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It ain't over 'til it's over: The right to strike and the mandate of the ILO Committee of Experts revisited

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It ain't over 'til it's over: the right to strike and the mandate of the ILO Committee of Experts revisited

Claudia Hofmann
Norbert Schuster

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IT AIN'T OVER 'TIL IT'S OVER: THE RIGHT TO STRIKE AND THE MANDATE OF THE ILO COMMITTEE OF EXPERTS REVISITED

Claudia Hofmann
Norbert Schuster

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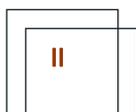
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SUMMARY

For many years now, the question of whether the standards of the International Labour Organization (ILO), and the provisions of Convention No. 87 on Freedom of Association and Protection of the Right to Organize (1948) in particular, implied the existence of a right to strike was the subject of a controversy among the tripartite constituents. The debate escalated in 2012, when no agreement was reached at the International Labour Conference of the ILO regarding the adoption and discussion of a list of 25 Member States that stood accused of serious breaches of ILO Conventions. Since then, this issue had continued to hamper the process of supervising the application of ILO Conventions. In 2015, however, the matter seems to have been settled. This working paper reflects on the recent events and decisions by the Governing Body, so as to assess the sustainability of the action taken. It argues that there is still a need for a definite clarification as regards the right to strike and – implicitly also – as regards the mandate of the Committee of Experts.

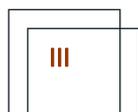


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1. THE DEBATE IN A NUTSHELL

For decades, the view that the standards of the International Labour Organization (ILO), and especially the provisions of Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948, implied the existence of a right to strike seemed not to be disputed. However, for some time now, this issue has become the subject of a controversy among the tripartite constituents. The smouldering dispute escalated in 2012, with the failure of the International Labour Conference (ILC) to adopt and discuss a list of (for the most part) 25 ILO Member States that stood accused of very serious breaches of ILO Conventions.¹ The employers' side had criticized the ILO Committee of Experts on the Application of Conventions and Recommendations (hereafter, the Committee of Experts) for frequently ruling that Convention 87 had been violated on the grounds that the States concerned had not provided for a right to strike.² The employers argued that this Convention did not contain any specific provision on a right to strike and that the Committee of Experts was not mandated to interpret Convention 87 in this way.³

After the "clash" at the 2012 International Labour Conference, informal tripartite consultations were held in September 2012 and February 2013.⁴ In the course of these exchanges, it became clear that, while the question of whether Convention 87 embodies a right to strike may have sparked the debate, the real point at issue among the representatives of the constituents is the scope of the mandate held by the Committee of Experts.⁵ According to the employer representatives, the Committee was not tasked with interpreting the Conventions.⁶ Under Art 37

¹ Cf. International Labour Conference, 101st Session, Geneva, May-June 2012, Provisional Record No. 19 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 134.

² Cf. International Labour Conference, 101st Session, Geneva, May-June 2012, Provisional Record No. 19 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, paras 49 and 82.

³ *Ibid.*

⁴ Cf. International Labour Office, Governing Body, 316th Session, Geneva, 1-16 November 2012, Fifth Item on the Agenda: Matters arising out of the work of the 101st Session (2012) of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19 September 2012; and International Labour Office, Governing Body, 317th Session, Geneva, 6-28 March 2013, Fourth Item on the Agenda: Matters arising out of the work of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19-20 February 2013.

⁵ International Labour Office, Governing Body, 316th Session, Geneva, 1-16 November 2012, Fifth Item on the Agenda: Matters arising out of the work of the 101st Session (2012) of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19 September 2012, paras 8 ff.

⁶ See, for instance, International Labour Office, Governing Body, 316th Session, Geneva, 1-16 November 2012, Fifth Item on the Agenda: Matters arising out of the work of the 101st Session (2012) of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19 September

paragraph 1 of the ILO Constitution, they argued, this responsibility fell to the International Court of Justice (ICJ) or, under paragraph 2 of the same provision, to an alternative tribunal.⁷

At the 2013 ILC, the delegates did once again manage to agree on a list of countries, 26 this time. But they did so only on the basis that issues concerning the right to strike were not discussed.⁸ During the discussion, the employers' representatives repeatedly spoke against an "ILO right to strike".⁹ In 2014 as well, a list of 25 countries was adopted; however, the delegates at the Conference Committee on the Application of Norms at the ILC could only reach an agreement for conclusions in respect of the six double footnoted cases¹⁰ and not in respect of the remaining 19 countries.¹¹ This situation again was unfortunate, since the follow-up process regarding those conclusions forms part of the supervisory mechanism for international labour standards. Though there had been disagreement between the employers' and the workers' group only on three cases (Algeria, Cambodia and Swaziland) concerning the right to strike, the workers' group pointed out that the inability to adopt consensual conclusions in these cases "put into question the whole mechanism". Hence, they also refused to include a sentence again which stated that the right to strike was not being discussed due to the disagreement between employer and worker representatives. This had been a "one time concession"¹² and "accepting once again the reservations put forward by the Employer members on the cases

2012, para 8, International Labour Conference, 101st Session, Geneva, May-June 2012, Provisional Record No. 19 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 147 and International Labour Conference, 102nd Session, Geneva, June 2013, Provisional Record No. 16 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 50.

⁷ International Labour Conference, 102nd Session, Geneva, June 2013, Provisional Record No. 16 (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, para 50.

⁸ The Conference Committee, therefore, included a sentence which stated, in the cases of six countries being discussed in connection with Convention 87, that the right to strike was not being addressed, "as the employers do not agree that there is a right to strike recognized in Convention No. 87", International Labour Conference, 102nd Session, Geneva, June 2013, Provisional Record No. 16 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part Two, pp. 30, 45, 50, 57, 64 and 71.

⁹ Cf. International Labour Conference, 102nd Session, Geneva, June 2013, Provisional Record No. 16 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 50.

¹⁰ Cf. for an explanation on the terminology International Labour Conference, 97th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), Geneva 2008, at paras 40 f.: "[T]he Committee has indicated by special notes at the end of the observations (traditionally known as footnotes) the cases in which, because of the nature of the problems encountered in the application of the Conventions concerned, it has seemed appropriate to ask the government to supply a report earlier than would otherwise have been the case [...], often referred to as a "single footnote", as well as to cases in which the government is requested to provide detailed information to the Conference, often referred to as a "double footnote".

¹¹ Cf. International Labour Conference, 103rd Session, Geneva, May-June 2014, Provisional Record No. 13 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part Two.

¹² International Labour Conference, 103rd Session, Geneva, May-June 2014, Provisional Record No. 13 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part I, para 210.

concerning Convention No. 87 would give the impression that a tacit jurisprudence in relation to freedom of association cases was creeping into the Committee".¹³

After informal tripartite meetings and discussions at Governing Body level, the dispute appears to have been settled in 2015: in February, the social partners formulated a joint statement in which they, *inter alia*, acknowledged that "[t]he right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the International Labour Organization."¹⁴ The Governing Body meetings in November 2014 and March 2015 dealt with key issues of the debate, viz. the mandate of the Committee of Experts, actions according to Art 37 of the ILO Constitution, a review of the supervisory mechanism and the introduction of a Standards Review Mechanism (SRM).¹⁵

In the wake of the 2012 ILC, representatives of the ILO Members explicitly stated that the core issue in this debate really has more to do with the mandate of the Committee of Experts.¹⁶ In the General Surveys post-2012, the Committee of Experts addressed the question of its mandate directly. In 2013, the Committee explained its work and its relationship with the Committee on Freedom of Association and the Conference Committee on the Application of Standards.¹⁷ It elaborated in detail on the development of the "body of so-called 'soft law' " – or non-binding opinions and decisions intended to guide the actions of the national authorities".¹⁸ With regard to its competence to interpret ILO norms, the Committee stated that monitoring the application of ILO Conventions

"inevitably involves a degree of interpretation, with due regard to coherence and equal treatment of States.[...] As regards the interpretation of ILO Conventions and the role of the International Court of Justice in this area, the Committee has pointed out since 1990 that its terms of reference do not enable it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution of the ILO. It has stated,

¹³ Ibid, para. 209.

¹⁴ International Labour Organization, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2, Appendix I: The ILO Standards Initiative – Joint Statement of Workers' & Employers' Groups (23.02.2015).

