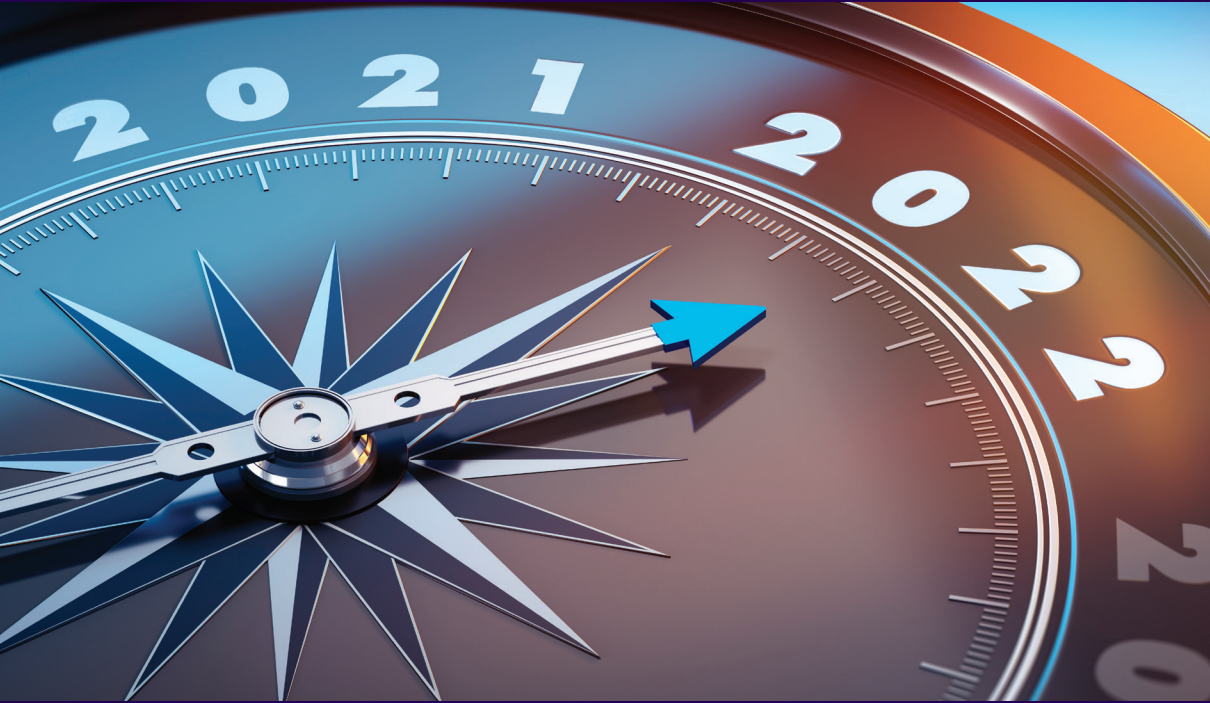




International
Labour
Organization



▶ **70 Years of the ILO Committee
on Freedom of Association:
A Reliable Compass in Any Weather**

Edited by Karen Curtis and Oksana Wolfson



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► Preface

Ever since its creation in 1919, the ILO has been the legitimately recognized international supervisor and promoter of freedom of association for workers and employers around the world and, through this role, has observed the critical interlinkages between this fundamental right and the construction, development and maintenance of democracies. Further to the adoption of the fundamental Conventions on freedom of association, the protection of the right to organize and collective bargaining¹ just following the end of the Second World War, the international community, considering the essential nature of these rights to the continued assurance of universal and lasting peace, determined that a special complaints mechanism should be available to enable the review of country situations regardless of the ratification of these fundamental instruments (or even membership in the ILO). Unquestionably, the freedom of workers and employers to form and join organizations of their choosing, and for those organizations to operate freely and without interference is a cornerstone of participatory, democratic governance of the labour market, and is a critical element to the promotion – and protection – of free societies everywhere.

It was in this context that the ILO Governing Body Committee on Freedom of Association (CFA) was created in 1951. The CFA set its first rules of procedure and began to develop the role it would go on to play in assisting governments to ensure that the basic principles of freedom of association were respected under the leadership of the French Governing Body member, former Prime Minister of France, Paul Ramadier. In its very first report, the CFA reaffirmed the clear foundation for its work stating that “the function of the ILO in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice”. Subsequently, in 1978 faced with the need to address a growing complexity and importance of cases alleging violations of freedom of association rights with the independence and impartiality expected of the complaints mechanism, the Governing Body decided to establish a practice of having an independent chairperson.

Ever since its establishment, the CFA has been the guardian of freedom of association throughout challenging periods when democracy has been in retreat but also when new nations have been guided by these principles to ensure the stability of their nascent states on the basis of equality and social justice. In some 300 sessions, examining nearly 3400 cases, the Committee has on numerous occasions insisted on the fundamental importance of a system of democracy for the free exercise of trade union rights, being obliged to deplore restrictions on freedom of association when democratic foundations

1 The Freedom of Association and Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining Convention (No. 98), adopted in 1948 and 1949, respectively.

have been eroded. The considerable impact that it has had on the lives of workers, trade unionists and employer organization leaders cannot be overemphasised.

The object of the CFA complaint procedure is not to blame governments, but rather to engage in a constructive tripartite dialogue to propose avenues to ensure respect for freedom of association in law and practice. The engagement over the years with the CFA's procedures demonstrates that its work is well known and appreciated as an authoritative voice for identifying shortcomings and finding workable solutions, promoting social dialogue at national level for full resolution. Moreover, as freedom of association can only be exercised in conditions in which fundamental human rights and civil liberties are fully respected and guaranteed, the CFA is also empowered, within its mandate, to examine to what extent the infringement of civil liberties in a given case may affect the exercise of freedom of association. The CFA thus provides a unique opportunity to ensure that, across the globe, there is a fair and level playing field where the fundamental rights of workers and employers are ensured. This publication looks at this unique and extraordinary procedure in the annals of international law and expounds on how the Committee's considerations have been influential in guiding governments and social partners to create the space necessary for these fundamental rights and their impact on democracy and the rule of law.

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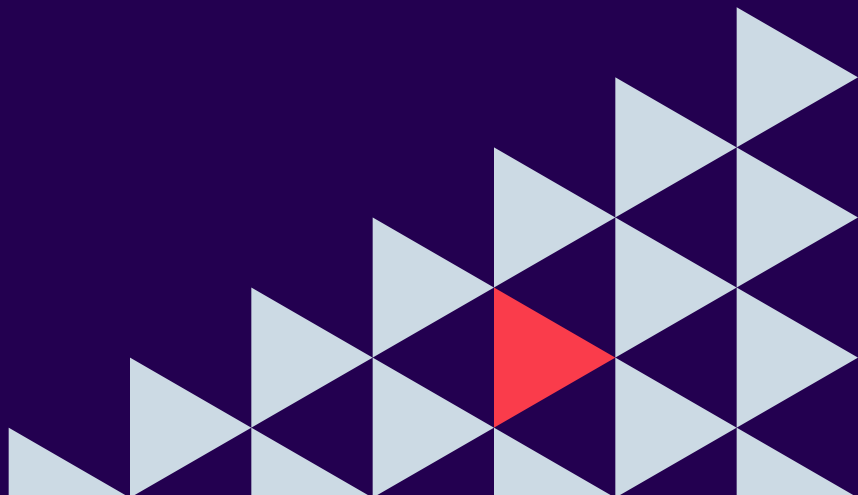
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► Introduction

As noted in the preface, the Committee on Freedom of Association (CFA) has focused for the past seven decades on promoting respect for freedom of association across the globe, setting a standard to guide all ILO Member States in the achievement of social justice and universal peace. The contributions in this celebratory volume highlight the diverse aspects of the CFA's broad impact on respect for this fundamental right, based on careful consideration of specific country situations and the guidance that it has provided. A recurrent theme in many of the contributions is the pioneering role of the CFA from the outset in linking freedom of association with respect for basic civil liberties. The first four articles examine the context of the creation of the Committee and the important impact it has had on customary international law (*jus cogens*), while the subsequent contributions focus on its regional significance and influence in specific cases, even when confronted with ongoing challenges, and the particular issues faced in organizing the informal economy. The volume closes with a reminder of the importance of the gender dimension of freedom of association and how the CFA could be better used to attain freedom of association for all.

Janice R. Bellace. The Committee on Freedom of Association: Making freedom of association a reality. The article examines the genesis of freedom of association as a principle in 1919, its inclusion in Part XIII of the Treaty of Versailles, its emergence as a right and the development of its scope over the years. The definition of the right was prompted by global developments in the late 1940s, with the beginnings of the Cold War, leading first to the adoption, in 1948 and 1949, of the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining Convention (No. 98). Ms Bellace reviews the establishment of the CFA as a tripartite committee of the Governing Body in November 1951 in order to deal with specific incidents of the violation of a right that is inherent to ILO membership. She observes that the CFA has shaped a comprehensive substantive understanding of the meaning of freedom of association based on its application in specific situations, thereby helping to make freedom of association a reality for workers and employers. Ms Bellace underlines the key contribution of the CFA to the ILO's overall mission, recalling the unique tripartite structure of the ILO, and paying particular attention to its *organizational effectiveness* as the ILO enters its second century. In so doing, she examines the relationship between the CFA and other ILO supervisory bodies in applying the same universal principles. She also discusses the historical dynamics between the tripartite actors in the CFA, including the recent challenges of divergent views on the right to strike, as well as questions concerning the extent and application of the right of freedom of association today, in the context of such current dynamics as the dominance of global supply chains.

Benedict Abrahamson Chigara. The norms *jus cogens* nature of the ILO regime on the protection of freedom of association and collective bargaining. The article

draws the intrinsic links between freedom of association in the political and in the industrial and social spheres, emphasizing the importance of the United Nations Human Rights Committee landmark decision in *Lovelace v Canada* in establishing freedom of association as essential to human dignity. Mr Chigara further refers to United Kingdom court decisions relating to the rights of workers at the Government Communications Headquarters (GCHQ) that build on the theme of human dignity and fairness to anchor freedom of association in labour relations. He argues that the creation of the CFA and the unique characteristics of its procedure, which do not require ratification or consent for the examination of complaints, bring freedom of association and the right to collective bargaining fully into the realm of recognized customary international law.

Takanobu Teramoto. The Committee on Freedom of Association (CFA): Origin and goals – Protecting the principles of workers’ and employers’ freedom of association and their right to collective bargaining as an enabling basis for sustainable, democratic and productive industrial relations. The article reflects on the context of the industrial revolution and the end of the First World War in giving rise to the ILO, and the special attention subsequently accorded to the CFA. Mr Teramoto focuses in particular on the articulation between civil and political rights and freedom of association for workers and employers. While recalling that the CFA’s mandate does not include purely political matters, he observes that the CFA is responsible for protecting the freedom of association of workers and employers in instances where the exercise of political power, for example in the name of national security or public safety, may be employed to curtail this fundamental human right. He illustrates this with historical reviews of the development of workers’ freedom of association in the United Kingdom, France and Russia, and CFA cases concerning Japan and Poland, where the nexus of political evolution has affected these rights, while further recalling the critical importance of industrial autonomy.

Bernd Waas. Seventy years of the Committee on Freedom of Association. The article recalls the development of the notion of freedom of association by the CFA and highlights the significance of its impact on European law, focusing in particular on the jurisprudence of the European Court of Human Rights (ECHR). Mr Waas reflects on the complex and multi-layered nature of the right of freedom of association, and thus the importance of the considerations of the ILO supervisory bodies, and particularly the CFA, to its understanding in complex situations. This has been especially important for the ECHR, which views the European Convention on Human Rights as a living instrument, and which has therefore been guided by the reflections and decisions of the CFA.

Karen Curtis. Synergies of the unique ILO supervisory system in promoting democratic, collective worker voice, and the critical role played by the Committee on Freedom of Association. The article recalls the critical inter-linkages between freedom of association and the democratic social order articulated by the CFA and the ILO’s constituent bodies. Ms Curtis focuses on the ILO’s engagement with Belarus and the role played by the CFA, which has been examining the situation of trade union rights in the country for the past three decades. She reflects on the available space, both for the Government and the ILO, to move forward towards greater respect for civil liberties in Belarus.

Kamala Sankaran. Democracy, universalism and informal employment: The Committee on Freedom of Association and South Asia. The article focuses on how the CFA has influenced democratic processes and trade union rights in South Asia, particularly in relation to the intersection between political and labour rights and the relationship between trade union rights and civil liberties. Ms Sankaran illustrates this relationship by referring to a number of cases in the region in which emergency regulations have impacted on the daily exercise of trade union rights, with reference to the guidance provided by the CFA in this respect. She also recalls the large numbers of workers in the informal economy in the region, who are restricted in the exercise of their right to organize and bargain collectively in law or practice. She highlights the challenges faced by these workers in having recourse to the CFA and suggests avenues for greater access by all workers to meaningful protection of these rights.

Emah Frédérique Kangah. Trade union freedom/right to strike: An African topic too. The article examines the root causes of difficulties in enforcing trade union freedoms, in general, and the right to strike, in particular, in African countries, and draws the link between freedom of association, including the right to strike, and democratic development. Recognizing that the situation of trade union rights is not the same in all countries in Africa, Mr Kangah focuses on the situation in Tunisia, where trade unions have traditionally played a central role in the social and political life of the country.

Marius Olivier. Introduction: African complaints and the Committee on Freedom of Association. The article reviews the challenges to freedom of association on the African continent, the measures taken to redress them through regional institutions and the critical role played by the CFA in filling certain gaps. Mr Olivier reflects on the nexus between freedom of association, civil liberties and democratic governance in light of the crucial perspective of development, illustrated by examples from South Africa, Zimbabwe and Sudan. He further discusses the role and potential of the CFA in ensuring that workers in the informal economy are able to enjoy freedom of association rights in law and practice.

Ana Virginia Moreira Gomes and Anil Verma. Freedom of Association, the ILO and Latin America: A retrospective and the path ahead. The article recalls the crucial role played by Latin American countries in the formation and early years of the ILO and the CFA. The authors nevertheless note the disproportionately high number of CFA cases in the region and reflect on the various reasons for this. They discuss the impact of the CFA on the quest for democracy in the region, reviewing a number of cases brought during times of military rule, while also looking at the influence of the CFA on the Inter-American Court of Human Rights. As in Africa and Asia, the important question arises of how to improve access to the CFA for informal economy workers, who represent a huge proportion of the workforce in the region.

Jane Aeberhard-Hodges. The gender dimension of the work of the Committee on Freedom of Association. The article examines whether there is an underlying inter-face between freedom of association and the right to collective bargaining, on the one hand, and the principle of the elimination of discrimination based on sex in the world

of work, including equal pay for women and men for work of equal value, on the other. Ms Aeberhard-Hodges looks at the CFA procedure, its membership and the cases it has considered and discusses how the CFA can exert a greater influence on workplace gender equality. She also explores measures that the ILO's tripartite constituents and the CFA itself might consider to ensure that the gender dimension of the CFA's work receives the attention and visibility that it deserves.

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Janice R. Bellace

► The Committee on Freedom of Association: Making freedom of association a reality

Introduction

Freedom of association is a foundational principle of the ILO. In 1998, it was proclaimed a fundamental principle and right at work. But the term, with nothing more, is an abstract principle. In its first 30 years, the ILO failed to further delineate the meaning of freedom of association, despite attempts to do so. Then, in 1951, in response to external political threats, the Governing Body set up its own committee, the Committee on Freedom of Association (CFA), to consider complaints of the infringement of freedom of association. But once again, there was no further amplification of what the term meant. Over the past 70 years, and through its decisions in more than 3000 cases, the CFA has shaped a comprehensive substantive understanding of the meaning of freedom of association because of the need to apply the right in actual situations. This has made the right to freedom of association a reality for workers and employers.

Its 70th anniversary is an appropriate time to consider whether the CFA has been successful. Such an analysis must take into account the unusual genesis of the CFA so as to identify the role that the International Labour Conference (ILC) expected the CFA to play in the ILO's supervisory system and the challenges that the CFA faced. This requires an examination of what the CFA was set up to accomplish, whether it did so, and whether there is still a need for the CFA. It is also useful to consider the organizational effectiveness of the CFA; that is, what it contributes to the ILO's overall mission, particularly as the ILO begins its second century.

1. First attempts to define the right

Although those present at the founding of the ILO recognized the special importance of freedom of association, no definition was set forth at the time, and for many years attempts to define its scope failed. In large part, this resulted from the failure of the tripartite Organization to achieve consensus on what Waas has pointed out is as an extremely complex and multilayered right.¹ In assessing the performance of the CFA,

1 Waas comments that even the wording of Conventions Nos 87 and 98 is ambiguous and questions that immediately arise remain unanswered if the wording of the Conventions is read literally. See below, Bernd Waas, "Seventy years of the Committee on Freedom of Association", section 1(b).

scholars often begin in 1951 when it was established. But one cannot fully understand why the CFA was confronted with an immensely difficult task where others had failed without going back further.

The term ‘freedom of association’ sprung up suddenly in 1919, a term that had not previously been in general usage. Prior to the convening of the Paris Peace Conference in January 1919, the British delegation had been preparing a draft proposal for an international labour organization, when it realized the need for a preamble as a means of setting forth the purpose of such an organization. The initial draft Preamble was short.² It proclaimed that conditions of labour existed which involved such “injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled”. It then declared that “an improvement of those conditions is urgently required”. Following this was a short list of items that urgently needed attention, nearly all of which were stated in specific operative terms, such as the eight-hour day. Although freedom of association was not included in this “first complete draft of the British Plan” prepared prior to the start of the Peace Conference,³ it did appear by 2 February 1919, the day on which the British delegation submitted the text of its proposal to the Labour Commission. The Preamble had become longer, with a longer list of items urgently needing attention, and among them now appeared “recognition of the principle of freedom of association”. In his commentary on the deliberations, Phelan⁴ makes no comment about what prompted the British to include freedom of association in their initial submission, nor what the British meant by the term. As the British proposal was the only full proposal submitted, the Labour Commission spent most of its time debating that proposal. Within a few weeks a new realization dawned. This new international labour organization was being told urgently to consider certain matters, but was not being told what view it should take on those issues. Several members of the Commission insisted that a “Labour Charter” be included as a way of expressing principles that should guide the new international labour organization as it considered

2 The drafting team was overseen by Harold Butler who, in 1920, became the Deputy Director of the ILO under its first Director, Albert Thomas, and then succeeded Thomas. He was Director of the ILO from 1932 to 1938.

3 James T. Shotwell (ed.), 1934. *The origins of the International Labor Organization*. Vol. I: *History*. Vol. II: *Documents*. New York, Columbia University Press, p. 372. The Shotwell volume contains chapters written by those who were present during the deliberations of the Labour Commission at the Paris Peace Conference.

4 Edward Phelan, a junior civil servant in 1919, was appointed secretary to the British delegates to the Labour Commission at the Paris Peace Conference. He subsequently became the first international civil servant when he was hired to organize the ILO office in Geneva in 1920. In 1941, he became the fourth Director-General of the ILO.

See Edward J. Phelan, *The birth of the ILO: The personal memories of Edward Phelan, formerly Director-General of the ILO*. Unpublished manuscript, ILO library, Geneva. Available at http://www.ilo.org/public/libdoc/ilo/1967/67B09_199_engl.pdf.

Phelan wrote more than one article or chapter covering the formation of the ILO, but all were published before he retired from the ILO. The unpublished memoirs were written between 1948 and the early 1960s. The manuscript was incomplete at the time of his death in 1967. The account of the deliberations at the Paris Peace Conference does not differ substantively from his earlier writings, but Phelan gives a more detailed and more reflective account in his unfinished memoirs.

standards to be regulated by convention.⁵ Freedom of association was always included in the list of principles.⁶ Once again, there was no discussion of what was meant by this term.

In the Labour Charter, the phrasing changed from “recognition of the principle of freedom of association” to the “principle that employers and workers should be allowed the right of association and combination for all purposes, subject only to such restrictions as are essential for safeguarding the national interests”.⁷ Commenting on this several years later, Phelan observed that, “[t]he Commission was faced with a difficulty which has not yet been solved: namely, the difficulty of finding a formula which could guarantee the right of free association within the State without interfering with or diminishing the State’s right to protect what it may conceive to be its essential interests. The discussion did not go very deep”.⁸ At no point during the full Peace Conference’s debate on the Labour Commission proposal was freedom of association discussed. Looking at the final draft, which became Part XIII of the Treaty of Versailles, and comparing it to the text contained in the Labour Commission’s report, Phelan concluded that they involve “many changes of a minor character which are only matters of form, certain rearrangements, and certain changes of terminology”.⁹

The final version that became Part XIII of the Treaty contains a Preamble. It is almost exactly the same as the Labour Commission’s final draft. It contains the phrase “recognition of the principle of freedom of association”, which is exactly the same as the phrase that appeared in the British proposal on the first day that the Labour Commission met. The Labour Charter is found in Article 427, which sets out General Principles regarding the regulation of labour. In the relevant part, it states: “Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance: [. . .] Second. – The right of association for all lawful purposes by the employed as well as by the employers”.

It is known that the key members of the Labour Commission saw no major difference in the scope of the right of freedom of association between this phrasing and the phrasing of the Labour Commission. All agreed that violent or revolutionary insurrectionist industrial action (which was occurring at the very time the Peace Conference was meeting) was not included within the notion of a protected right of association, and was thus permissible for a State to outlaw.

With the Treaty of Versailles having established an international organization to deal with labour matters, and considering the substantial industrial and political unrest in

5 Shotwell, 1934, *op. cit.*, pp 185–196.

6 *Ibid.*, pp 187, 214.

7 *Ibid.*, p. 187.

8 *Ibid.*, page 195. The Shotwell book was published in 1934. Commenting on this, 15 years after the Labour Commission’s deliberations and after the inconclusive attempt at the ILO in the 1920s to draft an instrument on freedom of association, Phelan observed that this was “the first clash of views on a question which in one form or another has arisen at almost every meeting of the International Labour Conference since”.

9 *Ibid.*, p. 220.

several European countries, many who took part in the Labour Commission's work were determined to have the new ILO begin its work without delay. The first International Labour Conference was convened only six months later in October 1919, even before the League of Nations came into being.¹⁰ On the agenda of the first ILC were items listed in the Preamble to Part XIII as "urgently" needing attention. Six conventions were adopted in 1919 and four at the 1920 Conference. Nothing relating to freedom of association was considered. In 1921, however, the ILC turned its attention to the fact that certain categories of workers were denied the right of association that was accorded to other workers. The proposed Right of Association (Agriculture) Convention, which became Convention No. 11, took the position that agricultural workers should be accorded this right, even though in some countries they were not employees, or even workers receiving pay, as these workers might be tied to the land and compensated in a non-cash arrangement.

Convention No. 11 provides in Article 1 that ratifying Member States undertake "to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers," notwithstanding the fact that in 1921 there was no ILO instrument that set forth the rights of association and combination enjoyed by industrial workers. While those attending the 1921 Conference believed that workers had a right of association, they did not agree on the scope of the right. During the debate on Convention No. 11, the employer representatives proposed an amendment which would guarantee the freedom not to join an association. This proposal was rejected, but it presaged continuing debate in the ILO throughout the 1920s, with issues being raised that would be heard decades later.¹¹ At the time it was pointed out that, without a convention on freedom of association, it was not possible for the ILO to examine complaints that were being made¹² that a Member State had failed to comply with its obligations, since this constitutional requirement applied only to ratified conventions. This structural difficulty was to remain unresolved for nearly 30 years.

Since the discussion on Convention No. 11 had raised numerous issues, the Governing Body directed the Office to collect information on the position in all Member States on the application of the principle of freedom of association.¹³ In 1923, the Office produced a comprehensive report, the first volume of which contained a comparative analysis based on national reports on law and practice.¹⁴ Debates in the Conference in the 1920s were extremely polarized and, in the face of this opposition from the tripartite constituents, the

10 The League of Nations came into being on 10 January 1920. Its first session took place on 26 January 1920.

11 For a fuller discussion, see Janice R. Bellace, 2014. "The ILO and the right to strike", *International Labour Review*, 153(1), pp 36–39.

12 The rise of fascism in Italy and Spain in the early 1920s occasioned complaints that freedom of association was not being respected by ILO Member States.

13 ILO, 1927. *Freedom of Association*, Studies and Reports, Series A (Industrial Relations), Nos. 28 – 32, five volumes, Geneva, p. vi. Volumes II – V contain national reports.

14 See Nicod, J., 1924. "Freedom of association and trade unionism: An introductory survey", *International Labor Review*, 9, 467–80 (April). This report is often referred to as "the Nicod report".

Governing Body did not authorize a questionnaire to be directed to Member States, an action which would have provided the basis for a proposed convention. The idea of drafting an instrument on freedom of association was dropped,¹⁵ not to re-surface for 20 years.

2. Forced to confront the issue: The immediate post-war period

The crushing of independent trade unions in fascist-controlled countries in the 1930s, and the massive violation of what would soon be called “human rights” during the war years, led the ILO to take a stronger, more affirmative position on fundamental rights. The 1944 Conference unanimously reaffirmed the “fundamental principles” of the ILO, declared that “labour is not a commodity,” and expanded on another principle by proclaiming that “freedom of expression and of association are essential to sustained progress”.¹⁶ While this was a powerful Declaration, it was short. There was still no amplification on the meaning of freedom of association.

It is possible that this situation of stasis on freedom of association might have continued but for external political developments. By 1946, the beginnings of the Cold War, with the splintering of the international trade union movement into Communist and non-Communist factions, compelled the ILO to take immediate action, if only to preclude the new United Nations from stepping into an area that the ILO considered to be within its mandate.

The specific incident that precipitated an ILO response began with a request in January 1946 by the newly formed World Federation of Trade Unions (WFTU) to be granted exclusive consultative status by the new United Nations Economic and Social Council (ECOSOC).¹⁷ Believing the WFTU to be controlled by the Soviet Union, the American Federation of Labor (AFL) immediately protested against giving the WFTU this status as the sole representative of the international labour movement and also asked to be granted consultative status.¹⁸ On 14 February 1946, the United Nations General Assembly directed ECOSOC to make consultative arrangements with both the WFTU and the AFL. In 1947, the WFTU asked ECOSOC to consider the guarantees relating to the exercise of trade union rights.¹⁹ The AFL protested against the referral of this question to ECOSOC rather than

15 The report of the ILC tripartite Committee on Freedom of Association (not the same as the CFA, a committee of the GB, which came later) indicates the differences between the Workers’ and Employers’ representatives, ILC, Tenth Session, 1927, Volume I, 638–655.

16 The entire Declaration of Philadelphia of 1945 is appended the ILO Constitution. See Annex I(a) and (b).

17 Lorwin, L.L., 1953. *The International Labor Movement: History, Politics, Outlook*. Greenwood Press, Westport, CT, pp. 224–225. The International Federation of Trade Unions (IFTU) had survived the war, but was only a shell of its former self. It voted to dissolve in December 1945, when it became clear that the new World Federation of Trade Unions had the support of certain stalwarts of the IFTU, such as the French General Confederation of Labour (CGT).

18 *Ibid.*, pp. 225–226, 235. This was contested.

19 In ILO parlance, freedom of association is also referred to as trade union rights, as restrictions on trade unions typically constrain the ability of workers to associate freely.

the ILO. At the same time, the AFL made its own reference to ECOSOC on this question.²⁰ At its February-March 1947 session, ECOSOC decided to refer the matter to the ILO and asked for prompt action and a report back by its next session, scheduled for July 1947.

By the standards of international organizations, the time pressure placed on the ILO to take action was extreme. Facing the prospect of having ECOSOC take back an issue of critical importance – freedom of association and trade union rights – the ILO met this deadline.²¹ The Office drafted the preparatory paper in a matter of weeks, a feat made possible because of the work done in 1927 on this subject. In it, the Office did not shy away from confronting the major stumbling block in reaching agreement by bluntly observing that it was “necessary to recall the chief reasons for the failure of this first attempt to deal with the question”.²² With this introductory admonition, the Office’s preparatory paper set forth two ways of securing a guarantee of freedom of association: by a list of detailed regulations, or by a statement of essential principles.²³ The looming very tight deadline made it obvious that it would be impossible to have the extended debate that would be necessary as a basis for drafting a convention with a detailed definition of freedom of association acceptable to the tripartite constituents. Thus, the Conference Committee²⁴ followed the preferred approach of the ILO’s Director-General, Edward Phelan, for a statement of essential principles.

There was little disagreement in July 1947 over the general approach and wording of the proposed convention, as recommended by the Conference Committee. One issue, whether an individual had the right not to join a union, was noted but was reserved for future resolution.²⁵ There was one issue on which there appeared to be significant disagreement, namely the right of public officials to strike. At the 1948 Conference in San Francisco, the delegates had considered the Seventh Item on the Agenda, Freedom of Association and Protection of the Right to Organize.²⁶ Following up on the 1947 discussion,

20 ILO, 1947. *Freedom of association and industrial relations*. Report VII, ILC, 30th Session, 1947, pp. 2–5 and 5–7.

21 For a more detailed account of the 1947 discussions, see Bellace, 2014, op. cit., pp. 40–44.

22 ILO, 1947. Report VII, op. cit., p. 16.

23 Ibid., p. 17.

24 A committee of the ILC was set up specifically to deal with the question of freedom of association, and was chaired by David Morse of the United States. The Committee on Freedom of Association, a committee of the Governing Body, was a later and completely different committee.

25 This had been a contentious issue for 20 years, but appears to have been set aside in 1947 as part of a complex deal. As noted by Dunning, the Employers proposed that the convention should contain a right not to join a union, but this was rejected. However, there was also a proposal by the Governments of two Eastern European States that “employers” should be deleted from the text, so that the convention would only provide for workers’ rights. The Workers’ group supported the Employers in rejecting this proposal. See Dunning, H., 1998. “The Origins of Convention No. 87 on freedom of association and the right to organize,” *International Labour Review*, 137(2), 149 et seq. (1998). It has been observed that: “Possibly as a *quid pro quo*, the Employers did not reintroduce the ‘right not to join’ amendment”. Rogers, G., Lee, E., Swepston, L., and J. Van Daele, 2009. *The ILO and the Quest for Social Justice, 1919-2009*. ILO, Geneva, p. 48.

26 ILO, 1948. *Freedom of association and protection of the right to organize*. Report VII, ILC, 31st Session, San Francisco.

the Office had drafted a short questionnaire which asked governments whether it would be “desirable to provide that employers and workers, without distinction whatsoever”, should have the right to join organizations of their own choosing without prior authorization, or whether it would be “preferable to enumerate descriptively the persons to whom the right of association should apply”.²⁷ Virtually all governments preferred the right of association to be extended to all without distinction. The last part of question 3 asked whether it would be “desirable to provide that that the recognition of the right of association of public officials [...] should in no way prejudice the question of the right of such officials to strike?” The answers to this question varied considerably, with some governments noting that it was not permitted in their country, a few saying that public officials were guaranteed this right by the national constitution, and many saying it would be preferable to defer discussion on this point and not cover it expressly in the convention. The latter view prevailed.

The Freedom of Association and Protection of the Right to Organise Convention (No. 87) was adopted in 1948. When the Convention came up for the final discussion before the vote in Plenary, there was little debate. The Employer Vice-Chair, Louis Cornil, noted that there were those who wanted the text to be “extremely precise” and stated that the Conference Committee “thought that the Conference the next year should decide whether the regulations should take the form of a Convention or a Recommendation” and observed that the text of Convention No. 87 would serve as “useful basis for next year’s discussion”.²⁸ Notwithstanding the expectation that Cornil voiced in 1948, no action was ever taken to draft a follow-up convention or recommendation that would further expand on the precise meaning of freedom of association.

3. Cold War challenges leading to the CFA

The Governing Body would wrestle with this issue over the next three years, as complaints were made of grave violations of trade union rights, but there was no mechanism for dealing with these complaints that seemed effective, practical and timely. In 1949, the Conference adopted the Right to Organise and Collective Bargaining Convention (No. 98), which was viewed as complementary to Convention No. 87, in that it was based on a principle that had already been accepted; namely, that workers and employers in exercising their right of freedom of association must be able, if they choose, to form associations which are independent and able to represent their interests for the purposes of collective bargaining. Beyond this, however, Convention No. 98 contains no language meant to further clarify the scope of the term “freedom of association”.

Convention No. 87 entered into force in July 1950 and, by the beginning of 1951, five Member States had ratified it. Yet, attacks from Eastern bloc countries regarding the

²⁷ *Ibid.*, p. 15.

²⁸ ILO, 1948. *Record of Proceedings*, ILC, 31st Session, 15th Sitting, San Francisco, Geneva, p. 284.

deficiencies of ILO processes made it increasingly evident that the ILO had to devise a way to determine whether freedom of association had been infringed in specific cases, regardless of whether a Member State had ratified the new Convention.²⁹ Some incidents reflected the broader political tensions of the immediate post-war period, drawing the attention of ECOSOC.³⁰ The Governing Body was well aware that many complaints would arise that could not be easily accommodated by the existing supervisory mechanisms. Not only was the Committee of Experts limited to reviewing compliance by Member States which had ratified Conventions Nos 87 or 98, it was not equipped to deal with an examination of specific incidents. In addition, the obligation to respect freedom of association now arose from membership of the ILO itself,³¹ not solely from the ratification of a Convention, which provided the basis for creating an additional supervisory mechanism.

3.1. Establishment of the Committee on Freedom of Association

At the March 1949 session of the Governing Body, several members raised the issue of the pressing need to deal with complaints of grave violations of trade union rights, but the discussion once again produced no practical effective suggestion. At the June 1949 session of the Governing Body, the discussion was unusually heated, in large part because an observer from the WFTU expressed the very strong view that ECOSOC should deal with violations of trade union rights.³² He asserted that the ILO was not competent to deal with violations of freedom of association and alleged that this was due to the role that employers played in the ILO. He took the position that action under Convention No. 87 would be unsatisfactory for several reasons, including the fact that the Convention “did not recognize the right to strike, the only effective weapon which the workers had to defend their rights,”³³ and that the Committee of Experts had “no power to impose their

29 As early as 1947, the Office had anticipated that the ILC in adopting any convention on freedom of association would not be able to list detailed regulation of the conduct of the parties and thus suggested that the Conference establish some mechanism for dealing with disputes. It proposed that the Governing Body appoint “a Committee on Freedom of Association, to establish the facts of the case whenever the guarantee of freedom of association is in dispute”. ILO, 1947. Report VII, op. cit., p. 106.

30 For a discussion of the highly politicized post-war period 1947–1951, see Janice R. Bellace, 2014, op. cit., pp. 44–47; see also, Maul, D., 2019. *The International Labour Organization: 100 years of global social policy*, ILO, pp. 135–148.

31 The Declaration of Philadelphia, adopted by the ILC in 1944, was incorporated into the Constitution of the ILO. In 1945, by virtue of these amendments to the ILO Constitution, membership of the ILO was open to all members of the United Nations provided that they formally accepted the obligations listed in the ILO’s Constitution. Thus, the ILO can impose obligations upon Member States in so far as the Member State has voluntarily agreed to them. Bartolomei de la Cruz, H., von Potobsky, G., and L. Swepston, 1996. *The International Labour Organization: The International Standards System and Basic Human Rights*, Westview Press, Boulder, pp. 5–6.

32 During the course of 1949, some affiliates of the World Federation of Trade Unions became convinced that the WFTU was dominated by Communist unions. They decided to leave the WFTU and form a new entity. In December 1949, the International Confederation of Free Trade Unions was formed.

33 ILO, 1949. Minutes of the 108th Session of the Governing Body, Geneva, June–July, p. 66.

views” and could act only with regard to ratified conventions.³⁴ The WFTU’s vehement attack on the ILO’s existing mechanism prompted the Governing Body to take action. The United States Worker representative declared that “the I.L.O. should set up the necessary machinery to put an end to the violation of trade union rights and that the question should cease to be used as a political football between the I.L.O. and the Economic and Social Council”.³⁵ This view met with general approval, and the Governing Body directed the Office to draw up a detailed proposal.³⁶

In 1950, when the Governing Body considered a specific proposal³⁷ to set up a fact-finding and conciliation commission, the Workers’ group emphasized that the “fundamental object” of setting up such a commission was to give effect to the principle of “freedom of association”, but doubted that the commission would be effective, since its ability to engage in its work depended on the willingness of the Government against which the complaint had been made to accept such a commission. The Workers’ group urged that the commission should have the power to carry out supervision and enquiry without the consent of the Government concerned and that the Organization take action to ensure that supervisory efforts were effective. This 1950 discussion changed the direction of the Office’s thinking and opened up the possibility of having a more activist body to respond to freedom of association complaints.

In June 1951, the Governing Body considered the report of the Director-General.³⁸ Over the next months, the Office prepared a draft proposal for a special committee that would deal with these issues. One major change between the early and the final proposal was the source and character of the members of the committee. Originally, the Office had considered that the members would be impartial, and would be jurists experienced in examining and evaluating evidence. The final proposal was that the members would be from the Governing Body and would reflect its tripartite composition. In November 1951, the Governing Body, after discussions with ECOSOC, established the CFA as a tripartite committee of the Governing Body.³⁹

34 Ibid, p. 67.

35 Ibid, p. 73.

36 Ibid., p. 84.

37 ILO, 1950. *Minutes of the 110th Session of the Governing Body*, 110th Session, January, Geneva. Sixth Item on the Agenda. “Question relating to Freedom of Association”, pp. 71–91, and Appendix VI, pp. 170–178.

38 It was agreed that this discussion would be held in private, and thus the Minutes do not reveal what was discussed. The subject was so highly charged that the Governing Body decided to change the name of the report from what was listed on the agenda, and an Officer of the Governing Body who could not be present for the Governing Body’s June session complained that the matter was being moved forward without due consideration and wanted this placed on record. ILO, 1951. *Minutes of the 115th Session of the Governing Body*, Sixth Item on the Agenda, “Report by the Director-General on his Consultation with the Officers of the Governing Body concerning Complaints Containing Allegations of Infringements of Trade Union Rights”, June, Geneva, p. 80. The text of this report appears in the Fifth Report of the ILO to the United Nations, Geneva, 1951, pp. 253-264.

39 It was technically the ILC which invited the Governing Body to do this through a resolution. Bartolomei, et al., 1996, op. cit., p. 99.

This change in the membership of the CFA indicates a desire by the Governing Body for a different approach to reaching decisions, which would not be strictly judicial or independent. It appears that at no time was the Conference Committee on the Application of Standards considered the right vehicle to examine complaints in the first instance. Rather, the Governing Body favoured the proposed nine-person tripartite committee consisting of members drawn from the Governing Body itself, which would convene three times a year and evaluate complaints to determine whether freedom of association had been respected.

Since the discussion on this point at the June 1951 session of the Governing Body was off-the-record, one can only speculate that the Governing Body wished to retain the ability to fashion the shaping of the right of freedom of association through the decisions that the CFA made in specific cases. All the members of the Governing Body would have been well aware that the regular deliberative mechanisms of the ILO had failed to produce agreement on a more complete statement on the meaning of freedom of association. Also, because there was no further amplification of the meaning of freedom of association, it can only be assumed that the Governing Body was willing to pursue a common law approach of proceeding on a case-by-case basis, with the result that a body of substantive CFA decisions would provide guidance on what freedom of association means in practice. Whether this was an explicitly considered decision is unknown. In retrospect, it may well be that, in the tense East-West political conflict of that period, the Governing Body felt compelled to act and could reach no other acceptable option. What is known is that the model and approach that the Governing Body accepted in June 1951 has endured for 70 years.

4. Organizational effectiveness

The ILO is a rarity on the international scene. It is unique in that it is tripartite, with its voting structure reflecting that commitment. It has survived for over 100 years. Its basic structure remains the one that the British delegation, and in particular Edward Phelan, sketched out in late 1918 and early 1919.⁴⁰ In 1926, the Conference devolved some of its tasks relating to the review of the reports of Member States on their compliance with ratified conventions. The independent Committee of Experts on the Application of Conventions and Recommendations (CEACR) was established to perform a technical juridical task of reviewing these reports. The Conference also established the Conference Committee on the Application of Standards to consider and form an opinion on these reports. This was not the proposal that had been put forward by the Office, but in light of the function that the ILC members saw themselves performing, it made sense to establish a mechanism to receive inputs from two different sources, one reflecting the tripartite nature of the Organization and the other its more formal, precise standard-setting aspect.

In contrast to the reasons that first prompted the elaboration of the supervisory system, the CFA was formed in response to external political pressures that threatened the ILO's

40 Namely, the Conference (ILC), the Governing Body and the Office.

autonomy,⁴¹ or at least its exclusive jurisdiction within the United Nations system over a subject that was not only fundamental, but foundational for the ILO. The concept of a standing committee on freedom of association arose rather quickly and was not subject to considered debate over a period of several years. Even after the Governing Body had agreed to its establishment, there was still uncertainty about what the CFA was. At the November 1951 session of the Governing Body, some Employer and Government members expressed concern at how the new committee would operate, what exactly it would be expected to do, and how it would relate to the Governing Body and the Office.⁴² The speed with which the concept of the CFA had been developed meant that there were no clear answers to these questions.

Surprisingly, there was no discussion of the relationship of the new CFA with the existing and long-established Committee of Experts, let alone the potential for conflicting views regarding the meaning of freedom of association or specific provisions of Conventions Nos 87 and 98.⁴³ Although there was no such discussion, it is clear that the Conference and the Governing Body proceeded on the assumption that the Committee of Experts would continue to maintain a supervisory function with regard to Conventions Nos 87 and 98, because there was no suggestion whatsoever that the role of the Committee of Experts with regard to the article 19 reports on ratified conventions might be restricted. At the end of 1951, nine Member States had ratified Convention No. 87 and the possibility of overlap with the CFA was low. As such, it may be that the possibility was recognized, but since conflict was unlikely to rear its head any time soon, discussion was deferred to another day. Such a discussion has never occurred.

Those within the Office, however, did perceive that there could be some difference of opinion between the tripartite CFA and the independent Committee of Experts. That this has not occurred reflects the *modus operandi* of the two committees and their views on the need for the ILO to present consistent statements on the meaning of freedom of association. Although the members of the two committees do not collaborate, they do consider what the other committee has said, in part to gain insight into the meaning of the conventions. For example, in addition to being aware of the CFA's published decisions,⁴⁴ the Committee of Experts, when drafting an observation or direct request to the government of a Member State regarding Conventions Nos 87 and 98, does consider

41 The term "autonomy" is used here in the sense historically adopted at the ILO, that is the ability of the Organization on its own to determine the meaning of rights embodied in the Constitution and in conventions.

42 ILO, 1951. Minutes of the 117th Session of the Governing Body. Fifth Item on the Agenda, "Procedure for the Preliminary Examination of Complaints Alleging Breaches of Freedom of Association", November, Geneva. P. 46.

43 It is however worth mentioning that in 1953 the Governing Body noted the proposal of the Director-General "that it would be inappropriate to express an opinion" regarding Convention No. 87 and Convention No. 98 "owing to the existence of a special procedure laid down by the Governing Body for dealing with complaints concerning alleged infringements of freedom of association". Minutes of the 122nd Session of the Governing Body, 29–30 May, 19 and 26 June 1953. P. 110, Geneva.

44 The CFA's decisions are published in the ILO *Official Bulletin* following each meeting of the CFA.

carefully what the CFA has said about events in that country in light of a particular complaint brought to the CFA. Similarly, the CFA will keep abreast of the views of the Committee of Experts, as expressed in its General Surveys⁴⁵ on the topic and its statements in observations and direct requests. Although they have not formally stated a reason for this, the two committees also consider what the other committee has said because of a felt need to maintain coherence in the ILO supervisory system. Addressing this objective, the Committee of Experts observed in 1994 that, while the two committees “differ in terms of their composition, the nature of their functions and their procedures, they apply the same principles, which are universal and cannot be applied selectively”.⁴⁶ Moreover, the Committee of Experts has recognized that, because of the sheer volume of complaints the CFA has examined, the CFA “has established a series of principles which constitutes a veritable international law on freedom of association”.⁴⁷ More recently, the Chairpersons of the CFA and the CEACR, in a joint report, observed that, while there could be conflicting views within the supervisory system that would undermine its impact, “in practice there do not seem to be problems in this respect”.⁴⁸ From this one infers that, while members of the supervisory bodies might not personally interact, they are informed of what the other bodies have said and of their own accord they have achieved a coherence of views as to the meaning of the Conventions.

Seventy years after its establishment, it is evident that the CFA, technically a committee of the Governing Body, is firmly entrenched in the ILO structure. It has met a continuing need of the ILO. It can respond in a timely manner to specific instances of alleged grave violations of freedom of association and bring to bear the practical experience of its tripartite members in industrial relations matters. A reading of the reports of the Committee of Experts and the CFA since 1952 reveals that the CFA, not the Committee of Experts, has taken the lead role in delineating the meaning of the right to strike. This has occurred because a novel issue usually arises for the first time in a particular case before the CFA, although it is possible that such an issue might first come before the Committee of Experts. The CFA is more likely to be confronted by a novel issue in part because complaints can be filed at any time with the CFA, while Member States report to the Committee of Experts at specified intervals (currently every three years for the fundamental Conventions).

45 There have been six General Surveys devoted entirely to freedom of association and collective bargaining; in 1956, 1957, 1959, 1973, 1983 and 1994. In 2012, the topic was included in a General Survey that covered all the fundamental Conventions. The Governing Body selects the topics for General Surveys.

46 ILO, 1994. *Freedom of association and collective bargaining*, General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Report III (Part 4B), ILC, 81st Session, Geneva, para 20.

47 *Ibid.*, para. 19.

48 ILO, 2016. “[The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association](#)”, Governing Body, 326th Session, Geneva, 10-24 March (GB.326/LILS/3/1), para. 89.

5. Impact on national law and practice

In assessing the impact of the CFA on the law and practice of Member States, it is difficult to separate CFA decisions from the observations and direct requests of the Committee of Experts when measuring the effect of a given view (such as the rights of a minority union). It appears that those outside the ILO generally obtain information, not from specific CFA cases or the observations of the Committee of Experts, but from the CFA Compilation/Digest of decisions⁴⁹ and the General Surveys of the Committee of Experts. Most constituents, particularly those not closely involved with the workings of the ILO, view the ILO as a single entity which, through its various parts, including the bodies of the supervisory system, speaks with one voice.

However, those more closely associated with the ILO have witnessed the changing views of constituents regarding freedom of association. During the era of the Cold War, the Employers' group was particularly supportive, and seemingly accepted the notion that the right to strike is an integral part of freedom of association.⁵⁰ It was not until 1994 that there appeared to be dissatisfaction with the views of the Committee of Experts, as expressed in the 1994 General Survey. Nearly 20 years later, the same views were expressed in more vehement fashion at the 2012 Conference during the discussion of the 2012 General Survey by the Conference Committee.⁵¹ This dissatisfaction continues, albeit at a lower level, but now somewhat more focused on the CFA.⁵² This continuing questioning of the extent of the right of freedom of association may reflect the importation of ILO fundamental rights into the United Nations Global Compact, the Human Rights Council's Guiding Principles on Business and Human Rights and many corporate codes of conduct for suppliers. As such, the guarantee of freedom of association is something no longer voluntarily assumed by ILO Member States; it has become a fundamental right imposed on companies by outside entities.⁵³ Moreover, in contrast with the carefully worded, even

49 The formal name since 2018 has been the "Compilation of decisions of the Committee on Freedom of Association". Many people still refer to this publication as the "Digest", as from 1972 its former name was "Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO". The Digest/Compilation has generally been viewed as a reference volume, not a commentary on freedom of association. Each paragraph takes a single aspect of the principle and then lists the CFA cases in which this principle has been applied.

50 See Wisskirchen, A., 2005, "The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience," *International Labour Review*, 144(3), pp. 253–289. Alfred Wisskirchen was the German Employers' representative, attended the ILC beginning in 1969. He was the Vice-Chairperson of the Employers' group and its spokesperson in the Committee on the Application of Standards from 1983 to 2004. His views were later expressed in the above article, which sets out the main objections of the Employers' group, as expressed in 2012.

51 For a discussion, see Janice R. Bellace, 2016. "Back to the Future: Freedom of Association, the Right to Strike and National Law", *King's Law Journal*, 27(1), 24–45; La Hovary, C., 2013. "Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike," *Industrial Law Journal*, 42(4), 338–368.

52 Janice R. Bellace, 2019. "The ILO Supervisory System post-2012: Back on Track?," *Archiv des Völkerrechts* (Archive of Public International Law), 57(2), 153–182.

53 Janice R. Bellace, 2018. "ILO Convention No. 87 and the Right to Strike in an Era of Global Trade", *Comparative Labor Law & Policy Journal*, 39(3), 101–137.

understated language of ILO materials, outside groups, such as NGOs, utilize simpler and sometimes more dramatic ways of discussing freedom of association designed to capture the attention of a wider audience. As such, the impact of CFA decisions, as part of internationally recognized rights, looms much larger for companies than previously.

The impact of CFA decisions on the law and practice in individual Member States depends largely on how individual governments, which have voluntarily assumed obligations by virtue of membership of the ILO and by ratifying conventions, view those obligations. Today, 157 Member States have ratified Convention No. 87 and 168 have ratified Convention No. 98. There are, however, notable exceptions, including such populous countries as Brazil, China, India and the United States. There are differing reasons for non-ratification. For the United States, major changes in national law would have to be made,⁵⁴ and political support in Congress has been lacking since 1947. Moreover, even if Congress amended federal statutory labour law, there would most likely be successful constitutional challenges,⁵⁵ as the United States Constitution contains strong private property rights, but nothing recognizing workers' freedom of association.⁵⁶ Although United States law may leave workers without the rights deemed to be encompassed in the guarantee of freedom of association, that does not mean that American companies can disregard what this right means.

Regardless of whether the home country of a company has ratified Convention No. 87, a company engaged in international business must contend with the fact that there is now widespread acceptance of the notion that freedom of association is a fundamental human right, and one which not only governments must respect. The Human Rights Council's Guiding Principles⁵⁷ expressly state that business must also respect human rights, and expressly include the ILO's four fundamental principles and the eight core Conventions within the ambit of human rights.

