

31 October 2023

Director General
International Labour Organisation
Route de Morillons 4
Geneva

By email: normes@ilo.org

Dear Director General

The Right to Strike

I am replying to your letter of 11 October, inviting governments and their social partners to comment on the employers' proposal to put a standard setting item on the right to strike on the agenda of the International Labour Conference.

Business New Zealand supports the employers' group proposal as it is deeply concerned at the prospect of the issue of the right to strike being referred to the International Court of Justice. We understand this prospect is being discussed at a special sitting of the present meeting of the ILO Governing Body.

Our concern is twofold. First, there is no evidence to support the view expressed by the Committee of Experts and the workers group that a right to strike may be read into the Freedom of Association and Right to Organise Convention 1948, (C87). Our reasons for this view are set out in the attached article.

Second, and of vital importance, a referral of this issue to the ICJ effectively undermines the entire raison d'être of the ILO, i.e., to be a tripartite forum in which labour standards are developed and agreed. It is clear to all that no explicit guidance agreed by the tripartite constituents of the ILO exists at present. We have only the views of the Committee of Experts in this regard. And, as is clear from the standard introduction to the Committee's annual report, its views are not binding. Nor in fact is an advisory opinion of the ICJ binding in respect of a matter referred to it under at Article 37(1) of the ILO Constitution.

An issue as important as the right to strike is a matter that should be dealt with by the full constituency of the ILO. Referral to the ICJ effectively denies that opportunity, thus undermining the mechanism at the heart of international labour standard setting,

the International Labour Conference. Discussing it in a "Committee of the Whole" format where non-Governing Body members cannot be physically present as they would at the International Labour Conference is inappropriate, however expedient it may seem.

Standard setting is the most obvious, appropriate and logical step towards defining authoritative ILO rules on the right to strike. An agreed standard would resolve the dispute over interpretation of C87. An advisory opinion of the ICJ is highly unlikely to do that, thus exacerbating existing differences.

Standard-setting is linked to the ILO's core mandate and reflects the ILO's core values of tripartism and social dialogue. Only standard-setting will ensure that all ILO constituents can actively engage in the process, that any solution achieved is based on consensus or at least a broad majority, and that any outcome adopted is universally relevant and accepted.

Adoption of a legally binding instrument such as a Protocol to C87 on the right to strike, or more broadly on industrial action, would adequately determine the scope and limits of the right to strike at the international level, and fill the regulatory gap that currently exists in the ILO body of standards.

A Protocol would also make clear it that rules agreed by the full tripartite constituency on the right to strike are contained only in the Protocol, and not in C87 (or any other convention).

Ultimately there is more at stake here than resolving the issue of the right to strike. How this issue is dealt with will affect the very integrity of the ILO system. Please take this into account.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paul Mackay', with a long, sweeping horizontal line extending to the right.

Paul Mackay
Manager Employment Relations Policy
BusinessNZ

The Right to Strike

By Paul Mackay¹

INTRODUCTION

In its 2012 General Survey Report *“Giving Globalisation a Human Face”* on Fundamental Conventions² (the 2012 General Survey), the International Labour Organisation’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) argued that the Freedom of Association and Protection of the Right to Organise Convention 1948 (C87) embodies a right for workers to strike over workplace, economic and social issues. This is despite the fact that C87 makes no explicit provision for a right to strike. Indeed, it contains no reference to strikes whatsoever.³

“...C87 does not mention the word strike let alone provide an express guarantee of any right to strike.”

The proposition that a general right exists for workers to walk off the job to raise or support concerns not related to their work and workplace is of enormous concern to employers globally. It raises prospects of whole industries, even the national economy, being brought to a standstill while workers protest against proposals from or initiatives by government or other quarters.

This is exactly why many countries’ laws restrict the right to strike to matters relating to the workplace(s) in which the motivating dispute exists. If the CEACR’s view was to be accepted, most of the ILO’s 187 member countries would find their current laws to be non-compliant with the CEACR’s interpretation and those which have ratified C87 would be legally obliged to change their laws to comply.

“...the right to strike is not supported by C87...if an international reference point for the right to strike were to be established it would be more appropriately aligned to conventions governing collective bargaining than to C87”

It is also why the employer members of the International Labour Organisation (ILO) have resisted this proposition since it was first raised in the late 1940s.

Unsurprisingly then, the 2012 General Survey brought employers’ concerns to a head and the ILO’s supervisory machinery to a standstill. Since

2012, extensive efforts have been made by the government, union and employer members of the ILO Committee on Application of Standards (“CAS”) to reconcile their differing views. To date these efforts have not required recourse to the International Court of Justice (“ICJ”), which is the international judicial body with the ultimate

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² See Appendix 2

³ https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

authority to resolve this matter and all issues of interpretation of ILO labour conventions⁴.

This article examines the source of the right to strike, and the nature of strikes. It concludes that the right to strike is not supported by C87. Instead, it finds strong support for the idea that the right to strike is an issue that has deliberately been left for individual countries to regulate. It also argues that if an international reference point for the right to strike were to be established it would be more appropriately aligned to conventions governing collective bargaining than to C87.

Next it looks at whether a right to strike can in fact be implied into conventions governing collective bargaining and finds that this right was deliberately excluded from such conventions also.

Finally, it discusses whether or not there is an urgent (or any) need for a specific global labour standard on the right to strike and concludes that there is not.