¹⁵ See International Labour Office, Governing Body, 322nd Session, Geneva, 30 October - 13 November 2014, Fifth Item on the Agenda: The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, Addendum, GB.322/INS/5(Add.2) and International Labour Office, Governing Body, 323rd Session, Geneva, 12-27 March 2015, Fifth Item on the Agenda: The Standards Initiative, GB.323/INS/5.

¹⁶ International Labour Office, Governing Body, 316th Session, Geneva, 1-16 November 2012, Fifth Item on the Agenda: Matters arising out of the work of the 101st Session (2012) of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19 September 2012, paras 8 ff.

¹⁷ International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), paras 5 f.

¹⁸ Ibid, para 7.

nevertheless, that in order to carry out its function of determining whether the requirements of Conventions are being respected, the Committee has to consider the content and meaning of the provisions of Conventions, to determine their legal scope, and where appropriate to express its views on these matters. The Committee has consequently considered that, in so far as its views are not contradicted by the International Court of Justice, they should be considered as valid and generally recognized. The Committee considers the acceptance of these considerations to be indispensable to maintaining the principle of legality and, consequently, to the certainty of law required for the proper functioning of the International Labour Organization.”¹⁹

The paragraph concerning the mandate in the General Surveys of 2014 and 2015 seems, however, to be formulated with more restraint – avoiding the use of the term “interpretation”:²⁰

“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 over 85 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.”

¹⁹ Ibid, paras 6 and 8.

²⁰ International Labour Conference, 103rd Session, 2013, Application of International Labour Standards 2014 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 31 and International Labour Conference, 104th Session, 2015, Application of International Labour Standards 2015 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 29.

The social partners expressly “recognized” this mandate in their joint statement of February 2015.²¹ The inclusion of the paragraph in the General Survey was welcomed by the employers’ representatives who expressed consent that “the mandate of the Committee of Experts allowed for a certain degree of interpretation”.²² This reaction would support the assumption – which was expressed at the Governing Body meeting in March 2014 – that “the formulation provided by the experts [...] could adequately address the concerns that have been raised and command consensus.”²³ It might be due to this assumption that the question of the mandate has not again been addressed at the following Governing Body meetings.²⁴

As regards measures according to Art 37 of the ILO Constitution, both options – consulting the International Court of Justice and referring the matter to an in-house tribunal – have been examined in detail by the Governing Body.²⁵ However, it was decided “not to pursue for the time being any action” in this respect.²⁶

So, both issues which lie at the centre of the debate are, at least, not being explicitly addressed. Yet the actions taken in respect of the Standards Review Mechanism (SRM) and the review of the supervisory mechanism (Art 22, 23, 24 and 26 of the ILO Constitution) can be seen as implicit answers: The motive for the SRM is, *inter alia*, to provide for up-to-date and effective ILO standards fit for current and future needs of all workers, to further their ratification and implementation and to identify new subjects for ILO standards and approaches for their creation.²⁷ The report on the interrelationship, functioning and possible improvement of the supervisory procedures and the complaints mechanism on freedom of association will be prepared by the Chairperson of the Committee of Experts, Judge Abdul Koroma, and the Chairperson of the Committee on Freedom of Association, Professor Paul van der Heijden.²⁸ Ensuring an effective and up-to-date set of international labour standards and a sound supervisory system might be a proactive approach to safeguarding the ILO’s relevance as a champion of workers’ rights.

²¹ International Labour Organization, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2, Appendix I.

²² International Labour Conference, 104th Session, 2015, Application of International Labour Standards 2015 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 16.

²³ International Labour Office, Governing Body, 320th Session, Geneva, 13 - 27 March 2014, Fourth Item on the Agenda, The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.320/LILS/4, para 16.

²⁴ [Status as of October 2015].

²⁵ See International Labour Office, Governing Body, 322nd Session, Geneva, 30 October - 13 November 2014, Fifth Item on the Agenda: The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.322/INS/5.

²⁶ International Labour Office, Governing Body, 323rd Session, 24 March 2015, Decision on the Fifth Item on the Agenda: The Standards Initiative, dec-GB.323/INS/5, lit b).

²⁷ International Labour Office, Governing Body, 323rd Session, Geneva, 12-27 March 2015, Fifth Item on the Agenda: The Standards Initiative, GB.323/INS/5, paras 9 and 10.

²⁸ International Labour Office, Governing Body, 323rd Session, 24 March 2015, Decision on the Fifth Item on the Agenda: The Standards Initiative, dec-GB.323/INS/5, lit h).

Could it have been left at that? Could the tripartite dialogue and the Governing Body decisions have put an end to a highly conflictual situation, which some even called a “crisis”?²⁹ After all, at the ILC in 2015, consensus was again reached not only with regard to the adoption of the list of individual cases but also the formulation of conclusions concerning these cases.³⁰ The persistence of the debate, however, justifies a certain degree of doubt. Maybe it was not necessary to get the advisory opinion of the ICJ, since it would neither have been binding nor final and it could thus still have been contested.³¹ But perhaps in order to strengthen the position of the Committee of Experts, it would still have been advisable to *answer* – at an institutional level – the two questions that were to be submitted to the ICJ:

“(1) Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)?

(2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to:

(a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); and

(b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?”³²

With a view to addressing these unanswered questions, this article reflects on the factual and legal bases of a potential advisory opinion of the ICJ. Since, on the surface, this seemed to have sparked the debate, Section II starts with an overview of how the Committee of Experts approached the right to strike and looks at the relevant ILO Conventions and the related “jurisprudence” created by the Committee of Experts and the Committee on Freedom of Association. Section III examines the ways in which supranational and national courts have received this “jurisprudence”. It is this reception which has been criticized against the background of an alleged lack of “tripartite legitimation” of the Committee of

²⁹ *Maupain*, The ILO Regular Supervisory System: A Model in Crisis?, in: *International Organizations Law Review* 10 (2013), p. 117 ff.

³⁰ Cf. International Labour Conference, 104th Session, Geneva, June 2015, Provisional Record No. 14 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part Two, Geneva 2015. For the first time, the report states, in a preceding paragraph, that “[t]he CAS [Committee on the Application of Standards] has adopted conclusions on the basis of consensus. The CAS has only reached conclusions that fall within the scope of the Convention being examined. If the workers, employers and/or governments had divergent views, this has been reflected in the CAS record of proceedings, not in the conclusions.”, *ibid*, p. 8.

³¹ Cf. International Labour Office, Governing Body, 322nd Session, Geneva, 30 October - 13 November 2014, Fifth Item on the Agenda: The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.322/INS/5, para 25.

³² International Labour Office, Governing Body, 322nd Session, Geneva, 30 October - 13 November 2014, Fifth Item on the Agenda: The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, GB.322/INS/5, para 49.

Experts' views.³³ Section IV is therefore devoted to this aspect and examines the question of whether, and in what framework, the Committee has competence for interpreting the ILO Conventions. The central argument often used to refute any such competence on the part of the Committee of Experts is Art 37.1 of the ILO Constitution.³⁴ This stipulates that competence for matters of interpretation lies with the International Court of Justice. So Section V links back to the original question by setting out the basis for a potential ICJ "decision" on the issue of the right to strike. Section VI then draws attention to current developments concerning the right to strike which could test the sustainability of the newly found peace.

2. HOW THE COMMITTEE OF EXPERTS APPROACHES THE RIGHT TO STRIKE

In this debate, the representatives of the employer side are admittedly correct in asserting that a right to strike is not especially mentioned either by Convention 87 or by Convention No. 98, of 1949, which concerns the application of the principles of freedom of association and the right to collective bargaining.³⁵ Art 3.1 of Convention 87 lays down that workers' organizations shall have the right to draw up their constitutions and rules, elect their representatives in full freedom, organize their administration and activities and formulate their programmes. Art 10 of Convention 87 defines a workers' organization as "any organization of workers [...] for furthering and defending the interests of workers [...]". In view of this purpose, Art 3.1 of Convention 87 can be taken to mean that this provision not only guarantees that trade unions can organize their activities internally, but also necessarily covers their organization and autonomous exercise of external activities. The official English-language version of Art 3.1 of Convention 87 states that workers' organizations have "the right to [...] organize their administration and activities". The word "organize" contains elements not only of arranging but also of shaping. The shaping of trade unions' action constitutes a genuine means of furthering workers' interests, with industrial disputes as the *ultima ratio* (last resort). This is also the view taken by the Committee of Experts and the

³³ Cf, for instance, International Labour Conference, 104th Session, Geneva, June 2015, Provisional Record No. 14 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 39.

