International Labour Review, Vol. 126, No. 5, September-October 1987

Principles of the Committee on Freedom of Association concerning strikes

Jane HODGES-AEBERHARD and Alberto ODERO DE DIOS *

I. Introduction

No international labour Convention or Recommendation explicitly recognises or deals with the right to strike. In fact the word "strike" appears only incidentally in the Abolition of Forced Labour Convention, 1957 (No. 105), which forbids the use of any form of forced or compulsory labour as a punishment for having participated in strikes (Article 1 *(d)*), and in Paragraphs 4, 6 and 7 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92).[1] The International Labour Conference has on several occasions, particularly between 1947 and 1950 and again in 1978, discussed the right to strike in the context of preparatory work on instruments covering related subjects, but those discussions did not give rise to international standards expressly covering the right to strike.

In international law the right to strike is explicitly recognised in Article 8 of the International Covenant on Economic, Social and Cultural Rights of 1966. At the regional level, the European Social Charter of 1961 (Article 6) recognises the right to strike in the case of a conflict of interest, subject to any commitments which might arise out of collective agreements. This right is also recognised in the Inter-American Charter of Social Guarantees of 1948 (Article 27).

The absence of explicit ILO standards on the subject does not mean, however, that the ILO has ignored the right to strike or refuses to deal with means of safeguarding its exercise. That this is not the case is clear from the following four facts:

(1) Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), lays down the general and unrestricted right of workers' organisations "to organise their administration and activities and to formulate their programmes" – and strikes are obviously a common and important activity of workers' organisations.

(2) The ILO supervisory bodies, particularly the Committee of Experts on the Application of Conventions and Recommendations and the Govern-

* International Labour Office.

ing Body Committee on Freedom of Association, when considering the application by various countries of Article 3 of Convention No. 87, have consistently reaffirmed the principle of the right to strike, subject to any reasonable restrictions imposed by law, and have defined the limits within which the right to strike may be exercised.[2] Reference should be made here to the quasi-judicial function of the supervisory bodies of the ILO, as elucidated by N. Valticos:

> The application of freedom of association Conventions is regularly examined by the international supervisory bodies and these, in their decisions on hundreds of cases, have built up a substantial body of case law, in the broadest sense of the term. This case law has been the work essentially of two ILO bodies . . . one is the Committee of Experts on the Application of Conventions and Recommendations, whose individual comments and general surveys, though not to be construed as a definitive interpretation of Conventions, which only the International Court of Justice is empowered to give, have acquired wide authority; the other is the Committee on Freedom of Association, whose decisions have been published systematically in a widely used digest. This latter case law is not limited to determining the meaning of freedom of association Conventions. Since it is not bound by the terms of these Conventions but is more generally inspired by the *principles* of freedom of association, this Committee has, owing to the variety of cases referred to it, been led to formulate principles and standards which, on various points, have complemented and extended the express provisions of the Conventions.[3]

(3) There are numerous provisions in Conventions and Recommendations (especially those relating to the right to organise and bargain collectively) that, as will be seen below, guarantee protection to workers against acts of discrimination based on their participation in trade union activities. Although these instruments make no explicit reference to the type of activity protected, given the general tenor of the provisions in question, there is no reason to consider them not to cover participation in lawful strikes. The Freedom of Association Committee and the Committee of Experts have made it abundantly clear that protection against acts of anti-union discrimination covers participation in lawful strikes.

(4) The resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference at its 54th Session in 1970, in inviting the Governing Body to instruct the Director-General to take action to ensure full and universal respect for trade union rights in their broadest sense, drew particular attention to the right to strike (paragraph 15).

In addition, the question of strikes has received attention at both the regional and the sectoral level in a number of resolutions. In chronological order, there is first the resolution concerning protection of the right to organise and to bargain collectively adopted by the Third Regional Conference of the American States Members of the ILO held in Mexico City in 1946. Paragraph 3 of its first section states that

> Appropriate legislative measures should safeguard in each country the exercise of labour union rights and the activities of the labour leaders, particularly during the

preparation and the period of strikes so that labour leaders may not be dismissed, prosecuted or deprived of their liberties because of their legitimate union activities.

Likewise, at the sectoral level, the Committee on Inland Transport – one of the international industrial committees to set up pursuant to a decision taken by the Governing Body in January 1945 – adopted in 1947 a resolution that also reflects the importance given to strikes at that time. In paragraphs 13 (2) and 17 the resolution states that

> Having regard to the vital position which transport occupies in the national economy, employers and workers, with due regard to their responsibility to society, should consider lockouts and strikes as an extreme and ultimate means of bringing pressure to bear upon one another. Consequently, they should undertake to utilise to the full extent all existing facilities for the expeditious and effective settlement of disputes before considering recourse to a lockout or a strike. . . . While the right to lockout and strike applies in inland transport as in other industries, in the event of a dispute arising during the operation of temporary restrictions placed by legislation upon the normal exercise of the right to lockout or strike, effective guarantees should be provided for the maintenance of wages and conditions of employment while negotiations are in progress.

