



The protection of the right to strike in the ILO: some introductory remarks

por Achim Seifert

The recognition of a right to strike in the legal order of the International Labour Organization (ILO) is probably one of the most controversial questions in international labor law. Since the foundation of the ILO in the aftermath of World War I, the recognition of the right to strike as a core element of the principle of freedom of association has been discussed in the International Labour Conference (ILC) as well as in the Governing Body and the International Labour Office. As is well known, the ILO, in its long history spanning almost one century, has not explicitly recognized a right to strike: neither Article 427 of the Peace Treaty of Versailles (1919), the Constitution of the ILO, including the Declaration of Philadelphia (1944), nor the Conventions and Recommendations in the field of freedom of association - namely Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948) - have explicitly enshrined this right.

However, the Committee on Freedom of Association (CFA), established in 1951 by the Governing Body, recognized in 1952 that Convention No. 87 guarantees also the right to strike as an essential element of trade union rights enabling workers to collectively defend their economic and social interests¹. It is worthwhile to note that it was a complaint of the World Federation of Trade Unions (WFTU), at that time the Communist Union Federation on international level and front organization of the Soviet Union², against the United Kingdom for having dissolved a strike in Jamaica by a police operation; since that time the controversy on the right to strike in the legal order of the ILO was also embedded in the wider context of the Cold War. In the complaint procedure initiated by the WFTU, the CFA recognized a right to strike under Convention No. 87 but considered that the police operation in question was lawful. In the more than six following decades, the CFA has elaborated a very detailed case law on the right to strike dealing with many concrete questions of this right and its limits (*e.g.* in essential services) and manifesting an even more complex structure than the national rules on industrial action in many a Member State. This case law of the CFA has been compiled in the “Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO”³. In 1959, *i.e.* seven years after case No. 28 of the CFA, the Committee of Experts for the Application of Conventions and Recommendations (CEACR) also recognized the right to strike as a core element of freedom of association under Article 3 of

1. Comm. of Freedom of Association [CFA], (*United Kingdom*), July 1, 1951, Case No. 28 Rep. No. 2 (1952).

2. In any event, this was the case after a number of important Western Trade Union Federations had left the WFTU in 1949 and founded shortly after this schism the International Confederation of Free Trade Unions (ICFTU).

3. Cf. Freedom Of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO paras. 520-676 (5th rev. ed. 2006), *available at*, http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_090632/lang--en/index.htm.

Convention No. 87⁴. Since then, the CEACR has reconfirmed its view on many occasions. Both CFA and CEACR coordinate their interpretation of Article 3 of Convention No. 87⁵. Hence there is one single corpus of rules on the right to strike developed by both supervisory Committees of the Governing Body. Moreover, the ILC also has made clear in various Resolutions adopted since the 1950s that it considers the right to strike as an essential element of freedom of association⁶. On the whole, the recognition of the right to strike resulted therefore from the interpretative work of CFA and CEACR as well as of the understanding of the principle of freedom of association the ILC has expressed on various occasions. It should not be underestimated the wider political context of the Cold War had in this constant recognition of a right to strike under ILO Law. Although the very first recognition of the right to strike -as mentioned above- went back to a complaint procedure before the CFA, initiated by the Communist dominated WFTU, it was the Western world that particularly emphasized on the right to strike in order to blame the Communist Regimes of the Warsaw Pact that did not explicitly recognize a right to strike in their national law or, if they legally recognized it, made its exercise factually impossible; to this end, unions, employers' associations but also Governments of the Western World built up an alliance in the bodies of the ILO⁷.

In accomplishing their functions, CFA and CEACR necessarily have to interpret the Conventions and Recommendations of the ILO whose application in the Member States they shall control. In so doing, they need to concretize the principle of freedom of association that is only in general terms guaranteed by the ILO Conventions and Recommendations on freedom of association. But as supervisory bodies, which the Governing Body has established and which are not foreseen in the ILO Constitution, both probably do not have the power to interpret ILO law with binding effect⁸. This is also the opinion that the CEACR expresses itself in its yearly reports to the ILC when explaining that, "its opinions and recommendations are non-binding"⁹. As a matter of fact, the Governing Body, when establishing both Committees, could not delegate to them a power that it has never possessed itself: *nemo plus iuris ad alium transferre potest quam ipse habet*¹⁰. According to Article 37(1) of the ILO Constitution, it is within the competence of the International Court of Justice to decide upon "any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution." Furthermore, the ILC has not established yet under Article 37(2) of the ILO Constitution an ILO Tribunal, competent for an authentic interpretation of Conventions¹¹. However, it cannot be denied that this constant interpretative work of CFA and CEACR possesses an authoritative character given the high esteem the twenty members of the CEACR -they are all

