

International Labour Law and Domestic Law



A training manual for judges,
lawyers and legal educators

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lawyers and
legal educators**

Edited by Xavier Beaudonnet

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Preface

Some 90 years after the foundation of the International Labour Organization (ILO), international labour standards continue to be the ILO's principal instrument. Together with a tripartite approach, these standards represent the principal comparative advantage of the ILO's commitment to social justice and decent work for all.

The ILO's standard-setting activity is not static, however. On the contrary, it develops over time in order to remain relevant, particularly in the current context, which is so different from the climate that prevailed when the ILO was in its infancy.

The International Training Centre of the ILO plays a key role in promoting and reinforcing the impact of international labour law, and helps to make it a living instrument. Its training activities are essential for developing skills at domestic level which allow ILO standards to be enforced and applied more stringently. This involves building the capacities not only of the traditional tripartite constituents, but also of judges and legal practitioners.

This Manual is the result of practical cooperation between the ILO's International Labour Standards Department and the International Training Centre, which firmly believe that labour tribunals, the lawyers who appear before them, the tutors responsible for training future lawyers and the legal advisers to employers' and workers' organizations are crucial to the effective, in-depth application of international labour law and to the achievement of the objective of decent work.

Nowadays these professionals are constantly and systematically in contact with systems other than those in which they practice. What is more, technological resources and technical capacity make it possible to establish lasting institutional links and to foster exchanges of knowledge among members of the legal world. Besides the traditional domestic sources on which these experts rely, they may henceforth take inspiration and indeed use the instruments made available by the international community.

Depending on the country concerned, ILO Conventions and Recommendations and the work of the ILO's supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations or the Freedom of Association Committee, may therefore represent a direct source of law as well as an important source of guidance and inspiration in the application of domestic labour law.

ILO standards can also be regarded as forming part of the phenomenon of the globalization of the law, but with a clear understanding that rather than replacing domestic legal systems, the purpose of international labour law is on the contrary to reinforce them.

We hope this Manual will be adopted and used by a substantial number of national training institutions, judges and lawyers, thereby contributing to the expansion of new generations of legal practitioners working in the field of labour law who are better equipped to exercise their profession at the service of social justice.

François Eyraud
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Director of the
International Training Centre of the ILO

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Director of the
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¹ Xavier Beaudonnet is currently working as STANDARDS specialist at the ILO Subregional Office in Lima.

Introduction

While international labour law was traditionally regarded as the exclusive domain of the legislature and the executive, which were responsible for developing its provisions through domestic legislation and regulations, an increasing number of examples from the jurisprudence of very diverse countries clearly shows that employment-related international instruments may also prove to be very useful to courts in resolving disputes. The application of international labour law by domestic courts is thus crucial to its effective implementation and enforcement. The international labour standards (ILS) adopted by the International Labour Organization and the work of the international supervisory bodies which clarify their meaning and scope can therefore be particularly relevant tools for interpreting or completing domestic labour law in order to resolve certain disputes.

In a large majority of countries, however, the training of labour law judges and legal practitioners still attaches very little importance to examining the content of international labour law, or to its possible use in domestic law. In particular, the study of the comments and decisions of the bodies that supervise the application of ILS is generally completely overlooked.

In order to fill this gap, in 1999 the International Training Centre of the ILO (ITCILO) in Turin launched a training programme in international labour law for judges, lawyers and legal educators in order to enable legal practitioners to implement international sources of labour law in domestic law. Many training initiatives have been organized both at global and at domestic level since that time. These have not only contributed towards greater acknowledgement by the courts of international labour law², but have also made it possible to bring together substantial legal documentation and a body of practical considerations and experience on the judicial use of international labour law.

This Manual seeks to place this training on a systematic footing and thereby promote broader consideration of international labour law in the application and teaching of domestic labour law.

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² See the independent impact study carried out in 2005 (ITC-ILO: *Evaluation d'impact des cours sur les normes internationales du travail pour juges, juristes et professeurs de droit (1999-2003)*, Turin, August 2005).

Overview

I. Objectives and target readers

This Manual has two objectives:

- to provide a *reference tool* to guide labour law judges and lawyers who wish to explore opportunities for using international labour law in domestic law;
- to provide a *training tool* that will allow professors and trainers to focus their training activities on the use of international labour law in domestic law on the one hand, and to ensure better coverage of the content of international labour law in their domestic labour law courses on the other.

