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The right to strike[1]

by Jeffrey Vogt

Background

At the commencement of the 2012 International Labour Conference (ILC), the spokespersons of the Employers' Group and the Workers' Group met to finalize a "short list" of 25 cases drawn from the Annual Report of the ILO Committee of Experts which would be discussed by the tripartite constituents the following week in the Conference Committee on the Application of Standards (CAS). Without warning, the Employers' Group refused to agree to a negotiated final short list that included any case where the Committee of Experts' Report contained observations regarding the right to strike. The Employers' Group (EG) also sought a "disclaimer" on the Committee of Experts' General Survey.[2] The purpose of this disclaimer was two–fold – to diminish the persuasive authority of the Committee of Experts' observations outside of the ILO and to attempt to establish a (non-existent) hierarchy of the political, tripartite body - the CAS - over the independent Committee of Experts.

The Employers' Group makes three central claims. First, the mandate of the Committee of Experts is limited to commenting on the application of conventions, not to "interpret" them. They also argue that the General Survey and the Annual Report of the Committee of Experts are not agreed or authoritative texts of the ILO tripartite constituents. Specifically, they argue that the Committee of Experts does not supervise labour standards but rather the ILO tripartite constituents and thus the tripartite constituents ultimately decide upon the meaning of the ILO conventions. Finally, they argue that given the absence of any reference to a right to strike in the actual text of ILO Convention 87, the internationally accepted rules of interpretation require Convention 87 to be interpreted without a right to strike. As such, the right to strike is not an issue upon which the Committee of Experts should express an opinion.

The Existence of the Right to Strike

The Employers' Group's argument relies on a deeply-flawed understanding of the right to freedom of association. They take a deeply conservative view, where freedom of association is a self-contained, individual right, wholly divorced from the context of industrial relations. However, the right to freedom of association has long been understood as a collective right, particularly in the context of industrial relations, and indeed is a bundle of rights which includes the right to strike. Indeed, without the attendant derivative rights, the right to association in the industrial relations context would be wholly meaningless. This view is shared by the ILO and indeed the great majority of tribunals and scholars.

The theory of freedom of association taken (correctly) by the ILO CFA, the Committee of Experts and notably the European Court of Human Rights and even the Court of Justice of the European Union is specific to the context of the workplace. Combination in a trade union may be a function of individual liberty, but this liberty has little meaning if workers are unable to pursue their own interests through such organisations. Worker solidarity allows workers to overcome the limitations inherent in entering individual contracts of employment, to achieve fair conditions of employment and to participate in making decisions which affect their own lives and society at large. In the absence of a right to strike, it remains difficult for workers to achieve these goals given the unequal power in the employment relationship. From this premise stems the view that freedom of association implies not only the right of workers and employers to form freely organisations of their own choosing, but also the right to pursue collective activities for the defence of workers' occupational, social and economic interests.

Notably, there were no challenges made by the Employers to ILO jurisprudence on the right to strike as developed by the Committee of Experts and Committee on Freedom of Association (CFA) in relation to Convention 87 for nearly 40 years. Both the Committee of Experts and the Committee on Freedom of Association have, since the 1950s, regarded Article 3 as encompassing protection of a right to strike, albeit a circumscribed and carefully defined entitlement. By 1959, less than a decade after Convention 87 came into force, the Committee of Experts, in the first General Survey to review in detail freedom of association, provided analysis on the right to strike in the section corresponding to Article 3 of the convention. It found in particular that the "prohibition of strikes by workers other than public officials acting in the name of public powers… may sometimes constitute a considerable restriction of the potential activities of trade unions." The Committee of Experts also found that prohibitions on the right to strike run counter to Articles

Corporate Strategy and Industrial Development (CSID)
University of the Witwatersrand

Nicolas Pons-Vignon
E-mail: Nicolas.Pons-Vignon@wits.ac.za

8 and 10 of Convention 87.

