The Right to Strike: Commentary

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Introduction

In its 2012 General Survey Report *"Giving Globalization a Human Face"* (the 2012 General Survey), the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations (the CEACR) argued that ILO Convention 87 on Freedom of Association and Protection of the Right to Organise 1948 (C87) is the source of workers' right to strike on workplace, economic and social issues. This is despite the fact that C87 contains no reference to strikes, and makes no provision whatsoever for a right to strike.

This article examines the source of the right to strike, and the nature of strikes, and concludes that the right to strike is not supported by C87. Instead, it finds strong support for the idea that the right to strike currently is an issue for individual countries to regulate. It also argues that if an international reference point for the right to strike were to be established, it would be more appropriately aligned to conventions governing collective bargaining than to C87. Finally, it discusses whether or not there is an urgent (or any) need for a global labour standard on the right to strike, and concludes that there is not.

Source of the Right to Strike

The CEACR started by opining that the absence of specific provisions establishing a right to strike did not prevent such a right from being read into C87. It stated that:

> *the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in light of its object and purpose. While the Committee considers that preparatory work is an important supplementary interpretative source ….it may yield to the other interpretative factors, in particular, in this specific case to the subsequent practice over a period of 52 years (see articles 31 and 32 of the Vienna Convention on the Law of Treaties).*[1]

Then it said:

> *the right to strike was indeed first asserted*[2] *as a basic principle of freedom of association by the tripartite Committee on Freedom of Association in 1952…Moreover, the 1959 General Survey, in which the Committee first raised its consideration in respect of the right to strike in relation to the Convention, was fully*

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[1] Paragraph 118 of the 2012 General Survey.

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

> *discussed by the Conference Committee on the Application of Standards without any objection from any of the constituents.*[3]

The CEACR

> *…highlights that the right to strike is broadly referred to in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments*[4]*, which justifies the Committee's interventions on the issue*[5] [emphasis added].

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

The CEACR then went on to say *"…the affirmation of the right to strike by the supervisory bodies lies within the broader framework of the recognition of this right at the international level,"*[6] which appears to conflict with the CEACR's opening statement[7] that it was "*mainly on the basis of Article 3 of the Convention which sets out the right of workers to organise their activities and to formulate their programmes, and Article 10…, that a number of principles relating to the right to strike were progressively developed."*

In making these remarks, the CEACR gives apparently contradictory primacy both to C87 and to international practice.

Convention 87 on Freedom of Association and Protection of the Right to Organise

Certainly, it is hard to see how Articles 3 and 10 of C87 support the CEACR's views.

Article 3 states:

1. Workers' and employers' organisations [emphasis added] shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 10 states:

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

[3] Paragraph 118 of the 2012 General Survey.
[4] Paragraph 35 of the 2012 General Survey
[5] Paragraph 119 of the 2012 General Survey
[6] Paragraph 120 of the 2012 General Survey
[7] Paragraph 117 of the 2012 General Survey

Article 3(1) relates unequivocally to the right of workers *and employers* to set up *organisations* and for those organisations to be able to plan and organise their programmes and activities free from official interference. This is quite different from the CEACR's proposition that C87 Article 3 *"…sets out the right of workers* [emphasis added] *to organise their activities and to formulate their programmes…"*[8] At face value, Article 3 does not extend to individual workers and employers because the rights are conferred upon the relevant organisation. Article 10 emphasises Article 3's focus on "organisations" by defining that term. This is important because workers' organisations *per se* cannot go on strike; only workers employed by employers can, even if those workers are also members of a workers' organisation. Likewise, employers' organisations cannot lock out workers but individual employers can.

