

ILO principles concerning the right to strike

Bernard GERNIGON, Alberto ODERO and Horacio GUIDO *

It may be surprising to find that the right to strike is not set out explicitly in ILO Conventions and Recommendations. It has been discussed on several occasions in the International Labour Conference during the course of preparatory work on instruments dealing with related topics, but for various reasons this has never given rise to international standards (Conventions or Recommendations) directly governing the right to strike.¹ However, the absence of explicit ILO standards should not lead to the conclusion that the Organization disregards the right to strike or abstains from providing a protective framework within which it may be exercised.

Two resolutions of the International Labour Conference itself — which provide guidelines for ILO policy — in one way or another emphasized recognition of the right to strike in member States. The “Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation”, adopted in 1957, called for the adoption of “laws ... ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers” (ILO, 1957, p. 783). Similarly, the “Resolution concerning Trade Union Rights and Their Relation to Civil Liberties”, adopted in 1970, invited the Governing Body to instruct the Director-General to take action in a number of ways “with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense”, with particular attention to be paid, *inter alia*, to the “right to strike” (ILO, 1970, pp. 735-736). The right to strike has also been affirmed in various resolutions of the ILO’s regional conferences and industrial committees, as well as by other international bodies (see Hodges-Aeberhard and Odero, 1987, pp. 543 and 545).

* International Labour Office.

¹ The right to strike is, however, mentioned incidentally in a Convention and in a Recommendation. The Abolition of Forced Labour Convention, 1957 (No. 105), prohibits the use of forced or compulsory labour “as a punishment for having participated in strikes” (Article 1, subparagraph (d); and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), first mentions strikes in paragraphs 4 and 6, then states in paragraph 7 that no provision it contains “may be interpreted as limiting, in any way whatsoever, the right to strike” (ILO, 1996b, p. 89 and 1996a, p. 660).

Furthermore, though it does not explicitly mention the right to strike, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), establishes the right of workers' and employers' organizations to "organize their administration and activities and to formulate their programmes" (Article 3), and the aims of such organizations as "furthering and defending the interests of workers or of employers" (Article 10), (ILO, 1996a, pp. 528 and 529). On the basis of these provisions, the two bodies set up to supervise the application of ILO standards, the Committee on Freedom of Association (since 1952) and the Committee of Experts on the Application of Conventions and Recommendations (since 1959),² have frequently stated that the right to strike is a fundamental right of workers and of their organizations, and have defined the limits within which it may be exercised, laying down a body of principles in connection with the right to strike³ — giving rise to substantial "case law" in the broadest sense of the term — which renders more explicit the extent of the provisions mentioned above.⁴

Of the remaining supervisory bodies of the ILO, the committees established under article 24 of its Constitution do not deal, in principle, with matters relating to the right to strike, since the Governing Body generally refers the corresponding complaints to the Committee on Freedom of Association. The few Commissions of Inquiry that have been set up in response to complaints under article 26 of the ILO Constitution for non-observance of Conventions relating to trade union rights refer in their conclusions to the principles of the Committee on Freedom of Association and of the Committee of Experts, and the same is true of the Fact-Finding and Conciliation Commission on Freedom of Association.

Finally, the ILO Conference Committee on the Application of Standards has noted that a broad consensus exists among its members regarding the principle of the right to strike, although the views of the Workers' Group, the Employers' Group and the Government delegates do not coincide (see ILO, 1994b, pp. 25/31-25/41, and ILO, 1998a, pp. 18/23-18/25). The Workers' Group fully supports the approach of the Committee of Experts regarding the right to strike, considering it to be inalienable from the right to freedom of association protected by Convention No. 87 and by the principles embodied in the ILO Constitution. The Employers' Group considers that the right to carry out direct action — for workers the right to strike and for employers the right to lock out

² The mandate, composition and procedure of the ILO's supervisory bodies are described, for example, in ILO, 1995, pp. 121-170.

³ These principles are contained in particular in ILO: *Freedom of association and collective bargaining*, a General Survey of Conventions No. 87 and No. 98, conducted in 1994 by the Committee of Experts on the Application of Conventions and Recommendations (ILO, 1994a); and in ILO: *Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (ILO, 1996d). These are frequently referred to in ILO publications in their abbreviated forms: *General Survey*, 1994 and *CFA Digest*, respectively.

⁴ During the discussions preceding the adoption of Convention No. 87, no amendment expressly establishing or denying the right to strike was submitted (ILO, 1994a, para. 142).

— could perhaps be acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorized only under excessively restrictive conditions. Nevertheless, the Employers' Group has emphasized that Conventions No. 87 and No. 98 do not contain specific provisions regarding the right to strike and, therefore, it does not accept that the Committee of Experts should deduce from the text of these Conventions a global, precise and detailed, absolute and unlimited right. Several Government delegates on the Conference Committee on the Application of Standards, during the discussion of the General Survey of the Committee of Experts on freedom of association and collective bargaining, in 1994, stated their general agreement with the position of the Committee of Experts regarding strikes, while others expressed some doubts as regards particular considerations in the General Survey, or identified specific problems arising notably in connection with the public service; the majority of Government members made no comment. It should be borne in mind that, unlike the other supervisory bodies, the Conference Committee on the Application of Standards has a particularly large number of members (214 in 1998, excluding deputy members).

The purpose of this article is to elucidate the principles regarding the right to strike laid down by the Governing Body's Committee on Freedom of Association and by the Committee of Experts on the Application of Conventions and Recommendations, which have evolved substantially over the last decade. It is interesting to note that these bodies take each other's reports into account: the Committee of Experts frequently refers in its observations to the reports of the Committee on Freedom of Association in matters relating to respect for freedom of association in different countries, while the latter consults the Committee of Experts on the legal aspects of the cases it examines, or employs principles laid down by the Committee of Experts.

Taken up in turn are general issues, objectives of strikes, workers included or excluded, conditions for exercising the right to strike, strikes and collective bargaining, anti-union discrimination, abuses, legislative restrictions, summary of principles, and final observations.

General issues

The basic principle of the right to strike

From its very earliest days, during its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principle underlying this right, from which all others to some extent derive, and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests (ILO, 1996d, paras. 473-475). Over the years, in line with this principle, the Committee on Freedom of Association has recognized that strike action is a right and not simply a social act, and has also:

1. made it clear it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy;⁵
2. reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;
3. linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a *purely* political nature from the scope of international protection provided by the ILO, although the Committee makes no direct statement or indication regarding sympathy strikes other than that they cannot be banned outright; this matter will be examined subsequently);
4. stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.

These views expressed by the Committee on Freedom of Association coincide in substance with those of the Committee of Experts.

Definition of the right to strike and various types of strike action

The principles of the ILO's supervisory bodies contain no definition of strike action which would permit definitive conclusions to be drawn regarding the legitimacy of the different ways in which the right to strike may be exercised. However, some types of strike action (including occupation of the workplace, go-slow or work-to rule strikes), which are not merely typical work stoppages, have been accepted by the Committee on Freedom of Association, provided that they are conducted in a peaceful manner (*ibid.*, para. 496). The Committee of Experts has stated that:

When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralysing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.

The Committee considers ... that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful (ILO, 1994a, paras. 173 and 174).

⁵ Nevertheless, the supervisory bodies have accepted that legislation may make the exercise of this right subject to the agreement of a certain percentage of the workers, regardless of their union membership.

Objectives of strikes

This section examines the nature of claims pursued through strike action which are covered by the body of principles set down by the Committee on Freedom of Association and the Committee of Experts. In discussing this matter, reference should be made at the outset to Article 10 of Convention No. 87 which, for the purposes of the Convention, defines worker organizations as any organization “for furthering and defending the interests of workers”. This definition is clearly of fundamental importance not only in that it sets down guidelines for differentiating such organizations from those of other types, but also because it specifies the purpose of such organizations is for “furthering and defending the interests of workers” — thereby demarcating the boundaries within which the rights and guarantees recognized by the Convention are applicable, and consequently protected in so far as they achieve or seek to achieve the stated objectives.

The nature of the demands pursued through strike action may be categorized as being occupational (seeking to guarantee or improve workers’ working or living conditions), trade union (seeking to guarantee or develop the rights of trade union organizations and their leaders), or political. The two former categories do not give rise to any particular problems as from the outset the Committee on Freedom of Association has made clear decisions stating that they are legitimate. However, within the three categories of demand specified, a distinction should be made as to whether or not they directly and immediately affect the workers who call the strike. This introduces the issue of the political strike and the sympathy strike. It should at once be noted that the Committee on Freedom of Association and the Committee of Experts have rejected the notion that the right to strike should be confined to industrial disputes that are likely to be resolved through the signing of a collective agreement.