³⁴ International Labour Office, Constitution of the International Labour Organization and Standing Orders of the International Labour Conference.

³⁵ Nonetheless, various other ILO Conventions and Recommendations assume the existence of a right to strike. For instance, Art 69(i) of Convention No. 102 on Social Security (Minimum Standards), 1952, permits the Parties to suspend unemployment benefit where the person concerned has lost his or her employment as a direct result of a stoppage of work due to a trade dispute. Art 1(d) of Convention No. 105 on the Abolition of Forced Labour, 1957, commits ratifying Member States to suppress forced or compulsory labour and not to use them as a punishment for having participated in strikes; cf. the detailed treatment in *Weiss/Seifert, Der Streik im Recht der Internationalen Arbeitsorganisation*, p. 133 f. The 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation explicitly called upon the ILO Member States "to adopt laws [...] ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers, and to guarantee the application of these laws in practice.", International Labour Conference, 40th Session, Geneva 1957, Record of Proceedings, Appendix XV, p. 783.

Committee on Freedom of Association (CFA). For more than sixty years now, their rulings have emphasized that the right to strike is to be regarded as a central constituent and indispensable logical consequence of freedom of association.³⁶ The right to strike is, they argue, a fundamental instrument that dependent employees need in order to further their economic and social interests.³⁷ As mentioned above, this interpretation can also be justified by the wording. Since the dispute described in the introduction is primarily about the Committee of Experts, a closer examination will now be made for the rationale behind the Committee's arguments as well as the counter-arguments used by its opponents.

The Committee of Experts certainly does not give unconditional recognition to the right to strike. It includes restrictions. These mainly concern the modalities of a strike, the assessment of political strikes, so-called sympathy strikes, and not least the right to strike in public services.³⁸ This approach shows just how much the Committee also takes the justified interests of the employer side into account and tries, in this way, to bring them into harmony with the interests of the workers' side, thus helping to ensure optimum impact for both positions. An analogy would be the securing of "practical concordance" in constitutional law. Thus, the Committee tries to take a balanced view, guided by international standards. Most Member States that have ratified Convention 87 have explicitly written a right to strike into their constitutions. Equally, the case law from national and international courts does not leave room for denying the right to strike.³⁹ For instance, Art 9.3 of the German Basic Law provides "only" for freedom of association. Industrial disputes are mentioned in sentence 3 of Art 9.3 of the German Basic Law; a *right* to engage in such disputes is, however, not laid down in this provision. Nonetheless, although few would suspect the Federal Labour Court of strike-happiness, it has never, since it was first established in 1954, denied the existence of a constitutional right to strike.⁴⁰ The Federal Constitutional Court takes a similar line.⁴¹ Nobody disputes that employees and

³⁶ The Committee of Experts has taken this view since 1959, cf. International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 31. The identical position taken by the Freedom of Association Committee dates back to 1952 - *Weiss/Seifert*, *Der Streik im Recht der Internationalen Arbeitsorganisation*, p. 136. For a comprehensive overview of rulings by both committees, and the principles developed regarding the right to strike, cf. *Gernigon/Odero/Guido*, ILO Principles Concerning the Right to Strike, p. 11 ff., *Servais*, The ILO law and the freedom to strike, in: *The Canadian Labour and Employment Law Journal* 15 (2010), p. 147 ff. and *Betten*, *International Labour Law – Selected Issues*, p. 105 ff.

³⁷ Cf. International Labour Conference, 101st Session, 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), Giving globalization a human face, paras 117 and 119.

³⁸ Cf. International Labour Conference, 101st Session, 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), Giving globalization a human face, paras 117 ff., and International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 31.

³⁹ International Labour Conference, 101st Session, 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), Giving globalization a human face, paras 123 ff.

⁴⁰ Cf. BAG v. 28.01.55, in: NJW 1955, 882; BAG v. 21.04.71, in: NJW 1971, 1668 and BAG v. 05.03.85, in: AuR 1985, 160, 227.

⁴¹ Cf. for example BVerfG v. 10.9.2004, in: NZA 2004, 1338 and BVerfG v. 26.06.1991, in: NJW 1991, 2549.

their trade unions need this right as compensation, at least in part, for their structurally disadvantaged position and therefore as a means of last resort for the improvement of their employment conditions.

It should be noted at this point that the development, by the Committee of Experts and the Committee on Freedom of Association, of the principles underlying the right to strike went practically unchallenged by the representatives of the employer side for many decades.⁴² It was not until the 1990s ILC that resistance was increasingly expressed.⁴³ A reason sometimes advanced for this is that the recognition of a right to strike used to serve the western ILO Member States as a means of putting pressure on the real-socialism States. But, it is argued, once the eastern bloc imploded, “the political agenda basis for the social partners’ linking arms in this way” disappeared.⁴⁴ The employer side’s concern about this may also be reflected in recent rulings by supranational and national courts, as examined below.⁴⁵

3. RECEPTION BY (SUPRA-)NATIONAL COURTS

As explained above, the right to strike is explicitly recognized in many national constitutions and laws as well as in international and supranational regulations. When ruling on the right to strike, courts are also guided by ILO standards and the differentiated case law created by the Committee of Experts and the Committee on Freedom of Association. To illustrate this, some examples are highlighted below from the decisions of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and the Constitutional Court of South Africa.

The ECJ’s ruling on the *Viking* case concerned the relationship between freedom of establishment and the right to strike. The context was the intention of a Finnish shipping company, which had an Estonian subsidiary (Viking Line Abp) to fly a flag of convenience on one of its ships.⁴⁶ To lower its wage costs, Viking Line Abp wanted to register the ship in Estonia and reflag it. The Finnish Seamen’s Union (FSU) campaigned for the crew to continue to be paid at current Finnish collective agreement rates after the reflagging and threatened to take strike action. Moreover, the International Transport Workers’ Federation (ITF), to which the FSU

⁴² See for the few cases of criticism before the 1990s, International Labour Office, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised), Geneva, 23–25 February 2015, TMFAPROC/2015, paras 25 ff.

⁴³ Cf. International Labour Office, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revised), Geneva, 23–25 February 2015, TMFAPROC/2015, paras 28 ff.

⁴⁴ Cf. *Weiss/Seifert*, Der Streik im Recht der Internationalen Arbeitsorganisation, p. 131 f., *Wisskirchen*, The standard-setting and monitoring activity of the ILO: Legal questions and practical experience, in: International Labour Review 144 (2005), p. 288 and *Maupain*, The ILO Regular Supervisory System: A Model in Crisis?, in: International Organizations Law Review 10 (2013), p. 123 f.

⁴⁵ International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 16.

⁴⁶ ECJ 11 December 2007, C-438/05, European Court Reports 2007, p. I-10779.

is affiliated, sent a circular to all its affiliates calling on them not to negotiate with Viking Line Abp. At which point this company brought a case against the FSU and the ITF. This is not the place for a detailed account of the court's reasoning and the many criticisms that it drew.⁴⁷ What should be brought out, however, are its remarks on the right to strike. According to the ECJ's verdict, the right to strike constitutes a fundamental right that forms an integral part of the general principles of Community law. The ECJ explicitly refers to the European Social Charter and Convention 87 as instruments that EU Member States have signed or cooperated in.⁴⁸

In the case of *Demir and Baykara v. Turkey*, the ECtHR's ruling was sought as to whether union-organized municipal employees in Turkey are permitted to conclude collective agreements.⁴⁹ The court came to the wholly unambiguous conclusion that the right to found and join a trade union, in accordance with Art 11 of the European Convention on Human Rights, includes as an essential element the right to bargain collectively with the employer.⁵⁰ In its reasoning, the court emphasized that the European Convention is a "living instrument", which must be interpreted in the light of present-day conditions and the standards set by national and international law.⁵¹ As international standards, it also cites ILO Conventions 98 and 151 (the Labour Relations (Public Service) Convention concerning protection of the right to organize and procedures for determining conditions of employment in the public service, 1978) and refers to the corresponding case law created by the ILO supervisory bodies.⁵² This judgement is also remarkable for the ECtHR's finding that "it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies."⁵³ This view clearly derives from the idea that a *universal* stock of international norms is developing that governs the relations of States with each other but also with their own citizens.