54 For a discussion of the specific changes that would have to be made for American labor law to come into alignment with ILO standards, see Edward E. Potter, 1984. *Freedom of Association, the right to organize and collective bargaining: The impact on U.S. law and practice of ratification of ILO Conventions No. 87 and No. 98*, Labor Policy Association, Washington D.C.

55 For a discussion, see James G. Pope, 2004. "How American Workers Lost the Right to Strike, and Other Tales", *Michigan Law Review*, 103(3), 518–553. See also James J. Brudney, 1995. "Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace", *Texas Law Review*, 74, 1563.

56 The First Amendment of the United States Constitution, adopted in 1791, states that "Congress shall make no law [...] abridging [...] the right of the people peaceably to assemble, and to petition the government for a redress of grievances". There is nothing in the United States Constitution that prohibits private employers from restricting freedom of assembly or association. This constitutional right has never been seen as applying to working persons seeking to join together.

57 The Guiding Principles are contained in the Annex to the March 2011 report to the United Nations Human Rights Council, authored by Professor John Ruggie; Human Rights Council, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie", Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, pp. 6–27. I.A.12 expressly states that businesses are to respect internationally recognized human rights, including "the principles concerning fundamental rights set out in the [ILO] Declaration on Fundamental Principles and Rights at Work".

Conclusion

It was not anticipated in 1998 that the ILO Declaration on Fundamental Principles and Rights at Work would become part of a much broader global governance system.

In 1919, the drafters of the ILO structure viewed governments as the key players, which would be responsible for and capable of maintaining standards. In a globalized world, with global supply chains linking companies, consumers and workers around the work, it is evident that “business” is often the most effective player in respecting fundamental rights on the ground. Without the meticulous work of the CFA in thousands of cases, the call to respect freedom of association would ring hollow, as it would be an admirable abstract principle lacking obvious application to real life situations. It is a tribute to the CFA that, over the past 70 years, it has taken a concept – freedom of association – and given it true meaning and applicability.

Not only has the CFA succeeded in securing a lasting and indispensable place in the ILO’s structure because it has risen to the challenge presented to it in 1951, but the respect accorded its views (as expressed in thousands of cases) is now critical to the future of the ILO.

As many new actors enter the human rights arena, the question will be whether the tripartite ILO will be able on its own to determine the meaning of rights embodied in its Constitution and conventions, and whether its determination will be accepted worldwide by relevant actors. Freedom of association has always been viewed as an enabling right, one necessary to give practical effect to the autonomy and dignity of workers. With technological advances heralding a transformation, not only of work, but also of how workers relate to each other and the company, and with many workers now controlled by platforms and engaged in on-demand work, the right of freedom of association will need to be applied in entirely new contexts.

The ILO must be at the forefront of the debate, stating what the right of freedom of association means in the new economy, a meaning which has been and will continue to be developed by the CFA.

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Benedict Abrahamson Chigara

► The *norms jus cogens* nature of the ILO regime on the protection of freedom of association and collective bargaining

Introduction

Associating with others is one of life's most natural conditions. It is implied and supported by one of life's most shared gifts across all cultures – language. Language offers a much needed ability to create and exchange views, thoughts and feelings with others by providing individuals the opportunities to find out, to express their reactions of joy or pain, gratitude or sadness, and to reject or accept positions.

Language transforms and binds individuals into communities, and communities into societies. It is the *sine qua non* of association. The universally appreciated maxim – ‘*No man is an island!*’ is a salutary declaration across all cultures that associating with others is as much a physiological need as other basic and fundamental needs listed under that category by Maslow.¹

Physiological needs are understood as the most basic pre-conditional requirements of life.² If so, then denial of association rights probably should compare to such international crimes against human dignity as apartheid, genocide, slavery, torture and degrading treatment because it is contrary to human nature. It is the capacity to associate with others, including at the outset of life, one's mother, family, community, etc., that sustains life and keeps mortality at bay. Maslow's basic survival physiological needs of food, water and good health cannot be satisfied without associating with others across the plane of human life. Even those that grow up to become champions, Kings and Queens of this world need at the beginning a mother to give them milk for food, a covering blanket for warmth, a bath for cleanliness, and so forth; and much later on, advisers, coaches and even adulators.

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1 Including water, air, food, and health. See especially Abraham H. Maslow, 1962. *Toward A Psychology of Being*, Martino Publishing, Mansfield Centre CT.

2 See also Susan Nolen-Hoeksema, 2015. Atkinson, R. and E.R. Hilgard, *Atkinson and Hilgard's Introduction to Psychology*, 16th edition.

1. Language, association rights, and the ILO regime on freedom of association and collective bargaining

In its interim decision of 31 July 1980 in *Lovelace v Canada*,³ the United Nations Human Rights Committee stated that there are linguistic minority rights under Article 27 of the International Covenant on Civil and Political Rights (1966) that Canada was required to ensure in order to comply with its anti-discrimination obligations under the ICCPR.

The case had arisen from a failure by Canada to protect the threat to the association rights of an Indian woman within her Indian community if she chose to marry a non-Indian man. This is because the Canadian Indian Act provided in Section 14 that an Indian woman ceased to be a member of her Indian group if she married a person who was not a member of that group. Consequently, she lost the right to the use of the land allotted to the group and all other benefits in common with other members of the group. Instead, where an Indian woman married a member of another group, she thereupon gained membership of her husband's group and was entitled to the use and benefit of lands allotted to her husband's group. Further, the Act provided that:

An Indian (including a woman) who ceases to be a member of a band ceases to be entitled to reside by right on a reserve. Nonetheless, it is possible for an individual to reside on a reserve if his or her presence thereon is tolerated by a band or its members. It should be noted that under section 30 of the Indian Act, any person who trespasses on a reserve is guilty of an offence.⁴

Prior to her marriage, Sandra Lovelace had lived on the Tobique Reserve with her parents. Following her marriage, she had been denied the right to live on an Indian reserve. Canada submitted that:

Since her marriage and following her divorce, Mrs. Lovelace has, from time to time, lived on the reserve in the home of her parents, and the Band Council has made no move to prevent her from doing so. However, Mrs. Lovelace wishes to live permanently on the reserve and to obtain a new house. To do so, she has to apply to the Band Council. Housing on reserves is provided with money set aside by Parliament for the benefit of registered Indians. The Council has not agreed to provide Mrs. Lovelace with a new house. It considers that in the provision of such housing priority is to be given to registered Indians.⁵ ... (But) [w]hen Mrs. Lovelace lost her Indian status through marriage to a non-Indian, she also lost access to federal government programs for Indian people in areas such as education, housing, social assistance, etc. At the same time, however, she and her children became eligible to receive similar benefits from programs the provincial government provides for all residents of the province.

3 Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 7.2.

4 *Ibid.*, para. 9.3

5 *Ibid.* para. 9.6

Mrs. Lovelace is no longer a member of the *Tobique band and no longer an Indian under the terms of the Indian Act*. She however is enjoying all the rights recognized in the Covenant, in the same way as any other individual within the territory of Canada and subject to its jurisdiction.⁶

Notwithstanding, following her divorce, the Tobique Reserve Indian community had gratuitously tolerated Mrs Lovelace's return, but with no definite or absolute right to remain there. It was submitted on her behalf that she had returned to the Reserve with her children because her marriage had broken up and she had no other place to reside. Moreover, she was only able to "remain on the reserve in violation of the law of the local Band Council because dissident members of the tribe who support her cause have threatened to resort to physical violence in her defence should the authorities attempt to remove her".⁷

The key question is whether the freedom to associate in the hope or the effort to promote one's own welfare interest in conjunction with others rightfully understood to be participants in similar cultural circumstances or conditions of life can be alienated by, for instance, marriage or anything else for that matter? An ancillary question is whether the right to organize which is recognized as one of the core ILO treaties on employment relations could be alienated? If so, on what basis and with what guarantees to employers or employees who may wish to organize themselves in pursuit of the promotion of their welfare causes?

In the Sandra Lovelace case, Canada conceded that the right to associate with others was a *sine qua non* of human dignity and that it was inalienable. Therefore, it had already begun to amend its laws so that the law recognized, promoted and protected the inalienable right to associate with others in the furtherance of common welfare values and standards.⁸

2. Association rights in industrial relations

It is in the cultures of employment relations or industrial relations or labour relations, and not just linguistic minority, or any other minority cultures for that matter, that the breach of association rights is most acutely felt across the world in 2022. Because work is historically the oldest, commonest, biggest and consuming culture anywhere you look, it operates 24/7, 365 days a year, pulling in everyone into the obsessive world economy of today.

The international conventions on freedom of association (Convention No. 87 of 1948) and collective bargaining (Convention No. 98 of 1949) are two of the ILO's fundamental

6 Ibid. para. 9.8

7 Ibid. para. 9.7

8 Ibid. para. 9.5

international labour conventions/treaties. I would characterize these two instruments as the *oxygen of fairness and social justice* in employment relations because, unless you can organize, how else can you advance your welfare in employment relations, whether as employers in relation to ‘worrying’ governmental regulations, or as employees in relation to either employers’ exploitative conditions or, governmental inaction?

Convention No. 87 establishes in Articles 2-6 the right of both workers and employers to establish and join organizations of their own choosing for the advancement of their own welfare interests in employment relations, without anyone’s prior authorization. Further, such common welfare organizational associations shall operate freely and not be liable to dissolution or suspension by administrative authority. Even more, such organizational associations shall have the right to form and establish national federations and confederations, which may in turn affiliate with international organizations of workers and employers.⁹

Convention No. 98 guarantees workers in Articles 1-6 adequate protection against acts of anti-union discrimination in respect of their employment. Moreover, it shall be illegal to make the employment of a worker subject to the condition that s/he shall not join a union or shall relinquish trade union membership. It shall also be illegal under international law to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours. The Convention guarantees both workers and employers adequate protection against any acts of interference by each other or, each other’s agents or, members in their establishment or administration.

Convention No. 98 specifically deems as prohibited interference with this right, any “acts which are designed to promote the establishment of workers’ organisations under the domination of employers or employers’ organisations, or to support workers’ organisations by financial or other means, with the object of placing such organisations under the control of employers or employers’ organisations”.

Article 3 obligates Member States that are parties to the Convention to establish on their territories, as necessary, conditions for the purpose of ensuring respect for the right to organize as defined in Articles 1 and 2. It is still the case that the armed forces and the police are not covered by this Convention. Members of these services are dealt with separately under national laws or regulations.

9 See Ben Chigara, 1995. “Article 2 of Convention No. 87: Precepts and Their Application - a Global Assessment”, *Managerial Law*, 37(6), pp. 1-20; Ferdinand von Prondzynski, 1984. “Freedom of association in modern industrial relations”, *Industrial Relations*, 15(1), pp. 9-16; Ben Chigara, 1994. “International aspects of industrial democracy”, *Managerial Law*, 36(2), pp. 1-16; Ferdinand von Prondzynski, 1987. *Freedom of association and industrial relations: A comparative study*, Mansell.

3. Challenges in recognizing, promoting and protecting freedom of association and collective bargaining

The *Council of Civil Service Unions (CCSU) v Minister for the Civil Service*¹⁰ is probably a classic case on the issues around the protection of the rights guaranteed in Conventions Nos 87 and 98. The case arose out of the issuance of an oral instruction on 22 December 1983 by the United Kingdom Minister for the Civil Service stating that the employment terms and conditions of service for civil servants at the Government Communications Headquarters (GCHQ) “should be revised so as to exclude membership of any trade union other than a department staff association approved by the Director of GCHQ”.¹¹ That power was purportedly derived from Article 4 of the Civil Service Order in Council 1982, which authorized the Minister to “give instructions [...] for controlling the conduct of the service”.¹²

The instruction had itself been issued under royal prerogative for the purpose of ensuring the smooth and efficient running of GCHQ, which had responsibility for the security of United Kingdom military and official communications and for providing signals intelligence for the Government. The case raised the question of whether a Governmental ‘spy’ department at the heart of national security was entitled to claim and enjoy the rights to organize and to form and join trade unions without prior authorization of anyone, as set out in Conventions Nos 87 and 98.

Importantly, since the establishment of GCHQ in 1947, all the staff at GCHQ had enjoyed the right to belong to national trade unions, and most of them did.¹³ Further, the unions represented at GCHQ were all members of an association of civil service unions and there was an established “practice of consultation between the official side and the trade union side about all important alterations in the terms and conditions of employment of the staff”.¹⁴

The High Court ruled in the application for judicial review that the Minister ought to have consulted the staff before issuing the instruction. On appeal to the Court of Appeal, the Minister argued that:

- (i) The power relied upon was immune from judicial review of the courts because it was a delegated discretionary power emanating from royal prerogative.¹⁵

10 [1984] 3 All ER 935

11 *Ibid.* p. 936.

12 *Ibid.*

13 *Ibid.* p. 935

14 *Ibid.*

15 *Ibid.* p. 396

(ii) The requirements of national security overrode any duty which the minister otherwise had to consult the staff.¹⁶

Additionally, the Minister filed affidavit evidence suggesting that the requirement of prior consultation with the workers had been offset by the real risk that prior consultation “would occasion the very kind of disruption [at GCHQ] which was a threat to national security and which it was intended to avoid”.¹⁷ The Court of Appeal ruled in favour of the Minister citing national security reasons.

On further appeal, the United Kingdom Supreme Court (then the House of Lords) held in its lucid judgment, inter alia, that *the principle of fairness* required that where a decision of a public authority cancelled out a benefit or advantage that was previously enjoyed and which could legitimately be expected to continue to be enjoyed until reasons for its withdrawal and a fair opportunity to comment upon those reasons had been granted, then such a decision should be subject of judicial review as in the present case, where the appellants could be said to have the legitimate expectation that the regular and long-established practice of consultation between management and staff regarding conditions of service would continue. Moreover, the previous practice of consultation at GCHQ “gave rise to an implied limitation on the minister’s exercise of the power contained in Article 4 of the 1982 order, namely an obligation to act fairly by consulting the GCHQ staff before withdrawing the benefit of trade union membership. [Therefore] ... the minister’s failure to consult prima facie entitled the appellants to judicial review of the minister’s instruction”.¹⁸

The fairness test relied upon by the Supreme Court to settle the matter is the *raison d’être* of the ILO’s social justice agenda, especially of the CFA, currently chaired by one of the ILO’s own abiding luminaries and lifer, Evance Kalula, Emeritus Professor of Law, University of Cape Town. The CFA is a tripartite committee with jurisdiction to deal with complaints of infringement of the strictures of Conventions Nos 87 and 98, submitted either by governments or by organizations of employers or of workers.¹⁹

4. The ILO Committee on Freedom of Association (CFA): A *norms jus cogens* committee?

The operational dynamic of the CFA conferred upon its establishment by the ILO Governing Body in 1951 places the ILO among the original instigators in international law of the concept of *norms jus cogens*. This is partly because the CFA’s jurisdiction is automatic and neither dependent upon state consent or ratification of the relevant ILO Conventions. The International Law Commission’s instigation of the idea appears to have

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ ILO. *Compilation of decisions of the Committee on Freedom of Association*, 6th edition, 2018 (hereinafter, “CFA, Compilation of decisions”).

followed much later, in the form of the Vienna Convention on the Law of Treaties (1969),²⁰ Article 53 of which proscribes the validity under international law of any treaty that at the time of its adoption contradicts *norms jus cogens*.

The CFA supervises the recognition and protection of Convention rights regardless of whether a State has or has not ratified Convention No 87 and Convention No. 98.²¹ This might be understood as recognition that the standards protected by these ILO two Conventions are recognized as inalienable in the employment relations policy of civilized States. If so, these standards must be regarded, under the light of Article 38(1)(c) of the Statute of the International Court of Justice²² on sources of international law, as “general principles of law recognized by civilized nations”.

Even more significant about the ILO standards in Conventions Nos 87 and 98 is their consonance with the characterization in Article 53 of the Vienna Convention on the Law of Treaties of what pass as *norms jus cogens*, namely that they ought to have been “accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted”. The automatic jurisdiction conferred upon the CFA to supervise state compliance with the relevant ILO Conventions regardless of their ratification status of Conventions Nos 87 and 98 strongly recommends the view that freedom of association and the right to collective bargaining may have gained the status of *norms jus cogens* in the field of employment relations policy.

The CFA’s tripartite composition,²³ with representatives of governments, employers’ associations and employee associations, inspires belief among stakeholders that the CFA is a representative, objective, balanced and unbiased supervisor whose recommendations can be relied upon. Shotwell writes that:

The International Labour Organisation, created at the Paris Peace Conference of 1919, is the first international institution in history participated in by workers, employers, and governments to deal with the problems that are most real to most people the world over, the problems that have to do with the day’s work. Its name belies its nature, for it represents all interests, not merely those of labor. It might perhaps be more accurately termed an International Organization for Social Justice. There is a hint of this broader conception in the Preamble to the ILO Constitution in the statement that universal peace ‘can be established only if it is based upon social justice’.²⁴

20 United Nations Conference on the Law of Treaties, Vienna, 1968–9, A/Conf. 39/27. See also Matthew Saul, 2015. “Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges”, *Asian Journal of International Law*, 5(1) pp. 26–54.

21 See Yoshifumi Tanaka, 2021. “The Legal Consequences of Obligations Erga Omnes in International Law”, *Netherlands International Law Review*, 68(1), pp. 1-33. See also ILO, [Applying and promoting International Labour Standards](#), Committee on Freedom of Association.

22 [Statute of the International Court of Justice](#).

23 See Bernard Beguin, 1959. “ILO and the Tripartite System”, *International Conciliation*, No. 523.

24 Shotwell, J.T., 1959. Preface to Beguin, op. cit.

The automaticity of CFA jurisdiction, regardless of whether or not a State has ratified the relevant ILO Conventions, transforms in my view, in the field of labour relations, both the CFA's monitoring procedures and the substantive standards contained in Conventions Nos 87 and 98 into norms *jus cogens* because they apply regardless of sovereign consent.

Moreover, the conclusions and recommendations issued by the CFA in specific cases contribute to the formulation of benchmarks that respondent governments can utilize in any discussions relating to any complaints or allegations leveled against them in the search for a solution. "In making its conclusions and recommendations, the CFA is guided by the principles of freedom of association and the effective recognition of the right to collective bargaining [...], as well as by the long-standing experience and expertise of its members in the field of industrial relations".²⁵

Further evidence of the *norms jus cogens* nature of the ILO regime on freedom of association and collective bargaining can be gleaned from its interaction with the concept of State sovereignty. In the *Island of Palmas Arbitration*, Judge Max Huber described sovereignty as the foremost signifier of independence. "Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".²⁶ Thomas Franck writes that: "Sovereignty is supreme authority, which on the international plane means [...] legal authority which is not in law dependent on any other earthly authority".²⁷ But the supervisory procedure for the protection of freedom of association and the right to collective bargaining in industrial relations recognizes no barriers to its mission to balance the perpetual imbalance in power relations between employers and employees, with governments sometimes caught up in the roles of both employer and the regulator of employment relations on their territories, as seen in *Council of Civil Service Unions (CCSU) v Minister for the Civil Service*. In Case No. 2519 (Sri Lanka), the CFA stated that, while national judicial procedures for the resolution of industrial disputes mattered, its own competence was not dependent upon the exhaustion of local remedies.²⁸

This elite *norms jus cogens* packaging of CFA norms and procedures is justified by the recognition in the ILO's major constitutional developments that freedom of association and collective bargaining are indispensable to lasting international peace and economic progress. Often described as one of the visionary documents which contributed to shaping the global order after the Second World War by setting out the guiding principles for national economic and social policies, the Declaration of Philadelphia, adopted by the International Labour Conference on 10 May 1944, pins the hope of lasting international peace and security on social justice by: (i) affirming the centrality of human rights for all people; (ii) making social justice the central aim of all national and international policies;

25 CFA, Compilation of decisions, para. 3.

26 *Reports of International Arbitral Awards*, 1928. II, 838.

27 Franck, T.M., 1995. *Fairness in International Law and Institutions*, OUP, Clarendon Press, p. 4.

28 CFA, Case No. 2519, Report No. 348, November 2007, para. 1139.

and (iii) exhorting the ILO “to examine and consider all international economic and financial policies and measures in the light of this fundamental objective”.²⁹

Paragraph 2 of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) enmeshes the *norms jus cogens* nature of CFA standards and procedure by providing that:

all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination in respect of employment and occupation;

Similar obligations apply in international law regarding the prohibition of inhuman and degrading treatment, slavery, genocide and apartheid. These *norms jus cogens* are the foundational building blocs of the minimum order upon which international life depends. Thus, they override State consent and sovereignty claims.

These super-substantive and super-procedural standards are also justified by the workload that has resulted. The ILO reports that, in the ongoing 70 years of its work, the CFA has examined in excess of 3,400 cases. Over 60 countries on all continents have acted on its recommendations and have informed it of positive developments with regard to freedom of association in recent decades.³⁰

As a supervisory procedure of ILO strictures on freedom of association and collective bargaining, the CFA is often the only hope for workers and employers involved in a ruthlessly amoral globalized world economy, also characterized by the recent emergence of zero-hours employment contracts with no paid leave, pensions or national insurance. It is not surprising that the Governing Body established and packaged the CFA with *norms jus cogens* capabilities long before the concept had caught the imagination in public international law.

Multinational corporations (MNCs) have demonstrated immense and persistent opportunism in what James Brudney refers to as window-dressing of their portfolios by claiming recognition and respect in their corporate practices of the rights to freedom of association and collective bargaining.³¹ Often, their self-regulated codes do not reference specific labour regulations or standards in a global setting. Moreover, the record of MNCs “on vol-

29 ILO, *Constitution*, Annex, Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), II(d).

30 CFA, Compilation of decisions.

31 James J. Brudney, 2012. “Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisypus”, *Comparative Labor Law & Policy Journal*, 33(4), pp. 555–604.

untary compliance has been discouraging [...] especially disappointing in labour-intensive industries like apparel, shoes and toys, where a global supply chain of contractors effectively controls labor conditions. [Consequently the] persistent gap between aspiration and achievement regarding corporate codes has led to disagreement over their meaning and value”.³² This is because of the perception that business codes of conduct have the effect of enhancing corporate reputations with diverse audiences and a “publicly announced pledge to promote decent working conditions can help in recruiting and retaining certain types of employees, in attracting consumers or investors who prefer to engage with a socially responsible company, and in mollifying regulators who must allocate their limited resources among delinquent actors”.³³ Abusive domestic work practices are either ignored or unregulated in States where they are habitually practiced. Thus, to have any hope of success in countering such practices, the CFA jurisdiction had to be packaged with *norms jus cogens* capabilities, as well as their substantive and procedural norms.

Yet, despite the *norms jus cogens* nature of its work, the CFA often finds its efforts frustrated by changes of government with new administrations with their own priorities often delaying implementation of its recommendations. In its 2020 follow up, the CFA observed in Case No. 2637 (Malaysia)³⁴ that, for more than 11 years, it has been calling for changes to the law and practice so that domestic workers, including migrant workers, may effectively establish and join organizations of their own choosing, without any significant progress. It therefore firmly expected that the current labour law reform process would address the issue of freedom of association for migrant domestic workers, using the technical cooperation of the Office.

The case arose out of a complaint submitted in 2008 by the Malaysian Trades Union Congress alleging that the Government had refused to allow migrant domestic workers to establish organizations to defend their interests. The CFA responded by recommending the Government to urgently take the necessary measures, including legislation, to ensure that domestic workers, including contract workers, whether foreign or local, would all effectively enjoy the right to establish and join organizations of their own choosing. The Government responded that it was in the process of reviewing and amending the Trade Unions Act, 1959, to ensure adherence to international labour standards.

In its work over the last seven decades, and continuing, the CFA has established benchmark standards intended as guidelines for the formulation and implementation of more humane labour relations policies. The ILO indicates that it is neither the object nor the purpose of the CFA complaint procedure to blame or punish anyone. Rather, the CFA seeks constructive engagement through tripartite dialogue to promote respect for trade union rights in law and practice while taking into consideration different national realities and legal systems.

32 Ibid. p. 555.

33 Ibid.

34 CFA, Case No. 2637, Report No. 392, para. 90.

Conclusion

This contribution has explored the rationale underpinning the ILO Conventions on freedom of association (Convention No. 87) and collective bargaining (Convention No. 98), and the dynamic of the CFA established by the Governing Body in 1951 to supervise State compliance with that regime internationally. It has shown that these two Conventions are strongly linked to the international post-Second World War global compact agendas on social justice, economic development and human rights. As such, they are significant in that their failure would most probably impact very severely the United Nations mission to ensure against a Third World War.

The contribution has shown that the ILO has led international imagination in the development of standards and procedures that have become known in public international law as *norms jus cogens* because, when it was established by the Governing Body in 1951, the CFA was packaged with an automatic jurisdiction that defers to neither the claims of sovereign consent nor the requirement of the exhaustion of local remedies before it can treat a complaint alleging breach of the relevant standards. Such foresight and leadership was mandated by an acute awareness of the ILO's leadership under Albert Thomas that the meaningful recognition, promotion and protection of the inherent dignity of workers lay in the universal application and supervision of social justice agendas and similar standards.³⁵

Norms jus cogens are elite norms of international law that operate above the general requirement of sovereign consent in international law. This is because their application is necessary to establish the minimum sense of order for international life to subsist. The right to associate with others in furtherance of welfare interests in the world of work, and the right to collective bargaining, with which the CFA supervises State compliance, were established in a manner that showcases them as *norms jus cogens*. The workload of the CFA, with over 3,400 cases to date, from all continents of the world, is a clear indication in my view of the rightness of conceiving the CFA and equipping it with *norms jus cogens* competencies, as the Governing Body did in 1951.

The contribution has also shown that enforcement challenges still arise for the CFA, as they do in other fields of international law, including those similarly regulated by norms *jus cogens*. Despite its promise of objectivity and fairness, heightened by its composition, which caters for the involvement of all stakeholders in its procedures, and its conciliatory and collaborative approach, the CFA needs additional support to ensure timely responses to its recommendations to governments based on the outcome of its investigations and findings in relation to allegations of breaches of the strictures of the relevant ILO Conventions.

³⁵ See especially, Ben Chigara, 2007. "Latecomers to the ILO and the Authorship and Ownership of the International Labour Code", *Human Rights Quarterly*, 29(3), pp. 706–26.

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Takanobu Teramoto

► **The Committee on Freedom of Association (CFA): Origin and goals – Protecting the principles of workers’ and employers’ freedom of association and their right to collective bargaining as an enabling basis for sustainable, democratic and productive industrial relations**

Introduction

The Committee on Freedom of Association (CFA) is a standing committee of the ILO Governing Body. It meets in Geneva three times a year to examine complaints of infringements of the principles of workers’ and employers’ freedom of association and their right to collective bargaining. Although entitled simply the “Committee on Freedom of Association”, it deals only with matters relating to workers’ and employers’ organizations, but not political parties or various other civil associations. The CFA commemorated its 70th anniversary in 2021. On this occasion, I would like to provide an overview of its aims, functions, structure and the like, and to reflect on its historical background and think about its current and future reason for being.

Labour was one of the most important issues shaking the world in the 19th and 20th centuries. The industrial revolution beginning in the United Kingdom in the 18th century resulted in the victimization of workers through low wages, long hours of work, unemployment and poverty. Even the conflicting political ideologies of capitalism and communism were born to tackle this problem, and developed into strife in real national and international politics.

The ILO was set up in 1919 after the end of the First World War (1914-1918). During the War, the Russian Revolution of 1917 created a first communist state in the world. The establishment of the ILO was discussed in the Commission on International Labour Legislation set up by the Paris Peace Conference, the conclusions of which were included in the Treaty of Versailles of 1919, Part XIII, which then became the ILO Constitution. That Constitution listed “The right of association for all lawful purposes by the employed

as well as by the employers” among the nine methods and principles of special and urgent importance that all industrial communities should endeavour to apply so far as their special circumstances would permit (former Article 41). However, it took about 30 years, including another world war, to fix these principles in the form of Conventions through the adoption of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Before the Second World War, totalitarian governments had stood in the way. And, since the adoption of the two Conventions, there have been cases of infringements by different kinds of oppressive governments.

In this paper, particular focus is given to such political aspects of freedom of association (or workers’ and employers’ freedom of association from government interference) and how the CFA deals with it. As will be seen in the following sections, the CFA asserts that it is not competent to consider purely political allegations, such as insurrectional movements and within political parties, and focuses on the protection of the economic and social interests of workers and employers. However, the CFA does not allow governments to impair the principle of workers’ and employers’ freedom of association, whether by their exercise of political power (including for national security and public safety measures) or otherwise. I think these whole ideas on the competence of the CFA are extremely balanced, having been consolidated through worldwide tripartite discussion on the basis of both the recognition of freedom of association as a universally applicable human right and the understanding of diversity in national political systems between States. And the renewed sharing of them among governments, workers and employers is key to extending the widest possible recognition and implementation of the principles of freedom of association and the right to collective bargaining in the world. Because, based on such understanding, the principles have nothing of a political nature, and just leave matters of their own to the parties to employment relations. That is industrial autonomy.

By the way, I once noticed on a website a question raised about the difference between “freedom of association” and “the right to organize”, without any answer registered yet at that time. These two legal concepts are used in Conventions Nos 87 and 98, without any provisions on their definitions. My speculation from certain legal contexts in the Conventions, as well as in United Nations human rights instruments, is as follows. First, “freedom of association” is a legal concept commonly used for different kinds of associations in United Nations instruments. The International Covenant on Civil and Political Rights provides that: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” (Article 22(1)). And, the contemporary concept of human rights is “designed primarily to prescribe to governments what they ought to and ought not to do”.¹ Thus, it is mainly

1 Michael Freeman, 2017. *Human Rights*, (Third Edition), Polity Press, Cambridge/UK and Malden/MA/USA, 2017, p. 90.

governments that are told not to infringe “freedom of association” from the human rights perspective. On the other hand, “the right to organize” is a concept used in labour legislation, and all the provisions of Conventions Nos 87 and 98 which use that term deal with matters between employers and workers. For example, Convention No. 98 provides in Article 2(1) that: “Workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration”. So “the right to organize” is designed to prohibit both parties of employment relations from interfering with each other’s affairs. My speculative conclusion is that “the right to organize” is the freedom of association of workers and employers from each other, a new concept designed to contain real necessities from the continuing nature of industrial relations, that could not be contained in the general human rights concept of “freedom of association”. And I have found that this conclusion matches the intention of the ILO, as set out in Report VII on *Freedom of Association and Industrial Relations*, submitted to the 30th Session of ILC in 1947, that Section II corresponded to Convention No. 87, Part II of which, on the protection of the right to organize, was intended to supplement the guarantee of freedom of association in relation to the State by the guarantee of the exercise of the right to organize in relation to the other party to the labour contract.

It may well be that such an academic issue of legal concepts was left unresolved in face of the necessity to reach agreement within the timeline of the ILO tripartite discussion. But the value of a worldwide tripartite agreement is one thing, and its clear and transparent content is another. Even after agreement is reached, any possible incremental measures to make it clear to the public must be valuable. I hope that these terminological questions will be studied, clarified and explained to the public, including a similar question in relation to the term “trade union rights”, used in ILO documents on the CFA.

In this paper, for reasons of simplicity, allow me sometimes to use the term “freedom of association” to cover the meanings of both freedom of association and the right to organize, possibly in the same way as the title of the CFA.

My views expressed in this paper are personal, and do not represent the views of any organization with which I have been associated.

1. The Committee on Freedom of Association (CFA)²

The CFA is a standing committee of the ILO Governing Body, which supervises compliance by Member States with their constitutional duty to respect the principles of workers’ and employers’ freedom of association and their right to collective

2 Reference Materials for section 1: ILO, 2018. *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association*, (6th edition), Geneva; Odero, A., and Guido, H., 1995. ILO law on freedom of association: Standards and procedures, Geneva, ILO; ILO, 1947. *Freedom of Association and Industrial Relations*, Report VII, ILC, 30th Session, Geneva.

bargaining.³ Concerning the focal point of this paper, the political aspects of freedom of association (or freedom of association from the government), the relevant decisions of the CFA can be grouped into the following two categories: (i) restriction of government interference in industrial relations, which is aimed at workers' and employers' autonomy; and (ii) the promotion of social dialogue between the government and workers' and employers' organizations. Beginning with an overview of these categories of decisions, I will explain how the CFA is set up and functions.

1.1. Restriction of government interference in industrial relations, aimed at the autonomy of workers and employers

Going straight to the point, I think that autonomous industrial relations, or independent and voluntary decision-making by employers and employees on working conditions and other economic and social matters of mutual interest, is a primary goal of the CFA. Therefore, government interference in industrial relations is denied in principle.

On the other hand, the CFA limits its scope of protection of the principles of workers' and employers' freedom of association and their right to collective bargaining to the extent that the aim is the protection and advancement of workers' and employers' economic and social interests, thus excluding purely political interests from the scope of protection. "The Committee is not competent to consider purely political allegations; it can, however, consider measures of a political character taken by governments in so far as these may affect the exercise of trade union rights".⁴ Therefore, "[i]f a national civic work stoppage is exclusively political and insurrectional, the Committee would not have competence in the issue".⁵ And, "[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests".⁶

However, it should be noted that "[t]he right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members interests".⁷ This decision allows workers to use the right to strike against government policies affecting their economic and social interests, while they should be ready to accept wage deductions by employers for strike days, as admitted by the CFA.⁸

3 The principles of freedom of association and the right to collective bargaining are applicable to both workers and employers. See, CFA, Compilation of decisions, Introduction, para. 7: "the principles of freedom of association and the effective recognition of the right to collective bargaining are of a general nature and aimed to protect the rights of both workers' and employers' organizations. Therefore, the CFA's decisions drawn from previous conclusions compiled herein can also apply, *mutatis mutandis*, to organizations of employers".

4 CFA, Compilation of decisions, para. 24.

5 *Ibid.*, para. 762.

6 *Ibid.*, para. 753.

7 *Ibid.*, para. 766.

8 *Ibid.*, para. 942.

In summary, the CFA protects the principles of workers' and employers' freedom of association and their right to collective bargaining for the protection and advancement of their economic and social interests, including against government policies. Governments should refrain from any interference that would restrict or impede the application of these principles.

In fact, however, there are outstanding cases of interference for which corrective measures are recommended by the CFA:

1) Domination by the government or the ruling political party of the trade union movement, directly or through the recognized sole national confederation of trade unions; when all trade unions are required to affiliate to a confederation, and unaffiliated unions run the risk of persecution, interference or discrimination by the government. The CFA does not tolerate any justification for such domination of the trade union movement. According to the decisions of the CFA, “[u]nity within the trade union movement should not be imposed by the State through legislation because this would be contrary to the principles of freedom of association”.⁹ “The Committee recalled that the organizational monopoly required by the law was at the root of the freedom of association problems in the country and the main hurdle to the recognition of an employer’s organization, and requested a government to take measures to amend the legislation so as to ensure the right of workers and employers to establish more than one organization, be it at the enterprise, sectoral or national level, and in a manner that does not prejudice the rights formerly held by the employers’ organization”.¹⁰

2) Government interference in strikes

According to the decisions of the CFA, “[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests”¹¹ and, although not specifically mentioned in Convention No. 87, “[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87”.¹² Restrictions on the right to strike are therefore considered permissible under limited conditions. “The right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)”.¹³ Police intervention during the course of a strike may be aimed at public safety, public order and the like, which are legitimate in themselves. However, the question is how to demarcate a border between freedom of association

9 Ibid., para. 487.

10 Ibid., para. 500.

11 Ibid., para. 753.

12 Ibid., para. 754.

13 Ibid., para. 830.

and such other requirements. According to the decisions of the CFA, “[t]he authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order”.¹⁴

- 3) Government abuse of legislative or regulatory authority in collective bargaining with the trade unions of their own employees

According to the decisions of the CFA, “[p]ublic servants in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements, enjoy suitable protection against acts of anti-union discrimination and enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population”.¹⁵ And, “[t]he responsibility for suspending a strike should not lie with the Government, but with an independent body which has the confidence of all parties concerned”.¹⁶

In cases of government interference, as outlined above, the CFA requests the government to rectify the relevant laws, regulations or practices in compliance with the principles of freedom of association and the right to collective bargaining.

1.2. Promotion of social dialogue between governments and workers’ and employers’ organizations

With regard to economic and social matters in which government policies and the interests of workers and employers may overlap, the CFA promotes social dialogue and encourages governments to consult workers’ and employers’ organizations as social partners. This is another case of well-balanced and prominent wisdom derived from worldwide tripartite discussion based on both the recognition of freedom of association as a universally applicable human right and the understanding of diversity in national political systems. “The Committee has emphasized the importance it attaches to the promotion of dialogue and consultations on matters of mutual interest between the public authorities and the most representative occupational organizations of the sector involved”.¹⁷ Moreover, the Committee has “emphasized the vital importance that it attaches to social dialogue and tripartite consultation, not only concerning questions of labour law but also in the formulation of public policy on labour, social and economic matters”.¹⁸

14 Ibid., para. 935.

15 Ibid., para. 831.

16 Ibid., para. 914.

17 Ibid., para. 1523.

18 Ibid., para. 1525.

Social dialogue is promotional guidance by the CFA. According to the decisions of the CFA, “[w]hile the refusal to permit or encourage the participation of trade union organizations in the preparation of new legislation or regulations affecting their interests does not necessarily constitute an infringement of trade union rights, the principle of consultation and cooperation between public authorities and employers’ and workers’ organizations at the industrial and national levels is one to which importance should be attached. In this connection, the Committee has drawn attention to the provisions of the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113)”.¹⁹

Concerning the timing of social dialogue, the Committee “has emphasized the value of consulting organizations of employers and workers during the preparation and application of legislation which affects their interests”.²⁰ And, “[c]onsultations on bills must take place prior to the legislative procedure, but they do not necessarily have to take place during the parliamentary proceedings”.²¹

With regard to the parties to social dialogue, they depend on the issues to be discussed. Accordingly, “[b]ills do not require consultations or negotiations with each and every one of the trade union organizations, it being sufficient that these take place with the most representative organizations at the national or sectoral level”.²² On the other hand, “[i]t is essential that the introduction of draft legislation affecting collective bargaining or conditions of employment should be preceded by full and detailed consultations with appropriate organizations of workers and employers”.²³

In addition, “[i]t is for trade unions to appoint their own representatives to consultative bodies”.²⁴

For effective and meaningful social dialogue, “[i]t is important that consultations take place in good faith, confidence and mutual respect, and that the parties have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. The Government must also ensure that it attaches the necessary importance to agreements reached between workers’ and employers’ organizations”.²⁵

1.3. Continuity of CFA decisions

The decisions of the CFA, as referred to in the preceding paragraphs, are compiled in its *Compilation of decisions*. The compiled decisions are then referred to in new

19 Ibid., para. 1551.

20 Ibid., para. 1536.

21 Ibid., para. 1538.

22 Ibid., para. 1537.

23 Ibid., para. 1544.

24 Ibid., para. 1534.

25 Ibid., para. 1533.

individual cases in relation to new decisions of a similar nature, thus giving continuity to its decisions.

The *Compilation of decisions* is the Committee's body of thoughts on the application of the principles of workers' and employers' freedom of association and their right to collective bargaining that have been accumulated over the 70 years since its establishment in 1951.

1.4. Criteria on infringements of the principles of workers' and employers' freedom of association and their right to collective bargaining

The obligation of all ILO Member States to respect the principles of workers' and employers' freedom of association and their right to collective bargaining is based on the ILO Constitution, which refers to them in its Preamble, as well as its Annex, the Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia). While the content of that obligation is not specified in the Constitution, the CFA refers to the following international instruments for the interpretation of the principles:

1) International labour standards (ILO Conventions and Recommendations)

It is quite natural to consider that Conventions Nos 87 and 98 contain all or most of the principles, as revealed by their drafting processes and the relevant descriptions in their respective introductory remarks: "Considering that the International Labour Conference, at its Thirtieth Session, unanimously adopted the principles which should form the basis for international regulation" (Convention No. 87); and; "Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively" (Convention No. 98). These Conventions are not legally binding on Member States that have not ratified them, but nevertheless they should be respected by all Member States as a duty arising from their ratification of the ILO Constitution. This is the basic assumption on which the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) and the CFA were created and now function.

Also, relevant provisions of other ILO Conventions and Recommendations may well be referred to as valuable guidance adopted by the ILC.

2) Resolutions of the ILC

Resolutions adopted by the ILC, which are not in the form of international labour standards (Conventions and Recommendations), are referred to in CFA decisions as being relevant to the principles of workers' and employers' freedom of association and their right to collective bargaining. The following two resolutions are the most important: (i) the Resolution concerning the independence of the trade union movement, adopted in 1952; and (ii) the Resolution concerning trade union rights and their relation to civil liberties, adopted in 1970. Details of these Resolutions are explained in section 4 below.

3) Other instruments

Other international instruments are referred to in CFA decisions, such as those of the United Nations which provide for freedom of association in general and workers' and employers' freedom of association as human rights, namely the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

1.5. Composition and procedure of the CFA

The CFA was set up by the ILO Governing Body in 1951 as one of its tripartite standing committees. It currently has six members each from governments, employers and workers (a total 18 members), as well as an independent Chairperson with legal expertise. It ascertains the facts relating to alleged infringements, decides on the merits of the case and, if any infringements are found, recommends the necessary remedial measures. According to the current version of the "Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association", the "mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions" (paragraph 14), and it is "within the mandate of the Committee to examine whether, and to what extent, satisfactory evidence is presented to support allegations" (paragraph 15).

The parties to its procedure are national or international workers' or employers' organizations which submit a complaint, and the government that is responsible for ensuring the protection of those principles in its territory. "The usual practice of the Committee has been not to make any distinction between allegations levelled against governments and those levelled against persons accused of infringing freedom of association, but to consider whether or not, in each particular case, a government has ensured within its territory the free exercise of trade union rights" (paragraph 17).

As a result of its examination of a case, the CFA concludes either that a case does not call for further examination because no infringements have been found, or recommends the government to take the necessary remedial measures. "The Committee (after a preliminary examination, and taking account of any observations made by the governments concerned, if received within a reasonable period of time) reports to the Governing Body that a case does not call for further examination if it finds, for example, that the alleged facts, if proved, would not constitute an infringement of the exercise of trade union rights, or that the allegations made are so purely political in character that it is undesirable to pursue the matter further, or that the allegations made are too vague to permit a consideration of the case on its merits, or that the complainant has not offered sufficient evidence to justify reference of the matter to the Fact-Finding and Conciliation Commission" (paragraph 18). Otherwise, the CFA "may recommend that the Governing Body draw the attention of the governments concerned to the anomalies which it has observed and invite them to take appropriate measures to remedy the situation" (paragraph 19).

The decisions of the CFA are not enforceable, either in relation to its proceedings or recommendations. But its supervision of a case continues until the case has been completely closed with “a definitive report”, or in the case of “a report in which the Committee requests to be kept informed of developments”, the completion of the follow-up given to its recommendations. During its continuous examination, the Committee can have ample time to seek facts by issuing “interim reports” or “follow-up reports”, while the parties are never relieved of their duty to submit the requested observations and information. And, during the course of this process, any disguised version of the facts that is submitted would not be sustainable, and the party submitting such information may have to recover from any resulting procedural delays and damages.

1.6. The CFA and other supervisory mechanisms for international labour standards

The CFA is tasked with supervising the implementation by all ILO Member States of their constitutional duty to respect the principles of workers’ and employers’ freedom of association and their right to collective bargaining. This is a special supervisory mechanism focusing on these principles, added in 1951 to the general supervision of all international labour standards undertaken by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards (CAS),²⁶ which was established in 1926 through an ILC resolution.

The CEACR is a standing committee of legal experts, and meets once a year to examine the implementation status of ratified Conventions that are legally binding for the respective ratifying Member States. Its report is submitted to the ILO Governing Body, and then published as Report III (Part 4) of the General Session of the ILC, including its observations on the failure by Member States to implement ratified Conventions. The CAS is a tripartite committee that is appointed each year by the ILC to examine implementation problems relating to ratified Conventions on the basis of the latest CEACR report. It discusses individually a list of cases selected from among those identified in CEACR observations, with the participation of tripartite representatives of the Member States concerned. The two supervisory bodies complement each other effectively: while the CEACR conducts a technical and impartial examination of cases, the CAS, including when its conclusions are discussed in the plenary sitting of the ILC, contributes to the supervision of the application of international labour standards the political weight and influence of an international forum in which governments, workers and employers from the world over may speak freely.

²⁶ The scope of the general supervision undertaken by the CEACR and the CAS also includes the obligation of Member States to bring before the competent authorities Conventions and Recommendations newly adopted by the ILC (ILO Constitution Article 19, paragraphs 5(b) and 6(b)) and to report regularly to the Office the position of its law and practice on unratified Conventions and Recommendations (Article 19, paragraphs 5(e) and 6(d)). However, in this paper, the focus is on their supervision of ratified Conventions based on the examination of the annual reports submitted by Member States under Article 22 of the Constitution in light of its relevance to the CFA.

These two permanent supervisory mechanisms, the CFA and the CEACR plus the CAS, have a different scope in respect of international labour standards and Member States. The CFA specializes in the supervision of the principles of freedom of association and the right to collective bargaining in all Member States, while the CEACR plus the CAS supervise the implementation of all Conventions by Member States that have ratified them. Another difference is the number of sessions each year. The CFA holds three sessions a year, while the CEACR plus the CAS meet only once a year. Accordingly, the CFA can address complaints in a timely and flexible manner.

Although they undertake their respective tasks independently, the CFA and the CEACR plus the CAS have developed collaborative practices. For example: (i) the CFA draws the legislative aspects of cases involving ratified Conventions to the attention of the CEACR, which then requests non-periodic reports from the government concerned to follow them up; and (ii) the CFA Chairperson makes an annual report to the CAS.

In addition to these permanent supervisory mechanisms, the ILO has ad hoc mechanisms: the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC); and the two mechanisms under articles 24 and 26 of the ILO Constitution. The former (the FFCC) is a higher body to the CFA, composed of independent persons, and the CFA was originally set up to conduct a preliminary examination of complaints for the FFCC so that, if it considered a full examination necessary, it could refer cases to the FFCC, which would be set up on an ad hoc basis. In practice, however, the FFCC is very rarely set up (according to the ILO NORMLEX database, only six cases out of a total 3,412 examined by the CFA had been referred to the FFCC as of 18 October 2021). The examination of most cases therefore ends with the final reports of the CFA.

The latter two Constitutional mechanisms are for the examination of representations or complaints of violations of any ratified Conventions, including those on freedom of association and the right to collective bargaining. Under article 24 of the ILO Constitution, representations from workers' or employers' organizations that a ratified ILO Convention is not being effectively observed may be examined by an ad hoc tripartite committee. In practice, however, when a representation concerns the principles of freedom of association and the right to collective bargaining, the Governing Body normally refers it to the CFA for examination. Under article 26, a complaint may be filed on the non-observance of a ratified Convention by Member States that have ratified the Convention in question. The Governing Body may decide to appoint a Commission of Inquiry for its examination, either at its own motion or upon receipt of a complaint from an employer, worker or government delegate to the ILC. The report of the Commission of Inquiry is sent to each of the Governments concerned in the complaint, and each of these Governments must inform the Director-General whether it accepts the recommendations contained in the report, and if not, whether it proposes to refer the complaint to the International Court of Justice (article 29 of the ILO Constitution), the decision of which is final (article 31).

In practice, there are cases that are examined, simultaneously or otherwise, by more than one supervisory mechanism, the complementary and multiple functional effects

of which contribute to their final settlement. Two such cases are described in sections 4 and 5 below.

2. History of the protection of workers' and employers' freedom of association and their right to collective bargaining²⁷ by the ILO and the United Nations

The protection of freedom of association and the right to collective bargaining by the ILO, in cooperation with the United Nations, developed as follows, particularly around the middle of the 20th century with the adoption of ILO Conventions No. 87 (1948) and No. 98 (1949) and the Universal Declaration of Human Rights (1948), as well as the establishment of the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC, 1950) and the Committee on Freedom of Association (CFA, 1951):

- ▶ **In 1919**, when the Treaty of Versailles was concluded, Part XIII became the ILO Constitution, which affirms in its Preamble the “recognition of the principle of freedom of association” as one of the means for the improvement of labour conditions, and in Article 41, at the time, identified “the right of association for all lawful purposes by the employed as well as by the employers” as the second item of the methods and principles of special and urgent importance for regulating labour conditions which all industrial communities should endeavour to apply so far as their special circumstances would permit.
- ▶ **In 1926**, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Conference Committee on the Application of Standards (CAS) were set up as the general supervisory mechanism for international labour standards (Conventions and Recommendations).
- ▶ **In 1944**, the Declaration of Philadelphia was adopted by the ILC to reaffirm or affirm the aims of the ILO and the principles that should inspire the policies of its Members, including the principles of freedom of association and the right to collective bargaining.
- ▶ **In 1948**, Convention No. 87 was adopted by the ILC. That year, the United Nations also adopted the Universal Declaration of Human Rights, which provides that “[e]veryone has the right to freedom of peaceful assembly and association”, that “[n]o one may be compelled to belong to an association” (Article 20) and that “[e]veryone has the right to form and join trade unions for the protection of his interests” (Article 23(4)).

27 Reference materials for section 2: Rodgers, G., Lee, E., Swepston, L. and J. Van Daele 2009. *The International Labour Organization and the quest for social justice, 1919–2009*, ILO, Geneva; ILO, 2019. *If you want peace, cultivate justice: A photographic history of the International Labour Organization, 1919–2019*, Geneva; 工藤誠爾「史録ILO誕生記—日本はどうか対応したか」日本労働協会、東京、1988年 (Seiji Kudo, 1988. *Shiroku ILO Tanjou-ki: Nihon wa dou taiou shitaka* (Memoir on the birth of the ILO: How Japan acted), Nihon Roudou Kyoukai, Tokyo; Tapiola, K., 2018. *The teeth of the ILO: The impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work*, ILO, Geneva; ILO, *History of the ILO*.

It also affirms that: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty” (Article 2).

