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**LA THÈSE A ÉTÉ
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THE UNIVERSITY OF OTTAWA

TRADE UNION RIGHTS AND THE INTERNATIONAL
LABOUR ORGANIZATION

- An African Perspective -

A DISSERTATION SUBMITTED TO
THE FACULTY OF LAW, COMMON LAW SECTION
IN CANDIDACY FOR THE DEGREE OF
MASTER OF LAWS

BY
BILIKA HARRY SIMAMBA

OTTAWA, ONTARIO
NOVEMBER 1986

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7
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TABLE OF CONTENTS

	PAGE NO.
ABBREVIATIONS	1-1
PREFACE	i
CHAPTER I BACKGROUND	
A. History	1
1. Origins of thoughts on international labour standards	1
2. International institutions	5
a. The International Association for Labour Legislation	5
b. The League of Nations and the United Nations	6
3. The purposes of international labour standards	9
a. International economic competition	11
b. Social justice	13
c. Consolidation of peace	16
d. Social and human objectives of economic development	20
B. The universality of standards in general	21
C. The universality of standards and African Ideology	23
D. Institutional framework	28
1. The tripartite structure of the ILO	28
2. The Committee of Experts on the Application of Conventions and Recommendations	29
3. The Governing Body Committee on Freedom of Association	32
a. The jurisdiction of the Committee regarding Conventions	36
(1) The jurisdiction regarding ratified Conventions	37
(2) The jurisdiction regarding unratified Conventions	38
b. The legal effects of <u>ultra vires</u> acts	46
E. Conclusion	47

CHAPTER II THE ESTABLISHMENT OF TRADE UNIONS UNDER ARTICLE 2 OF CONVENTION NO. 87

A. The meaning of 'without distinction whatsoever'	50
1. Occupational categories	51
2. Duties of a highly confidential nature	57

B.	The meaning of 'of their own choosing'	66
1.	Trade union monopoly directly imposed by law	66
2.	Factors indirectly affecting choice of union	71
C.	The meaning of 'without previous authorization'	76
D.	Conclusion	77

CHAPTER III THE FUNCTIONING OF TRADE UNIONS UNDER CONVENTION NO. 87

A.	Introduction	79
B.	Setting up a trade union	80
1.	The constitutions and rules of a union	80
2.	Election to trade union office	85
C.	Operations of a trade union	88
1.	Trade unions and politics in general	90
2.	Trade unions and politics in Africa	94
D.	The overall picture	101

CHAPTER IV COLLECTIVE BARGAINING

A.	Introduction	104
B.	The independence of the parties	110
1.	The independence of the parties in general	110
2.	The independence of the parties, the economy and recession	118
a.	The approval and content of collective agreements	123
b.	Restrictions on wage rates	127
3.	Other rights relative to collective bargaining	132
C.	The future of the principle of voluntariness in Africa	136

CHAPTER V STRIKES

A.	The source of the right to strike	139
B.	The nature and scope of the right to strike	144
1.	Matters over which a union may strike	146
2.	Essential services	150
a.	Essential services in general	150
b.	Essential services, under-development and recession	155
3.	Strikes and emergencies	158
C.	Conclusion	160

CHAPTER VI GENERAL CONCLUSIONS

A.	The Committee on Freedom of Association and its work	162
B.	Trade unions rights under the UN covenants and the African Charter	170
1.	Trade union rights and the rights of others'	176
C.	The future of ILO trade union standards in Africa	180
D.	Epilogue	

APPENDICES

1.	The Philadelphia Declaration, 1944	184
2.	Convention (No. 87) concerning Freedom of Association and Protection of the right to Organize, 1948	187
3.	Convention (No. 98) concerning the Application of the Right to Organize and to Bargaining Collectively, 1949	190
4.	Convention (No. 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Service in the Public Service, 1978	192
5.	Convention (No. 154) concerning the Promotion of Collective Bargaining, 1981	195
6.	Independence dates of African states	198
7.	Illegal displacements of governments in Africa	199
8.	List of Reports of the Committee on Freedom of Association	200

BIBLIOGRAPHY	202
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ABBREVIATIONS

Am. U.L. Rev

American University Law Review

B.Y.B.I.L.

British year Book of International law

Con. bar. Rev.

Canadian Bar review

Comm. of Exps.

Committee of Experts of the ILO

Digest.

Freedom of Association: Digest of
Decisions and Principles of the Freedom
of Association Committee of the governing
Body of the ILO.

G.B.

Governing body of the ILO.

Harv. J. Int'l. L.

Harvard Journal of International Law.

Holds. L.R.

Holdsworth Law Review.

I.C.L.Q.

International and Comparative law
Quarterly.

I.J.I.L.

Indian Journal of International Law.

I.L. Conf..

International Labour Conference.

ILO

International labour Organization

I.L.R.

International Labour Review.

Ind. Pol. Sci. Rev.

Indian Political Science review

Mins. of Proceeds.

Minutes of Proceedings

Ott.L.R.

Ottawa law Review

rec. of Proceeds.

Record of Proceedings.

Trans. Grot. Soc.

Transactions of the Grotius Society

UNDP

United Nations Development Programme

Va.J. Int'l. L.

Virginia Journal of International Law.

PREFACE

— By the end of 1984 the Governing Body Committee on Freedom of Association¹ had heard over 1,300 complaints relating to the enjoyment of freedom of association. The Committee has power to deal with complaints from governments, employers' organizations and trade unions. Virtually all the cases heard however, have come from trade unions. Since the global economic recession which began in 1973 there has been a substantial increase in complaints.² Trade unions have increasingly felt that their rights were being violated by governments. Governments on the other hand, have generally asserted that measures restricting trade union rights have been necessary to counter the recession.

The general increase in the number of complaints has been coupled with an increase in the number of complaints originating in the industrialized market economy countries.³ Before the seventies complaints tended to come predominantly from the countries of the Third World. This was because the Third World countries were comparatively

¹ The Committee on Freedom of Association has been the principal body in the ILO responsible for developing the principles of freedom of association. See further details in Chapter I.

² Since the Committee was established there has tended to be a gradual increase in the number of complaints. This increase is attributable to such matters as increased industrialization and improved awareness and organization of workers in the world. The sharp increase in the early seventies however, remains clearly attributable to the recession.

³ See ILO, Collective Bargaining: A Response to the Recession in Industrialised Market Economies (Geneva, 1984).

more inclined to pass laws, or to apply laws in a manner, found objectionable by their trade unions. The tendency to pass laws which more firmly control workers and unions has spread to the West, and has resulted in the increase of complaints originating from these states.

Generally speaking African leaders have always maintained that laws inspired by Western values are often unsuitable⁴ for African states. There is a considerable body of opinion regarding the extent to which fundamental rights and freedoms may be enjoyed on the Continent.⁵ Some authors assert that it is not desirable that there be the same degree of individual freedom in Africa as there is said to be

⁴ There are at least two possible meanings of "suitable" in this context. First, it can refer to the consonance of values and thought. Second, it can refer to whether or not Western inspired laws can help the solution of problems peculiar to Africa.

⁵ In the international sphere regarding developing countries there are a number of works: T.O. Elias, Africa and the Development of International Law (Leyden, Sijthoff/ Dobbs Ferry, Oceana, 1972) and New Horizons in International Law (Alphen, Sijthoff, and Noordhoff, 1979); C.N. Okeke, Controversial Subjects in International Law (Rotterdam, VP, 1974); F.C. Okoye, International Law and the New African States (London, Sweet and Maxwell, 1972); J.J.G. Syatauw, Some Newly established Asian States and the Development of International Law (Den Haag, Nijhoff, 1961); R. Falk, "New States and International Legal Order," 118 Rescueil des Cours (1966); A.A. Fatouros, "Participation of the 'New' States in the International Legal Order" in C.E. Black and R. Falk Eds., The Future of International Legal Order, Trends and Patterns (Princeton, 1969); S.P. Sinha, "Perspective of the Newly Independent States on the Binding Quality of International Law", 14 I.C.L.Q. 121 (1965) Omuzurike, "The 1949 Geneva Conventions in Africa", 11. I.J.I.L. pp. 205-218 (1971); Moore, "International Law, its Present and Future", A.J.I.L., (1907), part II p. 11; S.W. Simon, "The African States and the ILO: New Problems in International Consensus" 10 Tour. Con. (1966); P.K. Anand, New States and International Law (Delhi, Vikas, 1972).

in the West. It is in fact the official or unofficial policy of many African governments that economic, social and cultural rights should take precedence over civil and political rights. In its extreme form the policy asserts that governments should concentrate on emancipating Africans from dire poverty, ignorance and disease rather than on securing civil and political liberties. In application to trade-union rights, this policy has meant legislative and practical limitation on trade union activity. There are generally moderate to severe restrictions, and sometimes total prohibitions, on the formation and functioning of trade unions. Restrictions and prohibitions relating to collective bargaining and strikes are also commonplace. It is argued that excessive trade union freedom leads to industrial-unrest and that poor African countries can ill-afford the economic consequences of such unrest or to meet union demands.

The Preamble to the African Charter on Human and People's Rights of 1981⁶ however has a significant provision that may have some bearing on trade union rights. It refers to the conviction of African states "that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights." This statement seems to endorse at the international level the full-belly theory, namely that economic and social rights take precedence

⁶. Richard B. Lillich, International Human Rights Instruments (Buffalo, New York, William S. Hein Company, 1985), p. 530.3.

over civil and political rights. This part of the Preamble and Article 10 of the African Charter together would tend to lead to the conclusion that as regards the autonomy of trade unions in Africa there is a general consensus to leave things as they are. More than that for the first time in African political history, the full-belly thesis has been recognised through an international institution - the Organization of African Unity, under whose auspices the African Charter on Human and Peoples' Rights was adopted.

Western political and legal thought generally seems to frown upon the suggestion that individual freedoms are not as important as economic, social and cultural rights. The extent to which trade union and other rights are restricted in Africa has therefore often been the subject of disapproval in the West. However, certain kinds of restrictions on union rights, previously more common in the Third World have been increasingly used in the West during the recession. If industrialized nations find it necessary to restrict trade union rights for economic reasons, African nations could argue that this necessity applies, a fortiori, to them, especially during a recession. In fact, during the recession a number of industrialized countries attacked some of the very basic concepts in fundamental areas of trade union law, notably in the fields of collective bargaining and strikes. This alone dictates an examination of these and other areas of ILO trade union standards with a view to assessing their utility in modern day economies, and particularly in Africa.

It is not proposed to examine all the cases that have come before the Committee on Freedom of Association or all the pronouncements of other ILO bodies. It is proposed to examine only a few pertinent areas, and only in aspects of special interest to developing countries. Africa will be the focal point of the discussion. Chapter I will discuss the original purposes of international labour standards with a view to assessing their validity in Africa today. Chapter I will also consider how the ILO has dealt with the problem of the universality of standards. Chapter II discusses matters relating to the formation of unions and trade union monopoly. In Africa laws often allow for only one trade union congress and only one national union for a category of workers. Chapter II examines Article 1(2) of Convention (No. 151) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service. Unlike other ILO Conventions on freedom of association which always allow for the possible exclusion of the "police and armed forces", Convention No. 151 allows for the possible exclusion of persons whose duties are of a "highly confidential nature". In Africa there is a prevalence of one-party states; Chapter II examines how this affects the participation of trade unions in politics. Chapters IV and V discuss collective bargaining and strikes, respectively. The Freedom of Association Committee allows certain restrictions on bargaining rights and strikes. The two Chapters appraise the principles involved. In particular, Chapter IV

discusses the concept of "essential services" in the African context and its relation to the right to strike. Chapter VI offers general observations about the Committee and its principles, the African Charter of Human and Peoples' Rights of 1981 and whether the attitudes of African states are logically defensible or consistent with international law.

Each Chapter states the basic standards of the relevant ILO Conventions and the statements of the ILO supervisory bodies, in particular the Committee on Freedom of Association. The suitability of these trade union standards for Africa is considered. The cases discussed are not restricted to those involving African countries. Those principles which do not appear to have been applied to any complaint from Africa are discussed in relation to Africa because the ILO insists on the universality of its standards in relation to trade union rights.

A genuinely free and independent trade union movement can only develop where all fundamental human rights are fully respected and guaranteed. The Freedom of Association Committee has recognized this in many cases.⁷ Thus complying only with freedom of Association standards examined is insufficient for full enjoyment of trade union

⁷ 236th Report, Case No. 110, para. 399 (Thailand), Cases Nos. 1176, (Guatemala), 1195 (Guatemala) and 1215 (Guatemala), para. 424, Case No. 1269, para. 537 (El Salvador).

freedom.⁸ This must be borne in mind throughout.

Finally, I would like to thank Professor Anne F. Bayefsby of the Common Law Section for supervising this paper. My thanks go also to Mr. Robert N. Simbyakula of the University of Zambia for supplying me with certain specific materials I requested.

⁸ See also ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd Ed. (Geneva, 1985); for a summary of ILO trade union rights with information of laws of different countries see ILO, Freedom of Association and Collective Bargaining: A General Survey (Geneva, 1983); for a very compressed summary see A.J. Pouyat "The ILO's Freedom of Association Standards and Machinery: A summing up", (1982), 121 I.L.R. 287-299; ILO, The Impact of International Labour Standards (Geneva, 1976). For discussions of certain specific areas of trade union rights which are not discussed in detail in this work see the following: Jean-Michel Servais, "Freedom of Association and the inviolability of Trade Union Premises and Communications", (1980), 119 I.L.R. 217-227; B. Gernigon, "The Election and Dismissal of Trade Union Leaders", (1978), 117 I.L.R. 423-438; E. Cordova "Workers' Participation in Decisions within Enterprises: Recent Trends and Problems", (1982), 121 I.L.R. 125-139; E. Cordova and M. Ozaki, "Union Security Arrangements: An International Overview", (1980) 119 I.L.R. 19; N. Valticos "Temporary Work Agencies and International Labour Standards", (1973), 107 I.L.R., pp. 43-56; H.G. Bartolomei de la Cruz, Protection Against Anti-Union Discrimination (Geneva, ILO, 1976); B.Gernigon, Tenure of Trade Union Office (Geneva, ILO, 1977); ILO, Eligibility for Trade Union Office (Geneva, 1972); ILO, The Public Authorities and the Right to Protection of Trade Union Fund and Property (Geneva, 1974).

CHAPTER I

BACKGROUND

A. History

In a history of the International Labour Organization, an account should be given of developments in at least four areas. First, the origins of international labour standards are important because they reveal their rationale. Second, certain facts about the evolution of institutions preceding the ILO, and its shortcomings, will help to bring the strengths of today's machinery and procedures into focus. Third, the desirability and adequacy of international labour standards will be greatly influenced, if not determined, by what one holds to be their purpose and order of priority. And fourth, the universality of standards, or their utility in the solution of problems of states that differ widely in terms of political, economic, social and cultural development and outlook, is of great importance to the African states. These four areas will be examined in turn.

1. Origins of thoughts on international labour standards

The earliest recorded thoughts about the need for international labour standards did not come from workers. This was so notwithstanding the fact that by 1818, when the first attempt at setting labour standards at the international level was made, the recipe for a class struggle was already in existence. The Industrial Revolution took place at a time when the laissez-faire state was in vogue. It was based on the belief that individualism and liberalism

were of first importance in all areas of society and the state's functions were limited to maintaining a legal system and an atmosphere in which these would thrive. This general philosophy applied to the economy meant freedom of work, freedom of competition, free internal and external trade, and non-intervention on the part of the State.¹

Despite its apparent merits, the laissez-faire State created conditions under which the rich industrialist had a good chance of becoming richer while the worker remained poor and exploited. There were penalties for concerted efforts to lobby for higher pay, for a decrease in working hours, and for soliciting someone else to leave work.² There were also penalties for workers who refused to work with other workers. It was an offence, even during the French Revolution, to engage in trade unionism.

It was not until 1818 that the first international effort was made to have internationally protected labour standards. It came from a British industrialist named Robert Owen. In his textile mills at Lanark in Scotland he introduced new methods of management. He cut the hours of labour, improved the living conditions of his workers, made provision for their leisure and the education of their children and established cooperative marketing. In order to disseminate his ideas

¹ A. Alcock, History of the International Labour Organization (New York, Octagon, 1971), p. 3.

² Ibid, p. 3

to a wider audience and at the international level he made contact with the Congress of the Holy Alliance at Aix-de-la-Chapelle. There he presented two Memorials in which he suggested the adoption of his proposals.³ Charles Hindley was another early precursor of international labour standards. He managed a cotton spinning factory in Lancashire, England. In 1839 the same general proposals emerged in France through Villermé. The French liberal economist Jérôme Blanqui supported the idea of international labour standards in a treatise written in 1838 to 1839. It was Swiss industrialist Daniel Legrand who most forcefully and persistently fought for the recognition of the "rights" of workers in Europe, from 1840 to 1859. All of these efforts however produced no immediate results.

The fact that the first efforts towards the setting of international labour standards came from industrialists and not workers may appear odd. The absence of labour standards as we know them today was to the advantage of the industrialists. There were generally no standards regarding health and safety, leave pay, maximum working hours and other matters, now regulated both nationally and internationally.

³ It has been pointed out that Owen was not the pioneer of international labour legislation but rather an advocate of international legislation practiced at an international level. A Swiss banker, Necker, is said to have been the first to note that the question of protecting workers was an international question; A. de May, "Necker, Précurseur du Pacifisme et de la protections ouvrière, in *Revue de l'institut de l'institut de Sociologie Solvay* (Université Libre de Bruxelles; Brussels, 1935) XV n. a, quoted in Alcock, see footnote 1, p. 6.

Compliance with labour standards often involves additional expense on the part of the employer. The adoption of labour standards would therefore operate to reduce profits. The apparent oddity is explained by the potential effect of national labour standards on international economic competition. If labour standards were adopted only in some countries, goods produced in those countries would be more expensive than those produced in countries which had no labour standards.⁴

The fact that it was the industrialists who first proposed international labour standards has been relied on by G.A. Johnson to support the contention that the drive for international labour standards was in no way an expression of the class struggle.⁵ Nevertheless, even in the early 19th century widespread discontent among workers was discernable. It should be recognized that the industrialists concerned were intelligent, far-sighted and calculating men. Only 46 years from the year that Owen presented his Memorials at Aix-la Chapelle (1818) and only 5 years from the death of Legrand (1859), Karl Marx and Friedrich Engels founded the First International in London (1864)⁶ calling on the proletariat of all countries to unite.

⁴ See section of this Chapter regarding the purposes of international labour standards.

⁵ G.A. Johnson; The International Labour Organisation (London, Europa, 1970), p. 4.

⁶ Also, formed in 1864, the International Working Mens' Association; in 1889 the Second International was born; in 1913 the International Federation of Trade Unions was instituted. Its origins were traceable to a conference of 1901. There was also some

2. International institutions

The history of the ILO as we know it today begins at the Paris Peace Conference in 1919. However, one previous body and its failures was instructive to participants at the conference.

a) The International Association for Labour Legislation

This Association was established in Paris in 1900, its formation having been discussed at a conference in Brussels in 1897. It failed however to make any real impact on the international regulation of labour standards though some attempts were made; an international diplomatic conference in Berne in 1906 adopted two draft Conventions and a technical conference in 1913, also in Berne, adopted another two Conventions. The First World War prevented these latter conventions from being presented to a diplomatic conference which was to have been held in 1914.⁷ These developments, limited though they were, are important because the principle of international agreement for the regulation of labour conditions was accepted by a number of

⁷ The first two Conventions dealt with the prohibition of the use of white phosphorus in the manufacture of matches and on the prohibition of night work for women. The 1913 drafts made provision for the general prohibition on the night work of persons under sixteen and the total prohibition of those under fourteen; G.A. Johnson, see footnote 5, p. 7.

industrial states for the first time.⁸

The failure of the Association can in a very large measure be attributed to certain fundamental weaknesses, pointed out by Johnson.

In the first place, it was representative neither of employers' organizations nor of workers' organizations, nor of governments. Although the technical and diplomatic conferences were attended by government representatives, the great majority of those who attended the delegates' meetings were professors, doctors, lawyers and social workers, with a sprinkling of politicians and government officials. In the second place, in its investigations into industrial questions it could not command the necessary information.⁹

These deficiencies were later to be corrected in the ILO Constitution.

The reasons for the failure of the Association inspired at least three dominant conceptions now in the ILO Constitution namely, periodic conferences for the conclusion of international agreements; a central organ of information and preparation; and supervision over the observance of Conventions.¹⁰

b) The League of Nations and the United Nations

The conference in 1919 set up a body known as the Commission on International Labour. That Commission was comprized of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy,

⁸ Ibid., p. 9.

⁹ Ibid., pp. 9,10.

¹⁰ Johnson, see footnote 5, from p. 1.

Japan, Poland, the United Kingdom and the United States.¹¹ The Commission declared adherence to the principle of freedom of association and freedom of association was one of the principles set out in the original Preamble to the Constitution of the ILO. It was also among the principles set out in the body of the Constitution as being of special and urgent importance.¹² Article 41 recognized "the right of association for all lawful purposes by the employed as well as the employers." Freedom of association was therefore recognized during the formation of the ILO under the League of Nations.

The Preamble to the Treaty of Versailles sums up the intent of the framers. First, there is a recognition that there can be no lasting peace without social justice. Second, there is a concern to alleviate injustice, misery and deprivation among a large number of the workers of the world. And thirdly, it is recognized that governments, however well motivated, will find it impossible in a competitive world to improve the lot of their workers in the absence of a co-ordinated universal effort to improve working conditions.¹³

¹¹ J. T. Shotwell, Origins of the International Labour Organization, (New York, Columbia University Press, 1932) Vol. 1, pp. 128, 129.

¹² Article 14 (Article 427) of the Treaty of Versailles. See Clive Parry, ed. & annot., The Consolidated Treaty Series, Vol. 225, 1919, (Dobbs Jerry, New York, Oceana, 1981) pp. 412-424.

¹³ It has been suggested that there were less idealistic factors "necessitating" the establishment of the ILO namely "... the menace of Bolshevism." "By creating the ILO, [the victorious powers] offered organised labor participation in social and industrial reform within an accepted framework of capitalism"; Cox, "Labor and Hegemony", (1977) 31

Since the inception of the ILO, the premium placed upon freedom of association has not diminished. In May 1944, the International Labour Conference adopted the Philadelphia Declaration. The Declaration stated that "freedom of association and expression are essential to sustained progress" and that:

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 employers, enjoying equal status with those of governments, form them in free discussion and democratic decision with a view to the promotion of the common welfare.

There are other statements in the Declaration in the same broad vein.¹⁴

The contents of the Declaration were incorporated into the ILO Constitution in 1946.¹⁵ The Universal Declaration of Human Rights of

International Organization 385 at 387. The first Director of the ILO, Albert Thomas, speaking of the relevance of social justice to universal peace, said that it would be historically incorrect to accept the formula literally and that it must be understood in a broad and indirect sense; Albert Thomas, "Justice Social et Paix Universelle", La Revue de Paris, 15 March 1924, pp. 241-281, Quoted from Valticos, International Labour Law (Kluwer, 1979), p. 23. It is not clear what Thomas meant but those who claim that the ILO was primarily aimed at protecting capitalism would probably argue that Thomas was referring to the desire to consolidate capitalism. See also Phelan, "The Contribution of the ILO to Peace" (1949) 8 I.L.R. 607-632. Arguments suggesting non-philanthropic motives may be somewhat moot, however, as the ILO's contribution, especially to workers' rights, however, has been substantial.

¹⁴ See further part of the text of the Declaration at Appendix 1.

¹⁵ Article 23(4).

1948 also declares that "everyone has the right to form and to join trade unions for the protection of his interests." In addition, it declares that no one "may be compelled to belong to an association." The two 1966 covenants, which together with the Declaration, form the International Bill of Rights, also contain provisions relating to freedom of association. Article 8(1)(g) of the Covenant on Economic, Social and Cultural Rights declares the "right of everyone to form trade unions and join trade unions of his choice ... for the promotion and protection of his economic and social interests." And Article 22(1) of the Covenant on Civil and Political Rights stipulates "the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

In 1946, by an agreement between the United Nations and the International Labour Organization, the latter was recognized as a specialized agency responsible for taking such action as may be appropriate under its basic instrument. The next three years saw the adoption of the two most important international instruments in the field of trade union standards namely, 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). In these the general principles enunciated at Versailles in 1919 were given more tangible legal expression.

_____3. The purposes of international labour standards.

The proper construction and application of an international instrument cannot be divorced from the general purposes of the whole corpus of law under which it falls.¹⁶ There are at least seven purposes of International labour standards. They can be divided into two classes: those that assumed currency either before the establishment of the ILO or at its establishment in 1919, and those which were developed subsequently because experience dictated their recognition. The first class comprises three purposes: the need to avoid unfair international commercial and industrial competition, the pursuit of social justice and the need to consolidate peace. The second class comprises four additional purposes: the pursuit of what have been called the "social and human objectives of economic development", the regulation of matters of an international character¹⁷; the entrenchment of national labour laws and the¹⁸

¹⁶ Lord McNair, Law of Treaties (Oxford, Clarendon Press, 1961), p. 365. McNair says that the task of treaty interpretation "can be described as the duty of giving effect to the expressed intention of the parties as expressed in the words used by them in the light of surrounding circumstances." Surrounding circumstances would also include the state of law at the time the treaty is negotiated or comes into force.

¹⁷ Matters of an international character relate mainly to the migration of workers.

¹⁸ As to the development of national labour laws it is arguable that even where a state has already implemented the provisions of a Convention it has not ratified, it is desirable that it ratify the Convention as this contributes to the consolidation of the local law.

inspirational function.¹⁹ We shall consider in detail the four most important purposes of international labour standards: international commercial and industrial competition, social justice, the consolidation of peace, and the social and human objectives of economic development.

a) International economic competition

The international commercial and industrial competition argument was used particularly in the 19th Century and early this Century. It was argued that if certain states unilaterally passed labour legislation, the cost of labour in those states would rise, forcing up prices of goods and services. This would place such countries in an unfavorable economic position as compared with countries where the cost of labour remained low. The result would be that countries which did not have such legislation would produce cheaper products or provide cheaper services. The solution was seen as lying in the adoption of uniform labour laws, at least in certain

¹⁹ As to the inspirational function it is argued that international labour standards can be a broad guide and be inspirational to governments because of the authority of a text adopted by a body comprising government, worker and employer representatives. See further Jenks "The Corpus Juris of Social Justice", in Law, Freedom and Welfare (London, Stevens and Sons 1983), p. 105 and E.A. Landy, "The Influence of International Labour Standards: Possibilities and Performance", (1970) 101 I.L.R. 555-604; Mahaim, "The Historical and Social Importance of the International Labour Organization" in Shotwell, see footnote 11, pp. 13,14.

areas, through internationally regulated labour standards. The argument was advanced as if it were applicable in every situation.

By 1919 however, this argument had diminished in importance. It had weakened because of the realization that the value of goods and services depended on many other factors²¹ apart from the cost of labour. Its diminished importance was reflected in the Preamble to Part XIII of the Treaty of Versailles, the ILO Constitution, which mentioned it only third.²² Further, in 1922, the Permanent Court of International Justice indirectly disavowed it when it rejected an argument that the ILO's competence should be limited to cases where the international competition factor was relevant.²³ Acceptance of the argument by the Court would have implied that the Court endorsed the view that the sole purpose of international labour standards was the avoidance of international economic competition.

The argument however, remained valid in certain situations,

²¹ These include raw material prices, resource and capital availability, work organization, productivity, taxation, and market systems. See Herbert Feis "International Labour Legislation in the Light of Economic Theory", (1927) I.L.R. 491-518 and "Labour Cost as a Factor in International Trade", (1950) I.L.R. 425-486.

²² "... the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". This however, cannot be taken to be referring exclusively to international competition for it is equally capable of referring to the inspirational function of international trade union standards.

²³ P.C.I.J. Series B. Nos. 2 and 3, p. 9.

for example in groups of states where conditions were similar and where there were no tariff barriers. For instance, "it was for reasons connected with the equalization of costs and competition that the Treaty of Rome, which set up the European Economic Community, dealt with the question of equal remuneration for equal work for men and women workers (Art. 119)."²⁴

The economic competition factor may also vary in importance with the subject-matter. It has been observed that the factor "appeared to be of greater importance in the fields of hours of work - and the ratification of the relevant Conventions has suffered from this conception - and in the field of maritime questions."²⁵

It is appropriate as well that the avoidance of international economic competition is not regarded as the principal purpose of the ILO. Had it been so regarded it would have meant that workers benefitted from ILO standards only incidentally. The image of the organization would be considerably diminished if it were viewed as primarily serving the interests of industrialists.

b) Social justice

²⁴ Valticos, *International Labour Law* (Deventer, Netherlands, Kluwer, 1979) p. 22.

²⁵ Ibid., p. 22.