⁴⁷ For more details, cf. among others *Schubert*, Europäische Grundfreiheiten und nationales Arbeitskampfrecht im Konflikt – Zugleich eine Besprechung der Entscheidungen des EuGH v. 11. 12. 2007 – Rs. EUGH 11.12.2007 Aktenzeichen C-438/05 – Viking und v. 18. 12. 2007 – Rs. EUGH 18.12.2007 Aktenzeichen C-341/05 – Laval, in: RdA 2008, p. 289 ff. and *Sciarra*, Viking and Laval: Collective – Labour Rights and Market – Freedoms in the Enlarged EU, p. 105 ff.

⁴⁸ ECJ 11 December 2007, C-438/05, European Court Reports 2007, p. I-10779, para 43.

⁴⁹ ECtHR (Grand Chamber), judgement of 12 November 2008 - 34503/97, Reports of Judgements and Decisions 2008-V, p. 395 ff.

⁵⁰ ECtHR (Grand Chamber), judgement of 12 November 2008 - 34503/97, Reports of Judgements and Decisions 2008-V, p. 395 ff., para 154.

⁵¹ ECtHR (Grand Chamber), judgement of 12 November 2008 - 34503/97, Reports of Judgements and Decisions 2008-V, p. 395 ff., para 146.

⁵² ECtHR (Grand Chamber), judgement of 12 November 2008 - 34503/97, Reports of Judgements and Decisions 2008-V, p. 395 ff., paras 147 f.

⁵³ ECtHR (Grand Chamber), judgement of 12 November 2008 - 34503/97, Reports of Judgements and Decisions 2008-V, p. 395 ff., para 86.

In the case of *Enerji Yapi-Yol Sen v. Turkey*, the ECtHR considered the issue of public servants' right to strike.⁵⁴ Turkey's intention had been to prevent the participation of public servants, on pain of disciplinary sanctions, in trade union meetings called to plan strikes. Such punishments were indeed imposed, including on trade union members who took part. The ECtHR considered this to be a violation of the abovementioned Art 11 of the European Convention. The court did find that restrictions on public servants' right to strike are compatible with the European Convention. However, it ruled that an absolute ban on strikes is disproportionate and does not fulfil the conditions set out in Art 11.2 of the Convention.⁵⁵ In this judgement too, the ECtHR points out that "the right to strike [...] is recognized by the supervisory bodies of the International Labour Organization (ILO) as the indissociable corollary to ILO Convention C87 concerning freedom of association and protection of the right to organize."⁵⁶

Due to its particular relevance, mention should also be made here, venturing beyond the rim of Europe, of a ruling by the Constitutional Court of South Africa. In the case of *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*, the Constitutional Court had to decide whether a minority trade union has a right to strike.⁵⁷ In interpreting the relevant legal and constitutional provisions, the court took international legal standards into account, as it is obliged to do by Art 36.1(b) of the Constitution of South Africa. The international standards in this case were ILO Conventions 87 and 98 and the related rulings made by the Committee of Experts and the Committee on Freedom of Association.⁵⁸ The constitutional court directly incorporated the principles developed by these committees into its own interpretation of South African law, and thus came to the conclusion that a right to strike must also be guaranteed for the minority union concerned.⁵⁹

The judgements cited above show that the "soft", i.e. not legally binding, legal views of the ILO supervisory bodies are gradually being "hardened" through their reception by supranational and national courts. Basically, this is just a normal case of discourse concerning the content of a standard within a globally networked legal system. Various actors give their opinion and this is then noted and taken up by other, more influential actors. Koh describes these phases of the transnational legal process as interaction, interpretation and internalization.⁶⁰ Nothing much

⁵⁴ ECtHR (Third Section), judgement of 21 April 2009 - 68959/01, [2009] ECtHR, 2251.

⁵⁵ ECtHR (Third Section), judgement of 21 April 2009 - 68959/01, [2009] ECtHR, 2251, para 30.

⁵⁶ ECtHR (Third Section), judgement of 21 April 2009 - 68959/01, [2009] ECtHR, 2251, para 24.

⁵⁷ *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) (13 December 2002).

⁵⁸ *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) (13 December 2002), paras 29 ff.

⁵⁹ *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) (13 December 2002), paras 33 ff.

⁶⁰ For a detailed treatment, cf. *Koh*, Bringing International Law Home, in: *Houston Law Review* 35 (1998-1999), p. 623 ff. and, for an application of Koh's approach to South Africa, *Hofmann*, Internationale Sozialstandards im nationalen Recht – Eine Untersuchung am Beispiel des Systems der sozialen Sicherheit in Südafrika.

would change in this process even if, as proposed by the employer side, there were a “disclaimer” in the Committee of Experts report – i.e. a highlighted passage emphasizing that the Committee’s legal views are not legally binding.⁶¹ Nonetheless, statements made by the employer representatives⁶² imply that precisely this case of the use of the transnational legal process gives grounds for calling the mandate of the Committee of Experts fundamentally into question, in the concrete instance of the right to strike, and even going so far as to describe the whole ILO supervisory mechanism as “broken”.⁶³

4. REMARKS ON THE MANDATE OF THE COMMITTEE OF EXPERTS

But maybe the Committee of Experts’ clarification of its mandate in the General Survey has fixed this – as some appear to assume. The social partners have acknowledged the mandate (see Section I above), so we may now get back down to business. Unfortunately, however, it seems that the controversy has not yet been laid to rest. The criticism by the employers has now shifted from the Committee of Experts’ *competence to interpret* Conventions to the *scope of this interpretation*. At the International Labour Conference in June 2015, it was pointed out that the

“concerns regarding this issue had not been settled by the visible clarification of the Committee of Experts’ mandate. They [the Employer members, C.H./N.S.] had repeatedly argued that the Committee of Experts’ findings could not be justified on the basis of the interpretation methods prescribed by the Vienna Convention on the Law of Treaties and had moved into the territory of standard setting.”⁶⁴

In the light of this statement, it seems justified to take a closer look at the Committee of Experts’ mandate. Though a certain competence to interpret ILO Conventions has already been ascribed to the Committee, a thorough examination of this competence is necessary in order to assess its scope.

⁶¹ Cf. International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 36. The Committee of Experts in any case already points out that no such binding force exists, *ibid*, para 35.

⁶² International Labour Conference, 102nd Session, 2013, Application of International Labour Standards 2013 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 16.

⁶³ International Labour Office, Governing Body, 317th Session, Geneva, 6-28 March 2013, Fourth Item on the Agenda: Matters arising out of the work of the International Labour Conference, Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards, Summary report concerning the informal tripartite consultations held on 19-20 February 2013, para 20.

⁶⁴ International Labour Conference, 104th Session, Geneva, June 2015, Provisional Record No. 14 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 39.

4.1. The competence to interpret Conventions

Unlike most of the core United Nations pacts on human rights, the ILO Constitution does not establish any distinct body to supervise the application of ILO Conventions. Basically, the only provision is a duty to report to the Governing Body (which then in turn reports to the ILC – Art 23 of the ILO Constitution), together with checks on individual cases by means of representations and the complaints procedure (Art 24 and 26 of the ILO Constitution). It may be supposed that, when the ILO was founded in the framework of the Treaty of Versailles (Part XIII), States' scepticism about an international supervisory body was still too great, due to fears that State sovereignty might be restricted in the field of labour and social policy.⁶⁵ However, it soon became apparent that a reporting duty alone did not constitute a sufficient supervisory function to ensure that the Member States abided by ratified Conventions. Moreover, the ILC soon reached the limits of its capacity to assess the growing number of reports.⁶⁶

Therefore, in 1926, the Labour Conference gave the Governing Body the task of setting up the Conference Committee (initially called the *Committee of the Conference* and later the *Conference Committee on the Application of Standards*) and the Committee of Experts (initially the *Committee of Experts*, later the *Committee of Experts on the Application of Conventions and Recommendations*).⁶⁷ The aims behind the creation of the Committee of Experts were expressed rather vaguely at first: "[...] for the purpose of making the best and fullest use of this information and of securing such additional data as may be provided for in the forms approved by the Governing Body and found desirable to supplement that already available [...]."⁶⁸ It was really all about providing the Governing Body with an independent, non-partisan expert body that would monitor application of ILO instruments objectively, on the basis of the States' reports, and point to violations – a task to which the ILC, with its delegates driven by their own interests, was considered less suited.⁶⁹ At first, the tasks entrusted to the Committee of Experts were mostly of a technical nature, but their range subsequently broadened in view of its growing advisory role to the Governing Body.⁷⁰ Now, the Committee took to supplementing its reports with declarations by States as well as its own position on those declarations.⁷¹ This expansion of its

⁶⁵ Cf. *Wagner*, *Internationaler Schutz sozialer Rechte*, p. 53. In that respect, there is a clear parallel with the International Covenant on Economic, Social and Cultural Rights (hereinafter, the UN Social Covenant), for which – unlike the International Covenant on Civil and Political Rights – a supervisory committee was established not within the framework of the Covenant, but later through a resolution of the UN Economic and Social Council (ECOSOC Res. E/1987/87).

