

ILO standards on freedom of association and their implementation

Jean-Michel SERVAIS *

A frequent criticism of international organisations is that they confine themselves to statements of principle, that their deliberations lead to no practical results and that their activities are all the more disappointing because of the great expectations placed in them. Of course there is always the danger, and everyone can give examples, that one international forum or another may adopt a text that comes to nothing. But such occurrences, which are doubtless inevitable given the present state of world society, must not be allowed to detract from the many instances where the effective implementation of a right or freedom has been advanced by the solid work of an international agency.

This is the case in the International Labour Organisation of the methods worked out to protect freedom of association, especially the “revolutionary”¹ procedures set up for the purpose. They show that, while it would be wishful thinking to assume that the declaration of a right by an international organisation automatically means that it will be observed in practice, unwarranted scepticism is equally out of place.

However, a number of conditions must be met if international action is to produce concrete results. First, the rules prescribed must spell out to States the extent of their obligations in sufficiently clear and explicit terms. In the field we are concerned with here, the principle of freedom of association has been embodied by the ILO in its Constitution, and it has adopted several detailed instruments laying down the basic standards to be applied, in particular the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).² In the light of these basic standards, a body of principles has been elaborated by the competent ILO organs, which States are required to observe and cause to be observed in industrial relations – a subject we shall return to later on.

Another condition for effective action is that the application of the standards and principles is not left entirely up to governments. This brings us to the whole problem of how to ensure that instruments which in themselves

* International Labour Office.

do not provide for any sanctions for non-observance will actually be enforced. The ILO has sought to fill this gap by establishing a series of obligations for member States and a set of procedures aimed at both promoting and supervising the application of the standards it adopts every year at the International Labour Conference.

When a new Convention or Recommendation has been adopted by the Conference, the governments must bring it before the competent national authorities (usually parliament), "for the enactment of legislation or other action" (article 19 of the ILO Constitution) and report on the steps taken. They must also, at the request of the ILO Governing Body, report on the position of the law and practice in their country in regard to the matters dealt with in the instrument.

These promotional activities hold good for all international labour standards. The efforts made specifically to promote the principles of freedom of association have resulted in some original features, which we shall examine in due course.

Other methods of promoting the incorporation of ILO standards into national law and practice have gradually been developed. For instance, missions have been sent in particular cases to a country to review the situation regarding the implementation of certain instruments; some of these missions have been concerned with freedom of association, such as those which recently examined the trade union situation and industrial relations in two European countries.³ Regional or national seminars, organised by the ILO or with its assistance, are regularly held on national and international labour law. Regional conferences and other bodies within the Organisation have also helped to spread a greater awareness of ILO standards and have called for the ratification of different Conventions. ILO officials, especially the regional advisers on international labour standards, frequently discuss problems not only with government authorities but also with employers and trade unions and try to help them overcome any difficulties they encounter; an increasing number of national officials also come to Geneva for training courses. Several manuals have been published on questions relating to international labour standards.

Supervision of the application of Conventions constitutes the other aspect of the ILO's activity in this field. On ratifying a Convention, each State undertakes to observe its provisions; and the ILO Constitution requires States to furnish evidence that they do so: they are required to submit reports, either on a regular basis or in response to complaints, on the measures taken in law and practice to implement each instrument they have ratified. As a result, a very comprehensive supervisory system has gradually evolved, consisting in a number of complementary procedures. Some are designed to permit a regular examination of the application of ILO standards, whereas others are only set in motion after a complaint has been lodged and may either apply to standards as a whole or deal specifically with certain instruments, especially those concerned with freedom of association.

All of these procedures have had a major influence on the application of international labour standards.⁴ Here, however, we shall examine in greater detail the methods of protection specific to freedom of association, for they are unquestionably among the most original and innovative of the ILO's procedures.

Supervisory procedures

A. General procedures

The way in which regular supervision is exercised over the application of all international labour standards – including the right to organise – is well known.⁵ A State which has ratified a Convention is bound to submit regular reports to the ILO on the steps taken to implement its provisions and to communicate them to the representative employers' and workers' organisations in the country. These organisations may – and they are doing so more and more frequently – send the ILO any critical comments they consider appropriate. A Committee of independent experts examines these reports and comments, as well as other information at its disposal. The Committee makes comments on any difficulties it finds concerning the application of a Convention and communicates them directly to the government concerned and, where the importance of the case so warrants, publishes them in the report it submits each year to the International Labour Conference. At each of its sessions, the Conference sets up a special Committee on the application of standards to discuss with representatives of the governments concerned the most serious cases and appropriate measures for righting the situation. The Committee then reports to the plenary Conference, where a case may be discussed further.

