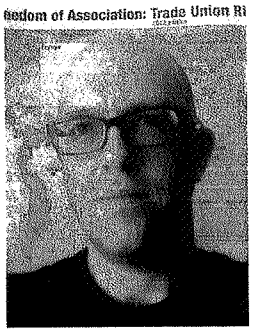
The dynamics have changed: the right to strike at the ILO

At the ILO in February 2015 Government after Government took the floor to insist that the right to strike is a fundamental right, protected within the ILO

In a dazzling about turn, Employers representatives at a specially convened meeting of the ILO in Geneva last month threw in the towel after 32 months of argument with Workers over the existence of the right to strike within the ILO system. The meeting, ostensibly a discussion on 'the right to strike and the modalities and practices of strike action at national level', was widely tipped as a last-ditch attempt for Employers and Workers to reach agreement without the requirement for a formal reference to be made to the International Court of Justice. Although Workers had been lobbying hard for Government support for many months, and were expressing quiet confidence about the growing levels of support for their position (which was in favour of such a reference to the ICJ), no-one seems to have noticed the levels of jitteriness that the Employers lobby was experiencing, prior to their surprise announcement on the opening morning. Although it must be noted that the Employers do still formally insist that the central argument remains open enough nails seem to have been hammered into its coffin by Governments over the course of the tripartite session that the argument is now thoroughly laid to rest for all practical purposes. And so, this extraordinary move now seems effectively to end the debate just as unexpectedly as it appeared, when Employers crudely halted the work of a key committee of the International Labour Conference in June 2012. We now find ourselves in a position in which the Employers have delivered major concessions, and in which the fundamental principle of the right to strike, its essential status as both a core human rights principle, and its centrality as a component of ILO Convention 87, has received the most extraordinary support from Governments of every political persuasion.



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The Joint Statement of Workers and Employers' Groups

In a document negotiated between Workers and Employers a number of key points of agreement were outlined, including the following key statement: 'the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation'[1]. This recognition, the agreement notes, 'requires' the Workers and Employers' groups to address four outstanding issues, which are: the mandate of the Committee of Experts on the Application of Conventions and Recommendations; the process for selection of cases before the Committee on the Application of Standards ('CAS') to be discussed, and the role for workers and employers in drafting conclusions of the CAS to be examined; 'improvement' in the operations of the supervisory procedures, namely the procedures of the Committee on Freedom of Association, and on Articles 24 and 26 of the ILO Constitution; and the Standards Review Mechanism, which is a process already underway concerning coherence and relevance of ILO standards. The Joint Statement was signed off by both parties, and is in force until November 2016, with provision for its renewal or cancellation, depending on its implementation. In practice, this should mean that Employers have signed up to a peace agreement that ought to allow the next two sessions of the ILO Conference (June 2015 and 2016) to proceed without interruption. But above and beyond this formality we have such a widespread sense of relief that it now seems unthinkable that the Employers could be taken seriously in any attempt to resurrect their main earlier lines of argument.

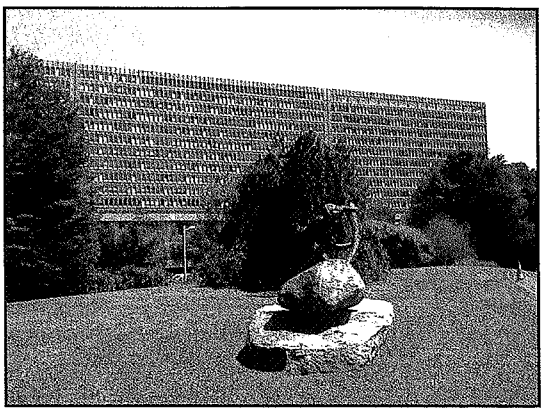
The contribution of Governments to the debate

