# (The Right to) Strike and the International Labour Organization

## Is the System for Monitoring Labour and Social Standards in Trouble?

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- At the 2012 International Labour Conference (ILC), employers blocked the adoption and discussion of a list of countries accused of the most serious violations of international labour and social standards according to the annual report by the Committee of Experts. The discussion of this list, the »naming and shaming« associated with it in the ILC Conference Committee and ensuing recommendations for actions for the respective countries constitute a key element in the monitoring of ILO standards, which was in this case completely disabled.

- On the surface employers are disputing whether the standards of the International Labour Organization (ILO), in particular Convention no. 87, can be interpreted as providing a right to strike. Above and beyond this, however, they have questioned the Committee of Experts' mandate and latitude of authority.

- The resolution of the dispute will stake out the direction of the ILO in the future and decide what opportunities will be available to effectively ensure compliance with international labour and social standards, including in free trade agreements. It would be desirable for the International Labour Conference to issue an explicit statement expressly conceding the Committee of Experts the power to bindingly interpret ILO standards.

## The Point of Departure: Opposition to the Practice of the Committee of Experts in Interpreting Standards

The question as to whether the existing standards of the International Labour Organization (ILO) – in particular the arrangements laid down in Convention no. 87 on the freedom of association and protection of the freedom of association (1948) – can be construed as providing for a right to strike has been an undisputed subject for decades; since 1994, however, it has been the source of a controversial debate between representatives of employees and employers as well as governments. This fermenting conflict escalated in 2012, when the group of employers' representatives refused at the International Labour Conference (ILC) to adopt and discuss a list of 25 ILO member countries accused of the most serious violations of ILO conventions.

The employers' side had criticised that the Committee of Experts on the Application of Conventions and Recommendations of the ILO (referred to in the following as: the Committee of Experts) in many cases censures failure to respect Convention no. 87, citing that a right to strike has not been upheld by the respective countries. This Convention, according to the employers, neither stipulates an explicit right to strike, nor does the Committee of Experts have a mandate to interpret Convention no. 87 in this manner. This initiative on the part of the employers is without parallel in the history of the International Labour Conference and is potentially explosive as far as the tripartite structure and mode of work of this organisation are concerned.

Although the delegates were able to once again agree upon a list of countries at the 2013 Labour Conference – in this case 26 in sum –, this was only subject to the proviso that no issues involving the right to strike would be discussed; the representatives of the employers furthermore repeatedly rejected an »ILO right to strike«. The dispute has therefore by no means been resolved. On the contrary: the debate continues to rage at different levels within the ILO, in particular over the mandate of the Committee of Experts and the question as to how the ILO monitoring mechanism can be strengthened.

Basically this debate involves nothing less than ensuring the ability of the ILO to take meaningful action and the effectiveness of monitoring international labour and social standards. The Committee of Experts performs a crucial function here, as it evaluates the reports of the ILO member countries on the conventions they have ratified, noting any violations in its Annual Report. This report provides the foundations for the public »naming and shaming« of the most serious cases in the Conference Committee (which is also referred to as the Committee on the Application of Standards) of the ILC. When the employers' side now questions the latitude of the Committee of Experts' mandate, it is in effect thrusting a knife at the »heart« of the monitoring mechanism. If successful in limiting the latitude of the Committee, the Committee would no longer be capable of independently arriving at decisions. This would create the impression that countries can simply avoid undesirable findings by the Committee of Experts by denying its power to establish and pronounce such findings. The question remains as to how much the (self-imposed) obligations that ILO member states have assumed through ratification of conventions would still be worth.

Such a weakening of the Committee of Experts would have an impact above and beyond control and monitoring of adherence to the ILO conventions, however. Representatives of the ILO emphasise the danger of non-uniform monitoring mechanisms in the debate over the inclusion of labour and social standards in international free trade agreements. If reference is made to adherence to ILO conventions within the framework of social clauses in trade agreements, this raises the question as to who is to monitor non-compliance with these social clauses. Representatives of the ILO stress the need for interlocking monitoring mechanisms, pointing out that primary responsibility for this lies with the Committee of Experts. If the ILO impedes itself in the performance of its tasks by restricting the powers of the Committee of Experts, it will at the same time be crippling itself in its role as a proponent of labour and social standards in the field of international trade. To secure and safeguard the latitude of the organization in this field, it is necessary to permanently resolve this conflict.