Although these bodies are not courts of law and their decisions are not legally binding, this procedure of observations and discussions has proved to be effective for various reasons.⁶ First, the persons chosen as experts are recognised authorities; second, the States are mentioned by name and, when the problems are serious, they are called upon to explain their position publicly before an international forum; and third, the fact that criticism is published and can be read by the public at large often prompts governments to take remedial action.

Another form of supervision applicable to all Conventions is the examination of representations and complaints⁷ brought against a State alleging violation of a ratified instrument. Naturally, the effectiveness of such supervision depends not only on the nature of the allegations but also on the extent to which these procedures are actually resorted to. They have not always been used in the past; but there is a growing trend to resort to them today, particularly in the field of freedom of association.⁸ When a workers' or employers' organisation submits a receivable representation, the ILO Governing Body appoints a tripartite committee – in which the Government,

Employer and Worker members are equally represented – to examine it. The committee then invites the government concerned to reply to the allegations and reports to the Governing Body. If the Governing Body does not consider the government's statement to be satisfactory, it publishes the representation and the government's reply. It may also refer the case to the Commission of Inquiry provided for in the ILO Constitution. This Commission, made up of eminent persons chosen for their impartiality, may likewise be entrusted by the Governing Body with examining a complaint received from a delegate to the Conference or from another State having ratified the instrument in question.

Recourse to the Commission of Inquiry is still rare although the relevant provisions of the Constitution have been invoked more frequently in recent years, especially with respect of freedom of association. To give only two examples: the case relating to the employment of workers from Haiti in the sugar-cane plantations in the Dominican Republic and the observance of Conventions Nos. 87 and 98 by these two countries; and the case relating to the observance of the same two instruments by Poland. While the Commission is concerned with determining the facts, this is not its only function: it also tries to find a solution to the problems encountered that will be both consistent with international labour standards and acceptable to the State concerned. Its report is published and brought to the attention of the Governing Body. The government is then asked to state whether it accepts the recommendations contained in the report and, if not, whether it wishes to refer the case to the International Court of Justice, whose decision is final.

Thus, apart from possible appeal to the International Court of Justice, these procedures also bring into play tripartite representative bodies and an independent body of experts. Here again the discussion of a report and the publicity it receives at the international level are bound to stimulate action by the government concerned to ensure that the instruments in question are fully observed. What is more, added force is given to the recommendations made by these bodies by article 33 of the ILO Constitution: if a government fails to implement them within the time specified, the Governing Body may recommend to the Conference whatever action it thinks advisable to secure compliance therewith. This may include, for instance, transferring an ILO office to another country, refusing to hold ILO meetings in the country, and even cutting off all or part of ILO technical assistance. The approach the ILO has consistently taken, however, has been to continue the dialogue rather than impose sanctions. It has usually succeeded – though to varying degrees – in convincing governments to adopt legislative or administrative provisions along the lines recommended. Furthermore, the governments have been invited – another example of how the procedures complement each other – to submit regular reports on the follow-up to these recommendations for consideration by the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations. On several occasions direct contacts missions (we shall return to this subject later) have

been sent to investigate on the spot what effect has been given to the recommendations.

B. The complaints procedure for infringements of freedom of association

The conviction that free and dynamic employers' and trade union organisations are vital for sustained development and progress underlies the additional guarantees accorded to freedom of association through machinery which, as one observer has said, "has carried the art of the possible to the limit and pushed back the boundaries of the impossible".⁹ The right of employers and workers to organise and freedom of action for their organisations are of special significance for the activities of an Organisation that is composed not only of government representatives but also of those of national employers' and workers' organisations.

The ILO accordingly, following an agreement concluded with the United Nations in 1950, established a procedure for examining cases of alleged infringements of freedom of association. Basically three bodies are involved. The Committee on Freedom of Association, a tripartite group appointed by the Governing Body, examines all the cases submitted (some 1,300 to date) and reports directly to the Governing Body. In exceptional circumstances (only five cases so far) the Governing Body refers the case to a fact-finding and conciliation commission, composed of independent experts, which investigates the allegations, discusses with the government concerned possible ways of overcoming the difficulties in question, and reports back to the Governing Body. Here again we have tripartite bodies composed of government, employers' and trade union members and a body independent of the parties concerned; and here too the government may be requested, following a discussion in an international forum and the publication of a report, to modify its law or practice.

