains a follow-up list which reports the extent to which its recommendations have been complied with. The defendant governments are asked to report the extent of their compliance. These reports provide an accurate measure of compliance. Governments which do comply with the recommendations generally report in a timely manner, whereas governments that try to avoid the recommendation will tend not to report. Parenthetically, it seems as if non-complying governments are not inclined to reply falsely, because the workers in their country might act as watchdogs who will inform the ILO of factual inaccuracies. Unfortunately, it is quite rare that workers in the country concerned draw attention to cases in which the recommendations of the CFA are not followed.

In paragraphs 18-19 of the 193rd Report of the CFA it was stated that special procedures were being applied in relation to countries which ratified Conventions Nos. 87 and 98. In this case the examination of the action is normally entrusted to the Committee of Experts on the Application of Conventions and Recommendations, whose attention is specifically drawn by the CFA to discrepancies between national laws and practice and terms of Conventions. But, where a country has not ratified the Conventions involved, the CFA in some cases invites the government concerned to state, after a reasonable period has elapsed, what action it has been able to take on the recommendations made to it. Moreover, according to paragraph 28 of the 127th Report, if there is no reply, or if the reply is partly or entirely unsatisfactory, the matter should be followed up periodically. The Committee must instruct the Director-General at suitable intervals, according to the nature of each case, to remind the government concerned of the matter and to request it to supply information as to the action taken. The CFA itself will from time to time report on the situation.

Generally speaking, the matter of enforcement on the international plane is a very difficult one, but a statement in paragraph 9 of the 193rd Report discusses the results of the CFA recommendations. It states that there is no doubt that in a large number of cases, the positive results achieved can be directly linked to the action of the Committee. It can also be said that in other cases of achievements, the Committee's efforts, coupled with other prevailing factors, greatly contributed in obtaining the desired results from

governments.¹¹³ Furthermore, it seems that the growing number of cases submitted annually also indicates that the CFA recommendations are having a positive effect.

When the matter of the follow-up was discussed during the 205th Session of the Governing Body (February-March 1978), it was proposed by the Workers' members that the ILO should have recourse to new and more severe measures in order to ensure the more effective implementation of its recommendations.¹¹⁴ Such measures would include, in particular, the withholding of technical co-operation, the refusal to hold meetings and the closure of the ILO field offices.¹¹⁵ The Committee expressed its view in this respect in paragraph 39 of the 193rd Report, where it stated that whatever the situation, the Committee, which has quasi-judicial functions, does not consider itself competent to examine or to propose any such measures, any consideration of which would be a matter for the Governing Body itself.

The follow-up procedure can also be illustrated by the 222nd and the 226th Reports, as only these two Reports out of the eight which were issued in 1983, contain provisions related to the effect given to recommendations of the Committee and of the Governing Body of the ILO. The follow-up of twelve cases is included within paragraphs 18-29 of the 222nd Report. The effect given to the CFA recommendations reported in those provisions relates to the following states: Chile (Cases Nos. 823, 1028, 1109 and 1152), Colombia (Cases Nos. 871 and 1073), Greece (Cases Nos. 968, 989 and 1019), India (Case No. 1024) and Japan (Case No. 1151).

The fact that these governments supplied a report in which the effect given to the CFA recommendations is discussed, does not prove *per se* that the afore-mentioned recommendations were fully implemented. Thus, the Chilean report relating to Case No. 823, which is discussed and severely criticised in paragraph 18 of the 222nd Report by the CFA states:

The Committee also notes the amendments made by the Government to the trade union legislation. It regrets to note that the majority of the provisions on which comment had been made have not been amended. The Committee can only again express the hope

113. See ILO: Committee on Freedom of Association, 193rd Report, para. 10, stating that since the beginning of 1976 the Committee, in the course of its examination of certain cases involving the arrest, detention or exile of trade unionists, has been informed of the release of over 250 trade unionists. See in this respect ILO: Committee on Freedom of Association, 157th Report, Case No. 812 (Spain), Case No. 763 (Uruguay) and Case No. 823 (Chile); 158th Report, Case No. 744 (The Central African Republic); 160th Report, Case No. 842 (Argentina); 161st Report, Case No. 823 (Chile); 163rd Report, Case No. 763 (Uruguay); 164th Report, Case No. 750 (Spain); 165th Report, Case No. 842 (Argentina); 166th and 169th Reports, Cases Nos. 685, 781, 806 and 814 (Bolivia); 172nd Report, Case No. 824 (Benin); 175th Report, Case No. 842 (Argentina); 176th Report, Case No. 823 (Chile); 177th Report, Case No. 823 (Chile) and Case No. 829 (Jordan); 181st Report, Case No. 897 (Paraguay); 183rd Report, Case No. 763 (Uruguay); 184th Report, Case No. 842 (Argentina); 187th Report, Case No. 840 (The Sudan), Case 885 (Ecuador), Case No. 823 (Chile), Case No. 854 (Paraguay), Case No. 861 (Bangladesh), Case No. 899 (Tunisia); 188th Report, Case No. 763 (Uruguay); 189th Report, Case No. 842 (Argentina).

114. See ILO: Committee on Freedom of Association, 193rd Report, paras. 33-34.

115. *Ibid.*, para. 39.

that the necessary amendments will be made shortly in the light of the recommendations set out in its 197th Report, in particular, as regards . . . the restrictions on the right to strike.

In such a case the Committee continues to require additional information until it is satisfied. Thus, Case No. 823 was further discussed in paragraph 16 of the 226th Report and in paragraph 18 of the 234th Report. Presumably this Case will be further discussed until the Committee is satisfied with the outcome.

The Report also includes a special paragraph of governments which, despite having been requested to report about the enforcement of the CFA recommendations, did not provide the desired information. Such a particular paragraph is paragraph 30 of the 222nd Report. This paragraph contains eleven cases relating to the following states: Bolivia (Case No. 1093), Brazil (Case No. 1043), Colombia (Cases Nos. 871 and 919), Kenya (Case No. 984), India (Case No. 1091), Malaysia (Case No. 965), Morocco (Case No. 1077), Paraguay (Case No. 854), Peru (Case No. 967) and the United States of America (Case No. 1074). That the special paragraph in this situation is quite effective as shown by the following five cases, which while included in a special paragraph in the 222nd Report, were already reported in paragraphs 17-18, 20-21 and 26 of the 226th Report: Colombia (Cases Nos. 871 and 919), Malaysia (Case No. 965), Peru (Case No. 967) and the United States of America (Case No. 1074). It must be noted, however, that sometimes the answer provided by the government is only partial or even amounts to nothing at all. In such a situation, the Committee has to continue its follow-up, as happened with Peru (Case No. 967), which was consequently reincluded in the special paragraph appearing in paragraph 23 of the 234th Report.

The examination of paragraphs 16-31 of the 226th Report from this perspective indicates the same findings. While fifteen cases are being followed up, either fully or partially in paragraphs 16-30, a special paragraph relating to ten cases is provided in paragraph 31. The reports which are provided concern Chile (Cases Nos. 823, 1028 and 1117), Colombia (Cases Nos. 879, 919 and 1065), Guyana (Case No. 941), India (Case No. 1024), Malaysia (Case No. 965), Morocco (Case No. 1115), Peru (Case No. 967), Portugal (Cases Nos. 1042 and 1087), the United States of America (Case No. 1074) and Upper Volta (Case No. 1131). In addition, the ten countries included in the special paragraph concern Bolivia (Case No. 1093), Brazil (Case No. 1034), Costa Rica (Case No. 1122), Kenya (Case No. 984), India (Case No. 1091), Morocco (Case No. 1077), Pakistan (Case No. 1075), Sierra Leone (Case No. 1121), Sudan (Case No. 1037) and Venezuela (Case No. 1141).

Here again, it is interesting to see how many of the countries mentioned in the special paragraph did not ratify Conventions Nos. 87 and 98. Such an examination might provide some indication as to enforcement patterns of behaviour of states which did not ratify those Conventions, and enable us to learn whether CFA recommendations applied to these countries are enforced to a lesser degree. In the 222nd and 226th Reports issued during 1983, fourteen states were mentioned in these special paragraphs. Only one state

(India) did not ratify any one of Conventions Nos. 87 and 98; eight states (Bolivia, Colombia, Costa Rica, Pakistan, Paraguay, Peru, Sierra Leone and Venezuela) ratified both Conventions, and five states (Brazil, Kenya, Malaysia, Morocco and Sudan) ratified one. These numbers re-emphasise the fact that countries which are reluctant to report about the enforcement of the CFA recommendation, presumably because they did not implement those recommendations, are not necessarily countries which did not ratify Conventions Nos. 87 and 98. This fact supports the conclusion that such countries are legally bound by the CFA procedure and feel obliged to follow it.

3.5 SUMMING UP THE CFA PROCEDURE

In conclusion, upon analysis of its structure and procedure, the CFA can be regarded as a quasi-judicial body.

The CFA procedure is now considered by all States members of the ILO to be a legally binding procedure. In this respect there is no difference in the behaviour of states which ratified Conventions Nos. 87 and 98, and the behaviour of states which did not ratify these Conventions.

4. Proposition A Related to Conventions Nos. 87 and 98 as the Source of an Implicit International Labour Standard

As stated earlier, despite the fact that there are no explicit provisions to be found in any of the ILO instruments guaranteeing freedom to strike, there are, in fact, ILO standards regulating the matter of freedom to strike. The following Proposition A, if accepted, serves as the source of the aforementioned standards:

- A. The right to strike is a treaty-based international labour standard inferred, according to the recommendations of the CFA, although tacitly, from Conventions Nos. 87 and 98, by which a legal obligation of a limited scope is imposed and applies only to states which ratified these Conventions.

First it is necessary to analyse the connection between the freedom of association concept with which the CFA is officially concerned and the freedom to strike. The CFA, whose competence was restricted to matters of freedom of association only, nevertheless accepted that allegations relating to the right to strike are not outside its competence in so far as they concern the exercise of trade unions' rights.¹¹⁶ The right to strike, both of workers and

116. See ILO: Committee on Freedom of Association, 30th Report, Case No. 177 (Honduras), para. 76; 41st Report, Case No. 143 (Spain), para. 91; 58th Report, Case No. 221 (the United Kingdom/Aden), para. 109; 60th Report, Case No. 191 (the Sudan), para. 155; 67th Report, Case No. 199 (Argentina), para. 98; 71st Report, Case No. 273 (Argentina), para. 67; 79th Report, Case No. 380 (the United Kingdom/Southern Rhodesia), para. 68; 83rd Report, Case No. 303 (Ghana), para. 217; 104th Report, Case No. 493 (India), para. 73; 105th Report, Case No. 524 (Morocco), para. 245; 111th Report, Case No. 546 (Colombia),

their organisations, is generally recognised by the CFA not only as a legitimate means of defending their occupational interests,¹¹⁷ but even as an essential one.¹¹⁸ As the Committee of Experts on the Application of Conventions and Recommendations expressed it in its 1983 Report: "The Committee considers that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests".¹¹⁹ This approach is typical of the attitude of the CFA, and was founded upon Articles 3, 8 and 10 of the 1948 Convention (No 87). In other words, the right to strike was seen to be implicitly contained in the concept of freedom of association which was recognised as being a three-dimensional concept, one of its dimensions being the right to strike.¹²⁰ In approximately 500 cases dealt with by the CFA since 1951, the CFA relied upon this three-dimensional concept to infer this from Article 3 of Convention (No. 87) which provides *inter alia* that workers' organisations shall have the right to organise their administration and activities and to formulate their programmes without the interference of public authorities, which might restrict this right or impede the lawful exercise thereof.¹²¹ The

para. 79; 116th Report, Case No. 385 (Brazil), para. 167; 118th Report, Cases Nos. 589 and 594 (India), para. 59; 120th Report, Case No. 604 (Uruguay), para. 150; 122nd Report, Case No. 636 (Argentina), para. 41; 123rd Report, Case No. 614 (Peru), para. 32; 125th Report, Case No. 642 (the United Kingdom/British Honduras), para. 38; 127th Report, Case No. 627 (the United States), para. 56; 128th Report, Case No. 662 (Nicaragua), para. 38; 133rd Report, Case No. 699 (Canada), para. 188, Case No. 629 (Nicaragua), para. 219; 134th Report, Case No. 693 (Uruguay), para. 15, Case No. 702 (Costa Rica), para. 36; 138th Report, Case No. 719 (Colombia), para. 71; 139th Report, Cases Nos. 741 and 742 (Japan), para. 137, Case No. 722 (Spain), para. 393; 142nd Report, Case No. 753 (Japan), para. 149, Case No. 678 (Spain), para. 189; 143rd Report, Case No. 757 (Australia), para. 153; 150th Report, Cases Nos. 758 and 783 (Costa Rica), para. 41.

117. See ILO: Committee on Freedom of Association, 4th Report, Case No. 5 (India), para. 27; 15th Report, Case No. 103 (the United Kingdom/Southern Rhodesia), para. 180; 25th Report, Case No. 152 (the United Kingdom/Northern Rhodesia), para. 217; 30th Report, Case No. 212 (the United States), para. 80; 60th Report, Case No. 274 (the Libyan Arab Jamahiriya), para. 266; 66th Report, Case No. 294 (Spain), para. 481; 90th Report, Case No. 490 (Colombia), para. 39; 106th Report, Case No. 523 (Canada), para. 32; 110th Report, Case No. 519 (Greece), para. 79; 113th Report, Case No. 266 (Portugal), para. 158; 116th Report, Case No. 385 (Brazil), para. 167; 118th Report, Cases Nos. 589 and 594 (India), para. 59; 122nd Report, Case No. 636 (Argentina), para. 41; 123rd Report, Case No. 614 (Peru), para. 32; 125th Report, Case No. 642 (the United Kingdom/British Honduras), para. 38; 139th Report, Cases Nos. 737 to 744 (Japan), paras. 122 and 197, Case No. 725 (Japan), para. 330; 142nd Report, Cases Nos. 745, 753 and 755 (Japan), paras. 125 and 149, Case No. 678 (Spain), para. 189; 149th Report, Case No. 793 (India), para. 133.
118. See ILO: Committee on Freedom of Association, 2nd Report, Case No. 28 (the United Kingdom/Jamaica), para. 68; 30th Report, Case No. 177 (Honduras), para. 76; 41st Report, Case No. 143 (Spain), para. 91; 58th Report, Case No. 221 (the United Kingdom/Aden), para. 109; 78th Report, Case No. 364 (Ecuador), para. 84; 82nd Report, Case No. 343 (Ceylon), para. 26; 87th Report, Case No. 363 (Colombia), para. 89; 130th Report, Case No. 641 (Colombia), para. 14; 138th Report, Case No. 719 (Colombia), para. 71; 139th Report, Case No. 722 (Spain), para. 393; 147th Report, Case No. 765 (Chile), para. 167; 149th Report, Case No. 709 (Mauritius), para. 111.

119. See ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, op. cit., para. 200.

120. On the three-dimensional concept see Part 1.

121. See Valticos, op. cit., para. 188.

CFA recognised the right to strike as being included within these activities, and determined its limits.¹²²

An analysis of CFA recommendations, and in particular the CFA interpretation of the right to strike as part of an international labour standard guaranteed by Conventions Nos. 87 and 98, supports Proposition A *vis a vis* those states which have ratified the relevant Conventions.

5. Proposition B Related to the ILO Constitution as the Source of an Implicit International Labour Standard

While Proposition A is relevant in the case of states which ratified Conventions Nos. 87 and 98, it is not relevant in the case of all other States members of the ILO. But the CFA has also dealt with allegations concerning violations of the right to strike by states which did not ratify those Conventions. Among these were the case of Spain,¹²³ where it was alleged that the applicable legislation in the event of labour disputes and strikes was in variance with the international labour standard of the right to strike, or the case of India,¹²⁴ where it was claimed that the legal restriction of the right to strike of the railway workers violated trade unions' rights. There are two important questions here:

The first concerns the states which did not ratify Conventions Nos. 87 and 98, and therefore are not required to act in compliance with the international labour standards secured by these Conventions. What, then, is the legal source from which an obligation is imposed to abide by the international labour standard concerning the right to strike?

The second question is what are the proper criteria to be used, in order to decide whether the international labour standard which concerns the right to strike has been violated, in circumstances where the provisions of Conventions Nos. 87 and 98 are not applicable?

The answers may be found in the following Proposition B:

- B. The right to strike is a treaty-based international labour standard inferred, according to the recommendations of the CFA, although tacitly, from the freedom of association general concept secured within the ILO Constitution, by which a legal obligation of a universal scope is imposed, as these recommendations are applied to all the States, which as members of the ILO are bound by its Constitution.

This Proposition requires some elaboration, and we shall start with the legal source from which an obligation to recognise a right to strike is inferred and imposed upon states which did not ratify Conventions Nos. 87 and 98. From the outset it was clear that the CFA and the FFCC its predecessor, were both

122. For the various restrictions of the right to strike which are considered legitimate according to the recommendations of the CFA see Part III.

123. ILO: Committee on Freedom of Association, 149th Report, Case No. 678 (Spain).

124. ILO: Committee on Freedom of Association, 149th Report, Case No. 793 (India).

founded to adjudicate cases of violation of freedom of association in general and not only of infringements of the provisions of Conventions Nos. 87 and 98. The CFA noted in its First Report that:^m

The function of the ILO in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice; if the Organisation is to fulfil its responsibility in the matter it must . . . not hesitate to discuss in an international forum cases which are of such a character as to affect substantially the attainment of aims and purposes of the ILO as set forth in the Constitution of the Organisation, the Declaration of Philadelphia and the various Conventions concerning freedom of association.

So according to the CFA, there is a general concept of freedom of association which is expressed by several instruments, including the Constitution and the various Conventions. In other words, the ILO Constitution is used by the CFA as an alternative source to the various ILO Conventions by which the general principle of freedom of association can be derived.¹²⁶ The question remains as to whether the basic freedom of association included in the ILO Constitution imposes a legal obligation upon States members of the ILO. On its face it would seem as though the answer to such a question is negative. This view is illustrated, for example, by the discussion that took place during the 33rd ILO Conference of 1951, where the Governments of the Union of South Africa and Australia challenged the constitutionality of the FFCC procedure.¹²⁷ It was alleged that the revised ILO Constitution was adopted and ratified on the condition that the obligations of member States derived solely from ratified Conventions and accepted Recommendations.¹²⁸ This view was taken into consideration to some extent, for example by the procedure of the FFCC which included the requirement of previous consent when allegations were submitted against the government of any state which had not ratified Conventions Nos. 87 and 98.

However, the CFA, the Committee of Experts on the Application of Conventions and Recommendations and highly qualified publicists later accepted a contrasting view. A distinction was drawn between a basic or fundamental international labour standard secured within the ILO Constitution and any other international labour standard safeguarded by Conventions and Recommendations only. Accordingly, it was held that member States are bound to apply the basic principles which are secured within the ILO Constitution as is the case of the principle of freedom of association, even if they did

125. ILO: Committee on Freedom of Association, 1st Report, para. 32.

126. ILO: Committee on Freedom of Association, 193rd Report stated . . . it should first be pointed out that the Committee performs functions of a quasi judicial nature, and its primary objective is to give guidance in order to redress situations which need to be brought into line with the commonly accepted principles relating to freedom of association.

127. See Jenks, *op. cit.*, pp. 191-193, for detailed information which concerns all other arguments.

128. *Ibid.*

not ratify the ILO Conventions which enunciated such an international labour standard in detail. This approach is illustrated for example, by the recommendation of the CFA which was issued in Case No. 102 which concerned a complaint submitted against the Government of the Union of South Africa.¹²⁹ In this case the CFA considered it appropriate that it should promote the objectives of the ILO which had been entrusted to it.¹³⁰ This approach is reflected in the Report of the Committee of Experts on the Application of Conventions and Recommendations which stated:¹³¹

The principles enunciated in the Constitution are applicable to all the member states of the Organisation.

In addition, an authoritative opinion in this respect is provided by Valticos:¹³²

While the Constitution contains mainly provisions relating to organs and functioning of the Organisation, it also lays down a number of general principles which have come to be regarded in certain respects as a direct source of law . . . ILO bodies have frequently drawn legal consequences from them particularly in the field of freedom of association . . . and state members of the ILO have been regarded as bound to some extent by these constitutional principles.

In another place Valticos adds that:¹³³

. . . the ILO Constitution, which the state members of the Organisation have accepted, lays down the principle of freedom of association; it has been held that this principle should be observed by all state members by virtue of their membership of the Organisation alone.

Further, this approach was specially accepted by the Second European Regional Conference of the ILO in a Resolution adopted on 23 January

1974 134

129. See ILO: Committee on Freedom of Association, 15th Report, Case No. 102 (Union of South Africa), paras. 128-132. The matter of the CFA competence was dealt with in the following previous cases or occasions: ILO: Committee on Freedom of Association, 1st Report, para. 29; 6th Report, Case No. 12 (Argentine Republic), para. 186; 12th Report, Case No. 63 (Union of South Africa), para. 268.

130. See ILO: Committee on Freedom of Association, 15th Report, Case No. 102 (Union of South Africa).

131. See ILO: *Freedom of association and collective bargaining*, General Survey by the Committee of Experts on the application of Conventions and Recommendations, op. cit., para. 5.

132. See Valticos, op. cit., para. 68. These principles concern also the field of racial discrimination (Apartheid). For this reason the International Labour Conference adopted unanimously, in 1964 a "Declaration Concerning the Policy of Apartheid in Labour Matters in the Republic of South Africa." The 1964 Declaration on apartheid is based on the principle contained in the Declaration of Philadelphia which makes part of the ILO Constitution, and on the fact that the Republic of South Africa had undertaken to perform and carry out the objectives which are included in the ILO Constitution. See *ibid.*, para. 260.

133. *Ibid.*, para. 631.

134. See *Official Bulletin*, (Geneva, ILO), Vol. 57, 1974, p. 152.

According to this approach Proposition B can be accepted. Thus, in matters of the general principle of freedom of association the ILO Constitution can be looked upon as imposing a legal obligation upon member States solely by virtue of their membership in the Organisation. In regard to the three-dimensional aspect of the general principle of freedom of association,¹³⁵ the international labour standard related to the right to strike is tacitly inferred from the ILO Constitution and thus imposed upon all States members of the ILO.

This condition raises the second question, concerning the criteria to be used to decide whether the international labour standard which concerns the right to strike, has been violated under circumstances in which the provisions of Conventions Nos. 87 and 98 are not applicable, considering that the ILO Constitution does not provide any guide-lines by which this general principle can be interpreted. Interestingly, the CFA has applied some of the same principles regarding cases under Conventions Nos. 87 and 98 as general guide-lines to interpret the general concept of freedom of association and its complementary right to strike. This process can be best illustrated by referring to the case of Spain (No. 678),¹³⁶ but it is better to start with the 1973 Report of the Committee of Experts on the Application of Conventions and Recommendations.¹³⁷ In this Report the question of the right to strike was examined and the Committee stated *inter alia* that:¹³⁸

A general prohibition [of strikes] greatly restricts the opportunities open to trade unions under Article 3 and Article 10 of Convention No. 87. Here again it must be recalled that the law of the land must not impair the guarantees provided for in the Convention, including the right of trade unions to organise their activities.

What the Committee decided was done through interpretation of the Articles of Convention No. 87. But when the CFA was confronted with allegations concerning a state which had not ratified Convention No. 87, and therefore could not use this Convention, it followed the same guide-lines as if this time these guide-lines interpreted the general concept of the right to strike. Thus, in the case of Spain,¹³⁹ the CFA had to decide whether the alleged legislation applicable to labour disputes and strikes was in conformity with the general principle of the right to strike. But, as Spain had not ratified Convention No. 87, this Convention could not be applied. Consequently, the principle laid down by the Committee of Experts on the Application of Conventions and Recommendations 1973 Report was cited, but this time as a general principle without its legal support in the Articles of Convention No. 87. The CFA stated:¹⁴⁰

135. On the three-dimensional concept see Part I.

136. ILO: Committee on Freedom of Association, 149th Report.

137. *Supra*, note 24.