The Preamble to the ILO Constitution after declaring that universal and lasting peace can be established only if it is based upon social justice goes on to declare that the High Contracting Parties were "moved by sentiments of justice and humanity." Thus social justice was seen not just as one of the pre-requisites for peace, but also as an end in itself. Now, the concept of social justice has a much expanded meaning. Whereas in the beginning it aimed principally at removing glaring injustices and protecting the weak, it can, in the words of Albert Thomas, the first Director of the ILO, be taken today to mean "a possible policy through which the individual might attain his [/her] political, economic and moral rights."²⁶

This aspect of social justice is particularly important for the developing world as a whole. Since the establishment of the ILO there has been, by and large, a remarkable improvement in conditions of work and in standards of living of workers in developed countries. The same cannot be said of developing countries. Nicholas Valticos has summarized the problem in this way.

The poorer countries are facing serious problems, such as poverty, unemployment, lack of administrative infrastructure and of essential facilities in the field of health and education, and these problems often lead to importance being attached to the rights of the individual and of groups. The urgency of finding solutions to these problems make it even more important to define clear goals for material development and the welfare of the population, a process in which

²⁶ Phelan, Yes and Albert Thomas (London, Cresset Press, 1936), p. 242.

international standards, used with a proper sense of priorities, could be of considerable help.²⁷

In referring to the "rights of the individual and of groups" the author probably had in mind the ideology that attaches greater importance to the economic and social rights of the whole population than to individual freedom. The ideology may, at least in part, be due to the dire economic and social conditions in developing countries. It may also be that the desperate conditions in these countries demand an order of priorities different from that of the developed nations.

For low income African countries, a stagnant economic growth has combined with rapid population growth to translate into a decreasing per capita income. Five out of the seven million children who die every year all over the world are in Africa. Over 50 per cent of the urban population live in slums or squatter housing. The amount of external resources lost yearly by African countries because of deteriorating terms of trade is equivalent to their total annual aid receipts. Debt service obligations of Sub-Saharan African countries rose by 25 per cent in 1982 alone. And about half the African labour force is unemployed or underemployed.²⁸

All these problems have been compounded by famine. According

²⁷ Valticos, op.cit., footnote 24, p. 24., Emphasis added.

²⁸ UNDP, Confronting the Crisis in Africa, 1984.

to the Food and Agriculture Organization (FAO), 24 African nations with a total population of 150 million have catastrophic food shortages.

Over 30 million people are unable to find or produce enough food and water to sustain life. Millions have died due to lack of food and water.²⁹ For the first time, human beings are dying by the million due to the lack of food and water. Social justice, one of the principal purposes of international labour standards, has assumed an additional dimension in Africa. No longer is it merely a question of improving the living standards of the people. It has also become a question of life or death.

c) Consolidation of Peace

It has been said that democratic regimes are more likely to be peace loving than totalitarian ones.³⁰ It has also been said that measures aimed at achieving social justice such as those which secure trade union rights and freedoms, will consolidate democratic regimes. In this way international labour standards, which provide, inter alia, for trade union rights, are a contribution to peace. Although it is a well-established general principle of international law that the sovereignty of all states dictates non-intervention in "matters which

²⁹ Canadian International Development Agency, Food Crisis in Africa (1985), p. 1.

³⁰ See Valticos, op.cit., footnote 24 p. 23.

are essentially within their domestic jurisdiction",³¹ Events in one state may have international repercussions. Hence, it is argued how international labour standards are relevant to peace.³² At the very least the award of the Nobel Peace Prize to the ILO in 1969 is evidence of the fact that the nexus between social justice and peace is recognized by a respectable proportion of global opinion.

If the stability of governments is an element of peace, then Africa must be regarded as having a problem related to consolidating peace which is more serious than the developed states. The coup d'état has become virtually a way of life in much of Africa. As has been observed by B.O. Nwabueze, a leading African constitutional lawyer, that before 1963, with the exception of Egypt (1952) and Sudan (1958), military interventions in the politics of the emerging states had been confined to the independent countries of Latin America, Asia and the Middle East. In 1963 there was a military coup d'état in the African country of Togo. Since then the phenomena has spread to virtually all parts of the Continent.³³ From 1963 to date there have been at least 45 illegal take-overs of governments. At least 23 countries have experienced an illegal take-over. Nigeria has experienced it 6 times in its first 25 years of independence while Ghana has seen 5. It is

³¹ See Art. 2(7) of the UN Charter.

³² See Valticos, footnote 24 p. 23.

³³ B.O. Nwabueze, Constitutionalism in the Emergent States (Canbury, New Jersey, Associated University Press, 1973), p. 219.

now common for states to experience more than one coup or to have one military administration replaced by another military administration.

And whereas previously it was only the high ranking army officers who led revolutions now it seems that officers of relatively low rank may increasingly become involved. In 1978 Flight Lieutenant Jerry Rawlings led a successful coup attempt in Ghana, voluntarily relinquished power in ____, only to lead another successful attempt in 1981. And in Liberia, Master Sergeant Samuel Doe overthrew that country's elitist government in 1980.

There have also been many abortive coups, such as those in Ethiopia in 1960, Senegal in 1962, Niger and the Ivory Coast in 1963, Gabon in 1964, Congo (Brazaville) in 1966 and 1969, Algeria and Ghana in 1967, Sierra Leone and the United Arab Republic in 1971, Angola in 1977 and Kenya in 1982.

Referring to statistics on coups in African states William Tardoff has said:

Such statistics underline the basic instability of most African governments, irrespective of whether the former colonial power was Britain or France, Belgium, Italy, Portugal or Spain; whether the state was one-party, like Dahomey (in 1963) and Nigeria; whether the character of the regime was conservative or radical (Niger and Ahmed Ben Bella's Algeria offer contrasting examples); and whether the state concerned was prosperous like oil rich

Libya, or desperately poor, like Upper Volta.³⁴

These facts indicate the seriousness of the problem of government stability in Africa.

The reason for referring to these statistics is first, that they contribute to the high sensitivity of African leaders to criticism, much of which comes from trade unions. Further, trade unions may exert great economic pressure on the government. Such pressure is always useful to anyone trying to bring down a government by illegal means. Second, in so far as military take-overs of governments result in the disruption of the process of government and often bloodshed, victimization, and anxiety among the population, such take-overs can be regarded as detrimental to the cause of peace. The extent to which this is true however, will depend on how comparatively "peaceful" the previous government was, what its record was regarding respect for human rights, and encouragement of economic and social development. Nevertheless, by and large states do not generally prosper more after a coup than before, and in some cases rapidly decline economically. Hence, the maintenance of a government in power, in most cases, serves the cause of peace.³⁵ Consequently, the tight control of unions as a pre-cautionary measure against union involvement

³⁴ William Tordoff, Government and Politics in Africa, (London and Basingstroke, Macmillan Press Limited, 1984), p. 152, 153.

³⁵ Ibid., Chapter 7, p. 152, for general discussion on coups including causes.

in conspiracies against the government appears; in theory, to serve the cause of peace. The practical problem however, is that genuine and lawful expressions of discontent by unions are sometimes misconstrued by political leaders as political challenge, to which the leaders over-react.

d) Social and human objectives of economic development

The motives for the establishment of the ILO as stated at Versailles were honourable. But with the economic crisis in the 1930's, it became clear that the relationship between economic matters and social matters had to be re-defined. As early as 1930, Thomas is said to have suggested the paramountcy of the social factor over the economic factor.³⁶ American President Roosevelt at the International Labour Conference in 1941 remarked that economic policy was merely a means of achieving social justice.³⁷ Perhaps more important is that the 1944 Philadelphia Declaration stated that the central aim of national and international policy must be directed towards the attainment of certain social conditions.³⁸ The same idea of labour standards was affirmed in 1970 by the United Nations General Assembly

³⁶ Valticos, footnote 24, p. 25. Pope Paul VI, it has been observed, also stated that "the social factor must take precedence over the economic factor", ILO, Rec. of Proceeds. of I.L. Conf., 1969, p. 79.

³⁷ I.L.O. Rec. of Proceeds. of I.L. Conf., 1941, p. 158.

³⁸ See Appendix 1, the Philadelphia Declaration.

when it adopted the International Strategy for the Second United Nations Development Decade. It accorded equal emphasis to social and economic objectives.³⁹ This balance between the social and economic objective is accepted with qualifications in the African Charter on Human and People's Rights.⁴⁰

B. The universality of standards in general

The matter of universality of international labour standards in general terms, was dealt with in 1919 in the ILO Constitution. It provides that:

in framing any Convention or Recommendation of general application, the Conference should have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, in any, which it considers may be required to meet the case of such countries.⁴¹

The provision is capable of application in two areas that demand flexibility: (a) where the state of development dictates the observance of a lower standard than the general standard, and, (b)

³⁹ Freedom by Dialogue - Economic Development by Social Progress - The ILO Contribution, Rep. of D-G to ILO, 1971, pp. 5-9.

⁴⁰ See Chapter VI.

⁴¹ Article 19(3). India is said to have attached particular importance to the inclusion of such a provision and considered it a safeguard which would facilitate her acceptance of the Constitution; J.F.M. McMahon, *The Legislative Techniques of the ILO* (1965-6), 41 B.Y.B.I.L., 31.

where natural conditions in different parts of the world make uniform application very difficult or impossible. In four Conventions adopted in 1919 the provision was used to exempt certain named countries from the general standard, or to allow modified application of the general standard.⁴² The formula was later used in two Conventions in 1937⁴³ and two Conventions in 1948⁴¹ all of which were revisions of older Conventions. It has been used in two new Conventions in 1932 and 1946.⁴² The device has now, however, been abandoned. It would have proved difficult to use in the case of Conventions adopted particularly after 1960, when many African States joined the Asian states as new entities in the international arena. The difficulty would have arisen from the fact that after 1960 the many newly independent African states would certainly have requested exemptions perhaps on a regular basis.

⁴² The Hours of Work (Industry) Convention, 1919, Arts. 9, 10, 11, 12, 13, and 19 had variously special provisions for Japan, British India, China, Persia, Siam, Greece and Rumania; also Night Work (Women) Convention, 1919, Arts. 5 and 6; Night-Work of Young Persons (Industry) Convention, 1919, Arts. 5 and 6. See ILO, International Labour Conventions and Recommendations (1919-1981), (Geneva, 1982)

⁴³ Minimum Age (Industry) Convention (Revised), 1937, Articles 7 and 8, Minimum Age (non-Industrial Employment) Convention (Revised), 1937, Art. 9. See ILO, International Labour Conventions and Recommendations, footnote 42.

⁴¹ Night Work (Women) Convention (Revised) 1948, Arts 9,10, and 11; Night Work of Young Persons (Industry) Convention (Revised), 1948, Arts, 7,8, and 9. See ILO, International Labour Conventions and Recommendations, footnote 42.

⁴² Minimum Age (non-Industrial Employment) Convention, 1932, Art. 9, and Medical Examination of Young Persons (Industry) Convention 1946, Art. 8. See ILO, International Labour Conventions and Recommendations, footnote 42.

There were soon to be 50 or so African states which might have been exempted. A large number of exemptions would have watered down the ILOs purpose of establishing a system of international labour law.

Clauses setting a general but flexible standard are still in use, though sparingly, to allow for different stages of development as well as climatic conditions. The difference from the early provisions is that the earlier Conventions named certain countries and stated in what way the provisions of the Convention would be modified in relation to those countries. The more recent approach is exemplified by Article 4 of the Convention (No. 98) concerning the Right to Organise and Collective Bargaining of 1949. That Article provides that measures "appropriate to national conditions" be taken to "encourage and promote the full development and utilization of machinery for voluntary negotiations."⁴³

C. The universality of standards and African ideology

The attitudes of African governments towards trade unions are rooted in their political ideology. It is generally believed that the maximum possible rate of development is achievable only under a one-party system of government. This is because a one-party state is better able to create conditions under which a sense of national unity

⁴³ For a detailed discussion of these see J.F.M. McMahon, footnote 41.

can develop. First, it is said that the greatest need of a developing country is to free the vast majority of the population from poverty, hunger, illiteracy, disease and apathy. This task cannot be accomplished quickly unless the nation is united under a one-party government. Nwabweze understands the argument in this way:

To free the people from these demoralising evils is an urgent and challenging task upon which the very survival of the state itself depends. For unless improvement can be effected as speedily as possible, the mood of impatience already felt by the masses, might explode into violent hostility to endanger, if not destroy, the state itself. The imperativeness and urgency of the task ... admit of no diffusion of energies in an unbridled competition for power.⁴⁴

Second, it is said that unity is necessary to effectively combat neo-colonialism. The former colonial powers having left against their will, are suspected of mounting an economic war against the new nations primarily to maintain their economic suzerainty. Neo-colonialism is supposed to be even more sinister than colonialism because it operates insidiously among the frustrated or misguided elements in African society. It is therefore necessary to detect and neutralise these forces to the benefit of the people. Trade unions are usually prime suspects. Their actions and statements are often said by the political leaders to be instigated by the outside forces of neo-colonialism.

⁴⁴ B.O. Mwabweze, Constitutionalism in the Emergent States, see footnote 39, p. 164.

These general ideas have given birth to the prevalent attitude in Africa whereby economic and social rights are held to be more important than civil and political rights. Former Tanzanian President Julius Nyerere stated the rationale of this approach in this way:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity.⁴⁵

The same argument has also been stated as follows:

Development requires significant economic growth and social stability. Such growth and stability often require limiting civil and political rights. Therefore, development often requires the limitation of civil

⁴⁵ Julius K. Nyerere, "Stability and Change in Africa" (An address to the University of Toronto, 1969), printed in *Africa Contemporary Record 2* (1969-70), pp. 33-31. See also Onésimo Silveira, *Africa South of the Sahara: Party Systems and Ideologies of Socialism* (Stockholm, Rabén and Sjögren, 1976). To see how ideology affects trade union laws and practices, see W.A. Beling, *Modernisation and African Labour: A Tunisian Case Study* (New York, Praeger, 1965); U.G. Damachi, *The Role of Trade Unions in the Development of Ghana* (New York, Praeger, 1974); S.E.D. Fawzi, *The Labour Movement in the Sudan 1945-1955* (London, The Ghanaian Factory Worker: Industrial Man in Africa (Cambridge at the University Press, 1972); and, especially, A.K. Ubeku, *Industrial Relations in Developing Countries: The Case of Nigeria* (London, Macmillan, 1979). The last work has a comprehensive Bibliography of works on African industrial relations.

liberties and political participation to succeed.⁴⁶

The idea that economic and social rights are more important than individual freedom is not universally shared. The opposing argument is that development requires active participation of people and the fulfillment of basic economic and social needs to be effective. Deprivation of civil and political rights and human needs destroys the possibility of people actively participating in the process of development. Therefore, failure to provide for human rights and basic needs makes development impossible.⁴⁷

In the context of this paper, it will suffice to observe how the thesis affects the attitudes of African leaders towards trade union freedom. It is argued that in order to ensure that freedom of industrial action does not become industrial anarchy, the state must not be fettered in its power to regulate union activities. Wage increases not matched by increases in productivity and profits can only be granted at the expense of the vast majority of the population who live off the land. Further, a developing nation can ill afford the losses in person-hours that inordinate strikes entail. And furthermore, it is argued, that freedom of association could undermine

⁴⁶ Ron I. Meltzer, "International Human Rights and Development: Evolving Conceptions and their Application to EC-ACP Relations", in Claude E. Welch, jr. and Ron I. Meltzer, eds., Human Rights and Development in Africa (Albany, N.Y., Sunny Press, 1983).

⁴⁷ Ibid., p. 40.

national integration by protecting industrial action and political association.

In subsequent chapters we shall examine first, the extent to which some African laws regulating trade unions and trade union activities are dictated by economic and social conditions in Africa. Secondly, we shall examine the extent to which these laws are conducive to the achievement of balanced economic and social progress.

It will be important to keep in mind the sentiment expressed in a 1972 meeting of the African Advisory Committee of the ILO, during which it was said that "any attempt to adopt standards on a regional basis would be a backward step and would produce anomalies and tensions between different regions." The Committee disapproved of what it called "substandards for subhumans."⁴⁸ The ILO therefore has disapproved specifically of ideas that advocate the setting down of inferior regional standards for workers in Africa in the field of international labour law.

In the area of trade union rights, attempts by African states to set inferior standards mean the curbing of trade union autonomy. The curbing of union autonomy is based on the belief that economic and social rights should take precedence over civil and political rights.

⁴⁸ ILO, Mins. of Proceeds. of G.B., 170, 1967, p. 82, para. 156.

It follows therefore, that the refusal by the African Advisory Committee of the ILO to sanction inferior standards for Africa is, by necessary implication, a disavowal of the contention that economic and social rights are more important than civil and political rights.

D. Institutional framework

1. The tripartite structure of the ILO

The principle of tripartism applies to both the International Labour Conference and the Governing Body of the I.L.O. The term refers to the constitutional requirement that government representatives participate on an equal footing with workers' and employers' representatives. Article 3(1) of the ILO Constitution requires that the Conference be composed of

four representatives of each of the Members of whom two shall be Government delegates and the others shall be delegates representing respectively the employers and workpeople of each of the Members.

With respect to the Governing Body, Article 7 provides that it

shall consist of fifty six persons - twenty-eight representing governments, fourteen representing the employers, and fourteen representing the workers.

Tripartism manifests itself at meetings of the two bodies. Each of the workers' group, employers' group and government delegates tend to speak with one voice. Tripartism has been extended to committees.

The Conference is the legislative body. Its functions include the adoption of Conventions and Recommendations.⁴⁹ The functions⁵⁰ of the Governing Body, which is the executive organ, include: the consideration of Representations and Complaints against member states for failure to implement Conventions which they have ratified, the recommendation of action to be taken against a Member which does not take the necessary action regarding the implementation of Conventions, the response to recommendations of a Commission of Enquiry or a decision of the International Court of Justice concerning a complaint, and the drawing up of the rules concerning the powers, functions and procedure of regional conferences.

2. The Committee of Experts on the Application of Conventions and Recommendations

This Committee was set up in 1927. It was meant to be the

⁴⁹ Convention is open to ratification and therefore gives rise to legal obligations. A Recommendation on the other hand does not give rise to legal obligations because it is not open to ratification. See respectively Articles 5 and 6 of the Constitution of the International Labour Organisation.

⁵⁰ For a recent examination of the International Labour Conference including its functions, powers, composition, meeting and voting see Ebere Osieke, Constitutional Law and Practice in the International Labour Organization (Den Haag, Martinus Nijhoff, 1985), pp. 81-102; See also C.W. Jenks, "The significance of the Tripartite Character of the International Labour Organization", in Grotius Society Papers, May 28, 1936, 45-81.

main supervisory body. It comprises experts who act in a personal capacity. Their independence is reinforced by the fact that they are appointed by the Governing Body following the proposal of the Director-General of the International Labour Office. This procedure does not involve their governments. They are drawn from persons of high qualifications in legal and social matters, and as a rule tend to come from the judiciary.

The Committee of Experts has emphasized that as far as the obligations contained in Conventions are concerned, these are to be met regardless of the economic and social conditions in a given country.

The Report of the Committee of 1977 reads:

Subject only to any derogations which are expressly permitted by the Convention itself, these requirements remain constant and uniform for all countries. In carrying out this work the Committee is guided by the standards laid down in the Convention alone, mindful, however, of the fact that the modes of implementation may be different in different States. These are international standards, and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular social and economic system.⁵¹

The Committee of Experts therefore applies the standards contained in Conventions in a similar manner to all countries regardless of political and economic ideology, unless otherwise stated in the Convention itself. Further, the use of the word "constant" suggests

⁵¹ ILO, Rep. of Comm. of Exps., 1977, p. 11.

that the Committee's policy is that constructions of Conventions should not change from time to time.

The Committee's supervisory functions are performed by examining documentary evidence which is routinely submitted. In order to assess the extent to which states that have ratified conventions are complying with their obligations it examines government annual reports, laws, regulations and comments of workers and employers organizations, as well as government replies to its comments. The Committee's comments may be addressed to particular countries in particular cases or by way of comprehensive study. Its individual comments may be by way of "observations" of discrepancies or "requests" for replies by particular governments in following reports. Over and above the individual comments addressed to particular governments on specific laws, the Committee conducts a general survey annually of a particular subject.⁵² The basis of its survey are reports requested from all States respecting both Conventions and Recommendations relating to that subject-matter. Ratification of the relevant Conventions is irrelevant; in practice the Committee requests reports from non-ratifying states. The Committee of Experts has generally been very active and its observations are often referred to by the Committee on Freedom of Association.

⁵² An example is ILO, Collective Bargaining: A General Survey (Geneva, 1983).

3. The Governing Body Committee on Freedom of Association

In 1951, the Governing Body established the Committee on Freedom of Association. It soon emerged as the most important body of the ILO in the area of trade union rights. The rationale for its establishment was that it would be a sifting mechanism for complaints from governments, employers or workers. It was charged with the function of determining which cases should be referred to the Fact-Finding and Conciliation Commission on Freedom of Association.⁵³ This Commission was established in 1950 after an agreement between the ILO and the Economic and Social Council of the United Nations. The Committee's prominence was a direct result of the procedure for referring cases to the Commission. The Committee (or the Governing Body) can refer a case to the Commission only where the consent of the government concerned has been obtained. Government consent has been withheld in an overwhelming number of cases. Thus out of over 1,300 cases heard by the Committee, only 5 have been referred to the Commission.⁵⁴ Consequently, the Committee has been, almost exclusively of other ILO bodies, responsible for applying the relevant Conventions and Recommendations to individual cases.

⁵³ For a fairly early account and analysis of the Commissions work see J.A.R. Nafziger, "The International Labour Organization and Social Change: The Fact-Finding and Conciliation commission of Freedom of Association" in (1969) Int. Law and Politics, pp. 1-34.

⁵⁴ Ibid, pp. 1-34.

The Committee reflects the ILO's tripartite structure. It comprises equal numbers of representatives of governments, employers and workers; They are appointed by the Governing Body from among its members. It examines complaints relating to trade union rights from governments, employers and workers. Generally it proceeds by way of documentary evidence though in some cases, at the consent or request of the government concerned, an ILO official may visit a state for an on-the-spot investigation. It meets in Geneva three times a year.

The procedure followed is of a quasi-judicial nature. When a complaint is brought, the Committee refers the allegations to the government concerned for its observations; these are to be submitted within a time specified by the Committee. When a government's observations are received they are referred to the complainant for further comment.

The final result regarding each complaint partly depends on whether or not the government does in fact reply. If it does reply, and the Committee has the necessary information and arguments of the parties, it will reach conclusions. It may be that a case will not call for further examination, in whole or in part, or that it discloses a breach of trade union rights. In the latter case the Committee makes

recommendations⁵⁵ drawing the attention of the government concerned to the rules or principles which have been violated. The Committee also makes non-binding recommendations about what should be done to bring the legislation, practice or acts within the accepted trade union standards. In this process, the Committee primarily relies on Conventions Nos. 87 and 98 and its own prior decisions in similar cases. It also relies at times on the relevant general resolutions of the Governing Body, and the observations of the Committee of Experts and Recommendations of the Governing Body. If a government persists in a failure to reply, the case will be submitted to the Governing Body in a report which contains the allegations and substance of the case, and which details the unco-operative attitude of the government. Wider publicity of the case ensues and the Governing Body will take a decision on it.

The Freedom of Association Committee has examined over 1,300 cases.⁵⁶ It has however, been largely unsuccessful, if success is assessed in terms of compliance with its recommendations. Although,

⁵⁵ The Committee's decisions are described in the ILO as Recommendations.

⁵⁶ Figures for Africa are as follows: Cases heard before independence - at least 29; cases heard after independence - at least 144; cases from North Africa - at least 47. Certain individual countries have had substantially more cases than others, eg. Morocco - 33, Congo (Leopoldville) - 16, South Africa - 21, Cameroon - 6, Tunisia - 5, Egypt - 4. Compiled from ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd ed., (Geneva, 1985).

even in these terms its continued existence is justified, its success should be measured in wider terms. First the sheer number of complaints, over 1,300 in about 35 years, originating almost exclusively from trade unions, coupled with the fact that the number of cases have been increasing since the recession, is significant.

Second, its recommendation, with respect to complaints, at the very least, carry moral authority and are relied on by trade unions in the championing of their causes nationally and internationally.⁵⁷ Third, in any assertion that an aspect of trade union rights is customary international law, the decisions of the Committee will be an important consideration.⁵⁸ They constitute the largest and most detailed enunciation of principles of international trade union law by an international organization. And fourth, the Committee has made a more general contribution to civil liberties in matters not directly involving trade union activities. In many cases it has reiterated the principles of freedom of speech, assembly, opinion and many other civil liberties that could have a bearing on the formation and functioning of trade unions.

⁵⁷ For a view as to law courts in individual countries should use decisions of the Committee see M. Bendel, "The International Protection of Trade Union Rights: A Canadian Case Study" in (1981) Ottawa Law Review, 169 at 191. His suggestion is that they be given serious consideration.

⁵⁸ See ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd. Ed. (Geneva, 1985) and for a very brief overview of the principles enunciated by the Committee see A.J. Pouyat, "The ILO's Freedom of Association: standards and machinery: A Summing Up", (1982) I.L.R., 287-301.

The strength of the Committee arises from the fact that it meets frequently to decide cases on an on-going basis and that it is open to national and international organizations who have no relationship of any sort with the ILO. Its strength is also related to the fact that it has claimed jurisdiction to hear and determine cases where the issues relate to a Convention which has not been ratified by the government concerned. It treats mere membership of the ILO to be sufficient for it to hear and decide a case. This claim has generally not been disputed by states in cases that have been heard by the committee. Some states however prefer to argue their cases on the basis only of Conventions they have ratified.

a) The jurisdiction of the Committee regarding Conventions

A number of important constitutional legal issues remain unresolved and regarding the powers of the Committee both in respect of cases where the Convention being invoked has been ratified by the government concerned and where the government has not. At the outset, it must be emphasized that the Governing Body Committee on Freedom of Association is not vested with the power to receive complaints. That power is vested in the Governing Body. Article 24 of the ILO Constitution vests that power. It reads:

In the event of any representation being made to the International Labour Office by an industrial association of

employers or of workers that 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, the Governing Body may communicate this representation to the Government against which it is made, and may invite that Government to make such statement on the subject as it may think fit.

The Committee therefore exercises power delegated to it by the Governing Body. In fact the reports of the Committee are in law and practice subject to the Body's approval.

In 1951 when the Committee was created, the Governing Body did not expressly state that it was delegating to the Committee the power under Article 24 of the ILO Constitution.⁵⁹ There is however no other provision in the Constitution under which complaints can be lodged with any ILO body. The Governing Body must therefore be deemed to have nevertheless delegated to the Committee its power under Article 24. Accordingly therefore, the powers of the Committee on Freedom of Association are circumscribed by the powers vested in the Governing Body by Article 24 of the ILO Constitution.

i) The Jurisdiction of the Committee regarding ratified Conventions

Article 24 of the ILO Constitution makes it clear that if a Member of the ILO has ratified a Convention, and a workers' association alleges failure by that Member to effectively observe the Convention,

⁵⁹ ILO, Mins. of Proceeds. of G.B., 1951, pp.45, 58.

the Governing Body is legally competent to receive a complaint in that regard. It is also clear from that Article that the Governing Body may invite the government concerned to reply to the allegations.

It is the disposal of complaints by the Committee however that calls for close examination. The disposal of complaints is dealt with by Article 25 of the ILO Constitution:

If no statement is received within a reasonable time from the Government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

Under Article 25 therefore, it is clear that the Governing Body has to make a determination as to whether there has been a violation of a Convention or not. It is submitted however that the Governing Body has no power to publish its determination. Article 25 allows only the representation and the statement to be published. In this context, the Governing Body was apparently intended to be a body through which a government in breach of a Convention could be subjected to adverse publicity. Admittedly the Committee only gives and publishes non-binding recommendations. Recommendations however are nevertheless a form of determination and Article 25 does not permit the publishing of determinations.

ii) The Jurisdiction of the Committee regarding unratified conventions

It was in 1955 that the Committee on Freedom of Association first claimed jurisdiction to apply the principles contained in a Convention which had not been ratified by the Member state involved in a case before it.⁶⁰ This jurisdictional claim has been reiterated.⁶¹ The basis of the claim, as advanced by the Committee, is that there are certain fundamental principles embodied in the ILO Constitution, of which freedom of association is one, and that every member of the ILO must be deemed to have some commitment to these principles even if it has not ratified the Convention that gives them substance.⁶² The issue is of course of general importance but in relation to African states it must be noticed that as at 1st January, 1986, of the 50 or so African states, at least 43 were members of the ILO.⁶³ About 26 had ratified Convention No. 87 while about 34 were parties to Convention No. 98. A significant portion of African states therefore are exposed to the jurisdiction the Committee claims.

It was recognized not too long after the establishment of the ILO that various principles of international law, in particular those relating to the law of treaties, would have to be reconsidered in the

⁶⁰ ILO, Official Bulletin, Vol. XXXVIII (1954) 15-41.