Subsequently, in 1960, the First African Regional Conference, held in Lagos, adopted a resolution on freedom of association and protection of the right to organise, paragraph 5 of which

> Urgently appeals to all African States and to governments responsible for territories in Africa to examine their legislation and practice afresh, in a thorough and objective manner, so that, in accordance with international standards, there may be recognised in every African State and territory, preferably by constitutional law . . . the right of all workers to go on strike in defence of their economic and social interests, after having exhausted all conciliation procedures provided for to this end, by the legislation, or failing legislation, by the practice of the country concerned, it being understood that in exercising these rights due consideration must be given to the provisions of Article 8 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

And two years later, in 1962, the Fifth Asian Regional Conference, held in Melbourne, adopted a resolution, paragraph 42 of which states that

> Governments should take the necessary measures to strengthen and improve conciliation services in order to provide more effective assistance in the settlement of disputes and in the avoidance of strikes, slow-downs and lockouts by voluntary action.

Other statements at the sectoral level relating to strikes can be found, for example, in the resolution concerning industrial relations in the chemical industries adopted by the Chemical Industries Committee (1958, paragraph 16), the conclusions of the Inland Transport Committee concerning methods of collective bargaining and settlement of disputes in rail transport (1966, points 18 and 19), the memorandum adopted by the Tripartite Technical Meeting on Mines Other than Coal Mines concerning industrial relations (1957, paragraph 8) and the memorandum concerning labour-management relations in the timber industry (1958, paragraph 15).

Let us now turn to the main subject of this article, the position which the Freedom of Association Committee has taken on strikes. The nature and functions of the Committee have been described as follows:

> The Committee on Freedom of Association is a tripartite, nine-member committee of the Governing Body . . . three Worker, three Employer and three Government delegates with appropriate substitutes. This Committee regularly examines . . . formal complaints of alleged infringements of trade union rights submitted to the ILO. What are these complaints and how can they be submitted? They can be submitted by one government against another. They can be presented by a national organisation of workers or employers which has a direct interest in the matters complained about. They can be submitted by an international organisation of workers or employers having what we call "consultative status" with the ILO. . . . Or they can be submitted by other international organisations of workers or employers . . . where the complaint involves an organisation which is affiliated to that particular international organisation. . . . One point which is important to remember is that this procedure is based on complaints against member States of the ILO, even against member States which have not ratified the freedom of association Conventions. The legal basis for this special machinery and the fact that it applies to all States irrespective of whether they have ratified the Convention or not, is quite simple. It lies in the fact that the very principle of freedom of association is written into the Constitution of this Organisation. This being so, States, in becoming Members of this Organisation and in accepting the Constitution of the ILO, are bound to uphold the principle of freedom of association.[4]

II. The basic principle

We can now go on to examine the basic principle laid down by the Committee concerning strikes, the principle from which, it may be said, all its other case law on the subject flows and the more important elements of which were enunciated by it as early as its second meeting in 1952. The principle can be set out thus: The right to strike is one of the essential and legitimate means through which workers and their organisations may further and defend their social and economic interests.[5]

An examination of this principle immediately raises the question of the legal definition of strikes. The Committee's reports from 1952 to 1984 contain the words "right to strike". From 1984 onwards, however, one finds a marked, although not uniform, use of the term "recourse to strikes" without any reference to the notion of a "right". This change in the formulation of the Committee's basic principle concerning strikes merits a brief investigation.

First, it should be noted that the Committee enunciates its principles in the light of the factual circumstances presented to it by complainants. These include situations where, even though strikes may be prohibited by legislation (covering all workers or only certain categories), they are more or less tolerated in practice. Considering that Article 3 of Convention No. 87 lays down the right of workers' organisations to organise their activities and to formulate their programmes freely without expressly requiring the adoption of specific legal provisions to this end, it can be argued that a situation in which workers are able in practice to strike without restrictions is compatible

with that provision of the Convention even in the absence of legislation specifically regulating or permitting strikes. Lastly, it should not be forgotten that the legal definition of strikes has been the subject of much controversy in academic circles and varies from one legal system to another.

In any event, it is of secondary importance from the point of view of the application of Convention No. 87 whether national legislation defines strikes as a right, a freedom or a power, since what matters in the last analysis, and the issue on which the Committee has to decide, is the ability lawfully to take strike action in practice. It is therefore not surprising that in recent years the Committee has used a pragmatic and sociologically oriented formulation – "recourse to strikes" – when expounding its basic principle on the subject.

Next, the basic principle refers to strikes as an "*essential*" means of furthering and defending the workers' interests. This means that a narrow criterion should be applied in defining the categories of workers who may be denied the right to strike, and that any legal restrictions which might limit its exercise should not be excessive. As noted below in the section on the conditions required for resorting to strike action, it is for each country to decide to what extent recourse to strikes should be a last resort subject to the prior use of means of negotiation.

The next element – a right of "*workers and their organisations*" – is double-edged. On the one side, it leaves to national legislation the task of determining whether the right to strike is a workers' or a trade union right, but on the other, by using the term "workers' organisations" instead of "trade unions", it makes it clear that national legislation must not prevent federations or confederations,[6] any more than trade unions, from exercising that right, whether directly (in countries where the right to strike is a trade union right) or indirectly (in countries where it is a workers' right). In paragraph 28 of the report on its first meeting in January 1952, the Committee established the principle that it has full freedom to decide whether an organisation may be deemed to be a workers' organisation within the meaning of the ILO Constitution and does not consider itself bound by any national definition of the term.

It should also be noted that the basic principle links the exercise of the right to strike or, to be more precise, the scope of international protection for that right, to the purpose of *furthering and defending the economic and social interests of workers*. It is clear that this criterion excludes from the scope of ILO protection strikes of a purely political nature and leaves open the question of solidarity or sympathy strikes, which will be examined later on.