The Manual is therefore aimed at judges, lawyers working in the field of labour law, legal practitioners acting for employers' and workers' organizations and labour law professors and trainers.

II. Structure and content

The Manual consists of a preliminary part and three principal parts which follow chronologically the structure of the ITCILO's seminars for judges, legal practitioners and legal educators. The Manual concludes with a synthesis workshop to complete the training programme on the judicial use of international labour law.

Preliminary part

Background to the study of the judicial use of international labour law

The dual goal of this part is to highlight the aspects that must be mastered before participants can begin to study the use of international labour law by domestic courts, and to define the purpose of the work. First, the factors leading towards a reciprocal narrowing of the gap between international human rights law on the one hand and domestic judicial authorities on the other are examined. The purpose of the Manual is then outlined in order to emphasize that the study of the judicial use of international labour law seeks neither to set aside domestic labour law, nor to call into question the importance of legislative action as a means of implementing and incorporating international labour law into domestic law. This part concludes with an overview of the ILO, the principal institution responsible for creating international legal instruments in the field of labour law.

Part 1

When and how domestic courts can use international labour law

Based on the study of many examples from jurisprudence, the extent to which the use of international labour law by courts is legally possible in both monist and dualist systems is analysed. A distinction is therefore first drawn between the different types of judicial use of international labour law according to the role played by such law in resolving disputes. In each case the legal conditions allowing it to be used in this way are examined. The legal factors generally considered to prevent domestic courts from relying on international labour law are then studied. For each factor, the Manual assesses the scale of the obstacles hindering the judicial use of international labour law and how such obstacles may be overcome.

Part 2

Sources of international labour law available to judges and legal practitioners

Part 2 sets out the characteristics of the various sources of international labour law by highlighting how useful they may be with regard to legal action. Each source is illustrated by examples of domestic court decisions.

The Manual focuses largely on ILO sources of law, but also describes United Nations sources relevant to labour issues. Finally, considerable stress is laid on presenting the work of the international supervisory bodies, which are valuable sources for domestic judges and legal practitioners in that their comments and decisions enable the meaning and scope of the provisions of international instruments to be clarified.

Part 3

The content of international labour standards on specific subjects and their interest for judges and legal practitioners

A great many international labour standards (ILS) have been adopted since the ILO was founded in 1919, which means that most labour issues are thus covered by international law. An examination of the content of ILS as a whole is therefore beyond the scope of this Manual. In order to illustrate the usefulness of international labour law in resolving disputes at domestic level, three themes of particular interest to labour law judges have been selected for the first edition of this work. These are freedom of association and collective bargaining, equality of opportunity and treatment in employment and occupation, and termination of employment. For each theme, great importance is attached to the decisions and comments of the ILO supervisory bodies that enable the meaning and scope of the relevant ILS to be specified. Each chapter is also illustrated by examples from jurisprudence on the use of the international instruments examined.

III. Teaching tools and suggestions accompanying each part or chapter

Various teaching tools and suggestions are proposed for each part or chapter in order to facilitate the use of the Manual in training activities:

- definition of teaching objectives;
- training methods suggested and time required;
- case studies and role plays to complete the presentations;
- resources (bibliographic references, internet links and documents addressing the themes covered by the part or chapter).

IV. Compendium of court decisions accompanying the Manual

The majority of the references from the jurisprudence cited in the Manual are brought together in a Compendium of Domestic Court Decisions relying on international law. This Compendium, which includes both a summary and the full version of each decision, is provided on a CD issued with the Manual.

Preliminary part

Background to the study of the judicial use of international labour law

Introduction

As explained at the very beginning of this work, the purpose of this Manual is to provide judges and legal practitioners with tools for analysing and reflecting on the application of international labour law in domestic law, with particular emphasis on opportunities for using international law to resolve employment disputes at the judicial level.

As has been shown, the approach adopted differs from a traditional approach in which international law is conceived to be restricted to governing relations between States or, at most, to be directed exclusively at the governments and parliaments responsible for transposing its content into domestic law.

Since the emphasis on the implementation of international labour law by the courts is therefore novel to some extent, several important issues must be presented and examined before the judicial use of international labour law can be studied in depth.

Firstly, the factors currently helping to narrow the gap between the domestic judicial authorities on the one hand and international human rights law on the other must be understood. Secondly, the importance this Manual attaches to the judicial use of international labour law also requires certain clarifications to avoid confusion regarding the place attributed to domestic labour law and the importance of legislative action as a way of implementing international labour law at domestic level. Finally, before these instruments and their application in domestic law can be examined, an overview must be provided of the International Labour Organization (ILO), the principal institution responsible for adopting employment-related international legal instruments.