- ▶ **In 1949**, Convention No. 98 was adopted by the ILC. Conventions Nos 87 and 98 were major accomplishments following 30 years of incessant struggles within the ILO to establish the constitutional principles of freedom of association and the right to collective bargaining in the form of Conventions. Before the Second World War, only once, at its session in 1927, did the ILC discuss the question of freedom of association on its formal agenda, although no session of the ILC had been held without reference being made to it and resolutions being adopted requesting the Governing Body to reconsider it with a view to its settlement.²⁸ In 1936, the 61st Session of the Governing Body adopted the report of the Committee on Freedom of Association (not to be confused with the present CFA), which had been set up to prepare a proposed Convention based on article 41(2) of the ILO Constitution, which at that time included among the nine methods and principles of special and urgent importance “the right of association for all lawful purposes by the employed as well as by the employers”. However, totalitarian governments stood in the way of progress before the Second World War.
- ▶ **In 1950**, the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC), composed of independent persons, was set up by the Governing Body as an ad hoc mechanism to examine allegations regarding infringements of the principle of workers’ and employers’ freedom of association.
- ▶ **In 1951**, the CFA was set up by the Governing Body as one of its standing committees to conduct a preliminary examination of complaints brought to the FFCC. The establishment of these two special mechanisms, the FFCC and the CFA, upgraded supervision by both the ILO and the United Nations of the implementation by Member States of the principles of workers’ and employers’ freedom of association and their right to collective bargaining. In the case of ILO Member States, complaints may be submitted against them regardless of the country’s ratification status of Conventions Nos 87 and 98; and in the case of the Member States of the United Nations, which are not Members of the ILO (such as the USSR at the time), complaints may be submitted against them and examined by the FFCC, with the consent of the governments concerned. Originally, the CFA was established for the preliminary review of complaints brought before the FFCC although, in practice, the latter has very rarely been

²⁸ ILO, 1947. *Freedom of Association and Industrial Relations*, Report VII, ILC, 30th Session, Chapter I, “History of the problem of association and industrial relations before the International Labour Organisation”.

set up, and the CFA has come to serve as a permanent international mechanism to examine infringements of these principles.

- ▶ **In 1966**, the United Nations adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which provide for freedom of association (Articles 8 and 22, respectively). The former includes a provision specifically referring to the right to strike.
- ▶ **In 1998**, in response to the liberalization of global trade and investment following the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT, 1994), as well as regional and bilateral agreements, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up was adopted by the ILC. Based on the Declaration, periodic surveys are conducted on the global situation in four areas of fundamental principles and rights at work (freedom of association, the prohibition of forced labour, the elimination of child labour and the abolition of discrimination in employment and occupation), based on the results of which ILO technical cooperation programmes are coordinated and adjusted. This new mechanism is not intended for the examination of cases of infringements, such as the CFA, but has a promotional effect to increase the number of ratifications of the relevant ILO Conventions, including Conventions Nos 87 and 98, as well as the number of regional and bilateral trade and investment agreements containing labour provisions.

3. History of freedom of association before the establishment of the ILO

The following historical analysis of freedom of association before the establishment of the ILO focusses on workers' freedom of association, and particularly the relevant legislative history of the United Kingdom, France and Russia. It was common in these countries, and perhaps in many other countries, that the industrial revolution, which started some time during the 18th – 20th centuries, resulted in increased industrial and social disputes. Capitalists who invested in new manufacturing factories competed with one another, sometimes or often exploiting cheap labour, including that of women and children. While the new technologies rapidly advanced production in manufacturing factories, as well as national and international trade, extreme poverty became outstanding among workers and their families, who were trapped in a vicious cycle of low wages, workplace injuries and diseases, and unemployment, affected by cyclical economic fluctuations. They struggled against their employers, capitalists and governments to make ends meet and recover their dignity and humanity. To protect themselves from inhumane exploitation and improve their working and living conditions, workers became unionized and developed collective forms of action, such as collective bargaining, collective agreements and collective work stoppages (strikes).

In response to the growth of the labour movement, governments introduced laws prohibiting workers' associations. But, after political debates and struggles, this was gradually

eased and finally followed by the legal recognition of workers' freedom of association. In the case of the United Kingdom and France, the legislative history of workers' associations has been their long-term reinforcement, beginning with their prohibition in the 18th century, followed by their recognition in the 19th century. This was later followed by their recognition in international law in the 20th century, both in ILO international labour standards and United Nations international human rights instruments.

The United Kingdom, France and Russia are three different prototypes of European States in the settlement of labour problems following the industrial revolution, either by changes to national laws on workers' associations, or by workers' revolution. The national legislative histories of the United Kingdom and France during the 18th and 19th centuries may be summarized as follows:

3.1. The United Kingdom²⁹

The Combination Act of 1799 and its revision in 1800, introduced under Prime Minister William Pitt the Younger of the Tory Party, generally prohibited trade unions. The Acts integrated previous laws prohibiting trade unions for particular industries. Under the Acts, collective agreements on wage increases and the reduction of working time and workload were void (only individual contracts between the employer and the employee could be effective for these matters), and workers who joined such agreements would be sanctioned (two months' imprisonment with hard labour or three months' imprisonment). The organization of a trade union was also treated as a crime of conspiracy under common law. In addition, the Master and Servant Act of 1823 provided for the criminal sanction of three months' imprisonment with hard labour for the cancellation of the employment contract by a worker, which was applicable in the event of strikes, while cancellation by the employer was only subject to civil damages. In 1824, a law was enacted to exempt trade union activities from criminal sanctions, except for the use of violence, threats and intimidation (two months' imprisonment). However, one year later there was a setback in response to criticism by employers when the Peel's Acts, enacted to simplify criminal law, and named after Sir Robert Peel, the Home Secretary, who had sponsored them, created new criminal sanctions for molesting or obstructing others in the cancellation of their employment contracts (three months' imprisonment with hard labour). However, the recognition of bona fide trade union activities (the negotiation of collective agreements on wages and working time) was maintained. In 1859, the Molestation of Workmen Act legalized peaceful and reasonable persuasion by workers. In 1867, the Master and

29 Reference materials for my analysis on the history of freedom of association in the United Kingdom: 松永義雄「英国労働組合法論」世界文献刊行会、東京、1926 (Yoshio Matsumoto, 1926. *Eikoku-Roudoukumiai-Hou-Ron*, Analysis of British Trade Union Law), Sekai-Bunken-Kanko-Kai, Tokyo; 石川吉右衛門、花見忠、赤松良子訳「英国労働組合法」有斐閣、東京、1958年 (Japanese translation by Kichiemon Ishikawa, Chu Hanami and Yoshiko Akamatsu of Samuels, H., 1956. *Trade Union Law*, Stevens); 月森佐知、水戸尚子「ケンブリッジ版世界各国史/イギリスの歴史」創土社、東京、2004年 (Japanese translation by Sachi Tsukimori and Naoko Mito of Speck, W.A., 1997. *A Concise History of Britain 1707-1975*, Cambridge University Press); Encyclopaedia Britannica; Wikipedia <https://en.wikipedia.org> <https://ja.wikipedia.org>; Y-History 教材工房「世界史の窓」(Window of world history).

Servant Act was revised to exclude the simple cancellation of the employment contract from the scope of its criminal sanctions. In 1871, the Trades Union Act, adopted under Prime Minister William Gladstone of the Liberal Party, recognized trade union rights, including the right to strike, and provided that, even though its purposes might include the obstruction of business, a trade union agreement or trust should not be void or canceled.

3.2. France³⁰

The Declaration of the Rights of Man and of the Citizen (1789), the historic human rights instrument of the French Revolution, provided that: “The Nation is essentially the source of all sovereignty; nor may any individual, or any body of men, be entitled to any authority which is not expressly derived from it” (Article III). Reflecting the popular rejection of the ancien régime of absolute monarchy and the repressive relations of intermediary associations, such as the Catholic Church and craft corporations (guilds), and in order to eliminate the negative effects of intermediary associations on the freedom and rights of individuals, as well as the formation of the general will of the nation through its free exercise, the Government adopted laws in 1791 proclaiming free commerce and enterprise and prohibiting associations of employers and workers: the Décret d’Allarde and Loi Le Chapelier. The prohibition of associations was reinforced by the Penal Code (1810) during the First Empire under Napoleon Bonaparte (1804–1814), as well as by the Associations Act (1834) during the July Monarchy under Louis Philippe (1830–1848). These laws generally provided for the dissolution of all types of unauthorized associations and penal sanctions for violations of the requirements established by the public authorities. The Second Republic (1848–1852), under Louis Napoleon as its elected President, aiming to establish a democratic and social republic by extending voting rights and various social rights, adopted the Constitution in 1848, which recognized freedom of association and repealed the earlier laws which had prohibited it. However, the prohibition of associations was restored in 1852 during the Second Empire (1852–1870), under the same Louis-Napoleon, who was then Emperor. Thereafter, the prohibition of associations was gradually eased by laws recognizing specific categories of associations: workers’ temporary coalitions in 1864 under the Second Empire, and permanent trade unions³¹ in 1884 under the Third

30 Reference materials for my analysis of the history of freedom of association in France: 高村学人「アソシエーションへの自由(共和国)の論理」勁草書房、東京、2007年 (Gakuto Takamura, 2007. *Association eno Jiyuu/ (Kyouwakoku) no Ronri*, “Freedom of association/Logic of the Republic), Keisou Shobou, Tokyo; 井上武史「結社の自由の法理」信山社、東京、2014年 (Takeshi Inoue, 2014. *Kessha no Jiyuu no Houri*, “Legal theories of freedom of association”), Shinzansha, Tokyo; 河野健二「資料フランス革命」岩波書店、東京、1989年 (Kenji Kawano, 1989. *Shiryuu-Furansu-Kakumei*, “Materials on the French Revolution), Iwanami-Shoten, Tokyo; 労働省労政局労働法規課「フランスの労使関係法制」日本労働協会、東京、1992年 (Japan, Ministry of Labour, Labour Policy Bureau, Division of Labour Laws and Regulations, 1992. *Furansu no Roushikankai-housei*, “Labour and management relations legislation in France”), Nihon-Roudou-Kyoukai, Tokyo); Encyclopaedia Britannica; Wikipedia <https://en.wikipedia.org> <https://fr.wikipedia.org> <https://ja.wikipedia.org>; and Y-History 教材工房「世界史の窓」(Window of the World History).

31 The recognized permanent trade unions were called “syndicats professionnels”, to avoid the class-based connotations of such other terminologies as “associations ouvrières”. The former term could also be used for associations of employers and of workers.

Republic (1870–1940). At last, the Associations Act was adopted in 1901 under the Third Republic at the initiative of Prime Minister Waldeck-Rousseau and recognized freedom of association of all kinds. However, it should be noted that, even under the Third Republic, insurrectional activities by trade unions were not tolerated. Accordingly, *chambres syndicales* (an earlier term for trade unions), which had been tolerated in 1868, were prohibited in 1872 as they became involved in violent strikes and were connected to the International Workingmen’s Association (IWA, 1864–1876), to which affiliation was prohibited by another law enacted the same year. The IWA, often called the “First International”, the basic founding texts of which were written by Karl Marx, claimed to have 8 million members worldwide in 1871 (the police reported 5 million).

While recognizing the different paths followed by the United Kingdom and France in the development of freedom of association, it is important to note that the histories of both countries show that decisions concerning both the prohibition and recognition of freedom of association depended on who the particular government represented. The histories of the United Kingdom and France provide evidence for a hypothesis that the realization of workers’ freedom of association depends on the status of democracy, and particularly the extension of voting rights.

In the United Kingdom, the basic parliamentary system was already in place by the 18th century, with the House of Lords and the House of Commons, the national system for the election of members of the House of Commons, and the Prime Minister appointed from the majority members of the House of Commons. While voting rights in the national election were limited to landowners in the 18th century (3 per cent of the population), they were extended to property owners in 1832 (4.5 per cent, in total) and to heads of families in cities in 1867 (9 per cent). It is conceivable that the extension of voting rights affected the change in ruling parties from the Conservatives to the Liberals, and then the change in policy from the general prohibition of trade unions (1799) to their general recognition (1871).

In the United Kingdom, the Chartist movement,³² the universal voting rights campaign in the middle of the 19th century, was led by workers, who had been left out of the first extension of voting rights in 1832. In 1838, the London Working Men’s Association and a handful of Parliamentarians launched the People’s Charter, demanding the following:

- 1) a vote for every man of 21 years of age, of sound mind, not undergoing punishment for crime;
- 2) secret ballots;
- 3) no property qualification for Members of Parliament;
- 4) the payment of Members of Parliament;
- 5) equal size constituencies; and
- 6) annual Parliaments.

32 See the website [Chartist Ancestors](#).

The Chartists put pressure on Parliament by submitting petitions with millions of signatures in 1838, 1842 and 1848, holding “monster meetings” of tens or even hundreds of thousands of people, taking up their demands in a general strike and organizing economic boycotts of businesses whose owners opposed them. However, all three petitions were rejected and Chartists were arrested and imprisoned. When 3,000 Chartists marched on Newport in Wales in 1839, soldiers fired on the crowd, killing at least 20 and injuring 50 more. In 1860, the National Charter Association was formally wound up, but many of its members continued to be active and helped to shape the Liberal Party as a more radical successor to the Whigs. And it was under the government of the Liberal Party, with William Gladstone as Prime Minister, that recognition of workers’ freedom of association was legalized in 1871.

In France, republican governments legislated for both the prohibition and recognition of trade unions: prohibition during the First Republic in 1791 and recognition during the Third Republic in 1884. However, voting rights were limited to property owners when the prohibiting law was enacted in 1791 (it was one year later, in the election in September 1792, that universal voting rights for men were implemented for the first time in France and the world). Under the Second Republic, in 1848, the election was held in April with universal voting rights for men, and the Constitution recognizing freedom of association was adopted in November. Under the Third Republic, the Constitution providing for universal voting rights for men was adopted in 1875, and trade unions were recognized in 1884.

The different decisions by the respective governments of the First and Second/Third Republics also appear to have been affected by the change in political philosophies. During the First Republic, Le Chapelier justified his proposal for the prohibition of workers’ associations in the National Assembly by explaining that there should be no intermediary interests apart from the individual interest of each citizen and the general interest of the nation. This was a reflection of the principle of the “general will” put forward by Genevan philosopher Jean-Jacques Rousseau (1712–1778), as expressed in *The Social Contract* (1762). However, the Second Republic aimed to build a “Democratic and Social Republic” and to realize the principle of fraternity in addition to the principles of liberty and equality. And the Third Republic recognized the unique role of associations in society, for example in assisting individuals in their independent development and deterring excesses of the national authorities.

Last, but not the least, another interpretation of the prohibition of workers’ associations under the First Republic was presented by Karl Marx as a coup d’état by the bourgeoisie.³³ It appears that Le Chapelier wanted the central role played by popular societies in the early part of the French Revolution to come to an end with the settling of the State and

33 長谷部文雄訳「資本論第二巻(第一部下冊)」青木書店、東京、1954 (Japanese translation by Fumio Hasegawa of Karl Marx and Friedrich Engels, *Das Kapital*). See also Wikipedia, the “[Le Chapelier Law 1791](#)” and “[Isaac René Guy le Chapelier](#)”.

the pending promulgation of a new constitution. He left the Jacobins, the most influential political club during the French Revolution, and joined the Feuillants, a group that advocated limiting the vote to property owners. The French Revolution seems to have been united on the cessation of feudal institutions, but divided on the prospective destinations.

Russia³⁴

The Tzarist autocracy continued until the early 20th century and, whenever workers went on strike, they were brutally suppressed. In the absence of a democratic basis for the recognition of workers' freedom of association, there was no overt trade union movement until the first revolution in 1905. In that year, for the first time, a national convention of trade unions was held with the participation of representatives of 26 trade unions and workers' groups from Moscow and ten trade unions from other cities. The wave of union organizing continued in 1906 and 1907 with the publication of the Temporary Laws of 4 March 1906 legalizing the formation of public organizations. In May 1906, the State Duma (Parliament) was created and proposed at its first meeting giving trade union rights as well as releasing political prisoners and launching land reform. But Tzar Nicholas II rejected the proposals and dissolved the Duma in July.

In 1917, workers played a decisive role in the February Revolution by launching a strike in the Putilov factory, the largest industrial plant in Petrograd (present day Saint Petersburg, which was then the capital of Russia). The strike marked the first major protest during the Revolution, resulting in the abdication of Nicholas II and the end of the 300-year Romanov dynasty, which was followed by the dual ruling power of the Provisional Government and the Petrograd Soviet.

Later that year, the October Revolution started with an armed insurrection by the Bolshevik Party (the Bolsheviks) of Vladimir Lenin against the Provisional Government of the Menshevik Party (the Mensheviks) of Alexander Kerensky. The Bolsheviks used their influence in the Petrograd Soviet to organize armed forces, known as "Red Guards", which occupied the government buildings.

However, the long-awaited Constituent Assembly elections, held in November 1917, resulted in only 175 seats for the Bolsheviks in the 715-seat legislative body, as they came second behind the Socialist Revolutionary Party (SR), which won 370 seats. The Bolsheviks won in urban areas and among soldiers on the Western Front, but lost to the Socialist Revolutionary Party in rural areas. Early in 1918, the Constituent Assembly, dominated

34 Reference materials for my analysis of the history of freedom of association and revolutions in Russia: W.Z.フォスター著/塩田庄兵衛他訳「世界労働組合運動史(上巻・下巻)」大月書店、東京、1957年 (Japanese translation by Shouhee Shiota and others of William Z. Foster, 1956. *Outline History of the World Trade Union Movement*, International Publishers, New York); 下斗米伸夫「ソ連現代政治」東京大学出版会、東京、1987年 (Nobuo Shimotomai, 1987. "Soren Gendai Seiji" (Present Day Politics of the USSR), Tokyo-Daigaku Shuppan-kai, Tokyo); 下斗米伸夫「図説ソ連の歴史」河出書房新社、東京、2011年 (Nobuo Shimotomai, "Zusetsu Soren no Rekishi", Kawade-Shobou-Shinsha, Tokyo, 2011); Encyclopaedia Britannica and Wikipedia.

by the Socialist Revolutionary Party, which was actually the Right Socialist Revolutionary Party following its schism, met for just two days overnight, and was dissolved by the Bolshevik-Left Socialist Revolutionary Soviet government. This led to the Russian Civil War, and finally to the creation of the Union of Soviet Socialist Republics (USSR) in 1922.

The revolutionary change in the political system left trade unions in a complex relationship with industrial management, government and the Communist Party of the Soviet Union (CPSU), as the Soviet Union was ideologically supposed to be a State in which the members of the working class ruled the country and managed themselves.³⁵ There were a great variety of ideas about how to organize and manage industries, and many people thought that the trade unions would be the vehicle for workers to control industries. However, by the Stalinist era of the 1930s, it was clear that the Party and the Government made the rules, and that trade unions were not permitted to challenge them in any substantial way. In the decades after Stalin, the worst of their powerlessness was past, but Soviet trade unions remained closer to company unions, answering to the Party and the Government, than truly independent organizations.

The history of Russia suggests various problems in realizing workers' freedom of association and their right to collective bargaining under their own Government, and particularly difficulties in securing their freedom and independence from the Government. In such political settings, there is the risk of trade unions being caught up in a conflict of interests between their members and the government. Moreover, autocratic rule by the Communist Party is liable to impair democratic political systems, such as universal voting rights, and accordingly recognition of workers' freedom of association and their right to collective bargaining.

Although labour was released from feudal constraints, it was then exploited through harsh business competition following the Industrial Revolution. To settle the problems of labour, freedom of association was developed in legal systems, while the conflicting ideologies of capitalism and communism developed in the political system. In the histories of the various sovereign States, different combinations of legal and political principles developed, resulting in successes and failures. From among them, it can be seen that the combination of civil liberties and freedom of association has been settled in international law, irrespective of political ideology.

4. Substance and nature of workers' and employers' freedom of association

The question of "what is freedom of association?" can be divided into "what is association?" and "what is freedom?". Also, as no freedom can be absolute, certain limitations of freedom of association are discussed in this section.

³⁵ See Wikipedia, "[Trade Unions in the Soviet Union](#)".

4.1. What is association? The united power of the people

An important element of the association of people is its united power to strengthen, for example, friendship, mutual aid and voice. Trade unions are typical examples of this, empowering workers to protect and advance their interests against employers, capitalists and governments.

The united power of workers may have been accorded the highest value by Karl Marx and Friedrich Engels, who concluded their renowned book, *The Communist Manifesto*, 1848, by calling for working men of all countries to unite! This phrase is quite symbolic of the time, and the book is now listed in the UNESCO Memory of the World Register. They must have trusted the united power of workers in pursuit of communist states in the world, and their objective or hypothesis was realized in Russia and Eastern European countries, as well as certain countries in other regions.

I think that the united power of associations has been a common reason for both the prohibition and recognition of workers' associations in history. And a change of policies has occurred when it has been valued differently by governments of different natures or representation, that is by despotic or capitalistic governments, in contrast with republican or socialist governments. The former have seen trade unions as enemies which imperiled public order or the national economy, while the latter have recognized them as supportive electoral constituencies.

As such, the historical recognition of workers' and employers' freedom of association has been dependent on politics. And such dependence still seems to exist, with the result that there is a broad difference by country in the level of recognition, even though all ILO Member States have accepted their constitutional duty to respect the principle of freedom of association, and the purely political interests of workers and employers are not within the scope of the protection of the CFA. This reality is invisible but conceivable, and emerges in the feeble recognition by governments that are reluctant to accept trade union pluralism, and which endeavour to maintain control over the trade union movement.

4.2. What is freedom? Workers' and employers' freedom of association as a human right, and the inseparable civil liberties

Freedom of association includes the following, in accordance with Convention No. 87:

- (i) The right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization (Article 2). Workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority (Article 4).
- (ii) The right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof (Article 3).

- (iii) The right to establish and join federations and confederations and to affiliate with international organizations of workers and employers (Article 5). Paragraphs (i) and (ii) above apply to federations and confederations of workers' and employers' organizations (Article 6).

Workers' freedom of association is now one of the internationally recognized and universally applicable human rights. The added value of such legal recognition may not be small if there is appropriate awareness and understanding, as illustrated, for example, by the history of freedom of association in France.

The Declaration of the Rights of Man and of the Citizen (1789) provided that "Men are born and remain free and equal in rights" (Article I). But all types of associations of people were prohibited in 1791 so that they did not affect the individual interests of citizens and the formation of the general will of the nation. It took another 110 years before the Associations Act establishing general recognition of freedom of association was enacted in 1901, and a further 70 years before freedom of association was recognized as a constitutional principle by the Constitutional Council in 1971. Thirty years later, in 2001, the centenary of the Associations Act was celebrated with the support of the vast majority of citizens, with 82 per cent of respondents endorsing its importance in a public opinion poll.³⁶ Popular endorsement of associations as such may offer support for trade unions beyond the working class.

Freedom of association, as generally established in the Universal Declaration of Human Rights, in Article 20, as well as the International Covenant on Civil and Political Rights, in Article 22, provides a legal enabling basis for a democratic society in every field. If the term "industrial democracy" is really to prevail in practice, trade unions and employers' organizations may be central to the whole of society in the expansion of democracy. The accomplishments of the Solidarnosc trade union in Poland offer a practical example (see section 5).

Finally, the activities of trade unions and employers' organizations are feasible, not only with the protection of the principles of freedom of association and the right to collective bargaining, but also of more general civil liberties. From this perspective, the ILC Resolution concerning trade union rights and their relation to civil liberties (1970) indicates that the General Conference of the ILO:

1. Recognizes that the rights conferred upon workers' and employers' organizations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights and that the absence of these civil liberties removes all meaning from the concept of trade union rights.

36 高村学人「アソシエーションへの自由〈共和国〉の論理」勁草書房、東京、2007年、314-315頁 (Gakuto Takamura, "Association eno Jiyuu/ (Kyouwakoku) no Ronri" (meaning Freedom of Association/Logic of the Republic), Keisou Shobou, Tokyo, 2007, pp. 314-315).

2. Places special emphasis on the following civil liberties, as defined in the Universal Declaration of Human Rights, which are essential for the normal exercise of trade union rights:
 - (a) the right to freedom and security of person and freedom from arbitrary arrest and detention;
 - (b) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers;
 - (c) freedom of assembly;
 - (d) the right to a fair trial by an independent and impartial tribunal;
 - (e) the right to protection of the property of trade union organizations.

Taking into account this ILC Resolution, the CFA protects civil liberties in relation to the life and activities of workers' and employers' organizations in its examination of complaints of infringements of the principles of workers' and employers' freedom of association and collective bargaining. The CFA has recalled that; "On many occasions, the Committee has emphasized the importance of the principle affirmed in 1970 by the International Labour Conference in its resolution concerning trade union rights and their relation to civil liberties, which recognizes that the rights conferred upon workers' and employers' organizations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, and that the absence of these civil liberties removes all meaning from the concept of trade union rights".³⁷ "For the contribution of trade unions and employers' organizations to be properly useful and credible, they must be able to carry out their activities in a climate of freedom and security. This implies that, in so far as they may consider that they do not have the basic freedom to fulfil their mission directly, trade unions and employers' organizations would be justified in demanding that these freedoms and the right to exercise them be recognized and that these demands be considered as coming within the scope of legitimate trade union activities".³⁸

4.3. Certain limitations on workers' and employers' freedom of association

Workers' and employers' freedom of association is not unlimited and has to be harmonized with protection of the rights and freedom of others, the securing of public order, and to pursue its innate objectives.

³⁷ CFA, Compilation of decisions, para. 68.

³⁸ *Ibid.*, para. 75.

(i) *Limitations for the purpose of harmonization with the rights and freedoms of others and to secure public order*

Convention No. 87 provides in Article 8 that: “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”; and that: “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”. The combination of these two provisions does not restrict freedom of association, at least in logical terms, but merely reaffirms that workers and employers and their respective organizations shall respect the law of the land, which shall not be such as to impair the guarantees provided for in the Convention.

However, in practice, there are many cases in which the CFA is faced with the question of how to harmonize or demarcate the principle of workers’ and employers’ freedom of association and public interests. For example, in the event of police intervention in a strike, according to the decisions of the CFA, “[t]he authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order. The intervention of the police should be in proportion to the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order”.³⁹

(ii) *Limitations for the pursuit of the innate objectives of workers’ and employers’ freedom of association*

The CFA limits the scope of workers’ and employers’ freedom of association to the protection of their economic and social interests, thus excluding the protection of their purely political interests. “The Committee is not competent to consider purely political allegations; it can, however, consider measures of a political character taken by governments in so far as these may affect the exercise of trade union rights”.⁴⁰ Thus, the CFA does not tolerate governments infringing the principle of freedom of association, whether through political measures (such as for national security) or otherwise.

(iii) *Self-control in pursuit of the innate objectives of workers’ and employers’ freedom of association*

Finally, although not a limitation on freedom of association, workers’ and employers’ organizations are called on to exercise certain forms of self-control in the pursuit of their innate objectives, as indicated in the ILC Resolution concerning the independence of the trade union movement (1952). While recognizing the role of

³⁹ Ibid., para. 935.

⁴⁰ Ibid., para. 24.

trade unions in the advancement of the community as a whole in each country, the Resolution calls for self-restraint by both trade unions and governments to preserve the freedom and independence of the trade union movement so that trade unions are in a position to carry forward their economic and social mission, which is their fundamental and permanent mission, irrespective of political changes.

The Resolution sets out the vision of the ILC concerning the involvement of trade unions in politics, and particularly “certain principles which should be laid down in this regard which are essential to protect the freedom and independence of the trade union movement and its fundamental task of advancing the social and economic well-being of the workers”. (introduction, fifth clause). It adds that: “The fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers”; and that: “The trade unions also have an important role to perform in cooperation with other elements in promoting social and economic development and the advancement of the community as a whole in each country”. In this regard, the Resolution outlines the following four principles, of which three are for trade unions and one is for governments:

► For trade unions:

To these ends it is essential for the trade union movement in each country to preserve its freedom and independence so as to be in a position to carry forward its economic and social mission irrespective of political changes (para. 3).

A condition for such freedom and independence is that trade unions be constituted as to membership without regard to race, national origin or political affiliations and pursue their trade union objectives on the basis of the solidarity and economic and social interests of all workers (para. 4).

When trade unions in accordance with national law and practice of their respective countries and at the decision of their members decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions irrespective of political changes in the country (para. 5).

► And for governments:

Governments in seeking the cooperation of trade unions to carry out their economic and social policies should recognize that the value of this cooperation rests to a large extent on the freedom and independence of the trade union movement as an essential factor in promoting social advancement and should not attempt to transform the trade union movement into an instrument for the pursuance of political aims, nor should they attempt to interfere with the normal functions of a trade union movement because of its freely established relationship with a political party (para. 6).

The wisdom contained in this Resolution was very useful and effective in resolving Case No. 179 (Japan, lodged in 1958), and contributed to stabilizing the once chaotic industrial relations in the country. In 1945, following the end of the Second World War, the country's political system was entirely transformed from totalitarianism to democracy and civil liberties under the occupying allied forces (1945–1952). A new Constitution was adopted to democratize the country, based on three main principles: popular sovereignty, pacifism and fundamental human rights. It provided for freedom of association and the right of workers to organize, collective bargaining and other activities, as well as equal voting rights for adult men and women (voting rights had been granted to adult men in 1925, although that was accompanied by the Public Security Law, which restricted freedom of thought, expression and association). The trade unions enjoyed complete freedom of activity until 1948, when an absolute prohibition of the right to strike was introduced in all public services and enterprises, national and local, in response to a request by the allied forces. In its final report on Case No. 179, the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC) wrote that: “The result of this measure has been a situation characterised by an attitude of undisguised and unremitting tension leading both the Government and the unions to adopt general concepts of labour relations which are equally open to serious criticism” (paragraph 2248(14), first sentence). Industrial relations were extremely combative, and many disputes occurred, particularly in the public sector.

Under these circumstances, the complaint in Case No. 179 was submitted by Japanese national trade union organizations, the General Council of Trade Unions of Japan (Sohyo) and the All-Japan Postal Workers' Union (Zentei), as well as international trade union organizations, the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF) and the Postal, Telegraph and Telephone International (Berne) (PTTI) alleging infringements of trade union rights in public services and enterprises, including laws and regulations restricting fundamental labour rights, the rejection by employers of collective bargaining, interference in trade union activities and disciplinary measures against striking workers, and criminal sanctions for leaders and members of trade unions who organized and participated in strikes. The CFA examined the Case at over ten sessions during the first six years, and then the Case was referred to the FFCC, as recommended by the CFA and with the consent of the Government. The FFCC, in its final report adopted in July 1965, in paragraph 2248, under the heading “Summary of Findings and Recommendations”, started with welcoming remarks on the country's ratification of Convention No. 87 and the initiation of high-level meetings between the Government and labour, indicating that these developments were “potentially of the utmost importance but neither yet represents more than a starting point” (subpara. 1). However, it also expressed concern at the deep-rooted distrust between the Government and the complainant national organizations, indicating that: “Far-reaching changes of attitude on the part of both Government and labour will continue to be necessary to give Japan a system of labour relations adequate to the needs of an advanced industrial society” (subpara. 2); and that: “More of the recommendations

are addressed to the Government than to the unions because they relate to matters within the sphere of government responsibility, but the Commission wishes to place special emphasis on its recommendations concerning future policy of the trade unions” (subpara. 4). The Commission’s assessment of Japanese industrial relations was that: “The authorities adopted toward collective bargaining in the public sector an attitude amounting to refusing or rendering ineffective or futile the negotiating process, while some of the trade unions in the same sector persistently engaged in political campaigns unrelated to the economic interests of their membership” (subpara.14); and that: “The widespread and by no means unjustified sense of grievance at that time by reason of past practice appears to the Commission to have been a major contributory element in the tension which had characterised labour relations in Japan in the public sector in recent years” (subpara. 50). It therefore recommended that both the Government and the unions should be guided in future by the terms of the 1952 Resolution concerning the independence of the trade union movement.

Case No. 179 was the first of a few cases to be referred to the FFCC. Some of the same issues were also examined by the Committee of Experts and the Committee on the Application of Standards (CAS) concerning inconsistencies with Convention No. 98, which had been ratified by Japan in 1953, and their conclusions were reflected in those of the CFA and the FFCC.

5. The political system and workers’ freedom of association

5.1. Workers’ freedom of association under the communist regime

Is it possible to establish a political system in which workers are fully represented by the government, and trade unions should therefore support and follow government policies, rather than disputing them? Even if that were possible ideologically, or as a personal belief of the individuals involved in the establishment of the government, I do not believe that it can be everyone’s eternal belief for generations.

In 1934, a quarter of a century after the establishment of the ILO, the Soviet Union (USSR/ Russia), which had been critical of the indecisive one quarter representation (or voting rights) of workers⁴¹ in ILO decision-making bodies (another quarter was for employers and the remaining half for governments), became an ILO Member State (in the same year that the United States became a Member of the ILO). Russia and the other communist countries were then criticized for the control of workers’ and employers’ organizations by their governments, in violation of the principle of freedom of association. According to the CFA: “It is important to distinguish between the evolution of a country’s political institutions and matters relating to the exercise of freedom of association, if, as was

41 西巻敏雄「国際労働組合運動史」日本労働運動史研究会、1981年、42－43頁 (Toshio Nishimaki, 1981, “Kokusai-roudoukumiai-undou-shi” (History of the international trade union movement), Nihon-roudou-undou-shi-kenkyukai, Tokyo, pp. 42–43.

emphasized by the International Labour Conference in 1970 in the resolution concerning trade union rights and their relation to civil liberties, respect for freedom of association is closely bound up with respect for civil liberties. In general, workers' and employers' organizations nevertheless have their own specific functions to perform, irrespective of the country's political system".⁴²

5.2. Case No. 1097 (Poland, lodged in 1981): The Solidarnosc trade union movement

One important case concerning freedom of association under the communist regime was Case No. 1097 (Poland). Its proceedings and the political evolution thereafter show that the realization of workers' freedom of association can advance democracy and civil liberties in a country as a whole. It also deserves special attention as a difficult case that was examined by the CFA and other ILO supervisory bodies, the complementary functions of which contributed to its resolution.

(i) *Content*

The case concerned complaints by international trade union organizations, the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL), concerning the repressive measures taken by the authorities against the Solidarnosc trade union movement, its members and leaders, and the events which occurred following the declaration of martial law by the Government. The CFA noted with deep concern the seriousness of the allegations, namely the massive arrest and internment of trade unionists, the death of workers during clashes with the security forces, the dismissal of trade union members and the general suspension of trade union activities.

The CFA issued interim reports in March and June 1982. Then a complaint was made under article 26 of the ILO Constitution by delegates to the 68th Session of the ILC in June 1982 on the same question concerning the observance by Poland of Conventions Nos 87 and 98, which it had ratified.

In its report in May 1983, the CFA noted with regret that the request it had made for information and on-the-spot visits had not been fully met, and recommended the Governing Body to refer the examination of the Case as a whole to a Commission of Inquiry. The Governing Body approved the recommendation and set up a Commission of Inquiry.

However, the Government did not participate in the examination of the case by the Commission of Inquiry, thus preventing the Commission from conducting its usual practice of on-the-spot visits and high-level communications with the Government and trade unions concerned. Instead, the Commission of Inquiry made use of the Government's observations and the information provided to the CFA and other ILO

42 CFA, *Compilation of Decisions*, para. 311.

supervisory bodies, as well as information available to the public, and made the following recommendations in its report adopted in May 1984:

- (i) “In order to calm feelings and to create the climate of tranquility that is indispensable to the renewal of a genuine trade union life, the Commission recommends that measures should be taken by the Government without delay to discontinue the legal proceedings against trade union leaders and to end the detention of persons who have been sentenced for trade union activities such as participation in strikes or demonstrations or the distribution of publications”. (para. 572)
 - (a) “With regard to the violent deaths of workers, the Commission recommends that impartial and independent inquiries into these events be undertaken in order to establish the facts, to determine responsibilities and to punish any person found guilty”. (para. 573)
 - (b) With regard to anti-union discrimination, “the Commission, concerned by the large number of dismissals of leaders and active members of trade unions since the proclamation of martial law, recommends that the situation of those dismissed be re-examined in conditions of complete independence and impartiality”. (para. 575)
 - (c) “As to the trade union legislation, the Commission, referring to the conclusions set forth above in paragraphs 535 to 563, recommends the Government to amend in the near future the laws and regulations issued under them that are in force with a view to ensuring the clear and full recognition of the following rights established by Conventions Nos 87 and 98:
 - (1) the right of workers, without distinction whatsoever (including public servants), to establish trade unions;
 - (2) the right of workers to establish organisations of their own choosing; the recognition of this right implies the re-establishment in practice of the possibility of trade union pluralism at every level: undertaking, branch of activity, regional and inter-occupational;
 - (3) the right of basic unions and federations to associate in Confederations;
 - (4) the right of trade unions to conclude collective agreements at all levels;
 - (5) the right of the unions to organise their activities, which implies the elimination of the unduly strict limitations imposed upon the exercise of the right to strike”.
 - (d) The Commission “recommends the Government to ensure that the provisions of the legislation (particularly those on the recognition of the guiding role of the Polish United Workers’ Party, the registration of organisations and the contents of their rules), whose conformity with Convention No. 87 largely depends upon their implementation in practice, are applied in a manner fully respecting the principles contained in the Convention”. (para. 576)

- (e) “with regard to the transfer of the assets of the dissolved trade union organisations, the Commission considers that this problem must be solved with regard to the situation of trade union pluralism that existed before the proclamation of martial law. In order that the principle of freedom of association may be respected in this connection, the organisations that are to receive the assets of the dissolved unions can be designated only when trade union pluralism can be effectively exercised in practice. The Commission therefore recommends the Government, within this perspective, to study a system for the devolution of assets which would make it possible to attribute them to the true successors of the dissolved organizations”. (para. 577)

Course of events

Below, although it may appear cumbersome, I would like to summarize the course of events from the time of the ratification of the Conventions Nos 87 and 98 by the country, according to the Commission’s report above, the CFA’s reports concerned, as well as the autobiography⁴³ of Lech Walesa, the leader of the Solidarnosc trade union movement in Poland.

In 1957, Poland ratified ILO Conventions Nos 87 and 98.

In 1959, the CEACR pointed out that the Trade Union Act was not compatible with the right of workers to establish organizations of their own choosing by obliging trade unions to be registered with the Central Council of Trade Unions, referred to by name in the Act as “one of the supreme authorities of the Federation of Trade Unions”, which was “the principal body representing the trade union movement in Poland”.

In 1978, the ICFTU presented a complaint to the CFA alleging that workers who had tried to form free trade unions had been persecuted and arrested (Case No. 909).

In 1979, in June, Pope John Paul II visited Poland for the first time since his election as Pope in 1978.

In the autumn, free trade union movement activists announced the “Declaration of Workers’ Rights” and demanded that the Government grant official recognition to independent trade unions.

The CFA, in its interim report on Case No. 909 in November, suggested the establishment of “direct contacts”⁴⁴ to facilitate the adoption of the necessary amendments to the Trade Union Act, as well as the clarification of the situation with regard to the other aspects of the case.

43 レフ・ワレサ著、筑紫哲也・水谷驥訳「ワレサ自伝－希望への道」、社会思想社、東京、1988年 (Japanese translation of Lech Walesa, 1987. *A Way of Hope*, Henry Holt and Company, New York).

44 A procedural stage of the CFA whereby a representative of the Director-General of the ILO - who can be an independent person or an ILO official - is sent to the country concerned in order to ascertain the facts relating to a case and to seek solutions to the difficulties encountered. It can only be established at the invitation of the government concerned, or at least with its consent.

In 1980, the Government accepted this proposal by the CFA, and the ILO mission, led by an Assistant Director-General, was carried out in May. The Gdansk Agreement was signed in August, which included recognition by the Government of the principles set forth in the Conventions Nos 87 and 98, and the Solidarnosc trade union was established in September. Also, the Trade Union Act was amended in October to enable a trade union to be registered by the Court of the Voivodship of Warsaw, instead of the Central Council of Trade Unions, and a committee was set up by the Government to prepare further amendments to the trade union legislation.

Following the difficulties encountered by the Solidarnosc trade union with the registration of its constitution (the court did register the trade union, but with modifications to certain provisions of its constitution), the same Assistant Director-General, with the agreement of the Government, visited the country once again. And, before the November meeting of the CFA, the Deputy Minister of Labour came to Geneva, where he held private discussions with the Chairperson of the CFA and the Director-General, and was heard by the CFA. He informed the Committee that on 10 November 1980 the Supreme Court had decided to confirm the registration of the Solidarnosc trade union on the basis of the constitution that it had drawn up; the only amendments would be those introduced by the trade union itself, which consisted of appending the texts of Conventions Nos 87 and 98 and part of the Gdansk Agreement to the constitution.

In November, the CFA adopted a definitive report in which it noted with satisfaction the measures taken by the government and closed the case.

In 1981, in May, the Director-General visited Poland and met members of the Government, representatives of the three national workers' organizations, including Solidarnosc, and of the employers' organization, as well as the president of the committee set up to draft a new trade union bill. During his visit, an act authorizing the registration of agricultural organizations was adopted and the Rural Solidarnosc union was registered.

In June, at that year's session of the ILC, the workers in the country's delegation were represented by the three national workers' organizations, including Solidarnosc, and the seat of the country's Workers' Delegate was attributed to the President of the National Committee of the Solidarnosc union, Lech Walesa.

On 13 December 1981, the Government proclaimed martial law and took restrictive measures against the Solidarnosc union, its leaders and active members.

On 14 December, the ICFTU and the World Confederation of Labour (WCL) presented complaints to the CFA concerning violations of trade union rights in Poland (Case No. 1097). The Director-General proposed to send an ILO mission to the country to obtain information on the trade union situation, including that of trade unionists who had been interned, but the Government replied that, under the prevailing circumstances, it was not possible to receive an ILO mission.

In 1982, in February, a Government delegation visited the ILO, where it held discussions with the Director-General and the Chairperson of the CFA.

The CFA, at its February session, examined Case No. 1097 and adopted an interim report, in which it expressed its deep concern at the extreme gravity of the allegations. It indicated that the suspension of trade union activities was a particularly serious matter and expressed its firm hope that trade union organizations would be able to resume their activities as soon as possible on the basis of trade union legislation consistent with ILO Conventions. It also urged the Government to agree to the sending of an ILO mission on the spot.

In a letter dated 4 March 1982, the Government of France expressed deep concern at the situation in Poland and reserved its position concerning the filing of a complaint at a later date under article 26 of the ILO Constitution.

At its March session that year, the CEACR made comments in an observation concerning the application by the country of Convention No. 87. The Committee stated that the general suspension of trade union activities removed from workers' organizations any possibility of promoting and defending the interests of their members. It considered that the measures severely restricted the guarantees provided for in the Convention, and trusted that the Government would soon take the necessary corrective measures.

Following a request by the CFA, and with the agreement of the Government, the Assistant Director-General visited the country once again in May and met representatives of the Government and of the different trade union organizations, including Lech Walesa, who was interned at the time.

The CFA, at its May-June session, after examining the report of the mission and certain information provided by the Government, adopted a new interim report in which it expressed the firm hope that Parliament would soon adopt a legal framework within which trade union organizations independent of the public authorities would be able to function freely, and urged the Government to liberate the trade unionists who were still interned.

In June, the Worker delegates of France and Norway to the ILC filed a complaint against Poland under article 26 of the Constitution for non-observance of Conventions Nos 87 and 98, which had been ratified by Poland.

In October, a Government delegation visited the Office and asked for a legal opinion on the conformity of the Trade Union Bill with Conventions Nos 87 and 98. The Office formulated written comments, which were transmitted to the delegation and then to the parliamentary committees entrusted with the preparation of the Bill. The Bill was adopted with a few amendments. However, under section 52 of the new Trade Union Act, the registration of existing trade unions, including the Solidarnosc union, was cancelled.

The CFA, at its November session, heard the Deputy Minister of Labour, representing the Government of Poland, and adopted an interim report, in which it urged the Government to take the necessary measures to lift martial law in the very near future, commented on the new legislation and requested the Government to adopt measures with a view to releasing the interned trade unionists.

On 11 November, the news was announced of both the death of Leonid Brezhnev, General Secretary of the Soviet Union, and the release of Lech Walesa.

On 31 December, the Government suspended the application of martial law.

In 1983, the CFA, at its February session, adopted an interim report in which it considered that, in order to elucidate the numerous aspects of the case that remained outstanding, it would be highly desirable for the Government to accept a further on-the-spot visit.

At its March session, the CEACR made comments in an observation on the application by Poland of Conventions Nos 87 and 98, with particular reference to the Trade Union Act.

In April, a Government mission visited the ILO, where it held interviews with the Director-General and senior officials.

The Government sent a letter of invitation to the Director-General dated 26 April with a view to an on-the-spot visit by the Assistant Director-General. In his reply, dated 9 May, the Director-General thanked the Government for the invitation, and noted the intention of the Government to ensure contacts between the Assistant Director-General and representatives of the public authorities, the newly formed trade unions and the employers. The Director-General indicated that, for the visit to produce the desired results, it would, in accordance with the practice followed by the ILO in similar cases, be essential for the Assistant Director-General to be able to have private contacts with the representatives of all the parties concerned, and especially with the former leaders of the trade union organizations which had represented the country's workers at the ILC in 1981 (including Lech Walesa).

The CFA, in its report in May, noted that it had always considered that the Assistant Director-General undertaking the on-the-spot mission would not be able to perform his task properly and thereby be fully and objectively informed on all aspects of the case if he was not free to meet all the parties concerned, including the leaders of the former trade union organizations. It also noted with regret that the requests it had made in February 1983 for information and on-the-spot visits had not been fully met, and recommended that the Governing Body should refer the examination of Case No. 1097 as a whole to a Commission of Inquiry, in accordance with article 26, paragraph 3, of the Constitution. This recommendation was adopted by the Governing Body by 44 votes for and six against, with five abstentions. The Government, in a statement dated 31 May, rejected the decision by the Governing Body as unfounded and indicated that the country would suspend cooperation with the ILO if the decision was put into practice, at the same time reserving the right to take suitable measures respecting its participation in the ILO. Accordingly, after the nomination by the Governing Body of the members of the Commission of Inquiry, the Government, in a letter dated 24 June 1983, rejected the decision by the Governing Body to set up a Commission of Inquiry and repeated that it was suspending its cooperation with the ILO. The Director-General, in a letter of the same date, reminded the Government that the appointment of the Commission of Inquiry was based on the provisions of the ILO Constitution and on the obligations that the Government had freely accepted by ratifying the Conventions in question.

In June, Pope John Paul II made his second visit to his country of birth.

In July, the Government abolished martial law, although similar restrictions were maintained through the implementation of new laws and the revision of the Constitution.

In October, the Nobel Peace Prize was awarded to Lech Walesa.

In 1984, on 2 May, the report of the Commission of Inquiry was adopted.

Poland remained in the ILO, and the report of the Commission of Inquiry was used as a basis for the round-table discussions on the democratization of the country held in the late 1980s.⁴⁵ And in 1990, the reinstatement of striking workers, the lifting of sentences for strike action and the establishment of trade union pluralism in all sectors were noted by the relevant ILO supervisory bodies. The Solidarnosc trade union, formed in 1980, was one of the first trade unions in a communist country not controlled by the communist party, and joined the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL) in November 1986. The settlement of their disputes with the Government not only rectified the violations of workers' freedom of association and their right to collective bargaining in the country, but also contributed to the transformation of the country's whole political system to one with civil liberties and democracy,⁴⁶ supported by various other domestic and international factors, one of which was religious. And in 1990, Lech Walesa was elected the first President of Poland under the new regime.

We learn from Case No. 1097 that workers, and also possibly employers, by exercising their freedom of association and right to collective bargaining, can be central to freedom and democracy for everyone. It also shows that the respective functions of the CFA and other ILO supervisory mechanisms can have complementary and multiplier effects in solving difficult problems. For the achievement of such effects, credit should first go to all the supervisory bodies themselves for exercising their respective special expertise as much as possible, second to the Office for its efficient and devoted work in serving them, and third to all those who have worked for the ILO to nourish a shared mission for decent work, social justice and world peace, thus enabling the different supervisory bodies and the Office to be united in facing and tackling difficult problems in a spirit of mutual respect.

Conclusions

The principles of workers' and employers' freedom of association and their right to collective bargaining are protected by the CFA in so far as their economic and social

⁴⁵ Rodgers, Lee, Swepston and Van Daele, 2009. *The International Labour Organization and the quest for social justice, 1919–2009*, op. cit., p. 51.

⁴⁶ Curtis, Karen, "Democracy, freedom of association and the ILO", in Jean-Claude Javillier and Gernigon Bernard (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 91–94.

interests are concerned. On the other hand, their purely political interests are not within the scope of protection of the CFA. And in the case of economic and social matters on which government policies and workers' and employers' interests overlap, the CFA promotes social dialogue. It requests governments to consult representative organizations of workers and employers, while also allowing workers' and employers' organizations to act against government policies, including through strikes.

The CFA is a body that examines complaints of infringements of the principles of workers' and employers' freedom of association and their right to collective bargaining with a view to ascertaining the facts and deciding on the merits of cases, including the recommendation of the necessary remedial measures to be taken by governments if any infringements are identified. It has no power to enforce its decisions, either in terms of its proceedings or the remedial measures recommended. It would not therefore ever be possible for a change to occur on the spot in a case without action being taken by the parties to the case, the complainant organization of workers or employers and the government concerned. Even its fact finding would be insecure without the observations and information provided by the parties.

The validity of the CFA supervisory process, in terms of the rectification of the laws and practices of a sovereign state, must be obtained through the highest possible credibility of its decisions and supporting mechanisms that are fully coordinated within the ILO.