⁶¹ 218th Report, Cases Nos. 1126, 1136 and 1137, para. 212, Case No. 1043, para 449.

⁶² Ibid.

⁶³ ILO, Official Bulletin, Vol. LXCII, 1984, Series A, No. 3, Supplement; there was no addition to the membership as at 1st January, 1986.

light of the unprecedented tripartite structure⁶⁴ by which workers, employers and governments jointly adopted Conventions. Regarding the significance of tripartism within the ILO C.W. Jenks, a former Director-General of the ILO, had this to say:

It is the tripartite character of the Organisation, the new role of employers' and workers' organisations and representatives both in the formulation and in supervising the application of international labour Conventions, which has so altered the nature of the international legal process as to make it necessary to reconsider, in respect of international labour Conventions, the substance of the ordinary rules of treaty law.⁶⁵

For example, the ordinary rule of international law regarding reservations to treaties is that a state may sign, ratify or accede to a treaty subject to reservations only if it can obtain the consent of all other states which are signatories or parties at the date of its signature, ratification or accession as the case may be.⁶⁶ But from the outset the International Labour Office has asserted that reservations to Conventions which are adopted by, and the application of which is internationally supervised by, tripartite bodies, cannot be validated by the approval of governments alone.⁶⁷ The effect of this

⁶⁴ See C.W. Jenks, footnote 53.

⁶⁵ C.W. Jenks, "The Significance, for International Law of the Tripartite Character of the ILO," (1937) 22 Trans. Grot. Soc., 45 at 58. See also by Jenks, "Are International Labour Conventions Agreements between Governments?", (1937) 15 Can. Bar. Rev. 574-8.

⁶⁶ C.W. Jenks, "The Significance of International Law of the Tripartite Character of the ILO," see footnote 65, pp. 58, 59.

⁶⁷ Ibid, p. 59.

modified rule is that reservations are inadmissible. The only way in which a reservation will be admissible is in a case where the International Labour Conference adopts a revising Convention incorporating the reservation.⁶⁸ In general, it may be said that those rules of treaty law which would, if applied, stultify the participation of workers and non-government employers are modified so as to avoid that effect.

In order to assess the constitutionality or legality of the Committees' claim to jurisdiction regarding states which have not ratified a Convention, it is necessary to appreciate the legal nature of its claim. The Committee has not expressly claimed that a Member of the ILO is bound by Conventions it has not ratified. Any such claim would be clearly ultra vires Article 24 of the ILO Constitution. That Article allows representations to be made to the Governing Body where it is alleged 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." The Committee has not claimed either that, in (apparently) relying on Conventions not ratified by a government concerned, it is in reality applying the ILO Constitution. This however is the only semblance of an arguable legal basis that the Committee may have.

⁶⁸ Ibid, p. 59.

In law the ground on which the committee appears to base its jurisdiction is not supportable. First, it is clear that once a state becomes a member of the ILO it can be taken to have accepted the principles contained in the ILO Constitution. It does not follow however that the member state also accepts by necessary implication the jurisdiction of the Committee to decide on whether or not those principles contained in the ILO Constitution have been effectively implemented in any particular country. It is one thing for a state to accept certain general principles but quite another for it to accept also the jurisdiction of any particular body to determine whether or not there has been a violation on any of those general principles. Thus though a Member of the ILO must be taken to have committed itself to clause I(a) of the Philadelphia Declaration (annexed to the ILO Constitution) which re-affirms the principle of "freedom of association [as being] essential to sustained progress", it does not follow that the Member also accepts the jurisdiction of the Committee to hear complaints from workers in the country concerned.

Second, it is doubtful whether the very detailed rules regarding trade unions laid down by the Committee can be fairly said to derive from the ILO Constitution or the Philadelphia Declaration. The Constitution and Declaration contain vague statements as to the need for the right of association and its importance to the well-being of workers; the Committee indirectly acknowledges this vagueness by deciding virtually all its cases on the basis of the wording of

Conventions (and sometimes Recommendations) with hardly any reference to the ILO Constitution itself or the Declaration. Almost as a matter of course the Committee will rely on the wording of a Convention even where the state concerned has not ratified that Convention.

Third, the Committee's assertion of jurisdiction appears to violate the principle pacta sunt servanda upon which the whole system of international law is based. This is so because the large majority of the principles which the Committee applies realistically derive not from the ILO Constitution but from the Conventions. In addition, if it had been intended that such a fundamental principle as pacta sunt servanda be abrogated in the ILO it would have been done in a more direct manner. The principle is too sacrosanct to be displaced by implication from the ILOs tripartite structure. On the contrary, ILO practice supports the opposite conclusion; it differentiates between binding Conventions from the non-binding Recommendations and provides in the case of Conventions for a system of ratification. The differentiation and the procedure for ratification are stultified if a state is held to be bound by principles elaborated in Convention it has not ratified.

And fourth, it should be recalled Article 37(1) of the ILO Constitution provides that "any question or dispute relating to the interpretation of the Constitution ... shall be referred for decision to the International Court of Justice." There is no guidance in the

ILO Constitution as to the meaning of "question" or "dispute". If, however, complaints heard by the Committee can be regarded as falling within the meaning of those words, the Committee's claim, in effect, that it applies the ILO Constitution, would appear to be a usurpation of the function of the International Court of Justice.⁶⁹

Even if it were to be accepted for argument's sake that the Committee of Freedom of Association in reality interprets the ILO Constitution and the Philadelphia Declaration in cases where a state has not ratified the applicable Convention, the legal basis upon which the Committee refers at all to the unratified Convention needs to be examined. One possibility is that the unratified Convention is referred to only as an aid to construing the ILO Constitution and the Philadelphia Declaration.

The Vienna Convention on the Law of Treaties⁷⁰ provides in Article 31(2) and (3) as follows:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its

⁶⁹ For a more detailed discussion see Ebere Osieke, "The Exercise of the Judicial Function with respect to the International Labour Organisation," (1975) 47 B.Y.B.I.L. 315-340; and also by Osieke, "Ultra Vires Acts in International Organisations: The Experience of the ILO," (1976-77) 48 B.Y.B.I.L. 259-280. Neither of these articles discuss directly the jurisdiction of the Committee on Freedom of Association to hear complaints.

⁷⁰ Found in Ian Brownlie, Basic Documents in International Law, 3rd. ed. (Oxford, Clarendon Press, 1983).

preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

It is clear from clauses 2(a) and (b) and 3(a), (b) and (c) what constitutes the "context" in the widest sense is a matter of consent between the parties. Accordingly therefore, in construing the ILO Constitution the Committee has no legal basis upon which it can use as an aid to interpretation a Convention which has not been ratified by the state concerned.

In the light of Article 31(3)(b) of the Vienna Convention on the law of Treaties, it is worth considering the legal effect of acquiescence on the part of states. That Article allows a body interpreting a treaty to take into account "any subsequent practice [by the parties] in the application of the treaty." The failure of most government representatives in proceedings in the ILO bodies and in hearings of complaints before the Committee to object to the assertion

by the Committee of jurisdiction regarding unratified Conventions is "practice" within the meaning of Article 31(3)(b). Such practice however cannot alter the clear and unambiguous language of Article 24 of the ILO Constitution, which clearly states that the jurisdiction to hear representations from workers is limited to states which are parties to the Conventions which have allegedly been breached. And by the same token, the doctrine of implied powers⁷¹ should not be applied so as to confer a jurisdiction which is clearly not conferred.

b) The legal effects of ultra vires acts

At a national level, the concept of ultra vires, which operates to nullify, ab initio, acts of government organs which are not in conformity with superior norms is well established in many legal systems. It however remains "a problematic and difficult question in international law."⁷² It has been observed that:

The I.L.O. Constitution and Standing Orders of the
International Labour Conference and the Governing Body of the

⁷¹ This alleged doctrine asserts that international organisations derive their powers from international law and not their constitutions. See generally for example Seyersted, "Is the International Personality of Intergovernmental Organisations Valid vis-à-vis Non-Members", (1964) 14 I.J.I.L. 233-269 and "International Personality of Intergovernmental Organisations: Do their Capacities Really Depend upon their Constitutions?" (1964) 4 I.J.I.L. 1-74. There is however a respectable body of opinion which maintains that the powers (and personality) derive exclusively from their constituent instruments. See for example C.W. Jenks, "The legal Personality of International Organisations," (1945) 22 B.Y.B.I.L. 267; Ian Brownlie, *Principles of Public International Law*, 3rd ed., (Oxford, Clarendon Press, 1983) 677-682.

⁷² Osieke, *Ultra Vires Acts in International Organisations: The Experience of the ILO*, (1976-77) 259 at 276.

International Labour Office do not contain provisions on whether any acts of the Organisation and its organs may be regarded as illegal or unconstitutional or on the procedure for determining any claims of illegality or unconstitutionality.⁷³

It has been argued as follows however in respect of those functions which the Governing Body may discharge without the approval of some other body (such as the power to hear complaints):

[I]f the Governing Body decides that it has not acted in an unconstitutional manner, then the decisions concerned will be binding on the organs and Members of the I.L.O. to the extent prescribed in the I.L.O. Constitution or the relevant instrument.⁷⁴

It is submitted however that this is a desirable rule regarding many matters of procedure and matters where at least some semblance of an argument supports the Body's decision. The rule is undesirable in the matter of complaints under Article 24 of the ILO Constitution where complaints may only be heard where the Convention being invoked has been ratified by the State against which a complaint is lodged.

C. Conclusion

It is clear that the International Labour Organization's tripartite structure loses much of its significance if governments, after having participated on an equal footing with workers and

⁷³ Ibid, p. 276.

⁷⁴ Ibid., p. 276.

employers in discussing, formulating and adopting a Convention, its application to a complaint affecting a particular government should depend on ratification by that government. This flaw however is the result of the clear wording of Article 24 of the ILO Constitution which provides for complaints to be heard in respect of parties who have ratified the relevant Conventions. The very feeble attempt by the Committee on Freedom of Association to justify its alleged jurisdiction to hear complaints in respect of States which have not ratified the Conventions concerned can be interpreted in at least two ways. First, the Committee's action can be seen as a zealous display of belief in the need to protect workers' interests. Second, those who see the ILO as being primarily intended at keeping workers contented but within a capitalist framework may interpret the Committee's excess of jurisdiction as a preoccupation with that desire.



CHAPTER II

THE ESTABLISHMENT OF TRADE UNIONS UNDER ARTICLE 2 OF CONVENTION NO. 97

Article 2 of the Freedom of Association and Protection of the Right to Organize Convention (No. 87) is designed to give expression to the basic right of workers to establish and join organizations. It provides that "workers without distinction whatsoever" have "the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing." This right to establish or join organizations should be exercisable "without previous authorization."

A. The meaning of "without distinction whatsoever"

The words "without distinction whatsoever" mean that freedom of association must be guaranteed without discrimination of any kind based on matters such as occupation, sex, colour, race,¹ beliefs, nationality or political opinion.² The right attaches not only to workers in the private sector of the economy but also to civil servants and public service employees in general.³ The right to form

¹ 15th Report, Case No. 102, para. 141 (South Africa).

² 126th Report, Case No. 683, para. 25 (Lesotho)
187th Report, Case No. 957, para. 268 (UK/Antigua).

³ 85th Report, Case No. 335, para. 452 (Peru).
208th Report, Case No. 1015, para. 244 (Thailand).

associations therefore extends to all workers; the extent of enjoyment of the rights however, may be restricted or limited in respect of the police and armed forces. The Committee on Freedom of Association has reiterated the rule and the exception regarding the police and armed forces in cases relating to public servants, agricultural workers, plantation workers and the police and armed forces.

1. Occupational categories

The Committee on Freedom of Association has applied to the letter Article 2 of Convention No. 87 and the exception relating to the police and armed forces contained in Article 9 of the same Convention. It is instructive, however, to observe how the ILO and the Committee⁷ have dealt with specific categories of workers.

Though the Committee has always held that public servants have the right, under Article 2 of Convention No. 87, to form trade unions like other categories of workers, the International Labour Conference found it necessary to adopt a Convention specifically dealing with public servants. In June, 1978, the Conference adopted the Convention (No. 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service.⁴ Article 5 of that Convention emphasizes that public

⁴ There was also adopted in June, 1978, Recommendation (No. 159) concerning Procedures for Determining Conditions of Employment in the Public Service. See ILO International Labour Conventions and Recommendations (1919-1981), (Geneva, 1982).

employees "shall enjoy adequate protection against any acts of interference by a public authority in their establishment ...". The Committee, however, made it clear that Convention No. 98 "by laying down certain provisions concerning, in particular, protection against anti-union discrimination ... [did] not in any way contradict or dilute the basic right of association guaranteed to all workers by virtue of Convention No. 87."⁵ Convention No. 151 is therefore understood as having been intended to add to and not derogate from, any rights public employees have deriving from any other Convention. The Committee's view appears to be supported by Article 1 which stipulates that Convention No. 151 "applies to all persons employed by public authorities, to the extent that more favorable provisions in other international labour Conventions are not applicable to them."

It is not sufficient to allow public employees to form associations that are not trade unions in the true sense. In one case,⁶ legislation allowed public sector employees to form "associations" which did not enjoy the same advantages and privileges as trade unions. The Committee found the law concerned to be in violation of the principle against discrimination.

The committee determined that the right of public servants to

⁵ 234th Report, Case No. 1261, paras. 363 and 364 (UK).

⁶ 48th Report, Case No. 193, para. 52 (Burma).

form trade unions cannot be taken away by custom and agreement. It has heard a case⁷ where by custom and agreement between public authorities and port employees the latter were classified as government officials and therefore outside the Trade Unions Act. The government concerned (which was a party to Convention No. 87) considered that the custom and agreement took the port employees outside the scope of the Convention. The Committee held that the provisions of the Convention could not be modified as regards particular categories of workers because of any private or national agreement, custom or other arrangement between such categories of workers and the government.

A number of African countries have legislation (respecting the right to organize) which does not differentiate between public servants and other categories of employees. Benin, Egypt, the Ivory Coast, Kenya, Senegal, Swaziland and Tunisia are examples.⁸ A few African countries such as Cameroon, Djibouti and Gabon have special legislation for public servants.⁹ Yet other African countries including Ethiopia, Liberia, and Zimbabwe do not recognize the right of public service officials to organize themselves into trade unions. In

⁷ Ibid., para 54.

⁸ Other countries with similar legislation include Argentina, Australia, Austria, Bulgaria, Bydorusian SSR, Cuba, Costa Rica, Germany, France and the United Kingdom. There are many others. The ILO, Freedom of Association and Collective Bargaining: General Survey (Geneva, 1983), p.25, and generally Chapter III on discrimination.

⁹ Ibid., p.25.

Liberia, the right to organize is in certain cases denied to workers in public undertakings.¹⁰ It is clear that legislation which denies the right to organize, i.e., the right to form trade unions to any category of workers, except the police or armed forces, violates Convention No. 87.¹¹

Like public servants, agricultural workers are the subject of a special ILO Convention. The right of association of agricultural workers is stated in Article 1 of Convention 11, the Rights of Association and Combination of Agricultural Workers, 1921. That provision states that a member of the ILO which ratifies the Convention "undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers,...". At the time however, the rights of industrial workers had not yet been expressed in a concrete way. Article 2 of Convention No. 87 eventually expressed concretely the right of association of all workers.

As for plantation workers the Committee on Freedom of Association has referred to a resolution adopted by the Plantations Committee of the International Labour Conference at its First Session

¹⁰ Ibid., p. 27.

¹¹ Note however, that the Committee has made it clear, as is discussed later, that though the right to form unions is universal, with the exception only of the police and armed forces, the exercise of other trade union rights can depend on the category of workers concerned.

in 1950.¹² The resolution provides, inter alia, that employers should remove hindrances, to the organization of trade unions by plantation workers.

It is common in ILO Conventions dealing with freedom of association to provide for an exception in the case of the police and armed forces. Article 9(1) of Convention No. 87 is typical: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations."¹³ In the Committee's view, Article 9(1)

cannot warrant the assumption that any limitations or exclusions imposed by legislation of a State as regards the trade union rights of the armed forces and the police are contrary to the Convention; this is a matter which has been left to the discretion of the State Members of the ILO.¹⁴

The Committee has not taken it upon itself to determine whether the restrictions imposed are excessive or not.

The word "extent" used in Article 9(1) of Convention No. 87

¹² 119th Report, Case No. 611, para. 93 (Costa Rica).

¹³ The exclusion regarding the police and armed forces is also found in other Conventions notably Convention No. 98 in Article 5(1) and Convention no. 151 in Article 1(3). See ILO International Labour Conventions and Recommendations (1919-1981), (Geneva, 1982).

¹⁴ 145th Report, Case No. 778, paras. 19 and 20 (France). 207th Report, Case No. 971, para. 52 (Dominican Republic).

however, would seem in this writer's view, to imply that certain restrictions may be imposed but that total denial, in law or in practice, of all the rights in the Conventions is prohibited. In a case where members of the police force filed a complaint the Committee expressed the hope that legislation would be adopted to "define the exact extent of the trade union rights of [that] category of workers."¹⁵ It seems therefore that at least the police and armed forces have, in so far as is presently relevant, trade union rights in a general sense, but that the extent of enjoyment of this right is left to be decided by the members of the ILO individually.

Where, however, the law regarding the police and armed forces sets out the extent to which trade union rights are to be enjoyed and the sanctions to be imposed for exceeding the limits of those rights, the Committee has declined to inquire into the severity of the sanctions. The law in Spain prohibited the attendance of members of the police force at public meetings. As regards the severity of the punishment imposed for attendance the Committee declined to make any recommendations.¹⁶

¹⁵ 211th Report, Case No. 1010, para. 52, (Spain).

¹⁶ 207th Report, Case No. 979, para. 52 (Spain).

a) Duties of a "highly confidential
nature"

Convention No 151 seems to have introduced an exception beyond Conventions No. 87 and 98, respecting the categories of workers which may belong to a union. Article 1(3) contains the usual exception respecting the armed forces and police. Article 1(2) states, inter alia, that the extent to which guarantees provided for in Convention No. 151 shall apply to employees whose duties are of a "highly confidential nature" shall be determined by national laws and regulations.

On any list of matters that are of a highly confidential nature, those relating to the security of a nation will rank high. In Africa, however, the instability of the governments is perhaps enough to make the government more sensitive to matters relating to national security than other regions of the world. At the same time, there is also the tendency to identify the presidency with a particular individual because, inter alia, that individual led the country to independence. The government's temptation to widen the meaning of confidential is likely to be proportionately higher under such systems. Referring to the one-party presidential regimes, B.O. Nwabueze, a leading authority in Commonwealth African Constitutional Law, has said:

The President is a personal ruler, he is indeed the government, and as such is identified with the state. National security is thus given a personal dimension too. It involves not only the security

of the state and its institutions, but also the security of the President's tenure of office. Anything that threatens the security of his continuance in office is also a threat to the security of the nation. He is the symbol of the nation, and the instrument through which this personal identification is achieved is the single or dominant party. A threat to the security of the party is therefore viewed as a threat to the security of the nation.¹⁷

The Committee on Freedom of Association has had an opportunity to apply the phrase "highly confidential nature" in at least one case.¹⁸ The facts of that case were not in dispute. Public servants who worked for the British government communications headquarters were denied the right to form or join a trade union of their own choosing. They were compelled by certain measures under national laws to relinquish their membership of a trade union following the disruption of operations at the headquarters. The government stated that it was the headquarters' function to ensure the security of the country's military and official communications and to provide signals intelligence in accordance with the requirements laid down by the government in support of the government's defence and foreign policies. The government argued that the work of the public servants was highly confidential and that therefore the measures taken were permissible under Article 1(2) of Convention No. 151.

¹⁷ Nwabueze, B.O. Presidentialism in Commonwealth Africa (New York, St. Martin's Press, 1974), p. 298.

¹⁸ 125th Report, Case No. 1261 (UK), 1984.

The Committee rejected this argument. It observed that the Committee and the Committee of Experts had "always taken the view that the exclusion of public servants from this fundamental right contravenes [Convention No. 87].¹⁹ The Committee on Freedom of Association stated that:

Convention No. 151, which was intended to complement the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) by laying down certain provisions concerning, in particular, protection against anti-union discrimination and the determination of terms and conditions of employment as these relate to the public service in general, in any way contradicts or dilutes the basic rights of association guaranteed to all workers by virtue of Convention No. 87.¹⁹

The Committee was fully conscious of the special position of civil servants. It went on to say:

The Committee acknowledges that the special nature of the functions of public servants engaged in the administration of the state and, in particular, the fact that their terms and conditions of employment may be determined otherwise than by a free collective bargaining process, was recognized by Convention No. 98.²⁰

The Committee continued however, that "the exclusion of certain categories of workers in Conventions Nos. 98 and 151 [could not] be interpreted as affecting or minimizing in any way the basic right to organize of all workers guaranteed by Convention No. 87." It concluded

¹⁹ Ibid., para. 383.

²⁰ Ibid., para, 364.

that there was nothing in either Convention No. 98 or Convention No. 151 which indicated an intention to limit the scope of Convention No. 87 with regard to categories of workers who may belong to a union.

This aspect of the Committee's views is not free from flaws. The exception relating to employees whose duties are of a "highly confidential nature" in Convention No. 151 was not used in Conventions 87 or 98. All these Conventions however, contain the exception relating to the police and armed forces. The Committee did not address itself to the possible significance of this fact in arriving at the conclusion that nothing in either Convention No. 98 or 151 indicates an intention to limit the scope of Convention No. 87. It is also curious that while referring to the preparatory work of Convention No. 98 it did not refer to the preparatory work leading to the adoption of Convention No. 151. The context in which Convention No. 151 was adopted would be relatively more important²¹ because Britain advanced an argument based on Convention No. 151.

The Preamble of Convention No. 151 gives some indication of at least the general purpose of that Convention. It first notes the terms of Conventions Nos. 87 and 98 as well as the Workers' Representatives Convention (No. 135) of 1971 and the Workers

²¹ See Rec. of Proceeds., I.L. Conf., 64th Session, 1978, discussed later in this Chapter.

Representatives Recommendation (No. 143)²² of the same year. Second, it states that Convention No. 98 "does not cover certain categories of public employees" and that Convention No. 135 and Recommendation No. 143 "apply to workers' representatives in the undertaking." The "noting" of the terms of Conventions Nos. 87, 98, and 135, and Recommendation No. 143 seems to indicate that the contents of these instruments were not to be affected by Convention No. 151.

The Preamble of Convention No. 151 indicates it was aimed at providing remedies in three areas. First it notes "the considerable expansion of public service activities in many countries and the need for sound labour relations between public authorities and public employees' organizations." Second, it recognizes "the great diversity of political, social and economic systems among member States and the differences in practice among them. And third, the preamble notes "the difficulties of interpretation" which arose in respect of the application of Convention no. 98 to public servants and "the observations of the supervisory bodies of the ILO on a number of occasions that some governments have applied these provisions in a manner which excludes large groups of public employees from coverage of that convention." The Committee did not, however, rely on the preamble

²² Convention No. 135 and Recommendation No. 143 are intended among other things to protect workers representatives from prejudicial acts of employers on account of their trade union membership or activities. See ILO International Labour Conventions and Recommendations (1919-1981), (Geneva, 1982).

to arrive at its conclusions or to confirm them. A preamble can be used as an aid in the interpretation of a Convention.²³

The Committee relied heavily on two provisions. First, it relied on the fact that Article 6 of convention No. 98 expressly states that the Convention should not be construed as prejudicing the rights or status of public servants engaged in the administration of the state. It said that Article 6 of Convention No. 98 therefore did not affect the rights of all workers to organize under Convention No. 87. Second, it relied on Article 1(1) of Convention No. 151. That Article states that Convention No. 151 applies to all persons employed by public authorities "to the extent that more favourable provisions in other international labour Conventions are not applicable to them." In a nutshell, the rights of all workers under Convention No. 87 to form trade unions was preserved by both Convention No. 98 and Convention No. 151.²⁴

The Committee's reasoning regarding the effect of Convention No. 98 on Convention No. 87 and the effect of Article 1(1) of Convention No. 151 on the two Conventions is easy to follow. It is a

²³ Article 31(1) of the Vienna Convention on the Law of Treaties, 1969, provides that "[a] treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose." According to Article 31(2) of the Vienna Convention, the preamble of a treaty constitutes, for interpretational purposes, part of the context.

²⁴ 126th Report, Case No. 1261, paras. 365 and 366 (UK); see case No. 1078 (Spain), also involving security.

long step in the argument however, to suggest that since Article 1(1) of Convention No. 151 did not derogate from the rights contained in the other Conventions, the other provisions of Convention No. 151 itself could not qualify those rights. Convention No. 151 should have been read as a whole and, in particular, the effect of Article 1(2) on Article 1(1) should have been considered. It is unfortunate that the Committee reached its conclusion without considering the applicability of the words "highly confidential nature" to the security work of the complainants. Of the arguments advanced by the United Kingdom the one relating to the meaning of those words seems to have been the most persuasive.

The preparatory work leading to the adoption of Article 1(2) of Convention No. 151 supports the argument of the United Kingdom that security officers performed duties of a "highly confidential nature" and that they were therefore outside the scope of the Convention. There was considerable discussion on the Article in draft form at the International Labour Conference in 1977. The United States suggested the exclusion of "sensitive categories of persons due to obligations arising from their states and the nature of their functions."²⁵ It was not stated to which obligations they were referring but it seems clear that "sensitive categories" would include security officers. The American Government Member specifically referred to the need to exclude

²⁵ Ibid., para. 34.

judges and policy makers from the scope of Convention No. 151.

Workers' Members however, would not accept any exclusions from the fundamental right of all workers to belong to a trade union and to participate in its activities.²⁶

The United Kingdom was also concerned about the security aspects of the proposed Article 1(2). It was suggested by the United Kingdom that "[t]he definition of the categories covered by the terms armed forces and police shall be according to national law and practice." Workers' Members were concerned such a provision might be too liberally applied.²⁷

The Working Party which prepared the draft of Convention No. 151 recognized that there were certain categories of workers who, though not constituting part of the police or armed forces, performed similar functions. It was therefore suggested by the Working Party that "a reference in the Preamble to the diversity of national laws and practice with regard to the public service could serve to acknowledge the position of those categories of workers."²⁸ Further, the Working Party suggested that the application of Convention No. 151 to workers performing similar functions to those of the armed forces and the

²⁶ ILO, Rec. of Proceeds. I.L. Conf., 63rd Session, 1977, No. 26, para. 34.

²⁷ Ibid., para. 40.

²⁸ Ibid., para. 50.

police could best be dealt with by the Committee of Experts on the Application of Conventions and Recommendations in the exercise of its supervisory functions. The Committee of Experts had performed similar functions in interpreting Conventions containing the expression "armed forces and the police."²⁹ The proposal was adopted by 153,082 votes to 980 with 10,339 abstentions.³⁰ All proposed amendments were withdrawn. The Workers Members accepted Article 1(2) of Convention No. 151 in its present form principally because of the inclusion of the word "highly". They had expressed the fear that unless "confidential" was qualified by "highly", many public employees would be excluded.³¹

There was no dispute as to whether or not Convention No. 151 should apply to the police and armed forces. The question was whether another category should also be excluded and what that category should be. It was argued by employers and workers at the Conference that persons who performed work of a "highly confidential nature" should be the additional category. The general consensus was that the words "duties of a highly confidential nature" were primarily intended to cover security officers.³² The decision of the Committee on Freedom of Association in the case involving the United Kingdom defeated the

²⁹ Ibid., para. 50.

³⁰ Ibid. para. 55.

³¹ Ibid., para. 27.

³² Ibid., paras. 34, 40 and 50.

intentions of the International Labour Conference with regard to Article 1(2) of the Convention No. 151.

The decision will be ignored at least in Africa. There, because of the instability of governments, security officers serve not only to safeguard the security of the State but also the security of tenure of the Head of State who personifies it. To allow security officers to form trade unions would make available to security officers an institution that could be used to disrupt the State or displace its leader. That leader is unlikely to allow such a development.

B. The Meaning of "of their own choosing"

Workers must be able under Article 2 of Convention No. 87 to establish and join organizations which are "of their own choosing." This freedom of choice is often directly or indirectly restricted or curtailed by law or practice particularly in Africa.

1. Trade union monopoly directly imposed by law

Trade union monopoly is said to exist where the law provides that there shall be only one labour organization in a state or one labour organization serving a particular category of workers.³³ There is no reason, however, why the terms should be restricted to trade union monopoly based on worker class, namely, where only one union is

³³ J.A. Erstling, The Right To Organize (Geneva, ILO, 1977), p. 19. See generally on trade union monopoly, Chapter 2.

allowed by law to represent workers in the same trade or occupation.

It would be equally descriptive of a system common in Africa where every union is obliged to affiliate to one trade union congress.