4. Cf. Int'l. Lab. Conf. [ILC], 43rd Sess., 1959, *CEACR, General Survey – Freedom of Association and Collective Bargaining*, para. 68, ILO Doc. 09661(1959-43).

5. See, e.g., Jean-Michel Servais, *International Labour Law* (5th ed. 2017), para. 1013. Cf. also Niklas Dominik Wagner, *Internationaler Schutz sozialer Rechte: Die Kontrolltätigkeit des Sachverständigenausschusses der IAO 167-9* (2002).

6. Cf. Res. of June 26, 1957 concerning the Abolition of Anti-Trade Union Legislation in the States Members of the ILO [ILC, 40th Sess., 1957, *Record of Proceedings of the 40th session (1957), Appendix XV*, p. 783] and Res. of June 25 1970 concerning Trade Union Rights and their Relation to Civil Liberties [ILC, 54th Sess., 1970, *Record of Proceedings of the 54th session (1970)*, p. 733-6 (1971)].

7. For an assessment of this *alliance de façade* within the ILO, see, e.g., Jean-Maurice Verdier, *Droit Social* 1994, p. 968.

8. For a fuller analysis of this aspect cf. Manfred Weiss & Achim Seifert, *Der Streik im Recht der Internationalen Arbeitsorganisation*, in *Individuelle und kollektive Freiheit im Arbeitsrecht: Gedächtnisschrift für Ulrich Zachert* 130 (Thomas Dieterich et al. eds., 2010). See also Achim Seifert, *Zur authentischen Auslegung der Übereinkommen der Internationalen Arbeitsorganisation*, in: *Festschrift für Eberhard Eichenhofer* 603 (Freiheit – Gerechtigkeit – Sozial(es) Recht Constanze Janda & Stamatia Devetzi eds., 2015).

9. Cf. e.g. ILC, 107th Sess., 2018, *Rep. of the CEACR, Rep. III (Part A)*, para. 19, ILO Doc. ILC.107/III(A).

¹⁰. Ulpianus, Dig. 50.17.54.

11. For a more in-depth analysis of Article 37 of the ILO Constitution cf. Claire La Hovary, *Article 37 of the ILO Constitution: an Unattainable Solution to the Issue of Interpretation?*, 38 COMP. LAB. L. & POL'Y J. 337 (2017). See also Governing Body, 322nd Sess. Oct. 30-Nov. 13, 2014, *The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, Governing Body 322nd Session*, ILO Doc. GB.322/INS/5.

internationally renowned experts in the field of labor law and social security law- and the nine members of the CFA with their specific expertise have. As the CEACR reiterates in its Reports, “[the opinions and recommendations of the Committee] derive their persuasive value from the legitimacy and rationality of the Committee’s work based on its impartiality, experience and expertise”¹². Already this interpretative authority of both Committees justifies that national legislators or courts take into consideration the views of these supervisory bodies of the ILO when implementing ILO law. Furthermore, the long-standing and uncontradicted interpretation of the principle of freedom of association by CFA and CEACR as well as its recognition by the Member States may be considered as a subsequent practice in the application of the ILO Constitution under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (1968): such subsequent practices shall be taken into account when interpreting the Agreement. Their constant supervisory practice probably reflects a *volonté ultérieure*, since other bodies of the ILO also have recognized a right to strike as the two above-mentioned Resolutions of the ILC of 1957 and 1970 as well as the constant practice of the Conference Committee on the Application of Standards to examine cases of violation of the right to strike as examples for breaches of the principle of freedom of association demonstrate. As this constant practice of the organs of the ILO has not been contradicted by Member States, there is a strong presumption for recognition of a right to strike as a subsequent practice of the ILO under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