138. *Ibid.*, p. 22.

139. ILO: Committee on Freedom of Association, 149th Report, Case No. 678 (Spain).

140. *Ibid.*, para. 79.

The Committee of Experts had observed that a general prohibition of strikes constituted a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members and of the right of trade unions to organise their activities.

Thus, the labour standard laid out in Conventions Nos. 87 and 98, served the CFA as a yardstick to measure the fundamental principle of freedom of association and its complementary right to strike which were safeguarded by the ILO Constitution.

As mentioned earlier with regard to Proposition A, CFA recommendations concerning the three-dimensional aspect of the general freedom of association concept, are an authoritative source, and therefore, the interpretation according to which such a general concept implicitly infers a right to strike, can be accepted as the accurate interpretation of the ILO Constitution..

Moreover, as the Constitution in this respect applies to all member States of the Organisation, there is ground to state that the obligation to grant a right to strike is of a universal scope. Thus, Proposition B provides a right to strike, which is wider in scope than the one which stems from Proposition A.

6. Summing up Propositions A and B

In sum, Propositions A and B shows that the right to strike was found to be a universal right.

Such a right was tacitly inferred from the ILO Constitution and from Conventions Nos. 87 and 98 by the recommendations of the CFA, which provided the appropriate interpretation of these international treaties.

Chapter 2. Freedom to Strike as an Explicit Right Under International Law

1. The Argument

This chapter is based upon Proposition C which states as follows:

- C. The right to strike is a treaty-based right under positive International Law, conferred by Article 8 para. 1(d) of the International Covenant on Economic, Social and Cultural Rights, by which a legal obligation of a limited scope is imposed and applies only to States which ratified this Covenant.

The right to strike is guaranteed on the international level by Article 8 para. 1(d) of the International Covenant on Economic, Social and Cultural Rights.¹ In contrast to the implicit right to strike which is safeguarded by the ILO instruments, the International Covenant on Economic, Social and Cultural Rights confers an explicit right to strike. The inclusion of the right to strike within the International Covenant on Economic, Social and Cultural Rights calls for an analysis of the developments which brought about the recognition of this right and of its scope.

2. Historical Background

On 10 December 1948 the United Nations General Assembly adopted and proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all nations".² At that time, the General Assembly requested the Economic and Social Council (ECOSOC) to ask the Commission on Human Rights to prepare a draft Covenant on human rights and on measures of implementation thereof, in an attempt to transpose the Universal Declaration of Human Rights into an enforceable instrument.³

In response, the Commission on Human Rights drafted in April and May of 1951, fourteen Articles on economic, social and cultural rights, based on proposals made by Governments and suggestions made by the specialised

1. On the regional level the right to strike is explicitly guaranteed by the European Social Charter which was the first international text to recognise the right to strike in the case of conflict of interests, subject to any commitments under collective agreements in force.
2. See United Nations: *United Nations action in the field of human rights*, (New York, 1980), p. 9.
3. Ibid.

agencies.⁴ While discussing this draft, the ECOSOC was particularly conscious of difficulties which might result from embodying in one covenant civil and political rights together with socio-economic ones. At the same time, the ECOSOC was also aware of the importance of guaranteeing both these categories of rights.⁵ It was thought that the differences which prevail between the civil and political human rights on the one hand and the socio-economic rights on the other, would create fewer conflicts if each of the two groups of rights were to be granted by a separate Covenant.

Consequently, the ECOSOC invited the General Assembly to reconsider its earlier decision that there should be only one Covenant.⁶ After a long debate, the General Assembly responded by requesting that the Commission on Human Rights "draft two covenants on human rights . . . one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two covenants simultaneously and open them at the same time for signature."⁷

The Commission on Human Rights completed its preparation of the two drafts and forwarded the texts to the General Assembly which reviewed these drafts in 1954, and recommended that the Third Committee start an Article by Article discussion of the texts with a view to their adoption at the earliest possible date.⁸ But only in 1966, in Resolution 2200(XXXI) of 16 December, did the Assembly adopt and open for signature, ratification and accession three instruments, one of which was the International Covenant on Economic, Social and Cultural Rights.⁹ Almost ten years elapsed before the International Covenant on Economic, Social and Cultural Rights received the number of ratifications or accessions required to bring it into force. The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976, three months after the date of the deposit with the Secretary-General of the thirty-fifth instrument of ratification or instrument of accession, in accordance with the provision of its Article 27.¹⁰

3. Legislative History

The process of safeguarding the right to strike started with the Commission on Human Rights, where the first draft of the International Covenant on Economic, Social and Cultural Rights was discussed, and was continued

4. On the legislative history see United Nations Document, General Assembly, A/2929 p. 2.

5. See United Nations: *United Nations action in the field of human rights*, op. cit., p. 10.

6. See Resolution 384 XIII.

7. See United Nations: *United Nations action in the field of human rights*, op. cit., p. 10. The General Assembly discussion was at its Sixth Session in 1952. In response to the above request, the Commission, at its Eighth Session, from 14 April to June 1952, worked on the two Covenants. First it drafted an Article on the right of peoples and nations to self-determination to be included as the first Article in each of the two Covenants. Then it proceeded in what concerns the International Covenant on Economic, Social and Cultural Rights to adopt a Preamble and fifteen Articles for this draft.

8. The Commission completed its drafting work in its Ninth Session held in 1953 and 1954.

9. The other two instruments were: the International Covenant on Civil and Political Rights and an Optional Protocol to the International Covenant on Civil and Political Rights.

10. See United Nations: *United Nations action in the field of human rights*, op. cit., p. 10.

within the General Assembly Third Committee which read the International Covenant on Economic, Social and Cultural Rights draft, Article by Article.

From the outset, the inclusion of the right to strike as an authentic human right met with opposition. The fact that such a right was not mentioned within Articles 22 to 27 of the Universal Declaration on Human Rights,¹¹ in addition to the fact that it was also overlooked by the ILO Conventions Nos. 87 and 98,¹² turned out to be detrimental, at least as far as the first draft of the International Covenant on Economic, Social and Cultural Rights was concerned. As a result, the right to strike was ignored by the first draft of the International Covenant on Economic, Social and Cultural Rights. Despite this humble starting point, the right to strike eventually came to be considered by the Commission on Human Rights.

3.1 LEGISLATIVE HISTORY CONCERNING THE COMMISSION ON HUMAN RIGHTS

The question of conferring a right to strike was raised in connection with the concept of freedom of association which, having been secured within the Universal Declaration on Human Rights, was included automatically within the draft Covenant on Human Rights. Moreover, because of its connection with the concept of freedom of association, the possibility of including the right to strike within the draft Covenant came to be discussed twice by the Commission on Human Rights.

Freedom of association was considered by the Commission on Human Rights on two occasions: as a general concept in its civil liberty aspect, and as a socio-economic human right in relation to trade unions only. Hence, the safeguarding of the right to strike was also considered on both these occasions. Meetings 224 to 226 of the Commission on Human Rights,¹³ dealt with the inclusion of the right to strike within Article 16 of the draft Covenant. This Article, which finally became Article 22 of the International Covenant on Civil and Political Rights, was at the time the specific Article within the first draft to deal with the general freedom of association.

The second time that freedom of association was discussed, it was from its socio-economic aspect. Within this context the workers' freedom to organise was the direct subject under consideration. Meetings 298 to 300 of the Commission on Human Rights dealt with the inclusion of the right to strike within Article 27 of the first draft Covenant on Human Rights.¹⁴

11. These Articles are the ones which secure the socio-economic rights within the Universal Declaration of Human Rights.

12. On this omission see, Part II, Chapter 1.

13. For the full discussion see United Nations Docs., ECOSOC, E/CN.4/SR224, E/CN.4/SR224, E/CN.4/SR226. For annotations on the text of this draft Article see A/2929, in *General Assembly, Official Record, Agenda Item 28 (Part II) Annexes, Tenth Session, 1955*.

14. For the full discussion see United Nations Docs., ECOSOC, E/CN.4/SR298, E/CN.4/SR299 and E/CN.4/SR300. For annotations on the text of this draft Article see United Nations Doc, A/2929 op. cit.

Ultimately, Article 27 became Article 8 of the International Covenant on Economic, Social and Cultural Rights.

The attempt to widen the scope of freedom of association and confer a right to strike was initiated by two proposals submitted to the Commission on Human Rights. Socialist countries, which had fought all along for the general recognition of socio-economic rights as human rights, were also the ones that stressed the need for the safeguarding of the right to strike, in particular the USSR and Yugoslavia.

The USSR maintained that the way the freedom of association concept was defined within the draft Covenant in Article 16 or in Article 27 did not provide the full protection of such a fundamental right. Therefore, the USSR submitted to the Commission on Human Rights a proposal by which the entire Article had to be redrafted.¹⁵ This proposal was submitted twice, first in relation to Article 16 of the draft Covenant and later in connection with Article 27. Paragraph 4 of the USSR proposal concerned the right to strike and read:

The right to strike shall be guaranteed.

Yugoslavia was striving to reach the same result, and submitted two different proposals. The Yugoslav proposal which concerned Article 16 of the draft Covenant dealt with the right to strike in its second paragraph which read:¹⁶

No one may be dismissed from his work or persecuted in any way by reason of his participation in the trade union movement or because he has exercised the right to strike.

The second time Yugoslavia submitted a proposal, the matter was dealt with somewhat differently. This time it concerned Article 27 of the draft Covenant and was expressed within the first paragraph of the Yugoslav proposal which read:¹⁷

All wage earners have the right to join and form local, national and international trade unions of their choice and freely to exercise trade union rights, including the right to strike . . .

In contrast to the Socialist countries' attitude towards the safeguarding of the right to strike, the Western countries were more reserved. The lack of enthusiasm which these countries demonstrated towards the general idea of including socio-economic rights within the framework of human rights was even more obvious when the particular case of the right to strike was under consideration. Although the recognition of the right to strike was not denied

15. For the USSR proposal see United Nations Docs., ECOSOC, E/CN.4/AC.14/2/Add.4, pp. 5-6, in this proposal the right to strike was provided by para. 4; for the USSR revised proposal see E/CN.4/L.50/Rev.1, in this revised proposal the right to strike was included in para. 5.

16. For the Yugoslav proposal in relation to draft Article 16 see E/CN.4/AC.14/2/Add.4, p. 5.

17. For the Yugoslav proposal in relation to the draft Article 27 see United Nations Doc., ECOSOC, E/CN.4/L.78.

outright, the Western countries had various objections to its inclusion within the draft Covenant. Two examples will illustrate this point.

Mr. Cassin, who represented the French Government in the Commission on Human Rights when Article 16 was considered thought "that it would be sufficient to draft an Article recognising the right of all workers freely to exercise their trade union rights",¹⁸ and it was therefore not necessary to grant an explicit right to strike. Afterwards he added that he did not feel "that it was essential to mention the right to strike, since the Covenant should be applicable to all countries, as there were some in which no strikes occurred."¹⁹ The French attitude was somewhat more constructive when the right to strike was discussed for the second time in connection with Article 27. This time Mr. Juvigny, who represented France, declared: "in the matter of the right to strike, the French delegation would not object *a priori* to the enunciation of the right in the Covenant, since it was recognised in the Constitution of the French Republic and had proved to be one of the most effective methods in the campaign to emancipate workers."²⁰ Nevertheless, he too brought up various reasons why it was impossible to state such an important although variable right, in a few lines.²¹

The attitude of the United States was even more reluctant. During the first discussion, which concerned Article 16, Ms. Roosevelt, who represented the United States, said that in the view of her delegation, "the right to strike was covered by the proposal as it was one method of collective bargaining to which reference was purposely made in sub-paragraph (a)."²² As with the French reservations, there was no direct opposition to the right to strike as such; rather, it seems that raising arguments according to which the right to strike should not be secured within the draft Covenant were designed to lead to the rejection of the USSR proposal. This is seen by a later argument that Ms. Roosevelt added: "because the right to strike had long been recognised in the United States, the Government of which could not therefore agree to any clause that thought to restrict that right in the sense explicit in the two texts mentioned."²³ This statement could justify the rejection of the two submitted amendments in which the restriction of the right to strike was proposed. However, this argument would have required the adoption of the USSR proposal, where the right to strike was not limited. Nevertheless, it was announced by Ms. Roosevelt that even the USSR proposal would be rejected because "the reference to the right to strike [in the USSR proposal] laid down undue emphasis on the method of achieving the purpose of trade unions."²⁴

These two examples indicate that at the time when Conventions Nos. 87 and 98 were adopted by the ILO,²⁵ the question of safeguarding the right to

18. See United Nations Doc, ECOSOC, E/CN.4/SR225, p. 9.

19. Ibid., p. 28.

20. See United Nations Doc, ECOSOC, E/CN.4/SR300, p. 5.

21. Ibid.

22. See United Nations Docs., ECOSOC, E/CN.4/SR225, p. 12; E/CN.4/591/Rev.I for the United States revised proposal.

23. See United Nations Doc, ECOSOC, E/CN.4/SR226, p. 5.

24. See United Nations Doc, ECOSOC, E/CN.4/SR298, p. 12.

25. For the legislative history of Conventions (Nos. 87 and 98, see Part II, Chapter 1).

strike may have become perhaps, in one way or another, an issue of the Cold War both in the ILO and the Commission on Human Rights. The fact is that in both institutions the issue was raised by Socialist countries: Poland and Czechoslovakia in the ILO,²⁶ and the USSR and Yugoslavia in the Commission on Human Rights.²⁷ It seems as if this fact created, at least to some extent, a greater reluctance among the Western countries to include such a right on the international level, although on the national level France, for example, secured the right to strike within its Constitution, and the United States conferred a right to concerted activity in §7 of the NLRA.

It should be also mentioned that the ILO remained faithful to the right to strike. Hence, as this right was not enunciated within the ILO Conventions Nos. 87 and 98, it was stated during the discussion which took place in the Commission on Human Rights that the Governing Body of the ILO would consider it satisfactory if some formula similar to the draft text of Article 27 were adopted, despite the fact that the right to strike was not conferred explicitly therein.²⁸

As mentioned, the question of safeguarding the right to strike was examined twice by the Commission on Human Rights, on each of the occasions when freedom of association was considered. On both occasions the same arguments were presented and therefore, we shall introduce them in general and thus spare the need for repetition.

Undoubtedly, the Commission on Human Rights Reports reflect the general view that the right to strike was essential if the economic and social interests of workers were to be protected. In absence of the recognition of such a right, it was claimed, there might not be any effective counterbalance to the greater authority of the state. However, some doubts were voiced against such a recognition because it laid undue emphasis on one method of achieving the aims of trade unions.²⁹ Another argument which claimed that the right to strike ought not to be secured within the Covenant dealt with the question of overlapping with the ILO's competence. In this regard several delegates felt that it was for the ILO, being the specialised agency for social matters, to prepare a special Convention on the right to strike.³⁰ It was also claimed that the right to strike could not be secured because it was very

26. For the proposals of Poland and Czechoslovakia see ILO: *Record of Proceedings*, International Labour Conference, 32nd Session, Geneva, 1951, Appendix VII, Fourth and Fifth Items on the Agenda: Industrial Relations, p. 468.

27. As regards the majority of the socialist countries, their legislation contains no provision relating to the legality or illegality of a strike. In view of the nature of the particular economic and political systems of these countries, the governments consider that trade unions have no need to resort to direct action in order to defend their interests. See in this respect ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session, Geneva, 1983, para. 203.

28. See United Nations Doc, ECOSOC, E/CN.4/SR229, p. 6.

29. See, e.g., United Nations Doc, ECOSOC, Commission on Human Rights, Ms. Roosevelt, E/CN.4/SR298, p. 12.

30. See, e.g., United Nations Docs., ECOSOC, Commission on Human Rights, the United Kingdom, E/CN.4/SR/300, p. 11; or Australia, E/CN.4/SR300, p. 8.

difficult to define such a right in view of all its required restrictions.³¹

Notwithstanding these general arguments, the core of the debate focused upon the various limitations which ought to be imposed on the right to strike. Four amendments or revised proposals were issued in reply to the USSR and the Yugoslav proposals, requesting the insertion of the right to strike either in Article 16 or in Article 27 of the draft Covenant.

The Uruguayan delegation submitted one amendment to the Yugoslav proposal which concerned Article 16.³² This amendment suggested adding the following to the first paragraph of the Yugoslav proposal:

It shall be understood that the right to strike is restricted to circumstances where attempts to conciliation have been exhausted. In the same way the right to strike may be restricted by legislative measures in the case of public officials.

Egypt submitted a revised proposal in relation to Article 16 which also concerned the right to strike and read as follows:³³

Recourse may be had to strikes when attempts to conciliation have been exhausted and provided the security of the State and the vital interests of the nation are not affected.

The next two amendments concern Article 27 and were both submitted by Uruguay. The first Uruguayan amendment concerned the revised USSR proposal and read as follows:³⁴

Add at the end of §5: 'It shall be understood that the right to strike may be restricted to circumstances where attempts at conciliation have been exhausted. In the same way the right to strike may be restricted by legislative measures in the case of public officials.'

The second Uruguayan amendment related to Article 27 and concerned the Yugoslav proposal.³⁵ This amendment proposed adding the same version as was proposed within the former Uruguayan amendment, but this time it was meant to be added to the revised Yugoslav proposal.

In addition to the afore-mentioned amendments, various reasons were introduced as to the extent of the required limitations. One could sum up these arguments within the following five claims:

First, it was claimed that a strike entails dangerous disturbances of the economy and therefore should be invoked only as a last resort after every

31. See, e.g., United Nations Docs., ECOSOC, Commission on Human Rights, India, E/CN.4/SR299, p. 12; or France, E/CN.4/SR300, p. 5.

32. For this amendment see United Nations Doc, ECOSOC, E/CN.4/594.

33. For this revised proposal see United Nations Doc, ECOSOC, E/CN.4/595/Rev.1.

34. For this amendment see United Nations Doc, ECOSOC, E/CN.4/L.118.

35. For this amendment see United Nations Doc, ECOSOC, E/CN.4/L.119.

possibility of conciliation has been exhausted.³⁶ It should be emphasised that the proposal to restrict the right to strike while the conciliation procedure was going on, was criticised severely by the ILO delegate.³⁷ He stated that the ILO attached considerable importance to the procedure of voluntary conciliation and arbitration. To this end it had adopted a Recommendation on the subject, which encouraged abstention from strikes and lockouts, always with the proviso that no provision of the Recommendation could be interpreted as limiting in any way whatsoever the right to strike.³⁸

Second, in order to prevent any concerted interruption of work which might jeopardise national interests, it was proposed to restrict the right to strike of public officials.³⁹ This idea saw further expression in the proposal to restrict the right to strike so that action should be taken only in cases where it did not affect the security of the state and the vital interests of the nation.⁴⁰

Third, it was argued that the right to strike should be allowed only for promoting and protecting economic and social interests and therefore its use for political purposes should be restricted.⁴¹

Fourth, it was claimed that the draft Covenant should merely proclaim the right to strike and it should be left to the state to regulate that right.⁴²

The fifth came from the Indian Delegate, although this objection was not to the recognition of the right to strike as a vital mean of trade unions, but only to its recognition as a human right. It was claimed that since it applied to certain categories of people, that is, to workers only, it therefore did not have the status of a human right. Moreover, it was not among the fundamental rights.⁴³

At least within the bounds of the afore-mentioned restrictions, the right to strike was generally supported. Yet, at the vote held during the Commission on Human Rights 226 Meeting on 27 June 1951, the right to strike in relation to Article 16 was rejected in all its versions.⁴⁴ Paragraph 5 of the USSR proposal was rejected by 8 votes to 3, with 7 abstentions. The first part of the Uruguayan amendment which concerned the right to strike was rejected by 7 votes to 5, with 6 abstentions.⁴⁵ The Yugoslav proposal was rejected by 8 votes to 3, with 7 abstentions.⁴⁶

What was finally adopted in relation to the concept of freedom of

36. See the first paragraph of the Uruguayan amendments United Nations Docs., ECOSOC, E/CN.4/L.118 and E/CN.4/L.119.

37. See United Nations Doc., ECOSOC, E/CN.4/SR229, p. 5.

38. For the discussion which took place in the ILO in this respect see, Part II, Chapter 1.

39. See, e.g., United Nations Docs., ECOSOC, the second paragraph of the Uruguayan amendments E/CN.4/L.118 and E/CN.4/L.119.

40. See, e.g., United Nations Doc, ECOSOC, the Egyptian revised proposal E/CN.4/595/Rev.1.

41. See, e.g., United Nations Docs., ECOSOC, Commission on Human Rights, the Chilean representative in E/CN.4/SR225, p. 13.

42. See e.g., United Nations Docs., ECOSOC, Commission on Human Rights, the Chilean representative in E/CN.4/SR299, p. 11, or the French representative E/CN.4/SR300, p. 5.

43. See United Nations Doc, ECOSOC, Commission on Human Rights, the Indian representative in E/CN.4/SR225. pp. 24-25.

44. See United Nations Doc, ECOSOC. Commission on Human Rights, E/CN.4/SR226, p. 6.

45. Ibid., p. 8.

46. Ibid.

association was the revised United States proposal in which the right to strike was not explicitly safeguarded.⁴⁷ Similar results were reached in relation to the right to strike when it came to voting on the draft of Article 27.⁴⁸ In this case the first sentence of the Uruguayan amendment was rejected by 8 votes to 4, with 6 abstentions.⁴⁹ The second sentence of the amendment was rejected by 8 votes to 3, with 7 abstentions.⁵⁰ Paragraph 5 of the USSR proposal in which a right to strike was provided, was rejected by roll-call by 11 votes to 6, with 1 abstention.⁵¹

As the draft Covenant was divided into two separate Covenants, Article 27 became Article 8 of the International Covenant on Economic, Social and Cultural Rights draft and read as follows.⁵²

The States Parties to the Covenant undertake to ensure the free exercise of the right of every one to form and join local, national and international trade unions of his choice for the protection of his economic and social interests.

3.2 LEGISLATIVE HISTORY CONCERNING THE THIRD COMMITTEE

Six years later the matter was reopened when the draft Covenants were discussed Article by Article by the Third Committee.⁵³ Article 8 of the International Covenant on Economic, Social and Cultural Rights was discussed at Meetings 719 to 726 of the Third Committee.⁵⁴ The right to strike was introduced within joint amendments submitted by Peru, Bolivia and Uruguay.⁵⁵ Paragraph 2 of these joint amendments read:

The States Parties to the Covenant undertake to guarantee the right to strike, provided that it is exercised in conformity with the laws of the particular country.

At its 720th Meeting, the Third Committee adopted by 38 votes to 8, with 12 abstentions, a proposal by the representatives of Afghanistan and

47. For the proposal of the United States see United Nations Doc, ECOSOC, E/CN.4/591/Rev. 1.

48. See United Nations Doc, ECOSOC, Commission on Human Rights, E/CN.4/SR300, pp. 13-14

49. Ibid., p. 13.

50. Ibid.

51. In favour: Chile: Poland, Union of Soviet Socialist Republics, Ukrainian Soviet Socialist Republic, Uruguay, Yugoslavia. Against: Australia, Belgium, China, Egypt, France, Greece, India, Lebanon, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America. Abstaining: Pakistan.