The ILO's attitude to trade union monopoly is clear. The Committee of Experts has stressed that there is a difference between voluntary and legally imposed monopolies:

There is a fundamental difference, with respect to the guarantees of freedom of association and protection of the right to organize, between a situation in which a trade union monopoly is instituted or maintained by legislation and the factual situations which are found to exist in certain countries in which all the trade union organizations join together voluntarily in a single federation or confederation, without this being the direct or indirect result of legislative provisions applicable to trade unions and to the establishment of trade union organizations. The fact that workers and employers generally find it in their interest to avoid a multiplication of the number of competing organizations does not, in fact, appear sufficient to justify direct or indirect intervention by the State, and, especially, intervention by the State by means of legislation.³⁴

In dealing with matters of trade union monopoly, the Committee has considered the possibility of workers benefitting from a unified trade union movement but has preferred to refer only to proceedings of the International Labour Conference. The International Labour Conference, the Committee has observed, by including the words

³⁴ 149th Report, Case No. 732, para 36 (Togo); 172nd Report, Case No. 841, para. 387, (Canada).

"organization of their own choosing"³⁵ in Article 2 of Convention No. 87, made allowance for the fact that in certain countries, there are a number of different workers' organizations which an individual may choose to join. He may choose to join an organization for occupational, denominational or political reasons. It has not dealt with the issue of whether a unified trade union movement is preferable for workers to trade union pluralism.³⁶

The Committee has held that Article 2 of Convention No. 87,³⁷ "is in no way intended as an expression of support either for the idea of trade union unity or for that of trade union diversity."³⁸ In other words, in the Committee's view, although the Convention is not inclined to make trade union diversity an obligation, it does at least require this diversity to remain legally possible in all cases. It has been held to be a violation of Article 2 to refuse registration of a trade union on the grounds that a trade union already exists for the same employees as those who are to be represented by a new union seeking registration, or the fact that the existing union holds a bargaining

³⁵ Emphasis added.

³⁶ 127th Report, Case No. 660, para. 269 (Mauritania); 160th Report, Case No. 841, para. 387 (Canada).

³⁷ The relevant part is that conferring the right to workers to form "organisations of their own choosing".

³⁸ 105th Report, Case No. 531, para. 283 (Panama); 158th Report, Case No. 824, para. 293 (Dahomey).

certificate in respect of such class of employees.³⁹ The Committee was of the same view where the refusal to register a union was made on the grounds that an already existing union was sufficiently representative of the interest which the union seeking registration proposed to defend.⁴⁰

The Committee has been well aware of the possible effects of certain ways of circumventing the general principle of choice of a union. Thus where workers' organizations have themselves requested unification of the trade unions and this desire has been given permanence in a law, the Committee has pointed out that when a unified trade union movement results solely from the will of workers, this situation need not be sanctioned by legal texts.⁴¹ Legal obligations to pay contributions of money to a single national trade union movement, whether or not workers are members, have also been disapproved of. The Committee has said that this represents a further consecration and strengthening of that monopoly.⁴² In that case, the complaint was lodged by non-members. It seemed that a compulsory fee imposed by law over members only is permissible.

³⁹ 15th Report, Case No. 103, para. 212. (UK/Southern Rhodesia).

⁴⁰ 149th Report, Case No. 709, para. 107 (Mauritus).

⁴¹ 83rd Report, Case No. 393, paras. 64 and 65 (Syria).

⁴² 65th Report, Case No. 266, paras. 61 and 62 (Portugal).

Trade union monopoly imposed by law is therefore incompatible with Convention 87 regardless of the form it takes. Thus the three main forms of trade union monopoly are prohibited: monopoly at the primary trade union level, namely, at the level of the undertaking, public body, occupation or trade; monopoly at all trade union levels, namely, prohibition of diversity at local, regional or national level; and monopoly through trade union legislation. This latter type is usually effected by conferring on the officer registering trade unions discretionary power to refuse registration. For example, some laws empower an officer to refuse registration where, in the officer's opinion, there is already a union that adequately represents the interest sought to be defended or where the officer considers that it would not be in the interests of the workers concerned to register a new union.

In Africa there is general belief in the desirability, if not necessity, of unified trade union movements. It is said that a developing nation can ill-afford the extra time, human and financial resources necessary for public authorities, who are usually the largest employer, to deal with a multiplicity of trade unions. In Ethiopia, all industrial unions must join the All-Ethiopia Trade Union which is a national confederation. By law, it is representative of "all workers in Ethiopia."⁴³ Unions in Sudan are permitted to form nationwide

⁴³ Quoted from J.A. Erstling, The Right to Organize (Geneva, ILO, 1977) p. 23.

federations but not more than one federation may be formed for manual workers, and one for non-manual workers.⁴⁴ This means that a maximum of only two federations are possible. The National Union of Tanganyika Workers is established by law in Tanzania. It is the sole trade union permitted by law but there are several occupational branches.⁴⁵ Affiliation to a single trade union permitted by law is compulsory in Uganda.⁴⁶ The law establishes the National Organization of Trade Unions which by law is the only national workers' organization. In Zambia only one union is allowed for each category of workers. Each union must belong to the Zambia Congress of Trade Unions.⁴⁷ All these provisions are clearly contrary to Article 2 of Convention No. 87 which provides, inter alia, that workers must be able to form "organisations of their own choosing" and the Committee has so found in a number of cases.⁴⁸

2. Factors indirectly affecting choice of union

So far we have dealt with cases where the law directly

⁴⁴ See J.A. Erstling, Ibid, p. 23.

⁴⁵ See J.A. Erstling, Ibid., pp. 23, 24.

⁴⁶ See J.A. Erstling, Ibid., p. 24.

⁴⁷ Industrial Relations Act, 1971, sections 5 and 4. See ILO, Legislative Services, 1971.

⁴⁸ 127th Report, Case No. 660, para. 269 (Mauritania); 160th Report, Case No. 841, para. 387 (Canada). For a general discussion on trade union monopolies see ILO, Freedom of Association and Collective Bargaining: A general Survey, (Geneva, 1983), pp. 43-48.

imposes trade union monopoly. There are however other factors that may in practice adversely affect the right of workers to choose a union. In the brief rule laid down by the Committee is that governments must not, in their laws or their practices, unduly influence the right of workers to choose a union.⁴⁹

Of all the factors that may affect the choice of union the phenomenon of union security arrangement is perhaps the most interesting. Union security is a generic term referring to arrangements where union membership or some of its financial aspects become a condition of employment.⁵⁰ Union security arrangements are aimed at consolidating membership and controlling labour supply. Such arrangements may therefore have repercussions not only on an employer's business but also on other unions or even individuals who are not members of a union. The closed shop is the strongest form of union security. It was first used by trade unions about 200 years ago.⁵¹ At that time unions had to take strong steps to survive in an unaccommodating atmosphere.

Criticisms of union security are not new. Soon after the closed shop was first used it was criticized on various grounds. Some.

⁴⁹ See generally, ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd. ed. (Geneva, 1985), paras. 222-251.

⁵⁰ J.A. Erstling, E. Cordova and M. Ozaki, "Union Security Arrangements: An International Overview," (1980) 119 I.L.R., 19.

⁵¹ Ibid., p. 19.

alleged that it violated the right to work and freedom of association. Others claimed that it encouraged trade union monopoly and unduly restricted management decisions particularly regarding recruitment options.⁵²

The types of union security have increased in number and have become more complex. Some forms make employment conditional on union membership. Other forms do not make trade union membership compulsory but exert pressure on non-members to become members by making the payment of union dues or other contributions a condition of employment. Yet others oblige an employee to give union members preference in hiring, firing or promotion.⁵³ Whatever form union security takes, however, the question has always been its compatibility with freedom of association; does the right to establish and join organizations of the worker's choosing necessarily imply a right not to join at all? In other words, how far in law can a union be allowed to go in consolidating its membership or controlling labour supply through union security before the freedom of non-members to form organizations can be affected?

The Committee on Freedom of Association has not fully addressed the possibility that union security can adversely affect the

⁵² Ibid., p. 19.

⁵³ There are many other forms.

right of other workers to choose a union. It has based its reasoning on a statement of the Committee on Industrial Relations appointed by the International Labour Conference in 1949. The Committee on Freedom of Association has said that according to that statement:

Convention No. 87 can in no way be interpreted as authorizing or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice. According to this statement, those countries - and more particularly those countries having trade union pluralism - would in no way be bound under the provisions of the Convention to permit union security clauses either by law or as a matter of custom, while other countries which allow such clauses should not be placed in the position of being unable to ratify [Convention No. 87].⁵⁴

On this basis, the Committee on Freedom of Association declined to make recommendations where the deduction of union contributions and other forms of union protection were instituted, not by legislation, but as a result of collective agreements or established practice between the parties.⁵⁵

The compatibility of a system of union security with ILO standards depends on whether or not it is imposed by law. The Committee has stated the principle in this way:

The position is quite different when the law

⁵⁴ 204th Report, Case No. 902, para. 146 (Australia); 214th Report, Case No. 988, para. 509 (Sri Lanka).

⁵⁵ Ibid.

imposes union security - either where it makes union membership compulsory or where it makes union contributions payable in such circumstances as to amount to the same thing. It has pointed out that, when a worker can legally join another union, but is still obliged by law to join a particular union if he wishes to retain his employment, such a requirement would seem to be incompatible with his right to join the organization of his own choosing.⁵⁶

Where therefore there is trade union monopoly and there are union security arrangements which makes it necessary for a worker to join that one union if he or she wishes to remain in employment, the worker's right to work is infringed.

Where union security arrangements require membership in a given organization as a condition of employment, the Committee has pointed out that there might be discrimination if unreasonable conditions were to be imposed upon persons seeking such membership.⁵⁷ The Committee has also dealt with union security in relation to bargaining agents. In one case the bargaining agent had the exclusive legal right to represent all the workers in a unit. It was compulsory for non-members of the bargaining agent to pay to the agent a fixed sum of money in return for benefits enjoyed by them under a collective agreement. The Committee did not find this to be incompatible with the principles of freedom of association. It added however, that the sum

⁵⁶ 181st Report, Case No. 857, para 100 (UK/Antigua).

⁵⁷ 15th Report, Case No. 114, para 62 (United States).

fixed by law should not be so low or high as to encourage withdrawal from membership of the bargaining agent or so high as to place an excessive financial burden on workers who pay contributions to another union of their choice.⁵⁸

C. The meaning of "without previous authorisation"

A report of 1948 by the Committee on Freedom of Association and Industrial Relations to the International Labour Conference contained perhaps the earliest enunciation of the meaning of previous authorisation in Article 2 of convention No. 87. The report stated that states would "remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of occupational associations."⁵⁹ The general rule regarding the registration of unions therefore is that legal requirements of a formal nature are not objectionable. Only those legal requirements conferring discretionary powers on an authority to register or not to register a union, or which can operate so as to hinder the right to form organisations, are contrary to Convention No. 87.⁶⁰

⁵⁸ 187th Report, Case No. 796, para 242 (Bahamas).

⁵⁹ 129th Report, Case No. 514, para. 112 (Columbia); 199th Report, Case No. 891, para. 74 (Guatemala).

⁶⁰ 172nd Report, Case No. 869, para. 109 (Nicaragua). Also see generally, ILO, Freedom of Association: Digest of Decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 3rd ed. (Geneva, ILO, 1985), 262-283. More formal requirements include the need sometimes to register the rules, the need to state in the rules the names of office bearers, the location of the office of the union, etc.; see further, ILO Freedom of Association and

D. Conclusion

Of the three main elements of Article 2 of Convention No. 87 the first, namely the right of workers "without distinction whatsoever" to establish or join unions, is comparatively problematic in Africa. In fact it suits current political ideology and rhetoric. It is regarded as fashionable and progressive for politicians to call on the "workers and peasants" to unite and fight "the enemy." It is in fact in the interest of political leaders to allow as many categories of workers as possible to belong to a trade union. If many categories of workers were denied the right to form unions, this rhetoric would have little effect. In addition, unions are a convenient medium to use for the politicization of the whole community.

The other elements of Article 2 of CONvention No. 87, namely the right of workers to choose a union, and to form or join a union without previous authorization, are relatively more difficult to implement in Africa. Trade union monopolies, for example, are likely to endure so long as ideas of political centralism predominate. Monopolies facilitate control. Control is the real reason for and not ideals about the need for a strong trade union movement.

Collective Bargaining: A General Survey (Geneva, 1983), Chapter IV, pp. 34-39. This latter publication has, inter alia, information about the laws of many countries regarding previous authorization.

Union security arrangements are of relatively less importance in African trade unionism because of monopolies. It seems unreasonable however, to hold that any kind of union security, no matter how severe or how many workers may be adversely affected, is unobjectionable. It seems that in extreme cases it would be a breach of the Covenant on Economic Social and Cultural rights to allow a large union to devastate smaller unions until it becomes virtually a monopoly. Article 8(1)(c) of the Economic Covenant expresses the "right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others."⁶¹ If some restrictions on severe kinds of union security are not made the rights of workers in smaller unions could be affected.

⁶¹ Emphasis added.

CHAPTER III

FUNCTIONING OF TRADE UNIONS UNDER CONVENTION No. 87

A. Introduction

To fully comply with ILO trade union standards, it is not enough for workers to have an unrestricted right to form or join a trade union. After being formed, a union must be able to function freely in the widest sense. If a union is not allowed, in law and practice, to function freely, the purpose for its formation is stultified and the union reduced to a sham. The right to function freely is therefore as important as the right to establish or join a union. Both are necessary to enable a union to effectively protect the occupational interests of its members.

Article 3(1) of the Freedom of Association and Protection of the Right to Organize Convention, No. 87, is the basic provision guaranteeing the free functioning of trade unions. It protects the right of workers 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." This right is fortified by other provisions of the Convention. Article 3(2) prohibits public authorities from interfering with the exercise of that right while Article 4 protects unions from dissolution or suspension by administrative authority. The right of trade unions, federations and confederations to affiliate with international workers' organizations is protected by Article 5.

The right of unions to function freely can be divided into two, sometimes overlapping, categories of rights. One category comprises rights relating to the actual setting up of a union, such as the right to draw up a constitution and rules, and to elect representatives in full freedom. The other category comprises rights respecting the organization of a union's administration and activities, and the formulation of its programmes after it has been set up.¹ These two categories will be examined in turn.

B. Setting up a trade union

1. The constitution and rules of a union

A union's right to draw up its constitution and rules means that a government cannot refuse to recognize a constitution adopted by the congress of a union.² Further, amendments to its constitution must be debated and adopted by the members.³ This however, does not preclude a government from listing in legislation the particulars that must be contained in a constitution. Merely formal requirements such as the need to state in a constitution the name of the union, its registered office, its objects, the manner of amending its constitution

¹ The right of a union to organize its activities and formulate its programmes under Article 3(1) of Convention no. 87 has been routinely interpreted by the Committee on Freedom of Association as conferring the right to collective bargaining and the right to strike, in addition to other trade union rights. See Chapters IV and V on the right to collective bargaining and the right to strike.

² 127th Report, Case No. 644, para. 250 (Mali).

³ 158th Report, Case No. 818, para. 223, (Canada).

and electing office bearers, the keeping of a roll of members and so on, are not generally regarded by the Committee on Freedom of Association as being contrary to freedom of association.⁴

In Africa it is common, directly or indirectly, to subordinate the union's interest to the government's economic and social goals. Ethiopia, which is currently under military rule, is one example. The Trade Unions Organization Proclamation No. 222 of 1982,⁵ prescribes the objectives and functions of all trade unions at all levels. Section 4(1) stipulates one of the objectives of trade unions as being "to enable workers to play their vanguard role as the advanced class in the struggle to translate into action the National Democratic Revolution Programme." Section 5(3) stipulates as one of the functions of trade unions their obligation "to educate and agitate workers to implement the development plans of the Government." Stipulating by law the objectives and functions of trade unions is tantamount to prescribing compulsory clauses in union constitutions regarding the objects a union may pursue. The Committee on Freedom of Association has had occasion to deal with compulsory clauses which appear to imply a degree of subordination of trade unions to the economic policies of the government, as does the Ethiopian proclamation. It has found them

⁴ For examples of such legislation in Africa see the following: Cameroon, Law No. 74-14, section 15, ILO Legislative Series, 1975, No. 8, Zambian Industrial Relations Act, sections 8 and 28, ILO Legislative series, 1971; Egypt, An Act to amend certain provisions of the Trade Union Act (No. 35 of 1976) No. 1 of 1981, section 36.

⁵ ILO, Legislative series, 1983, No. 1, p. 71.

not to be compatible with the principles of freedom of association.⁶

"Model" constitutions and rules must be distinguished from compulsory clauses. In Libya, model rules are issued by the Ministry of Labour and Social Affairs to be used only as guides for trade unions that are preparing their own rules.⁷ The Committee on Freedom of Association has ruled that the issuing of model constitutions and rules is not objectionable so long as there is no compulsion or pressure on the unions to accept them in practice.⁸ The Committee's ruling regarding models is still likely to work to the detriment of workers in the African context. It is common knowledge that African Countries suffer from a shortage of expertise in almost all professional fields. Model constitutions or rules would therefore appear to be one way of obviating the necessity of experts qualified to draft union constitutions and rules. It is ironic however, that it is in Africa where political leaders are more likely to exert pressure on proposed unions to accept supposedly optional model constitutions. In Africa, particularly in the one-party states and military regimes, both professionals and non-professionals are careful not to incur the displeasure of the government and in particular the President. Mention was made in Chapter 2 of how the President in Africa's one-party

⁶ 85th Report, Case No. 266, paras. 35-37, (Portugal).

⁷ H.P. Habib, Politics and the Government of Revolutionary Libya (Ottawa, Le Cercle du Livre de France, 1975) p. 48.

⁸ 6th report, Case No. 11, paras. 107 and 108 (Brazil), 86th Report, Case no. 298, paras. 516 and 518 (UK/Southern Rhodesia); 168th Report, Cases Nos. 825 and 849, para. 147 (Nicaragua).

states, both in law and fact, is the ruler and symbol of the nation. Any pronouncement the President makes tends to instantly acquire something of the sanctity of law. Any expression of the President's support of a particular model constitution or rules is therefore highly likely to translate into a form of compulsion or pressure. This pressure would be even more true if the model contains provisions subordinating the aims of trade unions to the aims of the government. A union omitting such a provision will be seen as being opposed to government policies. Model constitutions and rules seem likely to do more harm than good in the African context.

The rule as to models therefore needs modification. Since the problem in Africa is one of subordinating the union's aims to those of the government, modification of the rule should at least be concerned to meet this problem. Models, even if they are meant to be optional, should not contain any provision that tends to subordinate the aims of the union to those of the government. For example, model constitutions should not contain provisions such as those requiring or encouraging union members to join the ruling party or making membership of the ruling party a condition of eligibility for trade union office. On the assumption that such a modified rule would be observed, it would better meet the needs of trade union freedom and still be responsive to the special problems of trade unions in less developed countries⁹

⁹ It must be remembered however that generally African trade unions can only be formed by workers in one occupational category. Two or more unions are not allowed for one occupational category. Each union is therefore likely to be fairly large and the problem of expertise and expense in relation to the drafting of constitutions and

namely the shortage of expertise qualified to draw up union constitutions and rules.

A common way of restricting the right to draw up constitutions and rules is exemplified by the Ethiopian Trade Unions Organization Proclamation¹⁰ and the Zambian Industrial Relations Act, 1971.¹¹ Section 6(7) of the Ethiopian Proclamation enjoins the All-Ethiopia Trade Union, under whose umbrella all trade unions fall, to issue the by-laws of all trade unions in Ethiopia. Section 86 of the Zambian Act gives the Zambia Congress of Trade Unions, under whose umbrella all trade unions come, power to approve the by-laws of all unions. These provisions would seem to be contrary to Article 3 of Convention No. 87. The right to draw up the by-laws should be regarded as falling within the authority of the trade union which is going to be governed by them. Since the right belongs to each individual trade union, the umbrella organization can only have the right to draft or approve the by-laws where the affiliated union so requests. What is more, in cases such as those of Ethiopia and Zambia, the affiliation of the subordinate union to the mother union is imposed by law. This worsens an already restrictive provision in that not only is the power of each union to draw up its constitution taken away but it is given to the one and only trade union congress allowed by law.

rules of unions will not be a serious one in every case.

¹⁰ ILO, Legislative Series, 1982.

¹¹ ILO, Legislative Series, 1971.

Laws providing for a racially segregated internal organization have been held by the Committee on Freedom of Association to be contrary to Article 3 of Convention No. 87. In one case it was obligatory by law that registered trade unions with members of more than one race have separate branches for the different races and should hold separate meetings for the separate branches.¹² The Committee found the country in violation of Article 3.

2. Election to trade union office

Public authorities can interfere with trade union elections in two ways: by determining the conditions of eligibility of leaders or the methods of conducting the elections themselves. The Committee has therefore ruled that laws governing eligibility and the conduct of elections should not be so restrictive as to interfere with the right of workers to elect their representatives in full freedom.¹³ Control of trade union elections should, according to the Committee, be entrusted to judicial authorities.¹⁴ This means that the supervision of elections and the determination of complaints arising therefrom should fall within the jurisdiction of the courts and not that of public authorities.

¹² 24th report, Case No. 145, para. 209, (South Africa).

¹³ 83rd Report, Case No. 418, para. 347 (Cameroon); 236th Report, Case No. 1238, para. 248 (Greece).

¹⁴ 202nd Report, Case No. 944, para. 227, (Egypt); 236th Report, Case no. 1238, para. 248, (Greece).

In general, a law that regulates the frequency of elections or fixes the maximum period for the terms of office of its executive bodies is not contrary to Article 3.¹⁵ Zambia has a provision limiting the term of office to four years.¹⁶ It would seem, however that an unduly short or long term of office could be contrary to Article 3. A short maximum term would undermine a unions' continuity of operations to the detriment of the workers: a long maximum term, particularly where it is aimed at keeping particular individuals in power, would also seem to be contrary to Article 3.

The Committee's decisions regarding the maximum number of leaders that may be elected is surprising. It has decided that the number of leaders of an organization should be determined by the organization itself and not by law. It is easy to see how a very small executive body can be overworked and consequently be inefficient. It can also result in the limiting of the workers' choices of leaders thereby denying the union the maximum expertise and experience available. It is also easy to see how a very large executive can also be inefficient. A provision fixing the minimum and maximum number of leaders so long as the figures are not too low or too high, considering the size of a union, would seem to be reasonable.¹⁷

¹⁵ 202nd Report, Case No. 944, para. 227, 236th Report, Case No 1238, para. 252, (Greece)

¹⁶ Zambian Industrial Relations Act, 1971, section 8(h), ILO, Legislative Series, 1971.

¹⁷ See for example: Act No. 35 of 1976 Egypt.

There are certain conditions of eligibility which the Committee has found to unduly restrict the right to elect leaders. Conditions of eligibility based on race,¹⁸ political opinion or activities¹⁹, or requiring a candidate to belong to the occupation in which the organization functions²⁰, have been held to be contrary to Article 3. Laws prohibiting re-election are also incompatible with Convention No. 87,²¹ as are laws which disqualify a candidate on the basis of a criminal record unless the conviction is of such a nature as to risk the proper exercise of trade union functions.²²

Violations of the decisions of the Committee²³ do occur often, not just in Africa but elsewhere. The conspicuous feature about Africa however, is the flagrant violation of the right of unions to elect their representatives. On the takeover of a military regime such flagrant violations are almost inevitable. An example may be given of the Nigerian military take over of 1975 by which Brigadier Murtala Muhammed, who was later assassinated, came to power. The authorities

¹⁸ 24th Report, Case No. 145, para. 209 (South Africa).

¹⁹ 24th Report, Case 126, para. 94, (Costa Rica); 24th Report, Case No. 146, para. 273 (Colombia); 85th Report, Case No. 146, para. 273 (Colombia); 202nd Report, Case No. 911, para. 139 (Uruguay)

²⁰ 143rd Report, Case No. 771, para. 117 (Malaysia).

²¹ 143rd Report, Case No. 771, para. 117, (Malaysia).

²² 201st Report, Case No. 842, para. 51, (Argentina); 211th Report, Case No. 1043, para. 588, (Bahrain).

²³ For a general discussion on the issue see B. Gernigon, B., "The Election and Dismissal of Trade Union Leaders", (1978) 117 I.L.R. pp. 157-158.

reorganised over 250 unions into seven or eight, which became collectively known as the Nigerian Trade Union Congress. The military authorities then appointed the leadership of the Congress.²⁴

The outright appointment of trade union leaders is not confined to military regimes. In Tanzania, following the army mutiny of 1964, the President was given the power by law to appoint the top two officials of the National Union of Tanganyika Workers, (NUTA), the only trade union allowed in Tanzania.²⁵ And in Liberia, before the military take-over in 1980, the sons of Presidents William Tubman and William Tolbert were consecutively appointed to head the Congress of Industrial Organizations. President Tubman's social secretary was for many years the head of the Labour Congress of Liberia, the other trade union congress.²⁶

C. Operations of a trade union

The right of trade unions to organise their administration and activities and to formulate their programmes under Article 3 of Convention No. 87 protects every conceivable activity which is necessary for a union sufficiently to protect the workers' interests.

²⁴ B. Dudley, An Introduction to Nigerian Government and Politics (Bloomington, Indiana University Press, 1982) p. 104.

²⁵ L. Cliffe, The Party Democracy: The 1965 Tanzania General Elections (East African Publishing House, 1967)

²⁶ C. Clapham, Liberia and Sierra Leone (Cambridge, Cambridge University Press, 1976), p. 27.

First, a union must enjoy independence regarding matters that are internal to it; it must be free, inter alia, to hold its congress of members²⁷, hire experts²⁸ and decide whether or not its leaders will receive remuneration.²⁹ Second, a union must be master of its financial administration. Thus matters relating to trade union dues³⁰ must be under the union's control. It must have control over its funds;³¹ its premises and property are inviolable³² and it must be financially independent.³³

As important as the freedom of internal autonomy, is a

²⁷ 1st Report, Case No. 8, para. 66, (Israel); 23rd Report, Case No. 111, para. 164, (USSR).

²⁸ 90th Report, Case No. 335, para. 201, (Peru).

²⁹ 143rd Report, Case No. 771, para. 114, (Uruguay).

³⁰ This prohibits for example legal restrictions on the amount which a federation may receive from affiliated unions. See 6th Report, Case No. 50, paras. 850 and 851, (Turkey); 65th Report, Case No. 266, para. 31 (Portugal).

³¹ 48th Report, Case No. 191, para. 77, (Sudan); 204th Report, Case No. 962, para. 257, (Turkey); 208th Report, Case No. 1025, para. 418, (Haiti). The control exercised by public authorities over trade union finances should not normally exceed the obligation to submit periodic reports. 197th Report, Case No. 823, para. 386 (Chile).

³² 97th Report, Case No. 519, para. 18; 194th Report, Case No. 895, para. 132. See also Jean-Michel Servais, Freedom of Association and the Inviolability of Trade Union Premises and Communications (1980) 119 I.L.R. 217-227.

³³ The financial operations of workers' organizations should not be such as to give public authorities discretion over them - 25th Report, Case No. 152, para. 242, (UK/Northern Rhodesia). For example, obliging workers to pay contributions to a public organization which then finances trade union organizations is a threat to trade union independence. 75th Report, Case No. 341, para. 106, (Greece).

unions' freedom to pursue lawful activities³⁴ for the defence of its workers' occupational interests. The law should not itself however, impair the freedom of workers effectively to promote and defend their interests. One of the most important rulings by the Committee of Freedom of Association in this regard, particularly as far as African states are concerned, relates to the objects that may be pursued by a union. The Committee has held that any provision which gives the authorities the right to restrict the objects that may be pursued by a trade union is incompatible with the principles of freedom of association. As will be discussed, in more detail later³⁵, there has been a tendency in Africa to make the sole trade union congress permitted by law an instrument of the one and only party allowed by law. This tends to restrict not just the objects which the congress can pursue, but also the kinds of political activities that a union can pursue in defending its workers' interests. It is therefore necessary to examine the Committees' rules and principles regarding the extent to which a union may engage in political activities.

1. Trade unions and politics in general

Trade unions cannot be disassociated from the political life of the countries in which they operate. A governments' economic and social policy will affect directly or indirectly both government and

³⁴ 131st Report, Cases Nos. 626 and 659, para. 113, (Guatemala); 211th Report, Case No. 965, para. 200, (Malaysia).

³⁵ See section C(2) in this Chapter on "Trade unions and politics in Africa".

non-government employees. It is therefore important for trade union leaders, regardless of the category of workers they represent, to have the freedom to express their opinions on government policies that affect their union members. In multi-party states it is not uncommon for trade unions to enter into formal or informal alliances with political parties. In this way unions can be instrumental in keeping a government in power or in defeating it. Further, the responsiveness or unresponsiveness of the government to unions' demands may attract the approval or disapproval of the general public and this may be a factor in an election. In these ways, trade unions and the political life of any state are inextricably bound.