An innovative aspect of the procedure is that it may be instituted even against a State that has not ratified the Convention on freedom of association whose provisions it is said to have infringed.¹⁰ Nor is the State's consent required, except where a fact-finding and conciliation commission is established.

The Committee on Freedom of Association has nine members – three each from the Government group, the Employer group and the Worker group on the Governing Body – with, currently, an independent chairman. It meets three times a year.

The procedure for lodging complaints against governments and bringing them before the Committee has been simplified in an attempt to avoid excessive formalities; allegations may be submitted by telegram or even by postcard. Certain safeguards, however, have been established. It would be out of the question to accept complaints indiscriminately: the procedure would lose credibility and the Committee's already heavy workload would be

further increased. To be receivable, complaints must be lodged either by a State (a possibility which has remained theoretical), or by an employers' association (which is rare), or by a trade union (nearly all the cases). This last must be a genuine workers' organisation¹¹ and not a temporary body like a strike committee: it must be a national trade union (with a direct interest in the matter), an international trade secretariat (if the issue affects one of its affiliates), or one of the international trade union confederations enjoying consultative status with the ILO.

Safeguards also had to be established to protect the "accused", the government denounced for infringing trade union rights. The government accordingly is always allowed the last word in the exchange between the parties. To enable it to reply to the accusations, the allegations and any further information submitted by the complainant are sent to the government; as a general rule, its own comments are not transmitted to the complainants; however, if the Committee decides to do so, the complainants' further observations are sent to the government. The Committee is also concerned to protect governments against unfounded accusations and it has systematically rejected allegations that are not supported by sufficient evidence.

More generally, there has been a constant concern to ensure that States have confidence in the Committee's procedures, that they understand that it is in their ultimate interest to reply to the accusations brought against them, to refute unfounded or exaggerated allegations and to explain any difficulties they encounter in implementing principles of freedom of association. Their co-operation during the examination of a case (as, later, in following up any recommendations made) is a guarantee that their specific circumstances will be duly taken into account and that a satisfactory outcome will be reached. Experience over the past 30 years has shown that a spirit of co-operation has prevailed in the vast majority of cases.

There are, besides, several ways in which the Committee can prompt a government to discuss the issues: the more or less insistent appeals addressed to it or even the head of State in the Committee's report, i.e. publicly; contacts made by its Chairman with the government's delegates to the International Labour Conference; and contacts made through the ILO's field offices. If these methods fail, the Committee is free to go ahead and examine the case in the absence of any reply. Special publicity may also be given to the complainant's allegations, the Committee's recommendations and the government's negative attitude.

In the case of very serious allegations, the Director-General of the ILO may, on receiving the complaint, appoint a representative to make preliminary contacts on the spot, to obtain preliminary information and to stress the importance of full co-operation at the various stages of the procedure.

Obviously the Committee is unable to take a decision on the case unless it has sufficient evidence at its disposal. It may therefore invite the complainants or the government to supply additional evidence. Moreover, while the procedure in principle is based on written submissions and the

Committee's decision is based on the evidence contained in the file, other procedural methods have been developed to obtain more detailed and specific information. The Committee may, in particular, invite the government concerned to receive direct contacts missions, a method widely used, besides, for the regular examination of the effect given to ratified Conventions. If the government agrees, an ILO representative (either an independent expert or an official of the Office) is sent to ascertain the facts of the case on the spot and seek a solution. These missions are not international investigations but are intended, on the contrary, to enable the ILO representative, chosen for his impartiality and objectivity, to strike up a dialogue with the parties concerned, informally discuss the problems encountered, clarify the situation and try to create a propitious climate for finding a solution.¹²

On a few occasions the Committee has also decided to hear the parties or one of the parties to the dispute in order to obtain more detailed information on the case and, in some instances, to discuss possible solutions and try to reach an agreement based on the principles of freedom of association.

As the Committee recently recalled,¹³ its role is not to condemn a government; it does not have the competence to do so and its conclusions are not legally binding. It makes recommendations which, once approved by the Governing Body, are transmitted to the government to enable it to find a solution to a problem in the light of the relevant ILO standards. The whole procedure is geared to this end, but the more complex or serious the problem is, the more elaborate the methods are that have been devised to permit a constructive dialogue and arrive at solutions consistent with the Conventions. We have already referred to direct contacts missions and hearings of the parties. But technical co-operation has also helped more than once in overcoming difficulties encountered in the implementation of instruments, not to mention missions carried out by senior ILO officials and other more informal contacts. We have also mentioned the role of conciliation – along with that of fact-finding – of the commission to which cases are referred in exceptional circumstances.