THE MANDATE OF THE CEACR

The CEACR was established in 1926 in response to the rapidly growing volume of member reports that needed to be examined each year. As far as its terms of reference were concerned, the CEACR was quite explicit to have no judicial capacity, nor would it be competent to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than another.

Reinforcing this, Article 37 of the ILO Constitution provides in essence that a judgement or advisory opinion of the ICJ will be a binding interpretation of the ILO Constitution and ILO Conventions. Hence the CEACR's findings and interpretations cannot be binding. This is reflected in its statement of mandate, which was last reformulated by the ILO's Governing Body in 1947, and which is to be found in the first paragraphs of each of its annual reports. The most recent manifestation is that in the report presented to the 108th ILC in 2019; viz.

The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for more than 90 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.

⁴ ILO Conventions are international treaties that are legally binding on the countries that ratify them. Ratification requires the country concerned to amend relevant domestic legislation to be consistent with the ratified convention.

However, since its inception, the CEACR has attempted to widen its mandate. For instance, in 1990, the CEACR suggested that its interpretations were binding so long as the ICJ remained silent. Perhaps somewhat cynically, this took advantage of the fact that, apart from one case in 1932, no use had (or has) ever been made of the complicated, lengthy and expensive proceedings necessary to take a case before the ICJ⁵. Employers in the CAS reacted strongly against this proposition at the 1990 ILC. The outcome was a resumption of references to the original mandate. A similar attempt was made in 1994, with the same result.

The CEACR's most recent attempt to widen its mandate is the subject of this article; i.e., the 2012 General Survey.

Taking a case to the ICJ is a complex process because the seeking of advisory opinions from the ICJ may only be instituted by UN agencies (e.g. the ILO), which in turn must meet their specific constitutional requirements before doing so. In the case of the ILO, Article 37(1) of the ILO Constitution permits the ILO to submit an issue of interpretation of a convention directly to the ICJ and Article 37(2) gives the ILO Governing Body the authority to set up tribunals to consider issues of interpretation of conventions, which in turn are bound by any relevant findings of the ICJ.

Setting up of a Tribunal must be approved by the ILC which means it can take years.⁶ Taking a case to the ICJ therefore is a position of last resort.

Notwithstanding its explicit lack of a mandate to authoritatively interpret ILO Conventions, the CEACR's views, as the statement of mandate above suggests, do have persuasive value and cannot be summarily dismissed. In that context it is necessary to examine its views and test them, which is the purpose of this article.

SOURCE OF THE RIGHT TO STRIKE

In the 2012 General Survey, the CEACR opened its argument that C87 contains a right to strike with the statement that it was

"mainly on the basis of Article 3 of the Convention which sets out the right of workers to organise their activities and to formulate their programmes, and Article 10..., that a number of principles relating to the right to strike were progressively developed".

Then it stated that the absence of specific provisions establishing a right to strike did not prevent such a right from being read into C87, stating that

"the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in light of its object and purpose. While the Committee considers that preparatory work is an important supplementary

⁵ Advisory opinions from the ICJ are technically non-binding in themselves, however Article 37(2) of the ILO Constitution makes them binding in cases relating to interpretation of ILO conventions.

⁶ Article 37 (2) - Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.

⁷ Paragraph 117 of the General Survey

interpretative source ...it may yield to the other interpretative factors, in particular, in this specific case to the subsequent practice over a period of 52 years (see articles 31 and 32 of the Vienna Convention on the Law of Treaties).⁸

Next it said,

“the right to strike was indeed first asserted⁹ as a basic principle of freedom of association by the tripartite Committee on Freedom of Association in 1952...Moreover, the 1959 General Survey, in which the Committee [on the Applications of Convention and Recommendations] first raised its consideration in respect of the right to strike in relation to the Convention, was fully discussed by the Conference Committee on the Application of Standards without any objection from any of the constituents.”¹⁰

Somewhat confusingly, the CEACR then

“highlights that the right to strike is broadly referred to in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments¹¹, which justifies the Committee’s interventions on the issue [emphasis added].”¹²

This statement is confusing because it is out of context with the preceding two statements. The fact that many, if not most, countries have enshrined a right to strike, together with restrictions on that right, is not determinative of the proposition that C87 is the source of that right. To the contrary, it is far more supportive of a view that countries have rightly found it necessary to regulate this important issue in the face of a lack of clear and explicit guidance from a globally authoritative source, e.g. C87. Indeed, it is illogical to cite national practice as a basis for interpreting an international document as providing an otherwise unstated right.

“...it is illogical to cite national practice as a basis for interpreting an international document as providing an otherwise unstated right”

Finally, the CEACR said,

“the affirmation of the right to strike by the supervisory bodies lies within the broader framework of the recognition of this right at the international level”¹³

which, also confusingly, appears to conflict with the opening statement that it was

“mainly on the basis of Article 3 of the Convention which sets out the right of workers to organise their activities and to formulate their programmes, and Article 10..., that

⁸ Paragraph 118 of the 2012 General Survey

⁹ In fact, despite being “asserted”, the right to strike was deliberately not recognised in Convention 87 (or 98) because during the cold war of the late 40s, 50s and 60s western governments viewed it as a socio-economic right (the forte of communist countries) while unions feared that entrenching the right would have meant setting limitations on it. The issue was deliberately left “at large” to the great relief of both sides.