Convention No. 87 does not expressly deal with the participation of trade unions in politics. The matter was however discussed during the preparatory work for the drafting of the Convention. There were attempts to introduce amendments, to what is now Article 2, which were aimed at merely stating that workers should have the right to organise "with a view to defending their interests." Some wished it to be clarified in the Convention that workers should have the right to defend their social and economic interests. The Workers' Members however, objected to any amendment that could be construed as restricting trade union activities solely to the occupational field. Some Government Members supported the Workers' Members to the extent that they too opposed a definition that would restrict the right of unions to participate in political activities.³⁶

³⁶ See A. J. Pouyat, 1982) 121 I.L.R. 293, 294.

These differences of opinion remained and no provision was adopted dealing with political activities directly.

The Committee on Freedom of Association, with the support of the Committee of Experts, has however, repeatedly sanctioned the participation of trade union leaders and organizations in political activities but within certain limits. A government has no right to prohibit, in general terms, trade unions from engaging in political activities. The Committee on Freedom of Association has ruled that restrictions on participation in political activities can be imposed so long as they are not in general terms and the task of regulating abuses is entrusted to judicial authorities. General restrictions are objectionable because their interpretation may unduly restrict trade union freedom.³⁷

It is an abuse of a union's right to participate in political activities if it promotes essentially political interests.³⁸ Such is the case where occupational demands assume a clearly political aspect. The distinction between political activities which promote essentially political interests and those which promote essentially occupational interests is not always easy to draw. The two notions overlap. The Committee has however observed that it is inevitable, and sometimes usual, for trade unions to take a stand on questions having political

³⁷ 211th Report, Case No. 965, para. 200, (Malaysia); 220th Report, Cases No.s 997, 999 and 1029, para. 104, (Turkey).

³⁸ 162nd Report, Cases Nos. 685, 781, 806 and 814, para. 33 (Bolivia).

aspects as well as strictly economic, and social dimensions. It is in a union's own interest however to observe the distinction since by doing so it can gain more shelter from political vicissitudes.

From the Committee's decisions, it appears that a union's political activities may amount to over-indulgence even if such activities may help to advance the interests of workers. What matters seems to be the principal motive behind any occupational demands of a union, ascertainable (presumably) from all the circumstances of the case. If for example demands for higher wages or threats of strike action appear to be aimed primarily at achieving political ends it seems more likely that the Committee will hold that there has been over-indulgence in political activities. To put it another way, if the advancement of workers' interests appears to be merely incidental to the achievement of political ends, a union will be held to have abused its freedom.

The Committee has given general examples of the kinds of political activities that a union may engage in. In doing so it has relied on a resolution on the independence of the trade union movement adopted by the International Labour Conference at its 135th session in 1952. That resolution recognises the right of a union to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of workers'

economic and social objectives.³⁹ The Committee has re-affirmed another principle contained in the resolution namely, that governments should not attempt to transform trade unions into instruments for the pursuance of the governments' political aims.⁴⁰ Thus a law obliging leaders of occupational associations to make a declaration "to uphold democracy" has been held to be capable of abuse and therefore objectionable.⁴¹

2. Trade unions and politics in Africa

First and foremost it must be remembered that the majority of African states are either one-party states under civilian rule or military regimes. The former include Tanzania, Zambia, Malawi, Botswana, Sierra Leone, Gabon, Congo and the Ivory Coast. Regimes under military rule or a military ruler include Nigeria, Ghana, Liberia, Zaire, Rwanda, Libya, Uganda and Sudan. Second, as has been mentioned earlier, outright proscription of trade unions or prohibition of involvement by trade unions in political activities is common under military governments. At the same time appointment of trade union leaders by public authorities is common under both types of regimes.

The more interesting phenomenon however is the practice where the one allowable congress permitted by law enters into a special

³⁹ 201st Report, Case No. 842, para. 40 (Argentina); 230th Report, Case No. 1194, para. 291 (Chile).

⁴⁰ 190th Report, Cases Nos. 672, 768, 802, 819, 822 and 847, para. 58 (Dominican Republic); 197th Report, Case No. 823, para. 387 (Chile).

⁴¹ 183rd Report, Case No. 763, para. 35 (Uruguay).

relationship with the ruling and only party. This practice, in black Africa, began in Ghana. In 1957 that country became the first black African country to gain political independence. Kwame Nkrumah, its first Prime Minister (later President) had a clear general policy regarding the existence and role of trade unions. "We welcome the creation of trade unions and we welcome help from trade unions from abroad in assisting our unions to organise and expand." But it is essential that trade unionism in Africa takes into account the particular conditions of Africa.⁴² Nkrumah went on to warn his listeners against the dangers of copying what has been done in Europe and America. In Africa, he saw unions as having a "far wider task to perform than merely the safeguarding of the conditions and the wages of their members."⁴³ Nkrumah might appear not to have been challenging the right of unions to defend their interests. He might be seen rather to have been advocating wider functions of trade unions without abrogating the basic right of workers to defend their economic and social interests. Considering however that Nkrumah was speaking of Africa's need to develop, he was really advocating the subordination of worker's interests to the political aims of the state. This was confirmed by the relationship which was established between his Convention peoples' Party and the Ghanaian Trade Union Congress.

The Trade Union Congress became an affiliate of the Convention People's Party. Nkrumah saw his party as "a mighty tree

⁴² K. Nkrumah, I Speak of Freedom (London, Panaf, 1973) p. 87

⁴³ Ibid., pp. 87,88.

with many branches" whose branches included "such organizations as ... the Trade Union Congress ... and other patriotic organizations which in various ways were giving support to the [his] Party ..."⁴⁴ In fact the Congress was merged with the Party. This meant the discontinuance of separate membership cards for the Trade Union Congress and other organizations, and common office accommodation.⁴⁵ Later, the Congress, which had been a voluntary federation of unions, was dissolved by law and replaced by a monopoly congress.⁴⁶ Such legislation, coupled with the view that unions have a "wider task", seriously restricted the right of trade unions to defend their workers' interests by expressing views on political, economic and social matters. Unfortunately Nkrumah's approach was to prove popular with other independent African countries.

Following the army mutiny of January 1964, Tanzania adopted Ghana's approach. It appears that some trade unionists tried to take political advantage of the instability arising out of the mutiny.⁴⁷ It has been estimated that over 500 people were arrested and that over one

⁴⁴ Prime Minister's speech to 10th annual Delegates' Conference, Evening News, 3rd Aug., 1959; quoted from B.O. Nwabueze, Presidentialism in Commonwealth Africa (New York, St. Martins Press, 1974) p. 249

⁴⁵ Ibid., p. 249.

⁴⁶ Ibid., pp. 249, 250.

⁴⁷ L. Cliffe, ed. One Party Democracy: The 1965 Tanzania General Elections (Nairobi, East African Publishing House, 1982), p. 11, W. Tordoff, Government and politics in Tanzania (Nairobi, East African Publishing House, 1967) p. 147.

half of these were trade unionists from all parts of the country.⁴⁸ This led to the dissolution of the Tanzanyika Federation of Labour (TFL) by law and the establishment of the National Union of Tanganyika Workers (NUTA).⁴⁹ NUTA is not a trade union-congress. It is the only union existing in Tanzania but it has under it occupational branches. It is affiliated to the Tanganyika African National Union (TANU) which is the sole political party permitted by law. "Affiliation" means that NUTA appoints one delegate to the National Executive Committee of TANU, which is the highest policy-making body of the Party.

Zambia has a similar system. The Zambia Congress of Trade Unions has various unions affiliated to it. Article 32(3)(c) of the Constitution of United National Independence Party (UNIP), the sole party allowed by Article 4 of the Zambian Constitution, provides that among the delegates to the General Conference there shall be "one delegate representing each trade union affiliated to the Zambia Congress of Trade Unions." The General Conference, under Article 32(8) of the UNIP Constitution, "shall be empowered to consider, review or change any policy of the Party." All delegates to the General Conference must be members of the Party.

This political interference in union activities is often fortified by wide powers regarding dissolution of unions or their branches, as the case may be. In Nkrumah's Ghana, the President, if it

⁴⁸ Tordoff, *Ibid.*, p. 147.

⁴⁹ *Ibid.*, p. 147.

appeared to him, inter alia, that the Trade Union Congress had taken any action which was not conducive to the public good, could transfer and vest its assets in a receiver.⁵⁰ This would amount in practice to its dissolution. In Tanzania, NUTA may not dissolve itself but the President may dissolve it if he is satisfied that it has failed adequately to carry out its projects.⁵¹ And in Somalia the Supreme Revolutionary Council, the highest governing body, has "the power to dissolve any trade union the activities of which are considered to be detrimental to the interests of workers or against the spirit of the Revolution."⁵²

Such wide discretionary powers are unwarranted even in the precarious security situations that prevail in the young African states. The powers, by their very existence, tend to restrict the legitimate and independent participation of trade unions in political activities that may advance their interests. The Committee on Freedom of Association does recognise the possible disruptive consequences of a trade union over-involvement in politics. Poland is a case in point.⁵³ A complaint was brought by a Polish trade union protesting the temporary but total ban on trade union activity, among other measures. The Polish government gave the following explanation. "This measure was

⁵⁰ Source, Nwabueze, Presidentialism in Commonwealth Africa, (New York, St. Martin's Press, 1974), p. 250

⁵¹ Ibid., p. 250.

⁵² See ILO, Legislative Series, July-August, 1973. section 27.

⁵³ 214th Report, Case No. 1097.

necessary to prevent a civil war and counteract the signs of anarchy and economic chaos endangering the fundamental interests of the Polish nation state. The sole purpose of this measure is to guarantee far-reaching democratization of the country's social and political life."⁵⁴ The Committee did not disapprove of the measure. It only noted its "the extreme gravity". Further, it noted that the measure was temporary and expressed the firm hope that trade unions existing in Poland "which were legally recognised by the authorities, may resume their activities as quickly as possible."⁵⁵

It seems in this case that the Committee did not find a violation of Convention No. 87 because of three factors: law and order were breaking down, the ban on trade union activity was temporary, and the trade unions were still recognised under the law, only their activities having been temporarily suspended. If these factors did influence the Committee's decision, as they appear to have, there remains ample scope for a state to maintain law and order without disproportionately limiting the rights of trade unions. Despite this reasonable attitude of the Committee regarding the need to maintain law and order, African states are still likely to feel that their problems call for the regular strict control they presently have over trade unions. In Africa, because of the very serious problem of coup d'états, a government cannot think of law and order without also thinking about how to keep itself in power. And since illegal take-

⁵⁴ Ibid., para. 714.

⁵⁵ Ibid., para 751(b)

overs of government usually take place suddenly, governments prefer to ban unions or tightly control them at all times. The Committee's ruling however appears to allow the suspension of trade unions rights only when there is a breakdown of law and order. When applied to the problem of coups, the Committee's ruling would perhaps mean that if there is warning of an attempt to illegally displace a government or if an attempt is in progress, trade union rights can at that point be suspended. To this extent therefore, the Committee's decision may be regarded by African states as not being responsive to their problems regarding the need to have stable governments; illegal displacements of governments in Africa take place suddenly. A rule therefore, which allows the suspension of trade union rights only when there is already a breakdown of law and order will not help to keep African governments stable. The developing nations of Africa must be allowed to suspend trade union rights if they reasonably suspect that there might be a breakdown of law and order.

Another way in which trade union rights have been limited is in the area of international affiliations. It will be remembered that Article 5 of Convention No. 87 grants, among other rights, the right of trade unions to affiliate with international organizations of workers. It is common in Africa to restrict or prohibit such affiliations. The Committee has had the opportunity to re-affirm Article 5 in cases involving Liberia⁵⁶ and Kenya.⁵⁷ The two countries prohibited in

⁵⁶ 233rd Report, Case No. 1219, para. 658(c)

general terms the rights of their unions to affiliate with organizations outside their own countries. The Committee found them in violation of Article 5 of Convention No. 87.

It would seem that specific restrictions by governments on international affiliations aimed at promoting the rules of international law should not be objectionable to the Committee. For example, compelling states to permit their unions to affiliate with an organization which is exclusive to one race or whose internal organization is racially segregated would not help to advance UN principles against racial discrimination. Article 5 of Convention No. 87 should therefore not be interpreted so as to ostensibly diminish the importance which the UN and the ILO attach to some of their fundamental principles.

D. The Overall Picture

Laws in Africa relating to the functioning of trade unions are often in flagrant breach of ILO standards.⁵⁸ Generally, there is only one trade union congress allowed by law. Its objects are directly

⁵⁸ For some details about restrictions on the activities of trade unions in various countries and how they measure up to ILO standards, see further, ILO, Freedom of Association and Collective Bargaining: General Survey, (Geneva, 1983), Chapter VII, especially p. 61, 62 in relation to restrictions on unions political activities.

or indirectly subordinated to those of the one and only ruling party or the military regime. The congress is often affiliated to the ruling party. The ruling party seems to consider that the trade unions' primary function is to contribute to the development effort and not to defend the occupational interests of its members. Trade unions which criticise government policy are seen as being counter-revolutionary and unpatriotic. This same view is taken of trade unions that make demands that are considered extravagant. Where unions fail to tow the line, there are in most countries wide and drastic detention laws to encourage them to do so.⁵⁹ In Tanzania, as was mentioned above, over 500 people, about one half of them being trade unionists, were detained in 1964. In Nkumahs, Ghana over 1,000 were detained from 1958 to 1966, when Nkumah was deposed.⁶⁰ In addition, emergency situations often declared, which generally enable the President to detain without trial, tend to be very long. In Zambia, for example, which is an extreme case, an emergency declared in 1964 continues to date and detentions continue unabated.⁶¹

⁵⁹ For a detailed discussion of the emergency laws and their use in certain countries of Africa see Nwabueze, B. O. Constitutionalism in the Emerging States (Canbury, New Jersey, Associated University Presses, 1973) Chap. VII and Nwabueze B., O., Presidentialism in Commonwealth Africa, (New York, St. Martin's Press, 1974) Chaps: X and XI.

⁶⁰ International Commission of Jurists Report, quoted in K. Busia, Africa in Search of Democracy (New York, Praeger, 1967) p. 129.

⁶¹ In 1982 following a political pronouncement by the Chairman-General of the Zambia Congress of Trade Unions as to the inadequacy of the government, he and other trade union leaders were detained under emergency laws giving rise to a complaint before the Committee. The complaint was withdrawn when all the leaders were released. See 217th Report, Case No. 1080, (Zambia).

If detention powers are not used, governments often resort to patronage appointments. Mention here may be made of the appointment in Tanzania in 1964 of two top trade unionists to Ministerial and Ambassadorial jobs as part of a trade union re-organization in that country.⁶² The governments' power with respect to patronage has a more crippling effect on unions in the poor societies of Africa. In Africa, the government and government-controlled companies together usually employ the majority of the work force. For the overwhelming majority of the population the choice is between being a peasant and being employed by either the government or a government-controlled company. Trade unionism carries with it the risk of incurring the displeasure of the government. And when trade union leaders incurs the displeasure of their governments, their chances of remaining in employment or finding alternative employment are substantially reduced. Even if they remain in employment, their wages, which are usually their only source of income, are so low that when the government decides to offer them a better paying job in order to silence them, they will find it difficult to resist. Consequently, many trade union leaders will voluntarily patronise the government and ruling party, for in Africa the government and party giveth and the government and party taketh away.

⁶² W. Tordoff, Government and Politics in Tanzania, (Nairobi, East African Publishing House, 1967) p. 144.

CHAPTER IV

COLLECTIVE BARGAINING

A. Introduction

Collective bargaining is the principal means of fixing wages and conditions of work and of regulating the relations between employers on the one hand, and workers and their organizations on the other. It has also been said that collective bargaining has certain specific advantages. First, it allows employers and workers to be involved in the taking of decisions affecting them. Second, it has contributed, not only to improving the lot of the worker, but also to raising productivity. And third, it has permitted adaptation to the numerous economic and social changes that have occurred "during the past decades."¹

The Committee on Freedom of Association recognises that the right to bargain freely is an essential element of freedom of association.

¹ These three specific advantages were stated, though not for the first time, by "some members" of the Conference Committee on Collective Bargaining in 1980. The Committee was appointed by the International Labour Conference to do the preparatory work leading to the adoption of Convention (No. 154) concerning the Promotion of Collective Bargaining, 1981, see I.L.O., I.L. Conf., Rec. of Proceeds, 66th Session, Geneva, 1980, No. 41, para. 6. The views and Convention No. 154 are discussed later in this Chapter. For collective bargaining as a form of worker participation see a short overview in E. Cordova, "Workers' Participation in Decisions Within Enterprises: Recent Trends and Problems", (1981) 121 I.L.R., 125 at 128, 129.

More importantly, the Committee sees collective bargaining as one of the means by which workers can seek to improve the living and working conditions of workers.² This does not mean that the fixing of wages and conditions of work, and the regulation of employer-employee relations are ends in themselves. It means that wages and conditions of work must be fixed, and employer-employee relations must be regulated, so as to improve the workers' standard of living. It would be unlikely however, in most situations, that workers' standards of living would improve if the state or employers were allowed to pressure workers into accepting terms of employment. It is therefore a fundamental principle underlying collective bargaining that agreements must in all respects be the result of free negotiation between employers and employees' representatives.

It is this principle of voluntariness that has been very seriously challenged in recent years. Since the global economic crisis which began in the early seventies, there has been an increase in the number of initiatives taken to limit the freedom of employers and employees and their unions in the collective bargaining process. Wage raises have been a major target of restrictions. The increase in the number of such initiatives has been coupled with the increased use of such measures in the industrialised market economies. Before the early

² 65th Report, Case No. 266, para. 65 (Portugal); 67th Report, Case No. 303, para. 291 (Ghana); 116th Report, Case No. 55, para. 106 (Cuba); 172nd Report, Case No. 877, para. 92 (Trinidad and Tobago).

—seventies, government restrictions on collective bargaining were comparatively less common in the industrialised market economies. They were however already in fairly wide use in Africa and the rest of the developing world. In Africa, bargaining restrictions can be said to have been the norm in the industrial relations system, particularly from 1960, after which time most African states gained independence.³

Both in the world as a whole, and Africa in particular, restrictions on collective bargaining fall into three classes: mere guidelines not giving rise to legal obligations, obligatory restrictions of limited scope such as those limiting wage rises to a certain maximum percentage for employees earning beyond a certain level of income, and those restrictions which give rise to "straight" obligations. This last category includes general wage freezes and requirements that collective agreements be approved by specified public authorities before they can enter into force, regardless of what the agreements themselves provide. Often combinations of these devices are used. Any category of such restrictions can be implemented in one of two ways or by a combination of the two. There can be a law deeming a model clause to be incorporated into every collective agreement, a specified class of agreements or a particular agreement or agreements. There can also be direct provisions in a statute imposing obligations "directly" on the parties without a deeming provision.

³ Before 1960 only 6 African countries had been granted independence. See list at Appendix 6.

Regardless of the form they take, the rationale for restrictions on collective bargaining in developing countries is essentially similar to that advanced in the western industrialised nations. In both contexts the restrictions are predicated on the health of the economy and the public interest as a whole. The developing countries of Africa however, tend to adopt such restrictions as one facet of their larger economic policy. In their view, in the economic field the restrictions are the only sure way of lifting the broad masses of the population out of dire poverty in the fastest possible time.⁴ The developed industrialised nations on the other hand see such measures as one of the important ways of fighting inflation and recession. The developing countries of Africa therefore adopt the restrictions as a permanent feature of economic life, while the developed western nations generally regard the restrictions as dictated by temporal, economic difficulties though in some individual cases restrictions have tended to be of a permanent nature. This difference of attitudes is rooted in divergent economic and social ideologies, though it may be influenced also by differences in the level of development.

The developing countries of Africa can now cite the increasing number of collective bargaining restrictions as, at worst,

⁴ For more detailed discussion see Chapter I.

calling for a reappraisal of the principle of voluntariness and, at best, adding force to their argument that the principle is unsuitable for application to their weak and underdeveloped economies. In support of the African states, one may cite at least one matter in the preparatory work leading up to the adoption of Convention (No. 154) concerning the Promotion of Collective Bargaining, 1981. First, the preparatory work shows that there are differences of opinion, even among western industrialised states, regarding some basic issues relating to collective bargaining.⁵ Further, due to these differences of opinion on basic issues, there was less than unanimous agreement on whether the proposals should be given effect in a binding Convention, or a Convention supplemented by a non-binding recommendation, or a Recommendation only.⁶ The Conference finally agreed to adopt a Convention and a Recommendation.

It is quite clear that the principle of voluntariness has come under strain in the last 10 to 15 years. The purpose of this chapter is to state the most important collective bargaining standards

⁵ Infra, under "The independence of the parties in general".

⁶ ILO, I.L. Conf., Rec. of Proceeds., 66th Session, Geneva, 1980, No. 41, No. 9, para. 70. Both the employers' members and the workers' members had submitted amendments to the Conference Committee proposing that the International Labour Conference should adopt only conclusions prepared by the Conference Committee where a Convention supplemented by a Recommendation had been suggested. Very significant is that a major amendment aimed at restricting the scope of collective bargaining was proposed by a group of Western industrialised nations. See elsewhere in this Chapter.

chapter is to state the most important collective bargaining standards evolved by the ILO and assess their application in Africa. In assessing their application we shall observe the extent to which they are complied with on the Continent and offer some analysis regarding the reasons behind the failure of many African nations to comply with ILO standards in the area of collective bargaining.

There are five prerequisites to the success, or meaningfulness to both parties and the community, of any collective bargaining process. First, the parties must reach a sufficient degree of organization in order to ensure their strength. Second, the representatives of each party must have the skills necessary to cope with the intricacies of collective bargaining. Third, the parties must be willing to enter into agreements with each other within the framework of the established machinery. Fourth, collective agreements must be observed. And fifth, the community must have the ability to act effectively as a pressure group⁷ for or against demands of trade unions. It must also be borne in mind that though in the present writer's view the right to strike is not a prerequisite to successful collective bargaining, its existence and the ease with which it can be activated, will always be a source of leverage in the workers' favour.

⁷ It is recognised that this view of a community as a pressure group is amorphous. It is relative to the union or groups of unions involved in particular negotiations or a particular dispute. It can in particular situations include other unions in their capacity as unions and/or union members of the public.

The extent of the leverage will naturally be roughly proportionate to the extent of any restrictions on the right.

B. The independence of the parties

1. The independence of the parties in general

The main standards relating to the independence of the parties are contained in the Freedom of Association and Protection of the Right to Organise Convention, 1948, (No. 87), the Right to Organise and Collective Bargaining Convention, (1949), (No. 98), and the Collective Bargaining Convention, 1981, (No. 154). The right to collective bargaining itself, and therefore the principle of voluntariness, are said by the Freedom of Association Committee to derive from Article 3 of Convention No. 87. In many rulings⁸ the Committee has held that if the character of the bargaining procedure is not voluntary and the parties do not enjoy autonomy, this infringes their right under Article 3 to "organise their activities and formulate their programmes". Convention No. 98 gives this basic right fuller expression in Article 4 which states that

[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the negotiation of terms and conditions of employment by means of collective

⁸ 67th Report, Case No. 303, para. 303 (Ghana); 116th Report, Case No. 559 (Trinidad and Tobago); 172nd Report, Case No. 877, para. 92 (Greece)

terms and conditions of employment by means of collective agreements.⁹

Convention No. 154 prescribes various ways in which the general principle of promotion of collective bargaining contained in Convention No. 98 can be fully implemented. Its provisions include those aimed at encouraging a suitable institutional and procedural framework for bargaining and those aimed at the gradual spreading of collective bargaining to all branches of economic activity. It is therefore not enough, according to Conventions Nos. 98 and 154, for governments to merely allow collective bargaining. They must actively strive for the establishment, and perfection of collective bargaining machinery while also encouraging its wide use.

It is necessary to consider in more detail Convention No. 154, especially the discussions leading to its adoption. It is the most recent convention dealing with collective bargaining and it was adopted in the context of an acute and prolonged economic recession. In the light of the recession it is instructive to inquire into possible changes of attitudes towards the promotion of collective bargaining and the principles of voluntariness.

The government member for India in effect suggested that

⁹ Emphasis added.

there should be no obligation on states to promote bargaining.¹⁰ He said that in the rural sector in many developing countries where there were no employers' or workers' organizations public authorities could not really promote collective bargaining. Employers' members suggested that the difficulty could be met by an "as far as practical" provision. Workers opposed the Indian proposal. It was withdrawn.

There was more difficult discussion however, regarding voluntariness. During the discussions preceding the adoption of Article 1 of Convention No. 154 the government members of France, the Netherlands, Belgium, Denmark, the United Kingdom, Ireland, Italy and the Federal Republic of Germany submitted an amendment. It read as follows:

This instrument applies to all branches of economic activity, the extent to which guarantees provided in the instrument shall apply to the armed forces and the police, to the public service employees whose status is governed by laws and regulations, [probably security officers] and to persons employed in publicly or semi-publicly financed non-profit-making activities may be determined by national laws and regulations and national practice.¹¹

The Government member for France presented the proposed amendment. He stressed that collective bargaining developed in the competitive sectors, namely, the sectors that obtained their resources

¹⁰ ILO, I.L. Conf., Rec. of Proceeds., 66th Session, Geneva, 1980, No. 41, para. 30.

¹¹ ILO, Int. lab. Conf., Rec. of Proceedings, 67th Session, Geneva, 1981, No. 22/4, para. 28.

through the sale of goods and services. In his view, collective bargaining raised particular problems in the non-competitive sectors such as the public service and publicly or semi-publicly financed non-profit-making undertakings. The government member further stated that the amendment did not seek to exclude the non-competitive sectors from the scope of the instrument but just to permit national legislation to apply the instrument to these sectors using "special modalities."¹²

Workers' members "firmly opposed" the proposed amendment for two reasons. They said it would unjustly deprive certain workers of the fruits of national development. Further, they stressed that the proposed amendment would make it possible to totally or partially exclude from the scope of the instrument workers in the non-competitive sectors.¹³ "Several Government members of developing countries" again declared more generally that the economic and social problems confronting their countries often made very difficult the application of ILO instruments, in particular Conventions.¹⁴

The amendment was subsequently withdrawn and a new one introduced. Except for some grammatical variations, that amendment is

¹² Ibid, No. 22/1, para. 8.

¹³ Ibid, para. 29.

¹⁴ Ibid, para. 8.

what is now Article 1 Convention No. 154.¹⁵ According to Article 1(1) the Convention applies to "all branches of economic activity." Article 1(2) states that "[t]he extent to which the guarantees provided for in [the] Convention apply to the armed forces and the police may be determined by national laws and regulations or national practice." And Article 1(3) states that "[a]s regards the public service, special modalities of application of [the] Convention may be fixed by national laws or regulations or national practice." The Government member for the Netherlands stressed in particular that the new text did not allow the exclusion of the public service from the scope of the instrument but only the determination of special modalities.¹⁶

The arguments both in favour and against the exclusion or possible exclusion of workers in the non-profit-making sector from collective bargaining rights were not free from flaws. The attempt by the Government member for France and the Government members of the other countries to restrict collective bargaining to the profit-making sector would have been retrogressive.¹⁷ On the other hand the workers' argument that collective bargaining rights should extend to the non-

¹⁵ ILO, I.L. Conf., Rec. of Proceeds., 66th Session, Geneva, 1980, No. 41, paras. 30-33, Art. I was discussed at the conference as point 7.

¹⁶ Ibid, No. 22/5, para. 34.

¹⁷ It is correct that collective bargaining originated in the industrial and commercial sector. Industrialists became richer as profits soared while workers' standards of living remained stagnant or improved little.

profit-making sector so that the fruits of development can be shared by all is based on the assumption that such fruits exist. That assumption is not correct in relation to many African countries, particularly after the economic recession.¹⁸ The granting of collective bargaining rights to the non-profit-making sector can nevertheless be justified on the basis of the range of matters which are subject to bargaining in modern economic activity. Collective bargaining developed in profit-making institutions principally because of a desire by workers to match high profits with higher wages. The parties had to bargain about that. Over the years collective bargaining, and therefore collective agreements, cover not just wages but other matters such as hours of work, health and safety, compensation payments of all kinds and other matters which help to improve the conditions of work and standards of living of workers. Many matters that are the subject of collective bargaining are either of marginal or no relevance to an employer's profits.¹⁹ Even in the non-profit-making sector therefore machinery for collective bargaining is necessary.

In subsequent discussions in 1981 before the adoption of Convention No. 154 there was a final attempt to restrict collective

¹⁸ See Chapter V for statistics on some African economies.

¹⁹ Matters relating to the holding of union meetings during working hours, the running of a union press, and so on, are additional examples of items which may be the subject of collective agreements but are not usually a major factor in business profits.

bargaining. This time it rested on the interests of society. The Government member for Japan submitted an amendment proposing the addition of the following:

- (1) Measures adopted to national conditions should be taken to encourage and facilitate reconciling the specific interests of the parties to collective bargaining with the general interest. (2) the definition of the requirement of the general interest should be left to the public authorities, who should first consult those concerned, especially employers' and workers' organizations.²⁰

The Government member for Japan explained, inter alia, that though the concept of the general interest gives rise to problems of definition, it was still essential to recognise it. He further urged that

the required reconciliation could be achieved without prejudice to collective bargaining and the basic interests of the parties since there were adequate safeguards for their autonomy and for the principle of freedom of association in [the proposed Convention] and other instruments and the text itself provided for prior consultations.²¹

The Government members were divided about the amendment. Certain²² Government members thought that it was "in line with the development plans of many developing countries."²³ Others pointed out that "having to judge what was in the general interest would transform

²⁰ ILO, I.L. Conf., Rec. of Proceeds., 67th Session, Geneva, 1981, No. 22/8, para. 64. Emphasis added.