The fact remains that considerable pressure can be exerted by the Committee on Freedom of Association itself to have its recommendations carried out, whether these are interim recommendations (when it requests, for example, that urgent measures be taken pending its further consideration of the case) or definitive ones. Publicity is also used for this purpose: the Committee's conclusions are published (first as a Governing Body document and then in the *Official Bulletin* of the ILO) and discussed at plenary sittings of the Governing Body. In approving the Committee's recommendations, the Governing Body may also adopt the other measures which we have already mentioned in connection with the general complaints procedures.

Moreover, the mere fact that a complaint might be or has been filed has at times induced the parties to settle the dispute in order to avoid its being

brought before an international body or to reach a settlement after the complaint has been filed but before the procedure is completed.¹⁴

Finally, the Committee often invites the government concerned to keep it informed of the effect given to its recommendations or – and this is another example of how the procedures complement each other – requests the Committee of Experts on the Application of Conventions and Recommendations to keep under review any developments in the countries which have ratified the Conventions in question.

The principles applied

From the start the various bodies described above have based their recommendations on the standards laid down in the ILO Conventions dealing with freedom of association. But since these instruments could not provide beforehand a ready answer to every problem that might confront the Committee of Experts or the Conference Committee when carrying out its mandate to supervise observance of their provisions or the Committee on Freedom of Association when examining the complaints submitted to it, the supervisory bodies were led to formulate, in the light of those standards, more detailed principles on specific issues. When similar situations subsequently occurred, they naturally invoked the precedents and, in this way, a body of principles was gradually built up, constituting a veritable code of conduct which States are invited to follow in implementing standards on freedom of association in their national law and practice.

It may be worth while to describe these principles briefly¹⁵ in view of their importance for the protection of trade union rights.

The right to establish and join occupational organisations

This right, which is embodied in Article 2 of Convention No. 87, is seldom refused; but it is often subject to restrictions, especially to the detriment of rural workers and public servants. This shortcoming led to the adoption a few years ago of a Convention and Recommendation concerning rural workers' organisations and their role in economic and social development and of a Convention and Recommendation concerning protection of the right to organise and procedures for determining conditions of employment in the public service.

In principle, workers should be able to join trade unions of their own choosing, but in practice this is not always the case; more or less overt restrictions are often imposed. For instance, the authorities may bring indirect pressure to bear on workers not to join a particular trade union by issuing tough statements against a confederation or by discriminating against certain unions in the granting of premises or subsidies, etc. The restrictions may also lie in the conditions stipulated for the establishment of a union (minimum number of members or structure and composition required, etc.).

While the supervisory bodies have declared certain formal requirements to be acceptable, they have stressed that these must not be such as to prevent the establishment of a trade union.

The question has been raised whether the distinction made between trade unions in many countries according to their degree of representativeness is open to criticism. The supervisory bodies have replied in the negative inasmuch as the notion of representativeness is contained in the ILO Constitution in connection with the appointment of employers' and workers' delegates. Possible abuse should be prevented, however, by ensuring that the criteria applied to determine representativeness are objective, established beforehand and conclusive (particularly the number of members) and that the priority or exclusiveness granted to certain occupational organisations does not substantially limit the activities of minority unions and hence influence workers in their choice of an organisation. The advantages enjoyed by the most representative trade unions should be limited to priority in representation (especially for collective bargaining purposes), in consultation by governments and in the appointment of delegates to certain international bodies.

In considering complaints relating to trade union monopoly in various countries, the Committee on Freedom of Association has stated that it fully understands a government's wish to promote a strong trade union movement and avoid the disadvantages inherent in an unjustified proliferation of small competing trade unions whose weakness might undermine their independence. But it has added that in such circumstances the government should try to encourage the trade unions to group together voluntarily in strong and united organisations and should not impose a unified organisation by law, which would deny workers the free exercise of their right of association and thus run counter to the standards contained in the Conventions on freedom of association.

The right to form occupational organisations presupposes that no prior authorisation, direct or indirect, is required for their establishment. Although not many trade unions have complained that they needed to obtain express approval from the government authorities, certain conditions stipulated by law or regulations have resulted in situations where this is the case in practice. For instance, in order to operate a workers' organisation may have to obtain approval of its statutes or acquire legal personality at the administration's discretion, or to register, subject to the same condition, with the public authorities; and there have been examples where registration, although optional, brought so many advantages with it that any organisation wishing to conduct its activities normally was obliged to fulfil this formality. In each complaint they have examined the supervisory bodies have considered whether the relevant legislative or administrative provisions did not implicitly require the consent of the public authorities.