Political strikes

On the basis of the definition of “workers’ organization” contained in Article 10 of Convention No. 87, the Committee on Freedom of Association considers that “strikes of a purely political nature ... do not fall within the scope of the principles of freedom of association” (ILO, 1996d, para. 481). However, although the Committee has expressly stated that “it is only in so far as trade union organizations do not allow their occupational demands to assume a purely political aspect that they can legitimately claim that there should be no interference in their activities”, it has also specified that it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character, and that these two notions overlap (*ibid.*, para. 457).

Hence, in a subsequent decision, the Committee concluded that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions (*ibid.*, para. 479). Along the same lines, the Com-

mittee has stated that workers and their organizations should be able to express their dissatisfaction regarding economic and social matters affecting workers' interests in circumstances that extend beyond the industrial disputes that are likely to be resolved through the signing of a collective agreement (ibid., para. 484). Nevertheless, worker action should consist merely in the expression of a protest and not be intended as a breach of the peace (ILO, 1979, para. 450). In this connection, the Committee on Freedom of Association has stated that "a declaration of the illegality of a national strike protesting against the social and labour consequences of the government's economic policy and the banning of the strike constitute a serious violation of freedom of association" (ILO, 1996d, para. 493). That said, it should be added that the principles laid down cover both strikes at the local level, and general strikes, which by their nature have a markedly political connotation. As regards the geographical scope of the strike:

The Committee [on Freedom of Association] has stated on many occasions that *strikes at the national level* are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population (ILO, 1996d, para. 492).

As regards the general strike, in its examination of one particular case, the Committee considered that "[a] 24-hour general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change in economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organizations" (ibid., para. 494). Similarly, in connection with another case, the Committee concluded that "[a] general protest strike demanding that an end be put to the hundreds of murders of trade union leaders and unionists during the past few years is a legitimate trade union activity and its prohibition therefore constitutes a serious violation of freedom of association" (ibid., para. 495).

The Committee on Freedom of Association's attitude in cases where the demands pursued through strike action include some of an occupational or trade union nature and others of a political nature has been to recognize the legitimacy of the strike when the occupational or trade union demands expressed did not seem merely a pretext disguising purely political objectives unconnected with the promotion and defence of workers' interests.

The Committee of Experts also has stated that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers; this is the case, for example, of a general wage and price freeze.

In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions posed by

major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living (ILO, 1994a, para. 165).

Sympathy strikes

Where sympathy strikes are concerned, the crux of the issue is to decide whether workers may declare a strike for occupational, trade union or social and economic motives which do not affect them in a direct and immediate manner.

In its General Survey of 1983, the Committee of Experts defined sympathy strikes ("where workers come out in support of another strike") and determined that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided that the initial strike they are supporting is itself lawful (ILO, 1983b, para. 217). This principle was then taken up in 1987 by the Committee on Freedom of Association when it examined a Decree which did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. In the Committee's opinion, although several provisions contained in the Decree might be justified by the need to respect various procedures (notification of the strike to the labour authorities) or to guarantee security within the undertaking (the prevention of agitators and strike-breakers from entering the workplace) others, however, such as geographical or sectoral restrictions placed on sympathy strikes — which therefore exclude general strikes of this nature — or restrictions on their duration and frequency, constitute a serious obstacle to the calling of such strikes (ILO, 1987, paras. 417 and 418).

Similarly, the Committee of Experts has subsequently stated that:

Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee considers that a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful (ILO, 1994a, para. 168).

Workers who enjoy the right to strike and those who are excluded

It should be noted, first and foremost, that Article 9 of Convention No. 87 states that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations" (ILO, 1996a, p. 528). As a result, the Committee on Freedom of Association has refused to find an objection to legislations which deny the right to strike to such groups of workers.

Since the Committee on Freedom of Association first laid down its earliest principles on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers' organizations "to organize their ... activities" (Article 3 of Convention No. 87), the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee on Freedom of Association also accepts the prohibition of strikes in the event of an acute national emergency (ILO, 1996d, para. 527), as will be seen in a later section on this question. The Committee of Experts has in turn adopted this approach.

Public service

Both supervisory bodies were cognizant, where public servants are concerned, of the consensus reached during the preparatory discussions leading to the adoption of Convention No. 87, to the effect that "the recognition of the right of association of public servants in no way prejudices the question of the right of such officials to strike" (ILO, 1947, p. 109). The Committee on Freedom of Association and the Committee of Experts both agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages and in which arbitration decisions are binding on both parties and are fully and promptly applied. It should also be stressed that, while the provisions of Convention No. 151 and of Recommendation No. 159 on labour relations in the public service adopted in 1978 cover the settlement of disputes, among other things, no explicit mention is made of the right to strike for public servants.⁶

That being said, it should be emphasized that on the question of the right to strike in the public service, the ILO's supervisory bodies' approach is based on the fact that the concept of public servant varies considerably from one country to another. It may be deduced from the statements of the Committee of Experts and of the Committee on Freedom of Association that the concept of public servants, where their possible exclusion from the right to strike is concerned, relates to public servants who exercise authority in the name of the State (ILO, 1996d, para. 534). The implications of this approach are important in that the guidelines for determining those public servants who may be excluded no longer emanates from the application to them of the national law governing the public service, but from the nature of the functions that such public servants carry out. Thus, while the right to strike of officials in the

⁶ In that year, following a lengthy debate, the Committee on the Public Service of the International Labour Conference concluded that "the proposed Convention did not deal in one way or the other with the question of the right to strike" (ILO, 1978, p. 25/9, para. 62).

employ of ministries and other comparable government bodies, as well as that of their assistants and of officials working in the administration of justice and of staff in the judiciary, may be subject to major restrictions or even prohibitions (ibid., paras. 537 and 538), the same does not apply, for instance, to persons employed by state enterprises. To date, in response to complaints submitted to it, the Committee on Freedom of Association has stated that certain categories of public servant do not exercise authority in the name of the State, such as public servants in state-owned commercial or industrial enterprises (ibid., para. 532), in oil, banking and metropolitan transport undertakings or those employed in the education sector and, more generally, those who work in state companies and enterprises (ILO, 1984a, 233rd Report, para. 668; ILO, 1983b, 226th Report, para. 343; and ILO, 1996d, note to para. 492). Finally, it should be noted that, among the categories of public servant who do not exercise authority in the name of the State, those who carry out an essential service in the strict sense of the term may be excluded from having recourse to strike action. This concept will be examined in the following paragraphs.

The Committee of Experts shares the principles of the Committee on Freedom of Association regarding situations in which the right to strike is severely restricted or even prohibited. In this connection, the Committee of Experts has observed that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers" (ILO, 1994a, para. 158). The Committee has pointed out that one of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms *civil servant*, *fonctionnaire* and *funcionario* are far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants in different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

The Committee has considered that although it cannot overlook the special characteristics and legal and social traditions of each country, it must endeavour to establish fairly uniform criteria in order to examine the compatibility of legislation with the provisions of Convention No. 87. For this reason it has judged it futile to try to draw up an exhaustive and universally applicable list of categories of public servant who should enjoy the right to strike or be denied such a right given that they exercise authority in the name of the State. The Committee is aware of the fact that, except for the groups falling clearly into one category or another, the matter will frequently be one of degree. For this reason, in borderline cases, it has suggested one solution might be "not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a *total and prolonged* stoppage might result in *serious* consequences for the public" (ILO, 1994a, para. 158).

Essential services in the strict sense of the term

Over time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited). In 1983, the Committee of Experts defined such services as those “the interruption of which would endanger the life, personal safety or health of the whole or part of the population” (ILO, 1983b, para. 214). This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country”; likewise, there can be no doubt that “a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population” (ILO, 1996d, para. 541). The Committee on Freedom of Association has none the less given its opinion in a general manner on the essential or non-essential nature of a series of specific services.

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; air traffic control (*ibid.*, para. 544).

In contrast, the Committee has considered that, in general, the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain (*ibid.*, para. 545):

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| • radio and television; | • construction; |
| • the petroleum sector; | • automobile manufacturing; |
| • ports (loading and unloading); | • aircraft repairs; |
| • banking; | • agricultural activities; |
| • computer services for the collection of excise duties and taxes; | • the supply and distribution of foodstuffs; |
| • department stores; | • the Mint; |
| • pleasure parks; | • the government printing service; |
| • the metal sector; | • the state alcohol, salt and tobacco monopolies; |
| • the mining sector; | • the education sector; |
| • transport generally; | • metropolitan transport; |
| • refrigeration enterprises; | • postal services. |
| • hotel services; | |

These few examples do not represent an exhaustive list of essential services. The Committee has not mentioned more services because its opinion is dependent on the nature of the specific situations and on the context which it has to examine and because complaints are rarely submitted regarding the prohibition of strikes in essential services.

Obviously, the Committee on Freedom of Association's list of non-essential services is not exhaustive.

Attention should in all events be drawn to the fact that, in examining a complaint which did not involve an essential service, the Committee maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition (ILO, 1984b, 234th Report, para. 190).