Lastly, the basic principle describes strike action as a "*legitimate*" means, an adjective used together with "essential" since the Committee's first meetings in 1952. For our purposes here suffice it to say that the Committee considers that a proper exercise of the right to strike must not result in penalties or prejudicial measures of any kind that would constitute acts of anti-union discrimination contrary to the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

It is clear from the foregoing that the basic principle is more a general description of the right to strike than a specific definition of what constitutes a legitimate strike. Hence this latter concept – which the Committee has not been called on to formulate – has to be extracted from the principles it has adopted and from the types of strike action it has accepted, which are not limited to the classic interruption of work alone. While a definition falls outside the scope of this article, for illustrative purposes it may be recalled that the Committee has considered the following methods of peaceful striking: tools-down, the slowing down of work (go-slows), sit-down strikes, working to rule, stoppages of less than one working day and picketing.[7]

III. Strike action in normal circumstances

1. The objectives of strike action

This section deals with the types of claims leading to strike action covered by the body of case law established by the Freedom of Association Committee. According to the definition contained in Article 10 of Convention No. 87, the term "workers' organisation" means any organisation of workers established for furthering and defending their interests. This definition is of primary importance, not only because it lays down criteria for identifying workers' organisations as distinct from other associations but also because, by spelling out their purposes – to further and defend the interests of workers – it delimits the scope of the rights and guarantees laid down in the Convention. These rights are protected *in so far as* they are exercised with a view to achieving these purposes.

Claims pursued through strike action can be broken down into three categories: those that are of an occupational nature, those that are of a trade union nature, and those that are of a political nature. The first two types raise no particular problems since their legitimacy has never been doubted in the Committee's decisions.[8] However, a further distinction has to be made between claims that directly and immediately affect the workers calling the strike and those that do not. This raises the question of political and solidarity strikes. To begin with, it is important to note that the Committee has rejected the thesis that the right to strike should be restricted solely to industrial disputes that can be resolved through the signing of a collective agreement.[9]

Political strikes

In view of the definition of "workers' organisations" contained in Article 10 of Convention No. 87, the Committee has considered that strikes of a purely political nature do not fall within the scope of the principles of freedom of association.[10] While the Committee has expressly pointed out that "it is only in so far as trade union organisations do not allow their

occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities", it has also noted that "it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character" because "these two notions overlap".[11]

Consequently, in a later decision[12] the Committee concluded that the occupational and economic interests which workers defend through the exercise of the right to strike include not only better working conditions or other collective claims of an occupational nature but also solutions to economic and social policy questions. Along the same lines the Committee has stated that workers' organisations should be allowed to express in a broader context – outside industrial disputes that can be resolved through the signing of a collective agreement – their dissatisfaction regarding economic and social matters that affect their members' interests,[13] though such action must consist merely in the expression of a protest and must not be intended as a breach of the peace.[14] These principles also apply to general strikes[15] – which by their very nature have a strong political connotation – as well as to those of a limited geographical scope.

In situations where the demands being pursued through strike action include both claims of an occupational or trade union nature and claims of a political nature, the attitude of the Committee has been to recognise the legitimacy of the strike when the occupational or trade union claims do not appear to be a mere pretext for covering purely political objectives unconnected with the furthering and defence of the workers' interests.[16]

Solidarity strikes

As regards solidarity or sympathy strikes, the basic question is whether workers may call a strike for occupational, trade union or socio-economic reasons when its purpose has no direct or immediate bearing on them. In one recent case concerning a decree regulating recourse to solidarity strikes the Committee referred to a general survey of the Committee of Experts on the Application of Conventions and Recommendations in which the Experts considered that a general prohibition of solidarity strikes (which they define as strikes "where workers come out in support of another strike") could lead to abuse and that workers should be able to take such action provided the initial strike they were supporting was itself lawful.[17] The Committee noted that the decree in question did not ban solidarity strikes but only regulated them by limiting recourse to this type of action. In its opinion, although several provisions in the decree might have been justified by the need to respect various procedures (notification of the strike to the labour authorities) or to guarantee security within the enterprise (measures to prevent agitators and strike-breakers from entering the workplace), others, such as geographical or sectoral restrictions placed on solidarity strikes – which therefore excluded general strikes of this nature – or restrictions on

their duration and frequency, constituted a serious obstacle to the calling of such strikes.[18]

A further implication of these principles is that, when Article 10 of Convention No. 87 limits the organisations covered by the Convention to those established for the purpose of "furthering and defending the interests of workers . . .", the term "workers" is to be understood not only in the narrow sense (i.e. workers affiliated to unions) but also in the broad sense of the word.