¹⁰ Paragraph 118 of the 2012 General Survey

¹¹ Paragraph 35 of the 2012 General Survey

¹² Paragraph 119 of the 2012 General Survey

¹³ Paragraph 120 of the 2012 General Survey

a number of principles relating to the right to strike were progressively developed.”

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Overall, in setting out its reasoning for the existence of a right to strike as part of an international treaty, the CEACR gives apparently contradictory primacy to both C87 and international practice.

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION 1948 (No 87) - Articles 3 and 10

“however Article 3 is interpreted, it must apply equally to both employers’ and workers’ organisations and their activities”

Article 3 of C87 states:

1. Workers’ and employers’ organisations [emphasis added] shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 10 of C87 states:

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

Article 3(1) relates unequivocally to the right of workers *and employers* to set up *organisations* and for those organisations to be able to plan and organise their programmes and activities free from official interference.

However, the CEACR chose a limited focus on workers activities only when it said that Article 3,

*“...sets out the right of workers to organise their activities and to formulate their programmes...”*¹⁵

Crucially, the CEACR omitted any reference to organisations or employers.

On face value, Article 3 cannot extend to individual workers and employers, other than with respect to their right to form organisations, because the rights in Article 3 are conferred upon organisations. Article 10 emphasises Article 3’s focus on “organisations” by defining that term.

The emphasis on organisations is significant, because workers’ organisations per se cannot go on strike; only workers employed by employers can strike, even if those workers are also members of a workers’ organisation. Likewise, employers’ organisations cannot lock out workers but the employers of those workers can.

¹⁴ Paragraph 117 of the 2012 General Survey

¹⁵ Paragraph 117 of the 2012 General Survey

The injunction in Article 3(2) that the public authorities “*refrain from interference which would restrict this right or impede the lawful exercise thereof*” qualifies the right in Article 3(1) to establish workers’ and employers’ organisations but does not expand it.

Clearly, there are no explicit grounds on which the rights conferred by Article 3, permitting workers’ *and employers’* organisations to form and operate, can underpin a right to strike by workers, whether or not they are members of workers’ organisations. A right to strike therefore can only be inferred from Article 3 through the use of wider rules of interpretation.

However, wider interpretation is made difficult by the fact that Article 3 relates equally to employers, to whom the right to strike does not apply. Here it is notable that the CEACR made no reference to employers at all when referencing Article 3 let alone addressing the right of employers to lock out (the corollary of the right to strike).

Nothing in Article 3 indicates that the right of worker and employer *organisations* to “organise their activities” or “formulate their programmes” can be extrapolated to create any other rights, let alone the right to strike, restricted or otherwise. The lack of any mention of employers’ right to lock out is discussed in more detail later in this article, but it is immediately apparent that, however Article 3 is interpreted, it must apply *equally* to both employers’ and workers’ organisations and those organisations’ activities. It does not explicitly apply to the activities of workers and employers per se. In not considering the application of C87 to employers, and in ignoring the fact that the rights in C87 Article 3 are conferred upon organisations, the CEACR adopted an unbalanced interpretation of C87.

For its part, Article 10 confers no jurisdiction whatsoever; it merely defines the meaning of the term “organisation”, from which extrapolation of a right to strike is unsustainable.

Consequently, there are weak, if not meritless, grounds for relying on Articles 3 and 10 of C87 to support the implication of a right to strike of any nature or scope into C87.

INTERNATIONAL PRACTICE

Notwithstanding its citation of C87 Articles 3 and 10 as, at least partly, authoritative, the CEACR relied more on external indicators and custom and practice to interpret a right to strike into C87. It said,

*“the affirmation of the right to strike[...] lies within a broader framework of the recognition of this right at the international level, particularly in the International Covenant on Economic, Social and Cultural Rights of the United Nations (Article 8, paragraph 1(d))”*¹⁶

The International Covenant on Economic Social and Cultural Rights of the United Nations

Of the several international instruments cited by the CEACR as supporting the existence of a right to strike¹⁷ only the International Covenant on Economic, Social and

¹⁶ **8(1)** - The States Parties to the present Covenant undertake to ensure:(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

¹⁷ Paragraph 35 of the 2012 General Survey. See also Appendix 1

Cultural Rights of the United Nations may be regarded as being global in scope. Inconveniently for the CEACR's argument, Article 8(1)(d) of the Covenant requires the exercise of the right to strike to conform with the laws of the country concerned. The only constraint on the restrictions countries may place on strikes in their national laws is imposed by Covenant Article 8(3)¹⁸ which prohibits nations that have ratified C87 from establishing laws that contravene C87's guarantees.

However, the CEACR did not cite Covenant Article 8(3) in the 2012 General Survey, possibly because C87 does not mention the word strike let alone provide an express guarantee of any right to strike. Nor did the CEACR cite Article 8 of C87¹⁹, which is couched in exactly the same terms as Covenant Article 8, i.e. that the exercise of the rights in C87 is subject to national laws which in turn must protect C87's guarantees.

A "guarantee" is a "*promise or assurance, especially one in writing, that something is of specified quality, content, benefit, etc.*"²⁰ Since C87 does not provide any written (or any) promises or assurances of a right to strike, and since all other international instruments that do provide a right to strike²¹ require exercise of that right to conform to national laws and practices, there is arguably no legal basis for the CEACR (or the ICJ for that matter) to find national restrictions on the right to strike to be in breach of C87. In other words, since C87 provides no guarantees of a right to strike, national laws are authoritative in governing the right to strike.