²¹ Ibid.

²² Ibid.

²³ Ibid.

labour Ministries into Supreme Courts."²⁴ This latter statement was not elaborated upon but it appears to have been a reference to the need to preserve the autonomy of the parties to collective bargaining. The workers' members opposed the amendment. In their view the concept of general interest was too nebulous for introduction into an international instrument and was incapable of precise definition in "democratic societies."²⁵ They saw serious dangers with the power of public authorities to take account of the general interest and to reconcile the specific interests of the parties with that interest. Employers' members opposed the amendment for similar reasons. It was subsequently withdrawn.

~~Had the Japanese amendment been passed it would have in law effectively left in the hands of public authorities, the determination of wages and conditions of work since it would have left the definition of the "general interest" to the public authorities. The principle of voluntariness would have died, thereby changing the whole character of collective bargaining as we know it today. The fact that it had to be withdrawn is an indication of the preponderance of the opinion within the International Labour Conference that collective bargaining should be based on the principle of voluntariness. It is not surprising that workers opposed the amendment. Neither is it surprising that employers~~

²⁴ Ibid.

²⁵ Ibid.

opposed it as well; they too would have been subject to the discretion of the public authorities. Some Government members opposed it. The fact that some Government members opposed a proposed amendment that would have given governments substantial control over the collective bargaining rights of unions indicates that the principle of voluntariness is well entrenched within the ILO.

The Japanese Government member, in supporting the amendment, did not state what the other "adequate safeguards" to organizations' "autonomy" were. Assuming that the withdrawn amendment would have also extinguished the right to strike, the right to engage in political activities would have remained as perhaps the principal means by which trade unions and employer organizations could have exerted pressure on public authorities. Given the restrictions on the political activities of trade unions in the African one-party states, African trade unions would have been weakened more seriously than their counterparts in the West because the former would not have had the political weapon to fall back on.

2. The independence of the parties, the economy and recession.

Notwithstanding the survival of the principle of voluntariness in the ILO, there is evidence that an increasing number of countries are imposing restrictions on the freedom of the parties to

bargain collectively.²⁶ This is done in one of two ways: by excluding certain matters from the scope of bargaining or by making the collective agreement or some of its terms subject to the prior or subsequent approval of some outside body. The outside body is usually an administrative authority or an industrial court. In giving or withholding its approval, the authority or court concerned is usually obliged, by legislation, to take into account "the economy", "the general interest", "the policies of the government" or other words of similar effect. Chad, Kenya, Tanzania and Tunisia for example, have legislation to this effect.

In some countries the range of negotiable issues depends, at least in part, on legislation. The legislation may specify particular issues which the parties are obliged to discuss and on which they must reach agreement. Conversely, other legislation may prohibit the discussion of certain specified matters on grounds of the general interest or public policy. Legislation may determine what matters fall under the management's prerogatives and are therefore not negotiable. There are also countries where certain matters are set aside for regulation by legislation. Some countries specifically prescribe standards regarding such matters as conditions of employment, hours of work, leave and even wages.

²⁶ A. Pankert, "Government Influence on Wage Bargaining: the limits set by International labour Standards," (1983) 122 I.L.R. 579; ILO, Collective Bargaining: A General Survey (Geneva, 1983), para. 292.

In Africa specifically there are some curious provisions regarding the content of collective agreements. In Egypt, section 87 or Act No. 137 of 1981²⁷ reads as follows:

Any stipulation in a collective contract which endangers public safety, is prejudicial to the economic interests of the country, is contrary to the provisions of legislation currently in force or is prejudicial to public order or morality shall be null and void.

Section 64 of Act No. 5 of 1978 of Gabon²⁸ provides that a collective agreement "may contain provisions more favorable to workers than those of the laws and regulations", but "shall not depart from any provision in such laws and regulations which relates to matters of public policy." The Egyptian and Gabonese provisions seem to be open to abuse by public authorities and are for that reason perhaps contrary to the principle of voluntariness enunciated by the Committee on Freedom of Association.

Angola has perhaps an even more curious provision. The General Labour Act, No. 6 of 1981, Section 78(1) reads as follows:

A collective labour agreement shall make general provision for the rights and obligations of the workers and the management of the undertaking and shall specify the commitments entered into by both parties in connection with the plan for the production of goods or

²⁷ ILO, Legislative Series, 1982.

²⁸ ILO, Legislative Series, 1978.

the provision of services and the measures necessary for ensuring that the plan is carried out in practice.²⁹

In so-called marxist Angola, most undertakings are either wholly government-owned or are government-controlled. In these circumstances, though evidence is difficult to obtain, section 78(1) would operate so as to obligate the management of the undertakings and workers to meet production targets set by the government. Further, section 78(2)(d) provides that a collective agreement, among other things, shall make provision for "increases in wage rates, in exceptional circumstances, such as geographical considerations, climate and other factors adversely affecting life and work, in so far as such increases are not prohibited by law." On the whole therefore, workers bind themselves to certain targets (apparently fixed by the government) regarding the production of goods and provision of services and yet section 78(2)(d) seems to suggest that a rise in profits cannot alone be a ground for providing for pay increases in collective agreements. The provisions are unduly harsh on the workers, though it is difficult to readily identify a provision in an ILO Convention which is infringed by section 78(2)(d) of the Angolan General Labour Act. The provision however infringes a basic principle underlying collective bargaining namely that workers must share in the wealth they help to create. Workers may of course share in the wealth where other conditions of employment are improved. However, to prohibit wage raises when they are based purely

²⁹ Emphasis added.

on increased profits seriously impairs the right of workers to share in the profits they help the employer to make. To that extent therefore the provision is at the very least undesirable.

The ILO supervisory bodies generally disapprove of legislation as a means of solving labour disputes. The Fact-Finding and Conciliation Commission of Freedom of Association has pointed out that an unduly or excessively legalistic attitude on the part of either the government or workers is incompatible with the development of harmonious labour relations. The Commission has even declared that such a legalistic attitude is in conflict with the need to develop harmonious industrial relations. Further, it has asserted that even when there is genuine willingness on both sides to cooperate and reach mutual understanding, the inflexible and detailed requirements of the law often prevent real progress from being made.³⁰ The Committee on Freedom of Association has referred to these views of the Commission with approval.³¹ The ILO bodies have therefore not declared illegal the use of legislation as a means of solving labour disputes. They have merely disapproved of undue or excessive legalism. The actual meaning of this general principle can be conveniently considered under two broad and interrelated areas: the approval and content of collective agreements, and restrictions on wage rates.

³⁰ 72nd Report, Case No. 876, para. 367 (Greece).

³¹ Ibid.

a) The approval and content of collective agreements.

Legislation which allows an authority to refuse to approve a collective agreement on grounds of errors of pure form is not in conflict with the principle of voluntary negotiation.³² If however the legislation implies that the filing of a collective agreement may be refused on grounds such as incompatibility with the general policy of the government it would amount to a requirement of prior approval before an agreement enters into force. This kind of approval is itself contrary to the principle of voluntary negotiation.³³ In one case that came before the Committee on Freedom of Association, a state passed a law under which approval of a collective agreement could be withheld if the agreement contained a clause which interfere with "the right reserved to the state to co-ordinate and have control of the economic life of the nation."³⁴ The Committee declared that provision to be contrary to the principle of voluntariness. Section 84(1)(b) of the Zambian Industrial Relations Act, 1971, provides that collective agreements must not contain clauses contrary to the law or the Government's declared prices and incomes policy or the public

³² 85th Report, Case No. 341, paras. 185, 186 (Greece); 236th Report, Case No. 1267, para. 600 (Papua, New Guinea).

³³ Ibid.

³⁴ 125th Report, Case No. 654, para 86 (Portugal); Annex Case No. 266, para. 43 (Portugal).

interest.³⁵ This provision appears to violate the principle of voluntariness.

It is a fact that provisions such as the *Zambian* one can be used to strike down provisions in agreements granting extravagant concessions to unreasonable unions which are detrimental to the economy. The refusal of the Commission and Committee to sanction such provisions cannot therefore be based on their inutility in the solution of a country's economic problems. It is based rather on the fact that the extent to which collective bargaining rights are eroded is in most cases disproportionate to the advantages that may accrue to the economy or the public.

The principle has been applied strictly both by the Committee of Experts and the Committee on Freedom of Association. For example, the Committee has made it clear that prior approval of agreements is still objectionable even where the refusal may sometimes be subject to an appeal to the courts.³⁶ The supervisory bodies have objected to systems of prior approval which go beyond matters of pure form even where the number of objections have in practice been extremely low. For example, in 1966 the Committee on Freedom of Association advised against Spain's system of prior approval notwithstanding the fact that

³⁵ ILO, Legislative Series, 1971.

³⁶ 234th Report, Case No. 1173, para. 86 (Canada/British Columbia), 236th Report, Case No. 1206, para. 506 (Peru).

out of 4,736 agreements concluded only 33 had to be submitted for consideration by the government authorities concerned and only 3 were finally rejected.³⁷

It should not be surprising that even in cases of extremely low rejections the Committee should express disapproval. It must be remembered that the extremely low number of rejections in the case of Spain were likely to be principally the result of a developed trade union culture and other strong institutions capable of influencing the behaviour of the government and trade unions. The circumstances of Spain, like those of other industrialised market-economies, do not exist in many third world countries. The Committee's ruling in the Spanish case is therefore a reflection of the Committee's sensitivity to this wider problem.

This sensitivity notwithstanding, at least one inconsistency in the Committee's rulings needs to be explained. In a case involving Liberia the Committee did not disapprove of a provision giving a government authority a discretionary power to prevent a union from receiving finance from a foreign organization. The Committee merely expressed the hope that the application of the provision in practice

³⁷ 85th Report, Cases Nos. 294, 383, 397 and 400, paras 366-416 (Spain).

would not erode trade union rights.³⁸ This is different from the Committee's rulings regarding prior approval of collective agreements. The difference in approach can however, be explained on the basis that the principle of voluntariness is comparatively more important to the protection and advancement of worker's interests than the right to receive financial assistance from outside the country.

The Committee has made it clear that a state is free to institute bodies or procedures intended to reconcile the national interest with the interests of trade unions. It has however, emphasized that the final decision as to the content of the collective agreement must remain with the parties.³⁹ For example, if a public authority considered that the terms of a proposed agreement were in conflict with the economic policy objectives recognised by the authority as being desirable in the general interest, the case could be submitted for advice and recommendation to an appropriate consultative body. Further, the objectives to be recognised as being in the general interest must have been widely discussed by all parties on a national scale through a consultative body in accordance with the principle laid down by the Consultation (Industrial National Levels) Recommendation

³⁸ 233rd Report, Case No. 1219, para. 658(c) (Liberia). But see 233rd Report, Case Nos. 1133 and 1205 (Chile) where the Committee recommended the repeat of a similar provision.

³⁹ 218th Report, Cases Nos. 1047 and 1123, para. 84 (Nicaragua).

(No. 113) of 1980.⁴⁰

b) Restrictions on wage rates.

Restrictions on wage rates raise at least two issues in relation to trade union rights. First, can wage restrictions be at all relevant to the exercise of trade union rights? And second, if wage restrictions can affect trade union rights but are permissible within limits; what are those limits? As to the first question, the Committee on Freedom of Association has ruled in the affirmative. It has explained, that matters relating, for example, to the re-adjustment of wages to the cost of living may be mainly a question of an economic character and not connected with freedom of association. It has however held that matters regarding the method of fixing of wages by collective agreements are relevant to trade union rights. In this connection the Committee has pointed out that the development of procedures for voluntary negotiation of collective agreements (or methods, in this case, of fixing wages) constitute an important aspect of freedom of association. The Committee has however, found it difficult to lay down an absolute rule regarding methods that may be used to fix wages. This difficulty, the Committee has explained is due to the fact that governments may feel that the economic position of their countries call "at certain times" for stabilization measures

⁴⁰ 85th Report, Case No. 341, para 187 (Greece), 2134th Report, Case No. 1173, para 86 (Canada/British Columbia) 236th Report, Case No. 1206, para. 508 (Peru).

during the application of which restrictions on the method of wage fixing may be necessary.⁴¹ Such restrictions, the Committee further explains, should be imposed "as an exceptional measure and only to the extent necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards."⁴²

The meaning of "adequate safeguards" is exemplified by a Canadian case.⁴³ The Canadian Public Sector Compensation Restraint Act of 1982⁴⁴ provided for a two-year wage restraint policy in the federal public sector. Wage increases were not permitted to exceed certain percentages specified in the Act. The Committee objected to the Act only to the extent that compensation plans that were freely negotiated prior to the date on which the Act became applicable were also affected. The other provisions of the Act were found not to be objectionable because they were accompanied by "procedures which allow not only for bargaining beyond the minimum levels fixed by [the Act] but which, in certain cases, allow for exceptions to be made as well as

⁴¹ 110th report, Case No. 561, para. 561 (Uruguay) 116th Report, Case No. 551, para. 107 (Cuba).

⁴² 233rd Report, Cases Nos. 1183 and 1205, para. 482 (Chile); 236th Report, Case No. 1206, para. 507 (Peru). Emphasis added.

⁴³ 222nd Report, Case No. 11147 (Canada).

⁴⁴ Statutes of Canada, Vol. III, Chap. 122.

providing for mediation in case of dispute."⁴⁵

The Committee's difference of approach to problems of wage restraint must be noticed. Generally in the case of the principle of voluntariness, in general, the Committee has in effect sanctioned absolute enjoyment of the right of voluntary collective bargaining; the law may lay down procedures aimed at arousing the unions' sense of responsibility to the community or to the employer, but the final decision should be freely made. The Committee's approach to wage restrictions on the other hand, allows certain restrictions on the principle of voluntariness. Governments are allowed to fix the maximum wage rates that may be negotiated. Though adequate safeguards are necessary, the fact remains that wage rates can be imposed by a decision of an authority outside the negotiating parties. The difference of approach can be explained again on the basis that discretionary powers of approval of collective agreements threaten the very existence of the right to collective bargaining while restrictions in the narrow area of wages do not.

What is of particular interest to the developing African countries is not the difference in the Committee's approach with regard to prior approval of agreement, and to wage restraint legislation. It is rather the fact that the Committee has recognised that the principle

⁴⁵ Ibid, para. 116.

of voluntariness is not absolute and that restrictions based on the state of the economy may be placed on the principle, at least in the matter of wage rates. Further, the Committee has not based its guidelines concerning wage restrictions on the stage of economic development but on (the assumed) temporariness of economic difficulties. In the 1982 Canadian case concerning the Public Sector Compensation Restraint Act, the Committee recognised, by necessary implication, that by its own standards Canada was experiencing hard economic times. The Committee held, in effect, that the hard economic times were sufficient cause for imposing certain restrictions on unions' collective bargaining rights. The state of the Canadian economy in 1982 nevertheless was, to put it mildly, in a state superior to the economies of any of the African countries. This notwithstanding, the Committee insists that developing countries cannot impose collective bargaining restrictions as a permanent feature of trade union life. The Committee however, does accept that developing countries can also impose restrictions on collective bargaining rights provided that these restrictions are temporary. To put it another way, no country, developed or developing, can impose restrictions on collective bargaining rights as a permanent feature of trade union life. What this comes to is that a country can restrict collective bargaining rights only when, by its own standards, it is experiencing economic hardship. Each country is judged, with respect to restrictions on collective bargaining rights, according to its own stage of development and standards.

There are two points worth noting with respect to the Committee's rulings regarding restrictions on collective bargaining rights. First, the fact that the Committee allows restrictions on collective bargaining rights on the grounds of economic difficulties at all means that it accepts that it is sometimes necessary to restrict collective bargaining rights to maintain the state of an economy or to improve it. As with other matters relating to limitations or derogations of rights, the degree to which collective bargaining rights can be restricted must depend on the seriousness of the problem. The period for which restrictions last must also be dictated by the period for which the problem exists. It follows therefore that the very serious economic problems of African countries call for more stringent restrictions on collective bargaining rights. It also follows that the collective bargaining restrictions must be long term because the problem of underdevelopment needs long term solutions. To the extent therefore, that the Committee does not allow more stringent restrictions on collective bargaining rights in developing countries and does not allow a longer period during which such restrictions can continue, its rulings in this respect are not responsive to the needs of developing nations and are perhaps illogical.

Second, there is the problem regarding the relationship between the two requirements of necessity and temporariness. The

problem is exemplified by another Canadian case⁴⁶ that came before the Committee. In that case certain wage restrictions imposed by the government were allowed; the government provided statistics showing fairly serious economic difficulties. Three years later, the Committee disapproved of the same wage restrictions on the basis that three years was too long a time to keep the restrictions in force. There was no evidence adduced to show that the economy had improved. By necessary implication therefore, the Committee holds the requirements of necessity and of temporariness to be separate. In other words, the concept of necessity is qualified by that of temporariness.

There is however, no established criteria laid down by the Committee by which temporariness can be measured. Where the circumstances calling for restrictions on wage rates are brief in duration there is no problem. Where however, these circumstances become permanent the application of the Committee's principle amounts to subordinating the need to solve the economic problems to the need to preserve collective bargaining rights.

3. Other rights relative to collective bargaining.

In addition to the right of independence of the parties to collective bargaining, there are other rights that must exist in order to make the basic right more meaningful. Only some of the more

⁴⁶ 230th Report, Case No. 1171, esp. para. 160 (Canada/Quebec).

pertinent ones need be mentioned here. Whether or not collective bargaining takes place at the national, regional, plant or other level of trade union organization, must be left to the parties.⁴⁷

Accordingly, federations and confederations must be able to conclude collective agreements.⁴⁸ By the same token, the Committee has considered that refusal by employers to bargain at a particular level does not constitute an infringement of freedom of association.⁴⁹

It will be remembered that in general African countries by law allow only one trade union in the whole country for one category of workers and one trade union congress, to which all the occupational unions are affiliated. Collective bargaining is generally restricted to the national congress level and the occupational national level. Here there are two violations of ILO standards. The right of workers to form or join organizations of their own choosing is violated. The right of the parties to determine at what level collective bargaining takes place is also violated. Fortunately however, the level of collective bargaining is not always tied to trade union structure. For example in Zambia, despite the trade union monopoly situation, collective bargaining can take place without unions. It is carried out by committees composed of worker's and employers' representatives

⁴⁷ 202nd Report, Case No. 915, para. 53 (Spain).

⁴⁸ 233rd Report, Case No. 1209, para. 443 (Uruguay)

⁴⁹ 203rd Report, Case No. 915, para. 53, (Spain).

known as bargaining units.⁵⁰ The Committee has however sanctioned systems where the power to determine bargaining levels is entrusted to a body outside of the parties so long as it is independent of outside interference.⁵¹

The right to collective bargaining under Article 4 of Convention No. 98 and Article 1(1) of Convention No. 154 applies both to the private sector and to nationalised undertakings and public bodies. The only exception allowed relates to public servants engaged in the administration of the state.⁵² Accordingly therefore the Committee has held the right extends to the staff of a national radio and television institute⁵³, the administrative staff of a national teaching service⁵⁴ and the teachers themselves.⁵⁵ The Committee has

⁵⁰ In certain countries, including Ethiopia, Ghana, Tanzania and Zambia itself, collective bargaining at the level of the industry has been introduced by legislation. Agreements concluded at industry level in the Ivory Coast, Mauritania and the Niger, are supplemented by agreements at the level of the undertaking; see I.L.O., 6th African Regional Conf., Tunis, Oct. 1983, Report 1, Part 1, Report of the Director-General, Social Aspects of Development in Africa, The Role of Social Institutions, p. 23.

⁵¹ 208th Report, case No. 984, para. 36 (Spain); 217th Report, Case no. 1096, para. 300 (Chile).

⁵² 211th Report, Case No. 985, para. 208 (Malaysia); 236th Report, Case No. 1287, para. 598 (Papua, New Guinea).

⁵³ 143rd Report, Case No. 764, para. 87 (Colombia).

⁵⁴ 139th Report, Case No. 725, para. 278 (Japan); 202nd Report, Case No. 871, para. 99 (Colombia).

⁵⁵ 118th Report, Case No. 573, para. 194, (Bolivia); 202nd Report, Case No. 871, para. 99 (Colombia).

pointed out in particular that the right to collective bargaining extends to all public servants who do not act on behalf of the public authorities.⁵⁶ The right has therefore been held to extend to employers of the postal and telecommunication services.⁵⁷ It is not sufficient that the class of workers being excluded is part of the public service. There must be something in the nature of the functions of the excluded workers which makes them agents of the state. The Committee however, has recognised that Article 7 of Convention No. 151 allows a degree of flexibility in the choice of procedures to be used in the determination of the terms and conditions of employment.⁵⁸

Whereas a government must make bargaining possible, there is no obligation on it to enforce collective bargaining by compulsory means within an organization.⁵⁹ And more generally, even where a government has given legal recognition to trade unions as competent to regulate employment relations, it is not under a duty to make collective bargaining compulsory.⁶⁰ And finally, where the most representative union enjoys preferential or exclusive bargaining rights there must be one safeguard: decisions concerning which union should

⁵⁶ 139th Report, Case No. 725, para. 278 (Japan).

⁵⁷ Ibid.

⁵⁸ 222nd Report, Case No. 1147, Case no. 119 (Canada).

⁵⁹ 138th report, Case No. 728, para. 51 (Jamaica).

⁶⁰ 17th Report, Case. No. 97, para. 148 (India).

be recognised as the most representative union should be made by virtue of objective and pre-established criteria so as to avoid any opportunities for abuse.⁶¹

C. The future of the principle of voluntariness in Africa.

The voluntariness of the parties to collective bargaining can only thrive where there is mutual confidence. Governments and employers must believe that by and large trade unions are not given to making extravagant demands. The unions in turn must believe that governments and employers genuinely wish to improve the working conditions and living standards of workers. Even where the sense of mutual confidence is high however, there are obvious problems. In refusing to give in to the demands of unions, employers or governments may give reasons which the unions find to be irrelevant or only marginally relevant to the issues at hand. Such differences of opinion are an everyday phenomenon, at least in the industrialised market economy countries. These difficulties notwithstanding, the principle of voluntariness survives in western countries because there is a sufficiently developed trade union and collective bargaining culture based on that principle.

In Africa, and other parts of the developing world, there are

⁶¹ 208th Report, Case No. 981, para. 113 (Belgium).

additional problems.⁶² Government organs and institutions that are wholly or partly owned by the government usually employ the majority or a large proportion of the workforce. These organs and institutions are plagued by maladies ranging from a waste of resources, through corruption to misappropriation. The waste of resources is due chiefly to the inadequacy of the qualifications and experience of persons put in positions of responsibility. This in turn is principally a result of the fact that pre-colonial policies were not aimed at the education and training of the indigenous populace. Corruption and the misappropriation of property is a result of an inadequate supervision which itself is a result of insufficiently developed bureaucracy. This is worsened by the poverty of the persons in whose hands the financial responsibilities of the bodies are placed. It is considerably more difficult for trade unions to maintain their sense of confidence to governments in such circumstances. Unions will justifiably view any sacrifices they make as being for the benefit of a few individuals and not the society as a whole. Though these problems exist in developed countries too, they are far more serious in the developing countries. Further, the political and economic philosophies of the African nations do not favour the existence of the principle of voluntariness in the same way it exists in the developed market economy countries.⁶³ Until

⁶² In addition to the problems discussed here it must also be remembered that genuine union demands are often seen by African governments as challenging the governments' political authority. See Chapter III.

⁶³ See Chapter I.

these political and economic philosophies change to allow for greater trade union autonomy, and until the waste of government resources is substantially reduced, the mistrust now existing between the government and quasi-government institutions on the one hand, and the unions on the other, is likely to continue.

CHAPTER V STRIKES

A. The source of the right to strike

Neither of the two principal Conventions concerning trade union rights expressly mentions the right to strike. Neither Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise or Convention (No. 98) concerning the Right to Organise and Collective Bargaining adopted in 1948 and 1949 respectively refer to it. The other ILO conventions (and Recommendations) touching on trade union rights do not refer to it either. The International Covenant on Economic, Social and Cultural rights, 1966, however expressly provides for the right to strike. Article 8 of that Convention provides for the "right to strike, provided that it is exercised in conformity with the laws of the country."

However, the Committee on Freedom of Association has routinely asserted that the right to strike derives from Article 3 of Convention No. 87.¹ In the Committee's view, the right of workers' organizations to organise their activities and formulate their programmes contained in Article 3 of Convention No. 87 includes the right to strike. As early as its Second Report in 1952, the Committee declared the right to strike one of the "essential elements of trade

¹ For example, see 218th Report, Case No. 1115, para. 295 (Morocco); 233rd Report, case No. 1219, para. 653 (Liberia).

union rights."² From that time the Committee has always held matters relating to the right to strike as falling within its competence.³ The Committee of Experts and the Fact-Finding and Conciliation Commission⁴ have endorsed the Committee's basic assertion that a right to strike exists.⁵ The right can therefore be regarded as well established in the ILO system.

Though the right to strike is well established within the ILO supervisory bodies, it is by no means well respected in the laws and practices of member countries. Complaints relating to, or involving prohibitions or limitations on, the right are heard very frequently.⁶ And as with collective bargaining, interference with the right to strike has increased in the western market economy countries since the current recession.

Referring to the Convention No. 87, the ILO supervisory

² 2nd Report, Case No. 28, para. 68 (United Kingdom/Jamaica)

³ 153rd Report, Case No. 789, para. 279 (Nicaragua); 233rd Report, case No. 1224, para. 129 (Greece).

⁴ See Chapter I for the functions and powers of the Commission.

⁵ ILO, Rep. of Comm. of Exps., 1973, p. 44. [Committee of Experts Report] p. 2.

⁶ ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing body of the ILO, 3rd. Ed., (Geneva, 1985).

bodies have said that unions are to have the right to organise their activities and programmes (Article 3) free from laws which undermine their activities and programmes (Article 8). The activities and programmes which are protected in this way are those which are designed to further and defend the interests of workers (Article 10). Strikes are generally recognized as a means, often an essential means, by which workers can further and defend their interests. Therefore, bans and limitations on the right to strike could constitute a violation of Convention No. 87.⁷ According to the ILO therefore, workers have the right to strike because without it they cannot adequately promote and defend their interests.

The argument supporting the existence of the right to strike is a strong one but it remains curious that a right considered very important or even indispensable to the effective operation of unions should not have been expressly mentioned. It could have been mentioned with qualifications if there was a fear as to its exact limits in practice. Further, if collective bargaining rights are as important as the right to strike, it is also odd that collective bargaining was clearly dealt with in the Convention (No. 98) concerning the Right to Organise and Collective Bargaining in 1949 and subsequent Conventions and Recommendations but the right to strike was not. Article 4 of Convention No. 98 expressly refers to the need to encourage and promote

⁷ Michael Bendel, "The International protection of Trade Union Freedom: A Canadian Case Study", (1981) Ottawa Law Review, 168 at 182.

the full development and utilization of machinery for "voluntary negotiation". The same Article also refers to the regulation of terms and conditions of employment "by means of collective agreements." Convention No. 154 of 1981, adopted 32 years later, deals with collective bargaining as its principal subject-matter. There have been various explicit provisions in other Conventions and in Recommendations in between.⁸ And it cannot be argued that collective bargaining has needed more explicit treatment than the right to strike. Both have given rise to similar problems notably the applicability of the rights to public servants and the issue of what kinds of services are essential. And judging by the cases that have come before the Committee on Freedom of Association, problems relating to collective bargaining and to the right to strike occur with roughly equal frequency. The lack of explicit reference to the right to strike in any ILO instrument may well be evidence that member countries treat it as non-existent or at least subject to the unfettered discretion of states.

Government representatives on the International Labour Conference, on the Governing Body and on Committees have generally not objected to the assertion that the right to strike exists. This appears to be acquiescence. Notwithstanding the lack of objection however, serious restrictions and outright prohibitions of a nature and

⁸ See Chapter IV.

extent disapproved of by the Committee on Freedom of Association have been widespread in the world since the early seventies. More weight should be attached to what governments do than to their failure to express objection to the decisions of the Committee regarding the existence of the right to strike. Accordingly therefore, in this context, the apparent acquiescence of governments does not legitimize the Committee's assertions regarding the right to strike.