⁶⁶ *Wagner*, *Internationaler Schutz sozialer Rechte*, p. 53 f.

⁶⁷ International Labour Conference, Eighth Session (1926), Record of Proceedings, Vol. I, Appendix VII, Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles, p. 429.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, p. 396 f.

⁷⁰ *Wagner*, *Internationaler Schutz sozialer Rechte*, p. 95 ff.

⁷¹ *Ibid.*, p. 95.

activity was explicitly supported by the ILC.⁷² In 1947, the Terms of Reference of the Committee of Experts were reformulated by the Governing Body as follows:

“It is accordingly suggested that [...] the Committee should be called upon to examine:

- (a) the annual reports under Article 22 of the Constitution on the measures taken by Members to give effect to the provisions of Conventions to which they are parties, and the information furnished by Members concerning the results of inspections;
- (b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with Article 19 of the Constitution;
- (c) information and reports on the measures taken by Members in accordance with Article 35 of the Constitution.”⁷³

This formulation of its mandate does not concretely define the word “examine”. In other words, it leaves it up to the Committee of Experts to determine the manner in which reports from States are to be examined, as the Committee had already done - with the ILC’s express consent - in the period following its establishment.

When the issue is Member States’ observance of their obligations under the ILO Conventions, particular attention when verifying such observance needs to be paid to the nature of these Conventions as legal standards in general and as international treaties in particular. As legal standards, they contain abstract, general rules, i.e. prescriptions that are necessarily formulated in an open-ended way and which include unspecific legal phrasing. This is reinforced by the fact that under international law, rules have to be found that are not only applicable to multiple cases within *one* country but are also valid in all ILO Member States.

So these provisions inherently require interpretation. Indeed, that is apparent from the queries that Member States put to the International Labour Office when seeking clarification of the content of a particular Convention. The International Labour Office then publishes its responses to the various requests for interpretation – but always with a rider to the effect that it is not, in principle, responsible for these questions.⁷⁴ Thus, the application of ILO Conventions within national law already requires an interpretation of the content and scope of the rules. Engisch emphasizes this linkage between the application and the interpretation of law by pointing out that it is “the task of interpretation to present jurists with the *content and the scope* of legal terms”.⁷⁵ Logically enough,

⁷² Cf. International Labour Conference, 19th Session (1935), Record of Proceedings, Appendix V, p. 750: “As in previous years, the Committee desires to place on record its appreciation of the careful and impartial work done by the Committee of Experts. The Report of the Committee of Experts supplies it with an essential basis for its own work.”

⁷³ International Labour Office, Minutes of the 103rd Session of the Governing Body (1947), Appendix XII, p. 173.

⁷⁴ An overview of these queries is online at http://www.ilo.org/public/libdoc/Interpretation_of_conventions/ [16.09.2013].

⁷⁵ Engisch, Einführung in das juristische Denken, p. 126. Dörr, Art 31, in: Dörr/Schmalenbach (pub.), Vienna Convention on the Law of Treaties, marginal note 1, also points out that “**interpretation is indispensable** not only for understanding a rule, but also for the process of applying or implementing it.” [original emphasis].

the same link exists with the verification of the (proper) application of law. The Committee of Experts also makes this clear.⁷⁶

To the general question of who is responsible for interpreting international treaties – such as the ILO Conventions – Dörr gives a straightforward answer: whoever is entrusted with applying the treaty concerned.⁷⁷ So, as already stated, application governs interpretation. In view of this position, no explicit arrangement regarding the mandate of the Committee of Experts would be needed, as a competence to interpret derives from, or must necessarily derive from, the competence to verify the application of ILO standards, if the Committee is to perform this task properly.⁷⁸

Naturally, it is open to the parties to a treaty to override the interpretations of a monitoring body, provided that body has not been given powers of final interpretation.⁷⁹ This follows from the principle that parties to a treaty can, if there is consensus among them, adapt its provisions at any time.⁸⁰ But it does require, at the very least, that the parties should agree to deprive the body concerned of its competence to interpret. On this, divergent views have been expressed, particularly by the representatives of the worker and employer sides, specifically and mainly on the issue of the right to strike under Convention 87, and this may also imply differing positions on the Committee of Experts mandate to interpret. In the first place, however, the contenders are not the abovementioned treaty partners (i.e. States) and, secondly, there is no consensual *contrary* practice or agreement regarding the interpretation mandate.

Rather one could identify a consensus, which had grown up between the treaty partners over the course of decades, that the Committee of Experts interpretation of the right to strike was *not* to be disputed. And for decades on end, the Committee's approach to verifying the application of the Conventions had not only been accepted, it had been explicitly welcomed by the ILC delegates.⁸¹ So there are good grounds for arguing that there is really already a consensus about the Committee's mandate, and some representatives of the treaty parties simply disagree with the Committee's legal position on the right to strike.

⁷⁶ International Labour Conference, 102nd Session (2013), Report of the Committee of Experts on the Application of Conventions and Recommendations, Application of Labour Standards 2013 (I), p. 13.

⁷⁷ Dörr, Art 31, in: Dörr/Schmalenbach (pub.), Vienna Convention on the Law of Treaties, marginal note 18.

⁷⁸ Maupain, The ILO Regular Supervisory System: A Model in Crisis?, in: International Organizations Law Review 10 (2013), p. 155 f., is therefore mistaken in supposing that explicit assignment of competence to interpret would be required here. And the fact that Art 37.1 of the Constitution entrusts a court with the final decision on disputed interpretations does not mean that the Committee of Experts cannot also have such a responsibility (although it will not be an ultimate one). If such were the case, then for example public authorities who constantly, in the course of their duties, have to interpret laws – i.e. abstract general standards – in order to apply them or verify compliance with them, would be rendered helpless worldwide.

⁷⁹ Precisely, the Committee of Experts is not assigned competence for an authentic, i.e. binding, interpretation, cf. Weiss/Seifert, Der Streik im Recht der Internationalen Arbeitsorganisation, p. 136 f.

⁸⁰ Dörr, Art 31, in: Dörr/Schmalenbach (pub.), Vienna Convention on the Law of Treaties, marginal note 20.

The matter to be referred to the ICJ should therefore be only whether and to what extent Art 3.1 of Convention 87 also covers the unions' right to strike and not the question of the scope of the mandate held by the Committee of Experts, since it is up to the institution itself to define the mandate of one of its Committees. This then yields the classic case of the application of Art 37.1 of the ILO Constitution, in which the ICJ subsequently gives its opinion upon the point at issue. This view is emphasized by the wording of Art 37.1 of the ILO Constitution:

"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 shall be referred for decision to the International Court of Justice."

In the debate about the ICJ's (supposedly exclusive) responsibility for matters of interpretation, a frequent short cut is to state that this is laid down in Art 37.1 of the ILO Constitution. But in fact, what it says is that the ICJ is responsible for "any question or dispute *relating to* the interpretation". It follows that the ICJ's responsibility for (contentious) issues as far as interpretation is concerned (for instance, the present issue about the right to strike as it relates to the interpretation of Convention No. 87) does not preclude a basic competence on the part of the Committee of Experts for interpreting Conventions when performing its supervisory tasks. So, if there is still disagreement about the interpretation of the Convention No. 87 (and the comments by the employers' side suggest this⁸²), the obvious move would be to seek clarification by the ICJ (see Section V below).