First, for the credibility of its decisions, the CFA owes much to the credibility of international labour standards and the relevant ILC resolutions adopted by representatives of governments, workers and employers from all ILO Member States, as well as the legal interpretation of international labour standards by the CEACR, which are followed closely by the CFA when it makes its decisions. The CFA itself publishes a compilation of its decisions over the 70 years since its inception, refers to them in its new decisions so as to ensure continuity and consistency, and thus maintains the credibility of its decision-making process. The United Nations instruments providing for freedom of association, including the Universal Declaration of Human Rights and the two International Covenants, are also important factors in raising the credibility of the CFA's decisions, by demonstrating that they concern universally applicable human rights. Furthermore, the 1998 Declaration has promoted fundamental principles and rights at work, including those contained in Conventions Nos 87 and 98, and has led to an increase in their ratification. The inclusion of similar labour clauses in regional and bilateral trade and investment agreements has also contributed to the credibility of the CFA's decisions.

Second, the supporting mechanisms within the ILO begin with the staff of the Office and the Governing Body's practice of adopting the CFA's reports as they are submitted. There is also a demarcation of objectives and functions between the CFA and other ILO supervisory bodies with their respective complementary roles and their multiplier effects in resolving cases in a spirit of mutual respect. In this context, the unique function of the CFA is its early and continual supervision of cases, through the publication of reports at

the different stages (interim reports, reports in which the Committee requests to be kept informed of developments, follow-up reports, definitive reports). The CEACR assesses the implementation of Conventions and Recommendations by Member States and indicates its legal interpretation of their provisions. On the basis of the technical reports of the CEACR, the Conference Committee on the Application of Standards (CAS) offers a whole ILO-wide tripartite forum to discuss the problems identified by the CEACR with a view to promoting the application of international labour standards. The Fact-finding and Conciliation Commission on Freedom of Association (FFCC) conducts comprehensive and detailed examinations of the cases referred to it on the recommendation of the CFA, including through on-site visits to the country concerned, decides on the merits of the cases, including recommending measures to be taken by the government if any infringements are found, and discusses with the government at higher levels how to secure the adjustment of the difficulties identified by agreement. Commissions of Inquiry under article 26 of the Constitution, while reaffirming to the governments concerned the binding effects of the Conventions they have ratified, also conduct comprehensive and detailed fact-finding and decide on the merits of cases, including the recommendation of measures to be taken by the government if any violation is ascertained.

The problem-solving results of the CFA and other ILO supervisory mechanisms are plausible. Case No. 1097 in relation to Poland is well known, as recalled above, as is Case No. 179 concerning Japan. Of course, it was the governments and peoples concerned who worked to change the situation in practice in each of these cases. Nothing could have occurred without their action. The CFA and other ILO supervisory bodies only facilitated their work by making an assessment of the situation and a judgement of the merits of the case. However, in Case No. 179 concerning Japan, the international intervention had a superb impact on the desperate confrontation of the parties, who had been vexed with the vicious cycle of illegal strikes and punishments, reinforced by the political strife between the ruling and opposing parties. Furthermore, the FFCC adopted a comprehensive and detailed report of over 500 pages containing analyses of the historical and political background. I imagine that the report had a substantial impact on the parties, combined with the highly transparent and impartial examination process of the FFCC.

The principles of workers' and employers' freedom of association and their right to collective bargaining are set out in the ILO Constitution and the Universal Declaration of Human Rights. Whenever people are endeavouring to resolve an infringement of these rights, the CFA is available to facilitate their work by making an assessment of the situation and a judgement of the case on the merits, including the measures to be taken by the government for its resolution. The CFA would never be satisfied with a mere statement by governments concerning their political philosophies. It always requests governments to provide their observations and supporting factual information as a basis for its examination of whether the principles are respected in law and practice. And this continues until the case is completely closed with a definitive report or a closing follow-up report. The future of the CFA is promising, for as long as the ILO's tripartite system is

firmly established and functioning so that the means can be discussed of how to further these principles in all Member States, and there are qualified and devoted staff in the Office to undertake the technical supporting work efficiently.

In my view, the ultimate goal of the CFA is to achieve autonomy of industrial relations, irrespective of the political system in the country concerned, whether capitalism or communism. It does not state a preference for any particular political system. Through its continuing struggles against totalitarian or oppressive governments, the CFA appears to have reinforced the principles of workers' and employers' freedom of association and their right to collective bargaining as truly reliable human rights.

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Bernd Waas

► Seventy years of the Committee on Freedom of Association

Introduction

At the international level, freedom of association is guaranteed by two Conventions: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Compliance with both Conventions is overseen by a Committee that is celebrating its 70th anniversary this year: the Committee on Freedom of Association (CFA). In this paper, I will discuss from a European perspective the influence that the CFA has exerted on the development of freedom of association. However, this will by no means be a comprehensive impact analysis. Rather, I will limit myself to the reception of the CFA's decisions by the European Court of Human Rights (ECHR). Before tracing this influence, though, two things will be done. First, freedom of association will briefly be presented as the important and complex right that it is and, secondly, the contributions of the CFA in fleshing out this right will be appreciated in at least a few words. The paper ends with a short conclusion.

1. A quick look at freedom of association

To say that freedom of association is of paramount importance for the protection of workers is almost stating the obvious. Nevertheless, it seems worthwhile to take a step back and reassure ourselves once again of the relevance of this right.

1.1. The importance of the right

The paradigm of labour law is that workers are typically in a weaker position vis-à-vis their employers. This weakness or, perhaps better, this weakness in negotiations, is the reason why the regulation of working conditions cannot simply be left to the freedom of contract of employers and workers. There must be specific limits to contractual freedom in labour law. Some time ago, the German Federal Constitutional Court aptly put it this way: "Such limits are indispensable because private autonomy is based on the principle of self-determination, i.e., it presupposes that the conditions of free self-determination actually exist. If one of the contracting parties has such a strong preponderance that he or she can in fact set contractual regulations unilaterally, this has the effect of the other party being subject to external control. Where there is no approximate balance of power

between the parties involved, no proper balancing of interests can be guaranteed by the means of contract law alone”¹.

For this reason, other mechanisms replace freedom of contract to a large extent in labour law: state legislation, which establishes minimum conditions that employers and workers cannot fall below; and the possibility of joining together in trade unions in order to achieve collectively a fixing of appropriate working conditions that individuals would hardly achieve. Both instruments have their place and purpose, but freedom of association has some advantages over state legislation: unlike the latter, it is clearly based on the idea of autonomy and self-determination, and it regularly leads to regulations by actors who are much closer to the regulatory issues than the distant legislator.

1.2. Freedom of association: Handle with care

A look at freedom of association reveals two things. Firstly, it becomes clear how multi-layered and complex this guarantee is, even according to the wording of the provisions of the Conventions. Secondly, it becomes apparent that numerous questions arise to which the provisions of the Conventions do not provide an obvious answer.

A complex and multilayered right

The basic idea may be simple: freedom of association makes it possible to achieve appropriate working conditions by building countervailing power. Workers face their contractual partner in a position of relative weakness. In association with others, they come to eye level with them. Moreover, the setting of terms and conditions of employment uses the familiar contract mechanism, the beauty of which is that the give and take of the contracting parties comes with the promise of finding reasonable solutions that are acceptable to all. In reality, however, freedom of association is an extremely complex right.

This already applies with regard to the question of who is the bearer of the right. This is because freedom of association is available to individual workers and employers, but it is also available to the respective organizations themselves. Under Article 2 of Convention No. 87: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”. Under Article 3(1) of the same Convention: “Workers’ and employers’ organisations 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”. Both have weight: the individual freedom of each individual to come together with others to assert his or her interests, and the freedom of the organization itself to exist and operate freely. It is also clear, however, that both aspects of freedom of association are intertwined. Individual freedom of association aims at nothing other than being able to

1 Germany, Federal Constitutional Court, 7 February 1990 (1 BvR 26/84).

join together with others. Collective freedom of association ultimately serves no other purpose than to bring to bear the interest of each individual in appropriate working conditions. What is less clear is what follows from this observation, i.e. whether one must assume, for example, that the individual worker's freedom to strike is subject to the collective itself taking action.

Freedom of association also opens up very different rights in terms of content. Thus, individual freedom of association does not only include the right of each individual to found an association or to join an existing association. Rather, it also contains a prohibition of discrimination. Pursuant to Article 1(1) of Convention No. 98: "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". As Article 1(2) shows, this prohibition of discrimination takes aim at two things in particular: first, non-employment on the grounds of trade union membership; and, second, dismissal or other discrimination on the grounds of trade union membership or activity. Accordingly, freedom of association is both a "right to freedom" and a "right to equality". As a right to freedom, it is intended to guarantee a wide range of possibilities for action and activity for the individual and to protect her or him against unjustified interference. As a right to equality, it is intended to ensure that legal regulations concerning individuals or groups do not have a privileging or discriminatory effect in relation to others.²

However, freedom of association also has special features with regard to its addressees. It is true that it is the State that must respect freedom of association. This applies first and foremost to the extent that the State must abstain from unlawfully interfering with freedom of association. Under Article 3(2) of Convention No. 87, in conjunction with Article 3(1), the public authorities shall refrain from any interference which would restrict the right or impede the lawful exercise of the right of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. And under Article 4 of the same Convention: "Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority". However, freedom of association requires the State to do much more than refrain from interference. Rather, the State is obliged to bring freedom of association "to bear" in the first place. Under Article 3 of Convention No. 98: "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise". And under Article 4 of the same Convention: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements". All of this

2 On the distinction between fundamental rights of freedom (*Freiheitsgrundrechte*) and fundamental rights of equality (*Gleichheitsgrundrechte*) in German constitutional law, see Dreier, 2013, in: Dreier (ed), *Grundgesetz Kommentar*, 3rd edition, Art. 3, GG, notes 75 et seq.

shows that, in some respects, freedom of association obliges the State to exercise restraint, but in other respects it obliges the State to take action. In other words, as it is true that freedom of association is a “classic” right of defence against the State, it also obliges the State to shape it, if necessary, and thus make it practicable. The fact that these obligations are in a potential state of tension is almost palpable. The right (and duty) of the State to give concrete form to freedom of association and, in particular, to shape the collective bargaining system, is one thing; an “overbearing” State that “takes the associations by the rein” is quite another.

But freedom of association has still another dimension that goes far beyond the state. Under Article 2(1) of Convention No. 98: “Workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration”. Freedom of association is therefore not only about the relationship of the bearer of the right with the State, but also about the relationship of those entitled to it with each other. It almost goes without saying that freedom of association must also take the latter relationship into account. While individual freedom of association aims for association with others (co-workers or co-employers), collective freedom of association requires cooperation between the relevant organizations. An organization cannot achieve anything on its own. It is always dependent on the other side to achieve fair working conditions by concluding an appropriate agreement with them. But then, rules of the game must also apply to this relationship. In particular, it must be ensured that one organization is not in a position to bend the other to its will.

Challenges and pitfalls

The fact that international guarantees are usually relatively abstract has obvious reasons and therefore hardly needs explanation. Freedom of association is no exception. For example, it is reasonably clear what is meant when Article 2 of Convention No. 87 guarantees the right of workers and employers alike “to join” certain organizations. However, it is less clear, for example, what exactly is protected when Article 3(1) of the same Convention speaks of the freedom of workers’ and employers’ organizations “to formulate their programmes”. In any case, the wording is vague.

What has been said concerns the fact that many of the provisions of the Conventions (necessarily) involve a degree of ambiguity. Quite independently of this, however, challenges arise from the fact that a number of questions remain unanswered if one sticks only to the wording of the Conventions. Even a cursory reading of the Conventions suggests some of these questions. For example, Article 2 of Convention No. 87 speaks of the right to establish and to join an organization, whereas the provision says nothing about what should apply in the case of withdrawal from an organization. And while an individual can clearly rely on Article 2 if he or she wants to found a new organization with others, or join an existing one, there is no mention of the right of the individual worker or employer to freely participate in an organization. Some other issues are perhaps less obvious,

but no less in need of clarification. For example, as mentioned above, the individual worker is protected from discrimination (by the employer). However, the Conventions do not explicitly specify whether a prohibition of discrimination also exists to protect the organizations themselves.

While, in cases like these, one might think that the answers are obvious, even though they are not immediately apparent from the wording, there are countless cases in which things are far more complicated. For example, it is clear that some warranties in the Conventions are in potential tension with each other. There is much to be said, for instance, for considering the guarantee in Article 3 of Convention No. 87 as including the right of associations to recruit new members. But this right might end in cases where a union begins to poach members from a competing union. The right of one union must then be distinguished from the right of the other union. Incidentally, Article 2(1) of Convention No. 98 is of little help here since, according to its wording, it is only aimed at preventing interference “by each other”, i.e. interference by a trade union in the affairs of an employers’ organization and, more important in legal (Article 2(2) of the Convention) and practical terms, interference by an employers’ organization in the affairs of a trade union.

Ultimately, the problem behind the above example is that every organization is entitled to freedom of association, so that the question of how the legal spheres of the organizations are to be delimited from one another may have to be addressed in individual cases. At the same time, the role of the State must be taken into account in all of this. After all, according to Article 4 of Convention No. 98, the State is obliged to provide, if necessary, all organizations with a framework within which collective bargaining can take place, taking into account the fact that all of them enjoy freedom of association which, in principle, includes a right to participate in collective bargaining. This raises the question, for example, of whether and to what extent the State can give preference to certain unions on the basis of their representativeness without endangering the freedom of association of minority unions.

But enough of that. One thing should have become clear: freedom of association, as central as it is to ensuring decent working conditions, is a highly complex right that poses difficult questions for everyone involved. The CFA has impressively mastered the task of finding answers. It is therefore not by coincidence that it has gained significance far beyond the ILO. This will be shown below from the European perspective or, to put it more precisely, on the basis of the case law of the ECHR, which was established by the Member States of the Council of Europe to ensure compliance with the European Convention on Human Rights. Before doing so, however, the author feels the need to bow to the CFA with a few words of appreciation for its achievements.

2. A brief appreciation of the work of the CFA

How demanding freedom of association is has just been shown. In more than 3,400 decisions, the CFA has dealt with the above-mentioned and numerous other aspects of

freedom of association. For obvious reasons, it is not possible to give an account of the CFA's work here, nor is this the purpose of this short contribution. Nevertheless, a few words must be said.

Indeed, one of the focal points of the CFA's work is directed at an area that has been given the heading "Trade union and employers' organizations rights and civil liberties" in the CFA's *Compilation of decisions*.³ This area was not mentioned in the discussion above on the structure of freedom of association, as it is not so much freedom of association itself that is at issue here, but rather the fact that conditions outside it must exist for its exercise. These conditions may seem self-evident in some more fortunate countries, but are threatened almost daily in others. Often life and limb are affected, and often physical freedom of movement is at stake. There is also an arc that runs from freedom of association to freedom of assembly and to freedom of expression. The CFA stands ready to protect these rights. For this alone, it deserves the highest recognition.

With regard to the right of workers and employers, without distinction whatsoever, to establish and to join organizations, the CFA has consistently sought to counter discrimination, particularly on grounds of race, political opinion and nationality, while ensuring that this right has the broad personal scope that it enjoys under the Conventions. The right of workers and employers to establish organizations without prior authorization is seen by the CFA for what it is, namely, the decisive point in securing a space of freedom accepted and respected by the State: "The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization".⁴ There are two things in particular that the Committee takes into consideration in this context, namely, on the one hand, that preconditions for the establishment of organizations always require justification and, on the other, that a multitude of restrictive regulations are conceivable, which in their "choking effect" are de facto equivalent to prior authorization.

Behind the right of workers and employers to establish and join organizations of their own choosing lies a host of extremely difficult issues. One of these is the problem of trade union pluralism, inherent in the freedom of each individual to choose his or her union, which can stimulate competition, but at the same time can have divisive and weakening effects. The CFA aptly points out the problems as follows: "While it is generally to the advantage of workers and employers to avoid the proliferation of competing organizations, a monopoly situation imposed by law is at variance with the principle of free choice of workers' and employers' organizations".⁵ Many decisions of the CFA concern the right to strike. One focus of its efforts in this area is to counter attempts to exclude strikes on a wide scale by declaring areas as "essential services" in an overly "generous" manner. Numerous decisions of the CFA concern the machinery for voluntary negotiation

3 ILO, 2018. CFA, *Compilation of decisions of the Committee on Freedom of Association*, 6th edition.

4 CFA, *Compilation of decisions*, para. 419.

5 *Ibid.*, para. 486.

between employers or employers' organizations and workers' organizations, referred to in Article 4 of Convention No. 98. The decisions reached by the CFA over the years in this regard can serve as guidelines for any State legislature faced with the task of developing a comprehensive and functioning collective bargaining framework.

Every conceivable issue is addressed: the personal scope of collective bargaining; recognition of the most representative organizations and the rights of minority unions; levels of bargaining; the duration of collective agreements; the legal extension of collective agreements; the relationship between collective agreements and individual contracts of employment, and much more. In arriving at its decisions, the CFA always takes into account both elements that are set out in Article 4 of Convention No. 98: the measures taken by the State with a view to encouraging and promoting collective bargaining, and the voluntary nature of negotiations, i.e. the autonomy of the actors involved.

3. The CFA and the case law of the European Court of Human Rights

Before discussing the impact of the CFA on the jurisprudence of the ECHR, a word should first be said about the European Convention on Human Rights, or rather the ECHR's view of this Convention.

3.1. The European Court of Human Rights: In search of a broad consensus

What is most remarkable is that the ECHR does not view the European Convention on Human Rights statically, but sees it as a "living instrument", with the consequence that the guarantees it contains are not fixed once and for all, but are dynamic.⁶ The consequence of this is that, in the Court's view, the Convention "must be interpreted in the light of present-day conditions".⁷ Of particular importance in the present context is that the ECHR sees the Convention as part of international legal developments, and this means that in its interpretation of the Convention it is open to third party views on comparable guarantees. In the labour law sphere, this position of the Court became clear in its decisions in cases *Demir and Baykara*⁸ and *Enerji Yapi-Yol Sen*,⁹ which have been much discussed in expert circles. In the former decision (on the establishment of a trade union by employees of a municipality), the ECHR stated the following: "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into

6 See, for example, Letsas, G., 2012. "The ECHR as a Living Instrument: Its Meaning and its Legitimacy", available at SSRN.

7 *Tyrer v. The United Kingdom* [1978] ECHR 2, para. 31.

8 *Demir and Baykara v Turkey* [2008] ECHR 1345. For more information on the ECHR's approach, see also Teklè, T., 2018. "An Analysis of the Contribution of the ILO's International Labour Standards System to the European Court of Human Rights's Jurisprudence in the Field of Non-Discrimination" Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2018/50, available at SSRN.

9 *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251.

account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases”.¹⁰ The Court also made it clear that it did not matter whether the defendant State had ratified the relevant convention at all. Rather, it was sufficient, “that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies”.¹¹ In its judgment in *Enerji Yapi-Yol Sen*, the Court did not again elaborate on the relevance of international law other than the Convention, but underlined what it had said in its decision in *Demir*.¹²

3.2. Impact of the CFA on the case law of the ECHR

The decision in *Demir and Baykara*, however, demonstrates not only, in methodological terms, the openness of the ECHR to decisions of other courts and supervisory bodies, but also the influence of the CFA on concrete issues. In the specific case, which concerned a collective agreement between a trade union and a municipality, the Court held that members of the state administration could not be excluded from the scope of Article 11 of the European Convention on Human Rights, which guarantees freedom of association. At most, restrictions were conceivable whereby the exceptions contained in the exception provision of Article 11(2) of the European Convention on Human Rights, which refers to “members of the armed forces, of the police or of the administration of the State”, would have to be narrowly defined.¹³ In its reasoning, the ECHR not only emphasized the relevance of Convention No. 87,¹⁴ but also the application of that Convention by the CFA. In order to support its position that municipal employees also share freedom of association, and thus the right to engage in trade unions, the position of the ECHR is explicitly quoted as follows: “Local public service employees should be able effectively to establish organizations of their own choosing, and these organizations should enjoy the full right to further and defend the interests of the workers whom they represent”.¹⁵ In its reasoning, the Court observes that the right of public officials to join trade unions has been confirmed on a number of occasions by the ILO Committee of Experts,¹⁶ but the Court also notes that the CFA has adopted the same reasoning with regard to municipal

10 *Demir and Baykara v Turkey* [2008] ECHR 1345, para. 85.

11 *Ibid.*, para. 86.

12 *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251, para. 24.

13 *Demir and Baykara v Turkey* [2008] ECHR 1345, para. 97.

14 *Ibid.*, para. 100.

15 *Ibid.*, para. 39.

16 *Ibid.*, para. 101.

public employees. The CFA's view that local public service employees should be able to establish organizations, and that these organizations should enjoy the full right to further and defend the interests of the workers, is referred to explicitly.¹⁷

In the case *Enerji Yapi-Yol Sen*, which concerned a complaint by a civil servants' union, the ECHR ruled that a ban on strikes interferes with the guarantees of Article 11(1) of the European Convention on Human Rights. According to the Court, a strike enables a trade union to make its voice heard and is an important aspect of protecting the interests of trade union members. However, according to the Court, the right to strike is not absolute, but may be subject to certain conditions and restrictions. For example, the principle of trade union freedom is consistent with a ban on strikes for civil servants who exercise sovereign power on behalf of the State.¹⁸ In its reasoning, the Court did not explicitly mention the CFA, but instead referred to the supervisory bodies of the ILO in general, which considered the strike as an inseparable corollary of the right of trade union association protected by ILO Convention No. 87.¹⁹

The *Ognevenko* ruling of the ECHR also concerned the right to strike. In the underlying case, the applicant had participated in a strike and was later dismissed by his employer for this reason.²⁰ Among other things, the applicant had also relied on the "case-law" of the CFA to the effect "that no one should be penalised for participating in a strike action".²¹ The ECHR ruled that the applicant's dismissal constituted a disproportionate restriction of his right to freedom of association. In its reasoning, the Court presented, among others, "relevant international materials". In this context, statements by the CFA play a very prominent role.²² The CFA's assessment is quoted that "strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population". Furthermore, the CFA's assessment is reported that by "linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded" and that, while "the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequences in and of themselves do not render a service

17 Ibid., para. 102, referring to ILO, 1996. *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 4th edition.

18 *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251, para. 32.

19 Ibid., para. 24: "La Cour note également que le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT) comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical ...".

20 *Ognevenko v Russia* [2012] ECHR 1266.

21 Ibid., para. 52.

22 Ibid., para. 20, referring to ILO, 2006. *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edition.

‘essential’, and thus the right to strike should be maintained”. Moreover, it is recalled that the CFA is of the view that the “transportation of passengers and commercial goods is not an essential service in the strict sense of the term”, but that it is “a public service of primary importance where the requirement of a minimum service in the event of a strike can be justified”. In other respects too, the Court referred to the position of the CFA. This applies firstly with regard to the question of how to treat workers whose right to strike is restricted or even suspended because they are performing work in an essential service. In this respect, the CFA takes the view that, “[w]here the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services”. In particular, the Committee holds the view that “appropriate guarantees [...] should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented”. Both statements by the CFA are cited by the Court. Secondly, the assessment of the CFA is also referred to that “[r]esponsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved”. Finally, and thirdly, reference is also made to the assessment of the CFA that the use of “extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association”. The CFA’s assessments are not only presented as relevant material, but the Court also repeatedly refers to them in its reasoning. While noting an apparent international consensus that, “as in the case of ‘members of the armed forces, of the police or of the State administration’, restrictions may also be imposed on the right to strike of workers providing essential services to the population“, the Court also states that “neither the ILO nor the ECSR consider transport in general, and railway transport in particular to constitute an essential service”.²³ The Court points out that the ILO “also does not consider negative economic consequences to constitute a sufficient reason justifying a complete ban on the right to strike”.²⁴ By referring to the position of the CFA, the Court also notes that in the present case, the strike itself “was not declared unlawful [...] either by a national court [...] or another independent authority”.²⁵ Finally, the ECHR finds that that the applicant’s participation in the strike had “resulted in the most severe penalty – dismissal”, and explicitly referred in this context to the “similar assessment” by the CFA.²⁶

The above-mentioned decisions on the personal scope of freedom of association and the right to strike may illustrate the importance of the CFA particularly well. But other decisions could be mentioned as well. In *Palomo Sánchez a.o.*, the ECHR ruled that the

23 Ibid., para. 72

24 Ibid., para. 73

25 Ibid., para. 81.

26 Ibid., para. 83.

dismissal of trade union members for engaging in offensive and insulting expressions in a union newsletter did not amount to a violation of the right to freedom of expression, read in the light of freedom of association.²⁷ In its reasoning, the Court referred, among others, to “the general principles concerning freedom of opinion and expression” developed by the CFA. In this regard, the Court, in particular, referred to the assessment by the CFA that, “in expressing their opinions, trade-union organisations should respect the limits of propriety and refrain from the use of insulting language”.²⁸

In *Wilson, the National Union of Journalists a.o.*, the ECHR held that there had been a violation of Article 11 of the European Convention on Human Rights regarding the use of financial incentives to induce employees to surrender the right to union representation for collective bargaining.²⁹ The applicants had submitted that the right to union membership under Article 11 necessarily involved the rights of every employee: (1) to be represented by his or her union in negotiations with the employer; and (2) not to be discriminated against for choosing to avail him- or herself of the right to be represented. In this context, the applicants also referred to the findings of the CFA that the right of union representation is inherent in the right of union membership.³⁰ In its reasoning, the Court found that the United Kingdom law at the relevant time was the subject of criticism by the CFA (and the Committee of Experts) and considered that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the State was in violation of Article 11 of the European Convention on Human Rights, with regard to both the applicant trade unions and the individual applicant.³¹

The judgment in *Veniamin Tymoshenko a.o.* concerned a strike in the transport sector.³² The Court held that a strike ban by domestic courts constituted a violation of Article 11 of the European Convention on Human Rights. In its judgment, the Court referred extensively to the relevant case-law of the CFA.³³ However, the decisive factor for the Court was ultimately that the interference with the applicants’ rights under Article 11 of the European Convention on Human Rights was not based on sufficiently clear and foreseeable legislation.³⁴

The decision in *National Union of Rail, Maritime and Transport Workers* related to secondary strike action by a trade union.³⁵ In its judgment, the ECHR referred to the view of

27 *Palomo Sanchez a.o. v Spain* [2011] ECHR 1319.

28 *Ibid.*, para. 67, referring to ILO, 2006. *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edition.

29 *Wilson, the National Union of Journalists a.o. v UK* [2011] ECHR 1654.

30 *Ibid.*, para. 40.

31 *Ibid.*, para. 48.

32 *Veniamin Tymoshenko a. o. v Ukraine* [2014] ECHR 1016.

33 *Ibid.*, paras 35 et seq.

34 *Ibid.*, para. 85.

35 *National Union of Rail, Maritime and Transport Workers v UK* (2015) ECHR.

the CFA that a “general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful”, and that a ban “on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association”.³⁶ These findings by the CFA supported the Court’s position that “with its outright ban on secondary industrial action, the respondent State finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach”.³⁷ In the end, however, the Court upheld the ban on secondary action in light of the wide “margin of appreciation” enjoyed by the State.³⁸ In doing so, the Court referred to “the distinct character of the Court’s review compared with that of the supervisory procedures of the ILO and the European Social Charter”, and therefore, also in view of the circumstances of the case, did not attach decisive weight to the assessments of the relevant supervisory bodies.³⁹

More recently, in the – important – judgment of the ECHR in the so-called *Holship* case, the Court also referred to the CFA’s position on boycotts as special forms of industrial action and on the admissibility of legislative bans on including secondary boycott clauses in collective agreements.⁴⁰

Listing where and how the ECHR has referred in its judgments to the CFA may appear nitpicking. But that is not the point here. The point is to show something quite different, namely that the ECHR’s search for “common ground” over the years has not least been based on the position of the CFA.

Conclusion

The purpose of this paper is to acknowledge the challenging work that the CFA has been doing since its foundation in 1951. The practical significance of the CFA’s work cannot be overestimated. It also takes place in a field that is far from easy to get to grips with

36 *Ibid.*, para. 31, referring to ILO, 2006. *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edition.

37 *Ibid.*, para. 98

38 See, in this regard, for example, Gallagher, P., 2011. “[The European Convention on Human Rights and the Margin of Appreciation](#)”, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 52/2011, available at SSRN.

39 *National Union of Rail, Maritime and Transport Workers v UK* [2015] ECHR, para. 98. Just in passing, a point should be also mentioned which concerned a completely different aspect of the relationship between the CFA and the ECHR. The defendant State had considered the proceedings before the ECHR inadmissible because the complainant union had also appealed to the CFA. The ECHR rejected this and considered itself prevented from making a decision of its own under Article 35 (2)(b) of the Convention only if, by the time the Court was supposed to examine the case, a decision on the merits had already been taken by another court or body (*ibid.*, para. 48).

40 *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers’ Union (NTF) v Norway*, Application No. 45487/17, 10 June 2021, para. 72. See, most recently also *Case of Association of Civil Servants and Union for Collective Bargaining and Others v Germany*, Application nos. 815/18 and 4 others, 5 July 2022.

from a legal point of view. With its assessments of the scope and content of freedom of association, the CFA has had a lasting influence on legal developments in many States. But it has also had a significant impact on the development of international law as a whole. This has been shown here by using the case law of the ECHR as an example. And while it is true that the ECHR's understanding of the European Convention on Human Rights and of itself has allowed the CFA's findings to fall on particularly fertile ground, the overall importance of the CFA in the international arena cannot be denied. As has been shown, the ECHR looks for "common ground" for its decisions and often finds it in the assessments of the CFA. Recognition of the truly fundamental character of the CFA's work could not be clearer.

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Karen Curtis

► Synergies of the unique ILO supervisory system in promoting democratic, collective worker voice, and the critical role played by the Committee on Freedom of Association

Abstract

On the seventieth anniversary of the creation of the Committee on Freedom of Association (CFA) in 2021, the International Labour and Employment Relations Association (ILERA) held a special panel event reflecting on the Committee's contribution over seven decades to universal respect for this fundamental right and its particular importance to the promotion of democratic and participative collective voice. Within the framework of a broader presentation on the significant achievements of the CFA and the ILO in this regard (Poland, South Africa),¹ this paper focuses on the extraordinary contribution of this specialized ILO supervisory body, even when confronted with long-standing and pervasive challenges to this basic right. It focuses on the ILO's engagement with Belarus over the last three decades and highlights the systematic examination by the CFA, alongside other ILO supervisory machinery, which has ensured public awareness of developments relating to participative and inclusive collective voice within a context of broader political change, stimulating the identification and means of redressing gaps. This constant diligence provides a solid basis for the Government to reflect on further necessary steps, as well as for the Organization to consider measures to ensure the effective application of this core labour principle.

This year represents the 70th anniversary of the first meeting of the International Labour Organization's Committee on Freedom of Association (CFA). The creation of the CFA in 1951 was considered essential to provide meaningful support for the transcendent words of the ILO Constitution in the Declaration of Philadelphia, which accord primary

¹ See, for example, Francis Blanchard, 2004. "Une page d'histoire de l'OIT: La Pologne", and Karen Curtis, "Democracy, freedom of association and the ILO", in Jean-Claude Javillier and Gernigon Bernard (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 83 and 91-

importance to freedom of association and underline the equal role to be played by representatives of workers and employers in free discussion and democratic decision with a view to the promotion of the common welfare.

Freedom of association cannot be separated from the concept of democratic decision-making, whether within the structures of representative organizations themselves, in support of harmonious labour relations or across the political and governance spheres. The unique nature of the CFA, which has the mandate to hear complaints against any ILO Member State and examine alleged violations of freedom of association, even where the Governments concerned have not ratified the relevant Conventions, has enabled it to examine the impact of stifled democratic debate on the rights of trade unions and employers' organizations over the past seven decades. Numerous CFA decisions have highlighted that the freedom of workers and employers to form and join organizations of their choosing, and for those organizations to operate freely and without interference, are essential for participatory democratic governance of the labour market and critical to the promotion – and protection – of free societies everywhere.

In this paper, I first briefly recall the elaborate nature of the supervisory bodies, which enables a comprehensive and balanced consideration of respect for international labour standards, with special emphasis on freedom of association. Second, I recall the critical inter-linkages between freedom of association and the democratic social order enunciated by the CFA and the ILO's constituent bodies.² Third, I elucidate the nature of the CFA's considerations in relation to the application by Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), their relevance to freedom in the political sphere and the important and mutually supportive action of the supervisory bodies for the achievement of their recommendations. In conclusion, I reflect on the critical role played thus far by the CFA in the specific case of Belarus and the available space for moving forward towards greater respect for civil liberties.

1. Towards universal respect for freedom of association: A unique and robust system of supervision

The ILO's constitutional framework makes it self-evident that respect for the freedom of association of the social partners represented in this tripartite Organization was and remains primordial. Strong and independent voices representing employers and workers are essential for the Organization's tripartite governance structures in order to ensure that its internal debates are meaningful and built on free, open and democratic expression. Its achievements to this end have been built on comprehensive and complementary

² See, for example, ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties, ILC, 54th Session, preamble: "Considering that without national independence and political liberty full and genuine trade union rights could not exist".

supervisory bodies that carry out exhaustive analysis, identify gaps and recommend avenues for redress. This system combines tripartite and independent review,³ and is founded on the bedrock of constructive dialogue with Member States and the availability of technical assistance to ensure that due process is fully observed. The pinnacle of the system lies in the establishment of Commissions of Inquiry, which are independent fact-finding review bodies established to examine complaints of non-compliance with ratified Conventions.⁴ At the conclusion of their work, Commissions of Inquiry make time-bound recommendations, of which the Member States in question must indicate their acceptance or rejection.⁵ Disputes in this regard may be referred to the International Court of Justice for a final determination.⁶ Additionally, the ILO Constitution broadly frames the action that the Organization may take should a Member State fail to implement the recommendations within the specified timeframe.⁷

The example of Belarus further illustrates the robust nature of the intricate supervisory system outlined above.

2. Freedom of association interlinkages

On numerous occasions, the ILO has demonstrated its absolute commitment to the principle of freedom of association within a context of support for a democratic, participative social order.⁸ In its first years, the CFA recalled the importance of the democratic structure and processes of trade unions, which afford them legitimacy as workers' agents.⁹ However, the cases examined by the CFA also quickly brought to light political attacks on freedom of association which reverberated in the workplace and, in the most egregious cases, led to the dissolution of national trade union movements or them being brought under the control of the authorities. The CFA has repeatedly emphasized in such cases that the freedom of workers and employers to form and join organizations of their choosing, and for those organizations to administer their own affairs without hindrance, are essential to the principles of freedom of association and democracy.¹⁰ The CFA, following the guidance provided by the International Labour Conference (ILC) in its 1970 Resolution on trade

3 The regular review of ratified Conventions is carried out in the first instance by the independent 20 member Committee of Experts on the Application of Conventions and Recommendations (CEACR), the analysis of which may be subsequently discussed by the tripartite Conference Committee on the Application of Standards. The tripartite CFA examines complaints of alleged violations of freedom of association regardless of ratification by the Member State in question.

4 ILO Constitution, Article 26.

5 *Ibid.*, Articles 28 and 29.

6 *Ibid.*, Articles 29 to 32.

7 *Ibid.*, Article 33.

8 See, Karen Curtis, 2021. "100 years of the ILO in action: Reflections on inclusive collective representation and the Organization's quest for social justice," *King's Law Journal*, 32(2), 183-196. See also, ILO, 1992. *Democratisation and the ILO*, op. cit., and Curtis, "Freedom of Association, Democracy and the ILO", op. cit., 91

9 CFA, Case No. 388 (Costa Rica), 78th Report, paras 282–287

10 CFA, Compilation of decisions, para. 668.

union rights and civil liberties, has also clearly identified for the world community the intrinsic link between civil liberties and freedom of association and the importance of ensuring a climate in which both are fully respected and guaranteed.¹¹ Similarly, the Committee has further endorsed the argument that, if they consider that they do not have the basic freedom to fulfil their mission directly, trade unions and employers' organizations are justified in demanding recognition of the exercise of these freedoms as legitimate trade union activities.¹² Over 70 years, this special complaints mechanism has observed developments across the globe in which strong independent workers' organizations have become dynamic agents for change, not only in the social and economic spheres, but also in political transformation towards democracy.¹³

2.1. An incomplete transition postponed

With reference to the impact of the ILO supervisory bodies in promoting free worker voice following the publication in 2004 of the Commission of Inquiry's report on the observance of Convention No. 87 by Belarus, I recalled the unprecedented nature of this joint appeal, which had emanated from earlier complaints brought by both the traditional union structure and the more recently formed free trade unions in the country, and its potential to bring about far-reaching change.¹⁴ This paper offers an opportunity to review those considerations and the evolution over the past two decades, which has been characterized by both advances and setbacks.

The independence of Belarus from the former Union of Soviet Socialist Republics (USSR) in 1991 marked the beginning of a transition, not only in the political sphere through democratic elections, but also incipient movements away from State-controlled trade union monopoly structures towards small but independent structures (the Free Trade Union of Belarus and its umbrella structure, the Belarussian Congress of Democratic Trade Unions) with the objective of opening the democratic space for trade unions of workers, by workers, for workers.¹⁵ The formation of these independent unions and their activities were not without impediment, and gave rise to the first complaints against the sovereign Government of Belarus in the 1990s.¹⁶ In the first of these cases, the CFA noted with considerable concern the allegations, which ranged from severe restrictions imposed on the right to strike to the suspension of unions and the arrest and detention of trade unionists. The Committee, while noting with satisfaction that the Constitutional Court had declared unconstitutional the provisions of the Decree that had given rise to

11 *Ibid.*, paras 67-314.

12 *Ibid.*, para. 75.

13 Curtis, "Freedom of Association, Democracy and the ILO".

14 *Ibid.*, 102.

15 Indeed, mass strikes in Belarus in April 1991 represented the first signs of challenge to the political status quo, triggering the formation of these independent structures. See, Valyantsin Houbew and Alyaksei Khadyka, 2003. "Belarusian Trade Unions: Transformation and Prospects", Seminar materials, Friedrich Ebert Stiftung, Minsk.

16 CFA, Case No. 1849 (Belarus), 302nd Report, and Case No. 1885 (Belarus), 306th Report.

many of these allegations,¹⁷ was bound to observe in its follow-up that the Government was continuing to act in a manner that did not give effect to this important decision.¹⁸ Continuing pressure by the CFA and the use of the various tools available to the ILO, including an advisory mission, gave rise to significant progress, including revocation of the suspension of the Free Trade Union of Belarus, the registration of the Congress of Democratic Trade Unions of Belarus and the amendment of the infringing decree.¹⁹

This moment of revived space for freedom of association was however short-lived, and a further complaint was brought to the CFA, although on this occasion it was not confined to small independent unions. The thirst for meaningful representation and the disassociation of the trade union movement from governmental structures spread to the traditional Federation of Trade Unions of Belarus (FPB) and its sectoral affiliates (the Union of Agricultural Sector Workers, led by Alexander Yarushuk, the Union of Automobile and Agricultural Machinery Workers, led by Alexander Bukhvostov, and the Union of Radio and Electronic Workers, led by Gennady Fedynich)²⁰ which, alongside the Congress of Democratic Trade Unions and the Belarusian Free Trade Union, filed a complaint in June concerning yet another Presidential Decree imposing a process of re-registration for all trade unions, accompanied by egregious government interference in their activities.²¹ As the FPB, strong in its massive representation of workers in the country, increasingly became a forum for dissent and alternative voice, including political dissent, the Government began to retake control, with a consequent merger of the voices of the Government, trade unions and management. Following these Government actions, including the Government's virtual appointment of the former deputy head of the presidential administration to the position of FPB President, and the sharing with him of materials for societal control,²² the leaders of the traditional FPB and sectoral affiliates withdrew from the union and formed their own independent counterparts: the umbrella Belarussian Congress of Democratic Trade Unions (BKDP), the Union of Radio and Electronics Workers (REP Union) and the Free Trade Union of Metalworkers (SPM).

17 CFA, Case No. 1849 (Belarus), 302nd Report (March 1996), paras 207 et seq. In its decision of 21 August 1995, the Constitutional Court, demonstrating its independence from the Executive, referred to provisions of Convention No. 87 and recalled that Presidential Decrees and Orders may not be in variance with international legal instruments ratified by the Republic of Belarus. However, this nascent sign of an independent judicial system later appeared to be reined in, as subsequently observed by the United Nations Special Rapporteur on the independence of judges and lawyers: see United Nations, 2001. Civil and Political rights, including questions of: Independence of the Judiciary, Administration of Justice, Impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, Report on the mission to Belarus, E/CN.4/2001/65/Add.1; and ILO Commission of Inquiry, Recommendation 8.

18 CFA, Case No. 1849 (Belarus), 308th Report, para. 26.

19 CFA, Case No. 1849 (Belarus), 311th Report, paras 18–20.

20 The names are mentioned here to acknowledge the historical role that they have played in the development of independent trade unions in Belarus up to the present day, as seen below.

21 CFA, Case No. 2090 (Belarus), 324th Report.

22 CFA, Case No. 2090 (Belarus), 329th Report, para. 270.

The situation led to the Governing Body deciding to establish a Commission of Inquiry, the highest mechanism in the ILO's arsenal for examining allegations of serious violations of ratified Conventions. The Commission of Inquiry, observing that the industrial relations system in Belarus still retained many of the characteristics of the Soviet period, including the participation of high-level government officials directly in the decision-making of trade union bodies, formulated 12 substantive recommendations.²³ The Commission's last recommendation was aimed at the crux of the matter, calling upon the Government to undertake a thorough review of its industrial relations system with the aim of ensuring a clear distinction between the role of the Government and that of the social partners and of promoting clearly independent structures of workers' and employers' organizations.²⁴ Given the long-standing nature of the violations, the Commission of Inquiry considered that these recommendations could and should be carried out without further delay and at the latest by 1 June 2005. Recognizing the important role played by the CFA in examining these complaints, the Commission of Inquiry considered it important for the implementation of its recommendations to be followed up by the CFA, as the best way of ensuring effective evaluation of the concrete and tangible action to be taken by the Government.²⁵ The Governing Body approved the recommendations and transmitted their follow-up to the CFA, while observing that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) should continue its regular supervision of the two Conventions.

Regular supervision by the CEACR, examination by the CFA of the effect given to the recommendations of the Commission of Inquiry, the provision of technical assistance and development cooperation did not initially result in the significant changes requested, despite the reply from the Government of Belarus that "a socially oriented market economy is being developed. The primary aim of our social policy is the constant growth of prosperity of the citizens of Belarus. In our opinion, social partnership, an independent trade union movement and responsible employers' associations are the components of our society that will, without doubt, duly contribute to achieving this fundamental goal".²⁶ So the ILO's machinery could not rest and, following renewed consideration by the Conference Committee on the Application of Standards, which expressed grave

23 ILO, 2004. *Trade Union Rights in Belarus*, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), paras 631 et seq.

24 *Ibid.*, para. 634, Recommendation No. 12.

25 *Ibid.*, para. 636.

26 ILO, 2004. "Report of the Commission of inquiry established to examine the complaint concerning the observance by the Republic of Belarus of the freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to organise and collective Bargaining Convention, 1949 (No. 98), made by delegates to the 91st Session (2003) of the International labour Conference under article 26 of the Constitution of the ILO. Reply by the Government of Belarus to the report of the Commission of Inquiry", Governing Body, 291st Session (November), GB.291/6/1, 3.

concern at the serious discrepancies in law and practice that seriously threatened the survival of any form of independent trade union movement in the country, called on the Government in 2006 to take concrete steps for the implementation of the Commission of Inquiry's recommendations and, if no progress could be noted by the November session of the Governing Body, trusted that the Governing Body would begin to consider whether further measures under the ILO Constitution should be considered.²⁷

Article 33 of the ILO Constitution is the highest level of action available to ILO Member States in the event of serious non-compliance with a ratified Convention. It enables the Governing Body to recommend to the ILC such action as it considers "wise and expedient" to secure compliance with the recommendations of a Commission of Inquiry. The ILO takes such action very seriously and has so far only resorted to article 33 in one instance.²⁸ In the case of Belarus, there was significant re-engagement between the Government of Belarus and the ILO during the three years of special consideration by the Governing Body. This renewed interaction included high-level missions aimed at assisting in the implementation of the Commission of Inquiry's recommendations and a variety of training activities, including a seminar on the principles of freedom of association for judges and court prosecutors.²⁹ Observance of these steps and debate on the possible application of article 33 measures thus continued in the Governing Body (accompanied by the annual reports of the CFA), giving rise to the Government's acceptance of a tripartite mission in January 2009 to participate in a seminar on the application of the Commission of Inquiry's recommendations and the development of a plan of action with all the social partners to resolve the issues raised. Independent trade unions were given a space to participate, not only in the National Council for Labour and Social Issues, but also in the Council for the Improvement of Legislation in the Social and Labour Sphere. The pressure exerted through this combination of efforts had created the little bit of space necessary for independent collective worker voice to survive while the CFA continued to regularly monitor steps for the implementation of the recommendations of the Commission of Inquiry.

The period between 2010 and 2020 was characterized by continued inclusive social dialogue at a formal level, although the root causes of the obstacles to freedom of association remained. While dialogue did not often give rise to effective change, the independent unions had a place at the table and were signatories to the national collective agreements (General Agreements). The ILO and its dedicated specialists frequently provided technical assistance, capacity-building and support, not only at the request of the Government, but

27 ILO, 2006. *Record of Proceedings*, No. 24, Report of the Committee on the Application of Standards, ILC, 95th Session, 2/25.

28 ILO, 2000. Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, ILC, 88th Session.

29 ILO, 2007. "Measures taken by the government of Belarus to implement the recommendations of the Commission of Inquiry established to examine the observance of the Freedom of Association and Protection of the right to Organise convention, 1948 (No. 87), and the right to Organise and collective bargaining Convention, 1949 (No. 98)", Governing Body, 298th Session (March), GB.298/6.

also of the independent trade unions. The Committee welcomed the involvement of all the social partners, through the Tripartite Council, in addressing some of the issues raised by the ILO supervisory bodies, and the advances in social dialogue in the country. In addition, the CFA appraised positively, *inter alia*, the removal of the 10 per cent minimum membership requirement, the lowering of the minimum number of members for forming an enterprise trade union to ten workers,³⁰ and tripartite activity on collective labour dispute resolution with the consideration of possible new mechanisms.³¹ Additionally, under the auspices of the Tripartite Council, with ILO assistance, a provision relating to the collective bargaining procedure at enterprises with more than one union was drafted and included in the General Agreements concluded after 2015,³² and steps were taken to address the challenges of collective bargaining at the sectoral and territorial levels.³³ However, independent unions continued to face persistent obstacles to registration, rendering it impossible to solidify their voice.

Throughout this process, the CFA remained the first port of call to monitor developments and identify remaining gaps. It is not therefore surprising that when new and severe cases of repression were reported against independent trade unions for taking part in democratic protests following the presidential election in August 2020, the CFA was again called upon. The CFA recalled once again the 1970 ILC Resolution concerning trade union rights and their relation to civil liberties and the importance of ensuring respect for the civil liberties set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It called for the release of all trade unionists who were still detained and the dropping of all charges related to their participation in peaceful protests and industrial action.³⁴ The Committee once again recalled the basic precept that a system of democracy is fundamental for the free exercise of trade union rights.³⁵ However, tensions became further heightened between the independent trade union movement and the Government. In response to the Government's argument that these matters were solely a matter of national sovereignty, the Committee was obliged to recall that the improvement of working conditions and the promotion of freedom of association, for which the ILO was established, meant that these matters no longer fall within the exclusive sphere of States and that the action of the Organization for this purpose cannot be considered to be interference in internal affairs.³⁶ Noting reports of the arrest and detention of trade unionists with sentences of up to three years of imprisonment for participating in peaceful strikes, and observing the Government's repeated refusal to pro-

30 CFA, 379th Report, para. 24.

31 *Ibid.*, para. 27.

32 *Ibid.*, para. 31.

33 CFA, 390th Report, para. 19.

34 CFA, 394th Report, para. 42.

35 *Ibid.*, para. 44.

36 CFA, 398th Report, para. 92.

vide relevant court judgments, the Committee stressed the need to ensure an impartial and independent judiciary and justice administration in general in order to guarantee that investigations into these grave allegations are truly independent, neutral, objective and impartial.³⁷ While noting with deep regret the serious retreat by the Government from its obligations under the ILO Constitution and its commitment to implement the recommendations of the Commission of Inquiry issued 17 years earlier, the CFA maintained the spotlight on these grave matters, drawing them to the attention of the Governing Body so that it could consider any further measures to secure compliance.³⁸

Regrettably, in just a few months between March and June 2022, the situation deteriorated even further. On 19 April 2022, more than 20 leaders and activists of the BKDP were detained by the State Security Committee, including its President, Alexander Yaroshuk, a member of the ILO Governing Body, and Gennady Fedynich, leader of the REP Union. Alexander Bukhvostov, the representative of the Metallurgy Workers' Union was released under supervision, along with other trade union members. These names are familiar. They are not radical revolutionaries, but former leaders of the traditional sectoral trade union structures who had endeavoured for over two decades to maintain an independent worker voice. They had not called for regime change. Indeed, their actions were not antonymous to the very rules adopted by the Government-praised³⁹ FPB which, on 5 October 1990, set out in its Preamble that the Federation was to be independent from political parties and state bodies.

Having the occasion to review the matter once again in June 2022, the Conference Committee on the Application of Standards noted with great concern the numerous allegations of extreme violence in repressing peaceful protests and strikes, and the detention, imprisonment and violent treatment of workers while in custody. The Conference Committee deplored the escalating measures deployed to repress trade union activities, as well as the systemic destruction of independent trade unions. It recalled the outstanding recommendations of the 2004 Commission of Inquiry and the need for their full and effective implementation without further delay.⁴⁰ The Government was urged to release all trade union leaders and members arrested for participating in peaceful assemblies or for exercising their civil liberties pursuant to their legitimate trade union activities, to drop all related charges and to give access as a matter of urgency to visitors, including ILO officials, in order to ascertain their conditions of arrest and detention and their state

37 Ibid., para. 95.

38 Ibid., paras 106 and 107(i).

39 Demand by the President of Belarus for the establishment of trade unions in all private companies by 2020 at the request of the FPB, considered by the ILO supervisory bodies to be interference in contravention of freedom of association standards and principles. See ILO, 2021 and 2022, *Record of proceedings*, Nos 6B and 4B, ILC, 109th and 110th Sessions, 93–125 and 109–147, respectively; and CEACR, Convention No. 87, *Belarus*, observations, 2021 and 2022.