Chapter 1

International labour law and domestic courts

I. Domestic courts and international human rights law, international human rights law and domestic courts, the factors for a closer relationship

This Manual should be seen against a backdrop of an increasing tendency for many countries' courts to make use of international human rights law in general and international labour law in particular¹. It will therefore be useful to focus briefly on the factors allowing this development to be understood², since this largely explains the existence of this work.

- The content of international law evolved substantially with the creation of the ILO in 1919 and the United Nations in 1945³. This law increasingly governs relations between individuals, which were previously an exclusive monopoly of domestic law. International law is therefore becoming more useful in resolving disputes at domestic level.
- Domestic legal systems, meanwhile, are more and more receptive to international human rights law. Many recent constitutions thus attribute constitutional status to the international treaties ratified in this area⁴. In other cases constitutions state that domestic law must be applied and interpreted in accordance with these very same treaties. Such a position in the domestic legal system makes the judicial use of these instruments easier, and means that judges and legal practitioners must be familiar with them.
- There is also a growing awareness, conveyed *inter alia* by the work of the international supervisory bodies⁵, that ratified international human rights treaties are directed to the State as a whole, including the judiciary. The courts' action is therefore likely to render the State internationally liable, while at the same time the judiciary can contribute to greater

¹ The countries where such use has been identified during our non-exhaustive research are the following: Argentina, Australia, Azerbaijan, Belgium, Benin, Botswana, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Croatia, Dominican Republic, Ethiopia, Estonia, France, Fiji, Germany, Great Britain, Guatemala, Honduras, India, Israel, Italy, Ivory Coast, Japan, Kenya, Lesotho, Lithuania, Madagascar, Malawi, Mali, Morocco, Mexico, Niger, Nigeria, Norway, New Zealand, Netherlands, Paraguay, Peru, Philippines, Romania, Russian Federation, Rwanda, Senegal, Slovenia, South Africa, Spain, Special Administrative Region of Hong-Kong, Switzerland, Taiwan, Trinidad and Tobago, Tunisia, Ukraine, United States, Uruguay, Venezuela, Zambia, Zimbabwe.

² See X. Beaudonnet: 'L'utilisation des sources universelles du droit international du travail par les juridictions internes', in *Bulletin de droit comparé du travail et de la sécurité sociale*, COMPTRASEC, Bordeaux, 2005. For a Spanish version of this article, see X. Beaudonnet: 'La utilización de las fuentes universales del derecho internacional del trabajo por los tribunales nacionales', in *Revista Derecho del Trabajo*, La Ley, Buenos Aires, July 2006.

³ See A. Cassese: *International Law*, Oxford University Press, Oxford, 2005, pp. 376 et seq.

⁴ See V. S. Vereshchetin: 'New Constitutions and the old problem of the relationship between international law and national law', in *European Journal of International Law*, vol. 7, No. 1, 1996. For certain Latin American countries, see O. Ermida Uriarte: 'La Declaración sociolaboral del Mercosur y su eficacia jurídica', in *Eficacia jurídica de la Declaración sociolaboral del Mercosur*, ILO, Buenos Aires, 2002 (available in Spanish only).

⁵ See General Comment No. 3 (1990) of the Committee on Economic, Social and Cultural Rights on 'The nature of States parties obligations' (UN Document E/1991/23) and General Comment No. 9 (1998) on the 'Domestic application of the Covenant' (UN Document E/C.12/1998/24).

respect for international law. Such development is also fostered by the strengthening of the courts' role and independence in the context of the development of the rule of law underway in many countries. Members of the judiciary themselves have made a substantial contribution to this new understanding of the links between international law and the judiciary through major international judicial colloquia⁶.