Furthermore, pursuant to its examination of particular national legislations, the Committee on Freedom of Association has recommended that amendments should be introduced in order to prohibit only strikes in the essential services in the strict sense of the term, particularly when the authorities have held discretionary powers to extend the list of essential services (ILO, 1984a, 233rd Report, paras. 668 and 669).

The Committee of Experts, for its part, has stated the following:

Numerous countries have provisions prohibiting or limiting strikes in essential services, a concept which varies from one national legislation to another. They may range from merely a relatively short limitative enumeration to a long list which is included in the law itself. Sometimes the law includes definitions, from the most restrictive to the most general kind, covering all activities which the government may consider appropriate to include or strikes which it deems detrimental to public order, the general interest or economic development. In extreme cases, the legislation provides that a mere statement to this effect by the authorities suffices to justify the essential nature of the service. The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Furthermore, it is of the opinion that it would not be desirable — or even possible — to attempt to draw up a complete and fixed list of services which can be considered as essential.

While recalling the fundamental importance which it attaches to the universal nature of standards, the Committee considers that account must be taken of the special circumstances existing in the various member States, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety and health of the population. A strike in the port or maritime transport services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for a country on a continent. Furthermore, a non-essential service in the strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health

of the population are endangered (for example, in household refuse collection services). In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility ("services d'utilité publique") rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term (ILO, 1994a, paras. 159 and 160).

Terminological clarification regarding the concept of essential service and minimum service

Before proceeding further, it would be useful to clarify particular terminological points, since a full understanding of the supervisory bodies' principles regarding the so-called essential services may otherwise not be assured. In some countries, the concept of essential services is used in legislation to refer to services in which strikes are not prohibited but where a minimum operational service may be required; in other countries, the idea of essential services is used to justify substantial restrictions, and even prohibition of strike action. When formulating their principles, the ILO supervisory bodies define the expression "essential services" in the latter sense. They also employ an intermediate concept, between essential services (where strikes may be prohibited) and non-essential services (where they may not be prohibited), which is that of services of "fundamental importance" (Committee on Freedom of Association terminology) or of "public utility" (Committee of Experts terminology), where the ILO supervisory bodies consider that strikes may not be banned but a system of minimum service may be imposed for the operation of the undertaking or institution in question. In this regard, the Committee of Experts has stated that, because of the diversity of terms used in national legislation and texts on the subject, some confusion has sometimes arisen between the concepts of minimum service and essential services; they must therefore be defined very clearly.

When the Committee of Experts uses the expression "essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which would endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified, accompanied, however, by compensatory guarantees. Nevertheless, a "minimum service" "would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption" (ibid., para. 162). Specifically, the Committee considers this type of minimum service might be established in services of public utility (ibid., para. 179). Indeed, "nothing prevents authorities, if they consider that such a solution is more appropriate to national conditions, from establishing only a minimum service in sectors considered as 'essential' by the supervisory bodies according to the criteria set

forth above, which justify wider restrictions to or even a prohibition of strikes” (ibid., para. 162). Situations in which the supervisory authorities consider a minimum service may be imposed are described below.

Compensatory guarantees for workers deprived of the right to strike

When a country’s legislation deprives public servants who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee on Freedom of Association has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction (ILO, 1996d, para. 546). In this connection, the Committee has stated that a prohibition to strike in such circumstances should be “accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented” (ibid., para. 547). The Committee on Freedom of Association has stated that it is essential that “all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned” (ibid., para. 549).

The Committee of Experts has adopted a similar approach in stating that:

If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (ILO, 1994a, para. 164).

Acute national emergency

The Committee on Freedom of Association considers a general prohibition of strikes can be justified “in the event of an acute national emergency” (ILO, 1996d, para. 527). Clearly, this concept applies only in exceptional circumstances, for example, against the backdrop of an attempted *coup d’état* against the constitutional government, which gave rise to a state of emergency (ibid., paras. 528-530). The Committee of Experts also considers prohibition of recourse to strike action can be justified in case of an acute national crisis and then, only for a limited period and to the extent necessary to meet the requirements of the situation. The Committee has emphasized that “this means genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent” (ILO, 1994a, para. 152).

Conditions for exercising the right to strike

In most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful. The Committee on Freedom of Association has specified that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations" (ILO, 1996d, para. 498). The large number of Committee decisions in this connection may be attributed to the fact that some 15 per cent of the cases submitted to it concern the exercise of the right to strike.

The Committee on Freedom of Association has accepted the following prerequisites:

1. the obligation to give prior notice (*ibid.*, paras. 502-504);
2. the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage (*ibid.*, paras. 500 and 501);
3. the obligation to observe a certain quorum and to obtain the agreement of a specified majority (*ibid.*, paras. 506-513);
4. the obligation to take strike decisions by secret ballot (*ibid.*, paras. 503 and 510);
5. the adoption of measures to comply with safety requirements and for the prevention of accidents (*ibid.*, paras. 554 and 555);
6. the establishment of a minimum service in particular cases (*ibid.*, paras. 556-558); and
7. the guarantee of the freedom to work for non-strikers (*ibid.*, para. 586).

Some of these prerequisites merit further study since, over the years, the Committee on Freedom of Association and the Committee of Experts have adopted principles which restrict their scope, such as recourse to conciliation, mediation and arbitration; the necessary quorum and majority required to permit an assembly to declare a strike, and the establishment of a minimum service.

Conciliation, mediation and voluntary arbitration

As stated previously, the Committee on Freedom of Association accepts that provision may be made for recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage.

The Committee of Experts has emphasized that:

In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements. Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness (ILO, 1994a, para. 171).

It should here be mentioned that the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), advocates that if a dispute has been submitted to conciliation procedure or arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the conciliation procedure or arbitration is in progress and, in the latter case, to accept the arbitration award (ILO, 1996a, p. 660).

Compulsory arbitration

The Committee on Freedom of Association's position regarding compulsory arbitration is clear: it is only acceptable in cases of strikes in essential services in the strict sense of the term, in a case of acute national crisis, or in the public service:

Compulsory arbitration to end a collective labour dispute and a strike is acceptable *if it is at the request of both parties* involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the *public service* involving public servants exercising authority in the name of the State or in *essential services* in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population (ILO, 1996d, para. 515).

Generally, the Committee is opposed to the substitution by legislative means of binding arbitration, at the initiative of the authorities or one party, for the right to strike as a means of resolving labour disputes. Apart from cases in which compulsory arbitration is acceptable, "it would be contrary to the right of workers' organizations to organize their activities and formulate their programmes, as laid down in Article 3 of Convention No. 87" (ILO, 1984c, 236th Report, para. 144).

Two observations should be made regarding the Committee's position on arbitration. Firstly, according to these principles, compulsory arbitration is acceptable as long as it is provided for in the collective agreement as a means of settling disputes, or that it is approved by the parties during bargaining carried out regarding the problems which gave rise to the industrial dispute in question. Secondly, since the Committee's principles are couched in general terms, they are applicable at all stages of a dispute.

In other words, legislation cannot impose compulsory binding arbitration as a replacement for strike action, either at the outset or during the course of an industrial dispute, except in the case of an essential service, or when a non-

essential service is interrupted for so long that it endangers the life, safety or health of the whole or part of the population (and that the non-essential service thereby becomes essential), or — as recently pointed out by the Committee, invoking the view of the Committee of Experts — when, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities.⁷

The Committee of Experts has stated that some confusion arises at times as to the exact meaning of the term “compulsory arbitration”. If that term refers to the compulsory effects of an arbitration procedure resorted to voluntarily by both parties, this does not raise difficulties in the Committee’s opinion since parties should normally be deemed to accept to be bound by the decision of the arbitrator or arbitration board they have freely chosen. The real issue arises in practice in the case of compulsory arbitration which authorities may impose in an interest dispute at the request of *one* party, or at their *own initiative* (ILO, 1994a, para. 256).

As regards arbitration imposed by the authorities at the request of one party, the Committee considers that it is generally contrary to the principle of the voluntary negotiation of collective agreements established in Convention No. 98, and thus the autonomy of bargaining partners. An exception might, however,⁸ be made in the case of provisions which, for instance, allow workers’ organizations to initiate such a procedure on their own, for the conclusion of a *first* collective agreement. As experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.

As regards arbitration imposed by the authorities at their own initiative, the Committee considers that it is difficult to reconcile such interventions with the principle of the voluntary nature of negotiation established in Article 4 of Convention No. 98. However, it has to recognize that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. In view of the wide variety of legal frameworks (completed through national case-law and practice) established in the various member States to address what constitutes one of the most difficult problems of industrial relations, the Committee would only give some general guidance in this respect and suggest a few principles that could be implemented through “measures adapted to national conditions”, as contemplated in Article 4 of the Convention.