52. See United Nations Docs.. ECOSOC, *Official Record*, Fourteenth Session, Supp. No. 4, 1952, Report of the Eighth Session of the Commission on Human Rights, (Annex IA), p. 45, E/2256and E/CN.4/669.

53. See Report of the Third Committee, 9 February 1957. General Assembly Eleventh Session, (Annexes), p. 2. Article 8, p. 8 para. 54 etc

54. Ibid., para. 55.

55. Ibid., para. 59, United Nations Doc, General Assembly, A/C.3/L.552.

Peru to set up a working group, composed of sponsors of the various amendments, to prepare a consolidated text.⁵⁶ But, at the next Meeting the working group reported that it had been unable to agree upon a text for presentation to the Third Committee.⁵⁷ Afterwards, Bolivia, Peru and Uruguay submitted revised amendments redrafting the whole Article and of course also para. 1(d) of Article 8 which concerned the right to strike to read:⁵⁸

The States Parties to the Covenant undertake to ensure
(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

But this revised amendment included an additional para. 2 which stated:⁵⁹

It shall be unlawful to enact any legislation the effect of which is to impair, or to apply the law in such a manner as to infringe the rights stipulated in this Article.

The joint amendments of Peru, Bolivia and Uruguay were subsequently further revised. In the revision para. 1(d) remained unchanged but para. 2 was deleted.⁶⁰

It is perhaps useful to mention in this context another amendment which, although it dealt with restrictions of freedom of association, also consequently restricted the right to strike. The reference is to the sub-amendments of the Netherlands and the United Kingdom in which it was proposed to insert two additional paragraphs to the revised joint amendments:⁶¹

2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces', or of the police, or of the administration of the State.
3. Nothing in this article shall authorise States Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organise 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.

During the deliberations of the Third Committee, several issues were considered. One of the issues raised was the question of whether or not the Committee should elaborate upon the original text of the draft Covenant. It was accepted that the subject matter covered by Article 8 was very important,

56. *Ibid.*, para. 61.

57. *Ibid.*

58. For the revised joint amendments see United Nations Doc., General Assembly, A/C.3/L.552/Rev.1.

59. *Ibid.*

60. See United Nations Doc, General Assembly, A/C.3/L.552/Rev.2.

61. For the Netherlands and the United Kingdom joint amendments see United Nations Doc., General Assembly, A/C.3/L.555.

but also very difficult to define. Profound differences of opinions had arisen, possibly resulting in the possibility that further elaborations might merely state the obvious or cast doubts upon the scope of the Article, or adversely affect the work of the ILO.⁶² Nevertheless, the matter of Article 8 was reopened for consideration. As for the inclusion of the right to strike, it was asserted by many delegates that this right was essential if workers' economic and social interests were to be protected, and if trade unions were to function properly.⁶³ The Peruvian Delegate made this point.⁶⁴

Recognition of the right of association was not sufficient to protect the workers' interests, their most effective means of protection was the right to strike. It had been rightly argued that, although freedom of association and the right to strike were two different things, there was nevertheless a close connection between them. To recognise the former without recognising the latter would be to proclaim a purely theoretical right; the purpose of the joint amendments was precisely to prevent trade union rights from being deprived of all practical value. Moreover, in proposing that the Covenant should sanction the right to strike, the sponsors of the joint amendments were only acting in accordance with the latest legislation on the subject. That right was now an integral part of civil liberties, just as was the right of association.⁶⁵

It was said that the right to strike could not be recognised in absolute terms and should only be used as a measure of last resort.⁶⁶ Furthermore, the delegates of the United Kingdom and of Iran considered it a mistake to single out the right to strike for inclusion, without mentioning all the other means by which organised labour could attain its ends.⁶⁷ Some representatives pointed to the difficulty which might arise in distinguishing between strikes for the promotion and protection of economic and social interests and strikes which might be motivated by political reasons.⁶⁸

62. See United Nations Doc, General Assembly, Third Committee Report, op. cit., para. 66.

63. Ibid., para. 68.

64. See United Nations Doc., General Assembly, Third Committee, A/C.3/SR719, para. 40.

65. See also *ibid.*, para. 24, where the Uruguayan representative drew a firm distinction between freedom of association and the specific rights implied by that freedom. Accordingly the right to strike was an essential corollary of freedom of association and no one could disregard it, either *de facto* or *de jure*. Neither in a capitalist economy nor in a state controlled economy could freedom of association be guaranteed if the right to strike was not expressly sanctioned. See United Nations Doc, General Assembly, Third Committee, A/C.3/SR725, para. 1 for the Ecuadorian representation in this respect.

66. See, United Nations Doc, General Assembly, Third Committee Report, op. cit., para. 68, see, the Chilean representative in United Nations Docs., General Assembly. Third Committee, A/C.3/SR721. para. 36; the United Kingdom representative in A/C.3/SR719, para. 22; the Mexican representative in A/C.3/SR723. para. 8; the Indonesian representative in A/C.3/SR723 para. 20 and the Bolivian representative in A/C.3/SR722, para. 19.

67. See United Nations Docs., General Assembly. Third Committee Report, op. cit., para. 68, and the United Kingdom representative in A/C.3/SR720, para. 26; or the Iranian representative in A/C.3/SR722. para. 11.

68. See United Nations Doc, General Assembly, Third Committee Report, op. cit.. para. 68.

These problems were solved by the joint amendments according to which, although a right to strike is granted, its exercise is conditioned upon conformity with the laws of a particular country. A country might then restrict this right so that it will not be used for political aims, or restrict it in the public sector, in essential services, and so on. This tendency was furthered by the joint amendments of the United Kingdom and the Netherlands. These amendments stated that the Article would not prevent the imposition of lawful restrictions on the armed forces, on the police or on the administration of the state.⁶⁹

This solution was criticised by some representatives, who thought that it might mean, in fact, that the right to strike was not a right, but only a privilege which the state could grant or withdraw at its pleasure.⁷⁰ To be sure, one should note that the first time the joint amendments were revised, a second paragraph answering such criticism was included therein. A proposal was made to add a paragraph as follows:⁷¹

It shall be unlawful to enact any legislation the effect of which is to impair or to apply the law in such a manner as to infringe the right stipulated in this article.

But, the second time the joint amendments were revised, this part was deleted and the problem was raised again. The answer was finally found in Article 4 of the International Covenant on Economic, Social and Cultural Rights, a general Article according to which the state may subject rights provided in the Covenant only to such limitations as are determined by law, and upon condition that such limitations are compatible with the purpose of promoting the general welfare in a democratic society.⁷²

At the 225th Meeting, the Third Committee voter *inter alia* on the question of the right to strike.⁷³ Sub-paragraph (d) of the revised text proposed by Bolivia, Peru and Uruguay was adopted by 41 votes to 2, and 26 abstentions.⁷⁴ The additional para. 2 proposed by the Netherlands and the United Kingdom was adopted by 21 votes to 10, with 34 abstentions.⁷⁵ The additional para. 3 proposed by the Netherlands and the United Kingdom was adopted by 19 votes to 14, with 35 abstentions.⁷⁶ Article 8 as a whole, and as

69. See United Nations Doc., General Assembly, A/C.3/L.555.

70. See United Nations Docs., General Assembly, Third Committee Report, op. cit., para. 68, and the Australian representative in: General Assembly, Third Committee, A/C.3/SR723, para. 32; the Chilean representative in General Assembly, Third Committee, A/C.3/SR720, para. 3; the United Kingdom representative in General Assembly, Third Committee, A/C.3/SR722, para. 33; the Swedish representative in General Assembly, Third Committee, A/C.3/SR722, para. 4.

71. See United Nations Doc., General Assembly, A/C.3/L.552/Rev.1.

72. See United Nations Docs., General Assembly, Third Committee Report, op. cit., para. 69.

73. Ibid., para. 74.

74. See United Nations Doc. General Assembly, A/C.3/L.552/Rev.2.

75. See United Nations Doc. General Assembly, A/C.3/L.555.

76. Ibid.

amended, was voted on by roll-call at the request of the USSR and adopted by 37 votes to none, with 32 abstentions.⁷⁷

4. The Scope

4.1 RATIFICATION AND ACCESSION

The scope of the International Covenant on Economic, Social and Cultural Rights is a limited one, as is the case with any other international treaty. The International Covenant on Economic, Social and Cultural Rights is applied only to states that ratified or acceded to the Covenant. But, the practical value of the Covenant's provisions depends not only on the extent to which the Covenant is widely ratified, but also on the number of reservations which are submitted and which might detract significantly from the obligation which the Covenant embodies.⁷⁸

On 31 December 1982, the International Covenant on Economic, Social and Cultural Rights was ratified or acceded to by seventy-five states. Only seven specific references of various kinds were made in relation to Article 8 para. 1(d) which provides the right to strike.⁷⁹ These references include the following remarks:

1. Paragraph 3 of a declaration submitted by France states that 'The Government of the Republic declares that it will implement the

77. See United Nations Doc, General Assembly, Third Committee Report, op. cit., para. 74: In favour: Albania, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Ceylon, Chile, Czechoslovakia, Denmark, Dominican Republic, Finland, France, India, Indonesia, Iran, Iraq, Israel, Italy, Lebanon, Luxembourg, Mexico, Morocco, Nepal, Netherlands, New Zealand, Norway, Pakistan, Peru, Poland, Romania, Sweden, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay, Yugoslavia. Abstaining: Afghanistan, Argentina, Australia, Austria, Belgium, Canada, China, Colombia, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Ethiopia, Greece, Guatemala, Honduras, Ireland, Japan, Liberia, Philippines, Portugal, Saudi Arabia, Spain, Sudan, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yemen.

78. See C. W. Jenks. *The international protection of trade union freedom*, (London, Stevens & Sons, 1957). pp. 246-278.

79. See United Nations Doc, *Multilateral treaties deposited with the Secretary-General*, [Status as at 31 December 1982], ST/LEG/SER.E/2. The International Covenant on Economic, Social and Cultural Rights was ratified or accessed by: Australia, Austria, Barbados, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Central African Republic, Chile, Colombia, Costa Rica, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gambia, German Democratic Republic, Federal Republic of Germany, Guinea, Guyana, Honduras, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Libyan Arab Jamahiriya, Madagascar, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Spain, Sri Lanka, Suriname, Sweden, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zaire.

provisions of article 8 in respect of the right to strike in conformity with article 6 paragraph 4 of the European Social Charter according to the interpretation thereof given in the annex to that Charter'.⁸⁰

2. Paragraph 2 of the reservations and declarations made upon signature and confirmed upon ratification by Japan, states that 'Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of Article 8 . . . except in relation to sectors in which the right referred to in the said provisions is accorded with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan'.⁸¹
3. An interpretative statement submitted by Mexico states that 'The Government of Mexico accedes to the International Covenant on Economic, Social and Cultural Rights with the understanding that Article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation'.⁸²
4. According to the first paragraph of a reservation submitted by the Netherlands 'The Kingdom of the Netherlands does not accept this provision [para. 1(d)] in the case of the Netherlands Antilles with regard to the latter's central and local Government bodies'.⁸³
5. According to the first paragraph of the New Zealand reservation which concerns Article 8 in general, 'The Government of New Zealand reserves the right not to apply Article 8 to the extent that existing legislative measures, enacted to ensure effective trade union relations, may not be fully compatible with that Article'.⁸⁴
6. Norway ratified the Covenant subject to reservations to Article 8 para. 1(d) ' . . . to the effect that the current Norwegian practice of referring labour conflicts to the State Wage Board by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway'.⁸⁵
7. According to the reservation submitted by Trinidad and Tobago, its Government ' . . . reserves the right to impose lawful or reasonable restrictions on the exercise of the afore-mentioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which have been passed in accordance with the provisions of the Trinidad and Tobago Constitution'.⁸⁶

The situation is rather encouraging if we consider the large number of signatories on the one hand, and the low number of reservations on the other. Furthermore, this conclusion is strengthened by the fact that six out of the

80 Ibid. p. 112

81 Ibid. p. 114

82 Ibid.

83 Ibid.

84 Ibid. p. 115

85 Ibid.

86 Ibid.

seven countries that submitted those reservations ratified the ILO Convention (No. 87). Moreover, those reservations are perhaps also of less importance because, as discussed earlier, of the path of developments of the right to strike within the framework of the ILO.⁸⁷ In fact, these developments relegated this material source of the right to strike to a position of a secondary importance.

As Jenks explains, many of the substantive rights provided for in the International Covenant on Economic, Social and Cultural Rights, along with the right to strike, fall within the competence and the specialised experience of one of the specialised agencies, as recognised by the procedural provisions of the Covenant.⁸⁸ The fuller implementation of these rights is therefore likely to require the conclusion of further special Conventions under the auspices of the appropriate specialised agencies.

Jenks emphasises that this situation was well understood when the International Covenant on Economic, Social and Cultural Rights was drafted. Therefore, it was arranged within this Covenant that specialised agencies would receive copies of Reports submitted by Parties to the Covenant.⁸⁹ Potentially, the ILO became some kind of an executing agency of the International Covenant on Economic, Social and Cultural Rights in matters concerning the right to strike.⁹⁰ This is not only generally true, but especially helpful where the right to strike is concerned, as in this respect there are not only the various ILO Conventions which deal with the freedom of association concept,⁹¹ but in particular the Freedom of Association Committee of the Governing Body of the ILO (CFA) which adjudicates *inter alia* disputes related to industrial action.⁹²

4.2 DEROGATION AND LIMITATIONS

The International Covenant on Economic, Social and Cultural Rights does not provide for derogation.⁹³ In contrast to the case of the International

87. On these developments see Part II, Chapter 1.

88. See Jenks *The international protection of trade union freedom*, op. cit., p. 247.

89. Articles 16(b), 18, 19 and 20.

90. Jenks *The international protection of trade union freedom*, op. cit., p. 250, regards the specialised agencies as the executive arms in general. He notes that the full co-operation of the ILO in the implementation of the International Covenant on Economic, Social and Cultural Rights was pledged by the Governing Body of the ILO immediately after the adoption of the Covenant by the General Assembly.

91. In this respect see Part II, Chapter 1, Propositions A and B.

92. On the Freedom of Association Committee of the Governing Body of the ILO see Part II, Chapter 1.

93. On derogation see generally, Buergenthal. 'To respect and to ensure: State obligations and permissible derogations*', in *The International Bill of Rights*, L. Henkin ed., (New York, Colombia University Press. 1981), p. 72; Hartman, 'Derogation from human rights treaties in public emergencies', *Harv. International Law Journal*, Vol. 22, p. 1 (1981); Higgins, 'Derogations under human rights treaties', *British Year Book of International Law*, Vol 48, p. 281 (1976-77); Green, 'Derogation of human rights in emergency situations', *Canadian Year Book of International Law*, Vol. 16, p. 92 (1978); Meron, 'On the inadequate reach of humanitarian and human rights law and the need for a new instrument', *American Journal of International Law*, Vol. 77, p. 589.

Covenant on Civil and Political Rights, there is no special Article included within the International Covenant on Economic, Social and Cultural Rights that authorises any derogation of the rights recognised therein.⁹⁴ Under Article 4 of the International Covenant on Civil and Political Rights, rights ensured therein can be derogated from in times of an officially proclaimed public emergency which threatens the life and the existence of the nation.⁹⁵ Consequently, it is reasonable to conclude that the fact that such an Article was not included within the International Covenant on Economic, Social and Cultural Rights means that rights guaranteed therein cannot be derogated from in times of public emergency.⁹⁶

The explanation which is provided by Higgins for this is twofold: first he claims that a derogation provision is required where the obligations imposed by a Covenant create a duty to ensure the rights which are guaranteed therein, and as the International Covenant on Economic, Social and Cultural Rights generally speaking does not so provide, such a provision is not required.⁹⁷ It should be emphasised in this respect, that where the right to strike is considered, the obligation of the State parties to the International Covenant on Economic, Social and Cultural Rights is to ensure this right, and not just to utilise their available resources to the maximum with the viewpoint that progressive accomplishments will ultimately achieve the full realisation of this right.⁹⁸

Secondly, Higgins explains that as the rights ensured by the International Covenant on Economic, Social and Cultural Rights are already limited, either by general restrictions and safeguards provided by Articles 4-5 of the Covenant, or by specific limitations related to the various rights - there is no need for any derogation.⁹⁹ However, this conclusion may not be entirely appropriate, as there are important distinctions between derogations and limitations.¹⁰⁰ For example, the derogation is of a temporary nature, while the limitation is more of a permanent one;¹⁰¹ the limitation must be dealt with through legislation, while the derogation might take another form.¹⁰² Thus, sometimes both possibilities are considered, as is the case of certain rights which are ensured by the International Covenant on Civil and Political Rights.¹⁰³ In any case, the International Covenant on Economic, Social and Cultural Rights contains limitations but not derogations.

Article 8 paras. 1(d), and 2-3 of the International Covenant on Economic, Social and Cultural Rights deal with the particular limitations and safeguards of the right to strike. Let us start by introducing the limitation. First, Article 8 para. 1(d) ensures the right to strike, provided that it is

94. See, Green, op. cit., p. 102; Higgins, op. cit., p. 286.

95. For the term 'public emergency' see, Buergenthal, op. cit., p. 79.

96. For limitations of the right to strike in times of public emergency see Part III.

97. Higgins, op. cit., p. 287.

98. For the meaning of the obligation to ensure see, Buergenthal, op. cit., p. 77.

99. See, Higgins, op. cit., p. 286; Buergenthal, op. cit., p. 84.

100. See, Kiss, "Permissible limitations on rights", in L. Henkin (ed.): *The International Bill of Rights*, (New York, Colombia University Press, 1981), p. 290.

101. Ibid.

102. Ibid.

103. See, for example, Articles 4 and 22 (2).

exercised in conformity with the laws of the particular country. Accordingly, the right to strike conferred by the International Covenant on Economic, Social and Cultural Rights is subjected to the laws of the particular countries which can lawfully impose restrictions on its exercise. Neither specific purposes allowing such legal restrictions, nor the extent of such limitations, were included in this provision. While, for example, the right to join trade unions prescribed in Article 8 para. 1(a), can be limited by law only if such restrictions are necessary in a democratic society in the interests of national security, or public order, or for the protection of the rights and freedoms of others - no particular guide-lines are mentioned in relation to the right to strike. However, a state could not impose limitations that would vitiate the right.¹⁰⁴ Notwithstanding, one guide-line is provided for in Article 8 para. 2. This Article permits restriction *inter alia* of the right to strike of members of the armed forces, or the police, or the administration of the State.

Article 8 para. 3 provides a certain safeguard, at least where states that are parties to the ILO Convention (No. 87) are concerned. In this case, para. 3 of this Article provides that such states are not authorised to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice the guarantees provided for in the afore-mentioned ILO Convention. As will be indicated in detail later on,¹⁰⁵ the ILO right to strike is broader. It cannot be limited by legal provisions, if these provisions are not in conformity with the criteria provided by the Freedom of Association Committee of the Governing Body of the ILO (CFA). Hence, according to Article 8 para. 3, the right to strike ensured within the International Covenant on Economic, Social and Cultural Rights may not fall below the ILO standards in the case of States that are bound by these standards. It should be mentioned, though, that the right to strike ensured by the ILO Convention can be derogated in times of public emergency.¹⁰⁶

Also relevant in this respect is Article 4 of the International Covenant on Economic, Social and Cultural Rights which contains a general limitation. Accordingly, a State providing rights conferred by the International Covenant on Economic, Social and Cultural Rights . . . 'may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare'¹⁰⁷ in a democratic society'.¹⁰⁸ The implementation of this Article in the case of the right to strike is difficult. It could be said that this Article is relevant only in relation to rights ensured by the International Covenant on Economic, Social and Cultural Rights where there is no further specific provision limiting their extent. If this is the proper interpretation, then this Article is not relevant in the case of the right to strike because

104. In this respect compare with the International Covenant on Civil and Political Rights. See, Kiss, op. cit., p. 292.

105. See 1 Part III.

106. Ibid.

107.- The term *general welfare* is not to be found among the grounds for limiting the rights and freedoms guaranteed by the International Covenant on Civil and Political Rights. On this matter Kiss, op. cit., p. 292.

108. For the term *necessary in a Democratic Society* see, Kiss, op. cit., p. 305.

there is a specific limitation concerning the right to strike in Article 8. But, it could also be interpreted in a broader sense. Accordingly, Article 4 contains a general principle which is relevant even if there is a specific limitation. According to this interpretation, any limitation included within the various provisions of the Covenant, where the limitation is not accompanied by specific provisions to guide its restrictive implementation, can be implied only according to the general principle prescribed by Article 4. In other words, any such limitation can be implied only in so far as this may be compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society. If this is the appropriate interpretation, then there is a certain guide-line which is relevant to Article 8 para. 1(d). Hence, the right to strike can be limited by the specific laws of the particular countries, but solely for the purpose of promoting the general welfare in a democratic society as prescribed by Article 4.

A general safeguard against abuse of rights is provided by Article 5 (1) of the International Covenant on Economic, Social and Cultural Rights. This Article provides that 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant'.¹⁰⁹ Buergenthal explains that the importance of this Article is a result of the fact that the Covenant authorises the State parties, under certain circumstances, to limit the rights it proclaims.¹¹⁰ He adds that Article 5 (1) stipulates that rights and powers conferred for one purpose may not be used for another, illegitimate purpose.¹¹¹ Therefore, from this aspect, Article 5 (1) forms an integral part of the provisions of the Covenant that permit the imposition of limitations.¹¹² Viewed from this aspect, if the specific law of a certain country prohibits the right to strike, it is legitimate to examine the governments's purpose in passing the law. If the aim, in fact, is the destruction of the right to strike, then the prohibition would be impermissible even if it otherwise comported with Article 8 para. 1 (d).

Furthermore, another general safeguard is provided by Article 5 para. 2 of the International Covenant on Economic, Social and Cultural Rights. Buergenthal labeled this Article as the "most-favorable-to-individual" clause.¹¹³ This Article states that no restrictions on the fundamental human rights existing in any country shall be admitted on the pretext that the Covenant recognises such rights to a lesser extent. The purpose of this Article is to guarantee that the Covenant is not used as a basis for denying other more favorable rights which individuals might otherwise enjoy, whether under international law, or national law or practice.¹¹⁴ In effect this Article secures

109. For the meaning of Article 5(1) of the International Covenant on Civil and Political Rights see, Buergenthal, *op. cit.*, p. 86; the analysis is relevant to Article 5(1) of the International Covenant on Economic, Social and Cultural Rights too.

110. *Ibid.*

111. *Ibid.*, p. 87.

112. *Ibid.*, p. 89.

113. *Ibid.*

114. *Ibid.*

the ILO standards of the right to strike guaranteed by the ILO Convention (No. 87), because it does not allow its denial by claiming that the Covenant's right to strike is narrower.¹¹⁵

4.3 IMPLEMENTATION PROCEDURES

At its sixtieth session, in 1976, the ECOSOC considered the question of procedures for implementation of the International Covenant on Economic, Social and Cultural Rights. The measures of implementation are contained in Articles 16-25 of the Covenant. In resolution 1988 (LX) of May 1976, the ECOSOC established the following programme under which States parties to the Covenant would furnish, in biennial stages, the reports referred to in Article 16:¹¹⁶

- First stage: rights covered by Articles 6-9;
- Second stage: rights covered by Articles 10-12;
- Third stage: rights covered by Articles 13-15.

