The Right to Strike

By Paul Mackay[1]

INTRODUCTION

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

The proposition that a general right exists for workers to walk off the job to raise or support concerns not related to their work and workplace is of enormous concern to employers globally. It raises prospects of whole industries being brought to a standstill while workers protest against proposals from or initiatives by government or other quarters.

"…the right to strike is not supported by C87…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"

The employer members of the International Labour Organisation (ILO) have resisted this proposition since it was first raised in the 1940s. This is also exactly why many countries' laws restrict the right to strike to matters relating to the workplace(s) in which the motivating dispute exists. If the CEACR's view was to be accepted, most of the ILO's 187 member countries would find their current laws to be non-compliant with the CEACR's interpretation, and be legally obliged to change their laws to comply.

Unsurprisingly then, the 2012 General Survey brought employers' concerns to a head. Since then, extensive efforts have been made by the government, union and employer members of the ILO to reconcile their views. To date these have not required recourse to the International Court of Justice, which is the international judicial body with sole jurisdiction to resolve issues of interpretation of ILO labour conventions[2].

This article examines the source of the right to strike, and the nature of strikes. It concludes that the right to strike is not supported by C87. Instead it finds strong support for the idea that the right to strike is an issue that has been left for individual countries to regulate. It also argues that if an international reference point for the

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[2] ILO Conventions are international treaties that are legally binding on the countries that ratify them. Ratification requires the country concerned to amend relevant domestic legislation to be consistent with the ratified convention.

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

"…it is illogical to cite national practice as a basis for interpreting an international document as providing an otherwise unstated right"

In the 2012 General Survey, the CEACR started with the statement 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*[3]*."* Then it stated that the absence of specific provisions establishing a right to strike did not prevent such a right from being read into C87, stating 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).*[4]

Next it said, *"the right to strike was indeed first asserted*[5] *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 discussed by the Conference Committee on the Application of Standards without any objection from any of the constituents."*[6]

Somewhat confusingly, the CEACR then *"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*[7]*, which justifies the Committee's interventions on the issue* [emphasis added]." [8]

It is confusing because this statement is out of context with the preceding two statements. 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,

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

e.g. C87. Indeed, it is illogical to cite national practice as a basis for interpreting an international document as providing an otherwise unstated right.

Finally, the CEACR said, *"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"*[9] which, also confusingly, appears to conflict with the opening statement[10] 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."*

"however Article 3 is interpreted, it must apply equally to both employers' and workers' organisations and their activities"

Overall, in setting out its reasoning for the existence of a right to strike supported by international treaty, the CEACR gives apparently contradictory primacy to both C87 and international practice.

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION 1948 (No 87)

Articles 3 and 10

C87 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.

C87 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.

Interpreting Article 3

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. However the CEACR chose a limited focus on workers activities only when it said that C87 Article 3 *"…sets out the right of workers to organise their activities and to formulate their programmes…".* [11] Crucially the CEACR omitted any reference to organisations or employers.

[9] Paragraph 120 of the 2012 General Survey
[10] Paragraph 117 of the 2012 General Survey
[11] Paragraph 117 of the 2012 General Survey

At face value, Article 3 does not extend to individual workers and employers, other than in respect of their right to form organisations, because the rights in it are conferred upon organisations. Article 10 emphasises Article 3's focus on "organisations" by defining that term. The emphasis on organisations is significant, because workers' organisations per se cannot go on strike; only workers employed by employers can strike, even if those workers are also members of a workers' organisation. Likewise employers' organisations cannot lock out workers but the employers of those workers 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 therefore 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 made no reference to employers at all when referencing Article 3 let alone addressing the right of employers to lock out (the corollary of the right to strike).

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 other rights, let alone the right to strike, restricted or otherwise. 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 those organisations' activities. It does not explicitly apply to the activities of workers and employers per se. In not considering the application of C87 to employers, and in ignoring the fact that the rights in C87 Article 3 are conferred upon organisations, the CEACR adopted an unbalanced interpretation of C87.

Interpreting Article 10

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.

Articles 3 and 10 do not support a right to strike

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

INTERNATIONAL PRACTICE

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 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))"* [12]

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

Of the several international instruments cited by the CEACR as supporting the existence of a right to strike[13] only the International Covenant on Economic, Social and Cultural Rights of the United Nations may be regarded as being global in scope. Inconveniently for the CEACR's argument, Covenant Article 8(1)(d) requires the exercise of the right to strike to conform with the laws of the country concerned. The only constraint on the restrictions countries may place on strikes in their national laws is imposed by Covenant Article 8(3)[14] which prohibits nations that have ratified C87 from establishing laws that contravene C87's guarantees.

However, the CEACR did not cite Covenant Article 8(3) 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[15], 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 C87's guarantees.

"…C87 does not mention the word strike let alone provide an express guarantee of any right to strike."