4.2. The scope of interpretation

Having examined the Committee of Experts' competence to interpret ILO Conventions, we can now turn to the scope of this interpretation. It has been stressed by the employers' representatives that

"[t]he Committee of Experts should avoid straying into indirect labour standard setting by adding further obligations to Conventions through extensive interpretations, filling in gaps that had appeared since a Convention was negotiated or by narrowing the flexibility of Conventions by providing subsequent restrictive interpretations. Standard setting was vested solely with ILO constituents and the Employer members vowed to resolutely defend this principle. The Committee of Experts could not fill the void created by the continued absence of an operational standards review mechanism."⁸³

⁸² After the Tripartite Meeting in February 2015, the International Organization of Employers issued a statement in which it was pointed out that the "joint Employer/Worker Statement recogniz[es] the right to industrial action as a means to resolve industrial disputes - but not a right to strike within the scope of ILO Convention 87.", International Organization of Employers, Outcomes and next steps arising from February 23 - 25 ILO Tripartite Meeting on the Standards Supervisory System, 26 February 2015.

⁸³ International Labour Conference, 103rd Session, Geneva, May-June 2014, Provisional Record No. 13 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 47.

Hence, two questions arise: a) Where does interpretation end and law-making begin? b) Does the Committee of Experts have a certain law-making competence?

In order to answer the first question, the Terms of Reference of the Committee of Experts, cited above, may serve as a starting point. They state clearly that it is the Committee's task to "examine" the reports of the Member States and the measures taken.⁸⁴ As has been said, the task of examining the application of ILO Conventions requires a certain interpretation of these standards. According to Savigny, four interpretation methods can be distinguished: grammatical interpretation (which explores the wording of a standard), historical interpretation (which considers the legislative history), systematic interpretation (which puts the standard into the context of other standards or a specific chapter) and teleological interpretation (which focuses on the spirit and purpose of the standard).

Are all those methods of interpretation available to the Committee of Experts? With a view to the Committee's role within the supervisory mechanism one would probably have to answer this question in the affirmative. Only in respect of the teleological interpretation could limitations result from certain guiding principles of public international law such as the principle of state sovereignty and the principle of consensus as a basis for binding legal obligation. In this regard, one has to acknowledge the auxiliary function of the Committee, which is to support the ILO members (represented, *inter alia*, in the Conference Committee on the Application of Standards) in supervising compliance with ILO Conventions. Though the Committee can (and must) identify the rationale of a standard in an ILO Convention, the principle of (explicit or implicit) state consensus sets down the limit. The competence to set binding international standards lies with the ILO Member States.

Focusing on the principle of consensus, it might hastily be assumed that – since there is a visible disagreement between the employer and worker representatives – the Committee has gone beyond the boundaries of its interpretative competence. Yet two things need to be kept in mind. First, the parties to the consensus are the ILO Member States. Their (implicit or explicit) intentions need to be explored in order to determine whether there is consensus or not. Second, interpretation principles – as spelled out in the Vienna Convention on the Law of Treaties – also apply with regard to the identification of the sources for this consensus.

⁸⁴ International Labour Office, Minutes of the 103rd Session of the Governing Body (1947), Appendix XII, p. 173.

5. BASES FOR A POTENTIAL RULING BY THE INTERNATIONAL COURT OF JUSTICE

The question of whether the Committee has left the area of interpretation and entered the sphere of standard-setting can only be answered on a case by case basis. As has been indicated before, the primary question for an advisory opinion of the ICJ is whether Convention No. 87 contains a right to strike (see Section IV). What follows is, therefore, a cursory glance at the legal bases for an ICJ opinion, so as to sketch the broad outlines of a possible decision. Under Art 37.1 of the ILO Constitution, taken together with Art 36 of the ICJ Statute, the International Court of Justice is responsible for questions or differences of opinion about the interpretation of the ILO Constitution and the ILO Conventions. This reflects the function of the ICJ as an international mediation body inasmuch as cases are to be referred to the ICJ when the parties to a treaty disagree about the interpretation of a norm within the treaty. Let us assume that such a disagreement exists here as to whether, in particular, Art 3 of ILO Convention No. 87 also accords trade unions a right to strike.⁸⁵ The Committee of Experts and the Committee on Freedom of Association have expressed a legal opinion on this. In the current legal situation, i.e. in the absence of concrete rules explicitly granting the Committee of Experts a corresponding interpretative competence, the competence to decide on this issue rests with the ICJ. Upon what sources of law and which principles will the ICJ base its decision? Two provisions are particularly relevant here. One is Art 38 of the ICJ Statute and the other is Art 31 of the Vienna Convention on the Law of Treaties (VCLT).

Art 38 of the ICJ Statute contains a (non-exhaustive) list of legal sources on which the ICJ bases its decisions. In this regard, Art 38.1(a) of the ICJ Statute refers to all “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states”. These may be taken to include the ILO Constitution as well as, in principle, all the Conventions containing rules about freedom of association and/or the right to strike. However, in the case of the latter, account needs to be taken of which Member States have ratified which of the relevant Conventions. Regarding the interpretation of Art 38.1(a) of the ICJ Statute, the ICJ has reasoned as follows:

“The first question to be considered is whether [a Convention] is binding for all the Parties in [the] case [...]. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source.”⁸⁶

In other words, it is first and foremost the ILO Constitution that should be considered a convention within the meaning of Art 38.1(a) of the ICJ Statute, as the Constitution has been ratified by all ILO Members. Freedom of association is

⁸⁵ Strictly speaking, the disagreement is between certain representatives of the Member States.

⁸⁶ North Sea Continental Shelf (Federal Republic of Germany/Netherlands) Cases, 20 February 1969, paragraph 25, judgement available online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cc&case=52&code=cs2&p3=4> [08.10.2015].

mentioned in the ILO Constitution, both in the Preamble and in Paragraph I (b) of the Declaration concerning the aims and purposes of the International Labour Organization (known as the Declaration of Philadelphia), which was incorporated into the ILO Constitution. On the basis of their ILO membership and their ratification of the Constitution, Member States are therefore obliged to respect and effectively guarantee freedom of association⁸⁷ as one of the four fundamental ILO principles.⁸⁸

Also applicable under Art 38.1(d) of the ICJ Statute are, “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. Within the framework of its decision, the ICJ also explicitly takes account of the rulings made by the committees and bodies that were established to supervise the treaties concerned.⁸⁹ The ICJ explains this very clearly in relation to the *Diallo* case:

“Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.”⁹⁰

To the extent that these cases can be taken as precedents, the legal views of the Committee of Experts and the Committee on Freedom of Association would find their way into a potential ruling by the ICJ. Moreover, under this provision, account can also be taken of the abovementioned court rulings that incorporate these legal views. And the ECtHR judgement on the case of *Demir and Baykara v. Turkey* makes it clear that the court presupposes the development of generally applicable international legal positions and principles.

This aspect is reinforced by the fact that the position of the Committee of Experts and the Committee on Freedom of Association also has other international backing. Notably, various international treaties expressly recognize a right to

⁸⁷ Re the binding effects of the ILO Constitution in this regard, cf. *Hofmann/Hänlein*, *Verankerung von Sozialstandards in internationalen Handelsabkommen aus rechtswissenschaftlicher Perspektive*, p. 107 f.

⁸⁸ Re the binding effects of the ILO Constitution in this regard, cf. *Hofmann/Hänlein*, *Verankerung von Sozialstandards in internationalen Handelsabkommen aus rechtswissenschaftlicher Perspektive*, p. 107 f, cf. the ILO Declaration of Fundamental Principles and Rights at Work, 1998, text reproduced in: International Labour Conference, 86th Session, Record of Proceedings, Vol. II: Authentic Texts, p. 20 ff.

⁸⁹ *Dörr*, Art 31, in: *Dörr/Schmalenbach (pub.)*, *Vienna Convention on the Law of Treaties*, marginal note 19.

⁹⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, 30 November 2010, Paragraphs 66 and 67; judgement available online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7a&case=103&code=gc&p3=4> [08.10.2015].

strike. In particular, under Art 8.1(d) of the International Covenant on Economic, Social and Political Rights (hereafter called the UN Social Covenant), the treaty parties undertake to ensure a right to strike. Here, it should be noted that only 13 of the 153 parties to Convention 87 have not ratified the UN Social Covenant.⁹¹ Moreover, the right to strike is also recognized in Art 45(c) of the Charter of the Organization of American States; Art 28 of the Charter of Fundamental Rights of the European Union; Art 27 of the Inter-American Charter of Social Guarantees; Art 6.4 of the European Social Charter (revised); Art 8.1(b) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; and Art 35 of the Arab Charter on Human Rights.⁹²

These provisions may also be taken into account within the framework of Art 31 of the VCLT. Art 31 of the VCLT contains *one* rule of interpretation with several components (wording, context, intent and purpose, good faith).⁹³ The ICJ regards Art 31 ff. of the VCLT as a codification of principles recognized in international customary law. So in principle, this also enables the application of these rules to cases involving those who are not party to the VCLT.⁹⁴ The aim of interpreting international treaties is to apply them in a way that corresponds to the intentions of the treaty parties, as expressed in the wording but taking external circumstances into account.⁹⁵ So the point of departure for interpretation is the wording of the provision concerned. As already described above, in Section II, the interpretation of the Committee of Experts regarding the right to strike is grounded not only in the wording of Art 3.1 of Convention 87. It also corresponds to the intent of Convention 87, as expressed in its Art 10.