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This left the CEACR with only custom and practice and/or surrounding circumstances to sustain its argument that international practice justified interpretation of a right to strike into C87. It attempted to do just that through its citation of the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties

The apparent heart of the CEACR's interpretation of C87 as providing a right to strike is that "*subsequent practice over a period of 52 years*"²² justifies such an interpretation. In support of its argument, the CEACR cited Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which provide:

¹⁸ **International Covenant on Economic, Social and Cultural Rights of the United Nations Covenant Article 8(3)** - Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

¹⁹ **C87 Article 8(1)** In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land. (2) The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

²⁰ [www.http://Dictionary.com](http://Dictionary.com). This definition would cover outcomes as well

²¹ Paragraph 35 of the 2013 General Survey

²² Paragraph 118 of the 2012 General Survey

Article 31 - General rule of interpretation

“The preparatory work and records of the discussion that led to the adoption of C87 both support the view that the omission of a right to strike was deliberate.”

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

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

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

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

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

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

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

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

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

Article 32 - Supplementary means of interpretation

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

(a) leaves the meaning ambiguous or obscure; or

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

Custom and practice

Article 31 of the Vienna Convention is couched in terms familiar to most Common and Roman law jurisdictions. In simple terms it says that proper interpretation is based in the first instance on the plain and ordinary meaning of the words in the treaty. Only if the meaning is unclear is it permissible to look beyond the document to ascertain a complete interpretation.

Article 31 permits changes to interpretation to occur over time, for instance through custom and practice becoming more of a reality than the original words of the treaty would otherwise suggest. Article 31 provides that a departure from the plain meaning of the words of the treaty is possible, inter alia, because of “*any subsequent practice in the application of the treaty which establishes the agreement [emphasis added] of the parties regarding its interpretation.*”

The CEACR argued that the ILO Committee on the Application of Standards (CAS)²³ discussion of the 1959 General Survey covered the issue of the right to strike “*without*

²³ One of the standing committees of the annual International Labour Conference, the CAS is the tripartite body responsible for monitoring and supervising international labour standards. It is analogous to a parliamentary select committee. The CAS is the body that calls countries to account for failing to meet the standards they have committed themselves to

any objection from any of the constituents,” inferring that the five decades since this one event offered a sound basis for establishing a custom and practice interpretation under Article 31. However, and to the contrary, there is strong evidence that there has been no agreement on the issue since the right to strike was first discussed in 1948.

Before 1959 and since, employers objected strenuously to the view that C87 provides a right to strike, objections all recorded in the proceedings of successive International Labour Conferences. Indeed, the CEACR devoted a whole page of the 2012 General Survey to recalling employers’ objections to the notion that a right to strike could be read into C87.²⁴

Surrounding circumstances and intent of the parties

Without support from C87 Articles 3 and 10, the International Covenant on Economic, Social and Cultural Rights or Article 31 of the Vienna Convention the CEACR was left with only Article 32 of the Vienna Convention to justify implying a right to strike into C87. Article 32 is available in circumstances where an interpretation based on Article 31 remains unclear. Whereas Article 31 permits interpretations based on custom and practice, Article 32 permits the use of extraneous information to validate the prevailing circumstances and the parties’ intent leading up to the establishment of the convention.

However, the CEACR did not rely heavily on the preparatory work perspective. It said that while

*“preparatory work is an important supplementary source... it may yield to the other interpretative factors, in particular, in this specific case to the subsequent practice over a period of 52 years...”*²⁵

The CEACR’s apparent reluctance to rely on Article 32 may have been because it clearly does not aid a view that a right to strike can be implied into C87. The preparatory work and records of the discussion that led to the adoption of C87 both support the view that the omission of a right to strike was deliberate.

For example, the CEACR recognised in the 1994 General Survey that the right to strike was referred to several times in the preparatory work for C87, but that no explicit proposals for specific regulation of the right to strike were put forwards during the relevant debates²⁶.

Furthermore, the preparatory report prepared by the ILO for the debate on the (then) proposed C87 expressly excluded regulation of the right to strike by stating, in response to the statements of several governments, that;

“the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances it has appeared to the Office to be preferable not to include a

through their ratification of ILO Conventions. However, issues of interpretation of conventions are outside the mandate of the CAS; this power is vested via Article 37 of the ILO Constitution in the International Court of Justice (ICJ), or in an internal tribunal established specifically for the purpose by the ILC.

²⁴ Page 47 of the 2012 General Survey.

²⁵ Paragraph 118 of the 2012 General Survey

²⁶ ILC, 81st Session, 1994, Report III (Part 4B), para 142.

provision on this point in the proposed Convention concerning freedom of association.”²⁷

There was a strong political underpinning to this position. During the cold war period (mid 1940s to the late 80s) western governments viewed strikes as personifying a socialist perspective while unions feared that codifying the right to strike would have meant setting limitations on it. For all the stated reasons, the issue of the right to strike was deliberately left “at large”, to the great relief of both sides.

WHAT IS A STRIKE?

Having discussed its justification for implying a right to strike into C87, the CEACR examined the scope of that right, stating that,

“The Committee considers that strikes relating to the Government’s economic and social policies, including general strikes, are legitimate and therefore should not be regarded as purely political strikes, which are not covered by the Convention.”²⁸

In asserting that political strikes are not covered by C87, the CEACR distinguished political strikes from other strikes, thereby implying that all non-political strikes are legal strikes (notwithstanding the fact that C87 is silent on any form of strikes).