40 ILO, 2022, *Record of proceedings*, No. 4B, op. cit., 144.

of health.⁴¹ Just as in 2006, the matter was once again referred to the Governing Body to consider any further measures, including those foreseen in the ILO Constitution, to secure compliance with the recommendations of the Commission of Inquiry.

The matter is therefore back in the hands of the Governing Body to consider the use of the sharpest tool in its toolbox. In the meantime, all of the above independent trade unions have been dissolved by order of the Supreme Court of Belarus: the Belarussian Congress of Democratic Trade Unions (BKDP), the Belarussian Independent Trade Union (BITU), the Union of Radio and Electronics Workers (REP), the Free Trade Union of Belarus (SPB) and the Free Trade Union of Metalworkers (SPM). And many of their union leaders remain in detention.

Conclusion

It is open to the Governing Body to propose any measures that it judges may achieve compliance with the recommendations of the Commission of Inquiry. It has volumes of information and analysis to support its consideration, as a result of the regular examination and review by the CFA, which has pursued without fail the promotion of freedom of association in this case and has regularly offered support and technical assistance to the Government for that purpose. On occasion, small steps have been taken and limited space has been available for independent trade unions, whose leaders were largely left alone. Over the two decades, they continued to offer an alternative voice through which workers could speak out freely, without ideologies and choices imposed from above. This paper is dedicated to those champions of freedom and to their perseverance in the face of unrelenting obstacles. It also gives due acknowledgment to the efforts of those in power in the early years of this incomplete transition, who dared to uphold the vision of independent trade unions set out in the 1992 Law.

As seen time and again, independent voices are barely tolerated by entrenched powers, which do not allow different views that may challenge their legitimacy. The work of the CFA has been invaluable in keeping those voices alive and in promoting a path for the freedom of association that is necessary for participative and inclusive democracy, social justice and lasting peace. It has also been crucial in pointing the way for the Government of Belarus to take steps to demonstrate its commitment to the fundamental values of freedom of association, which it has repeatedly stated that it embraces. Releasing imprisoned trade union leaders and allowing independent trade unions to operate in the country is an essential first step by the Government of Belarus in moving towards adherence to these fundamental ILO principles. It is now time for ILO Member States to engage in profound reflection on what is wise and expedient with a view to forging a sustainable path for the development of a genuinely free and independent trade union movement

⁴¹ Ibid., 144–5.

that can exercise its activities in a climate free from violence, intimidation and threats of any kind.

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Kamala Sankaran¹

► Democracy, universalism and informal employment: The Committee on Freedom of Association and South Asia

Introduction

The 70th anniversary of the Committee on Freedom of Association (CFA) is an occasion to reflect on the contribution of this specialized ILO supervisory machinery focussing on freedom of association. The Declaration of Philadelphia indicates that “freedom of expression and of association are essential to sustained progress”. The pre-eminent position of freedom of association, and its consequential privileged position among labour standards, was also apparent in the (now discontinued) ILO publication, the *International Labour Code*, which classified a smaller group of Conventions and Recommendations as dealing with “basic human rights”.² The ILO Declaration on Fundamental Principles and Rights at Work, 1998, which highlights four categories of fundamental principles and rights at work, added the category of the abolition of child labour to the earlier grouping of “basic human rights”.

This paper focuses on how the CFA has influenced democratic processes and trade union rights with respect to countries in South Asia. The countries in this region by and large share a common colonial legacy. Writing on the occasion of the 50th anniversary of the CFA, scholars noted that two of the countries in the region (India and Pakistan) figure in the top 30 countries against which complaints have been filed to the CFA.³ Countries in the region have also responded fairly readily to the recommendations of the CFA. Writing almost 60 years ago, one of the foremost commentators of the ILO during the Cold War period, Ernst B. Haas, noted that countries such as India that are underdeveloped, with mixed economic institutions and assisted by a strong bureaucracy, are those that

1 National Law School of India University, Bengaluru and a member of the ILO Committee of Experts on the Application of Conventions and Recommendations. Views expressed are personal. I am grateful for comments and suggestions received from James Brudney. Errors remain mine.

2 For an analysis of the now-discontinued Code and its relevance, see Tomi Kohiyama and Dražen Petrović, 2019. ‘The International Labour Code – Myth or Reality?’, in Politakis, G., Kohiyama, T., and T. Lieby (eds), *ILO100: Law for social justice*, Geneva, 815–858.

3 See Gravel, E., Duplessis, I., and B. Gernigon, 2001. *The Committee on Freedom of Association: Its Impact over 50 Years*, Geneva, ILO, p. 72.

show the greatest improvement upon a complaint being referred to the CFA.⁴ Over the years, the South Asian region continues to have its fair share of complaints to the CFA: Bangladesh (17), India (70), Nepal (5), Pakistan (31), Sri Lanka (12).⁵

The complaints to the CFA cover a wide range of issues dealing with freedom of association. The next three sections focus on the jurisprudence developed by the CFA dealing with democracy, restrictions on trade union rights during public emergencies and workers in the informal economy, in order to understand the role of the CFA in this region.

1. Democracy and freedom of association

Freedom of association is seen as both a legitimate goal for workers to sustain themselves, and also as the gateway and means to advance the remaining international labour standards pertaining to the world of work. The principle of universalism that underpins the ILO (as well as other international organizations) makes its international labour standards applicable to a Member State irrespective of the political or institutional arrangements within the country. What is noteworthy is that the Declaration of Philadelphia, adopted in the closing years of the Second World War, made a connection between democratic processes and the enjoyment of freedom of association, without endorsing any particular political or economic system.⁶ Subsequently, the ILO made a connection between democracy, civil liberties and trade union rights.⁷

The CFA has often pointed out that, when a State becomes a Member of the ILO, it accepts the fundamental principles in its Constitution and the Declaration of Philadelphia, including the principles of freedom of association.⁸ Public accountability is a feature of the procedure adopted by the CFA when considering complaints. The need for governments to reply to a complaint by a trade union, even if the infringement is by a private employer, extends the vertical and horizontal accountability of the government to the ILO and to individual trade unionists within the country. The provisions of the ILO Constitution dealing with federal states compel a federal state to speak to the CFA with a single

4 Haas, E.B., 1964. *Beyond the nation-state: Functionalism and international organization*, Stanford University Press.

5 For cases from India, see Sankaran, K., 2009. *Freedom of Association in India and International Labour Standards*, Nagpur, LexisNexis Wadhwa.

6 The Declaration of Philadelphia, after noting that “poverty anywhere constitutes a danger to prosperity everywhere”, goes on to assert that “(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in *free discussion and democratic decision* with a view to the promotion of the common welfare” (emphasis supplied).

7 ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties, op. cit.; and ILO, 1992. *Democratisation and the ILO*, op. cit.

8 CFA, Compilation of decisions, para. 44.

voice.⁹ The easy accessibility of the reports of the CFA may sometimes serve as the only record in the public domain of infringements of trade union rights in countries where there is a clampdown on civil liberties. Yet, some sections of workers are consistently absent from the ‘docket’ of the CFA, notably workers in the informal economy, which poses a challenge to the potential influence of the CFA.¹⁰

There is obviously an overlap between political and purely economic, bread and butter unionism. The CFA has always been prepared to acknowledge this overlap. The political views of trade unions are often manifest in their publications, actions, fund-raising and strike action. Dealing with an early complaint by a Bangladeshi trade union that the Government had prohibited publication of its weekly newspaper, the CFA observed that the chief role of such publications is to advance the interests of trade union members and workers generally. Yet, it also noted that it would be difficult to separate purely trade union concerns from broader political matters. The CFA concluded that: “In view of the fact that these two notions overlap, it is inevitable and sometimes proper for trade union publications to take a stand on questions which have a political aspect as well as on strictly economic and social questions. However, the Committee also considered that it is only in so far as they do not allow their professional demands to assume a clearly political aspect that trade union organisations can legitimately claim that there should be no interference with their activities”.¹¹

This conclusion underscores the links between trade unions and civil liberties, and recognizes the social mandate of trade unions. This view of the CFA finds endorsement in the 1970 ILC Resolution concerning trade union rights and their relation to civil liberties.¹² The emphasis on creating a conducive environment for the enjoyment of civil liberties also draws attention to the central role of the Government, even in the case of private sector workers, and that “the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government”.¹³

9 For instance, India and Pakistan (and now more recently since 2015, Nepal) are federal states. Where the political party at the centre varies from the provincial government, or where the issues relate to matters within the specific domain of the provinces (such as matters of law and order in India, or labour matters, following the 18th constitutional amendment, in Pakistan), there are inevitable delays in responding to the CFA. The role of the central government is often only to transmit the observations of the CFA, and ensuring compliance by provincial governments remains a challenge. For details of the constitutional amendment in Pakistan and its effect on labour matters see, Furqan Mohammed, 2012. “Protecting Pakistani Laborers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power”, *Loyola University Chicago International Law Review*, 9(2), 265–296.

10 The final examination of the complaint is deferred so as to allow governments to reply, and additional material may also be filed by the complainant. Following the CFA’s final observations, matters continue to be followed up. As a result, a complaint may take several years to be finally disposed of. The CFA’s scrutiny in an ongoing complaint relating to the Maldives indicates the care and patience with which its examination proceeds. Dealing with the complaint filed in 2014 concerning the use of disproportionate force against strikers, along with repeated arrests, the CFA has noted that the procedure it adopts of seeking views from all concerned “is to promote respect for this freedom in law and in fact”. See CFA, Case No. 3076 (Maldives), Report No. 391, 2019, para. 399.

11 CFA, Case No. 729 (Bangladesh), Report No. 141, 1974, para. 16.

12 ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties, op. cit.

13 CFA, Case No. 3076 (Maldives), Report No. 391, 2019, para. 410.

Yet, the CFA has been cautious not to conflate political activities and trade union activities, and has drawn bright lines around those trade union activities which it would recognize and those which are not peaceful or which are in violation of the law of the land. The greater challenge for the CFA in protecting freedom of association has been in cases where the ordinary law has been suspended or greater powers have been granted to the executive during periods of public emergency. The next section examines the declaration of public emergency in South Asia and the CFA's role in the protection of trade union rights in the region.

2. Effect of public emergency

Many of the countries in South Asia have had periods of public emergency, and in some instances, the imposition of martial law.¹⁴ Writing nearly 100 years ago, the political theorist Carl Schmitt indicated that during such emergencies "the state remains, whereas law recedes".¹⁵ Scholars note that many liberal constitutions of the Anglo-American tradition do not contain provisions for the imposition of emergency, but constitutions in the South Asian region have explicit provisions authorizing such imposition, which have been used off and on. The extent of judicial review of proclamations of emergency by the national courts has varied across the countries of the region, and court decisions have yielded a rich body of constitutional principles addressing, inter alia, questions of proportionality and necessity. Of particular interest here is that the CFA, when dealing with the effects of such emergency proclamations on trade union rights, has not shied away from examining the consequences of such public emergencies and has called for the review of legal provisions or executive orders where required.

A complaint relating to Sri Lanka illustrates the manner in which the CFA has dealt with complex questions concerning the curtailment of trade union action and collective bargaining due to such emergency regulations.¹⁶ Following a dispute over the conclusion of a wage agreement, the workers in a State-owned port went on a work-to-rule strike. On a challenge by some affected apparel organizations, the Supreme Court of Sri Lanka ordered a temporary prohibition of such strike action on the ground of prima facie illegality and the loss to the nation as a whole. In the meantime, the Sri Lanka Government issued the Emergency (Miscellaneous Provisions and Powers) Regulation No. 01 of 2005

14 Kalhan indicates that the military often plays a much greater role domestically in parts of Asia than it has historically in many liberal constitutional democracies See Kalhan, A., 2010. "Constitution and 'extraconstitution': Colonial emergency regimes in postcolonial India and Pakistan", in Ramraj, V. and A. Thiruvengadam, (eds) . *Emergency powers in Asia: Exploring the limits of legality*, Cambridge University Press.

15 Cited in Ramraj, V., 2010. "The emergency powers paradox", in Ramraj and Thiruvengadam, *Emergency Powers in Asia*, op. cit., p. 25.

16 CFA, Case No. 2519, filed by the Free Trade Zone and General Services Employees Union, the Jathika Sewaka Sangamaya, the Suhada Waraya Sewaka Sangamaya, the United Federation of Labour, the Union of Post and Telecommunication Officers and the Dumriya Podhu Sewaka Sahayogitha Vurthiya Samithiya, supported by the International Textile, Garment and Leather Workers' Federation (ITGLWF) and the International Transport Workers' Federation (ITF).

under the Public Security Ordinance covering an expanded schedule of services, including ports, deemed to be essential. The Government in its reply also indicated that it would be appropriate if the CFA were to defer consideration, as a suit concerning these matters was still pending before the Supreme Court.

However, the CFA, while noting that internal judicial procedures were always given due consideration, concluded that its own competence was not dependent on the exhaustion of national procedures and proceeded with its consideration of the case. On examination of the complaint, the CFA concluded that “generally speaking, ports do not constitute an essential service in the strict sense of the term”.¹⁷ Further, prohibiting a strike when “no evidence has been put forward to establish the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population”¹⁸ was contrary to the principles of freedom of association. The CFA recommended that the Government review the emergency regulation and the list of services included as ‘essential’ in consultation with workers’ and employers’ organizations and in light of Conventions Nos 87 and 98. The CFA added that: “Should the case still be pending before the Supreme Court, the Committee requests the Government to take the necessary measures to expedite the judicial process and ensure that the Committee’s conclusions, particularly those concerning the exercise of the right to strike, are submitted for the Supreme Court’s consideration”.¹⁹

The follow-up to this case by the CFA indicates that the employers objected to the views taken by the CFA regarding the protection given to go-slow actions. The Government, in its further reply, also provided a copy of the Supreme Court order which noted that, after the prohibition of the strike action, the collective agreement was concluded. Yet the Court rebuked the complainants (who were parties in the matter before it) for proceeding to the CFA while the matter was sub judice. The CFA noted that the Court “maintained that, as the organizations concerned owed a paramount duty to have matters already before the Court concluded, they therefore should not have sought redress from an external body; their complaint to the Committee, as such, amounted ‘per se to defiance of [the] Court and of the law of this Country’”.²⁰

The CFA has often put on hold its consideration of a matter pending examination by a national judicial body of the substance of the complaint. When doing so, it has expressed the hope that domestic courts “will take into consideration the principles of freedom of association and the Committee’s previous conclusions in this case”.²¹ Yet, in cases such as the one relating to Sri Lanka, the CFA continued to maintain that it was competent to examine the effect of the Emergency Regulation and its compliance with the provisions

17 CFA, Case No. 2519 (Sri Lanka), Report No. 348, 2007, para. 1142.

18 Ibid.

19 Ibid., para. 1156.

20 CFA, Case No. 2519 (Sri Lanka), Report No. 350, 2008, para 205.

21 See, for instance, CFA, Case No. 3076 (Maldives), Report No. 391, 2019, para. 402.

of Conventions Nos 87 and 98, which Sri Lanka has ratified. While national courts may or may not have the jurisdiction to examine the legality of an emergency regulation or proclamation under the principles of proportionality, the CFA has steadfastly continued with its examination of the effect of such emergency regulations on trade union rights. Indeed, the CFA noted that, given the mandate of the ILO, as set out in its Constitution, “the matters dealt with by the Organization in this connection no longer fall within the exclusive sphere of States and the action taken by the Organization for the purpose cannot be considered to be interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to attaining the aims assigned to it”.²² The continued examination and follow-up of the case also resulted, as the CFA noted with satisfaction, in the repeal by the Government of the schedule of essential services provided for in Emergency (Miscellaneous Provisions and Powers) Regulation No. 01.

Complaints have been filed with the CFA alleging the arrest of leaders under preventive detention laws and the severe restriction of trade union rights, particularly strike action, during periods of public emergencies in most of the countries of South Asia. Due to the difficulties experienced by trade unions during such periods, the CFA’s rules of procedure, which confer standing on international trade unions to bring complaints on behalf of their affiliates within Member States, have been used by national trade unions. The first session of the CFA in 1952 took up for consideration the first complaint from India brought by both an Indian and an international trade union regarding the effects of the imposition of a state-level public security law. Similarly, the first case from Pakistan to the CFA relating to public security laws was brought by a large number of international trade unions.²³

Apart from proclamations of public emergencies, there have also been instances of the imposition of martial law. There is a distinction between a declaration of emergency and the imposition of martial law, and the CFA is mindful of this distinction.²⁴ Some countries in the region have also been placed under martial law through proclamations under which the Constitution may itself be suspended or abrogated, and the normal system of judicial redress may become unavailable. The CFA has emphasized the need for judicial oversight of action taken by the executive during martial law. For instance, in cases where trade unionists have been arrested or charged under laws made during martial law, the CFA has indicated “that appeals from labour court decisions may, under martial law, only

22 CFA, Case No. 2519 (Sri Lanka), Report No. 350, 2008, para. 206.

23 CFA, Case No. 5 (India), separate complaints by the Hind Mazdoor Sabha and the World Federation of Trade Unions, Report No. 4 (1953); Case No. 49 (Pakistan), separate complaints by the World Federation of Trade Unions, the Netherlands Unified T.U, the Pancyprian Federation of Labour, the Burma Trade Union Congress, the Confederation of Brazilian Workers, the Arab Trade Union Congress (Nazareth), the Trade Unions International of Workers in the Building, Wood and Buildings Materials Industries (Helsinki), the National Federation of Building, Public Works and Building Materials Workers, the Central Council of Trade Unions (Prague), the Textile and Clothing Workers' Trade Union International (Warsaw), and the International Union of Agricultural and Forestry Workers.

24 CFA, Compilation of decisions, para. 200.

go to the Chief Martial Law Administrator, a Government authority. This is contrary to one of the longstanding principles of freedom of association, according to which the final review of labour disputes must be by judicial bodies, not martial law authorities”.²⁵ This approach highlights the importance that the CFA places on the rule of law, as the context within which trade union rights can be enjoyed. Its understanding is not to be linked merely to electoral democracy or the encoding of trade union rights within the law, but translates into the enjoyment of civil liberties in practice, and also the requirement of an independent judicial review of administrative action.

Following the closure of a complaint against a Member State that has ratified Conventions Nos 87 and 98, the CFA calls on the CEACR to monitor the follow-up regarding any changes in law and practice that it may have recommended as part of its report. For instance, in the case from Bangladesh discussed above, the complainant indicated that laws made under martial law, the Industrial Relations (Regulation) Ordinance (No. XXVI) of 30 August 1982 and the "guidelines for determination of collective bargaining agents" published under that Ordinance on 6 September 1982, violated Conventions Nos 87 and 98. The CFA noted that the CEACR too in its report had commented on these restrictions and made a request to the Government. The CFA concluded that it “would endorse these comments and requests”.²⁶ The coordinated action of the supervisory bodies seeks to translate their recommendations into the law and practice of Member States.

3. The CFA and the informal economy

Trade union density is fairly low in the countries of South Asia, Sri Lanka had a relatively higher rate of 15.5 per cent (in 2016), while among the other countries in the region, India had a density rate of 12.8 per cent (2011), while in Pakistan it was 5.6 per cent (2008).²⁷ Other reports indicate that Bangladesh and Nepal had a trade union density of 11 per cent each.²⁸ The reasons for the low trade union density could be several, and particularly the large numbers in informal employment, including those in self-employment and those working as unpaid family workers. Such workers often work in scattered establishments, including their own homes. But even in relatively more organized workplaces, such as large-scale establishments, the replacement of regular workers with temporary sub-contracted workers, who are vulnerable and not unionized, has also led to a low level of trade union density. Convention No. 87, with its emphasis on the right to organize “without distinction whatsoever”, stresses the wide reach of this core Convention.²⁹

25 CFA, Case No. 1214 (Bangladesh), Report 230 (1983), para. 346.

26 *Ibid.*, para. 350.

27 ILO, [Statistics on union membership](#), ILOSTAT.

28 Danish Trade Union Development Agency, [Labour Market Profile 2019: Nepal](#), and [Labour Market Profile 2020: Bangladesh](#).

29 Apart from India and Nepal, the other countries in South Asia (Bangladesh, Maldives, Pakistan and Sri Lanka) have ratified Convention No. 87.

Over the past two decades, the ILO has focussed on forms of work which predominate in the informal economy, for example in its standards on home work, domestic work and part-time work, and has also set out a road map for a transition from the informal to the formal economy.³⁰ Has this resulted in a greater number of cases coming before the CFA from workers in the informal economy? The focus of most complaints has been on those in employment relationships and working in the formal economy. Complaints involving self-employed rural workers, marginal agricultural workers, artisanal fishers, forest workers, street vendors, rickshaw pullers, waste pickers or homeworkers have largely not been brought before the CFA. While the CFA has repeatedly emphasized the universality of the right to form trade unions “without any distinction whatsoever”,³¹ the low levels of unionization of informal workers may account for the relative absence of complaints to the CFA and the consequential lack of jurisprudence on how trade union rights can be restricted in the case of *self-employed* workers in informal employment.

In contrast, there is greater CFA ‘case law’ pertaining to those in employment *relationships* in the informal economy. Take, for instance, workers engaged in waged work, but whose engagement is sporadic and casual, and who are treated as ‘volunteers’ who merely receive an honorarium, not a wage.³² Case No. 3100 concerning India is an example. Tens of thousands (130,000) of young persons were recruited as “civic police volunteers” to supplement mainstream policing and provide short-term guard duties in the state of West Bengal prior to the elections in 2014. The “volunteers” were paid sporadically and were dismissed after a few months.

In its reply, the Government stated that the civic volunteers, earlier known as civic police volunteers, were enrolled to supplement the workforce for policing on special occasions, such as festivals and emergency situations for traffic management, that this was purely voluntary service to involve the community in some police-related duties on certain occasions, that it was not regular employment, for which there could be claims relating to the payment of wages, and that an honorarium was paid to them. Further, the Government stated that civic volunteers were not under any obligation to work for the Government and were free to take up any employment with any government or private agency at any point of time.

While the Government denied any employment relationship in the case of civic volunteers, the CFA indicated that “it considers that the activities carried out by the West Bengal civic police volunteers *constitute work* and as such are covered by the principles of freedom of association”³³ (emphasis added). It also recalled that, according to the

30 See the Part-Time Work Convention, 1994 (No. 175), the Home Work Convention, 1996 (No. 177), the Domestic Workers Convention, 2011 (No. 189), and the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

31 CFA, Compilation of decisions, para 329.

32 Interns receiving a stipend could also form part of this group of workers disguised as “volunteers”.

33 CFA, Case No. 3100 (India), Report No. 377 (2016), para. 370.

principles of freedom of association, such workers have the right to establish and join organizations of their own choosing.

The CFA referred to the *State of the World Volunteerism Report* (2011), drawn up by UN Volunteers, which states that the “three criteria of free will, non-pecuniary motivation, and benefit to others can be applied to any action to assess whether it is volunteerism”. The honorarium paid in this case, while lower than the minimum wage, was not a token amount. The CFA observed that it was “beyond a symbolic compensation to cover expenses” and that the volunteers were mainly “unemployed young people who enrol in the force precisely in order to collect an honorarium in the absence of other sources of income and thus can be considered to have pecuniary motivations”.³⁴ The CFA also did not accept that these civic volunteers were purely volunteers, since the Government orders contained provisions for their successive and continued enrolment for a fixed duration. While not explicitly declaring that the civic volunteers were in an employment relationship (albeit of short duration), the CFA instead maintained that it was a category of “work”. The CFA added that, in light of the above, it considered “that the work of civic volunteers, which entails compensation, determination of working hours, and continuity of service, must similarly afford these workers with the protection afforded by freedom of association principles, including the right to collective bargaining.”³⁵ Accordingly, the CFA called on the Government to engage in constructive social dialogue and collective bargaining with a view to resolving these matters. It is worth noting that, although the CFA cautiously refrained from declaring the volunteers employees, it sought to apply the principles of freedom of association to civic volunteers as persons who “work”.³⁶ The CFA also called for social dialogue and collective bargaining between the Government and the civic volunteers.

Most cases that come before the CFA pertain to waged employees who are in regular/casual/part-time/temporary employment relationships. The case of civic volunteers is significant because it broadens the category of those who approach the CFA to include those who “work”. The nature of this expansion includes self-employed or own-account workers, such as those in the informal economy. It also includes those whose employment status may be disguised or ambiguous (as indicated in the Employment Relationship Recommendation, 2006 (No. 198)), and who, on the basis of the facts, could be determined to fall within the category of those who “work”. In the case of the informal economy, this could further include the category of own-account workers who in turn employ unpaid workers.

The use of the expression “social dialogue” by the CFA is in addition to the expression “collective bargaining”, which is normally used in the context of the principles of freedom

34 Ibid., para 372.

35 Ibid., para 373.

36 For the status of “volunteers”, see La Hovary, C., and J. Agustí Panareda, “What is work? A malleable notion in the ILO’s legal pursuit of social justice”, in Politakis, Kohiyama and Lieby (eds), *ILO100: Law for Social Justice*, op. cit..

of association under Conventions Nos 87 and 98. The social dialogue concept allows for negotiations and agreements between categories of self-employed workers and public authorities as part of freedom of association, and allows for agreements to take place between workers and those who engage them. This is in line with the Committee of Expert's observations in its 2012 General Survey regarding the broad scope of social dialogue and collective bargaining.³⁷ Similarly, by emphasizing the nature of the “work” they perform, rather than their employment status, this case opens up the possibility of organizations of gig and platform workers approaching the CFA in future. This decision goes a step further in not only bringing visibility to those in informal employment, but is itself a step in the transition to formalization. It will also help to link the legal and juridical categories of “employees” and “workers” more closely to the comprehensive broad normative and statistical concept of “workers” used in ILO standards and the statistics collected by the various countries.³⁸

Conclusions

Over its 70-year history, the CFA has built up a considerable body of jurisprudence relating to trade union rights. The cases that come before the CFA are a reflection of the geographical and sectoral diversity of those who work, and who see value in approaching the CFA for its consideration. The CFA's own procedures and manner of functioning have enhanced its ability to influence outcomes in Member States. Its rules of receivability, which grant standing to national and international organizations, have offered visibility and voice to a greater cross-section of workers. The reports of the CFA, which meticulously record the substance of the complaints, the replies of the governments and the conclusions of the Committee, serve as repositories of public deliberation. At the same time, this success requires broader dissemination of the decisions and jurisprudence of the CFA in member States. As the CFA looks toward its future, and as the world of work encompasses different and newer forms of work, the relevance of its decisions is bound to grow.

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37 ILO, 2012. *Giving globalization a human face*, op. cit., paras 75 and 209.

38 See Sankaran, K., 2011. “Informal Employment and Challenges for Labour Law”, in Davidov, G., and B. Langille (eds.), *The Idea of Labour Law*, OUP, New York.

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Emah Frédérique Kangah

► Trade union freedom/right to strike: An African topic too

Introduction

Trade union freedom is a fundamental right for all workers and employers. Indeed, some will even say that there is no democracy without the power and the right to associate, to defend people's interests, to create and to dispute the applicable rules.

According to the ILO, freedom of association is a basic right which “goes together with freedom of expression and is the basis of democratic representation and governance. People need to be able to exercise their right to influence work-related matters that directly concern them. In other words, their voice needs to be heard and taken into account”.¹

However, it appears that it is more often discussed and enforced in Western countries than in African and other third-world countries. This is mainly due to the fact that, for a long time now, Western countries, such as European countries, which have been very invested in matters of liberties, have implemented legislation and processes to ensure that all workers and employers receive the support they need in their professional lives. This is why it is very common to identify a large set of sources: not only international treaties, which have long been ratified by many European countries, but also national employment legislation, which in most cases is very broad and full of requirements and rights for both workers and employers.

In any case, trade union freedom constitutes the right for people to organize themselves, create unions and partake in union-related activities.

At the international level, the ILO Governing Body Committee on Freedom of Association (CFA), created in 1951 to examine any complaints submitted by trade unions or employers' organizations, has been established. The CFA is considered to be the true guardian of this freedom.

The numerous Conventions, and notably Convention No. 87 on freedom of association, the various Recommendations, and the supervision carried out by the Governing Body are very useful instruments for reinforcing the idea that freedom of association and the right to strike are fundamental freedoms that must be enforced throughout the world.

1 ILO, 2002. *The International Labour Organization's fundamental Conventions*, Geneva, p. 9.

Thus, when clear violations occur in a country, the ILO can take a stand and remind the country of its obligations in the hope that the country concerned will change its practices and comply with the applicable laws and regulations.

Regular reports are also tools that allow for the early identification of countries that are lagging behind in terms of respect for fundamental freedoms.

At the European level, there are also rules which have been implemented to enforce this freedom for all workers and employers.²

At the national level, and in the case of France, for example, a pioneer country for freedom, labour law protects both parties. Collective bargaining agreements³ are in place in many sectors, which help to create specific rules that are more appropriate to the sector (e.g. specific bonuses in the construction sector, special benefits in the banking and insurance sector, specific leave rights, special departure procedures, and so on).

In most cases, these agreements were established a long time ago to protect the workers. However, they are regularly revised and updated, which means that social dialogue is real and progressive in France.

Another example of the applicability of social dialogue in France is the mandatory annual negotiations (*négociations annuelles obligatoires*), in which both employer and employee representatives are required to meet to discuss certain topics according to a certain periodicity (salaries, working hours, professional equity and quality of life at work, etc.).⁴

The corollary of this freedom of association is certainly the possibility for individuals to challenge the applicable rules by using the right to strike.

The right to strike is universal and is guaranteed in the Universal Declaration of Human Rights of 1948, in Articles 19 and 20. Article 19 provides that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Article 20 provides that: “Everyone has the right to freedom of peaceful assembly and association (...)”.

It is also guaranteed in the Preamble to the French Constitution of 27 October 1946,⁵ which is quite significant, since the rights and freedoms in the Preamble have constitutional value.⁶

2 The European Convention on Human Rights, 1950, Article 11, the European Social Charter, 1961, Article 5, the Community Charter of the Fundamental Social Rights of Workers, 1981, Article 11.

3 See Légifrance, [Accords de branche et conventions collectives](#).

4 France, Code du travail, article L.2242-1 et seq.

5 France, [Préambule de la Constitution du 27 octobre 1946](#).

6 France, [Conseil constitutionnel, Le Préambule de 1946](#).

At the European level, this right has also been recognized by various provisions, and notably the European Convention on Human Rights of 1950, which provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or of the administration of the State”.⁷

In practice, there may be differences in the way in which the right to strike is exercised in Europe, especially during the COVID-19 pandemic, when it was significantly limited in some countries,⁸ such as Portugal.⁹ However, it is obvious that it is an essential tool to ensure the defence of people’s interests.

Moreover, in order to reinforce this principle and the idea that everyone can defend their views, it is generally accompanied by the principle of non-discrimination,¹⁰ which means that no one should be treated differently or unfairly because of the exercise of the right to strike.

This may include financial penalties, dismissal or loss of benefits as a result of the exercise of this fundamental right. Unfortunately, the principle of non-discrimination following the use of the right to strike is not always respected. As a matter of fact, many people are still subject to sanctions for daring to publicly denounce their working conditions or protest against the practices in place in the company or a country.

With regard to freedom of association and the right to strike, it is apparent that the workers concerned in Western countries are usually very aware of these rules and do not hesitate to use them when necessary.

This can notably be explained by extensive information (rights often recalled in employment contracts, internal regulations and sometimes the existence of memos posted on the premises). In fact, workers know exactly what they are exposed to in the event of a strike and know that, unless there is abuse, they will not be subject to specific sanctions for exercising their rights.¹¹

7 European Convention on Human Rights, 1950, Article 11.

8 Fernandez, V. “Les pires atteintes au droit du travail en Europe depuis le début de la crise sanitaire”, *Rapports de force*, 8 May 2020.

9 Pereira, C., and A. Rodrigues. “O estado de emergência suspende o direito à greve!”, *PUBLICO*, 25 March 2020.

10 France, Code du travail, article L.1132-1.

11 See, for example, France, Code du travail, article L.2511-1 et seq.

This means that, in most cases, Europeans globally enjoy these freedoms and exercise their rights without fear of reprisal. National and European courts also play their part, most often by strictly applying the law and the texts in force.

While Europe has long been armed with tools to guarantee these fundamental freedoms, Africa, together with other parts of the world (the Middle East, Latin America) seems to be far behind on these issues and continues to face many challenges. Of course, differences can also be found in the terms and conditions of exercising this right from one country to another in Europe.

Some countries take honourable measures and show themselves to be in favour of the freedoms of association and the right to strike, while others find it difficult to guarantee these freedoms on a daily basis. In fact, abuses can be characterized in certain instances, where there can be excesses, in particular by the forces of law and order against people, or by some companies,¹² against workers who wish to exercise their right to strike.

It would appear that African countries are not totally at the same level with regard to fundamental freedoms, and more particularly trade union freedom and the right to strike. One might wonder about this delay and the difficulties in enforcing and respecting trade union freedom and the right to strike in these countries.

To address this issue, it would be interesting to: (i) evoke the example of Tunisia, which is historically a country where freedom of association and the right to strike have been enforced; and (ii) to take into consideration the fear of reprisal, which is omnipresent in an often fragile democratic context, and evoke the fact that, despite the impetus of the CFA, African countries are far behind in the effective application of these freedoms.

1. State of affairs in matters of freedom of association and the right to strike in Tunisia

It would be rather complicated to address freedom of association and the right to strike in all African countries, as this is a very complex issue that is not experienced in the same way from one country to the next.

However, it is very interesting to note that some countries are forerunners in terms of freedom of association in Africa. For many decades, they have had extremely strong trade unions, which have an almost central place in the trade union and political world of the country. Let's take the case of Tunisia, with the well-known General Federation of Tunisian Workers (UGTT).

Tunisia has long been a Member of the ILO and ratified Conventions Nos 87 and 98 in 1957. At the national level, the very recent Constitution, dated 2014, guarantees the

¹² Amnesty International. "Liberté syndicale pour le personnel d'Amazon ! Le respect des droits des travailleurs n'est pas optionnel", November 2020.

freedom to form political parties, trade unions and associations. It also guarantees the right to strike, freedom of assembly and pacific protest.¹³

Although Tunisia has many provisions protecting freedom of association and the right to strike, it is almost impossible to discuss the Tunisian example without highlighting the importance of the UGTT, which was created in 1946 and has had and continues to have a very important influence on the decisions that are made in the country. This union organization has around 750,000 members. It is therefore undeniable that, in terms of influence, it has particularly important power.

While Tunisia experienced a revolution in 2010, notably based on various claims by the people, this quasi central union has continued to occupy an exceptional place, and even participated in the exit of the country from the crisis through social dialogue.

In fact, in 2013, the UGTT did not hesitate to bring together many organizations, such as the Tunisian League for the Defence of Human Rights, the Bar Association and the Tunisian Confederation of Industry, Commerce and Crafts (UTICA), an employer's organization, to establish a plan for a way out of the crisis.¹⁴

This social dialogue was a success, as it led to the definition of a plan for a democratic constitution, an electoral calendar and the establishment of a government of technocrats. For all these reasons, in 2015, the UGTT was one of the four recipients of the Nobel Peace Prize for its support to the democratic transition in Tunisia and for rescuing the country from a certain crisis by organizing national dialogue.¹⁵ And since then, the UGTT has continued to be a force to be reckoned with.

For example, in 2017, the UGTT invited the people to mobilize against the draft budget law, which included a wage freeze in the public sector for a considerable period of time.¹⁶

Another example was in January 2019, when the whole country was paralyzed by a general strike called by the UGTT. Indeed, throughout the country, the health sector, universities, public transport, and even the airport, experienced closures or severely reduced service as a result of the general mobilization. The UGTT was calling for increases in wages,¹⁷ and the Government finally gave in with a phased-in salary increase for workers in the public sector.

Although the UGTT is not unanimous and is also facing many challenges in Tunisia, notably relating to its membership and representativeness, it is clear that it is a major player in social struggles and participates in major decisions in the country.

13 Tunisia, Constitution, Articles 35 to 37.

14 Bozonnet, C. "Le syndicat UGTT, Nobel de la paix et «pièce maîtresse du dialogue national» en Tunisie", *Le Monde*, 10 December 2015.

15 IndustriALL. "UGTT in Tunisia receives Nobel Peace Prize", 9 October 2015.

16 *Al Jazeera*. "Tunisia's powerful UGTT workers union holds nationwide strike", 17 January 2019.

17 *Capital*. "Grève massive dans le secteur public en Tunisie", 17 January 2019.

The influence of this organization could be one of the reasons why some say that Tunisia is the exception among the countries affected by the “Arab spring”, which have experienced many internal conflicts.¹⁸ However, it may be asked whether other trade unions exist in Tunisia, and whether they are truly involved in negotiations and their voices are heard.

In a complaint to the CFA in 2016, the Tunisian Workers’ Federation (UTT) claimed that it had been created in 2011 “as a result of the trade union pluralism advocated by the national Constitution”.¹⁹ Although, it has about 1,500 affiliated trade unions throughout the country, and about 150,000 members, it claims that there are many “obstacles to the exercise of freedom of association faced by affiliated organizations in enterprises, particularly the exercise of the right to information, the right of assembly and the right to engage in collective bargaining”.²⁰ The UTT notably claims that staff representatives are unfairly dismissed, unfairly sanctioned or that there is real discrimination towards them. It also emphasized that it does not receive its share of the Public Economic Development Fund under the statutory provisions, to which the Government replied that the country was compliant with its international commitments and emphasized that union organizations are placed on an equal footing.

In response, the CFA pointed out that:

one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate they hold from their trade unions.²¹

It also requested the Government to keep it informed of the outcome of Mr. Zoghbi’s legal action against the dismissal order against him and sought clarification from the Government on the issue of the UTT’s share of the Public Economic Development Fund.

The question of trade union pluralism is therefore very real and the guarantees and protection offered to the various trade unions do not always seem to be well observed in practice in Tunisia.

In a decision by the Tunisian Administrative Tribunal, dated 5 February 2019, at the initiative of the Tunisian General Confederation of Labour (CGTT), the tribunal appears to have ruled in favour of trade union pluralism. In fact, in this decision, the Tribunal notably granted it the right to participate in all national social negotiations and the right to subsidies.²²

18 Chahed, N. “Tunisie: La nouvelle Constitution, cinq ans après”, AA, 27 January 2019.

19 CFA, Case No. 3240, Report No. 384, para. 530.

20 Ibid., para. 531.

21 Ibid., para. 542.

22 WEBMANAGERCENTER. “Appel de la CGTT au respect du pluralisme syndical en Tunisie”, 30 April 2019; *Kapitalis*. “La justice tunisienne se range du côté du pluralisme syndical”, 27 February 2019.

Although many unions, led by the CGTT, have called for this decision to be put into practice, the subject remains as delicate as ever and Tunisia is still faced with obstacles to trade union freedoms.

2. Fear of reprisals in countries that are economically and politically fragile

Undoubtedly, while some countries have a significant foundation in the area of freedom of association, not all countries have adopted the same approach. In fact, several African countries have not ratified Conventions Nos 87 and 98. For example,²³ Guinea Bissau, Kenya and Morocco have not ratified Convention No. 87, even though it is a fundamental Convention. In other words, these countries have opted not to give effect to these fundamental principles.

According to the 2019 ITUC Global Rights Index,²⁴ which ranks countries according to their level of respect for labour rights, Kenya, Morocco, Namibia and Zimbabwe are among the African countries that do not provide sufficient protection and guarantees for freedom association and the right to strike. Unfortunately, this situation is not isolated.²⁵ Indeed, it appears that the right to strike has been violently repressed in many African countries over recent decades.

For example, in Douala, Cameroon, many dockers were hurt during a peaceful protest in June 2018. One of them even lost an arm when trying to throw back to the police a grenade that had already been primed.²⁶ In addition, an anti-terrorist law was adopted in Cameroon on 23 December 2014, initially to fight against the Boko Haram terrorist sect, like many other African countries which have adopted anti-terrorist laws to protect their citizens against the threat of terrorism.²⁷

However, many have criticized this law due to the fact that, from some angles, it can be seen as an instrument not only to fight anti-terrorist groups, but also to silence the press and significantly limit the right to freedom of association and the right to strike.²⁸ According to this law, and in more general terms, people who organize strikes, express different opinions or write/declare positions that could be considered contrary to the general opinion could be brought before a military tribunal, and even face the death penalty.

23 ILO. NORMLEX. Ratification of Conventions. [Ratifications of C087](#).

24 International Trade Union Confederation (ITUC), 2019. *2019 ITUC Global Rights Index: The world's worst countries for workers*.

25 Amnesty international. "Égypte: Des travailleurs et des syndicalistes reprimés", 4 May 2017.

26 Ndoumbe, N. "Caméroutn: La grève des dockers du Port autonome de Douala tourne au drame", *Actu Cameroun*, 25 June 2018.

27 Olivier, M., and S. Chellali, "Comprendre les lois antiterroristes de 15 pays africains en deux infographies", *jeunafrique*, 20 August 2015.

28 RFI. "Caméroutn: Le presse inquiète de la nouvelle loi antiterroriste", 18 December 2014.

The situation is therefore very serious, as the exercise of these freedoms can lead to the endangerment of people who wish to use them peacefully to ensure that their voices are heard and obtain or encourage through their demonstrations or protest real change in the country.

Indeed, the situation is so serious that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) made an observation in 2021 on this law in which it emphasized that:

In its comments relating to the Act on the suppression of terrorism (Act No. 2014/028 of 23 December 2014), the Committee has drawn the Government's attention on several occasions to the wording of section 2(1), under the terms of which "the death penalty shall be imposed on anyone who [...] commits or threatens to commit any act that may cause death, endanger physical safety, result in bodily injury or damage to property or harm natural resources, the environment or the cultural heritage with the intention of: (a) intimidating the public, causing a situation of terror or forcing a victim, the Government and/or a national or international organization to carry out or refrain from carrying out a given act, adopting or renouncing a particular position or act according to certain principles; (b) disrupting the normal operation of public services or the delivery of essential public services, or creating a public crisis [...]." The Committee has repeatedly expressed deep concern at the fact that some of the situations envisaged in the Act of 23 December 2014 could apply to acts related to the legitimate exercise of activities by the representatives of trade unions or employers in accordance with the Convention, with particular reference to protest action and strikes that would have direct repercussions for public services. The Committee also recalls that, in light of the penalty that may be imposed, such a provision could be particularly intimidating for the representatives of trade unions or employers who speak out or take action within the context of their duties.²⁹

Moreover, it would appear that the requests made by the CFA have not been answered.

In another example, in Harare, Zimbabwe, dozens of protesters were shot and many workers were attacked during a peaceful protest in 2019.³⁰

The ITUC Global Rights Index indicates that the situation is even more serious in some African countries, where strikes and rallies have been totally banned, including Benin, Gabon and Nigeria. In 2020 and 2021, the ITUC Global Rights Index concluded that Egypt and Zimbabwe are among the worst countries for workers due to the many violations of labour law by the Governments that are in office.³¹

Due to these restrictions and the increase in violence, it is understandable that more and more workers are remaining silent and refusing to use their right to strike or to lead or participate in rallies to avoid being subjected to abuse. When the bravest do, they often

29 CEACR, Cameroon, [Convention No. 87](#), observation, 2021.

30 Burke, J. "Chaos in Harare as Zimbabwe riot police violently disperse protesters: Court rejects opposition party's attempt to overturn ban on demonstration in capital", *The Guardian*, 16 August 2019).

31 ITUC, 2021. *ITUC Global Rights Index: The world's worst countries for workers*, Executive Summary.

face serious inequalities of treatment, particularly within companies (discrimination because of the exercise of trade union freedoms, lack of pay increases, and disciplinary measures up to and including dismissal).

In Kenya, workers who are elected as staff representatives face dismissal procedures, because companies try to discourage them from partaking in union-related activities.

Since 2021, seven unions affiliated to IndustriALL Global Union have been campaigning against violations of labour law by the company Style Industries.³² It would appear that, since 2015, Style Industries has refused to recognize the Kenyan Union of Hair and Beauty Workers (KUHABWO). The case has therefore been brought before the competent tribunal, which has ruled that the company must stop the termination of the employment contracts of staff representatives due to their membership of the union. Despite the conclusions of the tribunal, the illegal practices have continued.

The ILO continues to receive complaints from the various African countries relating to the non-observance of the right to strike or freedom of association. When it receives these complaints, it analyses the situation and regularly issues recommendations which, it should be recalled, are of a non-binding nature, so that it cannot completely reverse the situation and apply these provisions in practice. However, it should be noted that in many cases the claims are settled in accordance with the recommendations made.

The other point that should be noted is that one of the problems that frequently arises is that African countries often face democratic challenges of their own and, in such contexts, freedoms are often restricted and limited, and even totally repressed. Freedom of association and the right to strike are not excluded, and for good reason, as they are one of the strongest ways to mark disagreement or disapproval with a method, rule or a certain approach. So, in order to avoid being punished or repressed in any way, many African workers or employers do not therefore really take full advantage of these basic freedoms, for fear of not benefiting from normal professional development, financial sanctions, disciplinary sanctions up to dismissal, harassment and even arbitrary arrest.

Even countries that have ratified the Conventions are not always true actors in terms of protecting and guaranteeing these fundamental freedoms.

This situation is rather regretful, as countries should be able to have a real and concrete idea of people's opinions and/or workers' opinions/positions in companies. Indeed, this is one of the most powerful ways for countries to adopt certain rules, change practices or aim for better practices.

If people are not able to express themselves nationally and in companies by exercising their freedom of association or right to strike, it is not possible to change and make progress. Indeed, protest allows awareness, questioning and ultimately change in several

32 IndustriALL. "Kenyan unions campaign against workers' rights violations at Style Industries", 10 June 2021.

respects. The exercise of these rights acts as a “barometer” of change, which is why there are so necessary.

3. Difficulties in enforcing these freedoms in Africa

The situation regarding freedom of association and the right to strike may be challenging or negative in many African countries. Under the impetus of the CFA, some African countries have tried to respond to the claims made.

As indicated above, the procedure of the CFA is very well managed and allows the Committee to assess the claims of employers or employees’ organizations in the public and private sectors. Indeed, when a complaint is received, the CFA may respond to the complaint, make recommendations or ask the Government to keep it updated on the status of the case. When the country in question has ratified the international Convention, the case can be referred to the Committee of Experts for follow up. It is therefore obvious that the CFA operates within a regulated and well-defined framework.³³

The situation regarding freedom of association in Africa remains somewhat troubling. Indeed, on the basis of the annual report of the CFA, it would appear that, at the global level, Africa is still the region in which it is most difficult to apply and enforce trade union freedoms effectively.

On a scale of 0 to 10, Africa remains at 0 in terms of progress in 2020. Although there are signs of change, Africa still lags far behind other continents where progress has been made in 2020.

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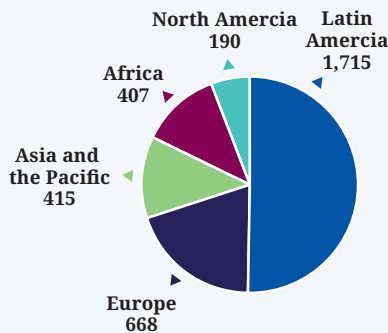
Marius Olivier

► Introduction: African complaints and the Committee on Freedom of Association

Introduction

The quest for the exercise of freedom of association rights by workers in Africa amidst control over and repression of trade unions, criminal prosecution of trade union leaders and infringement of strike and protest action has been of long-standing concern to the ILO, as evidenced by the continuing engagement of ILO supervisory organs with (in particular, trade union) complaints emanating from countries such as Burundi, Eswatini, South Africa, Sudan and Zimbabwe. The sizeable number of freedom of association complaints originating from Africa and considered by the ILO Committee on Freedom of Association (CFA) from 1951 to 2020 confirms the extent to which recourse has been taken to the CFA, in addition to the involvement of other ILO supervisory bodies.

► **Figure 1. Complaints made to the CFA (1951–2020)**



Region	No. of cases
Africa	407
Asia and the Pacific	415
Europe	668
Latin America	1,715
North America	190
Total	3,395

► Source: ILO. "The CFA annual report – 2020", Figure 1, p. 7.¹

* Honorary Professor: Faculty of Law, Nelson Mandela University (South Africa); Extraordinary Professor: Faculty of Law, North-West University (South Africa); Adjunct-Professor: School of Law, University of Western Australia, Perth.

1 ILO, 2021. "Presentation of the Committee on Freedom of Association annual report for the year 2020", Governing Body, 341st Session, Geneva, March (GB.341/INS/12/1(Add.1)). African cases represent fewer than 10 per cent of all complaints made to the CFA. For example, for the period 2008–2020, the figure was 9 per cent (p. 8).

Freedom of association is a foundational principle of the ILO, embedded in the Preamble to the ILO Constitution (1919) and in Part I of the Annex to the Constitution, which reaffirms the fundamental principles on which the Organization is based including, in particular, that “freedom of expression and of association are essential to sustained progress”. Also, the CFA has held that, by membership of the ILO, each Member State is bound to respect a certain number of principles, “including the principles of freedom of association”, which have become customary rules above the Conventions.² This provides the constitutional basis for the examination of complaints of freedom of association violations by the CFA, irrespective of whether the country concerned has ratified the relevant Conventions.³ In fact, the human rights and international law basis of freedom of association is cemented in a host of other United Nations and regional instruments, among others in Article 23(4) of the Universal Declaration of Human Rights (1948), which provides that: “Everyone has the right to form and to join trade unions for the protection of his interests”. This is a specific manifestation of the general reference in Article 20 of the Declaration to the “right to freedom of peaceful assembly and association”.⁴

However, it has to be noted that (continental) Africa’s own human rights instruments fall short of providing and regulating freedom of association in the world of work.⁵ The continent’s foundational human rights instrument, the African Charter on Human and Peoples’ Rights (1981), provides in general terms in Article 10 for the right of every individual to free association, subject to the rider (which, incidentally, is no longer required in the ILO’s constitutional approach to freedom of association) that the individual “abides by the law”. Article 11 in turn provides for the right to assemble freely with others.⁶ Pursuant to these rights, the African Commission on Human and Peoples’ Rights adopted in 2017 continental Guidelines on Freedom of Association and Assembly in Africa.⁷ However, while the Guidelines provide that the “rights to freedom of association and assembly are fundamental rights that should underpin all democratic societies in which individuals

2 CFA, Compilation of decisions, para. 51.

3 Gravel, E., Duplessis, I., and B. Gernigon, 2001. *The Committee on Freedom of Association: Its impact over 50 years*, Geneva, ILO, p. 10; and ILO, [Committee on Freedom of Association](#).