2. Categories of workers which may be excluded from taking strike action

It should be recalled, first, that Article 9 of Convention No. 87 allows national laws or regulations to determine to what extent the armed forces and the police are to be covered by the guarantees provided for in the Convention. Consequently, the Committee has refused to object to legislation banning strikes by such personnel.[19]

Since recourse to strikes is considered to be one of the basic means of putting into effect the "right of workers' organisations to organise their activities" (Article 3 of the Convention), the Committee decided from the outset to accord this means general recognition, the only possible exceptions being those that might be applied to civil servants and workers in essential services in the strict sense of the term.[20]

The public service

As far as public servants are concerned, the Committee took its inspiration from the understanding reached in the drafting of Convention No. 87, that recognition of their right of association "in no way prejudges the question of the right of such officials to strike".[21] Nevertheless, it and the Committee of Experts have since declared that, if public servants are not allowed to strike, they should be given adequate guarantees that their interests will be protected, for example through appropriate, impartial and speedy conciliation and arbitration procedures in which the parties concerned are able to take part at every stage, with the arbitration decisions being binding on both parties and being applied in full and speedily. It should also be noted that Convention No. 151 and Recomendation No. 159 concerning labour relations in the public service, both of which were adopted in 1978, do not explicitly mention the right to strike for public servants, although their provisions do cover the settlement of labour disputes. It was the understanding of the Committee on the Public Service of the International Labour Conference that year – after much discussion – that the proposed Convention (No. 151) did not come down on one side or the other regarding the right to strike.[22]

In recent years the Committee's principles have undergone an evolution characterised by the use of stricter criteria in defining the categories of public

servants that may be excluded from recourse to strikes. As a result, the categories in question have been narrowed down to only those who act as agents of the public authority. This has important consequences since the starting-point in the process of determining which public servants may be barred from taking strike action is no longer the fact that the national public service legislation applies to them, but the nature of the functions they perform. In considering which public servants engaged in the administration of the State may be excluded from the scope of Convention No. 98, the Committee of Experts has defined the categories of public servants "acting as agents of the public authority" as those who are employed in government ministries and other comparable bodies, as well as officials acting as supporting elements in these activities, but not other persons employed by the government, by public undertakings or by autonomous public institutions.[23] For its part, the Freedom of Association Committee has, in considering complaints presented to it so far, stated that certain categories of public servants were *not* acting as agents of the public authority, for example: employees in petroleum undertakings, in banks, in metropolitan transport or in the teaching sector,[24] and, more generally, those working in public corporations or state enterprises. Lastly, it should be noted that, among the categories of public servants not acting as agents of the public authority, some may be barred from taking strike action because they work in an essential service in the strict sense of the term.

Essential services

The Committee's definition of essential services in the strict sense of the term (in which the right to strike may be prohibited) has also become narrower. In the past the Freedom of Association Committee had defined such services as those whose "interruption may cause public hardship"[25] or "serious hardship to the national community".[26] Subsequently, in 1979, the definition was narrowed to those "whose interruption would endanger the existence or well-being of the whole or part of the population".[27] In 1983 (when the Committee of Experts reviewed its definition of essential services in the context of its general survey on freedom of association and collective bargaining), the Committee made its definition consistent with the Experts' wording, namely "services whose interruption would endanger the life, personal safety or health of the whole or part of the population".[28]

Obviously, what is to be understood by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a given country. Moreover, the circumstances surrounding a "non-essential" service may become essential if a strike continues beyond a certain period of time or extends beyond a certain scope, endangering the life, personal safety or health of the whole or part of the population. Such considerations, however, have not prevented the Committee from concluding that in general a number of specific services are not to be considered essential.

For example, the Committee has found that generally, according to the above-mentioned criterion, the following are *not essential* services: general dock work, aircraft repairs, banking, agricultural activities, the metal industry, teaching, the supply and distribution of foodstuffs, the Mint, government printing services, state alcohol, salt and tobacco monopolies, the petroleum industry and offshore petroleum installations (although the Committee did acknowledge that a strike here might paralyse production with serious long-term consequences for the national economy), mining and, in normal circumstances, transport in general including metropolitan transport undertakings.[29] In some of these cases it has suggested the possibility of considering an amendment to the relevant legislation so that strikes may be prohibited only in certain services that are essential in the strict sense of the term, particularly where the authorities have wide discretionary powers to extend the list of essential services.

On the other hand, the Committee has considered that the hospital sector is an *essential* service, as are water supply, telephone and electricity services. In a series of cases concerning strikes by air traffic controllers the Committee stated that the withdrawal of their services could endanger the life and safety of large numbers of passengers and crew; the exclusion of this particular category of public employees from the right to strike did not, therefore, constitute a violation of the principles of freedom of association.[30] Obviously these few examples do not constitute an exhaustive list of essential services. If the Committee has not enumerated more it is because its decisions depend on the specific cases it is called on to examine, and it is rare that complaints relate to strike prohibitions in essential services.

At all events, it is worth noting that the Committee, on examining a complaint that did not concern an essential service, maintained that the serious long-term consequences of a strike for the national economy did not justify its prohibition.[31] This would seem to rule out the argument that a strike in a non-essential service is legitimate only if the damage caused to the economy is not disproportionate to the benefits gained by the workers from a successful outcome, to say nothing of the fact that the disproportion may be difficult to establish.