## The Background Behind the Debate Over the Right to Strike

It must be conceded to representatives of the employers' side that neither Convention no. 87 nor Convention no. 98 about the principles of right of association and

the right to collective bargaining (1949), explicitly mention a right to strike. Article 3 (1) of Convention no. 87 guarantees a right on the part of labour organizations to issue statutes and codes of conduct, to freely elect their representatives, their boards and lay down rules for their activities and to adopt their own programme. Article 10 of Convention no. 87 defines an employees' organization as an organization which has the aim of »promoting and protecting the interests of employees […]«. With a view to this goal, article 3 (1) of Convention no. 87 can be interpreted as not only guaranteeing trade unions the right to manage their own internal affairs, but that this necessarily also includes laying down rules and independently engaging in activities vis-à-vis the outside world. The design of these activities covers strikes as the *ultima ratio,* a genuine means of defending and promoting the interests of employees.

This is also the perspective adopted by the Committee of Experts and the Committee for Freedom of Association, as they have emphasised in their pronouncements in the field of practice for over 60 years that the right to strike must be understood to constitute a central element and indispensable logical consequence of the right of association. The right to strike is a fundamental instrument which dependent employees need to guarantee and defend their economic and social interests. This interpretation, as stated above, can also be derived from the wording. The Committee of Experts by no means recognises the right to strike in an absolute manner, but rather with restrictions. These relate primarily to the modalities of a strike, the value assigned to political strikes, so-called sympathy strikes and not least the right to strike on the part of public employees. This approach clearly shows how much the Committee takes into account the legitimate interests of employers, in this manner attempting to bring these interests in harmony with the interests of employees in order to help both positions obtain an optimum effect.

## The Latitude of the Mandate from a Legal Perspective

The ILO Constitution does not contain any provisions regarding a Committee of Experts. The Labour Conference only commissioned the Administrative Council to set up this committee in 1926. The task was to create an independent and non-partisan committee of experts to support the Governing Board by objectively reviewing application of ILO instruments based on country reports and to determine violations – a task for which the ILC was considered to be less well-suited with its delegates guided by their own interests.[1] While the field of tasks for the Committee of Experts was initially more of a technical nature, this expanded in the ensuing period to an increasingly consultative function with the Governing Board. The expansion of activities was expressly supported and advocated by the ILC. The Terms of Reference of the Committee of Experts were rewritten by the Administrative Council in 1947 so as to *inter alia* explicitly commission the Committee to evaluate the country reports on application of the conventions and issue recommendations. At the same time, it was left up to the Committee of Experts to determine the manner in which it was to review country reports.

In evaluating adherence to the obligations emanating from ILO conventions by the member states, the nature of these conventions is expressly to be taken into account – as legal standards in general and as international legal treaties in particular. As legal standards, they contain abstract/general arrangements, i.e. provisions that are necessarily worded in an open manner and contain indeterminate legal terms. This is enhanced by the fact that in international law arrangements not only have to be found for a host of cases involving *one* country, but rather have to apply in all ILO member countries. A need for interpretation is therefore inherent in these provisions.

If the ILO member countries want to transpose the ratified conventions into national law, this already requires an interpretation of the content and the range of the provisions. Engisch stresses the linkage between the application of a law and the interpretation of the law by pointing out that it is »the task of interpretation to demonstrate to lawyers the *content* and *scope of the legal terms*«.[2] This linkage exists logically enough with

1. The Committee of Experts generally has 20 lawyers, usually from the area of jurisprudence science. They come from different countries and are appointed by the ILO Administrative Council for a period of 3 years (it is possible to be reappointed after the term of office expires).

2. Engisch, Karl (2010): *Einführung in das juristische Denken,* 11th edition, Stuttgart, p. 126; Dörr, Oliver (2012), in: Dörr, Oliver/Schmalenbach, Kirsten (Hrsg.) (2012): *Vienna Convention on the Law of Treaties – A Commentary,* Heidelberg. Art 31, margin no. 1 also notes that »**interpretation is indispensable** not only for understanding a rule, but also for the process of applying or implementing it« [the bold-faced print is in the original text].

the monitoring of the (proper) application of law as well. The Committee of Experts repeatedly commented on the question of its mandate in the preparation for the 2014 ILC: »In awareness of different national realities and legal systems, the Committee of Experts analyses in a non-partisan and objective manner how conventions are applied in legislation and practice in the member countries. By the same token it has to determine the legal framework, the content and the importance of provisions in conventions. Its statements of position and recommendations are to serve as a guideline in the actions of domestic agencies. Its power of persuasion is based on the legitimacy and the rational nature of the Committee's activity, and supported by its non-bias, experience and technical know-how.«[3]