4 See Sweptson, L., 1998. “Human rights law and freedom of association: Development through ILO supervision”, *International Labour Review*, 137(2), 169–194, at 170. For a discussion of the entrenchment of freedom of association in other (international and regional) human rights instruments, see pp. 171–174.

5 However, African instruments do encourage the implementation of the ILO freedom of association instruments. As has been noted, “... [T]he African Charter for Popular Participation in Development and Transformation, adopted in Arusha (United Republic of Tanzania) in February 1990, urged all governments to ‘vigorously implement’ the ILO’s Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and encouraged the trade unions to ‘organise and mobilise rural workers in accordance with ILO Convention No. 141’”. ILO, 1992. *Democratisation and the ILO*, Report of the Director-General, ILC, 79th Session, p. 14.

6 Qualified by the requirement that the “exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others”.

7 African Commission on Human and People’s Rights, 2017. [Guidelines on Freedom of Association and Assembly in Africa](#), p. 4.

can freely express their views on all issues concerning their society”, they fall short of making any reference to freedom of association and assembly in the occupational and labour relations contexts or to the stakeholders engaged in these areas, and particularly unions and employers. The continental deficit therefore stresses the importance of Africa’s engagement with the CFA and other ILO supervisory bodies for the purposes of strengthening freedom of association in work and related contexts.

The prominence of freedom of association in the world of work required a further dedicated normative and institutional response at the level of the ILO. Normatively, this led to the adoption of two core ILO Conventions on freedom of association and collective bargaining, Conventions Nos 87 and 98. Institutionally, and following the adoption of the two Conventions, the ILO came to the conclusion that the principle of freedom of association needed a further supervisory procedure to ensure compliance. Consequently, in 1951, the ILO set up the Committee on Freedom of Association (CFA), a committee of the Governing Body, for the purpose of examining complaints of violations of freedom of association.

Conventions Nos 87 and 98 have been widely ratified by African countries, especially following the inclusion of these two Conventions in the ILO Declaration on Fundamental Principles and Rights at Work of 1998. In fact, all except four African countries have ratified Convention No. 87, and all have ratified Convention No. 98.⁸ Together with the constitutional commitment to freedom of association made by African Member States of the ILO, this comprehensive ratification has provided an ample basis for the CFA to receive and examine freedom of association complaints emanating from Africa. It is worth noting that the 1998 Declaration, as amended in 2022, commits ILO Member States to respect and promote principles and rights in five categories,⁹ whether or not they have ratified the relevant Conventions. The Declaration also makes it clear that these rights are universal, and that they apply to all people in all States, regardless of the level of economic development.¹⁰

1. Freedom of association: An expanded notion and a dynamic interpretation

1.1. Occupational context

Conventions Nos 87 and 98 address in concrete terms specific dimensions of the occupational context of workers’ and employers’ complaints in the framework of their relationship vis-à-vis the State and each other. Convention No. 87 aims to protect both employers and workers and their respective organizations from *State interference*, while Convention No. 98 protects against *anti-union discrimination* and provides for the

8 Guinea-Bissau, Kenya, Morocco and South Sudan. See ILO, NORMLEX, [Ratification by Conventions](#).

9 Freedom of association and collective bargaining; the elimination of forced or compulsory labour; the abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

10 ILO Declaration on Fundamental Principles and Rights at Work, 1998.

duty of the *State to facilitate negotiation of collective agreements*.¹¹ At this level, typical complaints submitted by African trade unions to the CFA concern: protection against acts of interference; protection against anti-union discrimination; collective bargaining infringements; the rights of workers and employers to join and establish organizations of their own choosing and without previous authorization, and of organizations to elect their representatives in full freedom; and the right of organizations to organize their activities and to formulate their programmes.¹²

Even so, the engagement by the CFA and other ILO supervisory bodies has shown that freedom of association has been purposively interpreted and extensively applied to cover notions and situations beyond those explicitly mentioned in Conventions Nos 87 and 98. The best concrete example of this extended interpretation and application relates to the right to strike. Unlike other key international instruments (for example, Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights (1966)), Conventions Nos 87 and 98 do not explicitly recognize the right to strike. Yet, through the supervisory process, the CFA and other ILO supervisory bodies have adopted the general principle that the “right to strike is an intrinsic corollary of the right of association protected by Convention No. 87”.¹³ The ILO views the right to strike as one of the essential elements of trade union rights.¹⁴ As noted by the CFA, the “occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions [...] which are of direct concern to the workers”.¹⁵ This development reflects modern theories of labour relations, which view the labour relations system as three-dimensional, including the government in this framework as a third active force, and the involvement of the social partners, including trade unions, in economic and social policy-making bodies. Strikes that are purely political in nature do not fall within the scope of freedom of association, although the distinction between political objectives, on the one hand, and economic and social interests, on the other, may be particularly complex. Therefore, the CFA has held that trade unions should be able to have recourse to (peaceful) protest strikes, in particular to criticize the economic and social policy of the government.¹⁶ This view has been reiterated by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)

11 See Holmgren, C. 2021. “ILO freedom of association principles: Their particular relevance in the COVID context”, presentation made at the 9th ILERA African Regional Congress, 26 to 29 September.

12 GB.341/INS/12/1(Add.1), op. cit., p. 8.

13 ILO, 1994. *Freedom of association and collective bargaining*: General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), ILC, 81st Session, Geneva, para. 179; CFA Compilation of decisions, para. 754.

14 ILO Resolution concerning trade union rights and their relation to civil liberties (1970), 15.

15 CFA, Compilation of decisions, para. 758.

16 Ben-Israel, B. 1988. *International Labour Standards: The case of freedom to strike*, Kluwer, Deventer, 94–98; Sweptson, 1998, 187, 189.

and has often been applied in the African context, for example in the case of allegations that public servants and workers in the correctional service in Lesotho were prohibited from participating in a protest march.¹⁷

In fact, in a clear attempt to guarantee freedom of association to its fullest extent, the CFA and other ILO supervisory bodies have in several other manifest ways amplified the scope and content of the right to strike.¹⁸ In particular, the CFA has held that the right to strike accrues to all workers, although this may be restricted in the case of public officials and workers in essential services. In both instances though, the categories of workers so restricted are interpreted narrowly,¹⁹ and for those workers in respect of whom the right to strike may legitimately be restricted, compensatory guarantees should be provided. Also, the conditions set for declaring a strike must be reasonable and not place a substantial limitation on the means of action open to trade unions, so as to be compatible with freedom of association. Furthermore, limitations imposed by governments on forms of strike action would only be justified if the strike ceased to be peaceful, while sympathy strikes should not be subject to a general prohibition,²⁰ and picketing is acceptable so long as it is in accordance with the law, remains peaceful and does not disturb public order.

1.2. Social justice, developmental considerations, civil liberties and democratic governance

Moreover, the engagement of the CFA and other ILO supervisory bodies has continuously emphasized the evident links between freedom of association and social justice and developmental objectives, as well as democratic governance. In this regard, in reaffirming the fundamental principles on which the ILO is based, the ILO Constitution indicates in particular that:

- ▶ freedom of expression and of association are essential to *sustained progress*;
- ▶ the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, *enjoying equal status with those of governments*, join with them in *free discussion and democratic decision with a view to the promotion of the common welfare*.²¹

17 ILO, CEACR, *Convention No. 87, Direct Request*, 2017.

18 For a discussion of these principles, in part indicated below, see Ben-Israel, 1988, op. cit., 99–127; Swepston, 1998, 187–190; Gernigon, B., Odero, A. and H. Guido, 1998. *ILO principles concerning the right to strike*, ILO, Geneva; CFA, *Compilation of decisions*, paras. 758–978,

19 “Public officials” should be limited to officials exercising authority in the name of the State, and “essential services” are “those the interruption of which would endanger the life, personal safety or health of the whole or part of the population”.

20 According to the CFA, a general prohibition on sympathy strikes could lead to abuse; workers should be able to take such action, provided the initial strike they are supporting is itself lawful.

21 ILO Constitution, Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), I(b) and (d) (emphasis added).

The ILO Constitution also emphasizes the collaboration of workers and employers in the *preparation and application of social and economic measures*.²² As noted by the CFA: “The development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation”.²³ Economic interests are not meant to be of a self-serving nature; the focus should be on a transformed economic situation serving social objectives.²⁴ Exercising trade union rights to serve freedom of association purposes, also in this wider sense, essentially requires a stable political environment and an enabling socio-political system. The CFA has often held that a system of democracy is fundamental for the free exercise of trade union rights.²⁵ As so many examples of CFA engagement over the years have shown, repressive regimes and undemocratic governance structures are inimical to the free exercise of trade union rights.²⁶ Deep-rooted political changes may in fact be required to let this flourish, in support of a climate that is free from violence, pressure or threats of any kind against the leaders and members of workers’ and employers’ organizations.²⁷ Therefore, the CFA has on many occasions engaged with matters of a political nature, if the exercise of trade union rights, broadly understood, has been challenged:²⁸

Even though cases may be political in origin or present certain political aspects, they should be examined by the Committee if they raise questions concerning the exercise of trade union rights. It is for the Committee to rule on this issue after examining all the available information, in the same way as it rules on the question of whether the issues raised in a complaint concern penal law or the exercise of trade union rights.

22 Ibid., III(e), emphasis added. This is necessary since the “rights of workers’ and employers’ organisations and of human beings in general flourish in a climate of social and economic progress” and the “advancement of the rights of workers’ and employers’ organisations is linked both to national social and economic development ...”. See also ILO, 1992. *Democratisation and the ILO*, op. cit. p. 25, in which the then ILO Director-General quoted from the 1952 ILO Conference proceedings: “The fundamental and permanent mission of the trade union movement is the economic and social advancement of the workers ...”.

23 CFA, Compilation of decisions, para. 62.

24 See Gravel *et al.* 2001, 67.

25 CFA, Compilation of decisions, para. 69. See also Curtis, 2004. “Democracy, freedom of association and the ILO”, in Jean-Claude Javillier and Gernigon Bernard (eds.) *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos*, ILO, Geneva, 89–106 at 89–91.

26 As noted in ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties, without “... political liberty full and genuine trade unions rights could not exist”. See also ILO, 1992. *Democratisation and the ILO*, op. cit., pp. 26–27, with reference to the link between freedom of association, sustained progress and addressing poverty: “there can be no sustainable development that is not based on the participation of all concerned through free, representative and democratic organisations which takes into account, on equal terms, the needs and aspirations of all population groups”.

27 Gravel *et al.*, 2001, pp. 25–26.

28 Ibid., p. 13. See also Curtis, 2004, 91.

Social justice objectives are therefore intrinsically linked to the exercise of freedom of association.²⁹ As indicated in the ILO Centenary Declaration for the Future of Work, 2019, it is the imperative of social justice that gave birth to the ILO and became part of its constitutional mandate, and which needs to be taken forward by further developing its human-centred approach to the future of work, putting “workers’ rights and the needs, aspirations and rights of all people at the heart of economic, social and environmental policies”.³⁰

In addition, the exercise of freedom of association requires guaranteed respect for civil liberties.³¹ Freedom of association needs to be supported by the free exercise of other relevant fundamental rights,³² irrespective of the level of development of the country concerned.³³ The interdependence and inter-relationship between freedom of association and other fundamental rights are therefore of critical importance for the effective functioning of trade unions.³⁴ This could well be undermined by ongoing states of emergency and martial law declarations, given the associated restrictions invariably imposed on, in particular, trade union activity and trade union leaders.³⁵ There is therefore a

29 Ibid., 91.

30 ILO Centenary Declaration for the Future of Work, ILC, 108th Session, Geneva, June 2019, I(D).

31 As remarked by the then ILO Director-General in *Democratisation and the ILO*, 1992, op. cit., p. 24: “Surely, it is unnecessary to repeat that the denial of the civil liberties set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights makes a mockery of the very notion of trade union rights”.

32 Including but not restricted to: (i) the right to freedom and security of person and freedom from arbitrary arrest and detention; (ii) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; (iii) freedom of assembly; (iv) the right to a fair trial by an independent and impartial tribunal; and (v) the right to protection of the property of trade union organisations: ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties, op. cit. See also ILO, 1992. *Democratisation and the ILO*, op. cit., pp. 24–25, and Swepston, 1998, 177–179. Swepston notes: “There is a general consensus that respect for civil and political rights is necessary for the exercise of trade union rights”, 176, and adds that: “In the preparatory report prepared for the adoption of Convention No. 87, the Office stated that ‘freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly and of meeting, freedom of speech and opinion, freedom of expression and of the press, and so forth’”, 176–177.

33 CFA, Compilation of decisions, para. 53.

34 Swepston, 1998, remarks: “The supervisory bodies have always insisted on the importance of civil liberties. The Committee on Freedom of Association in particular has stated that a ‘genuinely free and independent trade union movement can only develop where fundamental human rights are respected’”, 177. In 1992, the Director-General stated in his report *Democratisation and the ILO* that: “The ILO takes a keen interest in civil and political rights, for, without them, there can be no normal exercise of trade union rights and no protection of the workers”, p. 24.

35 As noted by Gravel *et al.*, 2001, 31, the CFA has emphasized, “in cases where emergency measures are renewed year after year, that martial law is incompatible with the full exercise of trade union rights, thereby consolidating the principle that a climate of violence, pressure or threats is bound to be extremely damaging to the exercise of trade union rights. In general terms, cases of progress in these types of situations occur when the government provides information to the effect that the state of emergency was only of a temporary nature and the restrictions imposed on freedom of association are no longer applicable”.

need to uphold the rule of law and to guard against the arbitrary exercise of power by governments, also in these contexts. In particular, the arrest, even if only briefly, and detention of trade union leaders and trade unionists, and of the leaders of employers' organizations, for exercising legitimate activities in relation to their right of association constitutes a violation of the principles of freedom of association.³⁶ In turn, according to the CFA, adhering to the rule of law therefore requires the scrutiny of legislation and draft legislation,³⁷ as well as court judgments of the country concerned,³⁸ to ensure that freedom of association principles are appropriately accommodated and effectively applied. The underlying principle, endorsed by the CFA, is that governments have a duty "to defend a social climate where respect for the law reigns as the only way of guaranteeing respect for and protection of individuals".³⁹

The above exposition underscores not only the critical work done by the CFA over several decades in relation to safeguarding freedom of association, but also that it has done so as part of the overall supervisory function executed by the ILO in collaboration with other supervisory organs and in alignment with the ILO's constitutional mandate. It has achieved this through the persuasion embedded in its case law, prompted by a dynamic and flexible approach, through which it has been able to "breathe life into the provisions of Conventions, supplement and update them, taking into account the new conditions arising out of developments in each country, the employment market, demography and technological changes".⁴⁰ As noted by Sweptston, this illustrates both the vitality of the supervisory process, and the changing nature of the exercise of the right to freedom of association.⁴¹

The impact of this multi-dimensional engagement by the CFA and other ILO supervisory bodies has at times shown remarkable results, as appears from the African case studies below.

36 CFA, Compilation of decisions, paras 121-133. Also: "Detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular, the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority" (para. 167).

37 "... [T]he law of the land should not be such as to impair, nor should it be so applied as to impair, the guarantees provided for in the Convention (*i.e.*, *Convention No. 87*), and ... this principle should also be respected when trade unions assume responsibility in the interest of the common welfare", ILO, 1970. Resolution concerning trade union rights and their relation to civil liberties. See also Gravel *et al.*, 2001, 14–15.

38 Gravel *et al.*, 2001, 29–30.

39 CFA, Compilation of decisions, para. 72.

40 Gravel *et al.*, 2001, 68.

41 Sweptston, 1998, 193.

2. Selected African case studies

2.1. South Africa

South Africa was a founding member of the ILO. Yet, its increasing emphasis on systematically structuring South African society along racial lines (as part of the policy of *apartheid*) and the associated discrimination against and disparate treatment of the non-White parts of the population, also in the labour law and policy framework, put it on a collision course with the ILO, other United Nations organizations and, in fact, the world at large. As noted by the ILO Fact-Finding and Conciliation Commission on Freedom of Association (FFCC): “In the land of apartheid, many liberties, counted as normal in a democratic society, were diminished or lost altogether. Amongst them were the freedoms of association and collective bargaining which the International Labour Organisation (ILO) has done so much to promote and protect under international law since its establishment in 1919”.⁴² In February 1964, the ILO voted in favour of the suspension of South Africa from its annual general conferences, which led to South Africa’s withdrawal from the ILO in March 1964.

Political organizations representing the cause of the disenfranchised non-White majority population of South Africa were banned by the then Government, while some mainline trade union movements had to operate in exile. Within the country, Black workers in particular increasingly expressed their resistance against the oppressive regime, while independent trade unions became the key channel through which, not only their occupational, but also their social, economic and political interests were vented, specifically arguing for political change.⁴³ In 1988, the Congress of South African Trade Unions (COSATU) lodged a complaint with the ILO concerning the alleged violations of freedom of association in South Africa. As South Africa was no longer an ILO Member at that stage, its consent to such an enquiry was required. Despite the fact that at that stage neither Convention No. 87 nor Convention No. 98 had been ratified by South Africa, the Government gave its consent in 1991,⁴⁴ which led to the appointment of a Fact-Finding and Conciliation Commission on Freedom of Association (FFCC).

With a view to executing its task of measuring South African laws and practices against the well-established body of jurisprudence developed by the ILO during the preceding 70 years, the FFCC’s (revised) terms of reference, as agreed between the parties, was formulated as follows:⁴⁵

42 See ILO, 1992. “Prelude to change: Industrial relations reform in South Africa”, Report of the Fact-finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa, *Official Bulletin*, Vol. 75, 1992, Series B, i.

43 See Webster, E., and K. Forrest, 2021. “The Role of the ILO during and after Apartheid”, *Labor Studies Journal*, 46(4), 2021, 325–344.

44 In a communication to the Director-General, the Government of South Africa associated itself with Convention No. 87: ILO, “Prelude to change”, op. cit., p. i.

45 Ibid.

To deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association.

Acknowledging the profound changes already taking place at that stage in South Africa, the FFCC's conclusions essentially focused on two issues: (i) the extent to which the industrial relations system as such was incompatible with the principles of freedom of association established by the ILO; and (ii) specific acts and measures taken or susceptible of being taken against trade unions and their members to diminish or impede the attainment of their legitimate functions as unions. Regarding the first issue, the FFCC made a number of key recommendations, including:

- ▶ As far as the *process of labour law reform* is concerned, two recommendations were made: Firstly, the reactivation of the apex tripartite mechanism, the National Manpower Commission (NMC), which should include all stakeholders in a consultative process; and secondly, the simplification of the text of the main labour relations law, the (then) Labour Relations Act (Act No. 28 of 1956) (LRA).
- ▶ On the *substance of the LRA*, the FFCC indicated a number of significant adjustments required to bring the law into line with international freedom of association standards, including:⁴⁶
 - Extension of the personal sphere of the law, to include farmworkers, domestic workers and to ensure appropriate coverage of the public service, in particular allowing for strikes in the public sector, excluding public servants narrowly interpreted in accordance with the principle of adhering to freedom of association;
 - Removal of legal restrictions imposed on the registration and functioning of trade unions (including in relation to fund-raising and political activities);
 - Recognition and extension of the right to strike, with reference to the need for simplified pre-strike procedures; widening of the strike definition to allow strikes over economic and social issues (i.e., so-called protest strikes); narrowing of the definition of essential services and provision of essential services and of effective arbitration for all workers not allowed to strike; removal of criminal sanctions for peaceful strike action; protection of workers against dismissal for legitimate strike action; and
 - Removal of executive interference in the collective bargaining process (e.g., ministerial power to refuse to promulgate collective agreements,⁴⁷ and the absence of a guarantee of certain organizational rights or facilities).

Regarding the second issue, the FFCC noted the chilling effect of security and related legislation on trade union activities and made recommendations for the repeal and re-

⁴⁶ Ibid., paras 639–670.

⁴⁷ The FFCC reiterated that the principle of non-interference in freely concluded agreements is to be respected and that the Minister's role in checking concluded agreements should remain a technical one, Ibid., para. 710.

form thereof to reflect the principles embedded in freedom of association and the related fundamental rights. The FFCC recommended in particular:⁴⁸

- ▶ Respect for freedom of assembly – legislation authorizing prohibitions on gatherings should not interfere with the right to hold legitimate trade union meetings or to picket peacefully;
- ▶ Adherence to freedom of expression – trade union communication with their members concerning news and information of legitimate interest to their members needs to be safeguarded;
- ▶ Trade union rights are to be respected if a state of emergency is declared under prevailing legislation;
- ▶ An end to the various forms of comprehensive interference with the right of trade unions to organize, including physical attacks on trade unionists and union premises – the evidence suggested a pattern of violent and destructive attacks on trade unions and their members;
- ▶ No recurrence of conduct amounting to spying on, and surveillance of, trade unions by the authorities; and
- ▶ The termination of the covert funding provided by the Government to a particular trade union.

In arriving at its findings and formulating its recommendations, the FFCC confirmed a number of key principles emanating from an expanded understanding of freedom of association, alluded to earlier in this contribution. Among others, the FFCC emphasized that:⁴⁹

... the rights and freedoms of trade unions and their members to enjoy freedom of association in its full sense, can only really flourish in a society which guarantees and promotes the civil and political, social and economic rights of all its members.

The FFCC also reiterated that a general prohibition on all political activities is contrary to the provisions of Convention No. 87:⁵⁰

Decisions taken in the political arena may have a profound impact on the social and economic conditions of workers. If trade unions are to defend the interests of their members, they should not be obliged to confine themselves solely to shop-floor questions. They must be free to express their views publicly on a government's economic and social policy, since their fundamental objective is to advance the social and economic well-being of their members.

48 Ibid., paras 621–638.

49 Ibid., p iii. Also: “The Commission concludes that the principles laid down by the ILO in respect of activities appropriate to trade unions in pursuit of economic and social objectives are capable of application in South Africa and should be implemented”, *ibid.*, para. 620.

50 Ibid., para. 616.

However, the FFCC noted that political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions irrespective of political changes in the country. Yet, these principles have to be considered in the light of the very special context (then) of South Africa. In a context where major Black political parties were prohibited, it was natural, and indeed inevitable, that Black political aspirations should seek expression through the only lawful organizations open to them, namely the trade union movement.⁵¹ In its final recommendations,⁵² the FFCC urged South Africa to ratify Conventions Nos 87 and 98 and, in recognizing the changes already occurring in South Africa, commented that:

The changes should ensure that basic civil liberties are provided by law and guaranteed in practice in a democratic society. The basic rights of freedom of association and collective bargaining should be seen for what they are: vital attributes of a free society. This is the perspective upon which the ILO has always insisted.

Subsequent to the release of the FFCC report in 1992, and following the outcome of the first democratic election in South Africa in 1994, South Africa rejoined the ILO in 1994. The new Government committed itself to the implementation of the FFCC report by ratifying Conventions Nos 87 and 98 in 1996, repealing the discriminatory legislation, and adopting, with the assistance of the ILO and on the basis of tripartite stakeholder involvement, a comprehensive new Labour Relations Act (Act No. 66 of 1995), which closely resembles the recommendations of the FFCC and, more broadly, the freedom of association principles developed and applied over many years by the CFA and other ILO supervisory bodies. In 1994, the new Government also established, with ILO assistance, the National Economic Development and Labour Council (NEDLAC), a tripartite plus body incorporating a developmental component, i.e., a fourth chamber representing civil society. NEDLAC is therefore the vehicle through which Government, labour, business and community organizations seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing the country.⁵³

These developments were strengthened by the adoption of the new South African Constitution,⁵⁴ which:

- ▶ Enumerates a range of fundamental rights in its Bill of Rights chapter,⁵⁵ including labour rights inclusive of freedom of association, the right to organize, collective bargaining and the right to strike;⁵⁶ and

51 Ibid., paras 617–618.

52 Ibid., paras 746–748.

53 See [NEDLAC](#).

54 South Africa, Constitution, 1996.

55 Ibid., Chapter 2.

56 Ibid., section 23.

- ▶ Expressly adopts an international law-friendly approach, by committing South Africa to ratified international instruments, preferring a legislative interpretation that is in line with international law, and requiring of adjudicating institutions to consider (binding and non-binding) international law when interpreting any provision of the Bill of Rights.⁵⁷

In the new constitutional dispensation, South African courts, inclusive of the apex court, the Constitutional Court, confirmed adherence to international labour standards, including freedom of association principles. For example, in a matter concerning the constitutionality of a legal provision prohibiting members of the armed forces from joining trade unions, the Constitutional Court noted that Convention No. 87 does not assert the right of soldiers or other military personnel to join a trade union, but leaves the extent to which such workers are entitled to join unions to be determined by national legislation.⁵⁸ Even so, the Court found that the prohibition infringed their constitutional right to freedom of association, even if this right could be limited (e.g., in respect of strike action), given the nature of the South African Defence Force. In a further matter, the Constitutional Court referred to CFA case law, noting that it is internationally accepted that once trade unions are recognized by an employer, trade union representatives have a right to represent their members in disciplinary hearings.⁵⁹

In matters lodged with the CFA subsequent to the legislative changes which followed the FFCC report, the CFA has largely upheld the alignment of the provisions of the new Labour Relations Act with ILO freedom of association norms. In particular, in a recent matter, the CFA had to consider provisions of the Act which allow for the exclusion of minority unions from retrenchment consultations and do not allow them to make observations in event of the extension of collective agreements. In its conclusions, the CFA recalled that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions are both compatible with the principles of freedom of association. However, it also noted that minority trade unions that have been denied the right to bargain collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim. Regarding the extension of collective agreements, the CFA reiterated that when the extension applies to workers who are not members of the signatory union, this does not contradict the principles of freedom of association, in so far as it is the most representative union that negotiates on behalf of all workers.⁶⁰

57 Ibid., sections 231–233 and 39(1)(b).

58 *South African National Defence Union v Minister of Defence* 1999(4) SA 469 (CC); 1999(6) BCLR 615 (CC), referring to Article 9(1) of Convention No. 87.

59 *SANDU v Min of Defence* 2007 9 BLLR 785 (CC).

60 CFA, Case No. 3379, 396th Report, paras 73–75.

2.2. Zimbabwe

Zimbabwe has to be regarded as one of the most severe and tragic African examples of non-compliance with the freedom of association principles embedded in Conventions Nos 87 and 98 and fine-tuned by the CFA and other ILO supervisory bodies. This must be seen against the background of what an ILO Commission of Inquiry report described in 2009 as “... a country in deep crisis, which is facing the challenge of building a bridge from division and social tension to a peaceful and just future”.⁶¹ The historical trajectory of this state of affairs covers the period since 1996, subsequent to the ceremonial granting of independence by the United Kingdom in 1980. This period has been marked by intense political conflict and turmoil, comprehensive economic and labour market decline, and rapidly increasing poverty,⁶² exacerbated by the devastating impact of the COVID-19 pandemic. Engagement by the ILO and other United Nations organs (for example, the Human Rights Council) has resulted in certain improvements, although recent evidence confirms the long road still ahead to satisfactory compliance with freedom of association standards. For several years, Zimbabwe was listed as a serious and urgent case calling for special attention by the ILO Governing Body.

Since 1996, the CFA and the Committee of Experts have been called upon to deal with allegations concerning: the alleged violent break up of peaceful demonstrations by workers in support of their social and economic interests; arrest, detention, assaults and torture, as well as intimidation and harassment of trade union leaders and members; unauthorized entry into trade union premises; Government interference in trade union affairs and activities, as well as (the outcome of) collective bargaining processes; inadequate recognition of the right to strike and anti-union discrimination, all against the background of, until recently, the absence of social dialogue structures.⁶³

In November 2008, arising out of simultaneous complaints by Workers' and Employers' delegates to the International Labour Conference, the Governing Body decided to set up a Commission of Inquiry, in accordance with article 26, paragraph 4, of the ILO Constitution to examine the complaints concerning the observance by the Government of Zimbabwe of Conventions Nos 87 and 98 on freedom of association, ratified by Zimbabwe in 2003 and 1998, respectively.⁶⁴ The complaints examined by the Commission of Inquiry

61 ILO, 2009. *Truth, reconciliation and justice in Zimbabwe*, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), viii.

62 According to the World Bank, in Zimbabwe, 6.1 million people (out of a population of 15.1 million) lived below the international poverty line in 2021 (measured at USD1.90 per day): see The World Bank, [The World Bank in Zimbabwe](#). The percentage of the population falling below the international poverty line has risen rapidly from 21.4 per cent in 2011 to 39.5 per cent in 2019: see [theGlobalEconomy.com](#), [Zimbabwe](#).

63 *Truth, reconciliation and justice in Zimbabwe*, 2009, op. cit., paras 194–254.

64 See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103183, accessed on 16 January 2022.

referred in particular to serious allegations of violations of basic civil liberties, including the quasi-systematic arrest, detention, harassment and intimidation of trade union leaders and members for the exercise of legitimate trade union activities.⁶⁵ After a preliminary goodwill and contact-making mission, the Commission undertook a full fact-finding mission in August 2009, at a time when some measure of political rapprochement was being demonstrated, in the wake of the Global Political Agreement (GPA) of 2008, i.e. the Agreement between the ruling Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two opposition Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe.

The overall conclusion of the Commission summarizes what it described as the “systematic and systemic nature” of violations of the Conventions.⁶⁶ It saw a clear pattern of arrests, detentions, violence and torture by the security forces against trade unionists that coincided with Zimbabwe Congress of Trade Unions (ZCTU) nationwide events, indicating that there had been some centralized direction to the security forces to take such action. It also saw a clear pattern of control over ZCTU trade union gatherings, both internal meetings and public demonstrations, through the application of the then main security legislation.⁶⁷ The Commission referred to what it believed to be the intimidatory nature of the detentions of trade unionists, evident from the fact that they were often for short periods of time, were accompanied by violence and threats and did not lead to convictions in court. It further noted that the leadership of the ZCTU and its affiliate organizations were targeted by what appeared to the Commission to be a calculated attempt to intimidate and threaten ZCTU rank-and-file members. The severe and stressful impact of this state affairs, also economically and in terms of pressure being put on trade union officials to leave the ZCTU, was specifically noted.

The Commission's conclusions were accompanied by a number of findings of fact and statements of principle. It reaffirmed the ILO's views concerning the symbiotic nature of the relationship between civil liberties and the exercise of trade union rights.⁶⁸ It further held that the climate of violence and uncertainty that had existed in Zimbabwe seriously hampered the operations of a genuinely free and independent trade union movement.⁶⁹ The Commission also commented on the lack of due process of law, in view of the absence of or unfounded charges against trade unionists, the absence of convictions, delays in the legal process and the lack of enforcement of court orders. It stressed that the guarantee of judicial independence and the rule of law is crucial for the protection of all civil liberties, including freedom of association rights, and that without a fully independent and credible court system a sense of lawlessness and lack

65 *Ibid.*, p. vii.

66 *Ibid.*

67 The Public Order and Security Act, No. 1 of 2002 (POSA), as amended.

68 *Truth, reconciliation and justice in Zimbabwe*, 2009, para. 544.

69 *Ibid.*, para. 548.

of protection will exist.⁷⁰ On interference with rights of assembly and demonstration of trade unionists, the Commission indicated that the exercise by trade unions of the right to demonstrate includes the right to freedom of expression in relation to matters of social and economic interest; freedom of expression should also be guaranteed when trade unions and their leaders wish to criticize the Government's economic and social policy.⁷¹ Furthermore, the Commission recalled that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights.⁷²

Concerning the labour relations legislative framework, the Commission reiterated the right to organize of employees in the public service, and that the right to strike can be curtailed in the event of essential services only if the notion of "essential services" is narrowly construed. The Commission consequently observed, in relation to the right to strike, that:

... [T]he right to strike is not fully guaranteed in law or practice. In particular, the Commission is concerned that the legislation includes disproportionate sanctions for the exercise of the right to strike and an excessively large definition of essential services; and that in practice the procedure for the declaration of strikes is problematic and that it appears that the security forces often intervene in strikes in Zimbabwe. The Commission wishes to confirm that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87.⁷³

The Commission further held that there was no adequate protection against anti-union discrimination in Zimbabwe. It remarked that by virtue "of its ratification of Convention No. 98, the Government of Zimbabwe is responsible for preventing all acts of anti-union discrimination and must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be expeditious so that the necessary remedies can be really effective, inexpensive and fully impartial, and considered as such by the parties concerned".⁷⁴ Regarding collective agreements, the Commission emphasized that freely negotiated collective agreements should not be subject to ministerial approval. The Commission also emphasized the importance of institutionalized social dialogue for democracy and the achievement of harmonious labour relations.⁷⁵

In addition to making recommendations commensurate to its findings and conclusions,⁷⁶ the Commission concluded by noting the political and conciliatory steps that had been taken in the preceding months towards addressing these issues. These included the sign-

70 Ibid., paras 553–556.

71 Ibid., paras 558–562.

72 Ibid., paras 563–565.

73 Ibid., paras 566–575.

74 Ibid., paras 582–586.

75 Ibid., paras 587–592.

76 Ibid., para. 606.

ing of the GPA, the establishment of the inclusive Government and the commencement of a process of national healing and reconciliation as positive steps for the future of Zimbabwe. The Commission was pleased to note that the belief that social dialogue is the only way forward was widely shared. It expressed the firm view that the bridge to the future could not be built without tackling the systemic reasons for the violations of the Conventions, supported by the process of national healing and reconciliation. In this regard, it stressed that an acknowledgement of what had happened is a fundamental prerequisite for Zimbabwe to be able to create a future society in which such serious violations of the freedom of association and collective bargaining Conventions are not repeated.

Developments subsequent to the Commission's report confirmed a certain measure of progress, in particular in the areas of labour law reform and the bolstering of institutionalized social dialogue, through the re-establishment of the Tripartite Negotiating Forum (TNF). In both instances, the technical assistance provided by the ILO was crucial, and supported the strengthening of freedom of association in Zimbabwe.⁷⁷ Despite these developments, significant shortcomings amounting to a failure to implement freedom of association principles remain, as confirmed by the recurring complaints submitted and the conclusions and recommendations made by ILO and United Nations supervisory bodies, and in observations made by the International Trade Union Confederation (ITUC),⁷⁸ Amnesty International⁷⁹ and Human Rights Watch.⁸⁰ Recent examples involving the CFA and the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association include:

In its 389th Report in 2019, the denial of registration of new trade unions was among other issues considered by the CFA. It noted the slow progress made in amending the legislation that would remove the discretionary powers accorded to the Registrar concerning the registration of new unions, emphasizing the right of workers to join organizations of their own choosing.⁸¹

- ▶ In its 392nd report in 2020, the CFA issued an interim report on Zimbabwe, in which it engaged with the denial of the right to hold demonstrations on matters affecting the economic interests of workers (including increased taxation and the rising cost of living), the violent suppression of the demonstrations, and associated killings (in relation to one of the events), arrests, detention and delayed judicial proceedings involving trade union leaders.⁸²

77 ILO, 2019. *Record of Proceedings*, Conference Committee on the Application of Standards, ILC, 108th Session, Geneva, Part II, 300–01.

78 ITUC, 2020. *2020 ITUC Global Rights Index: The World's Worst Countries for Workers*, pp. 30–31.

79 Amnesty International, 2021. Report 2020/21: *The State of the World's Human Rights*, pp. 403–406.

80 Human Rights Watch, 2022. *World Report 2022: Events of 2021*, pp. 749–752.

81 CFA, 389th Report, Case No. 3128, paras 103–109.

82 CFA, 392nd Report, Case No. 3339, paras 968–1022.

- ▶ In the report on his visit to Zimbabwe, submitted to the Human Rights Council in 2020, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed his concern about the wide discretion of the Minister of Labour to declare what an essential service is, denying the affected workers the right to strike. He also found equally worrying the legislative provisions on collective job action, which provide for excessive penalties in case of unlawful collective industrial action. He also expressed concern about the charges brought against workers' representatives who have been arrested or even abducted for exercising their rights to freedom of peaceful assembly and of association, and about allegations of State interference in the activities of trade unions and the acts of intimidation and harassment against their leaders.⁸³

While noting the politically polarized context that had resulted in giving some workers a pseudo-political role in an already complex political situation, the Special Rapporteur concluded that the actions of the Government need to be consistent with the Constitution and its international commitments, allowing for a more enabling space for trade unions to operate.

2.3. Sudan

Sudan provides an important example of a jurisdiction affected by serious and comprehensive infringements of freedom of association, which have required sustained engagement and monitoring by the CFA and other ILO supervisory mechanisms. This has resulted in significant improvements, once the period of exclusive military rule came to an end. Currently, however, the military coup of October 2021 has placed much of the progress made in limbo.⁸⁴

Historically, freedom of association standards were rarely heeded in Sudan, even though Sudan ratified Convention No. 98 in 1957. Convention No. 87 was only ratified in 2021 and will enter into force for Sudan in 2022.⁸⁵ Following the military coup in 1989, all trade union organizations were dissolved, and several had to move into exile or underground. The imprisonment of trade union leaders and members without charge or trial followed, as well as the confiscation of union assets and property by the military. Legal changes did not do much to improve the situation. The 1992 Trade Union Act, while repealing the military decrees, imposed a State-controlled trade union monopoly and was not in compliance with freedom of association principles. In 1994, the Conference Committee on the Application of Standards emphasized the importance of the inter-relationship between civil rights and freedom of association. It emphasized that the guarantees set

83 United Nations, 2020. "Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association: Visit to Zimbabwe", Human Rights Council, Forty-fourth Session, paras 102–108.

84 For a historical perspective, see Curtis, 2004, op. cit., 91–92.

85 See NORMLEX, [Ratifications for Sudan](#).

out in Convention No. 98 could not be effective unless they were truly recognized and protected as part of civil and political freedoms.⁸⁶

Following a popular uprising in 2019, a power-sharing agreement between the military and an alliance of civilian groups, known as the Forces for Freedom and Change (FFC), provided a road map for governing the country until a democratically elected government could be installed.⁸⁷ However, the transitional government dissolved existing employers' and workers' federations by special law and seized all the property and assets of all trade unions. It further established a committee to revise trade union laws and prepare for new elections of leaders of trade unions under these new laws. The workers' federation filed a complaint with the CFA, in an attempt to achieve an amicable settlement and pave the way for effective social dialogue.⁸⁸ Nevertheless, its unilateral dissolution by the transitional government constituted a clear breach of freedom of association principles, as this should be the prerogative of a court of justice.⁸⁹

ILO technical assistance was offered to support progress towards respect for freedom of association principles and a new era of social dialogue, to be achieved through transparent labour laws and the ratification in 2021 of Convention No. 87 and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Based on new legislation, workers' and employers' organizations would be formally established in full freedom, registered and organize elections. A Tripartite Labour Advisory Council would provide the institutional framework for tripartite decision-making, while the ILO would invest heavily in building the capacity of tripartite constituents.⁹⁰

The progress made in embedding and strengthening freedom of association principles, also through the ratification of Convention No. 87 in 2021, was effectively stalled when the military leaders of the transitional government carried out a coup in October 2021. Civilian officials were arrested and the bipartisan transitional government dissolved. Committees managing the country's trade unions were also dissolved. Sudan's trade unions played a leading role in widespread civil opposition to the coup. However, the protests were met with lethal force by the security forces. A subsequent deal to allow for a new technocratic government was rejected by protesters and other political groups.⁹¹ It is evident that, given the coup-related measures against trade unions, the current climate

86 ILO, 1994. *Record of Proceedings*, ILC, 81st Session, No. 25, 1994.

87 A bipartisan transnational Sovereignty Council was established, and a prime minister, chosen by the FFC, appointed most of the cabinet members; a legislative assembly was provided for but not immediately formed: see [Britannica, Sudan](#).

88 *Ibid.*

89 *Ibid.* See also United Nations, 2020. "Report of the Independent Expert on the situation of human rights in the Sudan", Human Rights Council, Forty-fifth session, A/HRC/45/53, para. 38.

90 ILO, 2020. [Promotion of social dialogue and freedom of association in Sudan](#), SDN/20/02/USA.

91 See Human Rights Watch, 2022. *World Report 2022: Events of 2021*, p. 626; ITUC, 2021. "ITUC condemns Sudan military coup", 28 October; and *Jerusalem Post*, 2021. "Sudan's Burhan dissolve trade unions' management committees", (audio) 26 October.

of violence and the absence of democratic institutions, it would be difficult for freedom of association to be firmly established and flourish.

3. Freedom of association and workers in the informal economy: The need for an alternative paradigm

3.1. Context

For most of Africa, informal employment, and particularly informal employment in the informal economy, has been and remains a constant reality. According to the ILO, informal employment accounts for almost 86 per cent of all employment in Africa, despite significant regional differences, while 76 per cent of employment is in the informal economy.⁹² (Self-employed) own-account workers are the largest group in informal employment in the region,⁹³ while women⁹⁴ and the young, as well as the old,⁹⁵ are disproportionately represented in the informal economy. Those engaged in the informal economy are often exposed to vulnerability and impoverishment, and invariably excluded from the protective net provided by labour law and social security.⁹⁶ As indicated in a recent World Bank publication, the size of the informal economy as a percentage of GDP in Africa is the highest in the world, although it is declining.⁹⁷ It is expected that Africa's population will double by 2050, fuelled by rural-urban migration and the greater labour force participation of women, with most jobs created in the informal economy.⁹⁸

3.2. ILO normative instruments: Coverage and protection limitations

For the purposes of the present paper, the central issue concerns the entitlement in law to freedom of association and the access thereto in practice of workers in the informal economy. On the face of it, ILO normative instruments do not exclude informal

92 The figure for Northern Africa is 67.3 per cent and for sub-Saharan Africa 89.2 per cent: ILO, 2018. *Women and men in the informal economy: A statistical picture*, Third Edition, Geneva, pp. 29–30. See also Guven, M., Jain, H., and C. Joubert, 2021. *Social Protection for the Informal Economy: Operational Lessons for Developing Countries in Africa and Beyond*, World Bank, p. 1. Informal cross-border trade in Africa constitutes a major part of informal economy activity: Ndiaye, T., “Women Informal Traders Transcending African Borders: Myths, Facts and the Ways Forward”, Case Story on Gender Dimension of Aid for Trade, International Trade Centre, p. 2.

93 In Africa, 94.4 per cent of own-account workers are in the informal economy: ILO, 2018. *Women and men in the informal economy*, op., cit., p. 30.

94 89.7 per cent of women and 82.7 per cent of men work in the informal economy: *ibid.*

95 94.9 per cent of persons between the ages of 15 and 24, and 96 per cent of persons aged 65 and over are engaged in the informal economy: *Ibid.*

96 See ILO, 2020. “The impact of the COVID-19 on the informal economy in Africa and the related policy responses” ILO Brief, 14 April, p. 3; Guven *et al.*, 2021. *Social Protection for the Informal Economy*, op. cit., p. 2.

97 *Ibid.*, pp. 1–2.

98 *Ibid.*, p. 3.

economy workers. In fact, Convention No. 87 applies to “workers and employers, without distinction whatsoever”, in accordance with Article 2, while Convention No. 98 covers workers, employers, workers’ organizations and employers’ organizations. Also, the ILO Declaration on Fundamental Principles and Rights at Work and the eight fundamental Conventions embedded therein apply to all workers.⁹⁹ This principle generally applies to all ILO Conventions and Recommendations, implying that, according to the ILO, “the level of rights must be the same for both formal and informal workers; there cannot be a lower level of rights for informal workers”.¹⁰⁰ Moreover, certain instruments have been designed to expressly cover certain categories of workers in the informal economy, such as the Home Work Convention, 1996 (No. 177), and the Rural Workers’ Organisations Convention, 1975 (No. 141).

Yet, for the most part, ILO labour and social security Conventions and Recommendations have been developed with the employment relationship in mind, focusing on the employees and employers involved in this relationship. Clearly, in these instances, the diverse nature of and challenges associated with work in the informal economy have not been accommodated. Moreover, the Employment Relationship Recommendation, 2006 (No. 198), intended to combat disguised employment relationships, may be of limited application, as the Recommendation acknowledges self-employed workers as a category of workers distinct from employed workers and preserves true civil and commercial relationships between parties.¹⁰¹ Even in the case of domestic workers, the ILO Domestic Workers Convention, 2011 (No. 189), defines “domestic worker” as “any person engaged in domestic work within an employment relationship”.¹⁰²

Clearly, the focus on universality, criticized by Langille¹⁰³ and others,¹⁰⁴ is particularly problematic when it comes to informal economy workers. The accommodation of these workers requires an acute sensitivity regarding their particular context, including the frequent absence of an employment relationship, and therefore of employers in the strict sense. Yet, the special nature of their work contexts, as well as their particular relationship with and protection needs vis-à-vis other providers of work, for example in the context of supply chains, and vis-à-vis authorities (such as local councils), require a dedicated approach. To some extent, in recent publications, this has been recognized

99 ILO, 2002. *Decent work and the informal economy*, Report VI, ILC, 90th Session, Geneva, p. 40.

100 Ibid., p. 45.

101 Recommendation No. 198, Paragraphs 4(a) and 11(c), and 8.

102 Convention No. 189, Article 1.

103 Langille, B., 2010. “Imagining post ‘Geneva Consensus’ labour law for post ‘Washington Consensus’ development”, *Comparative Labour Law & Policy Journal*, 31(3), 523–552.

104 See, for example, Weiss, M., 2013 “International labour standards: A complex public-private policy mix” *International Journal of Comparative Labour Law and Industrial Relations*, 29(1), 7–20; Olivier, M., 2013. “International Labour and Social Security Standards: A Developing Country Critique”, *International Journal of Comparative Labour Law and Industrial Relations*, 29(1), 1–38.

by the ILO, for example in relation to the need for diverse modalities for the extension of social security to informal economy workers.¹⁰⁵

In fact, recent ILO instruments increasingly tend to be aware of the need to extend coverage to informal economy workers. The Social Protection Floors Recommendation, 2012 (No. 202), refers, as one of the principles to be applied, to “social inclusion including of persons in the informal economy”.¹⁰⁶ Paragraph 15 in turn indicates that: “Social security extension strategies should apply to persons both in the formal and informal economy”. The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), goes further in providing a framework for the of extension coverage and making a number of pertinent suggestions in the context of affirming that the transition from the informal to the formal economy is essential to achieve inclusive development and to achieve decent work for all. With particular reference to employment policies, the Recommendation confirms that countries should pay special attention to the needs and circumstances of those in the informal economy and their families.¹⁰⁷

Specifically within the context of global supply chains, which tend to rely increasingly on informal economy workers, the 2016 ILO Resolution concerning decent work in global supply chains highlights the importance of interventions such as “legislation on responsibility down the chain, sometimes providing for cross-border regulation of supply chains”.¹⁰⁸ Even more recently, the Violence and Harassment Convention, 2019 (No. 190), provides that it applies to all sectors, whether private or public, “both in the formal and informal economy, and whether in urban or rural areas” and protects “persons working irrespective of their contractual status”.¹⁰⁹ Article 6 provides, as one of the core principles of the Convention, that: “Each Member shall adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other persons belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work”. Article 8(a) in

105 See ILO, 2021. *Extending social security to workers in the informal economy: Lessons from international experience*, Second (revised) edition, Geneva. The Committee of Experts has emphasized that, “while relief and anti-poverty measures provide some form of protection and constitute an essential component of social protection floors in many countries, *securing a life in health and decency for all people requires the establishment of other types of social security measures, such as tax-funded social assistance and adapted social insurance mechanisms enshrined in law which are sustainable, rights-based and provide adequate levels of protection*”: ILO, 2019. *Universal social protection for human dignity, social justice and sustainable development*, General Survey concerning the Social Protection Floors Recommendation, 2012 (202), Report III (Part B), ILC, 108th Session, Geneva, p. 89 (emphasis added).

106 Recommendation No. 202, Paragraph 3(e).

107 Recommendation No. 204, Paragraph 19. Coverage of social insurance should progressively be extended to those in the informal economy, and administrative procedures, benefits and contributions should be adapted in accordance with the contributory capacity of those in the informal economy (Paragraph 20).

108 ILO, 2016. Resolution concerning decent work in global supply chains, ILC, 105th Session, Geneva, paragraph 9.

109 Convention No 190, Article 2(1) and (2), respectively.

turn requires ratifying Member States to take appropriate measures to prevent violence and harassment in the world of work, including: “(a) recognizing the important role of public authorities in the case of informal economy workers”.

3.3. Structural constraints impeding access to freedom of association

Nevertheless, the insufficiency and at times absence of dedicated coverage and protection extended by ILO normative instruments must be seen as impacting on the foundation needed for the exercise by informal economy workers of freedom of association rights in both the narrow and expanded sense. In our view, this is compounded by three further structural constraints. The first of these relates to the clearly expressed view by the ILO that transition from the informal to the formal economy “is essential to achieve inclusive development and to realize decent work for all”,¹¹⁰ “while respecting workers’ fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship”.¹¹¹ Several voices from the Global North and the Global South have been critical of the underlying assumptions behind the deliberate push towards formality as a *sine qua non* for appropriate coverage and protection. For example, Weiss indicates that:¹¹²

Another well-known problem relates to the fact that labour standards as elaborated in the context of the ILO are only relevant for the formal sector. However, in most developing countries in Africa, Latin America and South East Asia, the informal sector is much bigger than the formal one, and it is increasing rather than decreasing. This perhaps is the greatest challenge for the ILO. It would be futile to try to simply formalize the informal sector in these countries. The informal sector will remain without a link to traditional employment relationships, and the ILO is well aware of this dilemma.