Compensatory guarantees

The Committee has pointed out that, where national legislation denies public servants or workers in essential services the right to strike, they should be given adequate protection to compensate for the limitation thereby placed on their freedom of action. Hence strike prohibitions in such circumstances should be accompanied by adequate, impartial and speedy conciliation and arbitration procedures in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.[32] When considering mediation and arbitration proceedings, the Committee has stated that it is essential that all the members of the bodies

entrusted with such functions should not only be strictly impartial, but if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also *appear* to be impartial both to the employers and to the workers concerned.[33]

3. Conditions required for resorting to strike action

The legislation of most countries lays down a number of requirements governing the lawfulness of strikes. The Freedom of Association Committee has stated that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations".[34] The abundance of Committee decisions on the subject is due to the fact that "among the cases which most frequently come before the Committee are those relating to the right to strike".[35]

It has ruled that the following requirements are acceptable: (1) the obligation to give notice;[36] (2) the obligation to resort to conciliation and (voluntarily agreed) arbitration procedures in collective disputes prior to calling a strike, provided they are adequate, impartial and speedy, and involve the participation of the parties at every stage;[37] (3) the obligation to observe a fixed quorum;[38] (4) the use of secret ballots in strike votes;[38] (5) the adoption of measures to ensure observance of safety regulations and to prevent accidents;[39] and (6) the maintenance of a minimum service.[40]

Three of these requirements merit a detailed examination since the Committee has over the years adopted principles that tend to limit their scope: the use of arbitration procedures, the quorum required for a meeting (and the majority of votes required) to call a strike, and the maintenance of a minimum service.

As regards *arbitration*, the Committee's position is clear:

> The substitution by legislative means of compulsory arbitration for the right to strike as a means of resolving labour disputes could only be justified in respect of essential services in the strict sense of the term . . . apart from such cases, it would be contrary to the right of workers' organisations to organise their activities and formulate their programmes, as laid down in Article 3 of Convention No. 87.[41]

Two comments can be made in this respect. First, the Committee objects to the use of *legislation* as a means of replacing strikes by compulsory arbitration. Compulsory arbitration is acceptable on condition that it has been provided for in the collective agreement as a means of settling disputes, or is agreed to by the parties during negotiations on a collective dispute. Secondly, the Committee's principle, given the general terms in which it is worded, applies to all stages of a dispute. In other words, legislation cannot impose compulsory arbitration as a substitute for strikes either at the beginning of or during a collective dispute. This leads logically to the conclusion that it is for the workers and their organisations alone to decide,

once a strike in a non-essential service has commenced, when their strike shall end; the setting of a maximum period by legislation or administrative decision is ruled out except when the interruption of the service lasts so long that the life, personal safety or health of the whole or part of the population is endangered, i.e. the non-essential service has become an essential one.

As regards the question of the *quorum and majority required* for the calling of a strike, the Committee has again adopted a pragmatic approach: it has, for example, stated that a quorum of two-thirds of the members may be difficult to obtain, especially where a trade union has a large number of members spread over a wide area.[42] As regards the number of votes required for calling a strike, the Committee has observed that the requirement of two-thirds of the total number of members of the union or branch concerned is a restriction of Article 3 of Convention No. 87 and that the requirement of an absolute majority of workers or even the majority of members of federations or confederations may involve the risk of seriously limiting the right to strike of trade union organisations.[43] On the other hand, in one recent case[44] the Committee has accepted as being consistent with the principles of freedom of association a situation in which the decision to call a strike in the local branches of a trade union is taken by the general meeting of the local branches when the reason for the strike is of a local nature, and a strike decision by a higher-level trade union body is taken by an absolute majority of all the members of its executive committee. Clearly these principles have been formulated in specific legislative contexts; they are referred to here for illustrative purposes without prejudging the legitimacy of other quorum and majority systems.

As regards restrictions designed to ensure *minimum services*, the Committee's basic approach is that these are acceptable in the event of a strike whose extent and duration might be such as to result in an acute national crisis endangering the normal living conditions of the population. In such cases the Committee has stressed that a minimum service should be confined to operations that are strictly necessary to avoid endangering the life, personal safety or health of the whole or part of the population; in addition, the relevant workers' organisations should be able to participate, along with the relevant employers' organisations and the public authorities, in defining the minimum service.[45] The Committee has refused to give an opinion on the levels of minimum services established in specific cases presented to it, even where trade union organisations alleged – and supplied voluminous data to support their allegation – that the level was excessive since it limited the exercise of the right to strike of a large proportion of the workers concerned. It has, however, gone so far as to state that joint consultation about the appropriate level is essential not only to permit a careful exchange of views on what, in a given situation, can be considered to be absolutely essential but also to ensure that the extent of the minimum services to be provided is not so great as to render the strike ineffective in practice because of its limited impact.[46]

4. Protection against anti-union discrimination based on strikes

Even where workers' organisations pursuing acceptable aims and observing the limitations and procedures described above lawfully exercise the right to strike, there is a risk that strike action will lead to reprisals by the employer. As Bartolomei de la Cruz has put it:

> Since strikes or other industrial action generally follow failure of less radical courses of action, they naturally occur at periods of maximum tension or total breakdown in labour-management relations. It is easy to see that those may be moments when the management will be particularly inclined to take reprisals with the aim of dissuading employees from following the strike or other coercive action (if the action has not yet started), of punishing the leaders (if the action has already started), or of eliminating the leaders after the battle has been fought.[47]

For example, in one case the Committee found it difficult to accept as a coincidence unrelated to trade union activity that heads of departments decided, immediately after a one-day strike, to convene disciplinary boards which, on the basis of service records, ordered the dismissal not only of a number of strikers but also of the seven members of their union committee.[48]

ILO standards on anti-union discrimination

Protection against discriminatory acts based on participation in trade union activities is provided for in Convention No. 98 and in several subsequent freedom of association Conventions, although no provisions exist for specific protection against reprisals for strike action with the exception of Convention No. 105, which, as mentioned earlier, prohibits forced or compulsory labour "as a punishment for having participated in strikes".