The right to establish federations and confederations and to affiliate with international employers' and workers' organisations

The establishment of occupational federations or confederations (Article 5 of Convention No. 87) has given rise to few specific problems; and in most cases these are the same problems as those encountered by the primary organisations. However, more than one government has expressed reservations about the right to join the major international confederations and some have even gone so far as to prohibit such affiliation. Still more have done their utmost to make relations between the confederations and their national members difficult or even impossible – by forbidding national delegates to attend meetings of an international trade union organisation or prohibiting the entry into the country of the latter's representatives, forbidding it to hold meetings in the country or to assist the national federation financially, restricting the exchange of publications, etc.

Protection against suspension or dissolution by administrative authority

Workers' and employers' organisations and their members enjoy no immunity from due process of law; they are liable to penalties for any offences committed. For their part, however, the public authorities should not resort to threats or force to impede trade union activities. To ensure that the necessary guarantees are provided against possible abuse on either side, the supervisory bodies have considered that measures as serious as the suspension or dissolution of occupational organisations should be decided by the judicial authorities alone; moreover, as we shall see, they have also often insisted on the role of courts in protecting other rights of employers' and workers' organisations.

Since the suspension or dissolution of these organisations also affects the occupational representation of workers and employers, the Committee on Freedom of Association has stressed that such sanctions should be taken only as a last resort, after other less drastic measures against the organisation have been exhausted; moreover, the fact that trade unionists may be found guilty of reprehensible acts should not lead to measures depriving the unions themselves, or their leaders, of their possibilities of action.

Free functioning of occupational organisations

The seriousness of the cases examined by the Committee in this connection has of course varied greatly. Among the most serious are those where a government has prohibited unions from carrying on any activities at all, which is tantamount to banning the organisations themselves. At times, too, the authorities have placed one or more organisations under their supervision, dismissing elected officials, appointing a temporary adminis-

trator or even blocking trade union funds and occupying the premises. Most often, however, the problems raised have been of a more limited nature and the supervisory bodies have confined themselves to stressing the basic guarantees indispensable for the normal conduct of trade union activities in the light of Article 3 of Convention No. 87.

A trade union organisation is entitled to elect its officials in full freedom, without being subjected to pressure or having to obtain the approval of the public authorities; if conditions of eligibility are stipulated by law, they must be reasonable. The right to dismiss a trade union official lies with the union's members or, in certain instances, the courts, not with the administrative authorities.

Nor should it be the function of these authorities to supervise trade union activities. In a case examined some years ago, the Committee considered it unacceptable that a public servant should attend trade union meetings, where he might record the discussions or take part in them. In many other cases trade union officials have been subjected to measures that prevented them from discharging their duties, especially arrest, a subject to which we shall return later.

Trade union action is not limited to occupational activities alone since overall policy options, particularly on economic and social matters, are bound to have direct effects for workers. Accordingly, the ILO supervisory bodies have pointed out that trade unions cannot be forbidden to engage in political activities. At the same time, however, they have consistently maintained that arrangements whereby trade unions are closely linked with a political party are incompatible with the principles of freedom of association.

Under Convention No. 87, trade unions are entitled to draw up their constitutions and rules and to organise their internal affairs, such as the holding of assemblies and other meetings, voting procedures, auditing, etc. Although a State might legislate on the subject in order to ensure minimum guarantees for union members, it should, according to the supervisory bodies, exercise prudence and respect the basic principle that it is for the occupational organisations to settle these matters themselves.

Many complaints have related to the protection of trade union property and the inevitable limitations of such protection in the event of irregularities: government intervention in the unions' financial affairs (especially the fixing of union dues) and supervision of their financial administration, seizure, blocking and confiscation of funds, occupation and search of premises, etc. The Committee's general position, again, has been that if supervision proves necessary (since, as we have already said, unions do not enjoy any immunity in this respect) it must be exercised by the judicial authorities.

In some cases, the issue has been not so much to determine whether a government has acted in accordance with established principles as to find a solution to a particularly difficult and complex problem, a solution acceptable to both parties and, needless to say, consistent with the Conventions on

freedom of association. The Committee's role of conciliator has been even more pronounced in these cases. An example of such a situation is present-day Spain, where the disposal of the assets of the former corporatist trade union movement has been a major stumbling-block to harmonious industrial relations. When examining the case submitted on the matter, the Committee stressed the importance of consultation with the representative organisations of employers and workers in trying to solve the problem of the rightful recipients of the assets accumulated by the former official organisation, a solution, it said, that should be based on the principle that the assets should be used for the purpose for which they were intended and not on the exact amount of the contributions paid to the former official organisation by the employers or the workers. The disposal of the assets confiscated from the workers' organisations and some employers' associations at the end of the Civil War should, the Committee stressed, be a matter for negotiation between the Government and the representatives of the occupational organisations concerned, with a view to reaching a rapid agreement acceptable to all the parties.