Guha-Khasnobis, Kanbur and Ostrom comment:¹¹³

that it should not be about a transition to the formal economy, but rather a transition beyond concepts such as formality and informality and that a more sustainable approach will entail an understanding of the realities of the economic activities of these precarious workers.

These sentiments have been echoed by several scholars in the Global South.¹¹⁴ Writing about South Africa, but evidently reflecting the position in Africa and the rest of the

110 Recommendation No. 204, Preamble.

111 Ibid., Paragraph 1(a).

112 Weiss, 2013. “International labour standards”, *op. cit.*, p. 10.

113 Guha-Khasnobis, B., Kanbur, R., and E. Ostrom, 2006. “Beyond formality and informality”, in Guha-Khasnobis, Kanbur and Ostrom (eds), *Linking the formal and informal economy: Concepts and policies*, OUP, New York, pp. 1–20.

114 See, among others, the contribution by Gomes and Verma in this publication and the authorities quoted there; and, Olivier, 2013. “International Labour and Social Security Standards: A Developing Country Critique”, *op. cit.* Van der Linden emphasizes that the distinct nature of work and labour in the South should not be seen as a deviation from the norm of a standard employment relationship, but “as part of the diverging yet interconnected developments in different parts of the world”: Van der Linden, M., 2011. *Workers of the World; Essays Towards a Global Labour History*, Leiden, Brill, p. 9.

Global South as well, Webster and Forrest point to the reality of informality in and the duality of the labour market. They reflect on the contraction of formal employment due to the casualization of work¹¹⁵ and other factors, effectively pushing many workers into the informal economy. They conclude:¹¹⁶

The ILO seems more comfortable with traditional unions and clear-cut employer-employee relationships. However, in Africa, the industrial working class is very much a minority of wage earners. Instead, we find ‘classes of labour’. These include men and women who sell their labor power either directly on a wage labor market or indirectly through some form of product market in order to reproduce themselves and their families. Categories like ‘worker’, ‘peasant’, ‘employed’, and ‘self-employed’ become fluid.

Also, as suggested by La Hovary, the emphasis should be on the content of the law and the protection embedded in normative provisions, rather than on its scope and application.¹¹⁷

In fact, it is the very fact of “work” that should attract protection, and not whether the work is of an informal or formal nature. “Work” in this context, according to the 2013 Resolution of the International Conference of Labour Statisticians (ICLS), needs to be defined irrespective of its formal or informal character or the legality of the activity. Informal work/employment has therefore effectively been mainstreamed in the notion of “work”.¹¹⁸ This is also reflected in the principle approach of the CFA. In its decisions, the CFA has made it clear that the right to freedom of association does not accrue on the basis of the existence of an employment relationship (alone), but that it extends to all workers, including self-employed workers, domestic workers and home-based workers.¹¹⁹

115 In fact, as has been noted, “the nature of work has changed, prompted by two distinct processes, namely casualization and externalization or contractualization [...] These processes have had the effect of informalizing workers across emerging economies, often embedding them in complex supply chains of production, control and command. This has been exacerbated by new forms of work organization and the proliferation of multi-agencies and networks, leading to a complicated net of different employing entities, which benefit from the productive activity of informal workers, but escape liability in social security and labour law terms as they are not regarded as employers in the conventional sense”: Olivier, M., 2014. “Work at the margins of social security: Expanding the boundaries of social protection in the developing world”, in van Oorshcot, W., Peeters, H., and K. Boos (eds), *Invisible Social Security Revisited: Essays in Honour of Jos Berghman*, Lannoo, 215–230 at 219. See also Lund, F., 2012. “Work-related social protection for informal workers”, *International Social Security Review*, 65(4), 9–30, and Sankaran, K., 2012. “Flexibility and informalisation of employment relationships” in Fudge, J., McCrystal, S., and K. Sankaran (eds.), *Challenging the legal boundaries of work regulation*, Oxford and Portland, Oregon, Hart Publishing, 29–47.

116 Webster and Forrest, 2021. “The Role of the ILO during and after Apartheid”, 325–344.

117 La Hovary, C., 2016. “A new international labour standard for formalising the informal economy? A discussion of its desirability”, in Routh, S., and V. Borghi (eds), *Workers and the global informal economy: Interdisciplinary perspectives*, Routledge, London, 102.

118 ILO, 2013. Resolution concerning statistics of work, employment and labour underutilization, Nineteenth International Conference of Labour Statisticians, paragraph 6(a). See also the Resolution concerning statistics on work relationship, adopted at the occasion of the 20th International Conference of Labour Statisticians (2018): https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/meetingdocument/wcms_648693.pdf.

119 CFA, *Compilation of decisions*, paras 332, 387–389, 406–409. See also the contributions by Gomes and Verma, and Sankaran, in this publication.

The second structural constraint impacting on the exercise by informal economy workers of freedom of association rights concerns their access to and the use made of collective organization and bargaining processes and structures. Despite notable exceptions,¹²⁰ in many countries of the Global South, including African countries, trade unions find it difficult to organize, represent and negotiate on behalf of such a heterogeneous group of workers, who may operate in dispersed and even virtual workplaces. Developments in the Global North, indicative of the involvement of unions in representing and collective bargaining on behalf of platform workers¹²¹ and self-employed workers,¹²² may be of value. However, in several African jurisdictions, the representative mandate of trade unions is

120 In some Latin American countries, extension of social security via contributory mechanisms to independent workers has been introduced through trade union intervention. For example, in the Dominican Republic, the Autonomous Confederation of Workers' Unions (CASC) created an association to represent workers, also informal workers, so that they could join the Dominican Social Security System: see Ortiz, P.A., 2019. "Informal and self-employed workers in Latin America: From an excluded category to an example of innovative inclusive measures", in Westerfeld, M. and M. Olivier (eds), *Social Security Outside the Realm of the Employment Contract: Informal Work and Employee-like Workers*, Edward Elgar Publishing, 141–161 at 142. Also, in Zimbabwe, the Zimbabwe Chamber of Informal Economy Associations (ZCIEA) operates as a trade union for informal works. The ZCIEA has both self-employed and informal employees engaged in small, unregistered or unincorporated enterprises and undeclared workers. Its members include street/market vendors, construction workers, waste pickers, and other informal economy workers: see <https://www.wiego.org/zimbabwe-chamber-informal-economy-associations-zciea>.

121 An early example of a collective agreement for the benefit of platform workers occurred in 2018, when a trade union (3F) concluded such an agreement with a platform operator (Hilfr.dk). The agreement provided that once the freelance workers of the platform have completed at least 100 hours of work, they are reclassified as "employees", which provides them with higher wages and social protection: see Behrendt, C., Nguyen, Q. and U. Rani, 2019. "Social protection systems and the future of work: Ensuring social security for digital platform workers", *International Social Security Review*, 72(3), 17–41 at 33.

122 Through the involvement of the German trade union IG Metall, all self-employed workers have been included in the statutory pension scheme and the minimum contributions of self-employed workers to statutory health insurance: Behrendt *et al.*, 2019. "Social protection systems and the future of work", 33; Eurofound (European Foundation for the Improvement of Living and Working Conditions), 2018. *Platform work*. Also, a recent report of the European Parliament notes the representation and collective bargaining constraints, including a lack of common means of communication and opportunities to meet online or in person, which can prevent collective representation in practice. It further notes the legal difficulties in collective representation faced by platform workers, and that the solo self-employed are considered "undertakings", and as such are subject to the prohibition on agreements that restrict competition, and emphasizes the need to address this obstacle: European Parliament, Committee on Employment and Social Affairs, "Draft report on fair working conditions, rights and social protection for platform workers: New forms of employment linked to digital development", Rapporteur: Sylvie Brunet (2019/2186(INI)), paras 11–12. According to recently published proposed European Commission Proposal for a Directive on improving conditions in platform work, those who, as a result of correct determination of their *employment* status (as opposed to genuine self-employed people working through platforms), are recognised as workers will enjoy improved working conditions – including health and safety, employment protection, statutory or collectively bargained minimum wages and access to training opportunities – and gain access to social protection according to national rules. See European Commission Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final 2021/0414 (COD) 15. Also, in 2021 the European Commission published Draft Guidelines on collective bargaining of self-employed, for public comment. See European Commission Communication from the Commission: Approval of the content of a draft for a Communication from the Commission – Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons C(2021) 8838 final (Brussels, 9.12.2021).

often legally restricted to employees involved in an employment relationship, thereby rendering unions unable to represent informal economy workers in collective bargaining.¹²³ This need not be the case, as there are several examples elsewhere in the Global South of unions established by and officially representing informal economy workers, also in terms of collective bargaining.¹²⁴ However, note should be taken of the existence of other bodies representing the interests of and established by informal economy workers, such as cooperatives and other (often community-based) institutions.¹²⁵ Yet these institutions often lack efficiency, due to lack of scale and their non- or limited recognition in the legal, policy and operational space created for representative institutions in both the domestic and international spheres.

The mandate constraint could affect, if not inhibit participation in bilateral and tripartite structures, mechanisms and procedures by representative organizations established by and representing informal economy workers. This is also the case at the level of the ILO, its instruments, structures and processes. It is significant that Recommendation No. 202 consistently uses the formula “tripartite participation with representative organizations of employers and workers, as well as *consultation with other relevant and representative organizations of persons concerned*” (emphasis added), when dealing with the issue of representation.¹²⁶ This formula has, however, seen some change, as is evident from the formula used by the more recent Recommendation No. 204 of 2015 on the transition from the informal to the formal economy. The amended formula refers to consultation with “the most representative employers’ and *workers’ organizations, which should include in their rank, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy*” (emphasis added).¹²⁷

In view of the above and the unique context informing representation of and collective bargaining on behalf of informal economy workers, there may be a need to revisit the traditional approach to these issues. In particular, there may be a need to adjust the historical tripartite model for this purpose and to strengthen social dialogue structures and objectives, given the close association between social dialogue and freedom of association. As remarked by the Committee of Experts:

123 For example, in section 213 of the South African Labour Relations Act (Act 66 of 1995), “trade union” is defined as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations”. But note section 28(1)(l) of the Act, which extends the services and functions of the apex collective bargaining structure, i.e., bargaining councils, to workers in the informal sector and home workers.

124 For example, the Self Employed Women’s Association (SEWA) in India, which operates both as a trade union and cooperative for the benefit of its members.

125 Routh, A., 2013. “Forms of solidarity for informal workers in India: Lessons for future?”, paper presented at the Labour Law Research Network: Inaugural Conference, Barcelona, 13–15 June, 21–22; Fudge, J., 2012. “Blurring legal boundaries: Regulating for decent work” in Fudge *et al.*, *Challenging the Legal Boundaries of Work Regulation*, op. cit. 21–22.

126 Recommendation No. 202, see Paragraphs 3(r) and 8(d).

127 Recommendation No. 204, see in particular Paragraphs 6, 34, 38 and 39.

With regard to the informal economy, the Committee added that in many countries around the world ‘the informal economy represents between half and three-quarters of the overall workforce’ and that, under the terms of the Convention, these workers have the right to organize and to collective bargaining, without distinction whatsoever, to establish and join organizations freely and to represent their members in relation to the public authorities in structures established for the purpose of social dialogue.¹²⁸

Therefore, in relation to collective bargaining, but also wider social dialogue imperatives, it is necessary to recognize and allow membership-based organizations of informal economy workers to negotiate and conclude agreements with both providers of work (i.e., not restricted to employers) and public authorities.

The third structural constraint concerns access by these membership-based organizations to the CFA, with a view to the resolution of freedom of association conflicts involving informal economy workers. Until now, this has rarely happened.¹²⁹ In our view, and considering the mainstreaming of informal work in the concept of “work”, the right of all workers, including informal economy workers, to engage in freedom of association and collective bargaining, and the case made for membership-based organizations to represent informal economy workers, as discussed above, a significant basis has been laid for such organizations to submit disputes involving informal economy workers to the CFA. There may be a need to invest in capacity-building to strengthen the ability of these organizations to proceed in this way. Other constraints, including fiscal constraints, may have to be addressed to enable representative organizations to represent their members before the CFA.

Conclusions

African experience with freedom of association and its engagement with the CFA confirm the symbiotic inter-relationship between freedom of association and social justice, and its impact, increasingly, on areas beyond democratic governance. Integrally embedded in the social justice domain are considerations relating to the social contract between the State and the people, and particularly workers, the universal emphasis on the commitment to leave no one behind as a key sustainable development objective, the global endorsement of decent work for all, the importance of social dialogue and the confirmation of sustainable livelihoods as an overarching developmental outcome, as expressed in the recent report of the ILO Global Commission on the Future of Work and given effect in the subsequent ILO Centenary Declaration for the Future of Work (2019).

There is an evident need to give effect in law, policy and practice, at both the national and international levels, to the affirmation, contained in Article 23(4) of the Universal

128 ILO, 2012. *Giving globalization a human face*, General Survey on the fundamental rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report II (Part 1B), ILC, 101st Session, Geneva, para. 75.

129 See the contributions by Gomes and Verma, and Sankaran, in this publication.

Declaration of Human Rights (1948), of the right of everyone to freedom of association. This includes informal economy workers. The recent ILO Centenary Declaration for the Future of Work (2019) calls upon all ILO Member States to further develop its human-centred approach to the future of work, among others by ensuring that all workers enjoy adequate protection in accordance with the Decent Work Agenda.¹³⁰ Similarly, the Global Commission on the Future of Work emphasizes the reinvigoration of the social contract, recognizing the key role played by social dialogue in this context. Heeding the ILO's universal mandate, the Commission maintains that this implies scaling up ILO activities to include those who have historically remained excluded from social justice and decent work, notably those working in the informal economy.¹³¹ Given the authority of these legal and policy pronouncements, the ILO, and therefore also the CFA, should be seen to give concrete affect to engaging with informal economy workers and their representative organizations in respect of their freedom of association disputes.

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¹³⁰ ILO, 2019. Centenary Declaration for the Future of Work, III.

¹³¹ ILO, 2019. *Work for a brighter future*, Global Commission on the Future of Work, Geneva.

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Ana Virginia Moreira Gomes
and Anil Verma

► Freedom of Association, the ILO and Latin America: A retrospective and the path ahead

Introduction

This year, as we celebrate 70 years of the ILO Committee of Freedom of Association (CFA), it should be noted that Latin America contributed significantly to the formation and the early years of both the ILO and the CFA. Of all the cases examined by the CFA over the years, more than half have come from Latin America, even though the region accounts for only roughly about one-tenth of the world population (ILO, 2021a).

Freedom of association should be considered an essential right for workers everywhere, but especially in Latin America because of its capacity to reinforce democratic institutions and processes, which in turn leads to decreasing inequality and allows workers to achieve better working conditions and a higher standard of living. To provide a better understanding of this dynamic, this paper examines the work of the CFA from a Latin-American perspective.

The main objective of this paper is to examine the history of the CFA's interactions with countries in Latin America with a view to identifying the challenges that lie ahead. The paper is divided into three parts. First, we examine the history of the relationship between the ILO and Latin American countries on the issue of freedom of association. Second, we analyse selected cases examined by the CFA from the Americas. In the third part, we conclude by discussing the challenges that the ILO and the CFA need to address to ensure a better future for workers in Latin America.¹

One of the key challenges we examine relates to the CFA's scope of coverage. How to include people who are currently excluded by design or effectively in practice? Article 23(4) of the Universal Declaration of Human Rights attributes the right to organize to “everyone”, including workers engaged in informal work. But, in practice, informal workers, who constitute the majority of the workforce in Latin America, have almost no access

1 The data is from 20 countries: Argentina, Plurinational State of Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Guatemala, Haiti, Honduras, Dominican Republic, El Salvador, Ecuador, Mexico, Nicaragua, Peru, Panama, Paraguay, Uruguay and Bolivarian Republic of Venezuela.

to the CFA to pursue this most fundamental labour right. Workers, as individuals, can file a complaint with human rights courts, such as the Inter-American Court of Human Rights, but they have no access to the CFA, where a complaint can be brought only by an accredited labour organization. So, some expansion of the eligibility criteria for filing a complaint would clearly benefit informal workers. This issue is not unique to Latin America. Any change along these lines would also benefit the majority of the workforce in Asia and the Pacific and in Africa, where informal work remains pervasive. Apart from individual complainants, the CFA could also open the process to labour-oriented NGOs, which are the main advocates for labour in many emerging economies.

These challenges are not easy to address going forward. The ILO and the CFA have already achieved the pioneering goals of establishing and advocating for freedom of association. The next phase, although perilous, holds great promise for improving labour conditions in a globalizing world. Expansion of these rights would create a more sustainable prosperity in which we can all be winners. If we set our sights on this immense potential for such progress, it would help us engage all stakeholders in a dialogue that could lead to better outcomes for all.

1. The CFA and Latin American countries

The CFA is one of the central organs of the ILO international supervisory system. The ILO model of supervisory organs consists of three procedures: regular reports by each Member State to be sent to the Office “on the measures which it has taken to give effect to the provisions of Conventions to which it is a party”;² representations “by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party”;³ and complaints by any of the Members “if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified”.⁴ Representations and complaints are special procedures, while reports constitute the general procedure of the international supervisory system designed by the ILO Constitution. In all three cases, Member States must have ratified the Convention in order to be subject to the procedure, with the exception of the supervision undertaken by the CFA.

In 1950, right after the adoption of Conventions Nos 87 and 98, the United Nations Economic and Social Council (ECOSOC) and the ILO created a joint commission, the Fact-Finding and Conciliation Commission on Freedom of Association (Langille, 2007). The

2 ILO Constitution, article 22. In accordance with article 19(6), Member States have also the obligation to report to the Director-General on national law and practice in regard to the matters dealt with by Recommendations. This paper focusses only on Conventions.

3 Ibid., article 24.

4 Ibid., article 26. A complaint can also be initiated by the Governing Body, or by any delegate to the Conference.

Commission examines complaints received by the ILO and the United Nations against States that have or have not ratified the Conventions; in the latter case, the State has to give its consent. Due to this last condition, the Commission examined its first case only in 1964, and has only examined six cases in total (Gravel *et al.*, 2001, 9).

The CFA was created by the Governing Body in 1951 to make a preliminary analysis of the cases taken to the Fact-Finding and Conciliation Commission. However, with the failure of that Commission, the CFA enlarged its role and also started to examine the substantive aspects of the complaints. The CFA, however, did not need the consent of the States concerned, even when the Convention had not been ratified. As explained by Gravel *et al.* (2001, 10),

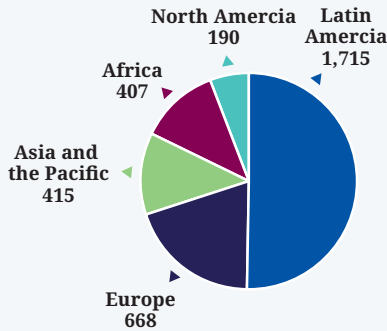
Because, originally, it was only intended as a preliminary and internal stage in the functioning of the ILO, it was not designed on the model of the Fact-Finding and Conciliation Commission. It did not therefore require the prior consent of the State to examine allegations in the absence of the formal ratification of the Conventions on freedom of association.

The CFA thus acquired its own importance in the ILO system – in its first year of existence it analysed 500 cases (Maul, 2012, 214). The justification for the CFA comes from a constitutional interpretation according to which ILO members are under the obligation to comply with the organization's constitutional principles (Gravel *et al.*, 2001, 10). The Preamble to the ILO Constitution recognizes the principle of freedom of association to be an essential means of improving the situation of workers and of securing universal and lasting peace; and the Declaration of Philadelphia goes on to elevate it to a principle of development, proclaiming for the first time that “freedom of expression and of association are essential to sustained progress” (Maul 2012, 212). It is not only about the Conventions, but is also about the principles (Langille, 2007, 377).

Despite a more political character, given its composition as a tripartite organ of the Governing Body with nine members, the CFA goes about its work in a quasi-judicial manner; “quasi judicial” because it cannot impose sanctions. The CFA receives complaints against Member States, applies the principle to specific situations and elaborates suggestions. The CFA Compendium of Decisions exemplifies this role, as it is seen as a type of jurisprudence code. Langille adds that, since the CFA receives complaints on countries that have not ratified the ILO Conventions, its analysis, on one hand, is not limited to the Conventions, but also covers the principles; and on the other, what “the CFA cannot do is impose obligations under those conventions upon non-ratifying members. It can only draw attention to the ‘principles,’ in a constitutional effort to ‘promote’ them” (Langille, 2007, 373).

Comparing the CFA and the Committee of Experts on the Application of Conventions and Recommendations (CEACR), two ILO supervisory organs, Compa explains that the CEACR reports, published annually, are quite technical, usually involving texts of laws and how they comport with conventions already ratified. CFA reports are usually more pointed because they respond to complaints and address concrete problems of workers’

► **Figure 1. Complaints made to the Committee on Freedom of Association (1951–2020)**



Region	No. of cases
Africa	407
Asia and the Pacific	415
Europe	668
Latin America	1,715
North America	190
Total	3,395

► Source: ILO, 2021a, p. 7.

rights violations (Compa, 2003, 306). With the CFA, the principle of freedom of association became the first human right protected by a specialized and exclusive international procedure (Ermida Uriarte, 2012, 38).

Among the 3,406 complaints examined by the CFA in its 70 years of existence, just over 50 per cent (1718 cases) have come from Latin America, even though Latin America accounts for approximately 10 per cent of the world population.⁵

The high number of complaints is a starting point for us to investigate the causes for such a high incidence of complaints to the CFA originating from Latin America. There are two possible explanations for this pattern of complaints. First, it is likely that there has been a high incidence of violations of trade union rights. The violation of rights is reinforced by low enforcement by the legal system and no space for dialogue. For Guido (2017, 114), the lack of trust between the tripartite constituents and State institutions has undoubtedly been one of the factors behind the recourse to ILO supervisory bodies.

Second, it is also likely that there is an institutionalization of freedom of association and collective bargaining principles and trade union rights in these countries. Institutionalization has taken many forms across Latin America. Most Latin American countries guarantee the principles of freedom of association and collective bargaining in their legislation, and some even in their constitutions. Except for Brazil, all the other 19 countries have ratified Convention No. 87, and all of them have ratified Convention No. 98.

⁵ Latin America's share of the world population has ranged between 9 and 13 per cent over the past century.

In a detailed analysis of these countries, Vega-Ruiz (2004) explains that the high number of complaints does not necessarily indicate that this region presents the worst scenario in the world for violating union rights. For the author, a key factor is perhaps a greater understanding by both parties of the importance of the law, its value and its guarantees, at all levels, both nationally and internationally (Vega-Ruiz, 2004, 8).⁶ In support of this argument, Vega-Ruiz cites successful cases of change in the conduct of selected countries based on the recommendations of the CFA. This possibility fits with Gomes' (2009) argument that countries where ILO action can be more effective are those which have the political will to comply, even though they lack sufficient material capacity. The favorable terrain for ILO participation may be due to a country's approach of cooperation with the Organization, even if the material conditions for the realization of the right are lacking, such as an adequate legal system, sufficient labour inspection and institutional spaces for social dialogue.

An ILO initiative has sought to address the problem of insufficient capacity for dialogue. Since 2000, the Organization has started to work with some governments (e.g., Colombia, Panama and the Dominican Republic) to develop national tripartite mechanisms. These mechanisms aim to resolve disputes related to compliance with international labour standards, especially freedom of association and collective bargaining, including those originating in complaints made to the CFA. Given the high number of complaints and the long duration of cases in Latin America, the ILO noted that the absence of national spaces for social dialogue was a key obstacle to the non-resolution of cases (Guido, 2017). Emphasizing that participation in such mechanisms should not constitute a condition for resorting to ILO supervisory bodies, Guido (2017) concludes that many of the serious or non-serious CFA cases could have been resolved more quickly and effectively at the domestic level if tripartite mechanisms had been in place.

Most Latin American countries have a long-established relationship with the ILO (Villasmil Pietro, Carballo Mena, 2020). Sixteen of the 20 countries examined here are founding members of the Organization, and their membership has been stable for most of this period.⁷ Bronstein (2010) reinforces this argument, noting that the number of complaints may indicate that social actors know and understand the ILO's international supervisory system. For Marcos-Sánchez Zegarra and Rodríguez Calderón (2013, 83), trade unions in the Americas know, use and value the function of the ILO supervisory bodies as part of their legal-institutional strategy for the defence of freedom of association.

6 Even though most cases originate from workers' complaints, there are examples of the participation of employers, such as Case No. 2699 (Uruguay), presented in 2009 by the Uruguayan Chamber of Industries (CIU), the National Chamber of Commerce and Services of Uruguay (CNCS) and the International Organisation of Employers (IOE). The organizations argue that "a series of labour laws were passed without taking account of the contributions of the employers' side; in addition, they object to the content of the Collective Bargaining Act, No. 18566, and consider that it violates Conventions Nos 98 and 154" (CFA, Case No. 2699, Report No. 356, allegations).

7 The only Latin American countries which were not founding Members of the ILO are Costa Rica (ILO Member since 1920), the Dominican Republic (since 1924), Ecuador (since 1934) and Mexico (since 1931).

The above analysis suggests that the high number of complaints from Latin America may be the result of a combination of a high level of violations of freedom of association and the institutionalization of freedom of association and collective bargaining principles.

2. Latin America and freedom of association: The data

To provide a broader view of the interaction between Latin American countries and the CFA, we have analysed data from the ILO NORMLEX database for the 20 countries during the Committee's 70 years of existence.⁸ Figure 2 indicates the average number of complaints filed against these Governments in total and the number of cases per capita. Figure 3 shows the number of cases for the five largest countries by population: Argentina, Brazil, Colombia, Mexico and Peru.

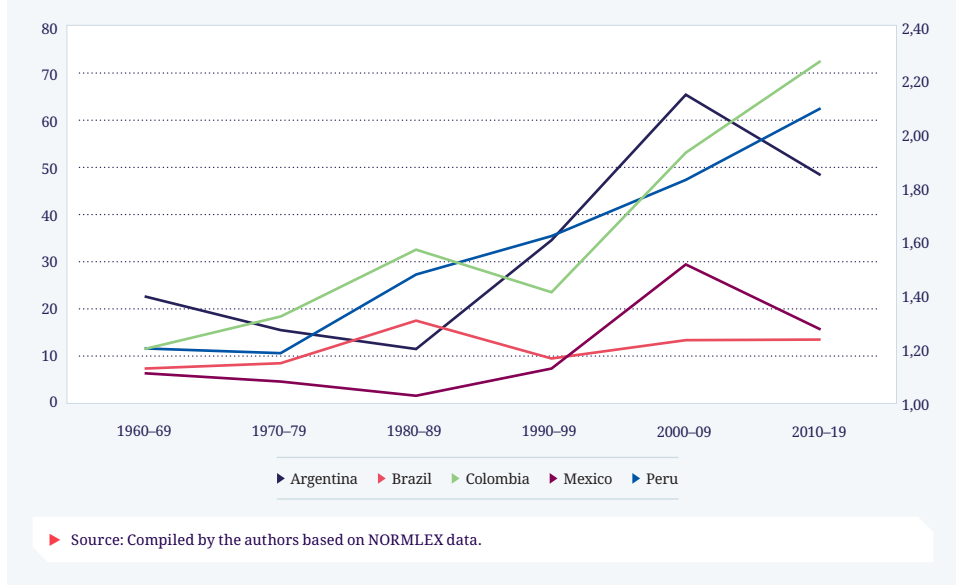
Some patterns stand out over the decades. The number of complaints increased during the 1980s following a period of military dictatorships in Latin America. From the 1990s, the number of complaints continued to increase sustainably. Bronstein (2010) suggests that this marked the beginning of the adoption of neoliberal policies and the flexibilization of labour markets.

► **Figure 2. CFA cases from Latin America, 1960–2019**



8 We have disregarded the 1950s and 2021 because of the low number of complaints.

► **Figure 3. No. of CFA cases from the five largest countries, 1960–2019**



On the one hand, the data shows the connection between freedom of association and democratic forms of governance, as affirmed by the ILO.⁹ According to Gomes (2009, 109):

freedom of association’s close relationship to democracy is central to the reluctance of governments to support freedom of association rights. This close relationship means that freedom of association goes beyond the workplace, that is, to promote freedom of association rights is to promote more participation, debate and need for dialogue not only in the workplace, but also in the social policy’s decision making.

On the other hand, it draws attention to the impact of the ILO in the fight for democracy in Latin America.¹⁰ In the case of Argentina, where the dictatorship lasted from 1976 to 1983, complaints of violations of the principle of freedom of association ranged from intervention in unions to the disappearance of people (Zorzoli, 2017). Seeking to differentiate themselves from the dictatorships of Chile and Uruguay, the Argentine military Government tried to project a reputation for maintaining human and labour rights. The military Government adopted the strategy of formally cooperating with the ILO on the surface, but in effect delaying the process of international supervision (Zorzoli, 2017).

⁹ On this relationship, see Curtis, 2004.

¹⁰ CFA, Case No. 2, presented to the Governing Body in 1950 against the Venezuelan Government denounced violations to freedom of association by the military authoritarian government.

Complaint No. 842 is a telling example.¹¹ It was filed by the World Federation of Trade Unions (WSF) on the day after the military coup, on 25 March 1976, and was forwarded to the CFA.

In analysing complaint No. 842, Basualdo observes that some of the positive outcomes of international supervision were that the complaint was examined and legitimated by recording human rights violations, which in turn resulted in political pressure on the Government. At the risk of its reputation, the dictatorial Government made concessions that resulted in concrete victories, such as the freedom of prisoners and the recognition “of rights for those who were not released” (Basualdo, 2017, 4). Despite these gains, Basualdo notes that there were limitations, delays, and difficulties in the proceedings, particularly in cases in which the Government provided formal responses that complied with what was requested, thereby managing to hide or disguise some of the most flagrant violations (Basualdo, 2017, 4). Two on-site visits by the ILO were carried out with timid results, in particular because the people interviewed were nominated by the Government (Basualdo, 2017). This case is significant as it shows that violations of workers' rights and threats to democracy are closely inter-related. They were then, and are now a clear and present danger to freedoms in today's world.

Fast forwarding to 2019, a year referred to by Guido as one of social unrest in South America, he wonders why even more cases did not reach the ILO due to the violent repression of social protests. Summarizing the difficulties of the ILO international supervisory system, he points out that:

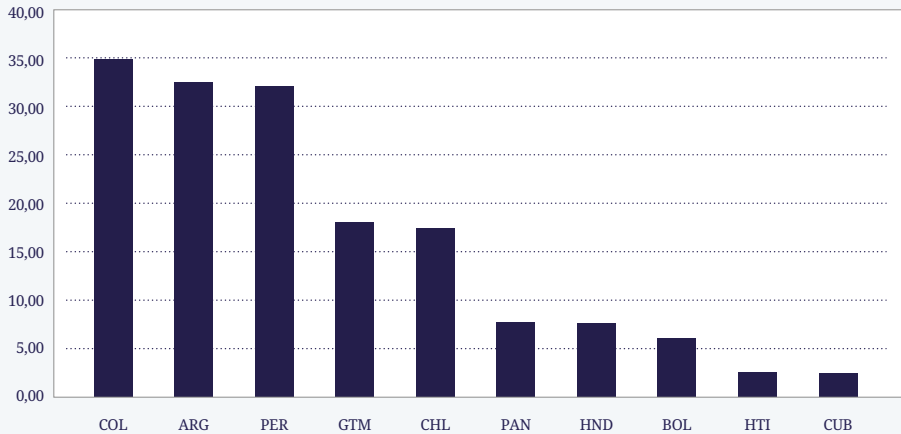
the diversity of actors does not correspond to traditional ILO actors; the lack of adequate knowledge to lodge complaints and observations with the ILO supervisory bodies; the issues that are urgent for new generations that are not reflected in the pace of the procedures of the supervisory system (Guido, 2019, 2).

Figure 4 shows the number of cases in the top five and bottom five countries, while Figure 5 shows the number of cases per capita. According to Figure 4, Colombia is the country with the highest number of complaints. The former ILO QVILIS database shows that, from 1990 to 2012, the types of grievances cited in the complaints were anti-union discrimination (43.88%), obstacles to collective bargaining (15.53%), safety and physical integrity of persons (9.32%), interference in trade unions (8.16%), restrictions to union organization and affiliation (6.02%) and others (5.63%).

Although cases related to threats to the life and physical integrity of union members are in third place, this type of violation of trade union freedom is the most “serious, brutal and inadmissible”, as Ermida Uriarte warns (2012, 46). Analysing the scenario in the

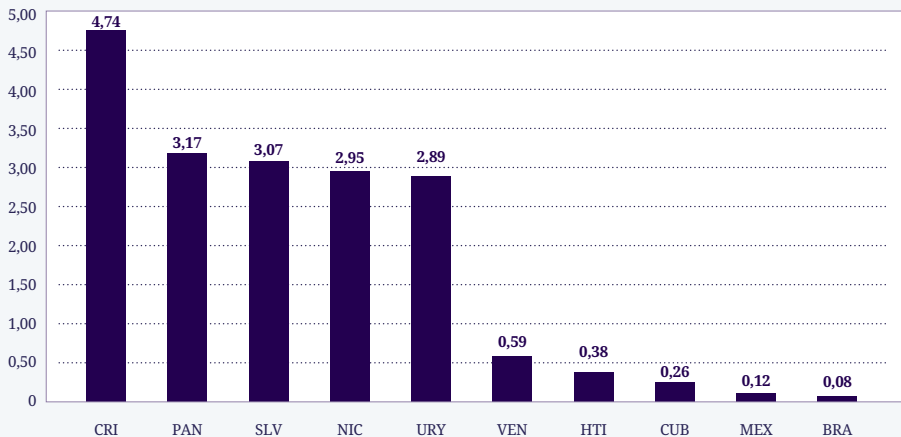
¹¹ The decrease in complaints is perhaps explained by the silence of Argentine trade unions during the dictatorship period. Zorzoli (2016, 24–25) explains that this posture was not that of a concealed collaborationism, but of a politically formed leadership (which had participated almost continuously in the ILO since its foundation) that acted according to its positions and interests.

► **Figure 4. Top five and bottom five countries by average No. of cases 1960–2019**



► Source: Compiled by the authors based on NORMLEX data.

► **Figure 5. Top five and bottom five countries by average No. of cases per million population, 1960–2019**



► Source: Compiled by the authors based on NORMLEX data.

2000s, Ermida Uriarte points out that the failure by the ILO in face of the persistence of the murders of trade unionists is due to tripartism, used in an instrumental way by the Colombian Government to prevent change.

More recent data shows that, even though the number of complaints has declined, violence against labour persists. According to the National Trade Union School, between 1973 and 2018, there were at least 14,842 violations of life, liberty and integrity against trade unionists in Colombia, of which 3,186 were homicides (Escuela Nacional Sindical, 2019, 5). The decline is important: from 200 homicides of trade union activists a year in the 1990s, to 36 in 2013 and 20 in 2014 (OECD, 2016). In 2018, there were 14 murders of trade unionists (Escuela Nacional Sindical, 2018).

Figure 5 shows Costa Rica as the country with the highest number of complaints when the data is standardized by population. Despite the ratification of both the ILO fundamental Conventions Nos 87 and 98, enforcement is inadequate. Union density is lower than 1 per cent in the private sector and lower than 30 per cent in the public sector, while overall trade union density is lower than 10 per cent (OECD, 2017). The collective organization system is fragmented due to the coexistence of employer-supported solidarity associations and trade unions.

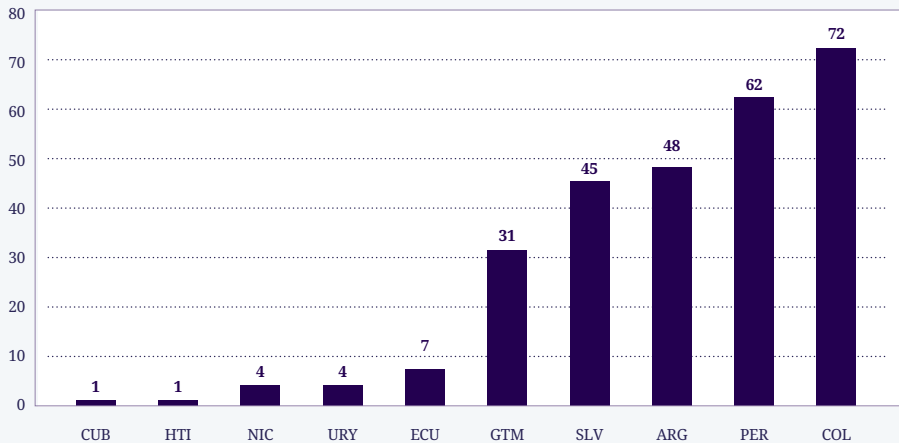
From the 1980s onwards, these solidarity associations gained popularity in the public discourse, in particular in the banana sector, supported by the Catholic Church School of Pope John XXIII and employers [...] Both employers and affiliated workers contribute to the saving fund of the association (2–3% of the salary). Even though these solidarity associations are not permitted by law to negotiate working conditions and labour rights [...] they attempt to substitute the role of the trade unions in protecting worker's rights by advancing an alternative worker's organization, called 'permanent committee', which does not function independently from management ... (Ganseman, D'Haese, 2020, 405).

At the other extreme, Brazil is the country with the lowest number of complaints. Despite an increase in the 1970s, during the military dictatorship, there has been a decrease from the 1980s onwards, and a stabilization in the number of complaints. The Brazilian case is interesting because, despite the comparatively low number of cases, the country has not ratified Convention No. 87 and its union system presents several incompatibilities with the principle of freedom of association (Gomes, Prado, 2011). The main incompatibility in terms of collective organization is the *unicity* rule, which imposes by law a single trade union for a specific category of workers. This legal representation is permanent and does not derive from workers' choice. Perhaps one explanation of the Brazilian case is that this collective structure, despite the lack of representation of the unicity rule, is paired with a well-established institution for resolving conflicts in the form of labour courts. Despite this, there have been important cases concerning, in particular, the right to strike¹² and trade union contributions.¹³

12 For example, Cases Nos 1992 (1998) and 2792 (2010).

13 For example, Case No. 2739 (2009).

► **Figure 6. Top five and bottom five countries by number of cases in the decade 2010–2019**



► Source: Compiled by the authors based on NORMLEX data.

Looking at the most recent decade, the 2010s, Figure 6 shows the number of cases in the top five and bottom five countries. According to Marcos-Sánchez Zegarra and Rodríguez Calderón (2013, 83-84), analysing the former QVILIS database, the most common subjects of cases are: anti-union discrimination; violations of the life, safety and integrity of people; obstacles to collective bargaining; and interference in union autonomy. In her study, Vega-Ruiz (2004, 22) notes that the character of complaints has changed since the 2000s, with the exception of Colombia: from violence and threats against trade unionists, to legal restrictions on freedom of association.

In the case of Cuba, despite only one case being lodged in the 2010s, the Committee has noted that “for several decades, it has been examining allegations of non-recognition and interference by the Government in the free operation of trade union organizations not affiliated to the Confederation of Workers of Cuba [see Cases Nos 1198, 1628, 1805, 1961 and 2258 of the Committee on Freedom of Association]”.¹⁴ The ILO has continuously asked the Cuban Government to recognize trade unions other than the Confederation of Workers of Cuba (CTC) and not to repress independent unionists. In Case No. 3271, the Government argued that the complaint was of a political nature against the regime. The Committee clarified that, despite not having the competence to deal with essentially

14 CFA, Report No. 397, March 2020, para. 350.

political issues, “it can, however, consider measures of a political character taken by governments in so far as these may affect the exercise of trade union rights”.¹⁵ According to the Inter-American Commission on Human Rights (IACHR) (2020), Case No. 3271 is considered a milestone as it is the first time a complaint filed by an independent trade union association has been examined by the CFA. The IACHR summarizes the violations of the principle of freedom of association reported by Cubans that it has interviewed (IACHR, 2020, para. 255):

impossibility of exercising freedom of association, the non-existence of the right to organize and to register entities independent of the State, the lack of representation of trade unions recognized by the government, the need for membership in order not to lose their jobs, the weakness of the defense of labor rights by official unions, the non-existence of the right to strike, and cases of persecution and harassment of independent trade unionists.

Our aim here is to offer an expanded view of the trends in the number of complaints as they relate to the different social, economic and political contexts of the countries concerned. Some common aspects arise from a shared historical path of development: European colonization, late industrialization, labour law dominated by the State, authoritarian periods of government, re-democratization, high levels of inequality and the adoption of neoliberal policies. In this context, full recognition of freedom of association and collective bargaining means disseminating democratic practices in societies marked by socio-economic inequalities.

3. Challenges ahead for the ILO and the CFA

Within the process of the institutionalization and strengthening of freedom of association and collective bargaining principles in Latin America, an important advance lies in the recognition of ILO Conventions as part of the constitutional order as human rights treaties. In a constitutional reform in 1994, Argentina gave ratified ILO Conventions a hierarchy superior to ordinary law;¹⁶ and in 2008, the Supreme Court of Justice of Argentina recognized the constitutional hierarchy of Convention No. 87 because of its human rights character (Omar García, 2021). The Supreme Court of Peru followed the same path, recognizing the hierarchy of the constitutional norms of ILO Conventions Nos 98, 151 and 154 on collective bargaining. In Brazil, according to the prevailing jurisprudential position of the Supreme Court, ILO Conventions, considered as human rights treaties, have a higher hierarchy than ordinary law. The Brazilian Constitution provides for a differentiated procedure for the ratification of human rights treaties, which gives them constitutional hierarchy. However, as of 2021, no ILO Convention had been ratified using this procedure (Gomes, 2019).

¹⁵ Ibid., para. 348.

¹⁶ 75.22. *Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes.*

In Colombia, in addition to ratified ILO conventions being part of the constitutional bloc (*bloque de constitucionalidad*), the Constitutional Court has ruled in various cases that the CFA's guidelines also have constitutional hierarchy, based on the argument that:

the legal and institutional value of the supervisory bodies arises from the work of the supervisory bodies, which in turn constitutes an authorized reading of the Conventions until the contrary is proven by the International Court of Justice and the good faith application of international treaties gives precisely this legal value (Ostau De Lafont De León, Niño Chavarro, 2011, 49).

Furthermore, the Inter-American Court of Human Rights, in various decisions, has based its understanding of ILO Conventions and on the guidance of the supervisory bodies, including the CFA (Duhaime, Décoste, 2020, 584–585).

The integration of the ILO Conventions on freedom of association and the interpretation developed by the CFA into national legal systems is based on the recognition of their human rights character. This view poses a challenge to the ILO, and to the CFA, that needs to be addressed: although, as human rights, labour rights need to reach all workers in Latin America; however, most rules, including those relating to freedom of association and collective bargaining, only protect employees. This exclusion is historical and was and is in part reinforced by international labour law.

Villasmil Pietro and Carballo Mena (2020) argue that there is a Latin American connection to the founding of the ILO. The action of Latin American States that were founders of the ILO and the influence of norms, such as the Mexican Constitution of 1917, belie the idea that the ILO was created solely by the industrialized Western countries. However, the Organization, despite its stated goal of universality, has failed to capture the complexities of work on this continent, especially those arising out of colonization and slavery, such as agricultural work, informal work and indigenous rights (Yáñez Andrade, 2017). Romano (2017) refers to a differential geography of rights and concludes that, although the ILO presents its normative function as a source of universal norms, it has also produced differentiated norms, excluding or guaranteeing a lower level of protection for broad territories and population groups (Romano, 2017, 27). With regard to indigenous rights, despite the pioneering spirit of the ILO, it was only with the Indigenous and Tribal Peoples Convention, 1989 (No. 169), that the Organization abandoned the assimilation and integration approach (Villasmil Pietro, Carballo Mena, 2020). The universal norms of the ILO deal with modern salaried work, which does not correspond to the majority of the Latin American workforce, which was and still is mostly informal.

The need for more inclusive labour law and international labour standards has re-emerged in the Global North with the intensification of precariousness and the fragmentation of work in the post-globalization world. However, the discussion resulting from this process about the scope of freedom of association and collective bargaining does not cover the complex reality of work in Latin America. In the Global South, informality is not only a result of more recent processes of precariousness; it is very old and embedded in poverty. Traditionally informal workers, who were already quite vulnerable, are now

facing additional risks to their livelihood due to the changes brought about by globalization, neoliberal policies and new technologies (Schurman, Eaton and Chen, 2017).

The composition of informality also differs between the Global South and North. Bonnet, Vanek and Chen (2019), analysing ILO data on informality from 2018, give a more comprehensive description:

Globally, 56 per cent of all workers are employees/wage workers and 44 per cent are self-employed [...]. However, there are significant differences across the country groupings. In developing countries, an overwhelming 72 per cent of all workers are self-employed. The reverse is true in developed countries where 86 per cent of all workers are wage employed. In emerging countries, just over half (51 per cent) are wage employed. (Bonnet, Vanek and Chen, 2019, 5)

In the informal sector, self-employment absolutely predominates in developing countries at 79 per cent (Bonnet, Vanek and Chen, 2019, 5). Most informal workers in Latin America are truly self-employed in the sense that they provide services in a fragmented and autonomous way – street vendors, wastepickers, care workers, domestic workers, agricultural workers and fishers. Not all of these workers are poor, but the majority are vulnerable to falling into poverty. Most of them are from families that have been informal for generations, and have never been protected by labour law.

As set out in the ILO Declaration on Fundamental Principles and Rights at Work (1998), freedom of association and collective bargaining are enabling rights that make it possible for workers to achieve better working and living conditions. In the few cases in which informal workers have been able to mobilize collectively, they have been able to make gains. Informal workers in Latin America, such as wastepickers, have organized collectively in some countries and have had their voices heard. In Brazil, for example, wastepickers have created a national movement that promotes the formation of associations and cooperatives and establishes dialogue with public authorities on inclusive waste management systems in many cities. Wastepickers in associations and cooperatives have been found to enjoy better living and working conditions than their unorganized counterparts (Gomes et al., 2020).

These workers have been able to organize and engage in dialogue with civic authorities and business, even though they have no rights under labour law. The example of domestic workers in Brazil is also important. Their trade union movement started in the 1930s. It was only in the 1970s that they managed to persuade the Government of the time to enact a law guaranteeing some labour rights. In 1988, the Federal Constitution finally guaranteed freedom of association and the right to collective bargaining for domestic workers, a right that is still highly ineffective today. During the COVID-19 crisis, domestic workers were one of the hardest hit groups: 1.6 million female workers lost their livelihood, informality jumped to 75 per cent and, as they continued to work during social isolation measures, they were one of the groups of workers most affected by the disease, as shown by their higher than average death rate (Instituto Pólis, 2021). Despite these developments, there is still no space for dialogue with domestic workers' organizations

► **Figure 7. Decisions of the CFA on the recognition of freedom of association for self-employed and domestic workers**

332. All workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing.

387. By virtue of the principles of freedom of association, all workers with the sole exception of members of the armed forces and the police should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.

388. The Committee requested a government to take the necessary measures to ensure that self-employed workers fully enjoyed freedom of association rights, in particular the right to join the organizations of their own choosing.

389. It is contrary to Convention No. 87 to prevent trade unions of self-employed workers who are not subordinate to, or dependent on, a person.

406. Domestic workers are not excluded from the application of Convention No. 87 and should therefore be governed by the guarantees it affords and have the right to establish and join occupational organizations.

407. Domestic workers, like all other workers, should benefit from the right to freedom of association.

408. Home-based workers are not excluded from the application of Convention No. 87 and should therefore be governed by the guarantees it affords and have the right to establish and join occupational organizations.

409. Persons working from home in the social services, health and childcare sectors should be able to enjoy the provisions of the Labour Code, or enjoy genuinely equivalent rights.

► Source: CFA, Compilation of decisions.

to build measures that would give them the same standards of decent work promised to other workers.

The CFA, in its interpretation of ILO Conventions, recognizes freedom of association for *all* workers, including the self-employed and domestic workers, as can be seen in Figure 7.

Article 23(4) of the Universal Declaration of Human Rights attributes the right to organize to "everyone", including workers engaged in informal work. But, in practice, informal workers, who constitute the majority of the workforce in Latin America, have almost no access to the CFA to pursue this most fundamental labour right. The question is no longer whether these workers have the right to collective organization and bargaining, but how it should be exercised, as highlighted by Novitz (2020).

The challenge for the CFA is to effectively enlarge its scope of coverage. The CFA only acts if provoked by a complaint. Workers, as individuals, can file a complaint with human rights courts, such as the Inter-American Court of Human Rights, but they have no access to the CFA, to which a complaint can only be brought by an accredited labour organization. So some expansion of the eligibility criteria for filing a complaint would clearly benefit informal workers. This discussion can be included in the limitations of tripartism in reaching out to informal workers and their representative organizations. This issue is not unique to Latin America. Any change along these lines would also benefit the majority of the workforce in Asia and the Pacific and in Africa. Apart from individual complainants, the CFA could also open the process to labour-oriented NGOs, which are the main advocates for labour in many emerging economies.

Many informal workers' associations have scarce financial and technical resources (Gomes *et al.*, 2021). The path to Geneva is almost impossible. The ILO must also focus on these associations when developing programmes for the capacity-building of social actors with regard to international labor standards.¹⁷ Making this process more inclusive would consolidate the view that all workers are entitled to freedom of association and the right to collective bargaining.

Conclusion

Over 70 years of dialogue between the CFA and Latin American countries has played an important role in building the expectation that a complaint to an ILO body will effectively result in a change in the behaviour of countries. This can be one among other factors in understanding the intense participation of Latin American countries in the CFA. It is also important in this analysis to explore other possible factors for this high incidence, including: democratization, economic crises, national institutional channels for filing complaints, trade union affiliation, trade union fragmentation and labour law reforms. This type of analysis helps identify similarities and differences in the protection of union freedom rights across these countries.

One important challenge that we have identified for the CFA is the need to effectively include informal workers, whether or not they are employees, in the processes of social dialogue and collective bargaining by guaranteeing their freedom to associate. The ILO needs to make this issue an integral part of its ongoing dialogue with Member States.

¹⁷ See, for example, the ILO's [PROSPECTS](#) programme aimed at refugee workers and the legal literacy of informal workers.