The approach of the Committee in monitoring adherence to conventions was not only accepted over the period of decades, but also expressly welcomed by ILC delegates. One can therefore argue with good reason that there is actually already an (implicit) consensus between the parties to the Treaty both regarding the mandate of the Committee as well as with regard to the right to strike and that merely since 1994 certain representatives of parties to this Treaty have no longer shared the legal opinion of the Committee with regard to the question of the right to strike. It is of course in the power of the parties to the Treaty to defy interpretations by a monitoring body if this committee – as in the case of the Committee of Experts – has not been assigned a mandate to perform an authentic, i. e. binding, interpretation. This emanates from the principles that the parties to the Treaty are able to amend and adapt treaty arrangements at any time by consensus. This requires, however, that the parties to the Treaty all agree to remove powers of interpretation from the respective body. In this regard diverging views have been expressed in particular by representatives of the employers' and employees' sides, above all regarding the question of the right to strike in Convention no. 87, which may imply a different position regarding the mandate of the Committee of Experts to interpret conventions as well. First of all this at the same time does not involve the parties to the Treaty, however (i.e. the countries). Secondly, there is no *consensus* over a different sort of practice or agreement in this case.

3. International Labour Organization, application of international labour standards 2014 (I), Report by the Committee of Experts on the Application of Conventions and Recommendations, Report III (part 1A), ILC.103/III(1A), Geneva 2014, section 31.

## Variants for Solving the Current Conflict

Based on the position adopted herein, one can describe the status quo as follows: a consensus can generally speaking be held to exist both regarding the mandate as well as the right to strike as a result of the fact that the interpretation practice by the Committee of Experts and the legal views adopted by the Committee were not contradicted by member countries over a period of decades. The objection which has been raised by the employers' side since the middle of the 1990s can only relate to sub-issues subsumed under the right to strike, as the responsibility for interpretation, as has been underscored in the foregoing, generally follows from the fundamental assignment of the task to monitor adherence to ILO standards to the Committee of Experts. Nevertheless, the debate revolves around the mandate of the Committee in particular at present. For this reason, several options for solving the prevailing conflict are discussed in the following.

### Escalation and Collapse of the Monitoring System

Although this variant appears unlikely given the momentary situation of things, for the sake of completeness it nevertheless needs to be included here. Although in the past especially the representatives of the employers' side were critical of the interpretation practice of the Committee of Experts, these were, however, merely delegates and not members of the ILO –only countries are members. Nevertheless it is at least not completely ruled out, for example, that those member countries which are frequently criticised by the Committee of Experts will take up this position and threaten further escalation at the next Labour Conference. If, for example, adoption of a list of countries was boycotted once again in the Conference Committee of the ILC, this would be tantamount to an official declaration that the monitoring system has failed. This would indicate that the ILO is not in a position to monitor adherence to its standards through an independent body and that the sanction mechanism, which is frequently held to be »toothless« anyway, could be undermined if certain actors resist it stubbornly enough. The manner in which the Administrative Council underscores the need for proper monitoring of adherence to ILO standards, however, allows one to hope for a constructive solution.

## Appeal to the International Court of Justice

One option for a such a constructive solution is provided by the ILO Constitution itself: under article 37 (1) of the ILO Constitution, ILO members are entitled to appeal to the International Court of Justice (ICJ) for a final ruling on disputed issues involving the interpretation of ILO conventions. For this, the debate would accordingly have to be moved from the level of the delegates to the level of the members. The issue to be referred to the ICJ from this perspective would solely involve the question as to whether and to what extent article 3 (1) of Convention no. 87 also contains a right of trade unions to strike, but not on the other hand – as is suggested by the employers' side – the question of the Committee of Experts' latitude of mandate.

In the discussion over the (purportedly sole) jurisdiction of the ICJ for issues relating to interpretation, it is often summarily noted that this is laid down in article 37 (1) of the ILO Constitution. What is, however, stipulated, rather, is that the ICJ has jurisdiction over »any question or dispute relating to the interpretation«. The jurisdiction of the ICJ for (legal) questions relating to interpretation – as in this case the question as to the right to strike within the framework of interpreting Convention no. 87 – does accordingly not rule out the basic powers of the Committee of Experts to interpret conventions in the performance of its monitoring activity.