Article 1 of Convention No. 98 protects individual workers against acts prejudicial to them in relation to two aspects of freedom of association: membership of trade unions and participation in trade union activities. It is the latter that interests us here. Article 1(1) provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment", including in particular dismissal or other prejudicial action against workers. This same provision appears in Article 58 of the Plantations Convention, 1958 (No. 110).

Article 2 of Convention No. 98 lays down the basic right to adequate protection against acts of interference in organisations of workers (or of employers). Paragraph 1 of that Article, in particular, is relevant to strike situations since it states that "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration". It should be pointed out that a given act – such as dismissal of members of the executive committee of a trade union for striking – could be seen as both an act of interference (covered by this Article) and an act of anti-union discrimination (covered by Article 1).

The Workers' Representatives Convention, 1971 (No. 135), lays down similar protection for workers' representatives in an undertaking, whether trade union representatives or elected workers' representatives. Article 1 reads:

> Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

Articles 4 and 5 of the Labour Relations (Public Service) Convention, 1978 (No. 151), lay down the right to protection of public employees and their organisations against acts of anti-union discrimination and interference respectively.

The Rural Workers' Organisations Convention, 1975 (No. 141), provides in Article 3 (2) that "the principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression".

To round out the picture, mention should be made of Article 5 *(a)* of the Termination of Employment Convention, 1982 (No. 158), which stipulates that "union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours" does not constitute a valid reason for termination. Standards relating to anti-union discrimination are also to be found in the Workers' Representation Recommendation, 1971 (No. 143), and the Rural Workers' Organisations Recommendation, 1975 (No. 149).

Persons and activities protected

It is against this background that the Committee has examined on numerous occasions allegations of anti-union discrimination in the form of various types of reprisals taken by employers or the authorities both during and after strikes, as well as prejudicial action taken even before a strike has commenced. The Committee has consistently taken the view that the imposition of penal sanctions for organising or participating in peaceful strikes is incompatible with the principles of freedom of association,[49] that no person should be prejudiced in his employment by reason of his legitimate trade union activities[50] and that protection against anti-union discrimination should apply particularly in respect of acts calculated to cause the dismissal of or otherwise prejudice a worker. The Committee has also said that such protection should cover not only hiring and dismissal but also transfers, downgrading, "blacklisting", compulsory retirement, etc.[51]

It is important to note that the Committee has stressed time and time again that adequate protection against all acts of anti-union discrimination in

respect of employment – including reprisals for strike action – is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate they hold from the union's members; protection is also necessary to ensure that effect is given to the fundamental principle that workers' organisations shall have the right to elect their representatives in full freedom.[52]

Protection machinery

What form should this "adequate protection" – which is mentioned in both Convention No. 98 and the Committee's decisions – take? In the many cases which it has examined on the subject the Committee has taken a strict approach to protection against anti-union discrimination. The basic line it has adopted is that, as long as protection is in fact ensured, the methods used to safeguard workers against such practices may vary from one State to another; but if there is discrimination, the government concerned should take all necessary steps to eliminate it, irrespective of the methods normally used.[53]

One way of ensuring the protection of trade union officials is to provide that they may not be dismissed either during their period of office or for a certain time thereafter except, of course, for serious misconduct.[54] On the other hand, the Committee has been careful to point out that the principle that a worker or trade union official should not suffer prejudice by reason of his trade union activities does not imply that the holding of a trade union office confers on that person immunity against dismissal irrespective of the circumstances.[55]

In one case involving a large number of dismissals of trade union leaders and other trade unionists following a strike, the Committee considered that the government should carry out an inquiry in order to establish the true reasons for the measures taken.[56] In other cases of dismissals following strikes the Committee has observed that, besides preventive machinery to forestall anti-union dismissals (such as the obligation to obtain the authorisation of the labour inspectorate prior to making a dismissal), another means of ensuring effective protection could be to require each employer to prove that the motive for his intention to dismiss a worker had no connection with the worker's union activities.[57] To place the onus of proof on the employer may be found necessary, as one author points out, because

> the difficulty of proving that an employer's action was an act of anti-union discrimination is due to the fact that it involves proving intent – an intangible subjective element which it is generally impossible to determine directly. . . . It is easy to see that strict application of the legal principle that he who alleges an act must prove it places a heavy or impossible burden of proof on the worker.[58]

In any case, according to the Committee, it would not appear that sufficient protection against acts of anti-union discrimination, as set out in

Convention No. 98, is accorded by legislation that allows employers in practice – provided they pay the compensation prescribed by law for cases of unjustified dismissal – to get rid of any worker, even if the true reason for dismissal is his trade union membership or activities.[59]

Whatever system of protection is established, the Committee has stressed that complaints against acts of anti-union discrimination, including anti-strike reprisals, should normally be examined by national machinery which, in addition to being speedy, should be impartial and seen to be such by the parties concerned, who should participate in the procedure in an appropriate and constructive manner.[60]

The Committee has also taken a realistic approach in cases where relevant machinery has been established by national legislation. It has stated, for example, that the existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient unless they are accompanied by effective procedures that guarantee their application in practice. The Committee has also stressed the importance of providing expeditious, inexpensive and wholly impartial means of redressing grievances caused by acts of anti-union discrimination; it has drawn attention to the desirability of settling grievances wherever possible by discussion without treating the process of determining grievances as a form of litigation, although in some cases of mass dismissals of strikers the Committee has concluded that where honest differences of opinion exist, resort should be had to impartial tribunals or individuals as the final step in the grievance procedure.[61]