Like the Committee of Experts, the CFA has made direct reference to Article 3 of Convention 87 as forming part of its reasoning, as well as the ILO Constitution. The CFA, as early as their second meeting in 1952, held that the right to strike was an "*essential [element] of trade union rights*". In Case 28 (UK-Jamaica), for example, the CFA held that: "The right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes."

One of the central contentions of the Employers' Group is that the supervisory system, and in particular the Committee of Experts, have no constitutional mandate to provide binding interpretations of ILO conventions, and that rather it is the tripartite constituents, in the form of the CAS and the ILC, that have the final say as to what conventions mean. While it is true that only the International Court of Justice (ICJ) may issue binding interpretations of ILO conventions, a point the Workers have not contested, it is not the case that the CAS or the ILC are the ultimate arbiters of the meaning of ILO conventions. There is no constitutional support for this notion. Further, the Committee of Experts' role, the application of conventions, requires a degree of interpretation. Indeed, this is a point that the Employers' Group has previously recognized. Especially as many ILO conventions set forth broad principles, some amount of interpretation will be required in order to assess the application.

The ILO Committee of Experts states that the right to strike is protected by Articles 3, 8 and 10 of Convention 87. On examination of the text of the convention, using the rules of construction under Article 31 of the Vienna Convention on the Law of Treaties, this proposition is undoubtedly correct. The ordinary meaning of the words of Article 3 of Convention 87 confers an unqualified right on the part of unions and employers' associations to include whatever they wish in their plans for the future. This must include the right, for example to plan for collective bargaining; and, for trade unions, the right to plan for industrial action. There is no basis within the words used for excluding from the right of a trade union to formulate within its programme, a plan which includes the organisation of or support for industrial action.

The Employers Group mistakenly holds that the preparatory work with regard to Convention 87 supports their views. However, one may have recourse to the preparatory works of a treaty only if the interpretation arrived at through Article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". The justification for the use of the supplementary means of interpretation under Article 32 VCLT is simply unjustifiable, as the existence within Convention 87 of the right to strike leaves nothing ambiguous or obscure nor is it manifestly absurd or unreasonable. However, even if we were to look at the preparatory materials, there is nothing suggesting that the convention should be interpreted otherwise. As Bernard Gernigon, Former Chief of the Freedom of Association Department of the ILO, has noted, at no point in the proceedings prior to the adoption of Convention 87 was the right to strike ever expressly denied.

Indeed, there is absolutely nothing to suggest that the concept of freedom of association is now or ever had been understood to stand for anything other than the notion that trade unions have as their purpose that of furthering and defending workers' interests. Further, subsequent agreement and practice also support the interpretation of Convention 87 to support the existence of an international right to strike.

Conclusion

There is no question that the right to strike is enshrined in ILO Convention 87, as well as the broader international legal framework. The supervisory system of the ILO was correct in observing that the right to strike exists, and acted within their constitutional mandate in doing so and in conformity with the rules of treaty interpretation. Were the matter to be considered by the ICJ it is submitted that the latter should defer to the well-reasoned views of the ILO supervisory system, and in particular the Committee of Experts, and find that C87 protects the right to strike.

[1] This article is a very short summary of the brief prepared by the International Trade Union Confederation on the existence of a right to strike. The full 120+ page brief is available at: (http://www.ituc-csi.org/the-right-to-strike-and-the-ilo?lang=en).

[2] The proposed disclaimer would state, *"The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an agreed or determinative text of the ILO tripartite constituents."*

Jeffrey Vogt is the legal advisor for the International Trade Union Confederation (ITUC). Before joining the ITUC in 2011, he was the global economic policy specialist for the American Federation of Labor and Congress of Industrial Organizations (AFL CIO) and later the deputy director of its International Department. Previously, he represented domestic and foreign trade unions in litigation in state and federal courts. He is a graduate of Cornell Law School, where he earned his JD and LLM in International and Comparative Law. He further studied international law at the University of Paris, Sorbonne.