Nonetheless, this recognition of a right to strike as a principle of ILO Law does not simplify things for legal practice. It entails that the complex case law of the CFA and the interpretative practice of the CEACR on the right to strike may only be considered as part of the principle of freedom of association under ILO law if they reflect a subsequent practice in the sense of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. In many cases, this will not be easy to demonstrate since it still is unclear where the borderlines of the existence of a subsequent practice precisely are. Furthermore, a considerable number of rules on the right to strike developed by the CFA and recognized by the CEACR in its Reports do not reflect a constant practice but have only punctually been approved (e.g. go-slow, wildcat strikes or working to rule as legitimate forms of industrial action). Consequently, there remains a lot of legal uncertainty as far as the precise content and the limits of the right to strike under ILO law are concerned.

Despite this long-standing interpretation of Convention No. 87 by the supervisory bodies of the ILO and by the ILC (including its Conference Committee on the Application of Standards), the right to strike has been challenged by the employers’ side on various occasions in the ILC and the Governing body since the early 1990s. The end of the Cold War has cracked the above-mentioned alliance between unions, employers’ association and Governments of the Western States. Already in the eighty-first session of the ILC (1994), the right to strike became a controversial issue. In 2012, the employers’ representatives in the Conference Committee on the Application of Standards of the ILO refused for the first time to deal -as it has usually been the case- with a list of Member States that have seriously violated Conventions of the ILO as long as the workers’ group would not accept to revise the mandate of the CEACR¹³. Underlying this incident was the attitude of the CEACR toward the right to strike even though, according to the view of the employers’ side, the Committee is not authorized to interpret ILO law with binding effect. By this, the controversy on the right to strike was widened and resulted in a conflict within the ILO supervisory system: as a matter of fact, the ILO’s tripartite structure, underlying the whole constitution of the ILO, presupposes that the three Constituents cooperate in good faith within the organization’s bodies. An attitude of refusal of only one of the constituents therefore necessarily questions the functioning of the ILO.

12. Cf., e.g., *supra* note 8, at para. 19.

13. Cf. ILC, 101st Sess., May – June 2012, *Provisional Record, 19(Rev) Part I, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards*, paras. 34-7.

This conflict between the Constituents has not been resolved in a definitive way yet. On February 23, 2015, the employers' and the workers' groups of the Governing Body only could reach a temporary resolution by agreeing upon a "Joint Statement"¹⁴ that resembles a cease-fire rather than a real peace treaty between the social partners in the ILO. In this "Joint Statement," both sides have clarified that "the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the ILO" but have avoided concretizing this right. On the other hand, the social partners in the Governing Body have agreed in the "Joint Statement" of 2015 that the ILO's supervisory system needs to be reformed. As a result of this agreement between the social partners, the International Court of Justice has not been appealed under Article 37(1) of the ILO Constitution in order to receive a binding response to the controversial question of whether Article 3 of Convention No. 87 guarantees a right to strike. By now, there have not been undertaken neither attempts to establish a specific ILO Tribunal by the Governing Body with the approval of the ILC under Article 37(2) of the ILO Constitution "for the expeditious determination of any dispute or question relating to the interpretation of a Convention." The "Joint Statement" between the representatives of the social partners in the Governing Body clarifies that a right to strike is guaranteed under ILO law as a general principle. Insofar as it marks a progress compared to the controversial debates among the Constituents of the ILO over the last decades. Its precise content remains, however, unclear. The gain of this general recognition of the right to strike is therefore limited. Furthermore, the recent events show that also the future of the supervisory system of the ILO is at stake and needs to be discussed.

On April 1, 2016, the German Federation of Labor Unions [*Deutscher Gewerkschaftsbund (DGB)*] and the German Friedrich-Ebert-Foundation -a political foundation associated the German Social Democratic Party [*Sozialdemokratische Partei Deutschlands (SPD)*]- hosted an international conference "On the justification of the right to strike in the ILO system of standards" in Berlin with many labor lawyers from around the world in attendance to address this still-controversial question concerning a right to strike in the legal order of the ILO, as well as the role that the supervisory bodies, namely the CFA and the CEACR, play in the debate. Given the great relevance of the right to strike under the law of the ILO for the domestic labor law orders of its Member States, the editors of the *Comparative Labor Law & Policy Journal* have decided to publish papers given at this Conference in Berlin.