Promotion of collective bargaining

The rights and safeguards we have reviewed above are indispensable to occupational organisations if they are to fulfil their role of promoting and defending their members' interests. Collective bargaining is one of the fundamental means of achieving this objective.

Under Convention No. 98 governments undertake to promote the voluntary negotiation of collective labour agreements and, where necessary, to take the appropriate measures to ensure this (such as setting up joint committees); that Convention is supplemented by the Collective Bargaining Convention (No. 154) and Recommendation (No. 163) of 1981. Furthermore, the Labour Relations (Public Service) Convention, 1978 (No. 151), refers to measures to be taken "to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters" (Article 7).

In several cases the Committee on Freedom of Association has stressed the need for employers to recognise for bargaining purposes the organisations representing the workers they employ.

There have been other cases, most of them recent, concerning the limitations imposed on wage negotiations as part of a strict wage policy; governments have considered that their countries' economic plight called for stabilisation measures and have restricted, for more or less long periods, the free determination of wages by the bargaining parties. The Committee has stressed the need for the bargaining parties to be independent but it has not

confined itself merely to noting any discrepancies between a given policy and the relevant ILO standards. First of all, it has indicated the acceptable limits on the State's intervention in the fixing of wages: ¹⁶ these restrictions should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period; furthermore, they should be accompanied by safeguards to protect workers' living standards. However, it has gone further than this and has suggested that, in the longer term, a wage policy consensus might be achieved through the adoption of measures aimed at encouraging the bargaining parties to take account, during the negotiations, of the government's economic and social policy and to have regard to the general interest. It has also stressed that the objectives recognised as being in the general interest should first be widely discussed by the public authorities and the workers' and employers' organisations, in accordance with the principles laid down in the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113); indeed, if employers and workers are to have greater regard to the general interest in their activities, it is essential that their organisations be closely involved in determining what the general interest is. However, the Committee has stressed that the final decision must lie with the parties to the agreement; in any case the effectiveness of such policies will depend to a large extent on their support and co-operation.

The right to strike

It is well known that ILO Conventions do not explicitly deal with the question of strikes; however, the supervisory bodies have had numerous occasions to take a position on the subject and have thus built up a body of principles. As the Committee on Freedom of Association has pointed out, Convention No. 87 recognises the right of trade unions, as organisations of workers set up to further and defend their occupational interests (Article 10), to formulate their programmes and organise their activities (Article 3); this means that unions have the right to negotiate with employers and to express their views on economic and social issues affecting the occupational interests of their members. This constituted the basis for the Committee's position that the right to strike is one of the legitimate and indeed essential means available to workers for furthering and defending their occupational interests.

However, in the course of the many specific cases which it has had to consider, the Committee has been led to indicate certain limits to this right: it has accepted that restrictions on strikes may be imposed for reasons of safety in the undertaking, during voluntary arbitration and conciliation procedures or while a collective agreement remains in force; it has also accepted that purely political strikes may be banned or that the right to strike may be suspended in times of acute national crisis, including an economic crisis. In some cases it has suggested that, rather than banning a strike, certain

minimum services at the workplace should be stipulated. Finally, it has accepted the prohibition of strikes in the public service and in essential services (essential services in the strict sense of the term), provided compensatory safeguards are afforded to the workers in the form of impartial and speedy conciliation and arbitration procedures in which those directly concerned are entitled to take part; all arbitration awards, the Committee has stressed, should be binding and executed rapidly.

Anti-union practices

If an employer refuses to hire a trade union member or transfers, downgrades or dismisses him, this obviously is not a discriminatory practice in itself. However, it becomes one if the employer does so *because* of the worker's trade union membership or union activities; in other words, if his action is dictated by anti-trade-union reasons.

On this point, Conventions Nos. 98 (Article 1) and 151 (Article 4) provide that workers are to enjoy protection against acts of anti-union discrimination in respect of their employment. (See also Article 1 of Convention No. 135 and Article 5 of the Termination of Employment Convention, 1982 (No. 158).)

Cases examined by the Committee have confirmed that trade union leaders and strikers are particularly subject to reprisals.