The ECOSOC invited the States parties to the Covenant to submit to the Secretary-General reports on the measures adopted by them and the progress made in achieving the observance of the rights recognised in the Covenant. It called for these reports, on the rights included in the first stage of the programme, to be submitted by 1 September 1977, and at biennial intervals thereafter. Moreover, as regards its own part in the implementation procedure, the ECOSOC decided that it would establish a sessional working group, with appropriate representation of States parties to the Covenant and due regard to equitable geographical distribution.¹¹⁷

The specialised agencies, were requested by the ECOSOC to submit to it reports on the progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities, as provided under Article 18 of the International Covenant on Economic, Social and Cultural Rights. It called for these reports, on the rights included in the first stage of the programme, to be transmitted by 1 December 1977.¹¹⁸

The right to strike being secured under Article 8, falls under the first stage of the programme. Therefore, the measure of its implementation should

115. Compare with Article 8 para. 3 of the International Covenant on Economic, Social and Cultural Rights.

116. See, United Nations: *United Nations action in the field of human rights*, op. cit., p. 272.

117. Ibid., for the reports of the Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights see the following United Nations Docs., ECOSOC.: E/1979/64 of 3 May 1979; E/1980/60 of 29 April 1980; E/1981/64 of 30 April 1981; E/1982/56 of 27 April 1982; E/1983/41 of 12 May 1983; E/1984/83 of 8 May 1984; E/1985/18 of 15 May 1985.

118. Ibid., p. 273. The ILO is the relevant special agency where the right to strike is concerned. For the reports of the ILO see the following United Nations Docs., ECOSOC: E/1978/27 of 6 April 1978; E/1979/33 of 9 April 1979; E/1980/35 of 10 April 1980; E/1981/41 of 31 March 1981; E/1982/41 of 24 March 1982; E/1983/40 of 15 April 1983; E/1985/63 of 15 April 1985.

be able to be gauged from the reports which were submitted in this respect.¹¹⁹ Unfortunately, the analysis of these reports does not provide an accurate picture of the status of the right to strike in the various reporting countries. The information contained by the reports is somewhat vague, and therefore the exact scope and extent of the right to strike in the various countries is not always clear. Notwithstanding, some information can be gathered from the analytical summary of these reports which was prepared by the Secretary-General pursuant to the ECOSOC decision 1978/9 of 3 May 1978.¹²⁰

For example, in the Federal Republic of Germany, a number of rules

119. For the initial reports concerning rights covered by Articles 6-9 under the first and second reporting cycles of the programmes established by the ECOSOC and their discussion by the Sessional Working Group see the following United Nations Docs., ECOSOC: Barbados E/1978/8/Add.33 and E/1982/WG.1/SR.3; Bulgaria E/1978/8/Add.24 and E/1980/WG.1/SR.12; Byelorussian Soviet Socialist Republic E/1978/8/Add.19 and E/1980/WG.1/SR.16; Chile E/1978/8/Add.19, 28 and E/1980/WG.1/SR.8-9; Colombia E/1978/8/Add.17 and E/1980/WG.1/SR.15; Cyprus E/1978/8/Add.21 and E/1980/WG.1/SR.17; Denmark E/1978/8/Add.13 and E/1980/WG.1/SR.10; Ecuador E/1978/8/Add.1 and E/1980/WG.1/SR.4-5; Finland E/1978/8/Add.14 and E/1980/WG.1/SR.6; German Democratic Republic E/1978/8/Add.8, Corr. 1 and E/1980/WG.1/SR.8; Federal Republic of Germany E/1978/8/Add.11 and E/1980/WG.1/SR.10; Hungary E/1978/8/Add.7 and E/1980/WG.1/SR.7; Iran E/1978/8/Add.2 see also E/1980/60, para. 14; Iraq E/1984/6/Add.3; Jamaica E/1978/8/Add.27 and E/1980/WG.1/SR.20; Madagascar E/1978/8/Add.29 and E/1981/WG.1/SR.2; Mongolia E/1978/8/Add.6 and E/1980/WG.1/SR.7; Norway E/1978/8/Add.12 and E/1980/WG.1/SR.5; Philippines E/1978/8/Add.4 and E/1980/WG.1/SR.11; Romania E/1978/8/Add.20 and E/1980/WG.1/SR.16-17; Rwanda E/1984/6/Add.4 and E/1984/WG.1/SR.10,12; Sweden E/1978/8/Add.5 and E/1980/WG.1/SR.15; Syrian Arab Republic E/1978/8/Add.25,31 and E/1983/WG.1/SR.2; Tunisia E/1978/8/Add.3 and E/1980/WG.1/SR.5-6; Ukrainian Soviet Socialist Republic E/1978/8/Add.22 and E/1980/WG.1/SR.18; Union of Soviet Socialist Republics E/1978/8/Add.16 and E/1980/WG.1/SR.14; Yugoslavia E/1978/8/Add.35 and E/1980/WG.1/SR.4-5; Australia E/1978/8/Add.15 and E/1980/WG.1/SR.12-13; Czechoslovakia E/1978/8/Add.18 and E/1981/WG.1/SR.1-2; Canada E/1978/8/Add.32 and E/1982/WG.1/SR.1-2; United Kingdom E/1978/8/Add.9,30 and E/1980/WG.1/SR.19, E/1982/WG.1/SR.1; Poland E/1978/8/Add.23 and E/1980/WG.1/SR.18-19; Spain E/1978/8/Add.26 and E/1980/WG.1/SR.20; Peru E/1984/6/Add.5 and E/1984/WG.1/SR.11, 18; Venezuela E/1984/6/Add.1 and E/1984/WG.1/SR.7-8, 10; Italy E/1978/8/Add.34 and E/1982/WG.1/SR.3-4; Japan E/1984/6/Add.6, Corr.1 and E/1984/WG.1/SR.9-10; Mexico E/1984/6/Add.2; Democratic People's Republic of Korea E/1984/6/Add.7. For the second periodic reports concerning rights covered by Articles 6-9 of the International Covenant on Economic, Social and Cultural Rights and their discussion by the Sessional Working Group see the following United Nations Docs., ECOSOC: Bulgaria E/1984/7/Add.18; Byelorussian Soviet Socialist Republic E/1984/7/Add.8 and E/1984/WG.1/SR.13-14; Chile E/1984/7/Add.1 and E/1984/WG.1/SR.11-13; Colombia E/1984/7/Add.21; Cyprus E/1984/7/Add.13 and E/1984/WG.1/SR.18,22; Denmark E/1984/7/Add.11 E/1984/WG.1/SR.17,21; Ecuador E/1984/7/Add.12 and E/1984/WG.1/SR.20,22; Finland E/1984/7/Add.14 and E/1984/WG.1/SR.17-18; German Democratic Republic E/1984/7/Add.3; Hungary E/1984/7/Add.15 and E/1984/WG.1/SR.19,21; Madagascar E/1984/7/Add.19; Mongolia E/1984/7/Add.6 and E/1984/WG.1/SR.16, 18; Norway E/1984/7/Add.16 and E/1984/WG.1/SR.19,22; Philippines E/1984/7/Add.4 and E/1984/WG.1/SR.15,20; Romania E/1984/7/Add.17; Sweden E/1984/7/Add.5 and E/1984/WG.1/SR.14, 16; Ukrainian Soviet Socialist Republic E/1984/7/Add.9 and E/1984/WG.1/SR.13-15; Union of Soviet Socialist Republics E/1984/7/Add.7 and E/1984/WG.1/SR.9-10; Yugoslavia E/1984/7/Add.10 and E/1984/WG.1/SR.16,18; United Kingdom E/1984/7/Add.20; Spain E/1984/7/Add.2 and E/1984/WG.1/SR.12,14.

120. Analytical summary of reports submitted by States parties concerning rights covered by Articles 6-9 of the Covenant United Nations Doc. E/1979/14.

concerning strikes have evolved on the basis of court decisions.¹²¹ Strikes must conform to the principle of reasonableness and may only be used as a last resort for settling a conflict of interests; strikes must be organised by a trade union and aim at regulating working and economic conditions.¹²² Another example of more or less detailed information is the Norwegian report.¹²³ In Norway, there is a firm basis in legislation for recognising strikes and lockouts as lawful weapons in a labour dispute. However, there are a number of prohibitions. An example of such prohibitions is cited in the analytical summary as follows:¹²⁴ Act No. 1 of 5 May 1927 relating to Labour Disputes and Act No. 2 of 18 July 1958 relating to Public Service Disputes prohibits the parties from seeking to solve legal disputes in established wage relationships by resorting to direct industrial strike.¹²⁵ In the United Kingdom, it was reported that the right to strike is fully recognised and legislation grants immunity from legal liability for acts done in furtherance or contemplation of trade disputes. Immunity to actions in tort for such acts is also guaranteed by legislation, as it is guaranteed in respect of peaceful picketing.¹²⁶

The Australian report shows an example of a country that imposed restrictions on the exercise of the right to strike.¹²⁷ In Australia, persons suffering damages as a result of industrial action may resort to civil proceedings in tort referring to conspiracy, interference with contractual relationship and intimidation. Federal legislation prescribes penalties for breaches of federal compulsory arbitration awards containing "bans clauses" through which strikes are made illegal.¹²⁸ In Colombia, under article 445 of the Substantive Labour Code, the collective cessation of work may take place only after five days have elapsed after the strike was called, and not more than 30 days thereafter.¹²⁹ In Cyprus, there are procedural limitations on the exercise of interest strikes as the Industrial Relations Code provides for 10 days notice for strikes or lockouts on disputes over interests. All disputes over rights must be eventually referred to binding arbitration.¹³⁰

Several Governments reported that there are no provisions prohibiting strikes in their legislation, although there was no longer any need for workers to have recourse to that method of protecting their rights.¹³¹

121. Ibid., para. 100.

122. See, United Nations Doc, ECOSOC, E/1978/8/Add.II.

123. See, United Nations Doc, ECOSOC, E/1978/8/Add.I2.

124. See, *Analytical summary*, United Nations Doc, ECOSOC: E/1979/14, para. 100.

125. Norway reserved the position in respect of Article 8 para. 1 (d) of the International Covenant on Economic, Social and Cultural Rights because it was considered that the system of a compulsory wages board and any new permanent statutory prohibitions exceeding the limitations in para. 2 of this Article would not be compatible with it. See, *ibid.*

126. See, *Analytical Summary*, United Nations Doc, ECOSOC, E/1979/14, para. 100; *see also* United Nations Doc, ECOSOC, E/1978/8/Add.9.

127. See, United Nations Doc, ECOSOC, E/1978/8/Add.I5.

128. See, *Analytical Summary*, United Nations Doc, ECOSOC, E/1979/14, para. 101.

129. See, United Nations Doc, ECOSOC, E/1978/8/Add.I7.

130. See, United Nations Doc, ECOSOC, E/1978/8/Add.21.

131. The Governments of Bulgaria, the Byelorussian Soviet Socialist Republic, the Czechoslovak Socialist Republic, the German Democratic Republic, Hungary, Poland and the Union of

Some reports included information concerning restrictions imposed upon the exercise of trade union rights by some groups, and such restrictions also related to the right to strike.¹³² In Colombia, for example, in accordance with the Constitution, strikes are prohibited in the public service.¹³³ In Cyprus, the members of the armed forces, of the police and of the gendarmerie do not have the right to strike.¹³⁴ In the Federal Republic of Germany, members of the armed forces, the police, civil servants and judges whose conditions of employment and remuneration are not determined by collective agreement but by legislation, do not have the right to strike.¹³⁵ In Norway, members of the armed forces, and certain groups holding public posts, do not have the right to strike.¹³⁶

5. Summing up Proposition C

In summary, Proposition C, as presented within this chapter is valid. As provided by this Proposition, there is a right to strike explicitly guaranteed by Article 8 para. 1(d) of the International Covenant on Economic, Social and Cultural Rights.

The right to strike conferred by the International Covenant on Economic, Social and Cultural Rights is a socio-economic right. But, in contrast to other socio-economic rights secured within the International Covenant on Economic, Social and Cultural Rights, it imposes an immediate obligation.

However, such a right applies only to states that ratified the International Covenant on Economic, Social and Cultural Rights and therefore is of a more limited scope than the one stemming from the ILO Constitution which was presented by Proposition B.

Soviet Socialist Republics, see, United Nations Docs., ECOSOC, E/1978/8/Add.7, 8, 16, 18, 19, 23 and 24. See also, *Analytical Summary*, United Nations Doc, ECOSOC, E/1979/14, para. 102.

132. See, *Analytical Summary*, United Nations Doc, ECOSOC, E/1979/14, para. 103.

133. See, United Nations Doc, ECOSOC, E/1978/8/Add.17.

134. See, United Nations Doc, ECOSOC, E/1978/8/Add.21.

135. See, United Nations Doc, ECOSOC, E/1978/8/Add.11.

136. See, United Nations Doc, ECOSOC, E/1978/8/Add.12.

PART III. The Scope and Extent of the Right to Strike

1. Objectives of a Strike

1.1 INTRODUCTION

Article 10 of Convention No. 87 defines trade union organisations as organisations of workers for furthering and defending their occupational interests. Under Article 3 of Convention No. 87, trade union organisations have the right to formulate their programmes and organise their activities. It is on the basis of the right which trade unions are thus recognised as possessing, that the Freedom of Association Committee of the Governing Body of the ILO (CFA), has always considered the right to strike as a legitimate - and indeed essential - means by which workers may defend their occupational interests.¹ It has been declared by the CFA that trade union activity, in all its facets, can develop fully and in complete freedom only when the right to strike and the right to bargain collectively at the global level are recognised in law and in practice.²

The right to strike can be exercised in various ways. In the early history of labour relations, the strike was the only recognised form of industrial action, which expressed itself as a complete stoppage of work. In recent decades, however, trade unions have begun to use other forms of collective action such as the go-slow, the work to rule, the sit-down strike and the repeated walk-out.³ Since industrial action is meant to exert pressure on the employer, a new and wider definition of strike has replaced the former one.⁴ Hence, the narrow definition of strike as a work stoppage only, has now been replaced by a wide one and includes all the nuances mentioned above as recognised weapons in collective action. But, whatever form of collective action is used by the union, it will lie within the scope of the principles of freedom of association only if the objective of the strike is defined and

1. See ILO: Committee on Freedom of Association, 194th Report, Case No. 893 (Canada), para. 114; *see also*, e.g., 202nd Report, Case No. 893 (Canada), para. 22; 160th Report, Case No. 672 (Dominican Republic), para. 67.

2. See ILO: Committee on Freedom of Association, Report 219th, Case No. 842 (Argentina), para. 22.

3. In this respect *See*, for example, ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 218.

4. *Ibid.*, para. 199.

analysed as legitimate by the CFA. Implicit in the right to strike is the obligation to do so peaceably, with no attacks on persons or property, without degenerating into riots.⁵

12 ECONOMIC AND SOCIAL OBJECTIVES

The CFA has ruled many times that recourse to strike action is a legitimate means available to workers and their organisations for promotion and protection of their economic and social interests.⁶ Not only is the exercise of the right to strike a legitimate step in a labour dispute, it is more often than not an essential weapon for workers and their organisations to promote and protect their economic, occupational and social interests in the broad sense of the term.⁷ These interests do not only concern collective claims of an occupational nature, but also the seeking of solutions to specific economic and social policy questions and problems which have direct bearing on the workers.⁸ The right to strike need not be restricted solely to industrial disputes likely to be solved through the signing of collective agreements.⁹ Workers and their organisations should be allowed to express any dissatisfaction they may feel regarding social matters affecting them, so long as their action consists merely of expression of a protest, and is not intended as a breach of the peace.¹⁰ The CFA has always stressed the importance of non-violence in actions of this kind.¹¹

The broad interpretation of the 'occupational interests of workers and

5. See, for example, ILO: Committee on Freedom of Association, 199th Report, Case No. 943 (Dominican Republic), para. 170; 222nd Report, Case No. 1131 (Upper Volta), para. 95. In addition it was also decided that strikes decided on systematically long before the negotiations take place do not fall within the scope of the principles of freedom of association; in this respect See ILO: Committee on Freedom of Association, 139th Report, Cases Nos. 737 and 744 (Japan), 124.
6. See ILO: Committee on Freedom of Association, 238th Report, Case No. 1295 (the United Kingdom/Montserrat), para. 172; see also, e.g., 214th Report, Case No. 1018 (Morocco), para. 92; 214th Report, Case No. 1068 (Greece), para. 365; 222nd Report, Case No. 1131 (Upper Volta), para. 95; see in particular, 139th Report, Case No. 722 (Spain), para. 393; 211th Report, Case No. 1025 (Haiti), para. 273.
7. See, for example, ILO: Committee on Freedom of Association, 139th Report, Case No. 722 (Spain), para. 393; 147th Report, Case No. 756 (India), para. 167; 149th Report, Case No. 709 (Mauritius), para. 111; 211th Report, Case No. 1025 (Haiti), para. 273; 214th Report, Case No. 1081 (Peru), para. 261.
8. See ILO: Committee on Freedom of Association, 217th Report, Case No. 1089 (Upper Volta), para. 239; see also, e.g., 181st Report, Case No. 899 (Tunisia), para. 242; 214th Report, (Peru), para. 261; 218th Report, Case No. 1131 (Upper Volta), para. 776.
9. See ILO: Committee on Freedom of Association, 190th Report, Case No. 913 (Sri Lanka), para. 450.
10. Ibid.; see also, e.g., ILO: Committee on Freedom of Association, 172nd Report, Case No. 885 (Ecuador), para. 384; 177th Report, Case No. 888 (Ecuador), para. 135; 177th Report, Case No. 889 (Colombia), para. 326; 181st Report, Case No. 899 (Tunisia), para. 242; 181st Report, Case No. 885 (Ecuador), para. 199; 214th Report, Case No. 1054 (Morocco), paras. 670 and 678; 238th Report, Case No. 1309 (Chile), para. 364.
11. See ILO: Committee on Freedom of Association, 177th Report, Case No. 884 (Peru), para. 301.

workers' organisations' provided by the CFA recommendations, is the realistic result of the developments which took place in the field of labour relations. These developments brought modern theories of labour relations to view this system as three-dimensional, including the government in this framework as a third active force. Workers' interests are often determined by national economic policy, or affected by minimum standards provided by legislation - the workers' standard of living rises by obtaining wage increases, and by the freezing of taxes, and prices. National package deals regarding wages, taxes and prices are frequently replacing common collective bargaining, especially in times of economic crisis. Such developments justify the statement of the *Committee of Experts* in 1983 that 'Developments in the trade union movement show that the promotion of working conditions through collective bargaining, though still a major feature of trade union action, increasingly involves participation by organisations in economic and social policy making bodies.'²

The number of objectives attainable by recourse to strike action has expanded and developed gradually over the years, beginning with immediate monetary compensation and finally embracing far-reaching social goals. To take a specific case, when a general strike was declared against an Ordinance, it was in reality, a strike against governmental policy. The CFA recognised the right of the workers and their organisations to criticise the government's economic and social policy in this case. Despite the fact that the strike was against the government's policy, it was considered to be a non-political protest against an employer, since under these particular circumstances the government was regarded basically as an important employer.¹³ Hence, the CFA was fairly certain that such allegations could not be summarily dismissed at the outset on the ground that it was not a bona fide labour dispute. It was somewhat later that the CFA recognised the right of the workers to pursue through the exercise of strikes their occupational and economic interests in the broad sense of the term.¹⁴

Another example in which the CFA was confronted with such a question was by the complaints presented by the ICFTU, the Federation of Peruvian Light and Power Workers and various other trade union organisations against the Government of Peru.¹⁵ The complainants alleged that on 27 October 1981 the Upper House of the Peruvian Congress approved a bill to regulate the right to strike, which according to the complainants contained provisions contrary to the ILO Conventions. Section 4 of this Bill stated as follows:

Section 4. Strikes by workers shall be intended for:

- (a) obtaining better economic and working conditions; and
- (b) ensuring compliance by the employer of provisions of law or

12. ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 195.

13. See, for example, ILO: Committee on Freedom of Association, 58th Report, Case No. 221 (the United Kingdom/Aden), para. 109.

14. See, for example, the cases mentioned *supra*, note 7.

15. See ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru).

collective agreements and the restoration of any of the workers' rights and benefits that may have been infringed or prejudiced.

In the light of its above mentioned approach to the use of the strike weapon, the CFA recommended that the aims which could be attained by strike action must not necessarily be limited to 'obtaining better . . . working conditions', or 'ensuring compliance by the employer of provisions of law or collective agreements' and 'the restoration of any of the workers' rights . . .' but must also include seeking solutions to economic and social policy matters which are of direct concern to the workers and have effect on their well-being.¹⁶ Consequently, the CFA recommended that it would be appropriate for the future Act to provide for a broader range of objectives which might be pursued and attained by strike action.¹⁷

1.3 POLITICAL OBJECTIVES

It was always stressed that strikes which are purely political in nature do not fall within the scope of the principles of freedom of association.¹⁸ There have been strikes in which the political and occupational aspects were inter-twined to the extent that it was almost impossible to separate one from the other. Under such circumstances, it is not easy to decide whether the workers' act of protest falls within the scope of the principles of freedom of association. For example, the CFA was called upon to express an opinion concerning the political aspects of a strike called by the Guyana Agricultural and General Workers' Union (GAWU), which revolved around the levy on sugar.¹⁹ This levy, which in effect wiped out the benefits derived by the workers from the profit-sharing scheme, dated back to 1974. The strike, however, broke out only in 1977, at a time of increasing dissension between the Government and the opposition political faction, whose leaders occupied senior posts in the GAWU. The CFA pointed out in this case that although called for industrial reasons, the strike seemed to have very strong political overtones.²⁰

Furthermore, it was also pointed out by the CFA, that political matters not involving the exercise of freedom of association are outside its range of competence, as such cases may be political in origin or present certain political aspects. However, they should be examined in substance to see if they raise questions directly concerning the exercise of trade union rights.²¹

16. See ILO: Committee on Freedom of Association, 214th Report, Case No. 1089 (Peru), para. 261.

17. Ibid.

18. See ILO: Committee on Freedom of Association, 190th Report, Case No. 913 (Sri Lanka), para. 450; *see also, e.g.*, 158th Report, Case No. 824 (Benin), para. 295; 177th Report, Case No. 884 (Peru), para. 301.

19. See ILO: Committee on Freedom of Association, 177th Report, Case No. 890 (Guyana).

20. Ibid., para. 171.

21. See, for example, ILO: Committee on Freedom of Association, 187th Report, Case No. 857 (the United Kingdom/Antigua), para. 263. In addition the Committee pointed out many

The meaning of the term 'workers' occupational interests' with all the ramifications resulting from a broad interpretation thereof, is closely related to the general question of the political involvement of trade unions. The CFA expressed its opinion that certain difficulties might arise if trade unions were generally prohibited from engaging in political activities; in particular because, interpretations of the relevant provisions become subject to change and might considerably restrict the possibility of action by the organisations.²² The CFA further indicated that such a prohibition would certainly be unrealistic in practice, because then the trade union would be deprived of the possibility of expressing publicly its opinion regarding the government's economic and social policy, an area of high priority in the goals the trade union sets for itself in its function of protecting workers' interests. It was also recommended that trade union organisations exert upon themselves the necessary amount of self-discipline, and not over-indulge in political activities at the expense of neglecting their true function - promotion of workers interests.²³ Thus, when trade unions, in accordance with the national law and practice of their respective countries, and the decisions of their members, decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations, or activities, should not be of such a nature as to compromise the *raison d'être* of the trade union movement or its social and economic functions, irrespective of political changes in the country.²⁴

The Bolivian trade unions learned a bitter lesson shortly after August 1971, when a new regime took over the reins of government. The political situation in the country was best described by the CFA as highly complex, because of the establishment and operation of the People's Assembly, a body whose powers were not derived from the Constitution. It was a body in which the Bolivian Central of Workers led a prominent role. This body was established in the final month of the outgoing Government's term. The new

times that where complaints concern alleged infringements of trade union rights committed under a state of emergency or a state of siege or under terms of an international security Act, it has always expressed the opinion that it was not competent to come to a decision on the need or the advisability of such legislation, which is a question purely political in character. However, it has taken the view that it should consider the repercussions which such legislation might have on the free exercise of trade union rights. In this respect *see*, for example, ILO: Committee on Freedom of Association, 25th Report, Case No. 136 (the United Kingdom/Cyprus), para. 144; 33rd Report, Case No. 184 (Haiti), para. 94; 78th Report, Case No. 364 (Ecuador) para. 82; 151st Report, Cases Nos. 798 (Cyprus) and 799 (Turkey) para. 101; 165th Report, Case No. 873 (India), para. 107.