Put another way, the CEACR’s view that strikes over economic and social issues are not political placed such strikes within the ambit of the CEACR’s interpretation of C87 as embodying a general right to strike. This is less a matter of law than of “social engineering”, in part because, historically, the majority of general strikes have occurred over political or politically sourced issues. In any event, the CEACR is on shaky ground in interpreting a document silent on the right to strike on any ground as permitting strike action on specified grounds.

At the broadest level, the CEACR saw strikes as a basic right “*which must be enjoyed by workers*”.²⁹ But, rights have real meaning only when considered in the context in which real events and situations give life to the right. If the right to strike is indeed a fundamental or basic right, it is at the practical level that it must be examined.

The practical level

The CEACR, in distinguishing between political (unlawful) and other (lawful) strikes in an international *labour* standard, implicitly recognised that strikes involve a withdrawal of labour.

“...the CEACR is on shaky ground in interpreting a document silent on the right to strike on any ground as permitting strike action on specified grounds.”

By extension, since withdrawal of labour requires a workplace from which to withdraw, it can be inferred that strikes are workplace issues covered by international labour

²⁷ ILC, 31st Session, 1948, Report VII, p87

²⁸ Paragraph 120 of the 2012 General Survey

²⁹ Paragraph 122 of the 2012 General Survey

standards, whereas political strikes and, arguably, strikes over economic and social policies, are not.

While workers join together for the general purposes of protecting and advancing their collective employment interests, they typically join a particular union or workers' association because that organisation covers their work, i.e. the nature of their work is the common denominator between workers who associate with each other for the general purpose of collective protection.

Without the workers' work as the context, any discussion of freedom of association can relate only to the general democratic right of citizens to associate with one another. It follows that it is the worker's work that creates the practical context of freedom of association for any given worker.

"...it is the worker's work that creates the practical context of freedom of association for any given worker."

Thus, if, as argued by the CEACR, the right to strike is a corollary of the right to freedom of association³⁰ and, as argued above by this author, the worker's work is the practical context for the worker's right to freedom of association, then the worker's work must also be the practical context for the right to strike. Add to this the argument that, as strikes are inextricably linked to the work the worker does, strikes are similarly linked to where the worker works.

Put more simply, strikes are workplace issues not wider issues. This proposition is important because it clearly undermines the CEACR's attempt to broaden interpretation of the right to strike beyond the workplace (e.g., sympathy strikes and strikes on economic or social grounds).

Furthermore, the CEACR's view that C87 permits workers strikes on economic and social grounds is inconsistent with the facts that Article 3 of C87 gives equal rights to workers' and employers' organisations (but not necessarily to workers and employers per se), and that an employer can only exercise the right to lock out (the corollary of the right to strike) in the workplace context. Employers cannot lock their workers out of a public street or their homes, only from the workplace. Similarly, an employer cannot lock out employees because the employer feels strongly about economic and social issues created by governments.

"...since withdrawal of labour requires a workplace from which to withdraw, it can be inferred that strikes are workplace issues covered by international labour standards, whereas political strikes and, arguably, strikes over economic and social policies, are not."

³⁰ This the basic premise on which the CEACR has articulated its views.

Overall, none of the grounds cited by the CEACR as underpinning its belief that a right to strike can be implied into C87 has any real merit.

WHEREIN REALLY LIES THE RIGHT TO STRIKE?

Freedom of association, in the context of C87 (particularly Article 3), is the right of workers and employers to associate, *each with their own kind*, together in organisations, federations or confederations for purposes including solidarity and mutual protection. Freedom of association carries with it the corollary right to *not associate* with one's own kind. A person or organisation should be free to not associate in the first place or, having associated, to disassociate.

However, if a strike is a withdrawal of labour from the workplace and, as discussed earlier, neither international custom and practice nor Articles 3 and 10 of C87 support a view that C87 provides for a right to strike, the CEACR's basic premise that the right to strike is derived from the principle of freedom of association (which transcends workplaces) must itself be open to question.

"...the CEACR's views on the right to strike are more consistent with the principles of the Right to Organise and Collective Bargaining Convention 1949 (C98) than they are with C87."

The vast majority of workplace strikes are, in fact, caused by the refusal of an employer to agree to worker demands for improved conditions of work, in turn most commonly linked to collective bargaining. Arguably, the CEACR's views on the right to strike are more consistent with the principles of the Right to Organise and Collective Bargaining Convention 1949 (C98) than they are with C87. This being true, the CEACR's claimed nexus between freedom of association and the

right to strike is certainly weakened (and arguably broken).

Indeed, this appears to be the view of the parties to most of the other international instruments cited by the CEACR as containing a right to strike; for instance,

Charter of the Organisation of American States Article 45 (c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defence and promotion of their interests, including the right to collective bargaining and the workers' right to strike, ..., all in accordance with applicable laws;

Charter of Fundamental Rights of the European Union Article 28 - Right of collective bargaining and action - Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

European Social Charter and European Social Charter (Revised) Article 6 – The right to bargain collectively - With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ...4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

In each of these cases the right to strike is clearly associated with the ability to bargain collectively and subject to national laws. No examples cited by the CEACR³¹ (see Appendix 1) contain references linking the right to strike to freedom of association.

“...the CEACR sees collective bargaining as a means of achieving negotiated periods of peace in an otherwise permanent state of class warfare.”