In many cases a solution acceptable to both parties has been found; and many dismissed trade unionists have been reinstated. One of the major difficulties here is to prove – to the national authorities as to the international bodies – that dismissals or other decisions taken by the management have been prompted by anti-union attitudes. Of course, the problem of producing conclusive evidence is not confined to these cases alone, as is attested by the number of times that the Committee on Freedom of Association has received contradictory information from the complainants and the government. But the problem here is a particularly thorny one since the Committee has to determine whether or not there was an intention, behind the act itself, to prevent the exercise of freedom of association in employment. As one guarantee against such practices, the Committee, drawing upon a provision of Recommendation No. 143 (also to be found in Article 9 of Convention No. 158), has suggested that the burden of proof should be reversed; in other words, the onus of proving that the measure adopted was justified should be laid upon the employer.

On the other hand, very few cases have been concerned with the protection of trade union organisations against interference by employers or employers' associations (for instance, the setting up of company unions) (see Article 2 of Convention No. 98 and Article 5 of Convention No. 151).

Methods adopted for combating these practices vary; in each country they depend on the historical, social and legal context in which trade unionism has developed, on the strength of the occupational organisations,

the experience of their leaders and the respective role of legislation and collective agreements in the legal system. The supervisory bodies try essentially to determine whether the workers actually enjoy adequate protection.

Complaints have also been brought before the Committee on Freedom of Association alleging that non-unionised workers or workers belonging to one union rather than another are subject to certain disadvantages as a result of union security clauses or practices (allowing employment to be restricted in certain occupations or trades or granting other advantages to members of a particular union). The supervisory bodies have refused to examine these allegations on the grounds that it was agreed, during the discussions which led up to the adoption of Conventions Nos. 87 and 98, that these instruments could in no way be interpreted as authorising or prohibiting union security clauses and that these questions were to be settled in accordance with national law and practice. The situation would be altogether different – and incompatible with the principles of freedom of association – if union security clauses were not based on an agreement, even tacit, between the parties concerned but were imposed by law.

Freedom of association and human rights

Apart from the difficulties regularly encountered by governments in implementing principles of freedom of association, the supervisory bodies were quick to perceive that freedom of association can develop truly only where there is general respect for civil liberties. This was strongly underlined by the International Labour Conference in 1970 in the resolution it adopted on trade union rights and their relation to civil liberties.

Some of these liberties are vital for the exercise of trade union rights, the most obvious being guarantees against summary execution, ill-treatment and arbitrary arrest. It should be noted that the Committee on Freedom of Association has received a considerable number of complaints concerning arbitrary arrests. It has considered that while trade unionists enjoy no immunity from due process of law, they are entitled to a prompt trial in accordance with normal judicial procedure and should not be harassed on account of regular trade union activities.

Other guarantees necessary to ensure trade union rights include the inviolability of trade union premises (apart from lawful searches with a court warrant) and of trade union correspondence and conversations, freedom of movement and the right of assembly (public and private).¹⁷ Special problems have arisen in this connection in plantations when workers live on the estate and in the houses of large landowners; the Committee has stressed that trade union leaders should have access to these estates, notwithstanding the fact that they are private, and that workers should be able to organise meetings there.

Finally, freedom of expression, freedom of the trade union press and freedom of speech obviously are also essential.

Conclusion

As mentioned earlier, the recommendations of the Committee on Freedom of Association, as well as those of the other ILO supervisory bodies, are not binding. The Organisation can nevertheless pride itself on having furthered the implementation of international labour standards in many cases, especially in the field of trade union rights. These rights, needless to say, are violated practically every day, and situations sometimes arise where no real way out, no overall solution, seems forthcoming. Yet even in such cases some genuine – if limited – progress has often been made. Moreover, these cases should not lead us to overlook all those where arbitrarily arrested trade unionists or employers' representatives have been released (or, if accused of activities unrelated to their representative functions, have been given a fair trial), where workers dismissed as a result of reprisals have been reinstated in their undertaking, where legislation incompatible with the Conventions on freedom of association has been amended, or where, more generally, dialogue has been resumed between the government and employers' and workers' organisations.