As an alternative, article 37 (2) of the ILO Constitution stipulates the creation of a separate tribunal »for the expeditious determination of any dispute or question relating to the interpretation of a Convention«. The employers' side also opposes the variant creating such a tribunal, proposing instead an option not contained in the Constitution of establishing a quasi-tribunal, »in other words, a mechanism within the spirit of article 37, paragraph 2«.[4] Because the decision handed down by such a body would not offer much in the way of legal security, it is to be welcomed that the ILO Administrative Council adopted a resolution at its meeting in March 2014 to clarify the modalities for appealing to both the ICJ as well as to a tribunal in accordance with article 37 (2) of the ILO Constitution for the upcoming ILC.[5]

## »Patching Up« a Pseudo-Problem

The perspective adopted here is that the question of the latitude of the Committee of Experts' mandate has basically already being resolved and that at most what is needed is to explicate a consensus that already exists and, based upon this, decades of practice as well. The right to strike is »only« questioned by representatives of ILO members, not by a clear majority of these members. Nevertheless one could clear up this issue in various points by referring the matter to the ICJ. Because the question under dispute has remained unresolved for almost 20 years, one could probably also wait for such a procedure to be conducted before the ICJ. This solution alone might not be enough to counter an attempt to use this issue under dispute to weaken the ILO mechanism for monitoring standards, however.

Should the question of the mandate also be referred to the ICJ even if this is actually not necessary? Here, unpredictable factors are much more salient. Even if the ICJ were to decide that the Committee of Experts is assigned powers to interpret ILO conventions, the ICJ might not concede the Committee the mandate for authentic interpretation. The question thus remains as to how much would be gained by calling upon the ICJ to settle the question of the mandate.

## Explicit Declaration of a Mandate by the Committee of Experts

One could look upon clarification of the issues under dispute within the framework of the ILC in the form of an explicit declaration on the mandate of the Committee of Experts which for example expressly concedes the Committee the powers to perform authentic, i. e. binding, interpretation of ILO standards as a best-case scenario. As was stated above, the ILO member countries have the power to assign this mandate by consensus.

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

5. International Labour Office, Governing Body, 320th Session, Geneva, 13–27 March 2014, Fourth Item on the Agenda: The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, section 41.

Such a declaration would offer the advantage that internal organizational questions *within* the organization as well could be decided by the parties to the Treaty and not an external court. In contrast to a decision by a tribunal (or even quasi tribunal), this declaration would have sufficient democratic legitimation within the ILO. With it the member countries could send out a strong message advocating international labour and social standards and their monitoring by independent experts, thus further strengthening the ability of the ILO to take effective action.

One should not fail to mention here, however, that this variant, although it would be highly desirable, is not particularly likely. The question as to the latitude of the committee of Experts' mandate for interpretation is by no means the only point under debate with reference to the current system for monitoring ILO standards.[6] Basically, a comprehensive revision of the system would be necessary before such a declaration could even be discussed in the first place. The Governing Board will nevertheless devise »a time frame for reviewing still-unresolved questions in connection with the supervisory system and to introduce the mechanism for monitoring standards«.[7]

## Strengthening the Existing Set of Instruments

The ILO was established 95 years ago in the wake of World War I – based on the fundamental philosophy that »a lasting world peace can only be established […] based on social justice«. The ILO was assigned the task of monitoring global guarantees on humane working conditions. It has often been criticised for lacking any real power to enforce these. Because of the principle of consensus that applies in international law, this power of enforcement for the most part depends upon what powers the member countries assign to the ILO, however. Here the countries have agreed on labour and social standards in the form of voluntary self-imposed obligations; failure to adhere to these can above all be sanctioned by public »naming and shaming«. The ILO member countries are also the actors that could agree upon stronger sanctions, for instance obligations to pay fines. Although it would be very desirable for this to happen, it is not particularly likely.

The task is therefore to find out how the effectiveness of the existing mechanism can be strengthened. In terms of internal organization, it is conceivable here that for example the Committee of Experts could continue to provide support in interpreting country reports, the complaints and objection procedure before the ILO could be revised and the Conference Committee at the ILC could be strengthened. If, however, public »naming and shaming« is the main instrument available, then this should be consolidated in a targeted manner and public-relations work expanded – for example by elevating the public discussion over the findings in the annual report issued by the Committee of Experts. Even if the actors primarily addressed by the ILO standards are the countries themselves, these standards after all specifically relate to labour and social law realities of people living in these countries. The ILO could strengthen awareness of this connection itself by getting more actively involved in the process of public opinion formation in the ILO member countries – perhaps including through targeted cooperation with civil society actors.

6. Compare Maupain, Francis (2013): The ILO Regular Supervisory System: A Model in Crisis?, in: *International Organizations Law Review* 10 (2013), S. 117–165; Simpson, W. R. (i. E.): *Comments on »The Regular Supervisory System: A Model in Crisis?« an article by Francis Maupain, September 2013;* International Labour Office, Governing Body, 320th Session, Geneva, 13–27 March 2014, Fourth Item on the Agenda: The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, sections 24 ff. and 40 f.

7. International Labour Office, Governing Body, 320th Session, Geneva, 13–27 March 2014, Fourth Item on the Agenda: The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, section 41 (letter b).

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