Where acts of interference based on strike activity are perpetrated by employers or their organisations against workers' organisations as distinct from individual workers, the Committee has taken much the same approach as it has generally in cases of violations of freedom of association covered by Article 1 of Convention No. 98. Starting from the principle that, where legislation does not contain specific provisions for the adequate protection of workers' organisations against such acts of interference, the government should consider adopting clear and precise provisions to ensure such protection,[62] the Committee has moved towards much firmer recommendations. In one recent case it stated, for example, that the legislation should lay down explicit remedies and penalties for acts of interference by employers in workers' organisations in order to ensure the effective application of Article 2 of Convention No. 98.[63]

Although the Committee has taken a harder line in recent years on anti-union discrimination against workers and on employer interference in workers' organisations, it has not yet gone as far as the Committee of Experts which, in its 1983 general survey on freedom of association and collective bargaining,[64] recommended that the legislation of countries having ratified Convention No. 98 should provide for sanctions that would ensure adequate protection against acts of anti-union discrimination; such protection might take the form of prevention (e.g. by requiring prior authorisation for dismissal), compensation or penal sanctions.

IV. Strike action in exceptional circumstances

Before examining this question in detail, it should be recalled that recent history has demonstrated the tendency of certain political regimes to prolong states of emergency in one form or another. This tendency has received the Committee's attention not only because the rights suspended during exceptional circumstances may include trade union rights themselves, but also because of the interdependence of trade union rights and civil liberties – for the exercise of trade union rights is devoid of meaning when other basic civil rights and freedoms are not respected. The situation becomes even worse when the state of emergency is constantly extended, in some cases for years. The Committee, while acknowledging that the declaration of a state of emergency is a political decision outside its competence,[65] has considered that it is justified in examining the consequences of such a decision on the exercise of trade union rights.

Let us now look more closely at the question of strike action in exceptional circumstances, particularly during acute national emergencies and wartime.

First, according to the Committee, in acute national emergencies a general ban on strikes or major restrictions (such as the mobilisation of workers) may be acceptable for a limited period of time.[66] Whether or not such circumstances can be said to exist is decided by the Committee case by case in the light of the information supplied by the complainants and the governments. Mention should be made of one case[67] where the government mobilised strikers in transport companies, railways, telecommunications and electricity services because of the disturbance to the economy and public order caused by strikes in these sectors. The Committee considered that although a stoppage in the services and enterprises concerned might disturb the normal life of the community, such stoppages did not themselves engender a state of acute national emergency and were not sufficient to justify its declaration.

Among exceptional circumstances, a state of war deserves special attention. In several cases involving strike bans the Committee has recognised that, under the wartime legislation of a country engaged in hostilities, it may be necessary for trade unions, like other groups or individuals, to accept restrictions on their freedom of action additional to those to which they are normally subject in peacetime.[68] These restrictions should, however, be replaced, as soon as possible after the end of hostilities, by legislation allowing greater freedom to trade unions.[69]

In one recent case the Committee has had occasion to spell out in greater detail its position concerning a state of war accompanied by the declaration of a state of emergency or siege, particularly where the hostilities appear to be limited to certain areas within the national territory. In that case[70] the Committee, while recognising the existence of extremely grave circumstances in the country concerned, considered that a return to normality in trade

union life would be facilitated by limiting the application of the state of emergency to the geographical areas directly affected; it added that it was necessary, at least, to safeguard specifically the exercise of trade union rights, such as the establishment of organisations, the right to hold trade union meetings in trade union premises, and the right to strike in non-essential services.

V. Final remarks

In this article we have seen how the Committee on Freedom of Association, starting from a basic principle concerning strikes, has taken a realistic and flexible approach to the cases presented to it over the years. The body of case law it has built up reflects not only great sensitivity to changes that have occurred in labour relations but also a deep commitment to the protection of workers and their organisations against excessive government intervention. At the same time its pragmatic approach has enabled various countries to incorporate into their legislation[71] some of the principles it has formulated on the subject of strikes. What better proof could there be of their usefulness and adaptability?

There is no doubt that both the composition and the procedures of the Committee have lent considerable authority to these principles. Its tripartite character, the fact that its members are required to serve in a personal capacity, and the reputation of its two chairmen (Mr. Paul Ramadier, former Prime Minister of France, and Prof. Roberto Ago, Judge of the International Court of Justice) are guarantees of the objectivity and fairness of its deliberations. Its quasi-judicial procedures have resulted in a substantial body of case law that gives weight to its decisions and principles. A complainant organisation presenting a new case, for example, can be sure that the Committee will consider the problems placed before it in the light of the principles of freedom of association that have been solidly established by 36 years of experience and the examination of over 1,400 cases – in all of which, with only one exception, its conclusions have been reached unanimously. All of its reports, moreover, although sometimes criticised by defaulting governments or dissatisfied complainant organisations, have been approved and adopted by the Governing Body.

While any attempt to predict the future evolution of the Committee's principles on the subject of strikes would obviously be out of place here, its "contribution to the development and progressive acceptance of a body of widely agreed principles concerning all aspects of the problem of trade union rights",[72] noted by C. Wilfred Jenks in 1955 four years after it had been established, deserves to be highlighted. Particularly noteworthy is its contribution to the consolidation at the international level of certain minimum standards of conduct that must be observed in relation to strikes, and which concern especially the extent to which various categories of workers should be protected. These minimum standards also include

[16] ibid., paras. 397 and 413, and *OB*, Vol. LXII, 1979, Series B, No. 1, 190th Report, Case No. 913, para. 450.