- The role of the domestic courts in the effective application of international law is all the more important since ratified international human rights treaties, although legally binding, do not generally involve enforceable sanctions at international level. It is therefore essential for the domestic courts to be able to use their power to impose sanctions at domestic level in order to ensure effective respect for these rules.
- However, the most frequent judicial use of international human rights law does not arise solely out of a better understanding of the duty of courts to contribute towards respect for the State's international obligations. Growing numbers of domestic judges and legal practitioners are also becoming aware that international law may be a useful resource for making it easier to resolve the disputes laid before them. Many therefore understand that studying the comments and decisions of the international supervisory bodies may be a significant aid in interpreting domestic law and a source of inspiration.
- In this respect the phenomenon of economic globalisation will probably lead the courts to take greater account of international labour law. In legal terms the fact that economic and consequently certain employment relationships are becoming internationalized does not influence the domestic courts' capacity to refer to the international instruments examined in this Manual to resolve employment disputes. The various ILO and United Nations standards can in fact be applied to employment relationships as a whole, whether they have an international dimension or not⁷. In practice, however, the development of international trade highlights the similarity of the problems and issues raised by employment throughout the world and helps to increase domestic judges' interest in legal solutions contributed by the international community on this subject. In addition, the increased competition generated by trade globalisation is sometimes perceived to require the protection afforded to workers by the domestic laws to be rendered more flexible or even to be dismantled. In this context, some courts may consider it useful to rely on international labour law to reinforce the legitimacy of regulating employment relationships and to stress that the phenomenon of globalisation is also expressed by the international recognition of human rights at work.
- Finally, the various ideas outlined here circulate all the more freely now that advances in technology, transport and language learning have allowed domestic judges and legal practitioners to access sources of international law much more easily, and also to develop intellectual and legal exchanges with their colleagues throughout the world.

⁶ See the 1988 and 1998 Bangalore Principles or the 2003 Arusha Declaration.

⁷ It is therefore important not to confuse the international labour law examined in this Manual with private international labour law, which consists of determining the rules and regulations applicable to employment relationships involving an international dimension.

II. Some clarifications on relationships between international and domestic labour law and on the importance of legislative action in implementing international labour law in domestic law

- The importance attributed to the judicial use of international labour law is clearly not intended to suggest that judges and legal practitioners should set aside their domestic law in favour of international labour law alone. This would first of all not be feasible, since domestic labour law is by nature more specific and detailed than international instruments. Furthermore and above all, this is not the aim of international labour law⁸, the objective of which is on the contrary to help to enhance domestic laws by establishing general principles and guidelines that help to develop them. This Manual therefore seeks to shed light on the complementarity between sources of domestic and international labour law.
- The Manual does not seek to advocate either a type of incorporation of international law into domestic law or a model for the judicial use of international law at domestic level. From the perspective of international law in general and the ILO in particular, each State is free to choose the ways to implement in law and in practice the international obligations it has agreed to.
- Neither does the stress placed on the judicial use of international labour law seek to question the great relevance the ILO has always attached to the incorporation into legislation of provisions of international labour conventions ratified by Member States⁹. This incorporation is the principal legal guarantee that conventions will be duly implemented by enabling contradictory domestic provisions to be revoked and by raising the profile and making the content of conventions more accessible to citizens. In addition, for the States parties the legislative and regulatory development of the content of ILO conventions is a necessity and an obligation in relation to many provisions of conventions setting out general principles or requiring an action policy and programmes to be implemented. This Manual therefore starts from the principle that, in effectively implementing international labour standards, there is a necessary complementarity between legislative and regulatory action on the one hand and the action of the courts on the other.
- Finally, before studying international labour law and its possible use by courts, it is probably superfluous to remind judges and legal practitioners that any application of a legal provision presupposes that it will be analysed in-depth. Such rigour is even more important in relation to sources of law that can be classified as 'new', in that they are rarely subjected to detailed study in traditional university courses.

⁸ See N. Valticos and G. Von Potobsky, *International Labour Law*, Second (revised) edition, Kluwer Law and Taxation Publishers, Deventer-Boston, 1995, pp. 20 et seq.

⁹ See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 47th Session, Geneva, 1963, Report III(IV), para. 31. For a comment on this position by the Committee of Experts, see G. Von Potobsky, 'Eficacia jurídica de los convenios de la ILO en el plano nacional', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 2004, pp. 287-305 (available in Spanish only).

Chapter 2

The International Labour Organization

The International Labour Organization is a specialized United Nations agency that seeks to promote social justice and human rights at work. It is the world's only multilateral institution with a tripartite structure representing governments, employers and workers.

The ILO's principal function is to draw up international labour standards in the form of conventions and recommendations establishing the minimum conditions of protection at work, and to ensure their implementation¹⁰. The Organization works with its 183 Member States to ensure that international labour standards are widely respected, both in law and in practice. The ILO's standard-setting activity is reinforced by important technical cooperation programmes whose general objective is to implement the Decent Work Agenda. Among a broad range of initiatives, the ILO also provides technical assistance to Member States, disseminates best practices, runs training programmes and communication campaigns and publishes many works and documents.