What guarantees are provided by C87? A "guarantee" is a *"promise or assurance, especially one in writing, that something is of specified quality, content, benefit, etc."*[16] Since C87 does not provide any written (or any) promises or assurances of a right to strike, and since all other international instruments that do provide a right to strike[17] require exercise of that right to conform to national laws and practices, there is arguably no legal basis for the CEACR to find national restrictions on the right to strike to be in breach of C87. This being so, the CEACR

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[12] 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.

[13] Paragraph 35 of the 2012 General Survey. See also Appendix 1

[14] International Covenant on Economic, Social and Cultural Rights of the United Nations Covenant Article 8(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.

[15] 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.

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

[17] Paragraph 35 of the 2013 General Survey

could only rely on custom and practice and/or surrounding circumstances to sustain its argument that international practice justified interpretation of a right to strike into C87.

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"*[18] justifies such an interpretation. Supporting 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.

"Before 1959 and since, employers have objected strenuously to the view that C87 provides a right to strike…the CEACR devoted a whole page of the 2012 General Survey to recalling employers' objections to the notion that a right to strike could be read into C87"

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.

[18] Paragraph 118 of the 2012 General Survey

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 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."

The CEACR argued that the ILO Committee on the Application of Standards (CAS)[19] 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 5 decades since this one event offered a sound basis for establishing a custom and practice interpretation under Article 31. However, and to the contrary, 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. Indeed, the CEACR devoted a whole page of the 2012 General Survey to recalling employers' objections to the notion that a right to strike could be read into C87.[20]

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, the CEACR did not rely heavily on the preparatory work perspective. It said that while *"preparatory work is an important supplementary 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…".[21] The CEACR's apparent reluctance to rely on Article 32 may have been because it clearly 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

[19] 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. It is analogous to a parliamentary select committee. The CAS 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.

[20] Page 47 of the 2012 General Survey.

[21] Paragraph 118 of the 2012 General Survey

omission of a right to strike was deliberate. During the cold war period (late 1940s to the late 80s) western governments viewed strikes as personifying a socialist perspective while unions feared that codifying the right to strike would have meant setting limitations on it. The issue was deliberately left "at large", to the great relief of both sides.

"…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."

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.* [22]

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

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.

"…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*".[23] But, rights have real meaning only when considered in the context in which real events and situations give life to the 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 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

[22] Paragraph 120 of the 2012 General Survey
[23] Paragraph 122 of the 2012 General Survey

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 workers' 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.

"…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."

Thus, if, as argued by the CEACR, the right to strike is a corollary of the right to freedom of association[24] and, as argued above by this author, 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. Add to this the argument that, as strikes are inextricably linked to the work the worker does, strikes are similarly linked to where the worker works. Put more simply, strikes are workplace issues not wider issues. 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).

Furthermore, the CEACR's view that C87 permits workers strikes 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 necessarily to workers and employers per se), and an employer can only exercise the right to lock out (the corollary of the right to strike) in the workplace context. 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.

"…it is the worker's work that creates the practical context of freedom of association for any given worker.

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.

[24] This the basic premise on which the CEACR has articulated its views)

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 to *not 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 Articles 3 and 10 of C87 support the view that C87 provides for a right to strike, the CEACR's basic premise that the right to strike is derived from the principle of freedom of association (which transcends workplaces) must itself be 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 (C98) than they are with C87. Certainly, this appears to be the view of the parties to most of the other international instruments cited by the CEACR as containing a right to strike; for instance,

> **Charter of the Organisation of American States** Article 45 (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*, …, *all in accordance with applicable laws*;
>
> **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 , 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.
>
> **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: …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.

In each of these cases the right to strike is clearly associated with the ability to bargain collectively. No examples cited by the CEACR[25] (see Appendix 1) contain references linking the right to strike to freedom of association.

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

[25] Paragraph 35 of the 2012 General Survey

democracy[26]. Indeed, the CEACR stated that *"trade unions and employers' organisations responsible for defending socio-economic and occupational interests should be able to use, respectively, 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."*[27]

"…the CEACR sees collective bargaining as a means of achieving negotiated periods of peace in an otherwise permanent state of class warfare."

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

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.

In using these terms in the same breath, the CEACR seemingly adopted an ideological 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.

"…the CEACR seems to have confused the right to strike with the general right to protest."

Support for this view may be found in the CEACR's statement that those 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.*"[28] In other words, the CEACR arguably saw collective bargaining as a means of achieving negotiated periods of peace in an otherwise permanent state of class warfare.

Moreover, and in clear contrast to the view that the right to strike is a corollary of freedom of association, this statement also clearly links the permitted prohibition of strikes or lockouts to an absence of collective bargaining rather than to an absence of freedom of association. Thus, and ironically, the CEACR's statement further

[26] This "confusion" is also apparent in the conclusions of the Committee on Freedom of Association (CFA), a standing committee of the Governing Body of the ILO. that examines complaints of breaches of C87 and C98, irrespective of whether or not the country concerned has ratified the relevant convention. Chapter 2 of the *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (6th Edition)* contains many statements concerning the application of law and order, which is a matter arguably outside the supervision of international labour standards.