[17] ILO: *Freedom of association and collective bargaining*, op. cit., para. 217.

[18] ILO, doc. GB.235/5/14, 248th Report, paras. 417 and 418.

[19] *Digest*, para. 221.

[20] *Freedom of Association Reports, 15-28* (Geneva, ILO, 1955-58), 26th Report, Cases Nos. 134 and 141, para. 76.

[21] ILO: *Freedom of association and industrial relations*, Report VII, International Labour Conference, 30th Session, Geneva, 1947, pp. 108-109.

[22] idem: *Record of Proceedings*, International Labour Conference, 64th Session, Geneva, 1978, p. 25/9.

[23] idem: *Freedom of association and collective bargaining*, op. cit., para. 255.

[24] See *OB*, Vol. LXVII, 1984, Series B, No. 1, 233rd Report, Case No. 1225, para. 668, and, for teachers, Vol. LXVI, 1983, Series B, No. 2, 226th Report, Case No. 1166, para. 343.

[25] *OB*, Vol. XLIV, 1961, No. 3, 54th Report, Case No. 179, para. 55.

[26] *Digest*, para. 393.

[27] *OB*, Vol. LXII, 1979, Series B, No. 2, 194th Report, Case No. 908, para. 289.

[28] *OB*, Vol. LXVI, 1983, Series B, No. 3, 230th Report, Case No. 1173, para. 577.

[29] *Digest*, paras. 402-408.

[30] ibid., paras. 409-410 and 412, and *OB*, 1954, Vol. XXXVII, No. 4, 13th Report, Case No. 82, para. 112 for telephone services, and Vol. LXVIII, 1985, Series B, No. 1, 238th Report, Case No. 1307, para. 325 for electricity services.

[31] *OB*, Vol. LXVII, 1984, Series B, No. 2, 234th Report, Case No. 1255, para. 190.

[32] *Digest*, para. 397.

[33] ibid., para. 399.

[34] ibid., para. 377.

[35] G. von Potobsky: "Protection of trade union rights: Twenty years' work by the Committee on Freedom of Association", in *International Labour Review*, Jan. 1972, p. 78.

[36] *Digest*, para. 381.

[37] ibid., para. 390. The Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), provides that if a dispute has been submitted to conciliation or arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the proceedings are in progress and, in the case of arbitration proceedings, to accept the arbitration award.

[38] ibid., para. 382.

[39] ibid., paras. 413 and 414.

[40] ibid., para. 415.

[41] *OB*, Vol. LXVII, 1984, Series B, No. 3, 236th Report, Case No. 1140, para. 144.

[42] *Digest*, para. 383.

[43] ibid., paras. 379, 380 and 384.

[44] *OB*, Vol. LXVII, 1984, Series B, No. 1, 233rd Report, Case No. 1224, para. 133.

[45] *Digest*, para. 415, and *OB*, Vol. LXIX, 1986, Series B, No. 2, 244th Report, Case No. 1342, para. 154.

[46] *OB*, loc. cit.

[47] H. G. Bartolomei de la Cruz: *Protection against anti-union discrimination* (Geneva, ILO, 1976), p. 18.

[48] *OB*, Supplement, Vol. L, No. 2, 1967, 95th Report, Case No. 494, para. 301.

[49] *OB*, Vol. LXVI, 1983, Series B, No. 3, 230th Report, Case No. 1184, para. 282, and Vol. LXVII, 1984, Series B, No. 3, 236th Report, Case No. 1213, para. 46.

[50] *Digest*, para. 538.

[51] ibid., paras. 540, 544, 550, 560 and 564.

[52] ibid., para. 556.

[53] ibid., para. 571.

[54] ibid., para. 557.

[55] ibid., para. 558.

[56] *OB*, Vol. LIX, 1976, Series B, No. 3, 158th Report, Case No. 834, para. 248.

[57] *Digest*, para. 569.

[58] Bartolomei de la Cruz, op. cit., p. 104.

[59] *Digest*, para. 547.

[60] ibid., para. 570.

[61] ibid. para. 568.

[62] ibid., para. 576.

[63] *OB*, Vol. LXVII, 1984, Series B, No. 2, 234th Report, Case No. 1242, para. 139.

[64] ILO: *Freedom of association and collective bargaining*, op. cit., paras. 265 and 278.

[65] *OB*, Vol. LVIII, 1975, Series B, No. 3, 151st Report, Case No. 809, para. 199.

[66] *Digest*, paras. 423 and 426.

[67] *OB*, Supplement, Vol. L, No. 1, 1967, 93rd Report, Cases Nos. 470 and 481, para. 274.

[68] *Digest*, para. 421.

[69] ibid., para. 422.

[70] ILO doc. GB.235/5/14, 248th Report, Cases Nos. 1129 and 1351, para. 434.

[71] For some examples see A. J. Pouyat: "The ILO's freedom of association standards and machinery: A summing up", in *International Labour Review*, May-June 1982, pp. 287-302.

[72] Jenks, op. cit., p. 105.

[73] idem: "The international protection of trade union rights", in E. Luard (ed.): *The international protection of human rights* (London, Thomas and Hudson, 1967), p. 236.