22. *See*, for example, ILO: Committee on Freedom of Association, 162nd Report, Case No. 685 (Bolivia), para. 33.

23. *See*, for example, ILO: Committee on Freedom of Association, 162nd Report, Case No. 685 (Bolivia), para. 33. In this connection the CFA emphasised the importance which it attaches to the principle established in the Resolution adopted by the International Labour Conference in 1952 concerning the independence of the trade union movement.

24. *See*, for example, ILO: Committee on Freedom of Association, 162nd Report, Case No. 685 (Bolivia), para. 33.

Government closed down the Bolivian Central of Workers, since it considered that that organisation had digressed from its function as a trade union, and had been transformed into an essentially political party.²⁵

The CFA has always maintained that activities of members of occupational organisations should be limited to the field of trade unionism, and that similarly, the government should refrain and be restrained from interfering in the functioning of trade unions, whose fundamental aim is the advancement of the workers on the social and economic fronts.²⁶ The CFA has reaffirmed the principle contained in the 1952 International Labour Conference resolution, that governments, in seeking the co-operation of trade unions to carry out their economic and social policies, should recognise that the value of this co-operation rests to a large extent on the freedom and independence of the trade union movement. Therefore, governments should not attempt to transform the trade union movement into a political arm of the party, nor should they attempt to interfere with the normal functions of a trade union movement because of its freely established relationship with a political party.²⁷

The CFA has recognised that a trade union may seek its aims by means of political action, and has expressed the opinion that States should be able at times, to entrust to the judicial authorities the task of preventing abuses. This must be done without prohibiting in general terms the political activities of occupational organisations, and applies to cases where abuses are committed by organisations which have lost sight of the fact that their fundamental objectives should be the economic and social advancement of their members.²⁸ In addition, the CFA emphasised the importance of distinguishing between recognition of freedom of association and questions relating to the country's political evolution. Neither should there be confusion between trade unions' performance of their specific functions and the possible pursuit by certain of their members of other activities having nothing to do with trade union functions.²⁹ It should be remembered that in such a case the penal responsibility which such persons may incur by such acts, should in no way result in measures amounting to depriving the unions themselves, or their leaders, of their means of action.³⁰

25. *Ibid.*, para. 30. Another example to the same effect can be learned from the Bangladesh case, in this respect see ILO: Committee on Freedom of Association, 187th Report, Case No. 861 (Bangladesh), para. 463.

26. See, for example, ILO: Committee on Freedom of Association, 187th Report, Case No. 857 (the United Kingdom/Antigua), para. 265.

27. See, for example, ILO: Committee on Freedom of Association, 187th Report, Case 857 (the United Kingdom/Antigua), para. 265; in this respect see *also*, 110th Report, Case No. 519 (Greece), para. 76; 127th Report, Case No. 660 (Mauritania) paras. 279-280; 217th Report, Case No. 1097 (Poland), para. 714.

28. See, for example, ILO: Committee on Freedom of Association, 162nd Report, Case No. 685 (Bolivia), para. 34; 191st Report, Case No. 763 (Uruguay), para. 27; 211th Report, Case No. 965 (Malaysia), para. 200.

29. See, for example, ILO: Committee on Freedom of Association, 194th Report, Case No. 887 (Ethiopia), para. 85.

30. *Ibid.*

2. General Prohibition of Strikes and the Suspension of the Right to Strike

2.1 GENERAL PROHIBITION OF STRIKES³¹

The right to strike is the essential weapon in the armoury of workers' organisations whereby the occupational interests of the workers can be attained, and having once been attained, defended.³² A general prohibition, or a prolonged suspension of the right to strike, is in contradiction with Article 10 of Convention No. 87 which recognises the right of trade unions to formulate and defend the rights of their members. This same prohibition or suspension of the right to strike also violates Article 3 of the same Convention, which gives to the unions the right to organise their activities and formulate their programmes.

A general prohibition of strikes can be attained directly by the passage of a specific law to that effect. A case in point was the prohibition of the right to strike in Liberia by Decree No. 12 of 30 June 1980, which was examined by the CFA.³³ In its recommendations, it was pointed out by the CFA that the Committee of Experts, in its comments addressed to the Government in 1983, had already drawn attention to the fact that the legislation in Liberia contained restrictions on the application of Convention No. 87. In this respect, the Committee of Experts pointed out that a general prohibition of the right to strike seriously limits the ability of trade unions to further and defend the interests of their members.

A general prohibition of strikes can be attained indirectly, as a result of the cumulative effect of the settlements of labour disputes by means of compulsory conciliation and arbitration procedures, the final award of which is binding upon the parties concerned.³⁴ By such procedures it is possible in practice to put a stop to any strike. The substitution of compulsory arbitration for the right to strike, by legislative means, as a manner of resolving labour disputes, is a violation of Article 3 of Convention 87, which guarantees the workers' organisations the right to organise their activities.³⁵

For example, the Mauritius Industrial Relations Act No. 67 of 1973 was examined by the CFA.³⁶ According to this statute, any industrial dispute, must be reported to the competent minister, who may accept or reject the

31. See ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), paras. 204-206.

32. See, for example, ILO: Committee on Freedom of Association, 78th Report, Case No. 354 (Ecuador), para. 84; 160th Report, Case No. 842 (Argentina), para. 443.

33. ILO: Committee on Freedom of Association, 233rd Report, Case No. 1219 (Liberia), para. 653.

34. In this respect see, ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 204.

35. ILO: Committee on Freedom of Association, 226th Report, Case No. 1140 (Colombia), para. 293, 236th Report, Case No. 1140 (Colombia), para. 145.

36. ILO: Committee on Freedom of Association. 149th Report, Case No. 709 (Mauritius), para. 89.

report made to him by one of the parties. If the report is accepted the minister may refer the dispute to the Permanent Arbitration Tribunal. The CFA concluded that when a minister solely at his discretion, saw fit to submit a labour dispute to compulsory arbitration, thereby preventing recourse to a strike, that the right to strike was severely restricted.³⁷ If any legislative provision directly or indirectly affects the use of the strike weapon, then this provision has restricted one of the most important activities of trade unions.³⁸

In Case No. 641 (Columbia), statutory provisions allowed employers to submit every labour dispute to compulsory arbitration once having decided that collective bargaining would bear no fruit.³⁹ In this case the procedure would prevent recourse to strike action. A system like the one confronting the CFA in Case No. 614 (Peru), resulted in an absolute prohibition of strikes, since it was based on legislation providing binding arbitration in disputes not settled by other means.⁴⁰ The Bangladesh legal system contains another example of an indirect general prohibition of strikes. Section 8 of the Bangladesh Industrial Relation (Regulation) Ordinance (No. XXVI) of August 1982 deprives workers of the right to strike by requiring that all labour disputes be submitted directly to labour courts. Appeals from the labour courts can go only to the Chief Martial Law Administrator. This Ordinance was examined by the CFA,⁴¹ which came to the conclusion that Section 8 of the Ordinance read with Section 6 (compulsory arbitration to settle industrial disputes), results in a severe limitation on the workers' right to organise their activities and formulate their programmes.⁴²

The guarantee of the right to strike must be genuine and therefore recognised in law and in practice. For example, in Argentina the suspension of the right to strike was set out in Section 1 of Act No. 21,261 of March 1976 and maintained in section 14 of Act No. 21,400 of 3 September 1976. This legislation was examined by the CFA on various occasions.⁴³ In 1982 the Government claimed that in practice the workers took part in a general strike and that strikes do in fact occur in the country. It was further claimed that when confronted with such events, the labour authorities act prudently and reasonably.⁴⁴ In its recommendations, the CFA pointed out that trade-union

37. *Ibid.*, para. 111; *see also*, e.g., ILO: Committee on Freedom of Association, 112th Report, Case No. 385 (Brazil), para. 76; 118th Report, Case No. 559 (Trinidad and Tobago), para. 139; 123rd Report, Case No. 614 (Peru), para. 34; 130th Report, Case No. 641 (Colombia), para. 14; 133rd Report, Case No. 629 (Nicaragua), para. 219.

38. *Ibid.*

39. ILO: Committee on Freedom of Association, 130th Report, Case No. 641 (Colombia), para. 14.

40. ILO: Committee on Freedom of Association, 123rd Report, Case No. 614 (Peru), para. 35.

41. ILO: Committee on Freedom of Association, 230th Report, Case No. 1214 (Bangladesh), paras. 344-346.

42. *Ibid.*

43. ILO: Committee on Freedom of Association, Case No. 842 (Argentina), in the following Reports; 160th Report, paras. 394-444; 165th Report, paras. 118-150; 175th Report, paras. 7-42; 180th Report, paras. 5-32; 184th Report, paras. 5-32; 189th Report, paras. 6-72; 192nd Report, paras. 5-57; 196th Report, paras. 5-45; 197th Report, para. 7; 201st Report, paras. 19-27; 203rd Report, paras. 5-22; 210th Report, paras. 4-51; 212th Report, paras. 5-26; 219th Report, paras. 5-32; 223rd Report, paras. 5-35; 231st Report, paras. 4-25.

44. ILO: Committee on Freedom of Association, 219th Report, para. 14.

activity can only develop fully and in complete freedom when the right to strike and the right to bargain collectively at the global level are recognised in law and in practice.⁴⁵ The CFA noted its satisfaction only when the right to strike was fully restored by Act No. 22,825 of June 1983.⁴⁶

2.2 TEMPORARY SUSPENSION OF THE RIGHT TO STRIKE

The sanctity of the right to strike is not absolute. There are cases when a prohibition of the right to strike would be justified if imposed:

1. in a situation of acute national emergency, and even then,
2. only as a transitory measure.⁴⁷

For example, in Case 1097 (Poland) when martial law was proclaimed on 13 December 1981, all trade union activities were suspended including of course the suspension of the right to strike.⁴⁸ The Government claimed that these measures were necessary to prevent a civil war and counteract the signs of anarchy and economic chaos endangering the fundamental interests of the Polish nation and State.⁴⁹ The CFA was deeply committed to the principle that in no case did the solution to the economic and social problems besetting a country lie in the isolation of trade union organisations and in the suspension of their activities.⁵⁰

It should be emphasised in this respect, that the CFA has declared, time and again, that the existence of martial law is incompatible with the exercise of trade union rights.⁵¹ Therefore, for example, a ban on all trade union activities in the national airline sector, imposed in Pakistan by Martial Law Regulations No. 52 - even if only of a temporary nature - constituted according to the recommendation of the CFA, an infringement of the principle of freedom

45. *Ibid.*, para. 22.

46. ILO: Committee on Freedom of Association, 231st Report, para. 21.

47. ILO: Committee on Freedom of Association, 177th Report, Case No. 884 (Peru), para. 300; 160th Report, Case No. 842 (Argentina), para. 443; 224th Report, Cases Nos. 997, 999, 1027 (Turkey), para. 27; Report 218th, Case No. 1133 (Nicaragua), para. 115.

48. For this case see ILO: Committee on Freedom of Association, the following Reports: 214th Report, paras. 696-750; 217th Report, paras. 666-719; 221st Report, paras. 5-99; 225th Report, paras. 5-63; 229th Report, paras. 5-53; *see also* Report of the Commission instituted under article 26 of the Constitution of the ILO to examine the complaint on the observance by Poland of Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Poland, *Official Bulletin*, (Geneva, ILO), Vol. LXVII, 1984, (Special Supp.).

49. ILO: Committee on Freedom of Association, 214th Report, para. 714.

50. *Ibid.*, para. 745.

51. *See*, for example, ILO: Committee on Freedom of Association, 224th Report, Cases Nos. 997,999 and 1029 (Turkey) paras. 5-65, in particular para. 27, for these cases *see also*, 207th Report, Cases Nos. 997 and 999, paras. 275-315; 208th Report, Cases Nos. 997 and 999, paras. 342-370; Case No. 1029, paras. 42-431; 211th Report, paras. 458-498, 214th Report, paras. 541-573; 220th Report, paras. 5-107; 228th Report, paras. 5-69; 232nd Report, paras. 5-85; 235th Report, paras 5-42; 237th Report, paras. 5-43; 240th Report, paras. 7-49.

of association.⁵² Hence, the question is whether in other circumstances, if martial law was not proclaimed and only the right to strike would have been suspended, the CFA would not have justified the suspension of the right to strike, if limited in time and in scope to the immediate period of emergency, according to the Government's claims of an acute national crisis.⁵³

Sometimes it is virtually impossible to reach a definitive conclusion as to the justification of a general prohibition of strikes. Such a prohibition can be justified at the time it was proclaimed, but in the long run, the aforementioned justification disappears. Argentine Case No. 842 serves as a good example of such a development. When the CFA first examined the complaint against the Government of Argentina it was alleged *inter alia* that the right to strike was suspended by force of Section 1 of Act No. 21,261 of March 1976 and maintained in Section 14 of Act No. 21,400 of September 1976.⁵⁴ The government claimed that all the measures taken were in response to an emergency and temporary in nature.⁵⁵ The Government pointed out, for example, that the situation had never before been that grave in Argentina, inflation having risen to 566.3 per cent in the period from March 1975 to March 1976.⁵⁶ Under these circumstances, the CFA noted the explanations given by the government with regard to the circumstances which led to the adoption of such measures.⁵⁷ The Committee also noted the statement of the Government that the restrictions on the right to collective bargaining and the right to strike were temporary measures and were necessary in view of the grave economic situation of the country. But, on this occasion the Committee stated that a general prohibition of strikes was an important restriction of one of the essential means by which the workers could defend and promote their interests and therefore such a prohibition should be imposed exclusively as a transitory measure in a situation of acute national emergency.⁵⁸ However, when the ban on strikes was not repealed, and in view of the fact that the restriction of the right to strike had been in force for more than six years, the Committee considered that one of the Government's priorities should be to grant genuine recognition of the right to strike.⁵⁹

Notwithstanding, under emergency war-time legislation of a country engaged in hostilities it may be necessary for trade unions, like other collectives and individuals, to accept greater restrictions on their freedom of action than is normally the case under peace-time legislation.⁶⁰ At the same time it would be desirable that such restrictive legislation should be replaced by

52. ILO: Committee on Freedom of Association, 217th Report, Case No. 1075 (Pakistan), para. 608.

53. See, for example, ILO: Committee on Freedom of Association, 224th Report Cases Nos. 997, 999 and 1029 (Turkey), para. 27.

54. ILO: Committee on Freedom of Association, 160th Report, para. 400.

55. Government's reply, ILO: Committee on Freedom of Association, 160th Report, para. 427.

56. *Ibid.*, para. 425.

57. *Ibid.*, para. 434.

58. *Ibid.*, para. 443.

59. ILO: Committee on Freedom of Association, 219th Report, para. 22.

60. See, for example, ILO: Committee on Freedom of Association, 17th Report, Case No. 73

legislation which allows a full measure of freedom of association, as close as possible to the conclusion of hostilities.⁶¹

3. Restrictions of the Right to Strike

3.1 INTRODUCTION

While a general ban on strikes is in contradiction to Article 3 of Convention No. 87, under special circumstances certain restrictions can be imposed upon the exercise of such a right. These restrictions are of a diverse character and concern prohibition of strikes by specific categories of workers, in particular, public servants or those employed in essential services,⁶² restrictions of the use of certain methods employed in the exercise of such a right, or limitations of certain procedural aspects related to the exercise of the right to strike.

3.2 REASONABLENESS OF THE RESTRICTIONS

Legal provisions which impose restrictions on the exercise of the right to strike must be reasonable, and in any event, they must be narrow in scope by placing limitations only on workers and workers' organisations engaged in the essential or public services. Under no circumstances should legal provisions place restrictions on strike actions by workers or their organisations that are not involved in essential or public services.⁶³ Hence, the conditions that have to be fulfilled in order to render a strike lawful must not place substantial limitations on the means of action open to trade union organisations to promote their interests and formulate their programmes of action.⁶⁴ It should be remembered that while workers' organisations are under obligation to respect the law of the land, this law must not be such as to impair, nor must it be so applied as to impair, the generally accepted rights of trade unions.⁶⁵ The provisions of Article 8 of Convention No. 87 prescribe that in exercising the rights provided for in the Convention, workers and their organisations, like other persons or organised collectivities, shall respect the law of the land, which shall not be such as to impede the guarantees provided for in Convention No. 87.⁶⁶ In this light, as will be analysed further, the CFA has examined

(the United Kingdom/British Honduras), para. 72; 25th Report, Case No. 136 (the United Kingdom/Cyprus), para. 177.

61. ILO: Committee on Freedom of Association, 17th Report, Case No. 73 (the United Kingdom/British Honduras), para. 72.

62. For essential services and public service *see infra*, *see also*, e.g., ILO: Committee on Freedom of Association, 217th Report, Case No. 1065 (Colombia), para. 557; 240th Report, Case No. 1304 (Costa Rica), para. 102.

63. *See*, for example, ILO: Committee on Freedom of Association, 217th Report, Case No. 1065 (Colombia), para. 557.

64. *See*, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 927 (Brazil), para. 353.

65. *See*, for example, *ibid.*, para. 356.

66. *See*, for example, ILO: Committee on Freedom of Association, 191st Report, Case No. 763 (Uruguay), para. 27.

allegations that specific legal provisions which restrict the right to strike were inconsistent with the principles of freedom of association.

3.3 COMPENSATORY PROCEDURES

Where it is permissible to restrict the right to strike, as for example, in the case of essential services or in the public service — adequate guarantees should be provided to safeguard the workers' interests.⁶⁷ Such guarantees include provisions for impartial and speedy conciliation and arbitration procedures, in which the parties can participate at every stage of the procedure and in which the awards are binding on both parties and are applied promptly and to the letter of the law.⁶⁸

For example, in a case which concerned allegations against the Government of Japan,⁶⁹ the Japanese Government was required to grant wage increases to various public corporation and national enterprises as a result of an arbitration procedure. Within the judgement, the compulsory arbitration tribunal, in order to ensure speedy implementation of the awards, called upon the Government authorities to take special action in the allocation of the necessary funds. According to the complainants, the failure to implement these awards promptly and their referral to the Diet to seek the funds constituted an infringement of the principles of freedom of association and, in particular, of the guarantee of the full and prompt implementation of arbitration awards, which should be provided where the right to strike is prohibited. The CFA noted that in order to constitute a compensatory procedure for waiving the right to strike, the arbitration awards, once they have been made, should be fully and promptly implemented.⁷⁰ Moreover, it was also stressed that the reservation of budgetary powers to the legislative authority should not have the effect of preventing compliance with the terms of awards handed down by the compulsory arbitration tribunal, implying that inclusion of such an authority, might detract from the effective application of the aforementioned principles.⁷¹

In another case, a proposed Bill to regulate the right to strike, which was approved by the Upper House of the Peruvian Congress on 27 October 1981, was examined by the CFA.⁷² This Bill did not grant the right to strike to workers employed in essential services nor did it provide for machinery to

67. See, for example, ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), para. 265.

68. Ibid., see also, e.g., ILO: Committee on Freedom of Association, 218th Report, Case No. 1151 (Japan), 361; 217th Report, Case No. 1034 (Brazil), para. 413; 226th Report, Case No. 1113 (India), para. 204; 211th Report, Case No. 1046 (United States), para. 372; 211th Report, Case No. 965 (Malaysia), para. 199.

69. ILO: Committee on Freedom of Association, 218th Report, Case No. 1151 (Japan), paras. 349-361; see also 139th Report, Cases Nos. 737 to 744 (Japan), para. 122; Case No. 725 (Japan), para. 330; 142nd Report, Cases Nos. 745, 753 and 755 (Japan), para. 125.

70. ILO: Committee on Freedom of Association, 218th Report, 1151 (Japan), para. 359.

71. Ibid.

72. ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), paras. 250-269.

compensate for the restrictions on the right to strike which were imposed on these workers.⁷³ In its recommendations, the CFA expressed its trust that the legislature would take due account of the above-mentioned principles, and would see to the provision of the required strike compensatory procedures.

The principle of strike compensatory procedures was applied in yet another case, which concerned the Canadian legal system, during the wage restraint period.⁷⁴ It was alleged that Article 3 of Convention No. 87 was violated by the combined effect of Section 6 (1) of the new Act, the Public Sector Compensation Restraint Act (PSCRA) which became law on 4 August 1982, and Paragraph 101 (2) (a) of the Public Service Staff Relations Act (PSRRA), resulting in the prohibition of the right to strike during the wage restraint period without provision of adequate strike compensatory procedures.⁷⁵ The Committee examined the situation and came to the conclusion that in the instant case, at least legally, adequate guarantees did exist.⁷⁶ As examples they cited Section 7 of the PSCRA, which allowed for limited collective bargaining, and Section 16 which allowed for making exemptions from the PSCRA. In addition the mediation procedures under the PSSRA continued to apply. Furthermore, it was stressed that under Section 6 (2) of the PSCRA, the Treasury Board could authorise change, including any increases in wage rates up to a certain amount, in certain circumstances, including cases where the parties fail to agree to change the terms and conditions of a compensation plan.⁷⁷ When all these facts were taken into consideration, the CFA held the opinion that the denial of the right to strike under such circumstances, despite the measures taken to place certain restrictions on wage bargaining, was nevertheless accompanied by procedures which allowed not only for bargaining beyond the minimum levels fixed by the PSCRA, but also allowed for exceptions to be made. There were also provisions for mediation in case of dispute. But, the question under consideration was concerned not only with the existence of compensatory procedures, but also with their effective implementation. Therefore, it was concluded that the extent to which these procedures adequately compensate the workers concerned for the denial of the right to strike, depended on their effectiveness in practice.⁷⁸ Hence, the Government was requested to ensure that individual claims would be examined fully and in good faith, in order to determine whether an exception to the application of the PSCRA should be made.⁷⁹

The aspect of impartiality of the strike denial compensatory procedures was examined in the case of railway employees in India.⁸⁰ The allegations in this case related, *inter alia*, to Section 36B of the Industrial Disputes (Amend-

73. Ibid., para. 265.

74. ILO: Committee on Freedom of Association, 222nd Report, Case No. 1147 (Canada), paras. 97-121.

75. Ibid., para. 116.

76. Ibid.

77. Ibid.

78. Ibid.

79. Ibid.

80. ILO: Committee on Freedom of Association, 226th Report, Case No. 1113 (India), para. 204; see also, e.g., 218th Report, Case No. 1113 (India), para. 719.

ment) Bill, introduced into Parliament on 23 April 1982, which granted to the Government, at its discretion, the right to exclude certain public employees from the scope of the principle Act. The CFA, after examining the provision in question, considered that it would appear to give the Government concerned unduly wide discretion to exclude employees of the State from the scope of the Industrial Disputes Act.⁸¹ Furthermore, it was maintained by the CFA that the machinery for settling disputes provided by the industrial Disputes Act, was the only means through which employees of the State could bring the settlement of disputes to the courts. Other forms of regulation of disputes did not ensure the same degree of impartiality and independence as that guaranteed by the Industrial Disputes Act.⁸² In view of these factors, the CFA considered that the application of Section 36B of the Industrial Disputes Act to railway employees would place them in a less, favourable position than they enjoyed at present, as it would expose these employees to dispute settlement procedures which did not have the confidence of the workers involved. Consequently, the Committee expressed the hope that the new provision 36B would not be used.⁸³

4. Public Service

The CFA has repeated on many occasions that as regards public employees, recognition of the principle of freedom of association does not necessarily imply the right to strike.⁸⁴ Moreover, the CFA pointed out that the Labour Relations (Public Service) Convention, 1978 (No. 151), does not deal with the question of the right to strike.⁸⁵ But, it should not be forgotten, that Convention No. 98 applies both to the private sector and to nationalised undertakings and public bodies. However, Article 6 of Convention No. 98 contains the possibility of exclusion only as to public servants engaged in the administration of the State.⁸⁶

The CFA further pointed out that in this connection the Committee of Experts on the application of Conventions and Recommendations has stated,⁸⁷ that while the definition of public servants may vary to some degree

81. ILO: Committee on Freedom of Association, 226th Report, Case No. 1113 (India), para. 202.

82. For the examination of the disputes settlement procedures under the Industrial Disputes Act, 1947, see, ILO: Committee on Freedom of Association, 217th Report, Case No. 1091 (India), para. 446.