The ILO owes these successes to a carefully thought out system of supervision that has been gradually built up over the years. In this article we have tried to highlight a number of salient features. We have described the balance maintained between the technical bodies, whose members are chosen for their independence and competence, and the representative bodies on which Government, Employer and Worker members sit (the participation of these last two groups has undeniably left a deep imprint on the supervisory procedures and strengthened their effectiveness). We have described the constant concern to carry out an objective and technically accurate analysis of each case in the light of ILO standards, and to make comments designed to encourage dialogue and co-operation rather than to criticise and condemn. We have described, finally, the combined action of diplomacy and sanctions, at least moral sanctions: on the one hand, the contacts made with the government and the employers' and workers' organisations in the country concerned and the conciliation efforts to find an acceptable solution consistent with international labour standards; on the other hand, the publicity given to the reports drawn up by the supervisory bodies and their discussion at international meetings, as well as other measures which, as we have seen, may induce the government to take the desired action.

Of course much remains to be done to ensure that the rights of employers and workers and their organisations are universally respected; but then this holds true for all rights. At the same time a look backwards shows how much ground has been covered so far; the achievements we have described above would have seemed Utopian at the beginning of the century; and attempts between the two World Wars to work out international regulations on freedom of association failed. International protection now exists in this field. Over and above the specific problems they attempt to resolve, the bodies responsible for

that protection seek to enable employers' and workers' organisations to take a free and active part in social dialogue and to contribute to the answers that each State must find to the great economic and social challenges facing it today, which may be even greater tomorrow.

Notes

¹ As they were called by P. Juvigny in: "The legal protection of human rights at the international level", in *International Social Science Journal* (Paris, UNESCO), 1966, Vol. XVIII, No. 1, p. 59.

² Other, more recent instruments that deal with specific aspects of freedom of association include: the Workers' Representatives Convention (No. 135) and Recommendation (No. 143) of 1971; the Rural Workers' Organisations Convention (No. 141) and Recommendation (No. 149) of 1975; the Labour Relations (Public Service) Convention (No. 151) and Recommendation (No. 159) of 1978; and the Collective Bargaining Convention (No. 154) and Recommendation (No. 163) of 1981.

³ ILO: *The trade union situation and industrial relations in Hungary*; and *The trade union situation and industrial relations in Norway* (Geneva, 1984).

⁴ On this point, see A. J. Pouyat: "The ILO's freedom of association standards and machinery: A summing up", in *International Labour Review*, May-June 1982, pp. 287-302.

⁵ See Nicolas Valticos: *Droit international du travail*, Vol. 8 of G. H. Camerlynck (ed.): *Traité de droit du travail* (Paris, Dalloz, 2nd ed., 1983).

⁶ See, in particular, E. A. Landy: *The effectiveness of international supervision. Thirty years of ILO experience* (London, Stevens and Sons, 1966); and ILO: *The impact of international labour Conventions and Recommendations* (Geneva, 1976).

⁷ See articles 24 to 34 of the ILO Constitution. For an in-depth analysis of these procedures, see K. T. Samson: "Procedural law", in B. G. Ramcharan (ed.): *International law and fact-finding in the field of human rights* (The Hague, Martinus Nijhoff, 1982), pp. 41-63.

⁸ For recent statistics, see ILO: *Report of the Director-General*, International Labour Conference, 70th Session, Geneva, 1984, p. 41.

⁹ Nicolas Valticos: "Les méthodes de la protection internationale de la liberté syndicale", in *Recueil des cours*, Académie de droit international (Leiden, A. W. Sijthoff, 1976), 1975, Vol. I, p. 85.

¹⁰ On the legal bases of this system, see *ibid.*, p. 95.

¹¹ The same rules apply to employers' associations.

¹² On this point, see Nicolas Valticos: "Une nouvelle forme d'action internationale: Les 'contacts directs' de l'OIT en matière de l'application de conventions et de liberté syndicale", in *Annuaire français de droit international* (Paris, Editions du Centre national de la recherche scientifique), 1981, pp. 477-489.

¹³ 234th Report of the Committee on Freedom of Association, doc. GB.226/5/18, para. 27.

¹⁴ See G. von Potobsky: "Protection of trade union rights: Twenty years' work by the Committee on Freedom of Association", in *International Labour Review*, Jan. 1972, p. 82.

¹⁵ For a systematic review of these principles, see ILO: *Freedom of association. Digest of decisions of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva, 2nd ed., 1976); *idem: Freedom of association and collective bargaining. General survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4 B), International Labour Conference, 69th Session, Geneva, 1983.

¹⁶ For a detailed study on the subject, see Alfred Pankert: "Government influence on wage bargaining: The limits set by international labour standards", in *International Labour Review*, Sep.-Oct. 1983, pp. 579-591.

¹⁷ Jean-Michel Servais: "Freedom of association and the inviolability of trade union premises and communications", in *International Labour Review*, Mar.-Apr. 1980, pp. 217-227.