The ILO's various fields of action are currently coordinated around four strategic objectives:

- to promote and implement standards, principles and fundamental rights at work;
- to increase the opportunities for women and men to obtain decent work and income;
- to increase the extent and effectiveness of social protection for all;
- to reinforce tripartism and social dialogue.

The international labour standards covered in this Manual cannot be fully understood, however, without first outlining the origin and structure of the ILO¹¹.

I. Origin

The ILO was founded in 1919 under the Treaty of Versailles, which brought an end to the First World War¹². The creation of the Organization formed an integral part of the line of thinking according to which universal and lasting peace could be established only if it was based on social justice.

The founding of the ILO was the international community's response to a number of security, humanitarian, political and economic considerations. According to the preamble to its Constitution, the High Contracting Parties were 'moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world...'

Since workers were heavily exploited in the industrialized economies of the time, the parties to the Treaty of Versailles appreciated the importance of social justice in securing peace. In addition, in light of the increasing interdependence between national economies, the major trading nations understood that it was in their interests to co-operate to ensure that workers did not have to endure inhumane working conditions and that they could avoid certain negative forms of international competition. All these ideas are set out in the preamble to the ILO Constitution, which begins as follows:

¹⁰ For a presentation of international labour standards, see below, *Part 2, Chapter 1*.

¹¹ For further details on the ILO, please refer to the organization's website (www.ilo.org).

¹² The Constitution of the ILO is Part of the XIII Treaty of Versailles.

'Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required;

Whereas also 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...'

II. Structure

The ILO, whose headquarters are in Geneva (Switzerland), has three main bodies: a General Assembly – the International Labour Conference; an executive body – the Governing Body; and a permanent secretariat – the International Labour Office. The first two are composed of representatives of governments, employers and workers.

The International Labour Conference

The International Labour Conference meets every year in June in Geneva. Each Member State is represented by two government delegates, an employer delegate and a worker delegate, assisted by technical advisers where necessary. The employer and worker delegates are appointed in agreement with the most representative national employers' and workers' organizations. Each delegate has the same rights and total freedom of voting, irrespective of the vote cast by the other members of their national delegation.

The Conference has several essential tasks: it adopts international labour standards and plays an important role in supervising their implementation¹³; it is a forum in which social and labour issues of global importance can be freely discussed; it adopts resolutions that form guiding principles for the organization's general policy and activities; it adopts the ILO's programme and votes on its budget; it elects the members of the Governing Body; it decides whether to accept new Member States (unless it is a case of automatic acceptance in the event of a formal application from United Nations Member States).

The Governing Body

The Governing Body of the ILO meets three times a year in March, June and November in Geneva. It is composed of 56 full members, 28 representing governments, 14 representing employers and 14 representing workers. Ten of the government seats are permanently held by the most industrially important states¹⁴. The other government members are elected by the government delegates to the Conference every three years (excluding the above-mentioned most industrially important countries), taking geographical distribution into account. Employers' and workers' representatives are elected by their respective delegates to the conference and are chosen according to their capacity to represent the employers and workers of the Organization as a whole.

The Governing Body takes decisions on ILO policy, decides the agenda of the Conference, establishes the programme and the budget, which it then submits to the Conference for adoption, elects the Director-General of the International Labour Office and runs the Office's

¹³ See below, *Part 2, Chapters 1 and 2*.

¹⁴ These are currently Germany, Brazil, China, the United States, the Russian Federation, France, India, Italy, Japan and the United Kingdom.

activities. It also plays an important role in supervising the implementation of international labour standards¹⁵.

The International Labour Office

The International Labour Office in Geneva is the permanent secretariat of the International Labour Organization. It is the focal point for the ILO's overall activities, which it prepares under the scrutiny of the Governing Body and under the leadership of a Director-General elected by the Governing Body for a renewable five-year term. The Office prepares the documents and reports forming the essential basic material for ILO conferences and meetings and manages technical cooperation programmes throughout the world in support in particular of the Organization's standard-setting activities. It also has a research and documentation centre that publishes a range of specialist publications and journals addressing social and employment-related issues.

The structure of the Office also includes a number of field offices around the world, through which the ILO maintains direct contacts with governments, workers and employers.

¹⁵ See below, *Part 2, Chapter 1*.