83. ILO: Committee on Freedom of Association, 226th Report, Case No. 1113 (India), para. 203.

84. See, for example, ILO: Committee on Freedom of Association, 6th Report. Case No. 55 (Greece), para. 919; 127th Report, Case No. 660 (Mauritania), para. 303; 139th Report, Case No. 737 (Japan), para. 180; Case No. 746 (Canada), para. 367; 143rd Report, Case No. 737 (Australia), para. 152; 172nd Report, Case No. 870 (Peru), para. 328; 177th Report, Case No. 853 (Chad), para. 83; 181st Report, Case No. 880 (Madagascar), para. 135; 187th Report, Case No. 792 (Japan), para. 135.

85. See, for example, ILO: Committee on Freedom of Association, 194th Report, Case No. 893 (Canada), para. 97.

86. See ILO: Committee on Freedom of Association, 208th Report, Cases Nos. 988 and 1003 (Sri Lanka), para. 340.

87. In this respect see also, ILO: *Freedom of association and collective bargaining*, General

under the various national legal systems, the exclusion of all persons employed by the State or in the public sector from the scope of the Convention, is contrary to the meaning of the Convention.⁸⁸ This applies to employees who do not act as agents of the public authority - even though they may be granted a status identical with that of public officials engaged in the administration of the State. Consequently, the distinction to be drawn, would appear to be basically between civil servants employed in various capacities in Government ministries, or comparable bodies and other persons employed by the Government, by public undertakings or by independent public corporations.

Hence, the above mentioned distinction is relevant regarding the prohibition of strikes. It was indicated by the CFA that, as one of the essential means through which workers and their organisations may promote and defend their occupational interests, the right to strike may be denied or seriously restricted only in public services in the strict sense of the term.⁹⁰ If the term public service is defined too broadly, the principle of limitation or prohibition of the right to strike in this sector would become bereft of all meaning.⁹¹ Hence, the CFA recommended, in light of the above-mentioned distinction made by the Committee of Experts on the application of Conventions and Recommendations, that the prohibition of the right to strike of public servants should be confined to public servants acting in their capacity as agents of the public authority.⁹²

For example, the Norwegian Society of Engineers alleged intervention in the legal activities of the complainant trade union organisation, because the Government adopted special legislation prohibiting that organisation from calling a strike in a particular dispute. Although the company in the dispute was wholly owned by the Government, it was organised as an autonomous company engaged in industrial production.⁹³ In this case, the ban on strike action could not be justified as related to the public service. Employees in a Government-owned autonomous undertaking are not considered to be public servants in the strict sense of the term. Therefore, the strike prohibition could be justified, in the prevailing circumstances, if at all, only if related to essential services.⁹⁴ The CFA pointed out that it would not be appropriate for all publicly-owned undertakings to be treated in the same manner regarding limitations on the right to strike, without making a distinction in the relevant

survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 214.

88. Ibid.

89. See for example, *ibid.*; see also, e.g., ILO: Committee on Freedom of Association. 116th Report, Case No. 598 (Ecuador), para. 377; 121st Report, Case No. 635 (Costa Rica), para. 81; 143rd Report, Case No. 764 (Colombia), para. 87.

90. ILO: Committee on Freedom of Association, 226th Report, Case No. 1166 (Honduras), para. 343.

91. Ibid.

92. ILO: Committee on Freedom of Association, 230th Report, Case No. 1173 (Canada), para. 578.

93. ILO: Committee on Freedom of Association, 217th Report, Case No. 1099 (Norway), paras. 449-470.

94. On this question see *infra*.

legislation between those companies which were genuinely essential, because any cessation of their activities would cause public hardship, and those companies which were not essential, according to this criterion.⁹⁵

In another case, which concerned teachers in the province of British Columbia in Canada, it was alleged *inter alia* that, although the pertinent provincial legislation was silent on the right of public servants to strike outside collective bargaining issues, the Minister of Education had threatened to dismiss any teachers who took part in any work stoppage called in protest against the wage restraint measures which were in effect.⁹⁶ In its reply, regarding the alleged threats against any protest action by teachers, the Government pointed out that at the time strikes by teachers did not have the protection of the British Columbia Labour Code. The Government clarified its stand by saying that unauthorised absences from the classroom would be classified under the School Act as misconduct subject to disciplinary action, even including dismissal. The CFA came to the conclusion that workers in the education sector ought to enjoy the right to strike, since they could not be considered as public servants acting in their capacity as agents of the public authorities, nor as working in essential services in the strict sense of the term.⁹⁷

Despite the fact that the right to strike can be restricted in the public service, there are countries whose legal systems, explicitly or implicitly, recognises the right to strike of public servants, or make no distinction between strikes in the public sector and strikes in the private one.⁹⁸ In such a case these workers can lawfully engage in strike action. The Laws and Regulations in force may, however, restrict the exercise of the right to strike by people in certain positions.

For example, the Federation of Greek Primary School Teachers alleged in its complaint that Act No. 643/77 respecting the trade union freedoms of officials and employees of public services, was contrary to Convention No. 87, because this Act, in practice, abolished the right to strike, by imposing certain procedural restrictions.⁹⁹ These allegations were rejected regarding the categories of employees whose right to strike was restricted - since the CFA found that the Act of 1977 granted the right to strike to most officials and employees of the State, with the exception of bodies which were not entitled to enjoy this right, namely the judiciary and the police.¹⁰⁰

95. See, for example, ILO: Committee on Freedom of Association, 187th Report, Case No. 893 (Canada), para. 535.

96. ILO: Committee on Freedom of Association, 230th Report, Case No. 1173 (Canada/British Columbia), paras. 551-578.

97. Ibid.; see also, e.g., ILO: Committee on Freedom of Association, 226th Report, Case No. 1166 (Honduras), para. 343.

98. For a list of such countries see ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), paras. 209-211.

99. ILO: Committee on Freedom of Association, 204th Report, Case No. 961 (Greece), paras. 56-70.

100. Ibid., para. 68.

As will be analysed further, when the right to strike of public employees of essential services, is not restricted, various requirements may be imposed, in case of a strike, in an area in which minimum services must be maintained.

5. Essential Services

The restriction of the right to strike as pertaining to essential services may be justified,¹⁰¹ though, essential services must be interpreted in the strict sense of the term.¹⁰² Only services whose interruption would endanger the life, personal safety, or health of the whole or part of the population will be considered genuinely essential.¹⁰³ In other words, the general principle is that essential services are only those services whose interruption would endanger the life, personal safety, or health of the whole or part of the population.¹⁰⁴

On many occasions the CFA was called upon to examine the extent to which certain services could be recognised as essential services. For example, strikes taking place in the medical and health sector were considered to be strikes in essential services.¹⁰⁵ Furthermore, the CFA considered that the withdrawal of services by air traffic controllers could endanger the life and safety of large numbers of air passengers and flying staff.¹⁰⁶ It was, therefore, of the opinion that the exclusion of this particular category of employees from the right to strike did not constitute a violation of the principles of freedom of association.¹⁰⁷ Services for the supply of water were recognised by the CFA

101. See, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1140 (Colombia), para. 145; *see also*, e.g., 197th Report, Case No. 823 (Chile), para. 411; 238th Report, Case No. 1175 (Pakistan), para. 190; 238th Report, Case No. 1295 (the United Kingdom/Montserrat), para. 172; 233rd Report, Case No. 1183 (Chile), para. 519; 233rd Report, Case No. 1225 (Brazil), para. 671; 226th Report, Case No. 1140 (Colombia), para. 293; 214th Report, Case No. 1081 (Peru), para. 263; 214th Report, Case No. 1071 (Canada), para. 249; 226th Report, Case No. 1166 (Honduras), para. 347; 211th Report, Case No. 965 (Malaysia), para. 199.

102. See, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1140 (Colombia), para. 145; *see also*, e.g., 197th Report, Case No. 823 (Chile), para. 411; 238th Report, Case No. 1175 (Pakistan), para. 190; 238th Report, Case No. 1295 (the United Kingdom/Montserrat), para. 172; 233rd Report, Case No. 1183 (Chile), para. 519; 233rd Report, Case No. 1225 (Brazil), para. 671; 226th Report, Case No. 1140 (Colombia), para. 293; 214th Report, Case No. 1081 (Peru), para. 263; 214th Report, Case No. 1071 (Canada), para. 249; 226th Report, Case No. 1166 (Honduras), para. 347; 211th Report, Case No. 965 (Malaysia), para. 199.

103. See, for example, ILO: Committee on Freedom of Association, 217th Report, Case No. 1091 (Greece), para. 374.

104. See, for example, ILO: Committee on Freedom of Association, 238th Report, Case No. 1295 (the United Kingdom/Montserrat), para. 172.

105. See, for example, ILO: Committee on Freedom of Association, 199th Report, Case No. 910 (Greece), para. 117; 202nd Report, Case No. 949 (Malta), para. 281; 233rd Report, Case No. 1203 (Spain), para. 96.

106. ILO: Committee on Freedom of Association, 211th Report, Case No. 1046 (United States), para. 372; *see also*, e.g., 214th Report, Case No. 1021 (Greece), para. 126.

107. ILO: Committee on Freedom of Association, 211th Report, Case No. 1046 (United States), para. 372; *see also*, e.g., 214th Report, Case No. 1021 (Greece), para. 126.

as constituting an essential service, an area where strike action might be prohibited.¹⁰⁸

In contrast, the CFA did not consider that the banking sector was an essential service in the strict sense of the term.¹⁰⁹ The same conclusion of non-essentiality was reached when restrictions of the right to strike in airline companies were examined. Such restrictions were not justified from this point of view.¹¹⁰ Moreover, the CFA recalled that teachers should enjoy the right to strike since they did not work in an essential service whose interruption would endanger the life, personal safety, or health of the whole or part of the population.¹¹¹ The CFA could not consider that the mining sector as a whole was an essential service in which the right to strike could be prohibited.¹¹² The same conclusion also held where the fishing sector was concerned.¹¹³ It was also pointed out by the CFA that rail transportation *per se* was not considered as an essential service in the strict sense of the term.¹¹⁴ Ports¹¹⁵ and telecommunications were not essential in the strict sense of the term and consequently strike restrictions should not apply to them.¹¹⁶

On several occasions the CFA was confronted with the question of whether serious economic losses to the economy, or other consequences like lay-offs caused by a strike justify the prohibition of strike action in such services.¹¹⁷ For example, the CFA was called upon to examine the legislation prohibiting strikes by certain employees in the Norwegian North Sea oil-pro-

108. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1179 (Dominican Republic), para. 299.
109. ILO: Committee on Freedom of Association, 197th Report, Case No. 935 (Greece), para. 285; 233rd Report, Case No. 1225 (Brazil), para. 671; 233rd Report, Case No. 1224 (Greece), para. 136; 240th Report, Case No. 1304 (Costa Rica), para. 102.
110. See, for example, ILO: Committee on Freedom of Association, 138th Report, Case No. 719 (Colombia), para. 72; 165th Report, Case No. 652 (Philippines), para. 30; 217th Report, Case No. 1075 (Pakistan), para. 608.
111. See, for example, ILO: Committee on Freedom of Association, 226th Report, Case No. 1166 (Honduras), para. 347; 230th Report, Case No. 1171 (Canada), para. 171; as to cases dealing with teachers *see also*, e.g., 164th Report, Case No. 845 (Canada), para. 42; 211th Report, Case No. 1020 (Malta), para. 252; 222nd Report, Case No. 1164 (Malta), para. 152; 230th Report, Case No. 1173 (Canada), para. 578; 236th Report, Case No. 1266 (Burkina Faso), para. 578; 239th Report, Case No. 1271 (Honduras), para. 275.
112. See, for example, ILO: Committee on Freedom of Association, 217th Report, Case No. 1076 (Bolivia), para. 620; 197th Report, Case No. 933 (Peru), para. 305.
113. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 933 (Peru), para. 305.
114. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1201 (Morocco), para. 554; in respect of the railways sector *see also*, e.g., 153rd Report, Case No. 793 (India), para. 55; 204th Report, Case No. 952 (Spain), para. 162; 211th Report, Case No. 1024 (India), para. 538; 214th Report, Case No. 1024 (India), para. 300; 226th Report, Case No. 1113 (India), para. 204.
115. See, for example, ILO: Committee on Freedom of Association, 118th Report, Case No. 589 (India), para. 90.
116. ILO: Committee on Freedom of Association, 218th Report, Case No. 1131 (Upper Volta), para. 779.
117. See, for example, ILO: Committee on Freedom of Association, 202nd Report, Case No. 949 (Canada), para. 211, a case which concerned the ban on strikes in the postal sector; 217th Report, Case No. 1099 (Norway), para. 470; 234th Report, Case No. 1255 (Norway), para. 192, a case which concerned the oil-production industry.

duction installations.¹¹⁸ In this respect, the CFA considered that, despite the detailed information supplied by the Government as to the economic consequences of any such strike, the legislative action taken by the Government, which had resulted in the total exclusion of this particular category of workers from the possibility of taking strike action, was inconsistent with the principles of freedom of association;¹¹⁹ principles according to which strikes may only be prohibited or restricted in the civil service or in services that are strictly essential in character.¹²⁰ In another case, the Committee considered that it had not been established in a satisfactory way that the mint, the Government printing service, and the State alcohol, salt and tobacco monopolies constituted genuinely essential services. While it might be said that a stoppage of work by workers in those undertakings could cause public inconvenience, it did not appear likely that it could bring about serious public hardship.¹²¹

Under certain circumstances, a specific service which does not fall under the definition of essential services in the strict sense of the term, might nevertheless justify the imposition of certain restrictions on the right to strike. This might be the case, for example, where serious harm is caused by strikes in a key sector of a country's economy.¹²² Such hardship can be brought about by general strikes in key sectors, particularly if these strikes are prolonged ones. For example, the CFA, in a case which concerned the railway sector in India, noted that according to the information supplied by the Government, the railways were a key sector in the life of the country.¹²³ It did not therefore appear possible for major strikes to take place in this public service without causing serious inconvenience to the national economy.¹²⁴ Furthermore, in another case which concerned a railway strike in Spain, the CFA was aware that a total and prolonged stoppage of railway services throughout the country might even lead to a situation that would endanger the well-being of the population.¹²⁵

On various occasions, the CFA was called upon to examine legal provisions by which the right to strike of workers employed in essential services was restricted. In these cases its recommendations were reached in light of the above-mentioned principles. For example, in a complaint against the Government of Peru, it was alleged by the complainants that a bill to regulate the

118. See ILO: Committee on Freedom of Association, 234th Report, Case No. 1255 (Norway), para. 192.

119. Ibid.

120. Ibid.

121. See, for example, ILO: Committee on Freedom of Association, 187th Report, Case No. 893 (Canada), para. 535.

122. See, for example, ILO: Committee on Freedom of Association, 153rd Report, Case No. 793 (India), para. 55; 187th Report, Case No. 892 (Fiji), para. 288; 194th Report, Case No. 893 (Canada), para. 114; 197th Report, Case No. 917 (Costa Rica), para. 222; Case No. 823 (Chile), para. 411; 204th Report, Case No. 952 (Spain), para. 162.

123. See ILO: Committee on Freedom of Association, 153rd Report, Case No. 793 (India), para. 55.

124. Ibid.

125. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952 (Spain), para. 162.

right to strike, which had already been approved by the Upper House of the Peruvian Congress, contained provisions contrary to the ILO Conventions Nos. 87 and 98.¹²⁶ The relevant section of this bill which regulated the right to strike in essential services was Section 17, which read as follows:

For the purpose of this Act, essential services shall be deemed to be:

- (a) water supply;
- (b) light, energy and communication;
- (c) cleaning and sanitary services;
- (d) cemeteries;
- (e) hospitals, clinics and other medical care services;
- (f) telecommunication; and
- (g) any other services declared by the Government, in agreement with the Council of Ministers, to be essential for daily social life.

The CFA in its recommendations, observed that the list of essential services given in Section 17, where the right to strike was seriously restricted, includes some services that were not essential in the strict sense of the term, and that the broad wording of subsection (g) - "any other services . . . essential for daily social life", as determined by the Government - could give rise to interpretations contrary to the generally accepted definition of essential services.¹²⁷ Hence, the Committee expressed its concern lest the final text of the Act should fail to conform fully with the principles of freedom of association. Among the principles stressed, the Committee pointed out the principles relating to the strict definition of essential services as explained above.¹²⁸

On another occasion the CFA was called upon to examine the Essential Services Maintenance Act, 1981 of India.¹²⁹ It is useful in this case to reproduce at least part of the relevant provisions of the Act in question:

2. (1) In this Act, unless the context otherwise requires- (a) 'essential service' means-
 - (i) any postal, telegraphic or telephone service, including any service connected therewith;
 - (ii) any railway service or any transport service for the carriage of passengers or goods by air or [. . .] land or water [. . .];
 - (iii) any service connected with the operation or maintenance of aerodromes, or with the operation, repair or maintenance of aircraft, or any service in the International Airport Authority of India [. . .];
 - (iv) any service in, or in connection with the working of, major

126. ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), paras. 250-269.

127. Ibid., para. 263.

128. Ibid., para. 269.

129. ILO: Committee on Freedom of Association, 217th Report, Case No. 1091 (India), paras. 431-448.

ports, including any service connected with the loading, unloading, movement or storage of goods in any such port;

(v) any service connected with the clearance of goods or passengers through the customs or with the prevention of smuggling;

(vi) any service in any establishment of, or connected with, the armed forces of the Union or in any other establishments or installations connected with defence;

(vii) any service in any establishment or undertaking dealing with the production of goods required for any purpose connected with defence;

(viii) any service in any section of any industrial undertaking pertaining to a scheduled industry on the working of which the safety of such undertaking or employees employed therein depends [. . .];

(ix) any service in, or in connection with, the working of any undertaking owned or controlled by the Central Government being an undertaking engaged in the purchase, procurement, storage, supply or distribution of food grains;

(x) any service in, or in connection with the working of, any system of public conservancy, sanitation or water supply, hospitals or dispensaries, in any Union territory, cantonment area or undertaking owned or controlled by the Central Government;

(xi) any service in connection with or in relation to banking;

3. (1) If the Central Government is satisfied that in the public interest it is necessary or expedient so to do, it may, by general or special Order, prohibit strikes in any essential service specified in the Order.

In applying the essential services criterion, the CFA considered that the possible prohibition on the withdrawal of services by hospital employees (section 2(1) (iii)) did not constitute a violation of the principles of freedom of association. Furthermore, Article 9 of Convention No. 87 leaves the regulation of industrial relations in the armed forces (section 2(1) (vi)) to the Government concerned. Having examined the list of essential services set out in the 1981 legislation, the Committee was of the opinion that the range of the services described as essential is an extensive one, going well beyond the concept of essential services, and requested that the Government consider the possibility of reviewing the legislation by narrowing down the list of services in which strikes might be prohibited to essential services in the strict sense of the term. The CFA also recommended the Government to indicate any steps taken to this effect.¹³⁰

The case which concerned the Essential Services Ordinance, a bill

130. Ibid., paras. 443-444.

presented to the Legislative Council of Montserrat on 29 June 1984, can serve as another example in which the CFA was called upon to interfere.¹³¹ Under section 2 (8) of this bill the Governor in Council had the authority to amend the list of essential services included in the bill at his discretion. In this case, in view of the criterion which concerns the strict definition of essential services, the CFA recommended the Governor to consider the possibility of depriving the Governor in Council of the authority to amend the list of the essential services at his discretion.¹³²

6. Minimum Service and Restrictions Designed to Assure the Safety of the Undertaking

While restrictions of the right to strike in essential services are not in contradiction to the principles of freedom of association, it should be remembered that there is no obligation imposed upon a state to prohibit strikes in such services. Hence, in some countries, the right to strike is lawfully exercised even in essential services.¹³³ These workers may, under certain legal systems, lawfully call a strike, yet there is some limitation imposed upon them. There is a clear distinction between the extent to which the right to strike can be used in essential services and the extent to which it can be exercised in other sectors. For essential services, in the strict sense of this term, a minimum service must be ensured in case of a strike.¹³⁴

In order to be acceptable, a minimum service requirement of this kind should be restricted to operations strictly necessary to avoid endangering the life, personal safety, or health of the whole or part of the population.¹³⁵ Consequently, adopting legal provisions recognising the principle of a skeleton service to be provided by the strikers, appeared to the CFA to be in conformity with the principles of freedom of association.¹³⁶ These principles would ensure that the most essential and most appropriate services would be maintained, as would be the safety of installations, in order to forestall accidents or catastrophes.

The system of minimum services can be legally used in order to avoid a total ban on strikes in essential services.¹³⁷ Therefore, the CFA drew atten-

131. ILO: Committee on Freedom of Association, 238th Report, Case No. 1295 (the United Kingdom/Montserrat), paras. 152-172.

132. *Ibid.*, para. 169.

133. See, for example, Greece, Law No. 1264, 1982, s. 21.

134. See, for example, ILO: Committee on Freedom of Association, 199th Report, Case No. 910 (Greece), para. 117; 204th Report, Case No. 961 (Greece), para. 68; Case No. 952 (Spain), para. 162; 211th Report, Case No. 1024 (India), para. 538; 214th Report, Case No. 1021 (Greece), para. 126; 217th Report, Case No. 1029 (Greece), para. 375; 233rd Report, Case No. 1203 (Spain), para. 96; 234th Report, Case No. 1179 (Dominican Republic), para. 299; 234th Report, Case No. 1244 (Spain), para. 155.

135. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952 (Spain), para. 162.

136. See, for example, ILO: Committee on Freedom of Association, 217th Report, Case No. 1019 (Greece), para. 375; see also, e.g., 204th Report, Case No. 961 (Greece), para. 68.