Prior to the issue of the Joint Statement it had been widely believed that Governments would be key to deciding how the long-running saga would play out, holding, as they did, the balance of voting power on the question of whether or not any reference ought to be made to the ICJ. This deciding role was to some extent taken away from Governments when the Joint Statement emerged, but it would by no means be accurate to say that Governments were thus sidelined from the meeting. Rather they took the opportunity to expound, at some length, on the broad theme of the fundamental importance of the right to strike. In a move that was almost as unexpected as had been the about-turn the Employers had just engaged in, Governments now stood in turn and clearly announced their commitment to the fundamental nature of the right to strike. One after another, Government speakers affirmed the centrality of the right to strike under international law, insisted on the vitality of the right under various national and regional legal systems, firmly located the right within the ILO system, and even directly affirmed that the right to strike is a core component of ILO Convention 87. Workers had asked Governments to come to their aid to protect a fundamental principle but the response was just stunning. Only a handful of Government speakers couched their language in polite diplomatic phrases that affirmed relatively little, but even they did not speak out against the Workers' position. And the great majority of Government speakers gave a stunning endorsement to the right to strike, quite beyond what Workers had hoped to imagine they might deliver. Just a handful of extracts from

the Tripartite Meeting give an insight into how extraordinarily strong – if unexpected - this outpouring of Government support was:

- '*Speaking on behalf of the group of Latin American and Caribbean countries (GRULAC)*, a Government representative of the Bolivarian Republic of Venezuela noted that ... the group understood that the right to strike existed in international law: it was an essential component of freedom of association and the right to organise.
Countries in the region attached considerable importance to the International Covenant on Economic, Social and Cultural Rights and the Additional Protocol of the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador", both of which were legally binding documents that made specific reference to the right to strike. The right of a trade union to freely organise its activities and to formulate its programme of action, set out in Article 3 of Convention No. 87, would be limited if the trade union did not have the right to strike, to be exercised in conformity with the laws of the country' (para 11)
- '*Speaking on behalf of the European Union (EU) and its Member States*, a Government representative of Latvia said that...Convention No. 87 had been supervised by the CEACR, the CAS and the CFA, without persistent objections from governments, but only some disagreement on specific findings. Article 19 of the ILO Constitution contained a minimum standard provision whereby ratified Conventions should not be deemed to affect any law, award, custom or agreement which ensured more favourable conditions for the workers concerned than those provided for in ILO Conventions. The United Nations International Covenant on Economic, Social and Cultural Rights, 1966, in its Article 8(d), protected the right to strike. Some 140 countries had ratified both the Covenant and Convention No. 87. The right to strike was thus a corollary of freedom of association, even though it was not mentioned explicitly in Convention No. 87' (para 13)
- '*A Government representative of the United States* regretted that the CEACR's function had been called into question as it was an essential part of the ILO and had been supported by every United States Administration over the past 60 years. It was vital to address this issue in a way that would strengthen the ILO supervisory system. In the decades since the adoption of Convention No. 87, the CEACR and the CFA had provided observations and recommendations with regard to the right to strike. Working within their mandates through the examination of specific cases they had observed that freedom of association and particularly the right of workers to organise their activities for the purpose of promoting and protecting their interests could not be fully realised without protecting the right to strike. The same logic had prevailed in the United States. Convention No. 87 was meant to protect freedom of association rights of workers and employers, and the right to organise activities and formulate programmes. The National Labor Relations Act in the United States protected workers' rights, and the Supreme Court of the United States deemed strikes to be a protected activity. The CFA had confirmed and applied the relationship between the right to strike and the right to freedom of association in almost 3,000 cases without dissent. The United States concurred that the right to strike was protected under Convention No. 87, even though the right was not explicitly mentioned in the Convention' (para 16)
- The US also ...'lent its full support to the dedicated work of the CEACR and the CFA, which for more than 60 years had provided non-binding observations and recommendations addressing the protection, scope and parameters of the right to strike. The United States also welcomed the opportunity to discuss how countries could promote this right and hoped that interference with ILO supervisory organs would not continue' (para 16.
- "*A Government representative of India* believed that the supervisory system was an integral part of the ILO, and that the ILO Constitution should govern every decision related to the functioning of the Organisation. The International Labour Conference was the supreme forum for deciding the course of action for world of work matters. The right to strike was essential, and should be guided by national laws' (para 19)
- '*A Government representative of Mexico* said that Mexico placed great importance on freedom of association and the right to strike, which were protected under its Constitution since 1917. While the right to strike was not explicitly mentioned in Convention No. 87, it was protected under international law and should therefore be protected under the Convention' (para 22)
- '*Speaking on behalf of the Africa group*, a Government representative of Zimbabwe observed that the dynamics had changed and that the joint statement provided a basis for resolving issues. His group wished to be part of an agreement, in the spirit of tripartism' (para 32)[2].