[27] Paragraph 124 of the 2012 General Survey

[28] Paragraph 142 of the 2012 General Survey

strengthens a view that the right to strike is aligned more closely to the practice of collective bargaining than to the concept of freedom of association.[29]

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.[30]

"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 globalisation characterised 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."[31]

The CEACR's support is paradoxical because, in espousing sympathy strikes, the committee 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.

"The absence of a right to strike for affected public servants therefore stems directly from the nationally determined absence of their right to bargain collectively, not from any restriction on freedom of association."

Restrictions and guarantees around the right to strike

The idea that the right to strike is more appropriately associated with collective bargaining than with freedom of association is still further strengthened by the CEACR's discussion of permitted restrictions and compensatory guarantees.

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."* [32] 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."* [33]

The important point here is that the ability to restrict public servants' right to strike is *not* derived from the deliberations of the CEACR or the Committee on Freedom of Association. It is in fact sourced directly from Article 6 of 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

[29] 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)
[30] 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.
[31] Paragraph 125 of the 2012 General Survey
[32] Paragraph 127 of the 2012 General Survey
[33] Paragraph 129 of the 2012 General Survey

right to bargain collectively, because C98 does not cover them.[34] The absence of a right to strike for affected public servants therefore stems directly from the nationally determined restriction of their right to bargain collectively, not from any internationally defined restriction on freedom of association.

"…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 (but one that needs to be regulated to avoid unfettered disruption of the economy)."

This is not the only permitted exclusion. The CEACR did not refer to the fact that C87 Article 9 leaves it to member states to determine the extent to which C87 applies to their armed services and police. An identical provision is made in Article 5 of C98.

This all strengthens the idea that exercise of the right to strike is a matter for national regulation. C98 explicitly leaves it to countries to determine for themselves which, if any, of their public servants will be excluded from the right to bargain collectively. At the same time the CEACR was open to the right to strike being restricted more broadly, 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…"* [35]

In other words, the CEACR accepted the right of member states to restrict the right to strike in circumstances where striking would endanger the lives, safety or health of the *whole or part* of the population. This of itself would suggest that in practice, only member states are in a position to determine the extent and nature of a right to strike applicable to workers in their country.

Having opined that the right of member states 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]*."* [36]

Here the CEACR effectively said that, while states may impose restrictions, these cannot be incompatible with the principles that the CEACR has implied into C87, in stark contrast to the provisions of C87 itself (i.e., that national practices be compatible with "*the guarantees provided for in this Convention*"[37]).

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[34] 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."
[35] Paragraph 131 of the 2012 General Survey
[36] Paragraph 132 of the 2012 General Survey
[37] C87 Article 8(1)

But there are no guarantees of a right to strike in C87. This puts member states in a nearly impossible position; effectively the CEACR requires that states restrict the *explicit* right in C98 (to exclude certain groups from collective bargaining) to fit within the view of the CEACR that a very broad right to strike may be *implied* into C87. Ultimately, almost all national level restrictions applied to the right to strike are likely to fall outside the CEACR's broad interpretation of C87.

IS THERE A NEED FOR GLOBAL LABOUR STANDARD ON THE RIGHT TO STRIKE?

Whether or not there is a need for a global standard on the right to strike has been the source of debate, at least as far back as the creation of the League of Nations in 1919. As a matter of principle, 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 (but one that needs to be regulated to avoid unfettered disruption of the economy).

> ***"Resolution of this question would require consideration of the fact that explicit provision of a right to strike in several non ILO instruments was agreed to at the time by all the parties to them, whereas the existence of a right to strike in C87 has been implied in over several decades by only some of the parties to it."***

Indeed, at least since 1948[38], countries have explicitly regulated the right to strike themselves. They have not needed the sort of guidance a globally applicable labour standard would provide. The few international instruments that do recognise a right to strike all make that right subject to national laws and regulations and almost all link that right with collective bargaining. None link the right to strike directly to the concept of freedom of association.

The reasons why it was not possible to agree on the nature and scope 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 supports the idea that they did so because the global position was not clear.

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

In this regard, 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.

"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."

Furthermore, were a right to strike, unencumbered by a requirement to conform to national laws and regulations, to be read into C87 the status of all subsequent international instruments containing such restrictions would be called into question. Resolution of this question would require consideration of the fact that explicit provision of a right to strike in several non ILO instruments was **agreed to** *at the time* **by all** *the parties* to them, whereas the existence of a right to strike in C87 has been **implied in** *over several decades* **by some** *of the parties* to it.

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 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.

"…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."

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. Indeed, 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 assertion 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 practices in ILO member states, and the general disapproval of the CEACR of many of those practices, suggest that no determinative international instrument supports a general right to strike. 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 explicit provisions in later non-ILO instruments, suggests that the concept of the right to strike was intended to be defined in practice by individual nations based on national circumstances. Ultimately, the right to strike is not a corollary of the universal principle of freedom of association but instead is a nationally governed workplace issue linked to collective bargaining and should be confined to the workplace where the motivating dispute exists.

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Appendix 1

Excerpts from cited[39] 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].

[39] Paragraph 35 of the 2012 General Survey