137. See, for example, ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 215.

tion, to the fact that it is important regarding minimum services in the event of a strike in an essential service, for legal provisions to be established clearly, to be applied strictly, and to be made known to those concerned in due time.¹³⁸ Furthermore, measures taken by the authorities to ensure performance of essential services should be in keeping with the situation leading neither to under-performance, nor to excess of services.¹³⁹

The obligation to provide a minimum service might, under specific circumstances, also be applied regarding services which are not considered as essential in the strict sense of the term.¹⁴⁰ For example, the CFA pointed out that a total prolonged stoppage of railway services throughout the country might lead to a situation such as to endanger the well-being of the population. Therefore, it seemed justified under such circumstances, to maintain a minimum service in the event of a strike whose extent and duration might be such as to generate a situation of acute national emergency.¹⁴¹

Restrictions on the right to strike to the extent necessary to comply with safety requirements are acceptable by the CFA.¹⁴² Legal provisions which did not limit the right to strike in essential services, but which required the strikers to maintain the minimum staff necessary to protect installations and machinery and comply with statutory safety measures, were found to be in conformity with the principles of freedom of association.¹⁴³ For example, the CFA took this fact into account when it accepted the restrictions of the right to strike in the coal-mining industry, whereby Article 3 of the Control of Methods of Acts of Disputes in Electric Enterprises and the Coalmining Industry, denied the right to strike only to persons required to protect installations and to comply with statutory safety requirements.¹⁴⁴ The same reasoning was applied in regard to the public sector, where the right to strike of supervisory personnel responsible for the maintenance of security was limited.¹⁴⁵

According to the CFA recommendations, determination of the level of minimum services to be maintained in the event of a strike in essential services, should involve not only the employers and the public authorities, but also workers' organisations.¹⁴⁶ Moreover, in defining such a service, workers'

138. See, for example, ILO: Committee on Freedom of Association, 233rd Report, Case No. 1203 (Spain), para. 96.

139. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1179 (Dominican Republic), para. 299.

140. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952 (Spain), para. 162; 211th Report, Case No. 1024 (India), para. 538.

141. Ibid.

142. See, for example, ILO: Committee on Freedom of Association, 6th Report, Case No. 40 (Tunisia), paras. 540 and 549; 12th Report, Case No. 60 (Japan), para. 81; 69th Report, Case No. 307 (Somalia), paras. 97 and 99; 82nd Report, Case No. 343 (Ceylon), para. 45; 160th Report, Case No. 851 (Greece), para. 197.

143. See, for example, ILO: Committee on Freedom of Association, 69th Report, Case No. 307 (Somalia), paras. 97 and 99.

144. See, ILO: Committee on Freedom of Association, 12th Report, Case No. 60 (Japan), para. 81.

145. See, ILO: Committee on Freedom of Association, 6th Report, Case No. 40 (Tunisia), paras. 540 and 549.

146. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952

organisations should not only be involved, but should be able to participate to the same degree as employers and the public authorities.¹⁴⁷

7. Requisitioning and Mobilisation

Measures taken to break a strike by the use of mobilisation or requisitioning orders, obliging strikers to return to work are inadmissible actions, in so far as workers are defending their occupational interests.¹⁴⁸ Such measures can be justified, according to the CFA decisions, if they are aimed at maintaining essential services in circumstances of the utmost gravity.¹⁴⁹ Hence, requisitioning may be justified in the same circumstances where a minimum service must be ensured, whether in essential services in the strict sense of the term, or in other sectors, if as a result of the particular nature of the strike, the well-being of the population is endangered.¹⁵⁰ It seems, therefore, that the requisitioning orders should be restricted to operations strictly necessary to avoid endangering the existence or the well-being of the whole or part of the population.

Accordingly, the CFA drew attention to the possibility of abuse inherent in the requisitioning of workers as a means of settling labour disputes.¹⁵¹ In such cases the CFA stressed the undesirability of recourse to measures of this kind, except of course, for the purpose of maintaining essential services in situations of acute national emergency.¹⁵²

8. Restrictions Relating to the Methods Used

Sometimes, restrictions imposed upon the right to strike take the form of prohibiting various methods of strike action. In such cases strikes are narrowly defined by the relevant legal provisions which exclude certain methods of strike actions. Usually, any work stoppage can be described as a strike, however short or limited it may be.¹⁵³ Restrictions relating to the methods used generally exclude strikes where there is no stoppage but merely a slowing down of work, or any other methods by which the regular course of

(Spain), para. 162; 211th Report, Case No. 1024 (India), para. 538; 234th Report, Case No. 1244 (Spain), para. 155.

147. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952 (Spain), para. 162; 211th Report, Case No. 1024 (India), para. 538.

148. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1201 (Morocco), para. 554; see also, e.g., 71st Report, Case No. 273 (Argentina), para. 74; 75th Report, Case No. 353 (Greece), para. 119; 93rd Report, Cases Nos. 470 and 481 (Greece), para. 272; 110th Report, Case No. 561 (Uruguay), para. 219; 197th Report, Case No. 823 (Chile), para. 418; 204th Report, Case No. 952 (Spain), para. 161.

149. Ibid.

150. For minimum services see *supra*.

151. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 952 (Spain), para. 161.

152. Ibid.

153. See, for example, ILO: *Freedom of association and collective bargaining*, General survey by the Committee of Experts on the application of Conventions and Recommendations, International Labour Conference, 69th Session (Geneva, 1983), para. 218.

work is disturbed. Forms of such action are the go-slow, work to rule, sit-down strike, repeated walk-outs, or even picketing.

For example, Section 14 of a bill to regulate the right to strike approved by the Upper House of the Peruvian Congress contained the following limitations.¹⁵⁴

Section 14. The right to strike shall not include:

- (a) wildcat strikes;
- (b) sit-down strikes;
- (c) go-slows, consisting in a deliberate and collective reduction either in output under the normal average or in normal working hours at the workplace; and
- (d) the occupation of the undertaking or workplace by workers as a means of stoppage.

Upon examining this Bill, the CFA noted the strike procedures denied to workers. It observed that such limitations would be warranted only in cases where a strike ceased to be peaceful,¹⁵⁵ or if there were due grounds for believing that it could cease to be.

In contradiction, the CFA considered the boycott as a very special form of action, which in some cases may involve a trade union whose members continue their work and are not directly involved in the dispute with the employer against whom the boycott is imposed. In such circumstances it seemed to the CFA, that the prohibition of boycotts by law would not necessarily constitute an interference with trade, union rights.¹⁵⁶

As far as picketing is concerned, the CFA considered that the mere fact of picketing and, firmly but peaceably, inciting other workers to keep away from their workplace, could not be considered unlawful.¹⁵⁷ Furthermore, legal provisions which authorise the presence of trade-union officers at picket lines organised by members of their union, but only for the purpose of maintaining order and discipline, were found to be unduly restrictive and counter to the principles of freedom of association.¹⁵⁸ This is particularly true as regards Article 3 of Convention No. 87, according to which trade unions should formulate their activities. But, the case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt

154. See ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), para. 253.

155. *Ibid.*, para. 262, *see also*, e.g., ILO: Committee on Freedom of Association, 217th Report, Case No. 1089 (Upper Volta), para. 240.

156. See ILO: Committee on Freedom of Association, 87th Report, Case No. 408 (Honduras), para. 253; as to solidarity strikes *see also*, e.g., 199th Report, Case No. 941 (Guyana), paras. 313-335; 204th Report, Case No. 961 (Greece), paras. 56-70; 208th Report, Case No. 1017 (Morocco), paras. 392-402; 217th Report, Case No. 1077 (Morocco), paras. 414-429.

157. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 923 (Spain), para. 58.

158. See, for example, ILO: Committee on Freedom of Association, 211th Report, Case No. 965 (Malaysia), para. 205.

to interfere with their freedom to work.¹⁵⁹ Accordingly, legal provisions prohibiting pickets from disturbing public order and threatening workers who continued to work were considered legitimate by the CFA.¹⁶⁰

9. Procedural Restrictions

Generally speaking, the CFA observed that, while a general prohibition of strikes constitutes a considerable restriction on the opportunities open to trade unions for the furthering and defending the interests of their members, the situation is different when the law imposes procedural restrictions or a temporary ban on strikes.¹⁶¹ Pertaining to the procedural restrictions, one can mention for example, the obligation to observe a certain quorum, to take the decision to strike by secret ballot, or to give prior notice to the employer before calling a strike. In connection with the temporary ban on strikes, one should mention, for example, strike restrictions during conciliation and arbitration procedures and during a cooling-off period, during a statutory period of strike notice or during the life of a collective agreement. Such restrictions on the right to strike are acceptable as long as they do not place substantial limitations on the means of action open to trade-union organisations.¹⁶²

Procedural restrictions according to which the decision to strike must be taken by secret ballot, are acceptable. The question is open only in relation to the terms of the voting procedure laid down by the legal provisions. In one example, the legal provisions which were examined by the CFA required that the decision to strike must be taken by an absolute majority of the workers concerned.¹⁶³ The same voting procedure included within those legal provisions was also true for the prolonging of a strike where a vote was called for by the bargaining committee.¹⁶⁴ In this respect, the CFA pointed out that according to the terms of the voting procedure laid down by the legal provisions, it might be difficult to obtain an absolute majority, particularly in the case of a trade union having a large number of members. Consequently, such a voting procedure was found to involve the risk of substantial limitations upon the right to strike.¹⁶⁵ The conditions required by law for a strike to be considered lawful must be reasonable, and in any case should not impose a

159. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 923 (Spain), para. 58; *see also*, e.g., 214th Report, Case No. 1017 (Morocco), para. 106.

160. See, for example, ILO: Committee on Freedom of Association, 211th Report, Case No. 965 (Malaysia), para. 205.

161. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 927 (Brazil), para. 355; 164th Report, Case No. 845 (Canada), para. 42.

162. See, for example, ILO: Committee on Freedom of Association, 164th Report, Case No. 845 (Canada), para. 42; *see also*, e.g., 37th Report, Case No. 170 (France/Madagascar), para. 41; 41st Report, Case No. 172 (Argentina), para. 157; 58th Report, Case No. 192 (Argentina), para. 445; 92nd Report, Case No. 454 (Honduras), para. 185; 139th Report, Case No. 722 (Spain), para. 393.

163. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 823 (Chile), para. 413; *see also*, e.g., 221st Report, Case No. 1097 (Poland), para. 77.

164. *Ibid.*

165. *Ibid.*

serious limitation such as the requirement that a high proportion of the workers should be in agreement with the strike before it could be considered lawful.¹⁶⁶

Another aspect of the voting procedure concerns the statutory requirement of a certain quorum as prescribed by law. For example, one case concerned the conditions fixed for calling a strike by Brazilian Law, in particular by Act. No. 4330 of 1964. According to this Act the decision to call a strike had to be adopted through a secret ballot by a majority vote of the general meeting of the industrial association, where the presence of not less than two-thirds of the members of the industrial association represented a quorum. Lack of a quorum in the first meeting required a second general meeting where the quorum would be not less than one-third of the members.¹⁶⁷ Furthermore, the statutory provisions required also that the convocation of the meeting had to be published ten days beforehand in local papers. The returning officers were required to be presided over by a magistrate, and a copy of the decision had to be transmitted to the authorities and the employer. The employer was granted five days in which to accept the claims, after which a strike could be declared, subject to a further period of notice of five days.¹⁶⁸ As to the question of the quorum, it was pointed out by the CFA that reaching a quorum of two-thirds of the members as fixed by the Brazilian legislation for the first meeting, might be difficult, in particular regarding trade unions which have large numbers of members, or cover a large area. In these circumstances, the obligation to convene a further meeting at ten days notice might result in a fair delay before a decision to strike could be considered to be valid.¹⁶⁹

In another case, the CFA determined that the requirements for calling a strike in the banking sector in Greece created problems of incompatibility with the principles of freedom of association. The conditions laid down by the Government required that the decision to strike had to be accepted by a qualified majority of all members of a trade union organisation whose activities cover a large area. The requirement of a simple majority of those voting would have been in closer conformity with free association principles.¹⁷⁰ The CFA therefore invited the Government to reconsider the question of the quorum in light of the principles laid down by the CFA in this respect, and to take appropriate measures to bring the legislation more closely into line with the above-mentioned principles.¹⁷¹

Procedural restrictions on the right to strike may also include provisions which demand that prior notification to the administrative authorities be

166. See, for example, ILO: Committee on Freedom of Association, 207th Report, Case No. 980 (Costa Rica), para. 140.

167. See ILO: Committee on Freedom of Association, 197th Report, Case No. 927 (Brazil), paras. 354-355.

168. *Ibid.*

169. *Ibid.*

170. See, for example, ILO: Committee on Freedom of Association, 233rd Report, Case No. 1224 (Greece), para. 136; *see also*, e.g., 160th Report, Case No. 834 (Greece), para. 197; 187th Report, Case No. 874 (Spain), para. 478.

171. See, for example, ILO: Committee on Freedom of Association, 233rd Report, Case No. 1224 (Greece), para. 136.

submitted before calling a strike.¹⁷² The CFA maintained that requirements of this kind are provided for in the laws or regulations of a substantial number of countries and that reasonable provisions of this type cannot be regarded as an infringement of the principles of freedom of association.¹⁷³

For example, Section 36 of Act No. 330/76 of Greece, dealing with strikes, provides that a decision to call a strike may not be taken until eight days have elapsed from the date that the workers' grievances and the reasons for the strike have been communicated, in writing, by a court bailiff to the employer or employers concerned, the competent ministry, and the Ministry of Employment.¹⁷⁴ In the opinion of the CFA, the condition the Act thus laid down for calling a strike was not in itself such as to restrict the exercise of the right to strike.¹⁷⁵

Legal provisions which impose a temporary ban on strikes during a cooling-off period and consequently pave the way for delaying the legal exercise of the right to strike for longer than a reasonable period, may constitute a serious limitation on the potential activities of trade unions.¹⁷⁶ For example, in a case which concerned Peru,¹⁷⁷ the complainants claimed that the provisions prescribed in the specific bill under examination contained certain requirements which might delay the calling of a strike for up to a year or even more.¹⁷⁸ Such a prolonged period was not justified by the CFA as reasonable.¹⁷⁹

Statutory provisions imposing a temporary ban on strikes, for example, during conciliation and arbitration procedures have generally been accepted by the CFA, on the understanding that the conditions that have to be fulfilled in order to render a strike lawful must be reasonable.¹⁸⁰ Hence, for example, in a case which concerned Costa Rica, the CFA considered that the declaration of illegality concerning the strike of the banana workers could not be objected to from the point of view of the principles of freedom of association, since the trade union in this specific case failed to comply with the legal

172. See, for example, ILO: Committee on Freedom of Association, 139th Report, Case No. 722 (Spain), para. 393; 197th Report, Case No. 917 (Costa Rica), para. 221; 199th Report, Case No. 910 (Greece), para. 118.

173. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 917 (Costa Rica), para. 221.

174. In this respect see, ILO: Committee on Freedom of Association, 199th Report, Case No. 910 (Greece), para. 104.

175. Ibid., para. 118; see also, e.g., ILO: Committee on Freedom of Association, 160th Report, Case No. 834 (Greece), para. 197.

176. See, for example, ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), para. 266.

177. Ibid., para. 254.

178. The reason mentioned for such a delay was the pending completion of the relevant administrative procedure in the event of the employer's failure to fulfill the obligations incumbent on him by law.

179. See, ILO: Committee on Freedom of Association, 214th Report, Case No. 1081 (Peru), para. 266.

180. See, for example, ILO: Committee on Freedom of Association, 164th Report, Case No. 845 (Canada), para. 42.; see also, e.g., 37th Report, Case No. 170 (France/Madagascar), para. 41; 41st Report, Case No. 172 (Argentina), para. 157; 58th Report, Case No. 192 (Argentina), para. 445; 92nd Report, Case No. 454 (Honduras), para. 185; 139th Report, Case No. 722 (Spain), para. 393.

requirement of prior conciliation and arbitration laid down in the Labour Code of Costa Rica.¹⁸¹

Furthermore, sometimes statutory provisions distinguish between the right to call a strike by legally constituted and legally operating organisations, and other workers' organisations which are not legally constituted or do not operate legally. The validity of such a distinction was examined in a case which concerned Greece.¹⁸² In this case, according to the prevailing legislation which was examined by the CFA, a strike could be called only by a legally constituted and legally operating organisation. Workers who were not members of a trade union were accordingly not empowered to start a strike, but they could take part in it. The "workers' centre", which is the most representative one in the principal town in the district in which they are employed, may decide to call a strike in their place. In these circumstances, it did not appear to the CFA that making a right to call a strike the sole preserve of trade union organisations was incompatible with the standards of Convention No.87.¹⁸³

In addition, the CFA has also considered acceptable a temporary restriction on strikes, under provisions prohibiting strike action in breach of collective agreements.¹⁸⁴

10. Dismissals, Penal and Other Sanctions

Many forms of sanctions are imposed upon striking workers and trade union leaders. In some instances the sanction applied calls for the dismissal of the striking workers, in other cases there are disciplinary or administrative sanctions. The most severe sanction involves imprisonment, or heavy fines imposed upon strikers.

10.1 DISMISSALS

The most common sanction is dismissal, which may apply to a few of the strikers, or which might even be a mass dismissal of thousands of workers who participated in the strike.¹⁸⁵ The many cases which have concerned dismissals

181. See ILO: Committee on Freedom of Association, 238th Report, Case No. 1300 (Costa Rica), para. 297.

182. See ILO: Committee on Freedom of Association, 160th Report, Case No. 834 (Greece), para. 198.

183. Ibid.

184. See, for example, ILO: Committee on Freedom of Association, 4th Report, Case No. 5 (India), para. 27; 15th Report, Case No. 102 (Union of South Africa), para. 180; 25th Report, Case No. 152 (the United Kingdom/Northern Rhodesia), para. 217; 147th Report, Case No. 756 (India), para. 167; 164th Report, Case No. 845 (Canada), para. 42.

185. For cases which dealt with mass dismissals see, for example, ILO: Committee on Freedom and Association, 214th Report, Case No. 988 (Sri Lanka), para. 510; 226th Report, Case No. 1166 (Honduras), para. 347; 230th Report, Case No. 988 (Sri Lanka), para. 375; 230th Report, Case No. 1187 (the Islamic Republic of Iran), para. 678; 234th Report, Case No. 1179 (Dominican Republic), para. 299; 236th Report, Case No. 1266 (Burkina Faso), para. 578.

of strikers, indicate that the dismissal phenomenon is characteristic in both situations where the strike is prolonged as well as in cases of strikes of one or two days duration.¹⁸⁶ Workers are dismissed either for having taken part in the strike, or for having failed to comply with orders to resume work.¹⁸⁷ Sometimes, under specific statutory provisions, such as in Chile for example, workers who maintain their decision not to return to work, after striking for sixty days, are considered to have voluntarily resigned.¹⁸⁸

The CFA considered that dismissal on account of a strike constitutes serious discrimination regarding the employment of those workers involved in legitimate trade union activities, is contrary to Article 1 of Convention No. 98 and represents an infringement on the freedom of association.¹⁸⁹ In this connection the CFA asserted that workers should enjoy adequate protection against acts of anti-union discrimination, and that such protection was all the more important in the case of trade-union leaders who, in order to fulfill their functions to the fullest, should enjoy the guarantee that they will not be discriminated against as a result of their activities.¹⁹⁰

With respect to allegations concerning, *inter alia*, the dismissal of workers and trade-union officials who had participated in a strike, and threats of dismissal against strike pickets, the CFA drew attention to the dangers inherent in these alleged acts for freedom of association, and considered that these acts restricted the legitimate exercise of the right to strike.¹⁹¹ Hence, according to CFA recommendations, no person should be dismissed or be subject to other prejudicial measures regarding his employment because of his membership in a trade union, or for carrying out legal trade-union activities.¹⁹² The same conclusion holds for mass dismissals too. The CFA pointed out that mass dismissal of strikers involves serious dangers of abuse and places freedom of association in grave jeopardy.¹⁹³ Therefore, pertaining to the example of the thousands of workers who were dismissed in Sri Lanka after the July 1980 general strike and remained out of work, the CFA drew the Government's attention to the principle that excessively severe measures, such as mass dismissal of, and refusal to re-employ, workers, on account of

186. For dismissal of workers who participated in a short strike see, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1113 (India), para. 132.

187. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1201 (Morocco), para. 554.

188. See ILO: Committee on Freedom of Association, 197th Report, Case No. 823 (Chile), para. 415.

189. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1201 (Morocco), para. 554; 239th Report, Case No. 1271 (Honduras), para. 275.

190. See, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1113 (India), para. 132.

191. See, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1270 (Brazil), para. 622.

192. See, for example, ILO: Committee on Freedom of Association, 236th Report, Case No. 1140 (Colombia), para. 145.

193. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1179 (Dominican Republic), para. 299; see also, e.g., 230th Report, Case No. 1187 (the Islamic Republic of Iran), para. 678.

their participating in a strike action, is a violation of freedom of association.¹⁹⁴

When trade unionists and trade union leaders are dismissed for striking, there is, according to the CFA, reason to conclude that they have been penalised for legitimate exercise of their trade union rights and that they are subject to anti-union discrimination contrary to the principles of freedom of association.¹⁹⁵ Where strikers were dismissed, the CFA could not help but establish a connection between labour disputes involving the trade unions and the management and the subsequent dismissals.¹⁹⁶ In cases of alleged discriminatory dismissals of a worker's representative, the burden of proving that such action was justified falls upon the employer according to the Representatives Recommendations, 1971 (No. 143).¹⁹⁷ Furthermore, the CFA pointed out that acts of anti-union discrimination should not take place under the pretext of dismissals for economic or administrative reasons.¹⁹⁸

10.2 REINSTATEMENT

The only remedy possible in the case of dismissal of strikers seems to be reinstatement. The CFA pointed out that the payment of compensation to get rid of any worker did not give sufficient protection against acts of anti-trade union discrimination as defined in Convention No.98. Legislation to this effect would enable the employer to get rid of any worker, for any reason whatsoever, even if the true and underlying reason for his dismissal lay in his trade union membership or activities.¹⁹⁹ The CFA recommendations which require the reinstatement of strikers, relate not only to trade union leaders, but also to militants dismissed following a strike.²⁰⁰ The reinstatement of strikers is required in order to create a climate that is more favourable for the

194. See, ILO: Committee on Freedom of Association, 230th Report, Case No. 988 (Sri Lanka), para. 375.

195. See, for example, ILO: Committee on Freedom of Association, 233rd Report, Case No. 1054 (Morocco), para. 337.

196. See, for example, ILO: Committee on Freedom of Association, 217th Report, Case No. 823 (Chile), para. 513.

197. See, for example, ILO: Committee on Freedom of Association, 211th Report, Case No. 1035 (India), para. 114; *see also*, e.g., 217th Report, Case No. 1077 (Morocco), para. 428, where the CFA recommended that a means of ensuring effective protection in this respect would be to make it compulsory for each employer to prove that the motive for his intention to dismiss a worker has no concern with the worker's union activity.

198. ILO: Committee on Freedom of Association, 218th Report, Case No. 1118 (Dominican Republic), para. 734; *see also*, e.g., 218th Report, Case No. 958 (Brazil), para. 413.

199. See, for example, ILO: Committee on Freedom of Association, 153rd Report, Cases Nos. 763, 786 and 801 (Uruguay), para. 240; *see also*, e.g., 119th Report, Case No. 611 (Costa Rica), paras. 104-105; 186th Report, Case No. 672 (Dominican Republic), para. 77; but compare with 226th Report, Case No. 1118 (Dominican Republic), para. 44 where the trade union accepted that 171 strikers will not be reinstated, and instead, be compensated only for the period of their trade union immunity.