It is also important to examine the content of discussions leading up to this Convention. A reading of the *Travaux préparatoires* (preparatory work reports) is illuminating in this respect.⁹⁶ Question 3 (c) of a questionnaire sent to ILO Members in the run-up to the discussions read as follows:⁹⁷

“Do you consider that it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudice the question of the right of such officials to strike?”

As none of the other items in this questionnaire enquired whether Members were against or for the right to strike in general, it may at least be concluded that this issue was not up for debate. One way of seeing this is that the existence of a right

⁹¹ They are Antigua and Barbuda, Botswana, Fiji,, Ireland, Israel, Kiribati, Moldavia, Mozambique, Burma/Myanmar, St. Lucia, St. Vincent and the Grenadines, Samoa and Vanuatu (as of October 2015).

⁹² Cf. International Labour Conference, 101st Session, 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), Giving globalization a human face, para 35.

⁹³ Dörr, Art 31, in: *Dörr/Schmalenbach (pub.)*, Vienna Convention on the Law of Treaties, marginal note 4.

⁹⁴ Dörr, Art 31, in: *Dörr/Schmalenbach (pub.)*, Vienna Convention on the Law of Treaties, marginal note 7.

⁹⁵ Dörr, Art 31, in: *Dörr/Schmalenbach (pub.)*, Vienna Convention on the Law of Treaties, marginal note 3.

⁹⁶ Cf. *Weiss/Seifert*, Der Streik im Recht der Internationalen Arbeitsorganisation, p. 141.

⁹⁷ International Labour Conference, 31st Session, 1948, Freedom of Association and the Protection of the Right to Organize, Seventh Item on the Agenda, p. 15.

to strike was taken as given and that the only discussion point was therefore to whom, if anyone, such a right should be denied.⁹⁸ Accordingly, the responses from ILO Members were solely about public officials' right to strike.⁹⁹ Against this background, it is interesting that Wisskirchen reproaches the Committee of Experts for leaving gaps in the account of how Convention 87 came about, but then himself omits a significant aspect when quoting from the *Travaux préparatoires*. He argues that "according to the analysis of government replies, the response to the question about a provision on the right to strike was explicitly negative", and he also quotes the replies concerned from ILO Members to the questionnaire - but without pointing out that these negative government responses were solely concerned with public officials' right to strike.¹⁰⁰ However, Wisskirchen is correct in further noting¹⁰¹ that a proposal for an explicit provision on the right to strike within Convention 98 was rejected by the ILC at its 32nd session.¹⁰² But the reason given in the ILC session report for this rejection is simply that the proposal was not receivable, as the content of Convention 98 did not cover issues relating to the right to strike.¹⁰³ Given the compressed form of the ILC session reports, one can only speculate, on the basis of this material, as to whether this was just a pretext.¹⁰⁴ Basically, this kind of rejection of the right to strike is a formality; it does not affect the material and legal aspect of the existence of a right to strike (as derived from freedom of association). This is further underlined by the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92). Wisskirchen states that the Recommendation "in

⁹⁸ This view is underlined by the portrayal of the historical background to Conventions 87 and 98 in *Ben-Israel*, *International Labour Standards: The Case of the Freedom to Strike*, p. 37 ff. *Ben-Israel* writes of a "widely held belief that a specific promulgation was unnecessary as the proposition [that the right to strike was indeed considered an integral part of the freedom of association, C.H./N.S.] was self apparent [...]"; although, he stated, other possible reasons why a right to strike was not specifically provided for may have included "procedural delay [...] as well as the workers' fears that providing a right to strike would lead inevitably to the restriction of their scope of activity", *ibid*, p. 37.

⁹⁹ International Labour Conference, 31st Session, 1948, Freedom of Association and the Protection of the Right to Organize, Seventh Item on the Agenda, Report VII.

¹⁰⁰ *Wisskirchen*, Die normsetzende und normüberwachende Tätigkeit der Internationalen Arbeitsorganisation (IAO) – Rechtsfragen und praktische Erfahrungen, in: *Zeitschrift für Arbeitsrecht* 34 (2003), p. 728, here cites International Labour Conference, 31st Session, 1948, Freedom of Association and the Protection of the Right to Organize, Seventh Item on the Agenda, Report VII, p. 87. The quotation, with the addition of the previous sentence which was not given by *Wisskirchen*, is as follows (emphasis added): "[It may be observed, in this latter connection, that the Governments were also consulted on the question whether it would be desirable to provide in the international regulations that the recognition of the right of association of public officials should in no way prejudice the question of the **right of such officials to strike**.] Several Governments, while giving their approval to the formula, have nevertheless emphasized, justifiably it would appear, 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 provision on this point in the proposed Convention concerning freedom of association."

¹⁰¹ *Wisskirchen*, Die normsetzende und normüberwachende Tätigkeit der Internationalen Arbeitsorganisation (IAO) – Rechtsfragen und praktische Erfahrungen, in: *Zeitschrift für Arbeitsrecht* 34 (2003), p. 729 here mistakenly cites the report of the 31st ILC.

¹⁰² International Labour Conference, 32nd Session, Geneva 1949, Record of Proceedings, p. 468.

¹⁰³ *Ibid*. "The Chairman ruled that this amendment was 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."

¹⁰⁴ This aspect is also emphasized by *Ben-Israel*, *International Labour Standards: The Case of the Freedom to Strike*, p. 40.

its point 4, makes a neutral reference to strikes and lockouts, i.e. without laying down any substantive provisions”.¹⁰⁵ Here too, he fails to mention an important consideration: point 7 of the same Recommendation specifies that “no provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike”. So if, during the negotiations on Convention 98, the inclusion of the right to strike was rejected on the grounds that this was discussed in the context of voluntary conciliation and arbitration, the first thing to note is that this did happen in Recommendation 92. True, paragraph 4 of Recommendation 92 does not contain an explicit guarantee of workers’ material right to strike. However, a possible reading of paragraph 7 of Recommendation 92 is that it simply assumes the existence of such a right. So even a particularly critical examination of this standard must recognize that to completely deny the existence of an “ILO right to strike” is untenable, given the genesis of Conventions 87 and 98.

Although a look back at that genesis can be helpful, Art 32 of the Vienna Convention on the Law of Treaties (VCLT) does make it clear that, at the very most, the preparatory work for a treaty, and the circumstances surrounding its adoption, can – in general – be used only as supplementary elements when interpreting an international treaty. However, it should be noted that Art 5 of the VCLT states that the rules which have been adopted by the organization concerned are *leges speciales* to the provisions of the VCLT. According to Art 2 para 1 lit (j) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the expression “rules of the organization” means “the constituent instruments, derived decisions and resolutions adopted within the international organization in accordance with the constituent instruments and the established practice of the organization”.¹⁰⁶ Which means there would have to be an examination of whether an interpretation practice within the ILO differed from the VCLT rules. It has been indicated that in the case of the ILO, preparatory documents are of high relevance as sources for the ILO’s interpretation practice.¹⁰⁷

As regards historical considerations, under Art 31.3 of the VCLT, the main elements to be brought into an interpretation are the developments that take place *after* the treaty is concluded.¹⁰⁸ It emphasizes that legal norms are subject to constant change, and it permits flexible interpretation. Art 31.3 of the VCLT states:

¹⁰⁵ *Wisskirchen*, Die normsetzende und normüberwachende Tätigkeit der Internationalen Arbeitsorganisation (IAO) – Rechtsfragen und praktische Erfahrungen, in: Zeitschrift für Arbeitsrecht 34 (2003), p. 729. Paragraph 4 of Recommendation 92 reads as follows: “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.”

¹⁰⁶ Cf. *Schmalenbach*, Art 5, in: *Dörr/Schmalenbach (pub.)*, Vienna Convention on the Law of Treaties, marginal note 15.