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Jane Aeberhard-Hodges

► The gender dimension of the work of the Committee on Freedom of Association

Introduction

When asked to contribute a chapter on the gender dimension of the work of the Committee on Freedom of Association (CFA), a first reaction was that it would be a short chapter indeed. But reading that one of this publication's aims is to highlight situations over the last decade in which the Committee's considerations have been more broadly influential in guiding governments, social partners and civil society actors in upholding fundamental rights and promoting democracy and the rule of law, I readily took up the challenge. Upholding fundamental rights and the rule of law apply equally to women and men. As a young CFA staffer in the 1980s and 1990s, I saw no cases being lodged that highlighted issues related to trade union rights interfacing with equality at work for women and men. Nor were there process issues that reflected who was filing complaints. How has that situation changed in the last decade?

This paper examines, first, the basis on which the CFA procedure has the potential to interact with workplace gender equality. Secondly, it describes the membership of this special procedure. Thirdly, it gives examples of certain cases in which women trade unionists and leaders have been involved – usually from sectors with a predominantly female labour force – and how the CFA has followed up their outcomes. Fourthly, it explores measures that the ILO's tripartite constituents and the CFA itself might consider in order to ensure that the gender dimension of the CFA's work receives the attention it is due, for example in its annual reports.

1. Is there an underlying interface between trade union rights and gender equality?

The CFA procedure protects trade union rights, and most complaints start with a paragraph explaining which freedom of association Conventions have been ratified¹ by the State named in the complaint, with Conventions Nos 87 and 98 being the fundamental

1 Ratification of the freedom of association Conventions is not a prerequisite for the CFA procedure to be engaged.

instruments always listed. Conventions Nos 135, 141, 151 and 154 are referred to as well,² if relevant to the facts of the case. So the ILO's normative basis for gender equality in the world of work (Conventions Nos 100, 111, 156, 183, and now 190)³ might appear irrelevant to the procedure. But any workers' rights and human rights specialists – whether activists, academics, practitioners or leaders of workers' or employers' organizations – will recognize the inter-relatedness of the ILO's fundamental principles and rights. According to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), as amended in 2022, all ILO Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize the principles concerning the fundamental rights which are the subject of the respective Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour;
- (d) the elimination of discrimination in respect of employment and occupation; and
- (e) a safe and healthy working environment

Among the pairs of Conventions giving life to these principles are Conventions Nos 87 and 98 on freedom of association and the right to collective bargaining, and Conventions Nos 100 and 111 on equal pay for women and men for work of equal value and the ending of discrimination in the world of work on the basis of, among other grounds, sex. These two groups of fundamental standards form a strong enabling environment for attaining all the other labour rights adopted by the ILO. And gender equality experts will agree that the mainstreaming of women's and men's equal rights at work requires “assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres, so that women and men benefit equally and inequality is not perpetuated”.⁴ The CFA procedure, through which workers' and employers' organizations are able to claim protection of their rights to improve, through collective action, the economic and social situation of workers of both sexes, should be gender mainstreamed.

2 The Workers' Representatives Convention, 1971 (No. 135), the Rural Workers' Organisations Convention, 1975 (No. 141), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

3 The Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Workers with Family Responsibilities Convention, 1981 (No. 156), the Maternity Protection Convention, 2000 (No. 183), and the Violence and Harassment Convention, 2019 (No. 190).

4 ECOSOC, 1997. “Report of the United Nations Economic and Social Council for the year 1997”, (A/52/3).

The freedom of association standards are the starting point. The right to form and join trade unions without discrimination is guaranteed by Convention No. 87, and that includes without discrimination based on the sex of the worker. Textual references to women and men workers in the ILO freedom of association instruments appear only in the Rural Workers' Organisations Recommendation, 1975 (No. 149). Paragraph 16 recognizes that, in order to ensure a sound growth of rural workers' organizations and the rapid assumption of their full role in economic and social development, steps should be taken to “(c) promote programmes directed to the role which women can and should play in the rural community, integrated in general programmes of education and training to which women and men should have equal opportunities of access”. This important normative message of inclusiveness counters a certain sexism against working women and societal perceptions of women's inappropriateness – or incapacity – to lead, especially to lead organizations that hold power, such as trade unions. United States researchers argue that, in the early days of the labour movement, many unions simply did not allow women to join and made it difficult for them to attain certain jobs in the workplace.⁵ But social norms do change. According to the United Kingdom Trades Union Congress (TUC), women members now outnumber men members and, since 2013, the TUC has had its first female General Secretary, Frances O'Grady. Yet, senior leadership in unions is still generally male dominated.⁶ It is estimated that, globally, just under 15 per cent of women workers are unionized, although men's unionization rate is decreasing, so there may be space for female leaders if a vacuum ensues.⁷

Turning to the history of decisions since the CFA was created in 1951, it appears, at first, that no complaints have been presented concerning women's freedom of association rights – documents are gender neutral. For example, no gender references appear in the Table of Contents of the Compilation of decisions of the Committee on Freedom of Association.⁸ Chapter 3, on the right of workers, without distinction whatsoever, to establish and to join organizations, reflects the many distinctions that have arisen in the cases examined over its 70 years history, such as distinctions based on race, the nature of the workers' contracts or their occupational category. Racial discrimination is particularly noted in relation to the right of organizations to freely draw up their own rules, with a strong CFA condemnation: “Laws providing for the organization, in registered mixed trade unions, of separate branches for workers of different races, and the holding of

5 Green, K. “The Future of Organized Labor — And the Role Women Play in That Future”, UnionTrack, 30 April 2019; for the United Kingdom history of women and trade unions, see Philips, A. “A history of women and trade unions”, 5 March 2021.

6 Mullaly, C. “A woman's place is in her Trade Union”, 8 June 2018.

7 Schmitt, J. and N. Woo. 2013. “Women Workers and Unions”. Policy Brief. Center for Economic and Policy Research; the United States Bureau of Labor Statistics 2020 data on union membership show men continue to have a slightly higher union membership rate (11 per cent) than women (10.5 per cent). Accessed 2 September 2021 <https://www.bls.gov/news.release/pdf/union2.pdf>.

8 ILO, 2018. *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, Sixth edition. Geneva.

separate meetings by the separate branches, are not compatible with the generally accepted principle that workers' and employers' organizations shall have the right to draw up their constitutions and rules and to organize their administration and activities" (para. 582). Similarly, the CFA has taken a stand against racial discrimination in the election of union officers: "Legislative provisions which reserve to Europeans the right to be members of the executive committees of mixed trade unions (made up of workers of different races), are incompatible with the principle that workers' and employers' organizations shall have the right to elect their representatives in full freedom" (para. 608). By analogy, if national laws prohibited the election of women as union officers because of their sex, complaints could be lodged, although this has not happened in the CFA.

Another source for locating an interface is the annual report of the CFA,⁹ which has been submitted to the ILO Governing Body since 2017. The report contains helpful information on the use of the CFA procedure throughout the year in question, supported by statistical data and other details on the work undertaken, the progress made and the serious and urgent cases examined by the Committee. For 2020, for example, data showed a trend towards a decrease in the use of this special procedure in Europe, Africa and Asia, and an increase in its use in Latin America. This geographical breakdown could be a link to the gender dimension, if correlated with women's labour force participation rates¹⁰ and with women's trade union membership across regions. Among the various breakdowns, the data reflecting the "nature of the allegations" shows that, in 2020 for example, the topics most frequently examined were threats to trade union rights and civil liberties, protection against anti-union discrimination, protection against acts of interference and violation of collective bargaining rights. Here, there is a clear interface of gender equality with civil liberties violations, when there have been complaints concerning beatings and rape affecting women unionists and leaders, especially in sectors with a predominately female workforce. As a young staffer, I had the honour to prepare, for training sessions, the very first graphic representations of CFA case data well before this decision to table data in the Governing Body. There was never an attempt to seek gender-related data at that time, but the CFA annual reports now offer an opportunity to do so.

Of course, it should be underlined that the CFA examines the facts within receivable communications presented to it, so if complainants themselves are not highlighting the gender dimension of freedom of association violations, the CFA may consider itself constrained to avoid entering into such an examination. But gender mainstreaming does not amount to "making things up" to be politically correct!¹¹ Although a quasi-judicial

9 See GB.341/INS/12/1Add.1 of March 2021, Accessed 2 September 2021 https://www.ilo.org/wcmsp5/groups/public/-/ed_norm/-/relconf/documents/meetingdocument/wcms_776030.pdf.

10 According to ILO data in 2020, less than half of all women participated in the labour force (49 per cent) compared to men (75 per cent). Accessed 2 September 2021 https://www.ilo.org/global/about-the-ilo/multimedia/maps-and-charts/enhanced/WCMS_556528/lang-en/index.htm.

11 Charlesworth, H. 2005. "Not waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations", *Harvard Human Rights Journal*, 18.

body, there is still leeway for judicial activism by the CFA. After all, gender analysis has entered into all levels of judicial proceedings, as demonstrated by the Rome Statute of the International Criminal Court.¹²

2. Membership of this special procedure

Given the global recognition that gendered outcomes in oversight structures are improved when representatives of all sexes have a place at the table and have a voice, it is interesting to share the profile of the current CFA membership.

Whereas, in recent decades, gender parity at the sessions of the International Labour Conference (ILC) has been closely tracked and given visibility in the reports of the ILC Credentials Committee and other ILO publications,¹³ and now for regional meetings as well, the same cannot be said for the Governing Body and its committees, such as the CFA. The composition of the Governing Body (as elected on 13, 14, 16 and 18 June 2021)¹⁴ shows that, on the Employer benches, only three of the 14 regular members are women, and on the Worker benches, five of the 14 regular members are women (as Governments are not elected nominally, a gender count of their representatives depends on who is sent to attend each session). For the first time in ILO history, for the period June 2021-June 2022, all three Officers of the Governing Body were women: Chairperson – Ambassador Anna Jardfelt (Government member, Sweden); Vice-Chairpersons – Ms Renate Hornung-Draus (Employer member, Germany), and Ms Cateleene Passchier (Worker member, Netherlands). Interestingly, Ms Jardfelt is only the 6th woman to chair the Governing Body since the ILO's creation in 1919,¹⁵ with the other women having held this important governance post being Ms Aída González Martínez (Mexico), Ms Maria Roldan Confesor (Philippines), Ms Maria Farani Azevedo (Brazil), Ms V.M. Velásquez de Aviles (El Salvador) and Ms Misako Kaji (Japan). When Director of the Gender Equality Bureau, I had the honour to be invited to brief some of these Chairpersons when taking office. I was always impressed by their keen interest in examining what gender-related issues were on the agenda of the Governing Body during the course of their period as Chair, and their perspicacity regarding the mainstreaming of gender into all items on the agenda that might, historically, never have received more than superficial attention in the verbal debates (no matter how gender-responsive the Office's background paper might be).

12 Rome Statute of the International Criminal Court, Article 54(1)(b); see also ICC, 2014. *Policy Paper on Sexual and Gender-Based Crimes*. The Hague: The Office of the Prosecutor.

13 Aeberhard-Hodges, J. "Practitioner perspective: Women and international treaty making – the example of standard setting in the International Labour Organization", in Harris Rimmer, S. and K. Ogg. 2019. *Research Handbook on Feminist Engagement with International Law*. Cheltenham: Edward Elgar Publishing; ILO. 2009. "Women's empowerment: 90 years of ILO action", Geneva.

14 ILO. "Composition of the Government Body of the International Labour Office", Geneva.

15 ILO. "Historical list of Officers of the ILO Governing Body", Geneva.

The CFA's members are chosen from these Governing Body members. The CFA's composition is stipulated, in gender-neutral terms, in paragraph 38 of the Compendium of rules applicable to the Governing Body.¹⁶ It is a good practice that CFA reports always commence with a listing of its members (women and men) present for the examination of the complaints in that report. For example, paragraph 2 of the 393rd Report states: "The following members participated in the meeting: Ms Batool Hashim Atrakchi (Iraq), Ms Valérie Berset Bircher (Switzerland), Mr Aniefiok Etim Essah (Nigeria), Mr Aurelio Linero Mendoza (Panama), Mr Takanobu Teramoto (Japan); Employers' group Vice-Chairperson, Mr Alberto Echavarría and members, Ms Renate Hornung-Draus, Mr Thomas Mackall, Mr Juan Mailhos, Mr Hiroyuki Matsui and Ms Jacqueline Mugo; Workers' group Vice-Chairperson, Mr Yves Veyrier (substituting for Ms Catelene Passchier), and members, Mr Gerardo Martínez, Mr Magnus Norddahl and Mr Ayuba Wabba".¹⁷ The membership thus constituted two women from the Government benches, two from the Employer benches and none from the Worker benches. Under the composition of a more recently elected Governing Body, in June 2022, the gender balance was healthier: of the 18 members of the CFA, four Government members were women, one Employer member was a woman and one Worker member, who was her group's spokesperson.¹⁸

Of course, research reveals many reasons why so few women appear among the leadership of workers' and employers' organizations. Some organizations address this challenge directly in their founding documents. For example, the Constitution of the International Trade Union Confederation (ITUC)¹⁹ highlights, as one of the ITUC's aims, "to end all discrimination on the basis of sex", among other grounds. It aims "[t]o make the trade union movement inclusive, and responsive to the views and needs of all sectors of the global workforce". "It shall advance women's rights and gender equality, guarantee the full integration of women in trade unions and promote actively full gender parity in their leadership bodies and in their activities at all levels". The Statutes of the International Organisation of Employers (IOE) state, in Article 2(b), that its objectives include, among others, "to provide an international forum to bring together, represent and promote the interests of national business and employers' organisations and their members [...] in all employment and socio-economic policy issues".²⁰ Such a broad mandate doubtlessly includes gender-related workplace issues.

16 ILO, 2019. "Compendium of rules applicable to the Governing Body of the International Labour Office", Geneva. This document also contain the CFA procedure (Annex II), which echoes para. 38 when stating the CFA composition: nine regular members representing in equal proportion the Government, Employer and Worker groups of the Governing Body and nine substitute members, each member participating in a personal capacity.

17 ILO, 2021. "393rd Report of the Committee on Freedom of Association", 383rd Report, March (GB.341/INS/12/1).

18 ILO, 2022. "Report of the Committee on Freedom of Association", 399th Report, June (GB.345/INS/4).

19 ITUC. 2018. "ITUC Constitution and Standing Orders", Brussels, p. 8.

20 IOE. 2022. "IOE Statutes", Geneva.

The CFA procedure document itself maintains a gender-neutral wording. For some aspects of the procedure, this could be improved. For example, on-the-spot missions are outlined in paragraphs 67ff. This highly successful measure involves an ILO representative being sent to the country concerned, at the government's invitation, or at least with its consent, to seek a solution to the difficulties encountered, or to verify the action taken on the recommendations of the Governing Body, and to report back to the CFA. The addition of a simple sentence highlighting that women and men could carry out such a task would remove any presumption that only men have the skills and profile to best engage with the concerned governments and other parties to a complaint in such on-the-spot missions.

3. Complaints involving women or issues related to gender equality at work – successful follow-up

Given the philosophical basis of Conventions Nos 87 and 98, the inter-relatedness of the fundamental rights at work and the importance of gender mainstreaming, one could expect that, over the CFA's 70 years of experience, some complaints would have been gender related, especially those involving collective bargaining over working conditions that are clearly related to gender. But the gender dimension has rarely surfaced. When it does, the CFA gives its usual careful follow-up scrutiny equally to the women and men named in the complaint. Here is a snapshot of cases from all regions over recent years involving women as activists and trade union leaders, in which the CFA doggedly followed up to ensure that justice was applied equally to the men and women at the heart of the complaint.

- ▶ Algeria, Case No. 3085, presented by the National Union of Education Workers (SNTE),²¹ following a case of inter-union rivalry in the education sector and Government reprisals, which the CFA asked to immediately cease. One of the disputed union leaders, noted the CFA, Ms Bennoui, President of the SNTE, had left her position in December 2015 upon her retirement. Closing the case, the CFA expected the Government to accept the consequences of any final decision of the Supreme Court on this issue, in compliance with the principles of non-interference by the authorities and with the right of professional organizations freely to elect their representatives, and to continue to ensure the participation of the SNTE in social dialogue in the national education sector (a highly feminized sector).
- ▶ Cambodia, Case No. 3064, presented by the ITUC.²² It was alleged that the then trade union law excluded large numbers of workers, including domestic workers, and that there had been a dramatic increase in the use of fixed-duration contracts (FDCs), particularly in the garment industry, where female workers predominate. The CFA

21 CFA, 395th Report, paras 20–24.

22 CFA, 377th Report, paras 200–214.

held that domestic workers, like all other workers, should benefit from the right to freedom of association. It likewise recalled that FDCs should not be used deliberately for anti-union purposes and that, in certain circumstances, the employment of workers through repeated renewals of fixed-term contracts for several years can be an obstacle to the exercise of trade union rights. It requested the Government to provide a copy of the latest draft of the Trade Union Law to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) for the examination of its application of ratified Conventions Nos 87 and 98, which the CEACR did.

- ▶ Cambodia, Case No. 2783, presented by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)²³ on behalf of its affiliated organization, the Cambodian Tourism and Service Workers Federation. The allegations concerned the dismissal of 14 trade union leaders and activists and forcing them to sign a severance agreement, including Ms Sophann Dara and Ms Pech Sovatthey (Secretary-General of the local union). Finding that that the dismissals had not taken place in accordance with the Labour Law, on 16 February 2010, the Arbitration Council had ordered their reinstatement with full back pay, and it nullified the termination agreements which they had signed under duress. The CFA urged that the reinstatement order be respected swiftly and the Government to take steps without delay to adopt an appropriate legislative framework to ensure that workers enjoy effective protection against acts of anti-union discrimination and anti-union dismissals, including through the provision of sufficiently dissuasive sanctions and rapid, final and binding determinations.
- ▶ China, Case No. 3184, presented by the ITUC,²⁴ concerned the arrest and detention of eight advisers and paralegals who had provided support services to workers and their organizations in handling individual and/or collective labour disputes, as well as police interference in industrial labour disputes. Appendix I to the complaint contained a list of 31 individuals detained or disappeared in connection with the Jasic workers' campaign, of whom 13 named women were described as "forcibly disappeared". Appendix II contained an additional list of individuals detained or disappeared as indicated in the ITUC communication of 11 February 2020, listing 16 workers, including four women, by name. Throughout its examinations of this case, the CFA recalled that adequate protection against all acts of anti-union discrimination in respect of employment – such as dismissal, demotion, transfer or other prejudicial measures – is fundamental to the principle of freedom of association. It urged the Government to take the necessary measures to ensure adequate protection against anti-union discrimination in law and in practice and to provide information in relation to all the named persons.

23 CFA, 359th Report, paras 317–341.

24 CFA, 395th Report, paras 97–121.

- ▶ China, Hong Kong Special Administrative Region, Case No. 3406, presented by the ITUC and the International Transport Workers' Federation.²⁵ In this recent complaint concerning the crackdown on civil liberties within the context of the adoption of the National Security Law in 2020, three trade union leaders, including two women, Ms Carol Ng, Chairperson of the Hong Kong Confederation of Trade Unions, Ms Winnie Yu, Chairperson of the Hospital Authority Employees Alliance, and Mr Cyrus Lau, Chairperson of the Nurses Trade Union, along with others, were arrested as part of a group of pro-democracy activists in January 2021, and on 28 February 2021, Ms Carol Ng and Ms Winnie Yu were charged with conspiracy to commit subversion under the new National Security Law, with their hearing set for 31 May, because the prosecutors claimed they needed time to investigate further, even though the charges had already been laid. These women face life in prison if convicted. It is alleged that the intense security pressure, surveillance and ongoing prosecution of Ms Carol Ng and Ms Winnie Yu, has led to their removal from their trade union leadership positions as the Confederation's President and Chairperson, respectively. After they had been denied bail, they resigned from their positions. Despite the Government's responses that these persons are charged for engagement in party political proceedings, the CFA recalled that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes serious interference with civil liberties in general and with trade union rights in particular. It is not possible for a stable industrial relations system to function harmoniously in the country as long as trade unionists are subject to arrests and detentions. According to the CFA, while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, the arrest of, and criminal charges brought against trade unionists may only be based on legal requirements that in themselves do not infringe the principles of freedom of association. The CFA trusted that the courts in their application of the law will take into account that governments should not attempt to interfere with the normal functions of a trade union movement. Given the length of the detentions awaiting trial and the absence of any indication that their liberty would create a public danger, the CFA requested the Government, should they still be held in preventive detention, to take measures to ensure that they may be released pending trial.
- ▶ Dominican Republic, Case No. 2786, presented by the National Trade Union Confederation (CNUS),²⁶ concerned, inter alia, intimidation of the union's leader and dismissal of more than 15 members of the trade union for having carried out trade union activities. According to the complainant, in the Universal Aloe enterprise, pregnant women were dismissed and direct threats had been made against trade union leaders in order to destroy the union, and the interventions of the Ministry of Labour

25 CFA, 395th Report, paras 122–173.

26 CFA, 383rd Report, paras 41–46.

were ineffective owing to the fact that a high level of complicity existed. According to the Government, the Ministry of Labour found no signs of anti-union discrimination by the enterprise, nor were practices uncovered which were harmful to freedom of association. In a case history that spanned seven years (from the interim conclusions through to the final follow-up paragraphs), the CFA repeatedly requested additional information, in particular regarding the allegations of inspection flaws. The CFA recalled in general terms that the exercise of trade union rights is incompatible with violence or threats of any kind and it is for the authorities to investigate without delay and, if necessary, penalize any act of this kind. In its final examination of the case, noting that the Government had not provided information on the allegations concerning the flaws and a lack of impartiality in the functioning of the inspection system that might have arisen in various enterprises, the CFA recalled that the Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures, which should be prompt, impartial and considered as such by the parties concerned. It offered the Government ILO technical assistance in respect of labour inspection.

- ▶ Guatemala, Case No. 2609, presented by the Movement of Trade Unions, Indigenous Peoples and Agricultural Workers of Guatemala and supported by the ITUC,²⁷ was a particularly serious case of numerous allegations of murder, attempted murder, assault and death threats, kidnappings, harassment and intimidation and blacklisting. One incident was described in detail, with the gender dimension clearly highlighted. As part of the campaign in favour of decent working conditions for women on banana plantations owned by the multinational companies Chiquita Brand and Del Monte, union leaders Dora Bajan, Blanca Villatoro, Cristina Ardón, Ingrid Ruano, Deysi Gonzales, Hortensia Gómez, María Ruano, María Barrios and Etelvina Tojín went to the Ministry of Labour and Social Welfare to present a complaint and ask for labour inspectors to be sent to see for themselves how women's rights (to a crèche and to the deduction of social security contributions, for example) under the national legislation were systematically being flouted. The media had been invited to witness the occasion and to inform the public at large. When the women arrived at the Ministry, security guards and members of the staff proceeded to close the entrances to the building and to keep them inside the railings that surround it, thereby preventing the representatives of the media from entering and the women from leaving. According to the complainant, during the roughly two hours that the women were held against their will, they were photographed, videoed and insulted by Ministry staff in order to intimidate them and prevent them from presenting their complaint officially. Under pressure from the media and from workers who had arrived at the scene to denounce the constant violation of their labour rights, the women were

27 CFA, 359th Report, paras 580–646.

eventually freed. Moreover, regarding the kidnapping and rape of trade unionist María Alejandra Vásquez, the Government replied that the Ministry had taken the necessary steps to determine whether a complaint had been lodged on behalf of the victim with the Office of the Public Prosecutor, which replied that there was a procedural problem as it needed the full name of the victim. On this allegation, the CFA requested the complainant to provide it with additional information so that the Government could conduct an investigation into the matter. For the other incidents, the CFA deplored the numerous allegations of criminal acts of which trade unionists had been victims in a general context of violence and expressed its concern that, according to the allegations, a large number of union leaders and members had been affected. It drew the Government's attention to the fact that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind.

- ▶ Hungary, Case No. 3381, was presented by the Democratic League of Independent Trade Unions, the Hungarian Trade Union Confederation and the National Federation of Workers' Councils.²⁸ The allegations were that, under the Fundamental Law of Hungary and Government Decree No. 47/2020 on immediate measures applicable during the COVID-19 pandemic, the Government had introduced derogations from Labour Code rights (and those in existing collective agreements), including protections for employees with special characteristics, such as single parents and working mothers with small children, which infringed the right to collective bargaining. The complaint mainly concerned the Decree's derogation on working time. The Government stated that the COVID pandemic emergency had been lifted in accordance with Decree No. 282/2020, which repealed Decree No. 47/2020 on 18 June, which itself had been a temporary measure to manage problems arising during the state of danger. According to the CFA, measures adopted during an acute crisis which set aside the application of the collective agreements in force and rule out collective bargaining must be of an exceptional nature, limited in time and provide guarantees for the workers most affected. The CFA emphasized, among other collective bargaining principles, that the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205), underlines the importance of social dialogue in general and collective bargaining in particular when designing a response to crisis situations; this should involve the active participation of employers' and workers' organizations in planning, implementing and monitoring measures for recovery and resilience. Therefore, the CFA encouraged the Government to engage in dialogue with these organizations in order to limit the duration and impact of the COVID-related measures in question, and ensure the full use of collective bargaining as a means of achieving balanced and sustainable solutions in times of crisis.

28 CFA, 395th Report, paras 204–251.

- ▶ Jordan, Case No. 3337, presented by the Jordanian Federation of Independent Trade Unions (JFITU),²⁹ concerned Labour Code restrictions on the rights of domestic workers (a feminized sector) and acts of anti-union discrimination, interference and retaliation by the Government against independent trade unions. The complainant also alleged interference in public meetings: a Women's Day 2017 celebration that had been planned by the women's committee of the independent trade union federation at the Jordanian University, but had been cancelled only two days before it was to take place. The women's committee decided to move the event to inside the Jerusalem International Hotel, but again it was cancelled by the security authorities just two hours before it was supposed to begin, despite the permission obtained both times. The Government responded that the Ministry of Labour had no knowledge of any meetings held, and indicated that domestic workers are subject to the provisions of the Labour Code as well as special regulations and instructions. The CFA drew the legislative aspects of the case to the attention of the CEACR. It also requested the Government to review the meeting ban allegations with the competent authorities with a view to giving appropriate instructions in the event that they had interfered with the right to hold meetings and the freedom of assembly of the trade unions involved, and to keep the Committee informed of the measures taken.
- ▶ Malaysia, Case No. 2637, was presented by the Malaysian Trades Union Congress (MTUC) in April 2008.³⁰ The complaint alleged that the Government refused in law and in practice to allow migrant domestic workers to establish organizations to defend their interests. It is well known that this is a sector where women workers predominate, yet the MTUC did not argue the underlying sex discrimination of the Government's statutory ban on such workers from joining or forming unions. The CFA recommended that the Government urgently take the necessary measures, including the adoption of legislation, to ensure that domestic workers, including contract workers, whether foreign or local, may all effectively enjoy the right to establish and join organizations of their own choosing. The Committee also once again urged the Government to take the necessary steps to ensure the immediate registration of the association of migrant domestic workers and requested the Government to keep it informed of developments. The Government responded that it was in the process of reviewing and amending the Trade Unions Act 1959 to ensure adherence to international labour standards. In its October 2020 follow-up, the CFA recalled that it had been calling for changes to the law and practice so that domestic workers, including migrant workers, may effectively establish and join organizations of their own choosing for more than 11 years, without any significant progress. It therefore firmly expected that the current labour law reform process would address the issue of freedom of association for migrant domestic workers, using the technical cooperation of the Office.

29 CFA, 393rd Report, paras 513–571.

30 CFA, 392nd Report, paras 88–91.

- ▶ Peru, Case No. 2856, presented by the General Confederation of Workers of Peru,³¹ reported anti-union dismissals by the regional government of Callao. At the end of another long case history of almost 10 years, with persistent follow-up, the CFA reiterated its firm expectation that the Government would take all the necessary steps to ensure compliance in the very near future with the 2015 ruling of the Supreme Court of Justice and to ensure that the General Secretary of the Callao Regional Government Workers' Union, Ms Clara Tica, was reinstated in a post similar to the one from which she had been dismissed in 2011 as a result of her trade union activity. The CFA noted with satisfaction information from the Government that Ms Tica had been finally reinstated in the position of telephone switchboard operator in the Information Technology Office of the Regional General Management in fulfilment of the court decision.
- ▶ Thailand, Case No. 3180, was presented by the International Transport Workers' Federation, the Thai Airways International Union and the State Enterprise Workers Relations Confederation.³² It alleged judicial and disciplinary harassment of four trade union leaders and failures in the law to protect workers' and trade union rights following the case brought by Thai Airways International suing the leaders for losses due to their strike affecting luggage loading. During its examinations of the case, the CFA decided that the disciplinary measures against the trade union officials had been imposed in response to violations of strike prohibitions, which were themselves contrary to the principles of freedom of association. When examining the final effect given to its decisions, the CFA noted the Government's indication that the airline had been in a reorganization procedure since September 2020 and that the process relating to the claim for damages against four union leaders, including Ms Chamsri Sukchotirat (then President of the local union), had been suspended until the business returned to a normal state. Moreover, in the meantime, she and some other leaders had retired and received full benefits and pensions without any deduction. As a result of their retirement, and in line with the enterprise regulations, the disciplinary measures against the union leaders had been revoked.
- ▶ United States, Case No. 2460, presented by the United Electrical, Radio and Machine Workers of America (UE) and Public Services International.³³ The complainants alleged that the legislation of North Carolina expressly prohibited the making of any collective agreement between cities, towns, municipalities or the State and any labour or trade union in the public sector, thus violating ILO principles on collective bargaining. The UE couched its complaint in a gendered situational analysis of its constituent unit, Local 150, explaining that its members were women and people of colour who toil in some of the most difficult, low-wage, public sector jobs in North

31 CFA, 393rd Report, paras 42–43.

32 CFA, 393rd Report, paras 44–49.

33 CFA, 344th Report, March 2007, paras 941–999 at 948, and 373rd Report, Oct.-Nov. 2014, paras 14–16.

Carolina (janitors, refuse-disposal workers, housekeepers, groundskeepers, medical technicians, bus drivers and other vital municipal and state employees). According to the complainants, the Government's failure to ensure compliance with the fundamental principles of freedom of association and the right to bargain collectively resulted in grievous working conditions and promoted race and sex discrimination in the workplace. They specified that employees complained of "unequal treatment for racial minorities and women in hiring, promotions, discharges and wage rates. The State's own comprehensive reports determined that these complaints are accurate. [...] Not surprisingly, African Americans and women are over-represented in the lowest paying jobs and have largely been unable to break through the State's 'glass ceiling'. Public sector employees also report widespread racial and sexual harassment". The Government denied the discrimination allegation. Recalling that only public servants engaged in the administration of the State may be excluded from right to collective bargaining, the CFA requested the repeal of the State law banning public sector collective bargaining, and the establishment of a collective bargaining framework in the public sector in North Carolina with the participation of representatives of the state and local administration and public employees' trade unions. Some seven years later, when following up on its recommendation, the CFA regretted that none of the bills introduced in North Carolina to remove the collective bargaining ban had been enacted into law, and it once again urged the Government to continue to promote freedom of association and collective bargaining rights in the public sector.

- ▶ Bolivarian Republic of Venezuela, Case No. 2254, was presented by the International Organisation of Employers (IOE) and the Federation of Chambers and Associations of Commerce and Production of Venezuela (FEDECAMARAS).³⁴ The allegations concerned, among others, the marginalization of employers' associations and their exclusion from decision-making, and acts of violence, discrimination and intimidation against employers' leaders and their organizations. The CFA examined serious episodes of attacks on FEDECAMARAS leaders and on the organization's headquarters, recommending that all those responsible should be identified and punished and that the victims should receive compensation. The CFA recalled in particular the abduction of and attack on Ms Albis Muñoz and three other FEDECAMARAS leaders in 2010 and the attack on the FEDECAMARAS headquarters in 2008. It noted that, despite the time that had elapsed, several key elements of the offences concerning Ms Muñoz and the other leaders had still not been clarified and that the corresponding judicial proceedings were still pending a final decision. According to the CFA, the absence of judgments against the guilty parties created, in practice, a situation of impunity, which reinforced the climate of violence and insecurity, and which was extremely damaging to the exercise of workplace rights. Among other recommendations, the CFA firmly urged the Government to adopt all measures necessary to end immediately

34 CFA, 395th Report, paras 369–401.

all acts of hostility and intimidation against FEDECAMARAS so that it could exercise its representative activities in full freedom; to ensure that the necessary foundations for genuine social dialogue in the country were established; and to ensure that any compensation measures sought by the victims of the attacks were applied.

4. How to ensure that the gender dimension of the CFA's work receives visibility?

The ILO's tripartite constituents and the CFA itself have several angles from which to address the gender dimension of the procedure and promote gender-responsive outcomes for the members and leaders of unions and the leaders of employers' organizations involved in complaints. Yet this chapter's overview reveals that not enough emphasis is given to the gender dimension, perhaps because the complainants do not clarify it, and perhaps because opportunities are not seen by the CFA itself in which it could highlight the impact of freedom of association violations on women as well as men. It may be that an increasing number of complaints will single out gender-related violations of freedom of association, such as interference in collective bargaining that particularly affects women's working conditions. It may be that the civil liberties violations in complaints will focus on sexualized violence against women leaders as a form of intersectionality of anti-union sentiment with misogyny. It may be that an increasing number of complaints will focus on sectors in which dismissals have become more common because women have entered that industry or sector and such women are elected as union leaders, with their sex compounding the anti-union bias. It may be that, as the world emerges from the public health, social and economic shocks associated with the COVID pandemic, more and more complaints will challenge the recovery packages adopted by governments that restrict trade union activity, in particular measures that leave women workers more vulnerable than men workers.

The CFA and the Office therefore need to be ready to ensure that the gender dimension of freedom of association complaints is given the weight it deserves. Here are some suggested measures:

- ▶ Review the CFA Rules of procedure to include references to women and men being able to be appointed to assist in various elements of the procedure
- ▶ Consider gender parity in the membership of the CFA
- ▶ Add an additional classification field to the CFA annual reports to the Governing Body covering the types of gender-related complaints received and examined, especially concerning sectors where females dominate the workforce, such as the garment sector and domestic work
- ▶ Specify cases in which women union members and leaders are particularly targeted for sexualized violence as a means of anti-union pressure, demanding the investigation of sexual violence against workers and employers in accordance with Convention No. 190

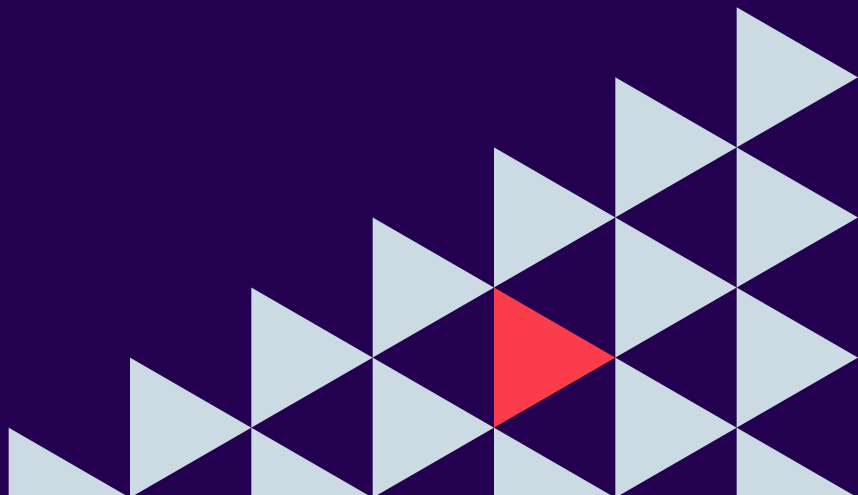
- ▶ Upscale Office assistance in various training events, seminars and workshops regarding the CFA procedure to include gender awareness, as well as attempts to gauge the gender responsiveness of the mechanism (e.g. use the ILO's Participatory Gender Audit Methodology).³⁵

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³⁵ ILO, 2012. "A manual for gender audit facilitators: The ILO Participatory Gender Audit Methodology", 2nd Edition, Geneva.





► Annex

The Composition of the Committee on Freedom of Association

The Governing Body established the Committee on Freedom of Association at its 117th Session (November, 1951) with nine regular members and an equal number of substitutes, selected from the members of the Governing Body.¹ Initially substitute members were called upon to participate in the meeting only if another member was not present.

In February 1958, the Committee adopted the practice of allowing substitute members who had so requested to participate in the discussion of the cases before the Committee, whether or not all the regular members were present. Substitute members thus participated alongside regular members, but in recent years, the worker and employer members of the Committee complained about the financial constraints due to the fact that the participation of substitute members was not paid for under the ILO Governing Body budget. As a result, the substitute members from their groups were often not present in the Committee's meetings.

Out of a concern for this imbalance and in light of the ever increasing workload, the Committee, in its 327th Report², recommended that appropriate measures be put in place rapidly to enable all of the substitute members to participate by right in the work of the Committee. As this decision implied financial consequences, it was examined by the Programme, Financial and Administrative Committee and by the Governing Body which decided to adjust the status of the substitute members to that of deputy members, thus ensuring their participation by right in the Committee's work. At this same meeting, the Committee, bearing in mind the rule that its members participate in their personal capacity, considered that it would be desirable for the nominations by the governments of their members be made by name, which would also help to ensure a relative continuity on the Government bench.³

1 See ILO: *Official Bulletin*, Vol. XXXIV, 1951, No. 3, pp. 207–210

2 See ILO: *Official Bulletin*, Vol. LXXXV, 2002, No. 1, para. 22

3 See ILO: *Official Bulletin*, Vol. LXXXV, 2002, No. 1, para. 23

	President	Governments	Employers	Workers
First Session January 1952	Mr RAMADIER FRANCE (Chairperson of the Governing Body, <i>ex officio</i>)	FRANCE INDIA MEXICO Substitutes ITALY IRAN, REP. ISLAMIC OF UNITED STATES	Sir FORBES WATSON (Employers' Vice -President of the Governing Body, <i>ex officio</i>) Mr PONS Mr WALINE Substitutes Mr BENITEZ Mr BERGENSTROM Mr MCCORMICK	Mr JOUHAUX (Workers' Vice-President of the Governing Body, <i>ex officio</i>) Mr FOBERTS Mr MORI Substitutes Mr DEBOCK Mr SOLVEN Mr VERMEULEN
1954–1957	Mr RAMADIER FRANCE	COLOMBIA FRANCE INDIA Substitutes MEXICO ITALY EGYPT	Mr ALLANA Mr PONS Mr WALINE Substitutes Mr BERGENSTROM Mr GHAYOUR Mr KUNTSCHEN Mr O'BRIEN Sir SNEDDEN	Mr COFINO Mr MORI Mr VERMEULEN Substitutes Mr AFTABALI Mr DEBOCK Mr NIELSEN
1957–1960	Mr RAMADIER FRANCE	FRANCE INDIA MEXICO Substitutes BRAZIL ITALY MOROCCO	Mr GHAYOUR Mr O'BRIEN Mr WALINE Substitutes Mr AYE Mr BERGENSTROM Mr ISMAIL Mr KUNTSCHEN Mr YLLANES RAMOS	Mr BORTHEREAU Mr MADARIAGA Mr MORI Mr SANCHEZ Substitutes Mr DEBOCK Mr NIELSEN Mr RUPPERT
1960–1963	Mr RAMADIER FRANCE (Until 1961) Mr AGO ITALY (From 1961)	FRANCE INDIA MEXICO Substitutes ARGENTINA ITALY MOROCCO	Mr GHAYOUR Mr O'BRIEN Mr WALINE Substitutes Mr BERGENSTROM Mr FENNEMA Mr KUNTSCHEN Mr MISHIRO Mr MURO DE NADAL Mr YLLANES RAMOS	Mr HERNANDEZ Mr MADARIAGA Mr MORI Mr SANCHEZ Substitutes Mr DEBOCK Mr KORTE Mr NIELSEN

	President	Governments	Employers	Workers
1963–1966	Mr AGO ITALY	BRAZIL INDIA ITALY Substitutes ECUADOR MOROCCO FRANCE	Mr KUNTSCHEN Mr RIFAAT Mr WALINE Substitutes Mr BERGENSTROM Mr FENNEMA Mr MURO DE NADAL Mr O'BRIEN Mr VERSCHUEREN	Mr HERNANDEZ Mr MADARIAGA Mr MORI Mr SANCHEZ Substitutes Mr BOTHEREAU Mr DEBOCK Mr NIELSEN
1966–1969	Mr AGO ITALY	ARGENTINA INDIA ITALY Substitutes CAMEROON FRANCE URUGUAY	Mr GHAYOUR Mr VEGH GARZON Mr WALINE Substitutes Mr BERGENSTROM Mr FENNEMA Mr GEORGET	Mr HERNANDEZ Mr MORI Mr SANCHEZ Mr MADARIAGA Substitutes Mr BEN EZZEDINE Mr BOLIN Mr DEBOCK
1969–1972	Mr AGO ITALY	ECUADOR INDIA ITALY Substitutes BRAZIL CENTRAL AFRICAN REP. FRANCE	Mr GHAYOUR Mr VERSCHUEREN Mr WALINE Substitutes Mr BASTID Mr NEILAN Mr YLLANES RAMOS	Mr ABID ALI Mr MADARIAGA Mr MORI Mr SANCHEZ Substitutes Mr BEN EZZEDINE Mr DEBOCK Mr FOGAM
1972–1975	Mr AGO ITALY	ARGENTINA INDIA ITALY Substitutes COLOMBIA FRANCE RWANDA	Mr GHAYOUR Mr VITAIC JAKASA Mr WALINE Substitutes Mr BASTID Mr MARTINEZ ESPINO O. Mr NEILAN Mr VERSCHUEREN	Mr FOGAM Mr MADARIAGA Mr MORRIS Mr SANCHEZ Substitutes Mr HERNANDEZ Mr SOLOMON Mr SUNDE
1975–1978	Mr AGO ITALY (From 1978 the President is an independent person)	INDIA ITALY VENEZUELA Substitutes ARGENTINA GUINEA FRANCE	Mr GHAYOUR Mr VERSCHUEREN Mr VITAIC JAKASA Substitutes Mr OLA Mr RICHAN Mr VEGH GARZON Mr YOSHIMURA	Mr MORRIS Mr ODEYEMI Mr SANCHEZ Mr MADARIAGA Substitutes Mr ROBEL Mr SUDONO Mr SUNDE

	President	Governments	Employers	Workers
1978–1981	Mr AGO ITALY	INDIA ITALY VENEZUELA Substitutes ARGENTINA FRANCE TUNISIA	Mr GHAYOUR Mr VERSCHUEREN Mr YLLANES RAMOS Substitutes Mr CHAMBERS Mr GEORGET Mr MOUKOKO KJNGUE Mr OLA Mr RICHAN Mr VILLALOBOS	Mr ISSIFU Mr MORRIS Mr SANCHEZ Mr MADARIAGA Substitutes Mr AGUIRIANO Mr SUDONO Mr SUNDE
1981–1984	Mr AGO ITALY	FRANCE INDIA VENEZUELA Substitutes ARGENTINA AUSTRALIA BELGIUM	Mr POLITES Mr VERSCHUEREN Mr YLLANES RAMOS Substitutes Mr CASTELLANO SABATER Mr CHAMBERS Mr GEORGET Mr OECHSLIN Mr OWUOR Ms SASSO- MAZZUFFERI Mr VILLALOBOS	Mr ANCHEZ Mr ISSIFU Mr MADARIAGA Mr MAIER Substitutes Mr MEHTA Mr SUDONO Mr SVENNINGSSEN
1984–1987	Mr AGO ITALY	INDIA FRANCE VENEZUELA Substitutes ARGENTINA AUSTRALIA SPAIN	Mr OECHSLIN Mr ROWE Mr YLLANES RAMOS Substitutes Mr DIAZ GARAYCOA Mr DURLING Mr GEORGET Ms HAK Mr LACASA ASO Mr OKOGWU Mr OWUOR Mr SAID Ms SASSO- MAZZUFFERI Mr VILLALOBOS	Mr MADARIAGA Mr MAIER Mr SANCHEZ Mr ZIMBA Substitutes Mr DELPINO Mr MEHTA Mr SVENNINGSSEN

	President	Governments	Employers	Workers
1987–1990	Mr AGO ITALY	INDIA FRANCE VENEZUELA Substitutes ARGENTINA AUSTRALIA GREECE	Mr DE REGIL GOMEZ Mr OECHSLIN Mr ROWE Substitutes Mr OKOGWU Mr SAID Mr VILLALOBOS	Mr MADARIAGA Mr MAIER Mr SANCHEZ Mr ZIMBA Substitutes Mr CHIROMA Mr DELPINO Mr MUKHERJEE
1990–1993	Mr AGO ITALY	ARGENTINA FRANCE INDIA Substitutes AUSTRALIA DENMARK URUGUAY	Mr DE REGIL GOMEZ Mr NOAKES Mr OECHSLIN Substitutes Mr DURLING Ms HAK Mr OWUOR Mr VILLALOBOS	Mr MADARIAGA Mr MORTON Mr SANCHEZ Mr ZIMBA Substitutes Mr BAKER Mr MUGALLA Mr SVENNINGEN
1993–1996	Mr AGO ITALY (Until 1995) MR ROOD NETHERLANDS (From 1995)	ARGENTINA FRANCE INDIA Substitutes AUSTRALIA CHILE NETHERLAND	Mr DE REGIL GOMEZ Mr NOAKES Mr OECHSLIN Substitutes Mr DIAZ GARAYCOA Mr DURLING Ms HAK Mr IMOISILI Ms SASSO-MAZZUFFERI	Ms ENGELEN-KEFER Mr MADARIAGA Mr MUGALLA Mr SANCHEZ Substitutes Mr GRAY Mr KHURSHID AHMED Mr TAPIOLA
1996–1999	Mr ROOD NETHERLANDS	ARGENTINA FRANCE JAPON Substitutes FINLAND INDIA PANAMA	Mr DE REGIL GOMEZ Mr NOAKES Mr OECHSLIN Substitutes Mr DIAZ GARAYCOA Mr DURLING Ms FRANCE Mr IMOISILI	Ms ENGELEN-KEFER Mr MADARIAGA Mr SANCHEZ Mr SIBANDA Substitutes Mr AHMED Mr EDSTROM Mr GRAY
1999–2002	Mr ROOD NETHERLANDS	FRANCE JAPON VENEZUELA Substitutes CHILE DENMARK PAKISTAN	Mr DE REGIL GOMEZ Mr NOAKES Ms SASSO-MAZZUFFERI Substitutes Mr BOISSON Mr BOTHA Ms DURLING Mr SUZUKI Mr THUSING	Ms ENGELEN-KEFER Mr RAMIREZ LEON Mr SIBANDA Substitutes Mr AGYEI Mr EDSTROM Mr ZELHOEFER

	President	Governments	Employers	Workers
2002–2005	Mr VAN DER HEIJDEN NETHERLANDS	BURUNDI EL SALVADOR FRANCE Deputies BULGARIA INDIA PAKISTAN	Mr DE REGIL GOMEZ Mr BARDE Mr NOAKES Deputies Mr BOTHA Mr RICCI Ms SASSO-MAZZUFFERI	Mr EDSTROM Ms ENGELEN-KEFER Mr JAKOBSEN Deputies Mr AHMED Mr OSHIOMHOLE Mr ZELHOEFER
2005–2008	Mr VAN DER HEIJDEN NETHERLANDS	CHILE FRANCE SENEGAL Deputies FINLAND JAPAN VENEZUELA	Mr BOISSON Mr DE REGIL GOMEZ Mr VAN VUUREN Deputies Mr ANDERSON Ms RICCI MUADI Mr SUZUKI	Mr EDSTROM Ms ENGELEN-KEFER Mr ZELHOEFER Deputies Mr AHMED Mr MARTINEZ Mr OSHIOMHOLE
2008–2011	Mr VAN DER HEIJDEN NETHERLANDS	FRANCE KENYA PEROU Deputies AUSTRALIA JAPAN MEXICO	Mr ANDERSON Mr DE REGIL Mr RONNEST Deputies Mr BURKETT Mr ECHAVARRIA Ms MUGO Mr SUZUKI	Mr EDSTROM Ms FOX Ms SUNDNES Mr VEYRIER Mr ZELHOEFER Deputies Mr AHMED Mr MARTINEZ Mr OMAR
2011–2014	Mr VAN DER HEIJDEN NETHERLANDS	AUSTRALIA KENYA MEXICO Deputies BOTSWANA DENMARK JAPAN	Mr ANDERSON Mr DE REGIL Mr RONNEST Deputies Mr ECHAVARRIA Ms HORVATIC Ms MUGO	Ms FOX Ms SUNDNES Mr VEYRIER Deputies Mr ASAMOAH Mr MARTINEZ Ms PANDEY
2014–2017	Mr VAN DER HEIJDEN NETHERLANDS	ARGENTINA KENYA SPAIN Deputies DOMINICAN REPUBLIC JAPAN ROMANIA	Mr DE REGIL Mr MATSUI Mr SYDER Deputies Mr ECHAVARRIA Mr FRIMPONG Ms HORVATIC	Mr CORTEBEECK* Ms FOX Mr OHRT Deputies Mr ASAMOAH Ms LIEW KIAH ENG Mr MARTÍNEZ * Mr Veyrier substituting Mr Cortebeek, when necessary

	President	Governments	Employers	Workers
2017–2021	Mr KALULA ZAMBIA	ARGENTINA JAPAN SWITZERLAND Deputies IRAQ LESOTHO NIGERIA	Mr ECHAVARRIA Ms HORNUNG- DRAUS Mr MATSUI Deputies Ms HORVATIC – until September 2018 Mr MACKALL – as of September 2018 Mr MAILHOS Ms MUGO	Ms BROWN – as of June 2018 Mr OHRT Ms PASSCHIER* Mr ROSS – until June 2018 Deputies Ms KEARNEY – until June 2018 Mr MARTINEZ Mr WABBA Mr WAGSTAFF– as of June 2018 * Mr Veyrier substituting Ms Passchier, when necessary

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