200. See, for example, ILO: Committee on Freedom of Association, 218th Report, Case No. 958 (Brazil), para. 415.

development of sound labour relations.²⁰¹ Reinstatement seems to be the proper remedy also in cases of mass dismissals which follow a strike.²⁰²

10.3 PENAL SANCTIONS

The development of labour relations could be retarded as a result of the adoption of an inflexible attitude in the application of severe sanctions against workers who participate in strike action.²⁰³ Hence, the imposition of excessively severe penalties for striking could only cause damage to industrial relations.²⁰⁴ In any case, the CFA has pointed out that any penalty should be proportional to the offence committed,²⁰⁵ and further has stressed that emergency legislation should not be used to punish the exercise of legitimate trade union rights.²⁰⁶ In addition the CFA noted that applying the doctrine of public security to legislation in all disputes might involve an infringement of the exercise of trade union rights.²⁰⁷

The CFA maintains that strikes are recognised as legitimate means available to workers to promote and defend their economic and occupational interests, and therefore, penalties of imprisonment should not be imposed for the exercise of their right to strike.²⁰⁸ Hence, the arrest of strikers after a period of industrial action involves serious dangers of abuse and places freedom of association in jeopardy.²⁰⁹ Preventive detention of trade unionists, on the ground that breaches of the law might take place in connection with a strike, involve a serious danger of infringement of trade union rights.²¹⁰ The CFA stressed that persons who had been arrested for having lawfully exercised trade-union activities had to be released immediately.²¹¹

In contrast, in a case which concerned the public service of Japan, disciplinary action resulting in arrests, and subsequent proceedings were

201. Ibid.

202. See, for example, ILO: Committee on Freedom of Association, 226th Report, Case No. 1166 (Honduras), para. 347; 236th Report, Case No. 1266 (Burkina Faso), para. 578.

203. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 921 (Greece), para. 244.

204. See, for example, ILO: Committee on Freedom of Association, 222nd Report, Case No. 1131 (Upper Volta), para. 88.

205. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 961 (Greece), para. 69; 217th Report, Case No. 1019 (Greece), para. 375.

206. See, for example, ILO: Committee on Freedom of Association, 233rd Report, Case No. 1113 (India), para. 473.

207. See ILO: Committee on Freedom of Association, 4th Report, Case No. 5 (India), para. 26.

208. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1227 (India), para. 315.

209. See, for example, ILO: Committee on Freedom of Association, 214th Report, Case No. 1024 (India), para. 300; *see also*, e.g., 222nd Report, Case No. 1040 (the Central African Republic), para. 218th; 230th Report, Case No. 1187 (the Islamic Republic of Iran), para. 678.

210. See, for example, ILO: Committee on Freedom of Association, 208th Report, Case No. 1029 (Turkey), para. 426; 214th Report, Case No. 1093 (Bolivia), para. 390.

211. See, for example, ILO: Committee on Freedom of Association, 239th Report, Case No. 1190 (Peru), para. 242.

taken against certain persons who were said to have incited a strike.²¹² Such action on the part of the authorities was clearly provided for by law against public service personnel who actively instigated or incited strike action. Under these circumstances, the CFA was of the opinion that, taking into account the fact that strike action was prohibited by law as regards this category of workers, the imposition of administrative disciplinary sanctions, or the arrest and prosecution under ordinary law of the persons who instigated or incited local public service personnel to strike, could not be said to be violating the principles of freedom of association.²¹³ But, in another case, where national legislation did not merely prohibit strikes for public officials and make strikers liable to administrative penalties, but made strikes a criminal offence with severe penalties involving imprisonment, the CFA recommended the modification of the relevant provisions.²¹⁴ Legal provisions which make it possible for strikers to be liable in all cases to penal sanctions were found to be in violation of Convention No.87 by the CFA. According to this Convention, the law of the land shall not be such as to impair, nor shall it be applied so as to impair, the guarantees provided for in the Convention.²¹⁵

Arrested trade unionists, like other persons, are entitled to the fair administration of justice.²¹⁶ The CFA has also insisted upon the importance that should be attached to the principle that anyone who was arrested should be informed, at the time of his arrest, of the reasons for his arrest and should be promptly informed of the charges brought against him.²¹⁷ In addition, the CFA has emphasised the importance that should be attached to the principle that all arrested persons should be subject to normal judicial procedures in accordance with the principles enshrined in the Universal Declaration of Human Rights, and in accordance with the principle that it is a fundamental right of the individual that a detained person should be brought without delay before the appropriate judge.²¹⁸ These rights are recognised in such instruments as the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and the American Convention of Human Rights.²¹⁹

212. See, ILO: Committee on Freedom of Association, 187th Report, Case No. 792 (Japan), para. 138.

213. Ibid.

214. See, ILO: Committee on Freedom of Association, 26th Report, Cases Nos. 134 and 141 (Chile), paras. 77-78.

215. See, ILO: Committee on Freedom of Association, 85th Report, Case No. 411 (Dominican Republic), para. 229.

216. See, for example, ILO: Committee on Freedom of Association, 239th Report, Case No. 1190 (Peru), para. 242.

217. See ILO: Committee on Freedom of Association, 160th Report, Case No. 842 (Argentina), para. 439; see also, e.g., 149th Report, Case No. 709 (Mauritius), para. 100; 218th Report, Case No. 1148 (Nicaragua), para. 125.

218. See, for example, ILO: Committee on Freedom of Association, 160th Report, Case No. 842 (Argentina), para. 439; 236th Report, Case No. 1266 (Burkina Faso), para. 578. From 217th Report, Case No. 958 (Brazil), para. 527, it follows that, in this respect, a Military Court is not considered as a competent Court.

219. See ILO: Committee on Freedom of Association, 160th Report, Case No. 842 (Argentina), para. 439.

11. Police and Military Intervention

The general principle laid down in the recommendations of the CFA regarding police intervention during a strike is, that in cases of strike movements, the authorities should resort to the use of force only in grave situations where law and order are seriously threatened.²²⁰ This principle relates to the intervention of security forces as well.²²¹ Hence, intervention by security forces in strike situations should be limited strictly to the maintenance of public order.²²²

The CFA recalled with firmness that the use of military forces to break a strike over occupational claims, and to oblige the strikers to return to work, is an inadmissible action,²²³ as it constitutes a serious violation of freedom of association.²²⁴

On the other hand, the CFA also pointed out that while strike pickets acting in accordance with the law should not be subject to interference by the public authorities, it is legitimate to prevent pickets from disturbing public order and threatening workers who continue to work.²²⁵

12. Strike Breaking

Strike breaking can take various forms. For example, one case concerned alleged favoured treatment given by the management to the members of one union which did not participate in the strike.²²⁶ In this respect, the CFA noted the Government's reply that allowance of leave with pay to certain workers was a token of appreciation of their devotion to duty. The CFA pointed out that by placing one organisation at an advantage, or at a disadvantage in relation to the others, a Government might either directly or indirectly influence the choice of workers regarding the organisation to which they would like to belong, since they would undeniably want to belong to the union best able to serve them, even if they were otherwise inclined to join another organisation for occupational, religious, political, or other reasons.²²⁷

On another occasion, the CFA drew attention to the fact that in situations of strikes, the recruitment of workers at a lower wage in order to break a

220. See, for example, ILO: Committee on Freedom of Association, 211th Report, Case No. 1046 (Chile), para. 326.

221. See, for example, ILO: Committee on Freedom of Association, 153rd Report, Case No. 793 (India), para. 57; 230th Report, Case No. 1187 (the Islamic Republic of Iran), para. 678; 234th Report, Case No. 1227 (India), para. 315; 239th Report, Case No. 1187 (the Islamic Republic of Iran), paras. 108-109.

222. Ibid.

223. See, for example, ILO: Committee on Freedom of Association, 234th Report, Case No. 1201 (Morocco), para. 554.

224. See, for example, ILO: Committee on Freedom of Association, 204th Report, Case No. 953 (El Salvador), para. 347; 239th Report, Case No. 1201 (Morocco), para. 123.

225. See, for example, ILO: Committee on Freedom of Association, 214th Report, Case No. 1017 (Morocco), para. 106.

226. See ILO: Committee on Freedom of Association, 211th Report, Case No. 1035 (India), para. 115.

227. Ibid.

strike, endangers the freedom of association, as it restricts the legitimate exercise of the right to strike.²²⁸ Furthermore, if the strike is legal, labour drawn from outside the undertaking to replace strikers may entail a risk of derogation from the right to strike liable to affect the free exercise of trade union rights.²²⁹

At the same time, the CFA has considered that the use of armed services or other services, to perform duties which have been suspended as a result of a labour dispute can - if the strike is lawful - be justified only by the need to ensure the working of services or industries, whose suspension would lead to an acute crisis.²³⁰ For example, the CFA considered that the use of military air traffic controllers as an emergency measure to maintain the safety of the air traveller public during the strike of the air traffic controllers in the United States, was the only option open to the Government beyond the closing down of all air traffic.²³¹

228. See ILO: Committee on Freedom of Association, 236th Report, Case No. 1270 (Brazil), para. 622.

229. See, for example, ILO: Committee on Freedom of Association, 197th Report, Case No. 832 (Chile), para. 416; 197th Report, Case No. 915 (Spain), para. 473; 202nd Report, Case No. 949 (Malta), para. 27; 214th Report, Case No. 1017 (Morocco), para. 106; Case No. 1018 (Morocco), para. 92; 236th Report, Case No. 1253 (Morocco), para. 220.

230. See, for example, ILO: Committee on Freedom of Association, 71st Report, Case No. 273 (Argentina), para. 73; 197th Report, Case No. 915 (Spain), para. 473; 202nd Report, Case No. 949 (Malta), para. 279.

231. See ILO: Committee on Freedom of Association, 211th Report, Case No. 1046 (United States), para. 372.

Index

- Abolition of Forced Labour
Convention, 1957 (No. 105) 24
- Afghanistan 79, 83
- AFL (American Federation of Labor)
38, 48, 51
- American Convention on Human
Rights 125
- American Declaration of the Rights
and Duties of Man 125
- Albania 83
- Argentina 40, 56, 59, 62, 64, 65, 68,
83, 100, 101-102, 116, 118, 120,
125, 127 .
- Armed Forces 80, 82, 87, 113, 126,
127
- Australia 53, 65, 67, 83, 90, 91, 106
- Austria 83
- Bahrain 59, 60
- Bangladesh 62, 98, 100
- Barbados 83, 90
- Basic Right 2
- Belgium 83
- Benin 62
- Bolivia 59, 60, 62, 63, 64, 79-80, 83,
97, 98, 110, 124
- Brazil 59, 60, 63, 64, 83, 100, 103,
104, 109, 110, 118, 119, 122, 123,
125, 127
- Buergenthal 88
- Bulgaria 83, 90, 91
- Burkina Faso 110, 121, 124, 125
- Burma 83
- Byelorussian Soviet Socialist Republic
83, 90, 91
- Canada 60, 65, 83, 90, 105, 106, 107,
108, 109, 110, 111, 118, 120, 121
- Central African Republic 60, 62, 83,
124
- Ceylon 65, 83, 115
- Chad 106
- Chile 47, 62, 83, 90, 94, 109, 111,
116, 118, 122, 123, 125, 126, 127
- China 83
- Civil liberties 3, 4, 14, 26, 33, 73, 81
- Closed shop 9, 37
- Cold War 43, 76
- Collective Agreement 5, 9, 26, 36, 121
- Collective Bargaining 7, 8, 10, 19,
26-27, 56, 75, 95, 100
See Right to bargain
- Colombia 59, 60, 62, 63, 64, 65, 83,
90, 91, 94, 100, 103, 107, 109,
110, 122
- Commission on Human Rights 73-79
- Committee of Experts on the
Application of Conventions and
Recommendations 63, 67-70,
95, 99, 106-107
- Complaint Procedure 47
- Concerted action 1, 9, 26
- Conciliation 35, 39, 41, 44, 77-78,
99, 104, 118, 120-121
- Conflicts of Interests 5, 91
- Costa Rica 63, 64, 65, 83, 103, 107,
110, 111, 119, 120, 121, 123
- Cranston 14, 22, 23, 29-30, 31
- Cuba 83
- Cyprus 83, 90, 91, 97
- Czechoslovakia 42-43, 76, 83, 90, 91
- Declaration of Philadelphia 1, 22, 67
- Denmark 83, 90
- Digest of Decisions and Principles of
the CFA 7, 54

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- Dismissals 121-123
- Dominican Republic 59, 60, 83, 94, 110, 114, 115, 121, 122, 123
- Donnelly 29
- ECOSOC (Economic and Social Council) 37-38, 48-50, 71-72, 89-90
- Ecuador 62, 65, 83, 90, 94, 97, 107
- Egypt 77, 83
- El Salvador 59, 60, 83, 126
- Employment Service
 - Recommendations, 1948 (No. 83) 2, 35
- Essential Services 11, 78, 84, 103-104, 109-114
- Ethiopia 83, 98
- European Conventions for the Protection of Human Rights and Fundamental Freedoms 9, 28
- European Court of Human Rights 9, 28
- European Social Charter 5, 22, 83
- Fact-Finding and Conciliation Commission (FFCC) 49, 54-55, 66-67
- Federal Republic of Germany 83, 90-91
- Fiji 111
- Finland 83, 90
- Forced Labour 24-25
- France 43, 75, 76, 83, 118, 120
- Freedom of Association 1, 7, 8, 12, 18, 19, 25-29, 73
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) 1, 6, 8, 9, 12, 13, 28, 36-46, 50, 52, 54-57, 60-61, 63-64, 64-70, 75-76, 85, 87, 93, 99, 103-104, 108, 112, 113, 121, 125
- Freedom of Association Committee (CFA) 5, 6, 7, 8, 9, 13, 20, 27, 41, 46-64, 85, 87, 93-127
 - Competence 54-57
 - Direct Contact Procedure 55, 59
 - Follow-up Action 61-62
 - Historical Background 48-51
 - Oral Hearings 52-53
- Procedure 51-54, 57-64
- Procedure at the Complaint Stage 57-61
- Procedure at the Compliance Stage 61-64
- Recommendations of 57-64
- Structure 51-54
- Freedom of opinion 18
- Freedom to strike
 - as a Moral Right 4
 - as a Socio-Economic Claim 3, 13-33
 - Completing Rights Principle 23-24
 - and the Definiteness aspect 20-21
 - as an Explicit Right 71-92
 - and Freedom from Forced Labour 24-25
 - Freedom of Association 25-29
 - "Held Against the World at Large" Aspect 31-32
 - "Held by All Men" Aspect 30-31
 - Implicit Labour Standard 35-70
 - Legislation Alone Requirement 19-20
 - Permanent Importance Objection 23
 - Simple Legislation Aspect 17-18
 - and Freedom from Slavery 24-25
 - Universality Objection 30-33
- French Constitution (1958) 17
- Gambia 83
- GCHG (Cheltenham Government Communications Headquarters) 9
- General Principle of law 5, 69
- German Democratic Republic 83, 90, 91
- Ghana 64
- Government Interventions 11, 17, 98
 - See also Role of Government
- Greece 47, 59, 60, 62, 65, 83, 94, 98, 106, 108, 109, 110, 114, 115, 116, 117, 119, 120, 121, 124
- Grenada 59, 60
- Guatemala 60, 83
- Guinea 83
- Guyana 63, 83, 96, 117

- Haiti 94, 97
- Hardship 11, 108, 111
- Higgins 86
- Honduras 59, 60, 64, 65, 83, 107, 108, 109, 117, 118, 120, 121, 122, 124
- Hook 15, 23
- Human Rights 1, 3, 11, 13-33
 - Authenticity test 14
 - Claim-Duty Correlation 18
 - Completing Rights Principle 23-24
 - Definiteness Requirement 20-21
 - Justification Objection 21-29
 - Legislation Alone Requirement 18-20
 - Paramount importance test 15, 22
 - Practicability test 15, 16-21
 - Universality Objection 29-33
- Hungary 83, 90, 91
- Iceland 83
- ICFTU 56, 95
- Ideology 1, 9, 43
- ILO-Constitution 1, 6, 22, 36, 38, 50, 55-57, 66-70, 92
- Implicit Right 6, 35-70
- India 62, 63, 64, 65, 66, 78, 83, 94, 97, 104, 105-106, 110, 111, 112-113, 114, 115-116, 121, 122, 123, 124, 126
- Individual Contract of
 - Employment 25, 26
- Individual Liberty 9, 10
- Indonesia 83
- Industrial Revolution 26
- International Court of Justice 4
- International Covenant on Civil and
 - Political Rights 24-25, 73, 86, 125
- International Covenant on Economic
 - Social and Cultural Rights 5, 6, 13, 21, 23, 25, 42, 43, 71-92
 - Accession 83-85
 - Derogation 85-86
 - Entry into Force 72
 - Historical Background 71-72
 - Implementation Procedures 89-92
 - Legislative History 72-73
 - Limitations 86-89
 - "Most-Favorable to Individual" clause 88
 - Ratification 83-85
 - Reservations 83
 - Scope 83-92
 - Third Committee 79-83
- International Custom 5
- International Labour
 - Conference 36-46
 - 30th Session, 1947 37-39
 - 31st Session, 1948 39-42
 - 32nd Session, 1949 42-44
 - 33rd Session, 1950 44-45, 56, 67
 - 34th Session, 1951 45
- International Law 4, 13, 35-93
 - Sources 4, 55
- Iran 81, 83, 90, 121, 122, 124, 126
- Iraq 60, 83, 90
- Ireland 83
- Israel 83
- Italian Constitution (1947) 17
- Italy 83, 90
- Jamaica 83, 90
- Japan 47, 48, 62, 65, 83, 84, 90, 94, 104, 106, 115
- Jordan 62, 83
- Kahn-Freund 26
- Kenya 63, 64, 83
- Korea 83, 90
- Labour Relations (Public Service)
 - Convention, 1978 (No. 151) 106
- Laissez-faire 10
- Lebanon 83
- Lesotho 47
- Liberia 83, 99
- Libyan Arab Jamahiriya 65, 83
- Lock out 2, 35, 39, 44-46, 78, 91
- Luxembourg 83
- Madagascar 83, 90, 106
- Malaysia 63, 64, 98, 104, 109, 117, 118
- Mali 83
- Malta 109, 110, 127
- Martial Law 101-102
- Mauritania 98, 106
- Mauritius 65, 83, 94, 99-100, 125

- Mayo 32
- Mexican Constitution (1917) 14, 84
- Mexico 83, 84, 90
- Mobilisation 116
- Monetarist School of Economics 10
- Mongolia 83, 90
- Moral Rights 21
- Morocco 59, 60, 63, 64, 83, 94, 110, 116, 117, 118, 122, 123, 126, 127
- National Legislation 8, 69, 87, 88, 97, 103, 125
- National Union of Belgian Police Case 28-29
- Negative Freedom of Association 8
- Nepal 83
- Netherlands 80, 82, 83, 84
- New Technologies 1,11
- New Zealand 43, 83, 84
- Nicaragua 59, 60, 83, 100, 101, 125
- Non-unionism 9
- Norway 20, 83, 84, 90, 91, 107, 110
- Pakistan 63, 64, 83, 101-102, 109, 110
- Panama 83
- Paraguay 62, 63, 64
- Penal Sanctions 124-125
- Peru 51, 63, 64, 65, 79-81, 83, 90, 94, 95-96, 100, 101, 104, 106, 109, 110, 111-112, 117, 120, 124, 125
- Philippines 83, 90, 110
- Pickets 10, 91, 117-118, 122, 126
- Poland 8, 42, 56, 59, 76, 83, 90, 91, 98, 101, 118
- Police 80, 82, 87, 108, 126
See also National Union of Belgian Police Case
- Political Strikes 96-98
- Politicisation of Labour Relations 11
- Portugal 63, 65, 83
- Positive Freedom of Association 8
- Preventive Labour Relations 10
- Public Emergency 86-87, 101-102
- Public Service 19, 77, 80, 82, 87, 91, 103-105, 106-109, 124-125
- Raphael 22, 31
- Recommendation concerning Collective Agreements (No. 91) 39
- Recommendation concerning Voluntary Conciliation and Arbitration 1951 (No. 92) 35-36, 44
- Redundancy 9
- Reinstatement 123-124
- Representation Procedure 47
- Representatives Recommendations, 1971 (No. 143) 123
- Requisitioning 116
- Restatement of the Law 22, 32
- Restrictions of the Right to Strike 103-127
- Compensatory Procedures 104-106
 - Dismissals 121-123
 - Minimum Service 114-117
 - Mobilisation 116
 - Penal Sanctions 124-125
 - Police and Military Intervention 126
 - Prior Notification 119-120
 - Procedural Restrictions 118-121
 - Reasonableness 103-104, 118, 120
 - Relating to the Methods Used 116-118
 - Requisitioning 116
 - Safety of the Undertaking 114-117
 - Strike Breaking 126-127
 - Temporary Ban of Strikes 120
- Rights in Personam 29-30
- Rights in Rem 29-30
- Right to a Fair Trial 31
- Right to Bargain 5, 93
- Right to Demonstrate 10
- Right to Employment 17-19
- Right to Impose upon the Government 3, 14
- Right to Oppose the Government 3, 14
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98) 1, 6, 8, 9, 28, 36-46, 50, 52, 54-57, 60-61, 63-64, 64-70, 75-76, 106, 112, 122, 123
- Right to strike 93-127
- as a Positive Right 4
 - General prohibition 99-101
 - Objectives of a Strike 93-98
 - Restrictions 103-106
 - Temporary Suspension 101-103

- Role of government 23, 32, 95
- Role of law 7, 16-20
- Romania 83, 90
- Rwanda 83, 90

- Saint Vincent and the Grenadines 83
- Saudi Arabia 83
- Schmidt Case 28
- Secret Ballots 118-119
- Senegal 83
- Service Sector 11
- Sierra Leone 63, 64
- Slavery 24-25
- Slavery Convention (1926) 24
- Social Justice 22
- Social security 17-19
- Social Security (Minimum Standards) Convention 1952 (No. 102) 35
- Solomon Islands 83
- Somalia 115
- South Africa 55-57, 67-68, 121
- Spain 48, 62, 64, 65, 66, 69, 83, 90, 94, 109, 110, 111, 114, 115-116, 118, 119, 120, 127
- Sri Lanka 60, 83, 94, 96, 106, 121, 122-123
- Strike
 - Concept 93
 - Economic and Social Objectives 94-96
 - International Labour Standard 2
 - Immunities 2
 - Judicial Hostility 10
 - Political Objectives 96-98
 - Principle of Reasonableness 91
 - Prohibition 99-101
 - Protection 2, 123-124
 - Restrictions 2, 8, 10, 46, 77-78, 82, 86-89, 103-106
 - Suspension 101-103
 - Targets 11,81-82,93-98
- Strike Breaking 126-127
- Sudan 62, 63, 64, 83
- Surinam 83

- Sweden 83, 90
- Syria 83
- Syrian Arab Republic 83, 90

- Tanzania 83
- Thailand 83
- Trade Unionism 1, 7, 8, 9, 10, 26, 95,98
- Trinidad (and Tobago) 83, 84, 100
- Tunisia 62, 83, 90, 94, 115
- Turkey 59, 83, 97, 101, 124

- Ukrainian Soviet Socialist Republic 83, 90
- United Kingdom 2, 8, 9, 43, 44, 64, 65,80, 81, 82, 83,90,91,94,95, 96-97, 98, 102-103, 109, 114, 121
- United States 2, 43, 47, 63, 65, 75, 76, 83, 104, 127
- Universal Declaration of Human Rights 3, 13, 18, 22, 24, 26,31, 32, 71, 73
- Upper Volta 63, 94, 110, 117, 124
- Uruguay 41-42, 62, 65, 77, 79-80, 83, 98, 103, 123
- USSR (Union of Soviet Socialist Republics) 48, 74, 76, 83, 90, 91

- Venezuela 63, 64, 83, 90
- Viet Nam 83
- Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) 2, 36, 39, 78

- Weimar Constitution (1919) 14
- Wellman 15, 22
- WFTU (World Federation of Trade Unions) 38, 48

- Yemen 83
- Young, James and Webster Case 9
- Yugoslavia 74, 76, 83, 90

- Zaire 83