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

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

However, wider interpretation is made difficult by the fact that Article 3 relates equally to employers, to whom the right to strike does not apply. Here, it is notable that the CEACR's analysis of Article 3 does not address the right of employers to lock out (the corollary of the right to strike). Indeed, the CEACR made no reference to employers when it stated that it was

> *…mainly on the basis of Article 3 of the Convention which sets out the right of workers to organise their activities and to formulate their programmes, and Article 10…, that a number of principles relating to the right to strike were progressively developed* [emphasis added].[9]

The lack of any mention of employers' right to lock out is discussed in more detail later in this article but it is immediately apparent that, however Article 3 is interpreted, it must apply equally to both employers' and workers' organisations and their activities; and nothing in Article 3 indicates that the right of worker and employer *organisations* to "organise their activities" or "formulate their programmes" can be extrapolated to create any form of right to strike, let alone for workers to undertake the broadest forms of strike contemplated by the CEACR (e.g. strikes on economic and social grounds).

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

Consequently, there are weak, if not unsupportable, grounds for relying on Articles 3 and 10 of C87 to support the importation of *any* right to strike into Convention 87.

[8] Paragraph 117 of the 2012 General Survey
[9] Paragraph 117 of the 2012 General Survey

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

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

> *…the affirmation of the right to strike … lies within a broader framework of the recognition of this right at the international level, particularly in the International Covenant on Economic, Social and Cultural Rights of the United Nations (Article 8, paragraph 1(d))* [10]

Inconveniently for this proposition, Covenant Article 8(1)(d) requires the exercise of the right to strike to be in conformity with member states' laws and regulations. The only constraint on the restrictions countries may place on strikes in their national laws is imposed by Covenant Article 8(3) [11] prohibiting nations that have ratified C87 from establishing laws that contravene C87's guarantees.

However, Covenant Article 8(3) was not cited by the CEACR in the 2012 General Survey, possibly because C87 does not mention the word strike, let alone provide an express guarantee of any right to strike. Nor did the CEACR cite Article 8 of C87[12], which is couched in exactly the same terms as Covenant Article 8, i.e. that the exercise of the rights in C87 is subject to national laws which, in turn, must protect the convention's guarantees.

A "guarantee" is a *"promise or assurance, especially one in writing, that something is of specified quality, content, benefit, etc"* [13] Since C87 does not provide any promises or assurances of a right to strike, and since all other international instruments that do provide a right to strike[14] require that right to conform to national laws and practices, there is arguably no legal capacity to find national restrictions on the right to strike to be in breach of C87. This being so, the CEACR could only fall back on custom and practice and/or surrounding circumstance arguments to make its case.

The Vienna Convention on the Law of Treaties

The apparent heart of the CEACR's interpretation of C87 as providing a right to strike is that *"subsequent practice over a period of 52 years"*[15] justifies such an interpretation. Supporting

[10] 8(1) - The States Parties to the present Covenant undertake to ensure: ….(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

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

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

[13] www.http://Dictionary.com

[14] Paragraph 35 of the 2013 General Survey

[15] Paragraph 118 of the 2012 General Survey

this argument, the CEACR cited Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention), which provide:

> *Article 31 – General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>   b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>   c. any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32 – Supplementary means of interpretation*
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> a. leaves the meaning ambiguous or obscure; or
> b. leads to a result which is manifestly absurd or unreasonable.

Custom and practice

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

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

The CEACR argued that the ILO Committee on the Application of Standards (CAS)[16] discussion of the 1959 General Survey covered the issue of the right to strike *"…without any objection from any of the constituents,"* inferring that the five decades on from this one event offered a sound basis for establishing a custom and practice interpretation under Article 31. However, there is strong evidence that there has been no agreement on the issue since the right to strike was first discussed in 1948. Before 1959 and since, employers have objected strenuously to the view that C87 provides a right to strike, objections all recorded in the proceedings of successive International Labour Conferences. Furthermore, the CEACR devoted an entire page of the 2012 General Survey to recalling employers' objections to the notion that a right to strike could be read into C87.[17]

Surrounding circumstances and intent of the parties

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

However Article 32 does not aid a view that a right to strike can be implied into C87. The preparatory work and records of the discussion that led to the adoption of C87 both support the view that the omission of a right to strike was deliberate. During the Cold War period (late 1940s to late 80s) western governments viewed it as a socio-economic right (the forte of communist countries) while unions feared that entrenching the right would have meant setting limitations on it. The issue was deliberately left "at large", to the great relief of both sides.