In the Committee’s opinion, it would be highly advisable that the parties be given *every* opportunity to bargain collectively, during a *sufficient period*, with the help of *independent* facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties

⁷ In a recent case (ILO, 1995b, 299th Report, para. 109), the Committee on Freedom of Association invoked this view, which had previously been formulated by the Committee of Experts (ILO, 1994a, para. 258).

⁸ In this connection, the Committee of Experts clearly diverges from the Committee on Freedom of Association.

should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations (*ibid.*, paras. 257-259).

Quorum and majority for declaring strikes

Regarding the quorum and requisite majority for taking strike decisions, the Committee on Freedom of Association has adopted criteria in response to the complaints submitted to it: it has indicated, for example, that the observance of “a quorum of two-thirds of the members may be difficult to reach, in particular where trade unions have large numbers of members covering a large area” (ILO, 1996d, para. 511). With regard to the number of votes required for the calling of a strike, the Committee has pointed out that the prerequisite of two-thirds of the total number of members of the union or branch concerned constitutes an infringement of Article 3 of Convention No. 87 (*ibid.*, para. 506). In contrast, the Committee has considered to be in conformity with the principles of freedom of association a situation where the decision to call a strike in the local branches of a trade union organization may be taken by the general assembly of the local branches, when the reason for the strike is of a local nature and where, in the higher-level trade union organizations, the decision to call a strike may be taken by the executive committee of these organizations by an absolute majority of all the members of the committee (*ibid.*, para. 513). Obviously, these principles were formulated in connection with specific legislation and are mentioned here by way of example, without detriment to the legitimacy of other systems of quorum and majority.

More recent decisions by the Committee reflect a more general approach:

The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises.

The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike (*ibid.*, paras. 507 and 508).

The Committee of Experts has confirmed that:

In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual elements such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member State deems it appropriate to establish in its legislation provisions

which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level (ILO, 1994a, para. 170).

Freedom to work for non-strikers

The Committee on Freedom of Association recognizes the principle of the freedom to work of non-strikers (ILO, 1996d, para. 586; ILO, 1998c, 310th Report, paras. 496 and 497); the Committee of Experts appears to accept this principle when, in connection with strike picketing, it emphasizes that such action should be peaceful and should not lead to acts of violence against persons (ILO, 1994a, para. 174).

Situations in which a minimum service may be imposed

The Committee on Freedom of Association holds that a “minimum safety service” may be imposed in all cases of strike action in order to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment (ILO, 1996d, paras. 554 and 555). Where “minimum operational services” are concerned, that is, those intended to maintain a certain level of production or services of the company or institution in which the strike takes place, the Committee on Freedom of Association has stated that:

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (*essential services in the strict sense of the term*); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an *acute national crisis* endangering the normal living conditions of the population; and (3) *public services of fundamental importance* (ibid., para. 556).

For example, the Committee has stated that minimum operational services may be established, for example, for ferry services on islands; the services provided by the National Ports Enterprise; the underground transport service; the transportation service of passengers and commercial goods; rail transport service; postal services; banking; the oil sector and the national Mint (some of these examples appear in ibid., paras. 563 to 568).

As regards the determination of minimum services to be maintained and the minimum number of workers providing them, the Committee on Freedom of Association has considered that this

should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that the strike has come to

nothing because of over-generous and unilaterally fixed minimum services. The Committee has pointed out that it is important for provisions regarding the minimum service to be maintained ... to be established clearly, to be applied strictly and made known to those concerned in due time (ibid., paras. 560 and 559).

In the event of a strike in public services, if there is any disagreement between the parties as to the number and duties of the workers concerned in a minimum service, the Committee is of the opinion that “the legislation should provide for any such disagreement to be settled by an independent body and not by the ministry of labour, or the ministry of public enterprise concerned” (ibid., para. 561).

In connection with consideration after a strike of whether the minimum services were excessive because they went beyond what was indispensable, the Committee has stated that “a definitive ruling [...] made in full knowledge of the facts — can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and functioning of the enterprises and establishments concerned and of the real impact of the strike action” (ibid., para. 562).

The Committee of Experts’ position regarding a minimum operational service (which it accepts in essential services in the strict sense of the term — when legislation does not ban strike action but imposes a minimum service — and, in all events, in all companies and institutions which provide “services of public utility”) features in the final part of the section in this article on terminological clarifications concerning essential services. This is developed in the following paragraph:

In the view of the Committee, such a service should meet at least two requirements. Firstly, and this aspect is paramount, it must genuinely and exclusively be a *minimum* service, that is, one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, their organizations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. It would be highly desirable for negotiations on the definition of the organization of the minimum service not to be held during a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment. The parties might also envisage the establishment of a joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of a such a minimum service and empowered to issue enforceable decisions (ILO, 1994a, para. 161).

Declaration of the illegality of a strike for failure to comply with legal requirements

Upon its examination of allegations regarding the declaration of illegality of a strike, the Committee on Freedom of Association has emphasized that responsibility for declaring a strike illegal should not lie with the government,

but with an independent body which has the confidence of the parties involved, especially in those cases in which the government is a party to the dispute (ILO, 1996d, paras. 522 and 523). As regards an official circular concerning the illegality of any strike in the public sector, the Committee has considered that "such matters are not within the competence of the administrative authority" (ibid., para. 525).

Strikes, collective bargaining and "social peace"

In practice, strikes may or may not be linked to a bargaining process intended to lead to a collective agreement. In connection with strikes for which collective bargaining is the point of reference, the Committee on Freedom of Association has stated that "*strikes decided systematically long before negotiations take place* do not fall within the scope of the principles of freedom of association" (ibid., para. 481). Similarly, according to the Committee "a ban on strikes related to *recognition disputes* (for collective bargaining) is not in conformity with the principles of freedom of association" (ibid., para. 488). Moreover, as regards strikes concerning the level at which negotiations are conducted, the Committee has stated that:

Provisions which prohibit strikes if they are concerned with the issue of *whether a collective employment contract will bind more than one employer* are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

Workers and their organizations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements) (ibid., paras. 490 and 491).

On the other hand, the Committee has also considered acceptable a temporary restriction on strikes under "provisions prohibiting strike action in breach of collective agreements" (ILO, 1975, 147th Report, para. 167). It has also considered that, since the solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts, the prohibition of strikes in such a situation does not constitute a breach of freedom of association (ILO, 1996d, para. 485).

None the less, as stated previously, the Committee on Freedom of Association considers the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement: "workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests" (ibid., para. 484). Likewise, the Committee on Freedom of Association has stated that "a ban on *strike action not linked to a collective dispute* to which the employee or union is a party is contrary to the principles of freedom of association" (ibid., para. 489). The Committee of Experts' approach is similar, as was apparent in the sections dealing with political strikes and sympathy strikes.

The Committee of Experts has dealt in greater detail than the Committee on Freedom of Association with the matters raised by collective bargaining systems which provide for social peace while the collective agreement is in force, either by virtue of the legislation, a collective agreement, or guidelines established by judicial decisions or arbitration awards:

The legislation in many countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice established by the law must be observed. Other industrial relations systems are based on a radically different philosophy in which collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited under the law itself, with workers and employers being afforded arbitration machinery in exchange. Recourse to strike action is generally possible under these systems only as a means of pressure for the adoption of an initial agreement or its renewal. The Committee considers that both these options are compatible with the Convention and that the choice should be left to the law and practice of each State. In both types of systems, however, workers' organizations should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements (for instance, the impact of a wage control policy imposed by the Government on monetary clauses in the agreement). If legislation prohibits strikes during the term of collective agreements, this major restriction on the basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement (ILO, 1994a, paras. 166 and 167).

Protection against acts of anti-union discrimination in connection with strikes

When a conflict of interests between employers and workers is not resolved through bargaining or arbitration, the conflict between the parties may lead to collective action in efforts to ensure that their respective interests prevail. At this point, the conflict enters a phase of entrenchment during which reprisals may occur and the rules of play be broken, going so far as to include violations of the law.

In connection with complaints submitted to it, the Committee on Freedom of Association has frequently examined allegations of reprisals against strikes in the form of dismissals of trade union officials, members or workers or other types of detrimental acts at work, for organizing or simply participating in legitimate strikes.

The Committee of Experts has emphasized that "the protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, since such acts may

result in practice in denial of the guarantees laid down in Convention No. 87” (ibid., para. 202). The following paragraphs will examine the ILO standards which protect against anti-union discrimination and the principles laid down by the supervisory bodies regarding the persons who should enjoy protection against such forms of discrimination, the different acts of discrimination and the requisite features of compensation mechanisms.

International labour standards regarding anti-union discrimination

Although no specific provisions exist to protect against acts of discrimination in connection with strikes, protection against any act of discrimination which undermines freedom of association in respect of employment is guaranteed primarily under the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), together with the Workers’ Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

Article 1, paragraph 1, of Convention No. 98 states, in general terms, that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment” (ILO, 1996a, p. 639).