The association of the right to strike with collective bargaining was in fact raised in the discussions leading up to the adoption of the Right to Organise and Collective Bargaining Convention 1949 (C98). Two specific attempts were made at the 32nd ILC in 1949 to introduce a right to strike into the proposed C98. Both were rejected and it was noted in the record of proceedings that;

*“The Chairman ruled that [these amendments were] not receivable, on the ground that the question of the right to strike was not covered by the proposed text, and that its consideration should therefore be deferred until the Conference took up Item V of its agenda relating, inter alia, to the question of conciliation and arbitration.”*³²

The question of conciliation and arbitration was ultimately covered by the Voluntary Conciliation and Arbitration Recommendation 1951 (R92). Paragraph 4 of R92 states;

“If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress.”

It is quite apparent here that the reference to strikes and lockouts in R92 is neutral in character and does not regulate the right to strike per se.

Notwithstanding the validity of any argument linking the right to strike to either freedom of association or collective bargaining, it is clear that attempts to create explicit links were defeated in the past, leaving the question at large. This remains the case today.

The 32nd ILC in 1949 was in fact the last attempt to introduce an explicit right to strike into any ILO labour standard. All subsequent discussion has focused on the attempts by the CEACR to imply such a right into C87.

Strike or Protest?

Taking all the above into account, the CEACR seems to have confused the right to *strike* with the general right to *protest*, one of the most precious rights in any democracy. Supporting this view is the CEACR’s statement that;

*“trade unions and employers’ organisations responsible for defending socio-economic and occupational interests should be able to use, respectively, strike action or protest action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members.”*³³

³¹ Paragraph 35 of the 2012 General Survey

³² ILC, 32nd Session, 1949, Record of Proceedings, p468

³³ Paragraph 124 of the 2012 General Survey

As mentioned earlier, the corollary of the right to strike is an employers' ability to lock employees out. Protests per se are not part of an employer's armoury in terms of bringing pressure to bear on employees. It is unheard of, nor is there supporting logic, for employers to protest government actions or policies by locking out their employees. This contrasts starkly with the CEACR's belief that employees should be able to abandon their employers as part of a protest against government actions or policies.

"...the CEACR seems to have confused the right to strike with the general right to protest."

Socio-economic issues transcend workplaces and may indeed have nothing to do with conditions of work. Protest is the democratically available response to such issues, whereas strikes, by definition, connote the withdrawal of labour from a workplace.

In using these terms in the same breath, the CEACR seemingly adopted an ideological perspective of workers' rights rather than objectively examining the right to strike in the context of the world of work and the *labour* standards that govern it.

An indication of this perspective may be found in the CEACR's statement that those systems in which;

"...while there is disagreement on whether or not there is already (via C87), or needs to be, a global authority for the right to strike, most countries recognise that it is a right (but one that needs to be regulated to avoid unfettered disruption of the economy)."

"...agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited... are compatible with the Convention."³⁴

In other words, the CEACR arguably saw collective bargaining as a means of achieving negotiated periods of peace in an otherwise permanent state of class warfare. Moreover, and in clear contrast to the CEACR's view that the right to strike is a corollary of freedom of association, this statement also clearly links the permitted prohibition of strikes or lockouts to an absence of collective bargaining rather than to an absence of freedom of association. Thus, and ironically, the CEACR's statement further strengthens a view that the right to strike is aligned more closely to the practice of collective bargaining than to the concept of freedom of association.³⁵

Sympathy strikes

³⁴ Paragraph 142 of the 2012 General Survey

³⁵And therefore regulated to the national level.

Having espoused the right to the broadest form of protest for workers (general strikes), the CEACR, paradoxically, also supported the notion of sympathy strikes.³⁶

“With regard to so called “sympathy” strikes, the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalisation characterised by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful.”³⁷

The CEACR’s support here is paradoxical because, in espousing sympathy strikes, the experts tacitly supported the workplace context of strikes (i.e. workers leaving their workplaces) rather than the broader civil right to protest exercised outside the workplace context.

Restrictions and guarantees around the right to strike

The idea that the right to strike is more appropriately associated with collective bargaining than with freedom of association is still further strengthened by the CEACR’s discussion of permitted restrictions and compensatory guarantees.

Despite implying a right to strike into C87 in the most general terms, the CEACR then recognised that the right to strike may be constrained; e.g.,

“States may restrict or prohibit the right to strike of public servants ‘exercising authority in the name of the state.’”³⁸

The important point here is that the ability to restrict public servants’ right to strike is *not* derived from the deliberations of the CEACR, or anywhere else for that matter. It is in fact sourced directly from Article 6 of the Right to Organise and Collective Bargaining Convention 1949 (C98). This permits states to exclude members of the public services engaged in the administration of the state from the right to bargain collectively, because C98 does not cover them.³⁹

“The absence of a right to strike for affected public servants therefore stems directly from the nationally determined absence of their right to bargain collectively, not from any restriction on freedom of association.”

The absence of a right to strike for affected public servants therefore stems directly from the nationally determined restriction of their right to bargain collectively, not from any internationally defined restriction on freedom of association.

³⁶ Sympathy strikes may be defined as the withdrawal of labour by workers at a workplace or workplaces not involved in the dispute causing the strike, in solidarity with the striking workers at the workplace(s) directly affected by the dispute.