It must be noted that in almost all cases these Government representatives qualified the above statements with variations on the argument that the right to strike is not an 'absolute' right, by which they were insisting on the possibility that the right might be limited or restricted in certain circumstances. The Government positions set out above must be understood within this context. And yet this, of course, is a position that is completely in accordance with how the right to strike was understood prior to the 2012 action by the



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Employers insist that the key argument remains live but after these staggering developments it is unimaginable that the attack could be resurrected

This article discusses the outcome of events at the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level, 23-25 February 2015

Employers Group. Workers are now – as they were then - content to accept at least some limitations to be set around the right to strike, so long as the fundamental principle is affirmed in practice. Such a position is well established in the decisions of the CEACR and other ILO bodies.

The mandate of the CEACR

The question of the mandate of the CEACR and a whole bunch of reform proposals around ILO standards and supervisory processes are given a renewed urgency by the commitment to address them set out in the Joint Statement. But although these demands are largely emanating from the Employer benches they seem eminently more manageable than did the key pillars of disagreement that were in play until the February meeting. There is also an explicit reference in the Joint Statement to the question of the mandate of the CEACR, in which the parties state that: *'the Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognisant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognised, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organisations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions'*[3]. While Employers clearly intend to pursue a reform agenda around the CEACR the language they have agreed to in this document seems largely to chime with the position that Workers have been arguing since 2012, and so here too real progress appears to have been made.

It is vital that Workers remain alert to the direction of future negotiations: the text of the agreed Joint Statement makes it clear that Employers intend to push for further change within the ILO system

Where are we now?

On the surface level the situation is quite remarkable, there has been an almost total climb down from the Employer position, and the status quo is returned to something like it was prior to the Employer bombshell dropped in June 2012. It may even be that Workers are in a rather stronger position than they were then. Who, after all, could back then have imagined that so many Governments would queue up like that to issue statements in support of the fundamental nature of the right to strike? But some closer analysis flags up that there are, of course, one or two potential problems ahead. The first observation worth looking at is that the Joint Statement studiously uses

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the language of 'industrial action' rather than 'strikes'. It is an odd position, and in some ways a reversal of their earlier Cold War position, when Employers supported the right to strike as a civil and political right to be wielded against repressive States, but shied away from its social and economic rights reading, which would site it as a weapon to be wielded in economic battles against employers... But clearly it is the Employer intention to place some limit on the 'political' element of strike action, and we must be alert to how this might unfold, and conscious of the fact that we are not privy to exactly where Employers are going with this line of argument. Secondly, the battle around the demarcation of the role and procedures of the CEACR is by no means over. The Employers clearly mean to continue with an agenda in this area, though the outpouring of support that both the Experts and the hitherto established 'jurisprudence' of the ILO has received from Governments, will no doubt weaken the Employer hand here too. But, weak or not, its an area we must remain alert to. Perhaps the most uncertain position is that around some aspects of the ILO system that have so far escaped the main focus of Employer dissatisfaction, notably the Representation and Complaints systems under Articles 24 and 26 of the ILO Constitution, and the role of the CFA. There are other areas in which problems may yet emerge, but for the moment these three sites of possible future conflict are key for trade unionists to watch.

Although it is to some extent depressing to realise that this essentially is only a defence of the pre-2012 status quo we can at least take some comfort in the fact that Workers have, for now, won a key battle. And we should recognise that we have, in addition, secured some extraordinary statements of support for the protected status of the right to strike. We have also discovered that there are reserves of support among the Governments of the world that we might not previously have recognised. And so on balance it is appropriate to see the outcome of this meeting as essentially positive and as a step forward from the Workers' perspective. Summing up the current situation, Sharan Burrow, ITUC General Secretary, said, 'having created the crisis, employer groups and some governments were refusing to allow the issue to be taken to the International Court of Justice even though the ILO Constitution says it should be. We've now managed to negotiate a solution which protects the fundamental right of workers to take strike action, and allows the ILO to resume fully its work to supervise how governments respect their international labour standards obligations'.

1 Joint Statement of Workers and Employers' Groups (ILO document - TMFAPROC/2015/2)
2 Draft Report (ILO document - TMFAPROC/2015/3)
3 Joint Statement of Workers and Employers' Groups (ILO document - TMFAPROC/2015/2)