Article 1 of Convention No. 135 states that:

Workers’ representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers’ representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements (ILO, 1996b, p. 495).

Article 4 of Convention No. 151 states that:

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment;
2. Such protection shall apply more particularly in respect of acts calculated to —
 - (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees’ organization;
 - (b) cause the dismissal or otherwise prejudice a public employee by reason of membership of a public employees’ organization or because of participation in the normal activities of such an organization (ILO, 1996c, pp. 48-49).

Other Conventions and Recommendations also contain provisions relating to anti-union discrimination in employment and the carrying out of union activities; these provisions basically re-state those laid down in the Conventions on freedom of association, adapted to specific situations and workers. Furthermore, Article 1, subparagraph (d), of the Abolition of Forced Labour Convention, 1957 (No. 105), prohibits any form of forced or compulsory labour “as a punishment for having participated in strikes” (ILO, 1996b, p. 89).

The Committee of Experts has emphasized the differences existing in legislation in ILO member States regarding guarantees against anti-union discrimination. It has stated, specifically, that in several countries, workers covered by general labour law are protected against acts of anti-union discrimination, but that in others legislation provides no general protection in this respect, or denies it directly or indirectly to certain categories of workers (ILO, 1994a, para. 206). Some legislation grants special protection to certain persons, for example, to the members of a trade union which has applied for registration or which is in the process of being established, or to the founding members of a trade union or to trade union officers and leaders (ibid., para. 207).

On the specific question of the right to strike, the Committee of Experts has observed that: “since the maintaining of the employment relationship is the normal consequence of recognition of the right to strike, its exercise [legal exercise, be it understood] should not result in workers being dismissed or discriminated against” (ibid., para. 179).

Persons protected and types of act of anti-union discrimination in strike contexts

The principles upheld by the Committee on Freedom of Association consider illegitimate any discriminatory act against union leaders for organizing legitimate strikes; such protection also covers trade union members and workers who participate in strikes. Specifically, the Committee supports the general principle that “no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities whether past or present” (ILO, 1996d, para. 690).

In practice, the Committee has maintained that:

- No one should be penalized for carrying out or attempting to carry out a legitimate strike (ibid., para. 590);
- The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98 (ibid., para. 591);
- When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against (ibid., para. 592);
- Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalize the exercise of the right to strike (ibid., para. 593);
- The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a

serious risk of abuse and constitutes a violation of freedom of association (ibid., para. 597);

- No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike (ibid., para. 602).

The Committee of Experts has also affirmed the protection of workers and union officials against acts of anti-union discrimination and has confirmed that most national legislation contains general or detailed provisions which protect workers against acts of discrimination, although the level of protection may vary. The Committee emphasizes that this protection “constitutes an essential aspect of freedom of association” (ILO, 1994a, para. 202) and, in its opinion, “is particularly desirable for trade union officers and representatives, because in order to be able to perform their trade union duties in full independence they must have the guarantee that they will not be prejudiced on account of their trade union office” (ibid., para. 207). This opinion coincides with that of the Committee on Freedom of Association (ILO, 1996d, para. 724).

As stated previously, regarding the right to strike, the Committee of Experts has emphasized that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike and that dismissals or discrimination against strikers should not ensue from the exercise of this right. The Committee recalls that:

[...] in some countries with the common-law system strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace strikers with new recruits. In other countries, when a strike takes place employers may dismiss strikers or replace them temporarily or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the Committee’s view, legislation should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content (ILO, 1994a, para. 139).

The Committee on Freedom of Association has stated its concern with regard to legislation in particular countries which permits dismissal without an indication of motive:

It would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker if the true reason is the worker’s trade union membership or activities (ILO, 1996d, para. 707).

The Committee of Experts has expressed a similar view in referring to appropriate protection that should be enjoyed by workers against acts of anti-union discrimination in general, according to Article 1 of Convention No. 98 (ILO, 1994a, para. 220). Similarly, when considering the possibility that trade union leaders could be dismissed without an indication of the motive, the Com-

mittee on Freedom of Association, in its consideration of the case, requested the government to take steps “with a view to punishing acts of anti-union discrimination and making appeal procedures available to the victims of such acts” (ILO, 1996d, para. 706).

From the complaints submitted to it, the Committee on Freedom of Association has identified acts of anti-union discrimination due to legitimate strike action, including dismissal, the practice of blacklisting of persons who have participated in strikes (particularly with a view to refusing to hire them), the transfer of trade union officials, the need for “certificates of loyalty” if workers are to be engaged or retained in service, demotion, compulsory early retirement, penal sanctions and other acts (ibid., paras. 702-722).

Protection machinery

In the view of the Committee on Freedom of Association, “as long as protection against anti-union discrimination is in fact ensured, the *methods* adopted to safeguard workers against such practices *may vary from one State to another*” (ibid., para. 737). Similarly, the Committee of Experts has stated that protection against acts of anti-union discrimination may “take various forms adapted to national legislation and practice, provided that they prevent or effectively redress anti-union discrimination, and allow union representatives to be reinstated in their posts and continue to hold their trade union office according to their constituents’ wishes” (ILO, 1994a, para. 214).

The Committee of Experts has noted, by way of example, that in order to guarantee the protection of trade union officials in some cases legislation establishes preventive machinery by requiring that certain measures taken against trade union representatives or officials must first be authorized by an independent body or public authority (labour inspectorate or industrial tribunals), a trade union body or the works council. In most legislation, however, the emphasis is laid on compensation for the prejudice suffered (ibid., para. 215). The Committee on Freedom of Association has pointed out that “one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain period thereafter except, of course, for serious misconduct” (ILO, 1996d, para. 727).

The Committee of Experts has stressed that anti-union dismissal cannot be treated in the same way as other kinds of dismissal, because freedom of association is a fundamental right. In the view of the Committee, this means that certain distinctions must be made, for example as regards conditions as to proof, sanctions and remedies (ILO, 1994a, para. 202).

In this regard, the Committee on Freedom of Association has pointed out that:

The existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient if these provisions are not accompanied by effective procedures ensuring their application in practice. Thus, for example, it would often be difficult, if not impossible, for a worker to furnish proof of an act of anti-union discrimination of which he has been the victim. This shows the full importance of Article 3 of Convention No. 98, which provides

that machinery appropriate to the national condition shall be established, where necessary, to ensure respect for the right to organize (ILO, 1996d, para. 740).

The supervisory bodies have also frequently and in a decisive manner demonstrated their concern regarding situations in which the measures taken to eliminate or prevent acts of anti-union discrimination have proved to be ineffectual or insufficiently persuasive or where the examination of complaints in this regard has been insufficiently expeditious. In this connection, the Committee on Freedom of Association has stated that:

- Respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to *means of redress* which are *expeditious, inexpensive* and fully impartial (ibid., para. 741).
- Legislation must make express provision for *appeals* and establish *sufficiently dissuasive sanctions* against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 (ibid., para. 743).

Furthermore, in the light of excessive slowness — sometimes years — by the legal system in dealing with disciplinary sanctions against trade unions, the Committee on Freedom of Association has stated that:

Cases concerning anti-union discrimination contrary to Convention No. 98 should be *examined rapidly*, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and particularly a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned (ibid., para. 749).

The Committee of Experts has in its turn stressed that “the existence of general legal provisions prohibiting acts of anti-union discrimination is not enough if they are not accompanied by effective and rapid procedures to ensure their application in practice” (ILO, 1994a, para. 214).

Whether the machinery is based on prevention or compensation, experience has shown that similar problems arise in practice and concern in particular the slowness of the proceedings, the difficulties relating to the burden of proof and the possibility for the employer to acquit himself by paying compensation which bears no proportion to the seriousness of the prejudice suffered by the worker. The Committee therefore emphasizes the necessity of providing expeditious, inexpensive and impartial means of preventing acts of anti-union discrimination or resolving them as quickly as possible (ibid., para. 216).

Legislative provisions are insufficient if they are not accompanied by sufficiently dissuasive sanctions to ensure their practical application. Similarly, the Committee of Experts considers that “the reinstatement of the dismissed worker, including retroactive compensation, [is] the most appropriate remedy in such cases of anti-union discrimination” (ibid., para. 224). The Committee

on Freedom of Association has also stated that job reinstatement should be available to those who were victims of anti-union discrimination (ILO, 1996d, para. 755).

Abuses in exercising the right to strike

The right to strike, which is held by the ILO supervisory bodies to be fundamental, is not an absolute right and its exercise should be in line with the other fundamental rights of citizens and employers. Consequently, the principles of the supervisory bodies cover only legal strikes, that is, strikes which are carried out in compliance with national legislation where this does not undermine the basic guarantees of the right to strike as have been described in the preceding sections on the principles of freedom of association in connection with strikes. Indeed, as the Committee on Freedom of Association has stated, “the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations” (ibid., para. 498).