For organizational reasons, the publication of the pieces had to be split up in two parts. The first part of this collection of papers was published in Vol. 38, no. 3 (2017). In this first part of our special issue on the right to strike under the law of the ILO, *Claire La Hovary* (visiting fellow at the University of Glasgow) discussed the procedural questions of a referral of the question whether a right to strike exists under ILO law to the International Court of Justice or the prospects of the establishing of a proper ILO Tribunal under Article 37(2) of the ILO Constitution¹⁵. *Tonia Novitz* (University of Bristol Law School) analyzed the principles that the ILO supervisory bodies have developed regarding strikes in the civil service, public sector, and essential services and demonstrates the coherence of this corpus of rules; additionally, she shows how institutions such as the European Court of Human Rights have received these principles¹⁶. In the article of *Nicola Smit* (University of Stellenbosch, South Africa), the focus is on which general principles the ILO's supervisory bodies have developed with regard to the right to strike and what their legal and broader

14. Governing Body, 323rd Sess., Mar. 12-27, 2015, *Fifth Item on the Agenda: The ILO Standards Initiative* ("Joint Statement of Workers' & Employers' Groups"), ILO Doc. GB.323/INS/5, published as Appendix I to: ILO, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (87), in relation to the right to strike and the modalities and practices of strike action at national level, Feb. 23-25, 2015, ILO Doc. TMFAPROC/2015/2.

15. La Hovary, *supra* note 9.

16. Tonia Novitz, *The Restricted Freedom to Strike: "Far-Reaching" ILO Jurisprudence on the Public Sector and Essential Services*, 38 *Comp. Lab. L. & Pol'y J.* 353 (2017).

significance is¹⁷. In his article, *Jean-Michel Servais* (Visiting Professor at the University of Gerona, Spain, former Director of the ILO and Honorary President of the International Society for Labour Law and Social Security) discusses the right to strike from a reform perspective¹⁸.

In this issue, *Janice Bellace* (University of Pennsylvania, USA) focuses in her article on “ILO Convention No. 87 and the Right to Strike in an Era of Global Trade,” and as she is pointing out, “(1) on the right to strike in the context of freedom of association, (2) the driving forces in defining the parameters of the right to strike, and (3) the relative roles of the Committee of Experts and the CAS” by going through the whole history of the ILO¹⁹. Her paper is supplemented by brief statements of the social partners on the current controversy on the right to strike under ILO law. These statements are provided by *Renate Hornung-Draus* (Vice-President of the International Organization of Employers and Member of the Governing Body of the ILO)²⁰ and by *Jeffrey Vogt* (former Head of the Legal Unit of the International Federation of Trade Unions and is currently the Director of the Rule of Law Department of the Solidarity Center)²¹.

The Editors of the *Comparative Labor Law & Policy Journal* are grateful to the German Federation of Labor Unions (DGB) for its financial contribution to the following special issue. They express their hope that this small collection of papers, published in this issue and in issue 3 of last year, will nourish the debate on the right to strike in the legal order of the ILO.

Achim Seifert

Professor of Law at the Friedrich-Schiller-University Jena (Germany)

* El presente artículo también se publicó en *Comparative Labor Law & Policy Journal (CLLPJ)*, Volume 39, número 3, Spring 2018. Se trata de la introducción a un número especial del CLLPJ sobre *The right to strike in the ILO system*. Se señala que las consideraciones contenidas en la presente intervención son fruto exclusivo del pensamiento del autor y no tienen en ningún modo carácter vinculante para la administración de pertenencia.

17. Nicola Smit, *International Developments Regarding the Implementation of the Right to Strike*, 38 *Comp. Lab. L. & Pol’y J.* 395 (2017).

18. Jean-Michel Servais, *The Right to take Industrial Action and the ILO Supervisory Mechanism Future*, *Comp. Lab. L. & Pol’y J.* 375 (2017).

19. *Cf. infra* pp. 495-532.

20. *Cf. infra* pp. 533-537.

21. *Cf. infra* pp. 539-544.