What is a strike?

Having discussed its justification for implying a right to strike into C87, the CEACR examined the scope of that right, stating that "*the Committee considers that strikes relating to the Government's economic and social policies, including general strikes, are legitimate and therefore should not be regarded as purely political strikes, which are not covered by the Convention.* [18]

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

[16] One of the standing committees of the annual International Labour Conference, the CAS is the tripartite body responsible for monitoring and supervising international labour standards. This is the body that calls countries to account for failing to meet the standards they have committed themselves to through their ratification of ILO Conventions. However, issues of interpretation of conventions are outside the mandate of the committee; this power is vested via Article 37 of the ILO Constitution in the International Court of Justice (ICJ), or in an internal tribunal established specifically for the purpose.
[17] Page 47 of the 2012 General Survey.
[18] Paragraph 120 of the 2012 General Survey

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

At the broadest level, the CEACR saw strikes as a basic right "*which must be enjoyed by workers*".[19] However, to put this view in context, it is necessary to understand how basic rights manifest themselves. It is a truism that basic or fundamental human rights (the right to liberty, free speech, freedom of association and so on) are themselves recognition of basic or fundamental human needs (food, water, shelter, clothing, warmth, a sense of community, self-respect and dignity[20]). However, these core human rights have real meaning only when considered in the context in which real events and situations give life to the wider right. If the right to strike is indeed a fundamental or basic right, it is at the practical level that it must be examined.

The practical level

The CEACR, in distinguishing between political (unlawful) and other (lawful) strikes in an international *labour* standard, implicitly recognised the truism that strikes involve a withdrawal of labour. By extension, since withdrawal of labour requires a workplace from which to withdraw, it can be inferred that strikes are workplace issues covered by international labour standards, whereas political strikes and, arguably, strikes over economic and social policies are not.

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

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

Thus, if the right to strike is a corollary of the right to freedom of association[21] and the worker's work is the practical context for the worker's right to freedom of association, then the worker's work must also be the practical context for the right to strike. It can, therefore, readily be concluded that as strikes are inextricably linked to the work the worker does, they are also linked by extension to where the worker works. This proposition is important because it clearly undermines the CEACR's ability to broaden its interpretation of the right to strike beyond the workplace (e.g., sympathy strikes and strikes on economic or social grounds).

[19] Paragraph 122 of the 2012 General Survey
[20] c.f. Maslow's Hierarchy of Needs
[21] This the basic premise on which the CEACR has articulated its views.

Furthermore, the CEACR's view that C87 is also the source of a right to strike on economic and social grounds is inconsistent with the facts that Article 3 of C87 gives equal rights to workers' and employers' *organisations* (but not to workers and employers per se), and that an employer can only exercise the right to lock out (the corollary of the right to strike) in the workplace context[22].

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

Wherein really lies the right to strike?

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

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

The vast majority of workplace strikes are, in fact, caused by the refusal of an employer to agree to worker demands for improved conditions of work, in turn most commonly linked to collective bargaining. Arguably, the CEACR's views on the right to strike are more consistent with the principles of the Right to Organise and Collective Bargaining Convention 1949 (No 98) than they are with C87.

Strike or protest?

Taking all the above into account, the CEACR seems to have confused the right to *strike* with the general right to *protest*, one of the most precious rights in any democracy. Indeed, the CEACR stated that

> *…trade unions and employers' organisations responsible for defending socio-economic and occupational interests should be able to use, <u>respectively</u>* [emphasis added], *strike action or protest action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members.*[23]

As mentioned earlier, the corollary of the right to strike is employers' ability to lock employees out. Protests per se are not part of an employer's armoury in terms of bringing

[22] Employers cannot lock their workers out of a public street or their homes, only from the workplace. Similarly, an employer cannot lock out employees because the employer feels strongly about economic and social issues created by governments.
[23] Paragraph 124 of the 2012 General Survey

pressure to bear on employees even though they may be part of the employer's social ability to bring pressure to bear on government. That said, it is unheard of, nor is there supporting logic, for employers to protest government actions or policies by locking out their employees. This contrasts starkly with the CEACR's belief (stated in the preceding paragraph) that employees should be able to abandon their employers as part of a protest against government actions or policies.