Abuses in the exercise of the right to strike may take different forms, ranging from its exercise by groups of workers who may be excluded from this right, or failure to comply with reasonable requirements in declaring a strike to damaging or destroying premises or property of the company and physical violence against persons. National legislations generally provide for sanctions for such abuses which may range, depending on the seriousness of the consequences arising from such abuses, from dismissal to financial or criminal sanctions of different types. For instance, in a recent case examined by the Committee on Freedom of Association in connection with a strike of air traffic controllers, which gave rise to dismissals and criminal proceedings, the Committee considered that the Government could not be asked to comply with the request for a return to work of the dismissed workers as demanded by the complainant, given that during the strike the passwords of the radar system had been changed, thereby endangering the security of the population (ILO, 1998b, 309th Report, para. 305). In more general terms, in examining situations involving abuses in the exercise of the right to strike, the Committee on Freedom of Association has decided as follows:

The principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike.

Penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principles of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike.

The Committee considered that some of the temporary measures taken by the authorities as a result of a strike in an essential service (prohibition of the trade union's activities, cessation of the check-off of trade union dues, etc.) were contrary to the guarantees provided for in Article 3 of Convention

No. 87. The Committee drew the Government's attention to the fact that the measures taken by the authorities to ensure the performance of essential services should not be out of proportion to the ends pursued or lead to excesses (ILO, 1996d, paras. 598-600).

In cases of peaceful strikes, the Committee has stated that "the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association" (ibid., para. 601); "no one should be deprived of their freedom or be subject to penal sanctions for the mere act of organizing or participating in a peaceful strike" (ibid., para. 602).

Most legislation restricting or prohibiting the right to strike also contains clauses providing for sanctions against workers and trade unions that infringe these provisions. In some countries, striking illegally is a penal offence punishable by a fine or term of imprisonment. Elsewhere, engaging in an unlawful strike may be considered as an unfair labour practice and entail civil liability and disciplinary sanctions (ILO, 1994a, para. 176).

The Committee of Experts considers that:

... sanctions for strike action should be possible *only* where the prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and the existence of heavy sanctions for strike action may well create more problems than they resolve. Since the application of disproportionate penal sanctions does not favour the development of harmonious and stable industrial relations, if measures of imprisonment are to imposed at all, they should be justified by the seriousness of the offences committed. In any case, a right of appeal should exist in this respect.

In addition, certain prohibitions of, or restrictions to, the right to strike which are in conformity with the principles of freedom of association sometimes provide for civil or penal sanctions against strikers and trade unions which violate these provisions. In the view of the Committee, such sanctions should not be disproportionate to the seriousness of the violations (ibid., paras. 177 and 178).

Other principles involved

Pickets

As regards the action of pickets organized in accordance with the law, the Committee on Freedom of Association considers that this "should not be subject to interference by the public authorities" and that "the prohibition of strike pickets is justified only if the strike ceases to be peaceful" (ILO, 1996d, paras. 583 and 584). Consequently, the Committee has considered legitimate a legal provision that prohibits pickets "from disturbing public order and threatening workers who continued work" (ibid., para. 585). In the opinion of the Committee:

Taking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences in many countries.

The requirement that strike pickets can only be set up near an enterprise does not infringe the principles of freedom of association (*ibid.*, paras. 586 and 587).

The Committee of Experts, after recalling that strike picketing aims at ensuring the success of the strike by persuading as many persons as possible to stay away from work, has stated that:

The ordinary or specialized courts are generally responsible for resolving problems which may arise in this respect. National practice is perhaps more important here than on any other subject: while in some countries pickets are merely a means of information, ruling out any possibility of preventing non-strikers from entering the workplace, in other countries they may be regarded as a form of the right to strike, and the occupation of the workplace as its natural extension, aspects which are rarely questioned in practice, except in extreme cases of violence against persons or damage to property. The Committee considers in this respect that restrictions on strike pickets and workplace occupation should be limited to cases where the action ceases to be peaceful (ILO, 1994a, para. 174).

Requisitioning of workers

The requisitioning of workers of a company or institution in which a strike is taking place, that is, a back-to-work order, have been alleged on different occasions before the Committee on the Freedom of Association, which has laid down the following principles:

Whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation.

The use of the military and requisitioning orders to break a strike over occupational claims, unless these actions aim at maintaining essential services in circumstances of the utmost gravity, constitute a serious violation of freedom of association.

Although it is recognized that a stoppage in services or undertakings such as transport companies and railways might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause a state of acute national emergency. The Committee has therefore considered that measures taken to mobilize workers at the time of disputes in services of this kind are such as to restrict the workers' right to strike as a means of defending their occupational and economic interests.

The requisitioning of railway workers in the case of strikes, the threat of dismissal of strike pickets, the recruitment of underpaid workers and a ban on the joining of a trade union in order to break up lawful and peaceful strikes in services which are not essential in the strict sense of the term are not in accordance with freedom of association.

Where an essential public service, such as the telephone service, is interrupted by an unlawful strike, a government may have to assume the responsibility of assuring its functioning in the interests of the community and, for this purpose, may consider it expedient to call in the armed forces or other persons to perform the duties which have been suspended and take the necessary steps to enable such persons to be installed in the premises where such duties are performed (ILO, 1996d, paras. 572, 573, 575-577).

The Committee of Experts also accepts requisitioning in circumstances of utmost gravity or to ensure the operation of essential services in the strict sense of the term; otherwise, it considers that requisitioning is to be avoided in that it could be abused as a means of settling labour disputes (ILO, 1994a, para. 163).

Hiring of workers to replace strikers

The Committee on Freedom of Association only considers the replacement of strikers to be justified: (a) in the event of a strike in an essential service in which strikes are forbidden by law, and (b) when a situation of acute national crisis arises (ILO, 1996d, paras. 570 and 574). The Committee of Experts has considered that:

A special problem rises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights (ILO, 1994a, para. 175).

Compulsory closing down, intervention of the police, and access by management to the enterprise

The Committee on Freedom of Association has concluded that for providing in national legislation the closing down of the enterprise, establishment or business in the event of strikes is an infringement of “the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise (maintenance of equipment, prevention of accidents and the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities)” (ILO, 1998c, 310th Report, para. 497).

As regards the intervention of the police during a strike, the Committee on Freedom of Association has stated the opinion that, while workers and their organizations have an obligation to respect the law of the land, the intervention by security forces in strike situations should be limited strictly to the maintenance of public order and only if there is a serious threat to law and order (ILO, 1996d, paras. 581 and 580). Similarly, in the view of the Committee, “the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order” (ibid., para. 582).

Furthermore, the Committee on Freedom of Association has concluded that requesting police assistance in order to allow access by members of management to the enterprise when occupied by strikers does not represent a violation of the principles of freedom of association. As has just been explained in connection with the compulsory closing down of the enterprise during a strike,

the Committee has established the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities during a strike.

Wage deductions for days of strike action

On the subject of wage deductions for days of strike, the Committee on Freedom of Association has stated that this practice gives rise to “no objection from the point of view of freedom of association principles” (ILO, 1996d, para. 588). None the less, as to the matter of possible payment of wages to strikers, for instance, under an agreement between the parties in a recent case, the Committee asked a Government to confirm that the payment of wages to workers for the period when they have gone on strike “is neither required nor prohibited” (ILO, 1997a, para. 223) and, after receiving this confirmation from the Government against which the complaint had been lodged, the Committee did not pursue its examination of the matter (ILO, 1998b, para. 151). Likewise, in another case in which deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conducive to harmonious labour relations (ILO, 1996d, para. 589).

The Committee of Experts has refrained from criticizing the legislation of member States which provide for wage deductions in the event of strike action and has indicated that, as regards strike pay, “in general the parties should be free to determine the scope of negotiable issues” (ILO, 1998d, p. 224).

Restrictions placed by national legislation on the exercise of the right to strike

It should first be recalled that national legislation in this area is not always respected in practice, particularly when it places substantial restrictions on basic trade union rights — such as strike action — or if the effect of accumulated restrictive provisions render it almost impossible for workers to exercise these rights legally.

The observations on the application of Convention No. 87 made by the Committee of Experts in their most recent reports (1997 and 1998) give a broad picture of the problems concerning strikes that arise in the ratifying countries, as well as the intentions expressed by many governments to amend their legislation in order to take these principles into account (see ILO, 1997b and 1998d).

Out of a total of 48 countries to which the Committee of Experts has addressed observations regarding the right to strike within the context of Convention No. 87 (which has been ratified by 122 member States), the problems that have arisen may be summarized as follows.

Algeria: Prison sentences for acts seeking to obstruct the operation of establishments providing public services; the ministry or competent authority is empowered to refer an industrial dispute to arbitration.

Australia (federal legislation): Strikes may be prohibited in cases of serious industrial disputes prejudicing or threatening trade or commerce with other countries or amongst the states.