³⁷ Paragraph 125 of the 2012 General Survey

³⁸ Paragraph 129 of the 2012 General Survey

³⁹ C98 Article 6- “This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.”

This is not the only permitted exclusion. Inexplicably, the CEACR did not refer to the fact that C87 Article 9 leaves it to member states to determine the extent to which C87 applies to their armed services and police. An identical provision is made in Article 5 of C98.

This all strengthens the idea that exercise of the right to strike is a matter for national regulation. C98 explicitly leaves it to countries to determine for themselves which, if any, of their public servants will be excluded from the right to bargain collectively.

At the same time the CEACR was open to the right to strike being restricted more broadly, viz;

*“The second acceptable restriction on strikes concerns essential services. The Committee considers that essential services, for the purposes of restricting or prohibiting the right to strike, are only those ‘the interruption of which would endanger the life, personal safety or health of the whole of [sic] part of the population’. This concept is not absolute...”*⁴⁰

In other words, the CEACR accepted the right of member states to restrict the right to strike in circumstances where striking would endanger the lives, safety or health of the *whole or part* of the population. This of itself would suggest that in practice, only member states are in a position to determine the extent and nature of a right to strike applicable to workers in their country.

Having opined that the right of member states to restrict strikes exists for, at least some, essential services, the CEACR noted that

*“in practice the manner in which strikes are viewed at the national level varies widely: several states continue to define essential services too broadly... others allow strikes to be prohibited on the basis of their potential economic consequences...or prohibit strikes on the basis of the potential detriment to public order or to the general or national interest. Such provisions’ are not compatible with the principles relating to the right to strike [emphasis added].”*⁴¹

Here the CEACR effectively said that, while states may impose restrictions, these cannot be incompatible with the principles that the CEACR has implied into C87, in stark contrast to the provisions of C87 itself (i.e., that national practices be compatible with *“the guarantees provided for in this Convention”*⁴²).

But, as already mentioned, there are no guarantees of a right to strike in C87. This puts member states in a nearly impossible position; effectively the CEACR requires that states restrict the *explicit* right in C98 (to exclude certain groups from collective bargaining) to fit within its view that a very broad right to strike may be *implied* into C87. Ultimately, almost all national restrictions applied to the right to strike fall outside the CEACR’s broad interpretation of C87, despite the numerous arguments and legal views expressed to the contrary over the years. This point was succinctly summarised by Alfred Wisskirchen, for many years the employers’ spokesperson in the CAS, who said;

⁴⁰ Paragraph 131 of the 2012 General Survey

⁴¹ Paragraph 132 of the 2012 General Survey

⁴² C87 Article 8(1)

*"It is also astonishing that the [CEACR] have never addressed the numerous arguments regarding the subject, which have been put forward in ILO bodies and in legal writings. Instead they keep on reiterating their observations from their earlier reports and General Surveys which they quote unchanged as if they were the texts of laws."*⁴³

"Resolution of this question would require consideration of the fact that explicit provision of a right to strike in several non ILO instruments was agreed to by all at the time, whereas the existence of a right to strike in C87 has been implied in by only some over several decades."

His observation emphasises the point that is also the essence of this article, i.e., that no explicit global right to strike (or lockout) exists in other than the grey void

characterised by the non-binding interpretations of those with no mandate to make them. At no stage since 1949 has the question been submitted to the only body truly capable of resolving the issue, a full session of the ILC.

"the right to strike as interpreted by the CEACR allows strikes over which employers have no control, because they cannot "settle" a dispute with those who are not their employees."

However, following the impasse created by the 2012 General Survey, strenuous efforts were made to avoid a recurrence and to resume hearing cases about freedom of association and the right to organise. These efforts culminated in 2015 with an agreement between the tripartite constituents of the ILO to work together on a consensus-based approach to the selection and processing of future cases heard in the CAS. The outcome document of this meeting clarified the role and mandate of the CEACR and set out the process and timetable for the management of cases in the CAS. It also contained a Government statement setting out governments' views on the right to strike.⁴⁴ The Government statement said in part:

"The Government Group recognizes that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. The Government Group specifically recognizes that without protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized. However, we also note that the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level. The document presented by the Office describes the multifaceted regulations that States have adopted to frame the right to strike."

The outcome document, including the government statement, constitutes a form of "armed detente" in which any aspects of cases before the CAS that relate to industrial action are dealt with in general terms only, and do not address the application of C87

⁴³ Alfred Wisskirchen, International Labour Review, Vol 144 (2005) No.3, *The standard setting and monitoring activity of the ILO: Legal questions and practical experience.*

⁴⁴ https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_346764.pdf

to the right to strike. In each such case the employers' group makes a statement along the following lines:

*"To recap, the employers disagree with the views of the Committee of Experts concerning Convention No. 87 and the right to strike. We hold the view that there are no ILO standards on strikes and therefore that the scope and conditions of the exercise of the right to strike should be regulated at the national level. Insofar as the right of workers in [the country] to take strike action is concerned, we would simply reflect that it is for the government to regulate this matter."*⁴⁵

While this approach has not resolved the issue of the application of C87 to the right to strike, it has permitted the CAS to resume hearing cases on freedom of association and the right to organise.

IS THERE A NEED FOR GLOBAL LABOUR STANDARD ON THE RIGHT TO STRIKE?

Whether or not there is a need for a global standard on the right to strike has been the source of debate, at least as far back as the creation of the League of Nations in 1919. As a matter of principle, the right to strike is important for any democracy, as is the right to protest.