As discussed earlier, socio-economic issues transcend workplaces and may indeed have nothing to do with conditions of work. Protest is the democratically available response to such issues whereas strikes, by definition, connote the withdrawal of labour from a workplace. The CEACR, however, used these terms apparently interchangeably and, in so doing, seemingly adopted an ideological socialist perspective of workers' rights rather than objectively examining the right to strike in the context of the world of work and the *labour* standards that govern it.

Support for this view comes from the CEACR's statement that systems in which *"…agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited... are compatible with the Convention."*[24] In other words, the CEACR was promoting collective bargaining as a means of achieving negotiated periods of peace in an otherwise permanent state of class warfare. While a possibly interesting insight into the political perspectives of the CEACR, this statement further strengthens the view that the right to strike is aligned more closely to the practice of collective bargaining than to the concept of freedom of association.[25]

Sympathy strikes

Having espoused the right to the broadest form of protest for workers (general strikes), the CEACR, paradoxically, also supported the notion of sympathy strikes.[26]

> *With regard to so-called "sympathy" strikes, the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful.*[27]

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

[24] Paragraph 142 of the 2012 General Survey

[25] In the author's view the global source of any right to strike, should one ever be developed, would most appropriately be located inside instruments dealing with collective bargaining, e.g. the Right to Organise and Collectively Bargain Convention, 1949 (No. 98) and the Collective Bargaining Convention, 1981 (No. 154)

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

[27] Paragraph 125 of the 2012 General Survey

Restrictions and guarantees around the right to strike

The argument that a general right to strike can be derived from C87 is further weakened by the CEACR's discussion of permitted restrictions and compensatory guarantees.[28]

Having implied a right to strike into C87 in the most general terms, the CEACR then recognised that the right to strike may be constrained; e.g, *"the right to strike is not absolute and may be restricted in exceptional circumstances"*[29] and, *"the Committee of Experts and the Committee on Freedom of Association consider that States may restrict or prohibit the right to strike of public servants 'exercising authority in the name of the state."*[30]

However, with respect to public servants, the CEACR failed to mention in the 2012 General Survey that the ability to restrict public servants' right to strike is derived directly from the Right to Organise and Collective Bargaining Convention 1949 (C98). This permits states to exclude *"members of the public services engaged in the administration of the state"* from the right to bargain collectively, because C98 does not cover them.[31] The absence of a right to strike for affected public servants is derived directly from the absence of their right to bargain collectively, not from any restriction on freedom of association. Once again, there is an explicit link between the right to strike and the right to bargain collectively, rather than the more general right to protest seemingly supported by the CEACR. There is also a corollary link to the idea that exercise of the right to strike is a matter for national regulation as C98 clearly leaves it to countries to determine which, if any, of their public servants will be excluded from the right to bargain collectively.

Outside the public service, the CEACR had equally explicit views, *viz*;

> *The second acceptable restriction on strikes concerns essential services. The Committee considers that essential services, for the purposes of restricting or prohibiting the right to strike, are only those 'the interruption of which would endanger the life, personal safety or health of the whole of [sic] part of the population'. This concept is not absolute…* [32]

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

> *in practice the manner in which strikes are viewed at the national level varies widely: several states continue to define essential services too broadly… others allow strikes to be prohibited on the basis of their potential economic consequences…or prohibit strikes on the basis of the potential detriment to public order or to the general or national interest. Such provisions' are not compatible with the principles relating to the right to strike* [emphasis added]. [33]

[28] Paragraphs 127 - 142 of the 2012 General Survey
[29] Paragraph 127 of the 2012 General Survey
[30] Paragraph 129 of the 2012 General Survey
[31] C98 Article 6 - "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way."
[32] Paragraph 131 of the 2012 General Survey
[33] Paragraph 132 of the 2012 General Survey

Here, the CEACR has effectively said that, while states may impose restrictions, these cannot be incompatible with the principles that the committee has implied into C87, in stark contrast to the provisions of C87 itself. These require national practices to be compatible with "*the guarantees provided for in this Convention,"*[34] putting member states in a nearly impossible position. Almost all restrictions applied to the right to strike are likely to fall outside the broad application of the principles the CEACR has espoused, even if there is no conflict with the non-existent guarantees in C87.