Article 8 of the Covenant on Economic Social and Cultural Rights⁹ adopted in 1966, seven years after Convention No. 98, does not do much to strengthen the Committee's position with respect to strikes. It provides for the right to strike so long as it is exercised "in conformity with the laws of the particular country." The content of laws is not in any way restricted. It is arguable that despite this lack of restriction on content, laws must not be so severe as to stultify or virtually stultify the reference to the "right." The wording of other provisions of Article 8 however, takes the strength out of this latter suggestion. Article 8(1)(a) and (1)(c) confer respectively the right to form and join trade unions and the right of unions to function freely; these rights are subject to limitations not appearing in Article 8(1)(d) which refers to the right to strike.

⁹ The Economic Covenant is mentioned here in relation to the ILO instruments because, as with the Political Covenant, it contains provisions suggesting that the ILO's and the UN systems of rights were meant to exist as one. See full arguments and relevant provisions under "Trade unions and the rights of others" in Chapter VI.

Whereas Article 8(1)(d) refers only to conformity with the laws of the particular country, Article 8(1)(d) and (1)(c) confer the rights subject to such limitations as are "prescribed by law and which are necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others." There is therefore room for the assertion that legal limitations on the right to strike need not be "necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." The total effect is that states have a carte blanche with respect to the extent to which they can interfere with the "right" to strike under the Covenant on Economic, Social, and Cultural Rights.

B. The nature and scope of the right to strike.

The foregoing deficiencies have not deterred the Committee on Freedom of Association from evolving detailed rules relating to the right to strike.

First, the Committee has stated in numerous complaints that the right to strike is a legitimate and essential means by which workers can defend and promote their economic and social interests.¹⁰ The recommendations of the Committee and of the other supervisory

¹⁰ 217th Report, Case No. 1091, para. 443, (India), Case No. 1099, para. 487 (Norway); 233rd Report, Case No. 1113, para. 470 (India).

bodies therefore, make it clear that general bans on the right to strike, whether imposed directly or indirectly, by law are not in accordance with the principles of freedom of association.¹¹

Second, the right to strike extends to federations and confederations of trade unions.¹²

Third, in many cases, the Committee has acknowledged that the right to strike can be restricted or even prohibited in the civil service or in essential services provided there are adequate compensatory guarantees.¹³ For example, where the right to strike has been interfered with, the employer must be denied the right of lockout; there must be joint conciliation procedures between workers and employers; and there must be provision in the law for joint arbitration where conciliation fails to resolve a dispute. The whole system of compensatory procedures must be such as to allow for adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage.¹⁴

¹¹ 217th Report, Case No. 1065, para. 557 (Colombia), Case No. 1076, para. 620 (Bolivia); 233rd Report, Case no. 1224, para. 130 (Greece).

¹² 172nd Report, Case No. 885, para. 385 (Ecuador); 197th Report, Case No. 823, para. 409 (Chile).

¹³ 211th Report, Case No. 1025, para. 273 (India); 217th Report, Case No. 1019, para. 374 (Greece).

¹⁴ 123rd Report, Case No. 614, para. 37 (Peru); 147th Report, Case No. 756, para. 187 (South Africa).

For reasons that will become clear in due course, there are at least three areas that are of particular importance especially in relation to developing countries: the matters over which a union may strike, the meaning of essential services, and the extent to which the right to strike can be restricted or prohibited in times of economic emergency. These three areas will be considered in turn.

1. Matters over which a union may strike.

Wherever the right to strike is recognised, it is accepted that workers may strike to support demands directly related to the worker's terms and conditions of employment. Workers can therefore strike to back demands regarding wages, leave, health and safety, and numerous other matters that are usually the subject of collective agreements. The Committee has gone farther than most states. It has ruled that 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. In the Committee's view, the right to strike is also relevant to the quest for solutions to economic and social policy questions and problems facing the undertaking, which are of direct concern to the workers.¹⁵ The Committee has even sanctioned a general strike against an ordinance concerning conciliation and arbitration procedures. The Committee

¹⁵ 123rd Report, Case No. 614, para. 37 (Peru); 147th Report, Case No. 756, para. 187 (South Africa).

considered it doubtful whether allegations relating to the ordinance could be dismissed at the outset on the ground that it was not in furtherance of a trade dispute. The allegations, the Committee ruled, could not be supported. In the Committee's view, a dispute over a proposed ordinance was a trade dispute over which workers could strike. It was a trade dispute because the unions were in a dispute with the government concerned in its capacity as an important employer following the initiation of a measure dealing with industrial relations which, in the unions' view, restricted trade union rights.¹⁶ More generally, but in the same vein, the Committee has held that the right to strike, should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement.¹⁷ The Committee therefore, while disapproving of strikes of a purely political nature and strikes decided upon systematically long before negotiations took place,¹⁸ has sanctioned the use of strike action to protest government legislation relating to conciliation and arbitration. It will be interesting to see if the Committee will in future sanction all strikes protesting government legislation affecting any area of trade union rights.

¹⁶ 58th Report, Case No. 221, para. 109 (United Kingdom/Aden).

¹⁷ 214th Report, Case No. 1081, para. 106 (Peru); 236th Report, Cases Nos. 1277 and 1288, para. 683 (Dominican Republic).

¹⁸ 177th Report, Case No. 884, para. 301 (Peru); 236th Report, Cases Nos. 1277 and 1288, para. 682 ((Dominican Republic).

The Committee on Freedom of Association has in effect sanctioned the use of strike action as a weapon in open political confrontation between the workers and the government. An important caveat is that a strike not directly related to occupational demands must not be purely political. Despite this caveat, a dispute between workers and the government regarding legislation is likely to be regarded in Africa as a purely political dispute; governments there are very sensitive to criticism regarding government measures. They will view strike action over government measures as a challenge of the government's political authority.¹⁹ Strike action over legislation will be objectionable to the average African government for two reasons. First, such strike action amounts to political opposition which as a rule is not tolerated. Second, strike action, even over purely occupational demands, is generally frowned upon.²⁰ The right to strike over legislation affecting unions therefore remains a distant hope for most African trade unions.

The motives which would influence most African governments in not tolerating strikes against legislation affecting trade union rights would generally be political and to that extent the motives are objectionable. Nevertheless, to allow unions to strike over

¹⁹ See Chapter II for further details.

²⁰ See Chapter I for further details.

legislation affecting conciliation and arbitration, or over any other area of trade union rights is undesirable. Trade union laws must of course balance between the right of the government to govern, the rights and interests of workers, and the rights and interests of employers. This balance is seriously upset if workers are allowed to coerce the government by strike action into not enacting, amending or repealing legislation especially where the legislation is aimed at dealing with an economic emergency or a threat to peace. The balance is maintained by allowing unions the freedom to express their objectives and, where possible, to challenge the constitutionality or legality of the legislation in question.

Further, it must be remembered that trade union leaders in Africa are often made members of the highest policy-making body in the land.²¹ They may therefore find it difficult to lead a strike over legislation that originates from a body of which they are members. The government will feel betrayed if trade union leaders through strikes, publicly oppose its policies expressed through legislation when the trade union leaders participated in their formulation. Thus even if strike action over legislation affecting unions were to become a realistic possibility from the point of view of general political freedom, unions would still have to deal with the fact that their leaders are members of the bodies that issue policies.

²¹ See Chapter VI for further details.

2. Essential services

a) Essential services in general

The Committee on Freedom of Association has given the following reason for allowing states to prohibit or restrict strikes in the public service and essential services. A strike there "could cause serious hardship to the national community."²² It has explained what it means by "hardship" in relation to essential services: "Essential services are services the interruption of which would "endanger the life, personal safety or health of the whole or part of the population."²³

Governments, employers and workers broadly agree that certain services are of such importance to the community as to warrant special dispute settlement rules. The aim is to limit the damage that may be caused by interruptions in the supply of those services. Though there is always ready agreement upon the principle, it is often difficult for the parties to agree on its application. The main problems relate to the determination of the services to be covered or what are essential services, and the way in which the special rules should differ from the

²² 211th Report, Case No. 1025, para. 273 (India);
217th Report, Case No. 1019, para. 374 (Greece).

²³ 234th Report, Case no. 1255, para. 190 (Norway);
236th Report, Case No. 1140, para. 144 (Colombia).

general rules.²⁴

Problems relating to essential services are as old as industrialization itself. Workers often claim that special dispute settlement rules are too restrictive while the public sometimes criticize the rules for what is seen as laxity. The basic problem has to do with balancing the general interest against the interests of the parties. This balancing of interests involves the determination of which services are really essential and the imposition of limitations on the rights of the parties only to the extent necessary.²⁵ And it must be borne in mind that it may be necessary in certain services not just to avoid prolonged interruptions but to prohibit them altogether.

The definition of what is essential is of fundamental importance to any industrial relations system and to the welfare of the community. An unduly narrow definition may endanger the well-being of society²⁶ while an unduly wide one may give the whole system of industrial relations a restrictive or even coercive character.

In the last 25 years there has been an increase in the number of activities classified as essential. In a number of both developed

²⁴ Alfred Pankert, "Settlement of Labour Disputes in Essential Services," (1980) 119 I.L.R., 723.

²⁵ Ibid.

²⁶ See details in Chapter VI.

and developing countries the civil service as a whole is considered to perform essential services and therefore is subject to strike prohibitions and compulsory arbitration. This concept of essential service has however, had less than universal acceptance. Some developed market economy countries and several French-speaking African countries have had or have introduced systems which distinguish between public servants who perform essential services and those who do not.²⁷

Notwithstanding that the Committee on Freedom of Association has repeatedly declared that essential services are only those whose interruption would endanger the life, personal safety or health of the whole or part of the population, some developed and developing countries continue to violate the rule. This has been particularly true during the world recession. An increasing number of countries have classified as essential, services whose interruption can cause grave damage to the national economy. The trend has been especially noticeable in developing countries. In 1971 Zambia listed mining activities as essential.²⁸ Since 1962 Trinidad and Tobago has done the same with the cultivation, manufacture and refining of sugar.²⁹ In the Phillipines essential services include the production of sugar, textiles, clothing, certain articles classified as essential by the

²⁷ See footnote 24, pp. 726-727.

²⁸ Ibid., p. 728.

²⁹ Ibid.

National Economic Development Agency and many goods destined for export.³⁰

In New Zealand slaughterhouses operating for export have been classified as essential since 1976.. Previously only those operating for domestic consumption were so classified.³¹ Recently various countries, developed and developing, have categorised as essential, certain financial operations such as those carried out by banks.³²

Applying the test that essential services are those whose interruption would endanger the life, personal safety or health of the whole or part of the population, the Committee on Freedom of Association has held that the hospital sector, services for the supply of water and the work of air traffic controllers are essential services.³³ The Committee has however held that in normal circumstances, general dock work, aircraft repairs and all transport services, banking, agricultural activities, the metal and petrol industries, teaching, the supply and distribution of foodstuffs are not

³⁰ Ibid.

³¹ Ibid.

³² Ibid.; For example Brazil and Poland among others. See respectively 233rd Report, Case No. 1225, para. 668 and 221st Report, Case No. 1097, para. 84.

³³ Ibid.

essential services.³⁴ The same has been held with regard to a government printing service, state alcohol, salt and tobacco monopolies³⁵, metal and mining sectors, transportation, and even metropolitan transportation undertakings.³⁶ And in an important case involving Norway in 1984 the Committee held that the withdrawal of services by workers in petrol producing installations "while possibly leading to a close down in production and serious consequences in the long term to the national economy"³⁷ was not a withdrawal of essential services.

Even where a given utility serves the public interest to such an extent as to warrant the prohibition of strikes, the Fact-Finding and Conciliation Commission and the Committee hold the view that it does not mean that all other types of concerted action ought to be forbidden.³⁸

³⁴ 118th Report, Cases Nos. 589 and 594, paras. 90-94 (India); 197th Report, Case No. 823, para. 411 (Chile); 208th Report, Cases Nos. 988 and 1003, para. 336 (Sri Lanka); 211th Report, Case No. 965, para. 199 (Malaysia).

³⁵ 139th Report, Cases Nos. 741 and 742, para. 199 (Japan).

³⁶ 230th Report, Cases No. 1173, para 577 (Canada/British Columbia); 217th Report, Case No. 1065, para. 557 (Colombia).

³⁷ 234th Report, Case No. 1255, para. 190 (Norway). This was the second case brought against Norway on the same issue. See 217th Report, Case No. 1099, paras 449-470 (Norway).

³⁸ Case No. 1201, para. 551 (Morocco); 233rd Report, Case No. 1225, para. 668 (Brazil).

b) Essential services, underdevelopment and recession.

It is instructive to compare some basic statistics regarding the economic importance of certain activities declared essential in some developed and developing countries.

In the 1984 Norwegian case³⁹ heard by the Committee, the government gave some important information about the economy which, according to it, demonstrated the need to prohibit strikes in oil producing installations. A fifteen day conflict in 1980 was estimated to have caused a loss of some NOK2,000 million in production earnings and an estimated NOK500 million in taxes and duties. Such revenue losses were said to be of great significance to the Norwegian economy. Oil activity contributed 17% to the gross domestic product and 33% to total exports. Oil tax revenue was an essential factor in the fiscal and social security budget of the state. Some 50,000 people worked in oil related activity of which 7,000 worked on production platforms in the North Sea.⁴⁰ The Norwegian government therefore argued not merely in terms of the effect of possible strikes but also in terms of the actual experience of a conflict in 1980.

Norway's dependence on oil is not so heavy when compared with some

³⁹ 234th Report, Case No. 1255 (Norway).

⁴⁰ Ibid., para. 182.

African nations. The central African country of Zambia is much more heavily dependent on mining. Mining accounts for over 95% of foreign exchange earnings. In 1982 copper alone accounted for 88% of Zambia's exports while other minerals (mainly cobalt, zinc and lead) accounted for 8%, leaving only 4% for non-mineral exports.⁴¹ And because of its central importance to the economy, the mining industry is a major consumer of goods and services offered by other industries. Any slow-down in mining activity is therefore likely to have repercussions in most sectors of the economy. Quite simply, Zambia's economy is almost completely dependent on mining, and copper mining in particular.

In addition, copper, like many other minerals, has drastically fallen in price since the recession. Its price is said to be the lowest in real terms since the Second World War.⁴² What is more, Zambian copper is becoming more difficult and expensive to extract though reserves have been said to be at 34 million tonnes, the fifth largest in the world. Because of the low copper prices on the world markets foreign exchange earnings have been drastically reduced, thereby diminishing the mining companies' ability to import and maintain equipment, and to extend and modernise their operations.⁴³

⁴¹ Times of Zambia, 6 October, 1985, p. 3, Speech by President Kenneth Kaunda; Republic of Zambia: Financial Report, February, 1983, p. 5.

⁴² Ibid., Times of Zambia, p. 3.

⁴³ Republic of Zambia: Financial Report, 1983, p. 5.

Zambia's problems are compounded by the fact that the high price of oil has made it necessary to allocate to oil imports foreign exchange previously reserved for non-oil imports.⁴⁴ Thus in addition to the fact that Zambia is far more dependent on copper than Norway is on oil, Zambia has to rely on a much cheaper commodity whose price continues to decline.

The Nigerian case is also instructive. Nigeria relies exclusively on oil for about 80% of its revenue and about 95% of her foreign exchange earnings.⁴⁵ In 1976 the oil industry was classified as essential by the government through legislation.⁴⁶ The current low price of crude oil is having a significant effect on the Nigerian economy.

With respect specifically to the action of developing countries which have extended the meaning of essential services to areas affecting the economic well-being of a state, it can be said that such action cannot be explained solely on the basis of the inferior stage of development. In many countries there has been a combination of factors: the inferior state of development, the extent of dependency on one commodity and, in most cases, the drastic fall of that

⁴⁴ Times of Zambia, see footnote 98, p. 3.

⁴⁵ Africa now, October, 1985, pp. 32, 79.

⁴⁶ Ubeku, Industrial Relations in Developing Countries: The Case of Nigeria (London, Macmillan, 1979) p. 164.

commodity's world price. It is also noteworthy that Zambia and Nigeria, as with Norway declared mining and oil operations respectively essential only after strikes seriously affected economic life.⁴⁷

3. Strikes and emergencies

According to the Committee on Freedom of Association, when a country is engaged in hostilities additional restrictions can be placed on unions' freedom of action.⁴⁸ Thus a general prohibition of strikes can be justified in the event of acute national emergency but this should be for a limited period of time.⁴⁹ The Committee on Freedom of Association has also held the mobilization or requisitioning of workers or the forcible return to work, permissible where it is for the purpose of maintaining essential services in circumstances of the utmost gravity during an acute national emergency.⁵⁰

It is necessary to consider some cases decided by the Committee regarding the meaning of acute national emergency for at least three reasons. First, emergencies are declared very frequently

⁴⁷ For Nigeria see Ubeku, Industrial Relations in Developing Countries: The Case of Nigeria, (London, Macmillan Press, 1979) p. 164.

⁴⁸ 25th Report, Case No. 136, para. 72 (United Kingdom/Cyprus).

⁴⁹ See section on the nature and scope of the right to strike in this Chapter.

⁵⁰ 214th Report, Case No. 1021, para. 123 (Greece); 234th Report, Ce No. 1201, para. 550 (Morocco).

in Africa.⁵¹ Second, developing countries tend not to restrict the meaning of "emergency" to matters affecting law and order. They tend to widen the meaning so as to include economic emergencies. Third, because many developing countries rely primarily on the production and export of one commodity they can easily fall into a state of economic emergency if there is an interruption in the production or distribution of that commodity.

What then is an acute national emergency? War⁵² is certainly covered and civil war too. A breakdown of law and order has also been sanctioned by the Committee.⁵³ The problem relates to economic emergencies. For example in a 1984 Nicaraguan case there was general suspension of the right to strike, though only temporarily. All disputes were to be solved by conciliation and arbitration. The government gave detailed information about social unrest, economic sabotage and general attempts to disrupt the community. The Committee nevertheless disapproved of the measures. It noted that the measures were to last as long as the state of economic emergency was in force, and the state of emergency was renewed month by month because of acts of violence and sabotage. It also reiterated the general principle

⁵¹ See Chapter III.

⁵² 17th Report, Case No. 73, para. 72 (UK/British Honduras); 25th Report, Case No. 136, para. 177 (UK/Cyprus).

⁵³ 214th Report, Case No. 1097, paras. 714 and 751(b) (Poland). See details in Chapter III.

that measures generally suspending the right to strike should be temporary and be limited to acute national crises.⁵⁴ The Nicaraguan case is similar to the case involving Poland⁵⁵ in that in both cases civil unrest was coupled with economic chaos. In the case of Poland however, the Committee permitted the temporary suspension of trade union activity. What seemed to make the difference is that in the Nicaraguan case the measures had apparently become permanent. In the Polish case, not only were the measures declared by the authorities to be temporary but there was no evidence at the time to suggest that the measures had assumed a permanent nature.

Whereas the Committee has allowed the suspension of trade union activity in cases where an economic emergency is coupled with civil unrest or the breakdown of law and order, it has not evolved a clear principle regarding precarious economies. The one-commodity African economies exist under the perpetual and real threat of economic emergency in that an interruption in the industry concerned would quickly put a country in a state of economic emergency. A government managing a precarious economy needs to have permanent but moderate control over union activity in essential sectors of the economy.

C. Conclusion

⁵⁴ 218th Report, Case No., 1133, para. 106, (Nicaragua).

⁵⁵ See footnote 53 in this Chapter.

A number of nations that are economically, politically and ideologically disparate have adopted a concept of essential services that is wider than that evolved by the Committee on Freedom of Association. In the cases on Norway and New Zealand interruptions in the oil industry and the cattle industry respectively, could not have proximately endangered the life, health or safety of the population and yet these economic activities were declared essential by public authorities. In Africa however, since the advent of the famine, the economic well-being of African states has become more proximately related to the life, health and safety of the population than is the case in the industrialised nations. If the definition of essential services is, in relation to one-commodity economies, extended to activities related to the production or running, and distribution of that commodity, it will then become more responsive to the economic and social problems facing the majority of African nations today.

CHAPTER VI

GENERAL CONCLUSIONS

A. The Committee on Freedom of Association and its work.

The body of rules and principles which the Governing Body Committee on Freedom of Association has built is impressive. It is impressive in terms of the number of rules and principles enunciated and the number of areas of trade union law covered. States felt increasingly compelled by the global economic difficulties which began in the seventies to use legislation as a means of controlling the power of trade unions. Much of this legislation is contrary to decisions of the Committee. For example, despite the many decisions of the Committee suggesting that, in general, activities which were important for the general health of an economy were not essential services, a significant number of both developed and developing countries continued to declare economic activities they consider vital or at least important to their economic well-being to be essential. The extent to which the Committee's pronouncements and specific decisions have been complied with has been less than satisfactory, though in many cases states have amended or repealed objectionable laws following decisions of the Committee. Practical difficulties of securing compliance aside, the Committee has made an important contribution to ideas of international human rights norms both in the area of trade union rights proper and in the area of general human rights.

The quasi-judicial nature of the Committee has been helpful. A fully fledged judicial body will often pronounce only on those issues that need to be decided in order to come to a determination in the particular matter. It is not uncommon for a court to refuse to decide a certain issue in a matter because a decision on that issue has been rendered unnecessary by virtue of a decision on some other issue; or by virtue of the failure of a party to prove the facts which gave rise to the issue in the first place. It is commendable that the Committee has taken advantage of its quasi-judicial nature to pronounce on matters in a more liberal manner than a court. This has helped the Committee to rapidly enunciate, mold and consolidate its principles. Further, its concern for compliance with its standards in practice as well as in law, has led it to requesting, on its initiative, information regarding compliance even when it has reached final conclusions in a case. The Committee has even offered its expertise to states which wish to amend their laws in order to bring them into line with its rulings.¹

It remains disappointing however that the by and large satisfactory principles expounded by the Committee, even some of the most important, have not been the subject of Conventions, or even Recommendations. The right to strike, for example, which in numerous cases the Committee and other ILO supervisory bodies have repeatedly

¹ 236th Report, Case No. 1225, para. 315(c) (Brazil); 237th Report, Cases Nos. 997,999 and 129, para. 42(o) (Turkey).

declared to be a legitimate and essential means by which workers can defend and promote their interests, still remains a matter of controversial construction of Article 3(1) of Convention No. 87. The Article gives workers, etc., "the right to organise their administration and activities and to formulate their programmes." In a nutshell, the committee has ruled that prohibiting or unduly restricting the right to strike prevents workers from organising their activities and programmes. If the right to strike is so important, it is time that the International Labour Conference recognizes it expressly as it has done in relation to collective bargaining. This would help to consolidate the Committee's principles more appropriately, than the Committee's own repeated statements. This is of course not a problem for the Committee as such. It is the responsibility of the International Labour Conference.

The Committee as such however, can be criticised in two main areas: its approach to the interpretation of ILO conventions and other substantive matters affecting the universality of trade union standards.

As regards the interpretation of Conventions, the Committee has relied on preparatory work excessively. Its reliance on preparatory work is excessive in that the Committee has often been content to read into Conventions statements of principle by the International Labour Conference or its Committees, during the early

years of the ILO, without sufficiently considering how the strict application of such principles may adversely affect the economic and social well-being of economically disadvantaged states particularly during a recession. The Committee's approach to preparatory work is demonstrated by its frequent statements regarding trade union monopoly and union security arrangements. It will be recalled that African governments argue that the limited human and material resources available to their public authorities dictate that the authorities deal with as few unions as possible. The argument has force in so far as it can be more convenient and less expensive to deal with one or at least a restricted number of unions. The Committee has not directly addressed this issue. It has preferred to rule that trade union monopoly imposed by law is objectionable under Article 2 of Convention No. 87 which gives workers the right to establish or join unions of their own choosing. It has added that the International Labour Conference in 1948, while discussing the adoption of Convention No. 87, did not express a view as to whether or not large single unions were better able to protect workers' interests than a multiplicity of unions.² The Committee's argument is a strong one. The basis upon which the Committee holds that trade union monopoly is contrary to Article 2 of Convention No. 87, namely that the International Labour Conference did not express a view in favour or against monopolies, has force. The unequivocal words of Article 2 of Convention No. 87, in

² See Chapter II under "Trade union monopoly directly imposed by law".

giving a right to workers to form a join unions of their choice, and the silence of the preparatory material regarding monopolies would seem to suggest no other conclusion. The point of mentioning the matter of trade union monopoly here however is that it is an example of the Committee's practice in some cases of adopting an interpretation with undue emphasis on conference materials while ignoring almost totally the practical implications, in this case, how monopolies can help conserve resources.

The same approach of relying on preparatory materials while paying insufficient attention to practical economic and social implications is evident in the cases relating to union security arrangements.³ The arguments raised before the Committee have been that excessive union security by very large, powerful unions may render the right of non-member workers or workers who belong to smaller union to form or join a union or, where there is a closed shop, the right to work meaningless. Again the Committee has not sufficiently addressed these issues.

Regarding the Committee's approach to the universality of standards, there are at least four principal problems. First, though the principle of flexibility is accepted by the ILO.⁴ and the

³ Ibid.

⁴ See Chapter I under "The universality of standards in general".

Committee, it has never been accepted as meaning that in the matter of trade unions different standards can be pursued by developing nations. Such an approach is not sufficiently responsive to the problems of developing countries particularly the extremely poor African countries.

Second, the Committee's requirement that restrictions or prohibitions on strikes and collective bargaining based on economic difficulties should be temporary rests on the often erroneous assumption, especially in Africa, that the economy will improve. On the contrary, African economies are so unsatisfactory, and continue to worsen at such a fast rate, that it is difficult to accept that they should be expected to comply with the same trade union principles as the Western industrialised nations especially in the field of essential services.

Third, the Committee has emphasised that the standards contained in Conventions and Recommendations must not be affected by any particular social and economic system.⁵ However and examination of the Convention and Recommendations dealing with functions of association and the constructions placed on them by the ILO does not support such an assertion. The governments of Western states and the governments of the East (which are similar to many African governments) differ principally in the economic and the political fields. In the

⁵ See Chapter I under "The Committee of Experts on the Application of Conventions and Recommendations".

political field Western states permit the existence of more than one political party and the existence of autonomous associations such as trade unions. Eastern states by definition permit only one political party and permit only monopoly trade unions in one form or another. The monopoly unions are subject to the close control of the single allowable party. The rulings of the Committee therefore that the monopolies are not permissible and that unions must operate independently clearly presuppose the existence of a Western type of democracy. The same can be said of many other rulings such as those declaring that a union should be allowed, if it so wishes, to align itself to a political party or to express general views as to what it thinks is the best way to solve a country's economic and social problems. In the economic field Western libertarian values generally permit free collective bargaining and recognize the right to strike while the Eastern states, which have planned economies impose extensive restrictions, in law or in practice, on the collective bargaining and on the ability of the unions to strike in the interest of what they see as national interest.

Fourth, attempts by the Committee and the ILO to maintain universal trade union standards has worked harshly on certain industrialised countries. Spain had a system of prior approval of collective agreements in which, it will be recalled, few were ever

rejected.⁶ In accordance with the Committee's general principle, the law introducing the system of approval was found to be objectionable. Though the Committee obviously had in mind other countries where a similar law would operate to the detriment of trade unions, the fact remains that a law which appeared to be working satisfactorily was regarded as tainted. The case demonstrates the injustices that may befall governments in an attempt to keep standards universal. If the Committee had been a regional body such as the European Court or Commission of Human Rights, it would have been less likely that, even applying the same principles, the Spanish system of approval would have been criticised.

And generally concerning universality of standards, it is necessary for the Committee to apply its "margin of appreciation"⁷ more liberally than at present. The serious economic problems of the African countries calls for a more liberal margin. The different social and economic systems in the world also require an extension of the margin of appreciation to matters of ideology. Matters relating to trade union monopoly or plurality and those relating to the interference with strikes or collective bargaining rights are examples

⁶ Chapter IV under "The approval and content of collective agreements".

⁷ The term has been used to describe techniques that can be used to allow flexibility of application of legal rules and principles but within a system of law. For example, see C. Morrison, Jr., "Margin of Appreciation in European Human Rights Law", (1973) 6 Revue des Droits de l'homme 263-286.

of matters that are by and large controlled by ideology; it is submitted that the Committee should not interfere in such matters. The ILO and the Committee insist that the standards are universal and that only modalities of application may differ. But the whole concept of trade unionism differs in the East and Africa, and the West.⁸ In order therefore that the ILO reflect its true character as a body composed of nations with different ideologies, it is necessary for the Committee to be ideologically neutral in a more real sense than at present.

B. Trade Union rights under the UN Covenants and the African Charter

If the African countries feel that the trade union standards of the ILO are harsh on them it would, at the very least, be desirable for them to attempt to explain their views on the basis of international law. It is therefore necessary to explore the possibility that their laws and practices on trade unionism are arguable on the basis of law. The provisions of the relevant ILO Conventions have been examined. It is now necessary to examine the United Nations Covenants.