Azerbaijan: Restrictions on workers' rights to participate in collective action which disturbs transport operations, state or public institutions or undertakings, with the possibility of severe sanctions, including up to three years' imprisonment.

Bangladesh: The necessity for three-quarters of the members of a workers' organization to consent to a strike; strikes lasting over 30 days may be prohibited; strikes considered as prejudicial to the national interest or as involving a "public utility service" may be prohibited (the Government has stated it is preparing a new Labour Code to amend the legislation).

Barbados: Prison sentences or fines for breaking a contract of employment in non-essential services in the strict sense, when to do so may endanger real or personal property.

Belarus: Inclusion of transport services in the list of essential services in which strikes are prohibited (the Government has stated a Bill has been prepared to amend the legislation).

Benin: Deprivation of the right to strike when the interruption of a service would harm the economy and the higher interests of the nation (the Government has reported it is in the process of adopting a Bill amending the legislation).

Bolivia: Penal sanctions in cases of general or sympathy strikes; a majority of three-quarters of the workers required to declare a strike; strikes prohibited in banks; compulsory arbitration may be imposed by a decision of the executive authority; public servants denied the right to strike, and strikes prohibited in all public services.

Burkina Faso: Workers may be requisitioned by government decision during strikes by public servants.

Canada: Certain categories of provincial public servants (Province of Alberta) who do not exercise authority in the name of the State are not allowed to strike; there are restrictions on the right to strike in the agricultural and horticultural sectors (Province of Ontario) and in the railway and port sectors (federal Government).

Central African Republic: Government empowered to requisition workers during a strike when so required by the "general interest".

Colombia: Presence of the authorities at general assemblies convened to vote on referral to arbitration or on the calling of a strike; ban on strikes in certain non-essential services; denial of the right to strike to federations and confederations; once a strike is called, the Ministry of Labour is empowered to submit to a ballot decision whether the dispute should go to arbitration, and to

impose arbitration if the strike lasts beyond a specific period (the Government has reported it has prepared a preliminary draft of a Bill to amend the legislation).

Congo: Organization by the employer of the minimum service indispensable to safeguard the general interest in case of strikes in the public service (the Government has reported its intention to amend the legislation or adopt a new text); certain restrictions on the exercise of the right to strike by public servants who do not exercise authority in the name of the State.

Costa Rica: Ban on the right to strike in the rail, maritime and air transport sector.

Cyprus: Discretionary power by the Council of Ministers to ban strikes in certain services which it considers essential but which are not so in the strict sense of the term (the Government has indicated it is examining a Bill to amend the legislation).

Djibouti: The President of the Republic has wide powers to requisition public servants in case of a strike.

Ecuador: Public servants who do not exercise authority in the name of the State are banned from striking; prison sentences for instigators of and participants in collective work stoppages; denial of the right to strike to confederations (draft amendments to the law were prepared during an ILO technical assistance mission).

Egypt: Compulsory arbitration may be imposed at the request of one party, in case of a strike.

Germany: Denial of the right to strike to public servants who do not exercise authority in the name of the State.

Guatemala: Requirement of a majority of two-thirds of the workers to call a strike; ban on strikes by agricultural workers at harvest time, with a few exceptions, and by workers in enterprises and services in which the Government considers that a suspension of their work would seriously affect the national economy; detention and trial of persons calling for an illegal strike; prison sentences in the case of strikes paralysing enterprises contributing to the development of the national economy.

Guinea: The compulsory arbitration procedure may be implemented at the request of one of the parties.

Guyana: Compulsory arbitration may be imposed in respect of strikes in public utility undertakings.

Honduras: Requirement of a majority of two-thirds of the total membership of the trade union organization in order to call a strike; ban on strikes being called by federations and confederations; the Minister of Labour and Social Security empowered to end disputes in services for the production, re-

fining, transport and distribution of petroleum; requirement that any suspension or stoppage of work in public services that do not depend directly or indirectly on the State is subject to government authorization or to six months' notice; compulsory arbitration, without the possibility of calling a strike for as long as the arbitration award is in force (two years), for collective disputes in public services which are not essential in the strict sense of the term, such as transport services in general, and services for the production, refining, transport and distribution of petroleum (the Government has indicated the existence of a preliminary draft Bill to amend the legislation).

Jamaica: The Minister is empowered to submit industrial disputes to compulsory arbitration including those in non-essential services (the Government has reported on the start of a process tending to amend the legislation).

Japan: Ban on the right to strike of public servants who do not exercise authority in the name of the State.

Liberia: Ban on strikes.

Madagascar: Forcible requisitioning of workers outside cases of strikes in essential services.

Mali: In order to terminate a strike, compulsory arbitration may be imposed by decision of the authorities.

Malta: Compulsory arbitration may be imposed in order to end a strike.

Mauritania: Prohibition of strikes in the case of compulsory arbitration (the Government has indicated it has prepared a draft Labour Code to amend the legislation).

Myanmar: Denial of fundamental trade union rights, with serious restrictions on freedom of association and, consequently, on the right to strike.

Namibia: Ban on strikes in export processing zones.

Nicaragua: Collective disputes can be subjected to compulsory arbitration 30 days after the start of a strike; no recognition of the right to strike for federations and confederations.

Niger: Wide requisitioning powers in case of strikes.

Norway: Compulsory arbitration may be imposed in strikes in the oil industry (the Government has indicated it is working on proposals for new legislation).

Pakistan: Restrictions on the right to strike of public servants who do not exercise authority in the name of the State and denial of freedom of association in export processing zones; one-year prison sentences for participating in a strike in an essential service.

Peru: Imposition of compulsory arbitration in strikes in the public services, including transport; requirement that a strike call be adopted by an abso-

lute majority of the workers (the Government has reported it is preparing various draft Bills to amend the legislation).

Philippines: Arbitration can be imposed in cases of strikes affecting an industry indispensable to the national interest (the Government has reported it has prepared a draft Bill to amend the legislation); penalties and prison sentences for participating in certain types of illegal strike.

Romania: Compulsory arbitration procedure at the sole initiative of the Ministry of Labour when a strike has lasted more than 20 days and its continuation is likely to affect the interests of the general economy; up to six months in prison and fines for organizing an illegal strike.

Rwanda: Denial of the right to strike in the public service including public servants who do not exercise authority in the name of the State (the Government has stated it is preparing a draft amendment to the law).

Senegal: The authorities are empowered to impose compulsory arbitration if a strike is prejudicial to “public order and the general interest”.

Swaziland: Prohibition, under penalty of up to five years’ imprisonment, of a federation from inciting to cessation or slow-down of work; ban on strikes in the broadcasting sector, with sanctions of one year’s imprisonment for the responsible leaders; power of the Minister to apply to the court to enjoin any strike if he or she considers that the “national interest” is threatened; ban on sympathy strikes; strike ballots conducted by the Commissioner of Labour; excessive majority of workers required to call a strike; penal sanctions of from one to five years for various “unlawful” forms of industrial action.

Switzerland: Ban on strikes by public servants who do not exercise authority in the name of the State (the Government has reported a reform of the Federal Constitution is being prepared).

Syrian Arab Republic: Ban on strikes in the agricultural sector.

Trinidad and Tobago: An excessively high number of workers in a bargaining unit required to call a strike; the Ministry of Labour or one of the parties may resort to the courts to end a strike.

Tunisia: Obligation to obtain the approval of the central workers’ union before declaring a strike.

United Kingdom: Restrictions on participation in sympathy strikes.

Yemen: Various restrictions on the right to strike, for example, the Ministry of Labour has the power to paralyse any action supporting trade union demands, and the obligation to obtain the approval of the Federation of Trade Unions to conduct a strike.

The foregoing details on national legislation show that the restrictions on the right to strike most commonly occurring in the member States of the ILO having ratified Convention No. 87 are the imposition of compulsory arbitration

through a decision of the authorities or at the initiative of one of the parties, even when the services concerned are not essential services in the strict sense or the public servants in question do not exercise authority in the name of the State; the imposition of penal sanctions for organizing or participating in strikes; the requirement of an excessively large majority in a strike vote as a condition for the legality of a strike; a ban on strikes by public servants who do not exercise authority in the name of the State; the power to requisition striking workers and, in many countries, the ban on strikes in certain non-essential services.

Application of the legal measures imposing such restrictions on the exercise of the right to strike has caused many complaints to be brought before the Committee on Freedom of Association. The most frequently recurring problems are the prohibition of strikes in services considered to be essential in the country concerned but which are not essential in the strict sense of the term acceptable to the supervisory bodies, as well as the imposition of sanctions for taking legitimate strike action.

Body of principles on the right to strike

As a summary of the preceding sections, there follows a synthesis of the principles and minimum rules of conduct established by the Committee of Experts and by the Committee on Freedom of Association as regards the right to strike.

A. Consideration of the right to strike as a fundamental right to be enjoyed by workers and their organizations (trade unions, federations and confederations), which is protected at international level, provided that the right is exercised in a peaceful manner.