Is there a need for global labour standard on the right to strike?

Whether or not a global standard on the right to strike is needed has been the source of debate for many decades, at least as far back as the creation of the League of Nations in 1919. The right to strike is important for any democracy, as is the right to protest. In this regard, while there is disagreement on whether or not there is already (via C87), or needs to be, a global authority for the right to strike, most countries recognise that it is a right and that it needs to be regulated.

However, at least since 1948[35], countries have explicitly regulated the right to strike themselves. They have not needed the sort of guidance a globally applicable labour standard would provide. Moreover, any attempt to create an explicit global authority risks placing countries that have enacted their own laws and regulations outside the new authority's ambit. As much as anything, this is because the reasons why it was not possible to agree on the nature of the right to strike in 1948 were much the same as they are today. The inherent conflict between workers who traditionally favour a right to strike on the broadest possible grounds and employers who prefer strikes to be confined to the workplace is still in play. The negotiations necessary for resolving this conflict risk a compromise that pleases no one and leads to the conclusion that it may be better to let sleeping dogs lie. Exactly the same conclusion was reached in 1948.

Conclusion

Overall, the fact that many, if not most, states have adopted restrictive practices that do not meet with the CEACR's approval suggests that, realistically, the notion of the right to strike can *only* be manifest in the context of workplaces subject to national jurisdiction. To be otherwise, international instruments should be explicit both about the existence of a right to strike and the parameters within which it can be exercised.

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

This article argues that the CEACR was wrong to imply a right to strike into C87 by improperly applying long-established legal principles of interpretation. It argues that the

[34] C87 Article 8(1)

[35] The year in which C87 was adopted, and the discussion for which included the possible introduction of a right to strike.

CEACR, and by extension the ILO, need to revisit their position on the right to strike. In so doing, it has identified four main areas in which it may be argued that the CEACR, and potentially the ILO, have departed from established principles.

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

Second, the grounds on which the CEACR justified its importation of the right to strike into a Convention silent on the matter are arguably indefensible. Inconsistencies exist in the CEACR's cited sources of authority and its application of international standards of interpretation appears to be flawed. Furthermore, explicit references to a right to strike in other, later, international instruments support an argument that the absence of any mention of that right in C87 is deliberate.

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

Last, widely varied practice in ILO member states, and the general disapproval of the CEACR of much of that practice, suggest no determinative international instrument espouses a general right to strike. Notwithstanding attempts to hold C87 up in that regard, it is probable that individual nations have recognised they need to manage their own affairs; certainly, they have been reminded by conditional mentions in numerous international documents of the necessity of regulating this issue. Moreover, the fact that most countries have indeed regulated this issue themselves also suggests that the need for a global labour standard on the right to strike has passed.

An objective consideration of the circumstances surrounding the creation and operation of C87, as well as most countries' current reality, suggests that the concept of the right to strike was intended to be defined in practice by individual nations based on national circumstances. This, in turn, suggests that the right to strike is not a corollary of the universal principle of freedom of association but instead is a workplace issue linked to collective bargaining and should be confined to the workplace where the motivating dispute exists.

Appendix 1

Excerpts from cited[36] international instruments containing the right to strike

International Covenant on Economic Social and Cultural Rights of the United Nations Article 8 (1) – The States Parties to the present Covenant undertake to ensure: ….(d) The right to strike, *provided that it is exercised in conformity with the laws of the particular country.*[emphasis added] ... 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

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

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

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

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

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

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

[36] Paragraph 35 of the 2012 General Survey