⁸ For example, out of the over 1,300 Cases the Committee has heard only about 12 are from Eastern Europe. The distribution is as follows: Russia 4, Poland and Hungary 2 each, and Czechoslovakia, Romania, Bulgaria and Yugoslavia. This is disproportionate when compared with other regions. See, ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee and the Governing Body of the ILO, 3rd ed., (Geneva, 1985) 127-140. They have however ratified a reasonable number of Conventions on Freedom of association. See Appendixes 2-5, in Section B respectively.

The Committee on Freedom of Association is not charged with the function of interpreting and applying either the Covenant on Economic, Social and Cultural Rights nor the Covenant on Civil and Political Rights.⁹ It is charged with the interpretation and application of the relevant Conventions of the ILO. It does however, on occasion refer to the UN Covenants especially on matters of general civil liberties. The Covenants should be examined on the issue of trade unions for four reasons. First, the covenants are part of the International Bill of Rights.¹⁰ Second, a great number of States that are parties to the two Covenants.¹¹ Third, states that are parties to the Covenants and to the ILO Conventions concerning trade unions will want, as much as possible, to reconcile their obligations. And fourth, both Covenants have provisions aimed at preserving the trade union rights under ILO Convention (No. 87.) concerning Freedom of Association and Protection of the Right to Organise.¹² This last fact, (though the

⁹ See UN, Human Rights: Compilation of Human Rights Instruments, (New York, 1978) pp. 3 and 8.

¹⁰ Together with the Universal Declaration of Human Rights. See footnote 9, p. 1.

¹¹ As at 17th December, 1985, there were 85 State parties to the Economic Covenant and 81 to the Political Covenant. See United Nations, New York, Dept. of Public Info., Press Section, Press Release No. L/T/3724.

¹² Article 8 of the Economic, Social and Cultural Covenant and Article 22 of the Covenant on Civil and Political Rights deal with trade union rights. Both Articles in paragraph 3 have the following provision: "Nothing in this article shall authorize State Parties to [Convention No. 87] to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees

relevant provisions are couched in terms intended merely to avoid conflicts between Convention No. 87 and the two UN Covenants) evinces an intention to make the ILO system of rights part of a coherent body of international law. The fact that the Committee sometimes refers to some provisions of at least the Political Covenant supports this assertion.

The two UN Covenants are not identical in the way they confer trade union rights. Article 22(1) of the Political Covenant provides that "[e]veryone 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) is the only provision in the Political Covenant expressly referring to trade unions. The Economic Covenant has more detailed provisions. A brief comparison will suffice. First, the Political Covenant does not mention the right to strike. The Economic Covenant confers it in Article 1(d) provided "it is exercised in conformity with the laws of the particular country." As mentioned earlier, the provision gives states, for all practical purposes, a carte blanche though in theory it can be argued that the reference to striking as a "right" would be stultified if it was totally prohibited and therefore that strikes cannot be prohibited altogether.¹³ To this extent it can be concluded that, for most provided in that Convention."

¹³ See detailed arguments in Chapter V.

practical purposes, neither UN Covenant confers the right to strike. Second the Political Covenant has no provisions regarding federations, confederations or international trade unionism. The Economic Covenant on the other hand refers to the "right of trade unions to establish material federations or confederations and the right of the latter to form or join international trade union organization." This is similar though not identical to Article 5 of Convention No.87. Third, the Political Covenant does not mention, at least not expressly, the functioning of trade unions. Article 8(c) of the Economic Covenant stipulates "the right of unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others."

Both Article 8(1)(a) of the Economic Covenant and Article 22(1) and (2) of the Political Covenant confer the right to form and join unions subject only to those restrictions as are "necessary in a democratic society" for the "protection of the rights and freedoms of others." It will be remembered that Article 8(c) of the Economic Covenant also confers the right of unions to function freely subject to only such limitations as are "necessary in a democratic society for the protection of the rights and freedoms of others."

The African Charter on Human and Peoples' Rights of 1981¹⁴ does not expressly mention trade union rights. Article 10 of the Charter however provides as follows:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

The most obvious criticism that can be made against Article 10(1) is that it appears to restrict freedom of association by a clawback clause¹⁵ namely that the freedom is exercisable "provided that [the

¹⁴ Richard B. Lillich, *International Human Rights Instruments* (Buffalo, New York, S. Hein and Company, 1985) p. 530.3. For a detailed legal study of the African Charter see R. Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis," (1981-82) 22 Va. J. Int'l L., 667-714. See also S.K. Mumba, "Prospects for Regional Protection of Human Rights in Africa," (1983) 8 Holds. L. R., 101-120 and W. Langley, "The Banjul Charter on Human and Peoples' Rights", (1985) 18 Ind. Pol. Sci. Rev. 1-16.

¹⁵ A clawback clause has been defined by Rosalyn Higgins as one "that permits, in normal circumstances, breach of an obligation for a specified number of public reasons". "Derogation under Human Rights Treaties", (1978), 48 B.Y.B.I.L. 281. She has distinguished a clawback clause from derogations *stricto sensu* which "allow suspension or breach of certain obligations in circumstances of war or public emergency." See also Norris and Reiton, "The Suspension of Guarantees", (1981) 30 Am. U.L. Rev. 189 at 198-3, note 24. Compare with Hartman, "Derogation from Human Rights Treaties in Public Emergencies", (1981) 22 Harv. J. Int'l L. 1 at 5-6.

Individual abides by the law". The power of states to restrict freedom of association is not in any way circumscribed. And as for Article 10 (2), its ineffectiveness in protecting freedom of association lies in the fact that, as read with Article 29, the net effect is that a person can be compelled to join an association for many vaguely defined reasons.¹⁶

Perhaps the single most important provision in the African Charter is Article 27(2). It provides that:

The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

The restrictions contained in Article 27(2) are not confined to only certain rights in the Charter. They apply to all the rights conferred by the Charter. It is therefore submitted that any law restricting the right to associate under Article 10(1) has to be justifiable under Article 27(2) as being in the interests of "the rights of others, collective security, morality (or) common interest".

¹⁶ Article 29 reads in part as follows: The individual shall also have the duty: 2. To serve his national community by placing his physical and intellectual abilities at its service; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the moral well being of society.

It will have been noticed that allowable restrictions on freedom of association under Article 8 of the Economic Covenant, Article 22 of the Political Covenant and Article 27(2) of the African Charter are not identical, at least in the manner of expression. There is however one common denominator: Freedom of association may be exercised subject to "the rights of others." It is therefore instructive to examine the way in which, if at all, certain restrictions on trade union rights can protect the rights and freedoms of others.

1. Trade Union rights and "the rights of others"

There can be no doubt that if trade unions are given complete or nearly complete autonomy they can prejudice the rights of workers and members of the public in general. A few simple examples will suffice. The closed shop has long been said to impair the right of non-union members to work and the right of managements to choose their employees. A restriction on the number of unions can help to conserve human and financial resources which can in turn be employed to advance the economic and social welfare of the population. Restrictions on the right to strike in key areas of the economy particularly where the government owns, or has controlling interest in, the relevant industries can help to avoid the government losing revenue and income. The need to avoid these consequences is more imperative in economically disadvantaged nations. In a very poor country, economically dependent

almost exclusively on one commodity, the state can be held to ransom by a union or group of unions controlling the production and distribution of that commodity. The wealth of such a nation can easily become concentrated in the hands of what is, in Africa, a very small proportion of the population, namely, the workers in the particular industry.¹⁷ Further, serious disturbances in a vital industry will result in direct losses to a government where it holds shares in the companies running the vital industry concerned.¹⁸ And even when the government is not a shareholder it may as we have said suffer revenue losses. In these circumstances, the chances of the economic, social and cultural rights of the population being prejudiced are more real than they would be in a developed economy. In fact due to the poverty of African states the vast majority of the population does not, even without the tyranny of unions, enjoy even the bare economic rights contained in the economic covenant. To effectively protect and promote the rights of others, particularly economic and social rights, therefore, it is necessary to restrict the autonomy of unions in the way some African countries have done.

¹⁷ For example, Zambia has a population of about 6.5 million. The total labour force is estimated at 1,880,400. Only 391,000; approximately one fifth, are wage earners. Quoted from E. Kalula, "The Influence of International Labour Standards on Zambian Legislation," 124 I.L.R. 593 at 593.

¹⁸ Generally in Africa the companies which run vital areas of the economy are nationalised. That usually means that the government compulsorily buys the majority of the shares. It usually takes 51% of the shares in each company concerned.

It is in the interest of the society as a whole that different interest groups be allowed to pursue their goals and protect their interests. Trade unions are no exception. There is a need to control unions comparatively more firmly in Africa than in the West. Workers in Africa occupy a position that is significantly different from workers in the West. Labour law developed in the West to protect the worker from exploitation. This exploitation has in modern day society been effectively counteracted by the unions with help from the law. Currently in the Western industrialised nations the bargaining positions of employers including governments are often balanced. In African the worker has a much greater potential to occupy the position of master. By the mere fact of holding a job the worker enjoys a standard of living distinctly higher than that of the majority who live off the land. Workers have an assured, steady income. Though they do not have the same freedom of speech as their counterparts in the West to speak in furtherance of their interests, the government or government-controlled companies in Africa will give them pay raises and otherwise improve their standard of living for political reasons, if for nothing else. If workers in Africa are given the same degree of autonomy as their Western counterparts they may have unduly strong leverage against the government, employers and the rest of the population in the economic and consequently in the social and political fields..

It is arguable that the power of unions even where they act

in concert can be prevented from being destructive to an economy of society if civil liberties in general are respected. There is perhaps, no doubt that if employers and other associations are permitted to operate and combine freely they can check the power of trade unions without governments having to resort to legislation in order to effect such checks. It is doubtful however that reliance on such checks can effectively keep trade union power within reasonable limits. It is doubtful because in an economy that is almost exclusively dependent on one commodity the union catering for workers who produce and market that commodity will nearly always have very strong leverage over employers and other associations. Legislating trade union controls seems to be the only solution. In order to avoid the exploitation of the weak in the African condition therefore, there is a need to more firmly control the right to form and join trade unions, and to control their functioning (Articles 81(a) and (c) of the economic covenant) if the rights and freedoms of others are to be protected. It must be pointed out however that the controls being activated here should be limited to a few areas. It is reasonable for example to limit the number of unions, to limit wage increases from time to time and to restrict or even prohibit the right to strike in industries of vital economic importance. Such control would make a contribution, however small, to the conservation of resources and to the amelioration of unequal distribution of "wealth", in Africa, matters over which African states are so heavily criticized. Trade unions must however enjoy full civil liberties including the right to champion their cause. They must

also be independent from political or other control or influence except by choice. Unless such freedoms exist, there is a danger of the worker being exploited.

C. The future of ILO trade union standards in Africa.

It is very difficult in the African context to reconcile the many competing and often conflicting interest. African countries are developing at a time and in circumstances which in many ways are more difficult than other countries have had to experience. A number of African countries had a short honeymoon after the attainment of independence from their colonial masters. They relied on one raw material for exports and to sustain their economies as a whole. Ten to fifteen years after independence, sometimes less, the prices of their commodities on the world market have fallen and continue to fall. The prospects of better prices have never been more bleak. Zambian copper and Ghanaian cocoa, for example, enabled those countries to make remarkable progress in their early years after independence. The two countries now have some of the most depressed economies on the Continent. There are few manufacturing industries. Economic development has a further dimension which compounds the problem. It is necessary to narrow or bridge the vast developmental gap between the urban and rural areas. The problem of the urban rural gap is more acute in Africa than in the West. These problems demand that the government be firmly in control of the economic life of the nation.

While trade unions in Africa need to be more closely monitored than in the West, the obvious problem is naturally one of ensuring that the power to control unions is not used for political ends. The fact that in practice powers to control unions are by and large used to further political interests would tend to suggest that such powers of control should not be conferred at all. Though this problem is appreciated it should at least be recognised that greater powers of control over unions in Africa is necessary. It is then the duty of each state to find ways of ensuring that such powers of control are not abused. In this age when even the Western industrialised nations are attempting to control trade unions in a way they have never done before, it would, barring radical political changes in the structure of governments, be futile to try and convince African states to be more liberal towards their unions than they are now. The age of union control seems to be here to stay though differences in the degree of control will survive at least for the time being.

These changes in the global pattern of laws regarding trade unions bring to mind the Great Depression and how it helped to mold today's views as to the purpose of international labour standards. It will be recalled that in 1930 Albert Thomas, a former Director-General of the ILO, stated that the social factor was more important than the economic factor. In the same vein President Roosevelt stated at the International Labour Conference in 1949 that economic policy was merely

a means of achieving social justice.¹⁹ Previously economic policy and social justice tended to be kept separate. The change in attitudes of labour law experts and politicians meant that economic policy should not be aimed at merely building wealth in the community; that wealth must be distributed in the community as evenly as possible.

It seems the time has come again for certain new facts to be accepted. The experiences of the recession in both developed and developing countries have shown that in order for economic policy to help effectively in achieving the social and human objectives of development, economic policy has to restrict the rights of trade unions to an extent never before found necessary. For example, since the recession even the developed countries have been passing laws declaring "essential" activities important to the economy and therefore to the well-being of the society. The right to strike has consequently been restricted in sectors of the economy which do not always endanger lives or health. In Africa the case for restricting trade union rights is even stronger. The problem of famine makes it necessary to apply economic policy, including the control of unions, to save large populations from imminent annihilation. It cannot be doubted that given a situation like this, the Freedom of Association Committee would find it hard to maintain that transportation for the supply and distribution of food is not an essential service as it has decided in

¹⁹ Chapter I.

one case.²⁰ It is therefore no longer enough to accept that economic policy must be a means of achieving social objectives. It needs to be formally recognized by the ILO that the responsibility for economic policy must mean more firm state control of trade unions to achieve social justice and that the degree of control will have to be dictated by the gravity of the economic and social problems of any given country.²¹

If African states hope to influence the formulation of ILO trade union standards to a greater degree they will have to participate in the activities of the ILO in the area of trade unions to a greater extent than at present. It is not enough to participate at the level of the International Labour Conference. Discussions there tend to take on a very general character. Ironically African states would have a better chance of influencing the ILO if their political atmosphere allowed the trade unions a real possibility of bringing cases before the Freedom of Association Committee. At that level, states can produce statistics regarding their economic problems. The Committee is more likely to be favorably influenced if there can be repeated cases coming from Africa giving statistics, for example, regarding the need to declare certain economic activities essential.

²⁰ 208th Report, Case No. 988, para. 336 (Sri Lanka). See also 221st Report, Case No. 1097, para. 84 (Poland).

²¹ See generally Chapter I.

At present the number of cases that have come to the Committee appear to be remarkably few as compared to the number of laws on the Continent which are contrary to ILO standards. As at 1st January, 1986, of the over 1,300 cases heard by the Committee only 173 were from Africa. Of these, 29 were pre-independence cases while 144 were post-independence. Further, a few countries have had a large number of complaints. Seven countries with the Morocco alone has had 33 and of these 1 was a pre-independence case. South Africa has had 21. Congo (Leopoldville) had 16, of which 1 was before independence. Sudan has had a total of 8, with 2 before independence. Cameroon had a total of 6, of which 2 were pre-independence cases. Egypt had 4. Tunisia had 5, of which 3 were pre-independence cases. Out of the total of 173 African cases 47 were from North Africa.

B. Epilogue

It is hoped that the cases for and against attitudes of African governments towards trade unions have been made. Trade union monopolies, restrictions on wage rates, and restrictions or prohibitions on strikes in economically vital areas, for example, are dictated by the grave economic and social conditions. Matters such as political control, control over elections and the denial of civil liberties however are generally not justifiable on the basis of the African condition. While the ILO has done well to point out many unnecessary controls over trade unions, it has failed to create rules that are sufficiently responsive to the poverty of the African Continent.

APPENDIX 1

DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular, that -

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (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.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that -

- (a) all human beings, irrespective of race, colour or sex, have the right to pursue both their material and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
- (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;
- (d) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;
- (e) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and

recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve -

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common wellbeing;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;
- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed in need of such protection;
- (e) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- (g) adequate protection for the life and health of workers in all occupations;
- (h) provision for child welfare and maternity protection;
- (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
- (j) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full co-operation of the International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task.

and for the promotion of the health, education and wellbeing of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the state of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.

Source: ILO, International Labour Code 1951, vol. I: Code, Geneva, 1952 pp. 21-23.



APPENDIX 2

CONVENTION (NO. 87) CONCERNING FREEDOM OF ASSOCIATION AND
PROTECTION OF THE RIGHT TO ORGANISE, 1948

Section "A"
(the text in part)

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

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.

Article 3

1. 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.

2. The public authorities shall refrain from any interference which would restrict this right or impede this lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority,

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to effect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term "organisation" means any organisation of workers or of employers for furthering and defending the interests of workers or of employers:

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

Source: ILO, International Labour Conventions and Recommendations, 1919-1981, 1982.

Section B

(the 97 ratifying states as at 1st January, 1986)

Albania, Algeria, Angola, Antigua and Barbuda, Australia, Austria, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia., Bulgaria, Burma, Byelorussian SSR, Cameroon un. rep. of, Canada, Central African Republic, Chad, Colombia, Comores, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, France, Gabon, German Democratic Republic, Germany, fed. rep. of, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kuwait, Lesotho, Liberia, Luxembourg, Madagascar, Mali, Malta, Mauritius, Mexico, Mongolia, Netherlands, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Saint Lucia, Senegal, Seychelles, Sierra Leone, Spain, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Ukrainian SSR, USSR, United Kingdom, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia.

Source: ILO, Official Bulletin, Vol. LXVII, 1984, Supplement.

APPENDIX 3

CONVENTION (NO. 98) CONCERNING THE APPLICATION OF THE RIGHT
TO ORGANISE AND TO BARGAIN COLLECTIVELY, 1949Section A
(the text in part)

Article 1

1. Workers shall enjoy adequate protection against act of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to -
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) 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.

Article 2

1. Workers' and employers' organisation 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.
2. In particular, acts which are designed to promote the establishment of workers' organizations 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, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

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.

Article 5

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

Source: As in Appendix 2.

Section B.

(the 113 ratifying states as at 1st January 1986)

Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Brazil, Bulgaria, Byelorussian SSR, Cameroon, un. rep. of, Cape Verde, Central African Republic, Chad, Colombia, Comoro, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic Yemen, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Ethiopia, Fiji, Finland, France, Gabon, Germany Democratic Republic, Germany, fed. rep. of, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Indonesia, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Lebanon, Lesotho, Liberia, Libyan Arab Jarnahiriya, Luxembourg, Malawi, Malaysia, Mali, Malta, Mauritius, Mongolia, Morocco, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Saint Lucia, Senegal, Sierra Leone, Singapore, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Syrian Arab Republic, Tanzania, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian SSR, USSR, United Kingdom, Upper Volta, Uruguay, Venezuela, Vietnam, Yemen, Yugoslavia, Zaire.

Source: As in Appendix 2.

APPENDIX 4

CONVENTION (NO. 151) CONCERNING PROTECTION OF
THE RIGHT TO ORGANISE AND PROCEDURES
FOR DETERMINING CONDITIONS OF
SERVICE IN THE PUBLIC SERVICE, 1978

Section A
(the text in part)

PART I. SCOPE AND DEFINITIONS

Article 1

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.

2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.

3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Article 2

For the purpose of this Convention, the term, "public employee" means any person covered by the Convention in accordance with Article 1 thereof.

Article 3

For the purpose of this Convention, the term "public employees' organisation" means any organisation, however composed, the purpose of which is to further and defend the interests of public employees.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 4

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect

of acts calculated to -

- (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organisation;
- (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees' organisation or because of participation in the normal activities of such an organisation.

Article 5

1. Public employees' organisation shall enjoy complete independence from public authorities.

2. Public employees' organisation shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.

3. In particular, acts which are designed to promote the establishment of public employees' organisations under the domination of a public authority, or to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of interference within the meaning of this Article.

PART IV. PROCEDURES FOR DETERMINING TERMS AND CONDITIONS OF EMPLOYMENT

Article 7

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employee's organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

PART V. SETTLEMENT OF DISPUTES

Article 8

The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as

mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

PART VI. CIVIL AND POLITICAL RIGHTS

Article 9

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association; subject only to the obligations arising from their status and the nature of their functions.

Source: As in Appendix 2.

Section B

(the 17 ratifying states as of 1st January, 1985)

Cuba, Cyprus, Denmark, Finland, Guinea, Guyana, Italy, Norway, Peru, Poland, Portugal, Spain, Suriname, Sweden, Switzerland, United Kingdom, Zambia.

Source: As in Appendix 2.

5

APPENDIX 5

CONVENTION (NO. 154) CONCERNING THE PROMOTION OF
COLLECTIVE BARGAINING, 1981Section A
(the text in part)

PART I. SCOPE AND DEFINITIONS

Article 1

1. This Convention applies to all branches of economic activity.
2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.
3. As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

Article 2

For the purpose of this Convention the term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations on the other, for -

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and workers' organisation or workers' organisations.

Article 3

1. Where national law or practice recognises the existence of workers' representatives as defined in Article 3, subparagraph (b), the Workers' Representatives Convention, 1971, national law or practice may determine the extent to which the term "collective bargaining" shall also extend, for the purpose of this Convention, to negotiations with these representatives.
2. Where, in pursuance of paragraph 1 of this Article, the term "collective bargaining" also includes negotiations with the workers' representatives referred to in that paragraph, appropriate

measure shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned.

PART II. METHODS OF APPLICATION

Article 4

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

PART III. PROMOTION OF COLLECTIVE BARGAINING

Article 5

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

- (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
- (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
- (c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;
- (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
- (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

Article 6

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or

institutions the parties to the collective bargaining process voluntarily participate.

Article 7

Measures taken by the public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations.

Article 8

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.

Source: As in Appendix 2.

Section B

(the 6 ratifying states as at 1st January, 1986)

Finland, Niger, Norway, Spain, Sweden, Switzerland.

Source: As in Appendix 2.

APPENDIX 6

INDEPENDENCE DATES OF AFRICAN STATES

Libya	24 December 1951
Sudan	1 January 1956
Morocco	2 March 1956
Tunisia	20 March 1956
Ghana	6 March 1957
Guinea	2 October 1958
Cameroon	1 January 1960
Togo	27 April 1960
Mali	20 June 1960
Senegal	20 June 1960
Madagascar	26 June 1960
Zaire (formerly Belgian Congo)	30 June 1960
Somalia	1 July 1960
Benin (formerly Dahomey)	1 August 1960
Niger	3 August 1960
Upper Volta	5 August 1960
Ivory Coast	7 August 1960
Chad	11 August 1960
Central African Republic	13 August 1960
Congo (Brazzaville)	15 August 1960
Gabon	17 August 1960
Nigeria	1 October 1960
Mauritania	28 November 1960
Sierra Leone	27 April 1961
Tanzania (As Tanganyika)	9 December 1961
Rwanda	1 July 1962
Burundi	1 July 1962
Algeria	3 July 1962
Uganda	9 October 1962
Zanzibar (now part of Tanzania)	10 December 1963
Kenya	12 December 1963
Malawi	6 July 1964
Zambia	24 October 1964
The Gambia	18 February 1965
Botswana	30 September 1966
Lesotho	4 October 1966
Swaziland	6 September 1968
Equatorial Guinea	12 October 1968
Guinea-Bissau	10 September 1973
Mozambique	25 June 1975
Cape Verde	5 July 1975
Sao Tome and Principe	12 July 1975
Angola	11 November 1975
Djibouti	27 June 1977
Zimbabwe	18 April 1980

Source: Dennis Austin, Politics in Africa, 2nd ed. (Hanover, University Press of New England, 1984) Appendix.

APPENDIX 7

ILLEGAL DISPLACEMENTS OF GOVERNMENTS IN AFRICA

1. Algeria: June 19, 1965
2. Burundi: (2) October 1965; November 29, 1966
3. Congo-Brazzaville: (3) August 15, 1963; August 3, 1968; September 4, 1968
4. Congo-Kinshasa: (1) November 25, 1965
5. Central African Republic: (2) January 1, 1966
6. Dahomey: (6) October 28, 1963; December 22, 1965; December 7, 1967; December 10, 1969
1. Egypt: 1952
8. Gabon: (1) February 18, 1964.
9. Ghana: (5) February 24, 1966; 1972; 1978; 1979; 1981
10. Lesotho: (2) January 31, 1970, 1986
11. Liberia: (1) 1980
12. Libya: (1) September 1, 1969
13. Madagascar: (1) 1975
14. Mali: (1) November 19, 1968
15. Nigeria: (6) January 15 and July 29, 1966; 1975; 1979; 1983; 1985
16. Sierra Leone: (2) March 24, 1967; April 18, 1968
17. Somalia: (1) October 21, 1969
18. Sudan: (1) 1958; May 25, 1969 (excluding the earlier one of 1958).
19. Togo: (2) January 1963; January 13, 1967.
20. Uganda: (4) February 22, 1966; January 25, 1971; 1979; 1985
21. Upper Volta: (1) January 4, 1966.
22. Zanzibar: (1) January 12, 1964.

Source (in part): B.O. Nwabueze, Constitutionalism in the Emergent States (Canbury, New Jersey, Associated University Presses, 1973).

APPENDIX 8

LIST OF REPORTS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION

Report	Publication		
<u>Reports of the International Labour Organization to the United Nations (Geneva, ILO)</u>			
1-3	Sixth Report (1952), Appendix V		
4-6	Seventh Report (1953), Appendix V		
7-12	Eighth Report (1955), Appendix II		
<u>Official Bulletin</u>			
	Volume	Year	Number ¹
13-14	XXXVII	1954	4
15-16	XXXVIII	1955	1
17-18	XXXIX	1956	1
19-24 ²	XXXIX	1956	4
25-26	XL	1957	2
27-28 ²	XLI	1958	3
29-45	XLIII	1960	3
46-57	XLIV	1961	3
58	XLV	1962	1 S
59-60	XLV	1962	2 SI
61-65	XLV	1962	3 SII
66	XLVI	1963	1 S
67-68	XLVI	1963	2 SI
69-71	XLVI	1963	3 SII
72	XLVII	1964	1 S
73-77	XLVII	1964	3 SII
78	XLVIII	1965	1 S
79-81	XLVIII	1965	2 S
82-84	XLVIII	1965	3 SII
85	XLIX	1966	1 S
86-88	XLIX	1966	2 -S
89-92	XLIX	1966	3 SII

¹ The letter S, followed as appropriate by a roman numeral, indicates a supplement.

² For communications relating to the 23rd and 27th Reports, see Official Bulletin, Vol. XLIII, 1960, No. 3.

Report	Publication		
93	L	1967	1 S
94-95	L	1967	2 S
96-100	L	1967	3 SII
101	LI	1968	1 S
102-103	LI	1968	2 S
104-106	LI	1968	4 S
107-108	LII	1969	1, S
109-110	LII	1969	2 S
111-112	LII	1969	4 S
113-116	LIII	1970	2 S
117-119	LIII	1970	4 S
120-122	LIV	1971	2 S
123-125	LIV	1971	4 S
126-133	LV	1972	S
134-138	LVI	1973	S
139-145	LVII	1974	S
146-148	LVIII	1975	Series B, Nos. 1-2
149-152	LVIII	1975	Series B, No. 3
153-155	LIX	1976	Series B, No. 1
156-157	LIX	1976	Series B, No. 2
158-159	LIX	1976	Series B, No. 3
160-163	LX	1977	Series B, No. 1
164-167	LX	1977	Series B, No. 2
168-171	LX	1977	Series B, No. 3
172-176	LXI	1978	Series B, No. 1
177-186	LXI	1978	Series B, No. 2
187-189	LXI	1978	Series B, No. 3
190-193	LXII	1979	Series B, No. 1
194-196	LXII	1979	Series B, No. 2
197-198	LXII	1979	Series B, No. 3
199-201	LXIII	1980	Series B, No. 1
202-203	LXIII	1980	Series B, No. 2
204-206	LXIII	1980	Series B, No. 3
207	LXIV	1981	Series B, No. 1
208-210	LXIV	1981	Series B, No. 2
211-213	LXIV	1981	Series B, No. 3
214-216	LXV	1982	Series B, No. 1
217	LXV	1982	Series B, No. 2
218-221	LXV	1982	Series B, No. 3
222-225	LXVI	1983	Series B, No. 1
226-229	LXVI	1983	Series B, No. 2
230-232	LXVI	1983	Series B, No. 3
233	LXVII	1984	Series B, No. 1
234-235	LXVII	1984	Series B, No. 2
236-237	LXVII	1984	Series B, No. 3
238	LXVIII	1985	Series B, No. 1
239-240	LXVIII	1985	Series B, No. 2
241-242	LXVIII	1985	Series B, No. 3

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2. Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise.
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4. Convention (No. 135) concerning Protection and Facilities to be afforded to Workers' Representatives in the Undertaking.
5. Convention (No. 141) concerning Organisations of Rural Workers and their role in Economic Development.
6. Convention (No. 151) concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.
7. Convention (No. 164) concerning the Promotion of Collective Bargaining.

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2. Recommendation (No. 149) concerning Organisations of Rural Workers and their role in Economic and Social Development.
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