In this regard, while there is disagreement on whether or not there is already (via C87), or needs to be, a global authority for the right to strike, most countries recognise that it is a right (but one that needs to be regulated to avoid unfettered disruption of the economy).

Indeed, at least since 1948, countries have explicitly regulated the right to strike themselves. They have not needed the sort of guidance a globally applicable labour standard would provide. The few international instruments that do recognise a right to strike all make that right subject to national laws and regulations and almost all link that right with collective bargaining. None link the right to strike directly to the concept of freedom of association.

The reasons why it was not possible to agree on the nature and scope of the right to strike in 1948 were much the same as they are today. The inherent conflict between workers who traditionally favour a right to strike on the broadest possible grounds and employers who prefer strikes to be confined to the workplace is still in play. Asking a third party to resolve this conflict risks an outcome that pleases no one.

CONCLUSION

Overall, the fact that many, if not most, states have adopted regulations that do not meet with the CEACR's approval supports the idea that they did so because the global position is deliberately silent on the matter.

⁴⁵ Case of Philippines, CAS, 108th ILC, 2019

In this regard, it is telling that no globally applicable international instrument is explicit about the existence and nature of a right to strike and even more telling that all international instruments establishing a right to strike explicitly restrict its exercise by means of national laws and regulations.

“...the right to strike is not a corollary of the universal principle of freedom of association but instead is a workplace issue mostly but not uniquely linked to collective bargaining and should be confined to the workplace(s) where the motivating dispute exists.”

Furthermore, in the event that a right to strike unencumbered by a requirement to conform to national laws and regulations was to be read into C87, the status of all later international instruments containing such restrictions would be called into question.

Resolution of the consequential conflicts between global, regional and national positions would require, inter alia, consideration of the fact that explicit provision of a right to strike in several non-ILO instruments was *agreed to by all at the time*, whereas the existence of a right to strike in C87 has been *implied in by only some over several decades*.

This article argues that the CEACR has wrongly implied a right to strike into C87 by improperly applying long-established legal principles of interpretation. In so doing, it has identified four main areas in which it may be argued that the CEACR, and potentially the ILO, have departed from established principles.

First, employers accept that strikes are a legitimate tool in dispute management. Lockouts, the corollary of strikes, are equally legitimate. However, these are workplace tools; they are tools to be used by workers and employers on each other as means of last resort, and are not to be used on the wider, uninvolved, population and economy. Contrary to all the evidence that says strikes are a workplace issue, the right to strike as interpreted by the CEACR allows strikes outside the workplace or by non-employees over which employers have no control, because they cannot “settle” a dispute with those who are not their employees.

The CEACR’s assertion that a right to strike is an essential element of the right to freedom of association arguably is evidence of its confusing the right to protest with the right to strike. They are not the same. While a right to protest may indeed be logically associated with the general citizens’ right to freedom of association the same association cannot easily be made of the workers’ right to withdraw their labour from their workplace over disputes about (proposed) conditions of work at that workplace.

Second, the grounds on which the CEACR justified its importation of the right to strike into a Convention silent on the matter are arguably indefensible.

Inconsistencies exist in the CEACR’s cited sources of authority, and its application of international standards of interpretation appears to be flawed. Indeed, explicit references to a right to strike in other, later, international instruments support an argument that the absence of any mention of that right in C87 is deliberate.

Third, there are considerable inconsistencies between the assertion of a general right to strike couched in the most general terms and the CEACR's pronouncements on the scope and parameters of strikes and on the restrictions placed upon them.

Last, widely varied practices in ILO member states, and the general disapproval of the CEACR of many of those practices, suggest that no determinative international instrument supports a general right to strike.

An objective consideration of the circumstances surrounding the creation and operation of C87, as well as explicit provisions in later non-ILO instruments, suggests that the concept of the right to strike was intended to be defined in practice by individual nations based on national circumstances. Moreover, the fact that most countries have indeed regulated this issue themselves also suggests that a global labour standard must recognise this reality.

Arguably, the right to strike is not a direct corollary of the universal principle of freedom of association but instead is a nationally governed workplace issue mostly linked to collective bargaining. Any right to strike therefore should be confined to the workplace(s) where the motivating dispute exists.

Appendix 1

Excerpts from cited⁴⁶ international instruments containing the right to strike

International Covenant on Economic Social and Cultural Rights of the United Nations

Article 8 (1) - The States Parties to the present Covenant undertake to ensure:(d) The right to strike, *provided that it is exercised in conformity with the laws of the particular country*. [emphasis added] ...

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

Charter of the Organisation of American States Article 45 - The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:... c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defence and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws [emphasis added];

Charter of Fundamental Rights of the European Union Article 28 - Right of collective bargaining and action - Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices [emphasis added], the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Inter-American Charter of Social Guarantees Article 27 - Workers have the right to strike. The law shall regulate the conditions and exercise of that right [emphasis added].

European Social Charter and European Social Charter (Revised) Article 6 – The right to bargain collectively - With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ...3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise: 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into [emphasis added].

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights Article 8 - Trade Union Rights - 1. The States Parties shall ensure: ...b. The right to strike. 2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law [emphasis added].

Arab Charter on Human Rights Article 35 - 3. Each State Party shall ensure the right to strike provided that it is exercised in conformity with its laws [emphasis added].

⁴⁶ Paragraph 35 of the 2012 General Survey