¹⁰⁷ International Labour Office, Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level (revized), Geneva, 23–25 February 2015, TMFAPROC/2015, para 58.

¹⁰⁸ *Dörr/Schmalenbach* emphasize, in their commentary on Art 31.3 of the VCLT, that “Art 31 para 3 requires taking account of subsequent developments, agreements between the parties and practice in applying the treaty, and thus seems to focus on the **current consensus of the parties** in

“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.”

Particularly in view of Art 31.3(b) of the VCLT, it can be argued that the rulings of the ILO supervisory bodies went unchallenged for decades, and that this can be regarded as a subsequent practice within the meaning of this provision.¹⁰⁹ Even in the 1990s, when employer representatives increasingly started to contest the Committee’s views on the right to strike, the Governing Body backed both the Committee of Experts and the Committee on Freedom of Association: In 1991, the Colombian Minister of Labour and Social Security had requested to include in the agenda for the ILC a proposal for a Convention on the right to strike. Refusing this request, the Governing Body pointed out that it has been

“left to the supervisory bodies – the Committee on Freedom of Association, the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards – to spell out the ILO’s principles in this matter on the basis of the cases which they have been called upon to examine.”¹¹⁰

Under Art 31.3(c) of the VCLT, also the previously mentioned international treaties, in particular the ILO Constitution and the UN Covenant on Economic, Social and Cultural Rights, can become relevant, as can the ILO Conventions and Recommendations that indirectly assume the existence of a right to strike. By taking these norms into consideration, the ICJ will be able to contribute to the consistency of international law, a matter evoked in the *Diallo* judgement.

As stated in the preamble of the ILO Constitution, a central aim of the organization is to ensure humane working conditions. Though it might be the task of the ILO to set and implement standards for decent work, this does not take away the right (and perhaps also the duty) for workers to fight for decent working conditions as well. Both the preamble and the Declaration of Philadelphia recognize the principle of freedom of association. As a core labour standard, all members of the ILO subscribe to this principle just by way of their membership.¹¹¹ Forming a trade union means that workers join forces in order to acquire greater

understanding the treaty. That consensus, which exists at the time of interpretation, may in some cases even override the original understanding of the text of the treaty, which prior to the subsequent developments may have appeared perfectly clear.”; *Dörr/Schmalenbach*, Vienna Convention on the Law of Treaties, Art 31 marginal note 4 [original emphasis].

¹⁰⁹ As also argued in *Weiss/Seifert*, *Der Streik im Recht der Internationalen Arbeitsorganisation*, p. 137 ff.

¹¹⁰ International Labour Office, Governing Body, 253rd Session, Geneva, May-June 1992, Second Item on the Agenda: Agenda of the 81st (1994) Session of the Conference, GB.253/2/3(Rev.), para 36 (emphasis added).

¹¹¹ Cf. *Hofmann/Hänlein*, *Verankerung von Sozialstandards in internationalen Handelsabkommen aus rechtswissenschaftlicher Perspektive*, p. 107 f.

bargaining power. Certainly, strikes must be the *ultima ratio* to achieve better working conditions. But still, they are the sharpest arrow in the quiver and often the only means of compensating for the power differential between workers and employers. It is, therefore, hardly conceivable that an international organization which was founded as a champion of workers' rights should *not* acknowledge that workers have a right to strike. On the contrary, the *travaux préparatoires* for Convention No. 87, and the tacit acceptance for decades on end of the views of the Committee of Experts and the Committee on Freedom of Association, support the position that it seemed redundant to the ILO constituents to explicitly provide for a right to strike. Most recently in 2015, in a joint, i.e. consensual, statement the Government representatives stated 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."¹¹² So, the Committee of Experts did not set new standards. The only thing the Committee did was to spell out the obvious.

6. IT AIN'T OVER 'TIL IT'S OVER

As implied by the agreement on the list of individual cases and the formulation of conclusions at the ILC 2015, peace seems to have been restored at the ILO. Of the 24 cases discussed, nine dealt with the application of Convention No. 87.¹¹³ Yet none of these nine cases concerned primarily the insufficient guarantee of a right to strike. The criticism as to the implementation of Convention No. 87 must rather be seen in the context of broader human rights violations in the respective countries. References to controversial views concerning the right to strike were omitted. Furthermore, concern has been expressed by the worker representatives that the Committee of Experts has started to apply a certain degree of self-censorship due to the controversy.¹¹⁴ In the course of its work, the Committee of Experts has turned into a quasi-judicial body within the ILO's supervisory machinery. Unsurprisingly, therefore, the Committee's credibility and "moral authority" – also outside the ILO system – stem from the "impartiality, experience and expertise" of the Committee members.¹¹⁵ It would be a deplorable development if the Committee had been intimidated by the attacks on its work.

Sooner or later, there will be a litmus test for the actions taken in respect of the conflict. Maybe even earlier than expected: the British Trades Union Congress (TUC), for instance, has just recently submitted a case to the Committee of Experts

¹¹² International Labour Organization, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, TMFAPROC/2015/2, Appendix II, para 4.

¹¹³ See International Labour Conference, 104th Session, Geneva, June 2015, Provisional Record No. 14 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part Two.

¹¹⁴ International Labour Conference, 103rd Session, Geneva, May-June 2014, Provisional Record No. 13 (Rev.), Third Item on the Agenda: Information and reports on the Application of Conventions and Recommendations – Report of the Committee on the Application of Standards, Part One, para 67.

¹¹⁵ International Labour Conference, 104th Session, 2015, Application of International Labour Standards 2015 (I), Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1 A), para 29.

dealing with the British government's Trade Union Bill. According to the TUC, the proposed legislation will entail restrictions on the right to organize, the right to facilities at the workplace, the right to bargain collectively, the right to strike, and trade union political freedom.¹¹⁶ In its reply – which addresses the application of Convention No. 87 not only in the United Kingdom but also, at a single stroke, in all the countries that have to send reports in 2015 concerning Convention No. 87 – the International Organization of Employers (IOE) rather boldly offers to “assist the CEACR [Committee of Experts] in better understanding the current status of the constituents’ discussion on Convention 87 in relation to the right to strike”.¹¹⁷ For this purpose, the submission reiterates that the social partners only recognized a right to take industrial action by workers and employers but not a right to strike within the scope of Convention No. 87.¹¹⁸ By way of conclusion, the IOE

“kindly calls upon the CEACR to constructively facilitate the ‘Standards Initiative’ process by reconsidering and suspending its non-binding interpretations on the ‘right to strike’ vis-à-vis Convention 87, whether in observations, direct requests or other CEACR documents. In particular, the Employers respectfully call on the CEACR to suspend at its forthcoming meeting all references and concrete requests in observations and direct requests on Convention 87 for amendments of law and practice with regard to strike action [...]”.¹¹⁹

This offensive by the employers supports the view that the conflict is far from being settled. The response by the Committee of Experts will, therefore, be keenly awaited. In addition, it remains to be seen which changes the Standards Review Mechanism and the review of the supervisory system will bring about. Over decades, the Committee of Experts evolved into an – internationally respected – moral authority, watching over the implementation of international standards. As is becoming obvious from the often poor reporting practice and the plethora of cases where states ratify a Convention but do not implement it, there is an urgent need for an impartial body to safeguard the enforcement of ILO standards. The fact that such a body has never been created by the ILO Constitution but only on an executive level casts some doubts on the willingness of the ILO members to submit themselves to such an impartial assessment. But even more doubts about the overall commitment to international labour standards will be in order if the outcome of the current crisis is a weakened supervisory mechanism. Maybe there is a need for change.¹²⁰ But almost a hundred years after the ILO's foundation, there is even more need for a strong institutional signal. A signal which shows the workers all over the globe that the ILO is still their champion, fighting for decent work for all.

¹¹⁶ Trades Union Congress, The Trade Union Bill, TUC Submission to ILO Committee of Experts.

¹¹⁷ International Organization of Employers, Submission to the Committee of Experts on the Application of Conventions and Recommendations relating to Article 23.2 of the ILO Constitution.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Cf. *Ryder*, Address to the Governing Body, Post-Election Speech, 28 May 2012: “I know, too, that there is heavy onus on the ILO to undertake its work with a maximum of efficiency - with the utmost regard to the need to spend each dollar you put at our disposal to optimal effect. We will change, reform, improve to meet your expectations in that regard - and you will rightly hold us to the highest standards of conduct.”

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