B. General recognition of the right to strike for workers in the public and the private sectors, with the sole possible exceptions being members of the armed and police forces, public servants who exercise authority in the name of the State and workers employed in essential services in the strict sense of the term (the interruption of which could endanger the life, safety or health of the whole or part of the population), or in situations of acute national crisis.

C. The principles of freedom of association do not cover strikes of a *purely* political nature, although they do cover those which seek a solution to major issues in economic and social policy.

D. A blanket ban on sympathy strikes could lead to abuse. Workers should be able to enjoy the right to take such action when the initial strike they are supporting is itself lawful.

E. A minimum safety service may be imposed in all cases of strike action when such minimum services are intended to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment.

F. A minimum operational service may be established (in the undertaking or institution in question) in the case of strikes in public utility services and in public services of fundamental importance; employers' and workers' organizations and the public authorities should be able to participate in determining this minimum service.

G. The obligation to give prior notice, the obligation to engage in conciliation, have recourse to *voluntary* arbitration, comply with a given quorum and obtain the agreement of a given majority where this does not cause the strike to become very difficult or even impossible in practice and the secret ballot method to decide strike action are all acceptable conditions for the exercise of the right to strike.

H. Restrictions on picketing should be confined to cases in which such action ceases to be peaceful, and picketing should not interfere with the freedom to work of non-strikers.

I. Requisitioning of the workers of an undertaking or institution in the event of a strike is admissible only in the case of a strike in an essential service or under circumstances of utmost gravity and in situations of acute national crisis.

J. The hiring of workers to replace strikers seriously impairs the right to strike and is acceptable only in strikes in an essential service or in situations of acute national crisis.

K. Legal provisions regarding wage deductions for days of strike give rise to no objection.

L. Appropriate protection should be afforded to trade union officials and workers against dismissal and other detrimental acts at work for organizing or participating in a legitimate strike, in particular through prompt, efficient and impartial procedures, accompanied by sufficiently dissuasive remedies and sanctions.

M. The protection of freedom of association does not cover abuses in the exercise of the right to strike involving failure to comply with reasonable requirements regarding lawfulness, or consisting of acts of a criminal nature; any sanctions imposed in the event of abuse should not be disproportionate to the seriousness of the violations.

Final observations

It is interesting to note that, with a few exceptions, until the late nineteenth century, strikes were generally considered to be an unlawful activity of a criminal nature, and that they were unlawful in many countries until beyond the mid-twentieth century. It is therefore remarkable that the right to strike subsequently became a fundamental right recognized by the large majority of countries, was embodied in the United Nations International Covenant on Economic, Social and Cultural Rights, 1996, and has been protected by the ILO supervisory bodies (principally the Committee on Freedom of Association — since 1952 — and the Committee of Experts on the Application of Conventions and Recommendations — since 1959). The decisions of these supervisory bodies have given rise to a body of principles on the right to strike broadly shared by the international community and based on the general principles of freedom of association embodied in the ILO Constitution and in the core Conventions on this subject.

As to the practice followed by the different member States, though measures restricting the right to strike are relatively frequent, the principle of the right to strike as a means of action for trade union organizations is almost universally recognized. So that though, on 20 September 1998, the number of countries having ratified Convention No. 87 stood at 122, observations made on this question by the Committee of Experts in its 1997 and 1998 reports concerned only 49 of those countries. Moreover, some of the observations referred merely to the means or conditions for the exercise of the right to strike, which do not always amount to very serious restrictions. This shows that the Committee of Experts considers the legislation governing strikes is satisfactory in a clear majority of the countries which have ratified Convention No. 87. The problems most frequently arising in connection with the right to strike are: the imposition of compulsory arbitration by decision of the authorities or at the initiative of one of the parties; the imposition of penal sanctions for organizing or participating in unlawful strikes; the requirement of an excessively large majority of votes to be able to call a strike; the ban on strikes by public servants who do not exercise authority in the name of the State; the power forcibly to requisition striking workers and, in many countries, the ban on strikes in certain non-essential services.

It emerges from this study that the principles regarding the right to strike laid down by the Committee on Freedom of Association and by the Committee of Experts coincide on practically all essential points, without, however, obliterating their respective approaches. The two bodies are autonomous, each with its own composition, procedure and mandate. The Committee on Freedom of Association is a tripartite body of the ILO's Governing Body, which examines complaints submitted in regard to breaches of trade union rights, while the Committee of Experts (composed of independent legal experts) carries out regular monitoring of compliance with ratified Conventions. On the basis of reports submitted by governments, and the observations of the workers' and employers' organizations, the Committee of Experts submit annual reports and, in response to decisions of the Governing Body, general surveys of national law and practice regarding matters covered by one or more Convention(s). They hold different mandates: the Committee of Experts is required principally to give its opinion regarding compliance with ILO standards (including those regarding freedom of association) under national legislations, and the Committee on Freedom of Association to give its opinion regarding alleged breaches of trade union rights in practice, presented by workers' and employers' organizations. Thus, the body of principles of the supervisory bodies regarding the right to strike are the product of the practical requirements of their respective briefs in a world characterized by widely differing — and not always satisfactory — national legislations.

The fact that the principles of the Committee on Freedom of Association and of the Committee of Experts on the subject of strikes so largely coincide may be accounted for by their concern to avoid discrepancies on basic points and also by the mutual esteem and good working relationship between the two bodies. Firstly, they are cognizant of their respective reports: the Committee of

Experts frequently refers in its observations to one or other aspect of freedom of association in the practice of a particular country mentioned in the reports of the Committee on Freedom of Association; the latter consults the Committee of Experts on legislative aspects of the cases it is examining, or employs the principles laid down by the Committee of Experts. Secondly, either body may refer in its reports to the views of the other, in connection with matters already dealt with by the other. Thirdly, the Committee on Freedom of Association has opted on occasion to adapt its principles regarding particular issues (for example, the definition of essential services or the identification of public servants who may be excluded from the right to strike) to bring them into line with those established in the general surveys conducted by the Committee of Experts. Finally, Professor Roberto Ago, judge at the International Court of Justice and Chairman of the Committee on Freedom of Association from 1961 to February 1995, was also a member of the Committee of Experts from March 1979 to February 1995.

Such an approach provides a dual input into thinking on these issues and ensures a particularly appropriate international approach to the right to strike, which brings together the purely technical approach of the Committee of Experts with the tripartite technical approach of the Committee on Freedom of Association (that is, that of a specialized body whose members act in their individual capacity and are not subject to instructions, although without ignoring general interests and points of view deriving from their membership of a group, that is, the Government delegates, Employers' Group or Workers' Group of the ILO Governing Body). Thus, as a result of the relationship between these bodies, a broad and realistic consensus has emerged regarding fundamental aspects of the right to strike. This is particularly important given that these bodies are the standard-bearers of the prestige, authority and credibility of an international — and universal — organization.

In terms of content, the principles and rules of conduct drawn up by the two supervisory bodies regarding the right to strike include, primarily, its peaceful exercise, the admissibility of particular standards regarding the objectives and lawfulness of strike action, the identification of the categories of workers who should enjoy this right, the rejection of any form of discrimination in reprisal for having organized or participated in legitimate strikes (the chief principles and rules of conduct were given in the preceding section). These are provided within a framework which simultaneously takes account of the diversity of national legal systems, seeks to establish sufficient levels of protection for the exercise of the right to strike and to balance the rights of trade unions, employers, users of essential services and of public utility services, and the State.

Today the right to strike is essential to a democratic society, so one might justifiably wonder why there is no ILO Convention or Recommendation on the subject. There are a number of reasons for this. ILO constituents' differing views on this question, together with the difficulties raised by the regulation of so complex a subject and the fear that the result may prove unsatisfactory have meant that its supporters have not been able to rally a sufficient majority to

place discussion of an international instrument specifically governing the right to strike on the agenda of the International Labour Conference. Moreover, there is a close link between the absence of an ILO instrument in this respect and the advantages afforded by the current, flexible system which, without imposing the formal obligations that arise from ratification, allows the Committee on Freedom of Association and the Committee of Experts, through their body of principles, to establish valuable points of reference to the international community. Thus, both ILO supervisory bodies exercise a considerable, positive influence in the medium and long terms on the way in which national legislation evolves regarding the right to strike and, in the shorter term, on guiding or correcting national decisions on specific cases concerning exercise of this right which are submitted to them.

Finally, the full importance of the ILO principles on the right to strike as enunciated by the supervisory bodies emerges when one realizes the extent to which substantial restrictions on fundamental trade union rights undermine not only the balance of labour relations and the existence of a counterbalance to the power of the State in the economy, but also reduce expectations of any improvement in conditions of employment and in the standard of living within civil society. For all these reasons, therefore, one may legitimately point to the invaluable contribution made by the Committee on Freedom of Association and by the Committee of Experts to the development of contemporary international law.

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