Resources

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Documents

■ ILO

Constitution of the ILO, 1919

■ United Nations

General Comment No. 3 (1990) of the Committee on Economic, Social and Cultural Rights on 'The nature of the obligations of the States parties'

General Comment No. 9 (1998) of the Commission on Economic, Social and Cultural Rights on the 'Domestic Application of the Covenant'

■ Other

Bangalore Principles on the Domestic Application of International Human Rights Norms, 1988
Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level, 2003

Internet Links

■ ILO

ILO web site: www.ilo.org

Alphabetical list of ILO Member States:

<http://www.ilo.org/public/english/standards/relm/country.htm>

International Labour Conference meetings and documents:

http://www.ilo.org/global/What_we_do/Officialmeetings/ilc/lang—en/index.htm

Governing Body meetings and documents:

http://www.ilo.org/global/What_we_do/Officialmeetings/gb/index.htm

List of departments and offices of the International Labour Office:

http://www.ilo.org/global/Departments___Offices/lang—en/index.htm

Part 1

When and how domestic courts can use international labour law¹

Introduction

Before focusing on the various sources of international labour law and on their content, consideration must first be given to when and how domestic courts can use international law to resolve a dispute². This issue must be examined first if full advantage is to be taken of subsequent parts of the Manual.

This part is naturally not intended to provide a general answer to this question, since each domestic legal system may take a different approach to relations between international law and domestic law, and may give the judiciary varying degrees of power.

Using examples drawn from different countries that will not be assumed to be transferable to other legal systems, the purpose of this part is primarily to highlight the variety of situations and techniques that allow many countries' courts to refer to international labour law before considering and appraising a number of real or presumed difficulties that may prevent or limit the judicial use of such source of law.

Before embarking on these developments, it should first be remembered that opportunities for making judicial use of international law depend in part on the national system for incorporating international law into domestic law, a distinction generally being drawn in this respect between 'monist' countries and 'dualist' countries.

¹ See X. Beaudonnet: 'L'utilisation des sources universelles du droit international du travail par les juridictions internes', in *Bulletin de droit comparé du travail et de la sécurité sociale*, COMPTRASEC, Bordeaux, 2005; X. Beaudonnet: 'La utilización de las fuentes universales del derecho internacional del trabajo por los tribunales nacionales', in *Revista Derecho del trabajo*, La Ley, Buenos Aires, July 2006; C. Thomas, M. Oelz and X. Beaudonnet: 'The use of international labour law in domestic courts: Theory, recent jurisprudence and practical implications', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 2004; R. Layton: 'When and how can domestic judges and lawyers use international law in dualist systems', Article written in 2005 for the ITC-ILO in Turin (available in English only); G. W. Von Potobsky: 'Eficacia jurídica de los convenios de la OIT en el plano nacional', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos, op. cit.* (available in Spanish only); M. Kirby: 'The road from Bangalore: The first ten years of the Bangalore principles on the domestic application of international human rights norms', speech given in 1998.

² It should be noted that this part mainly concerns the use by domestic courts of 'codified' sources of international labour law. The issue of the judicial use of customary international labour law will on the other hand only be referred to briefly because jurisprudence and publications on this subject are scarce. For an article on customary international labour law, see V. Marleau: 'Réflexion sur l'idée d'un droit international coutumier du travail', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos, op. cit.* (available in French only)

Broadly speaking, countries in which domestic law and international law are considered to belong to the same legal sphere, and where ratified treaties³ therefore form an integral part of domestic law, are classified as monist⁴.

Countries in which domestic law and international law are considered to be two distinct and separate spheres are by contrast classified as dualist, the ratification of international treaties not being sufficient to ensure their incorporation into domestic law. The applicability at domestic level of provisions of ratified treaties then depends on their transposition into the country's legal system by means of a statute subsequent to ratification⁵. According to this approach, it is theoretically not possible for the courts and tribunals of dualist countries to resolve a dispute directly on the basis of provisions in ratified international treaties where the latter do not form part of domestic law⁶.

As will be seen, this latter aspect (the use of ratified treaties to resolve a dispute directly) is the only general difference between monist and dualist countries in terms of the opportunity for domestic courts to use international law.

It is important to stress that monist and dualist systems can also find common ground in the position of international law in domestic law. It will be noted, for example, that the constitutions of several countries⁷, whether monist or dualist, state that ratified international treaties shall be used as a guide to interpret domestic law.

It should also be pointed out that certain developments or practices help to mitigate the distinction between the two systems. Firstly, some countries can be classified as mixed⁸, since they draw specifically on aspects of both systems of incorporation. This includes South Africa, a traditionally dualist country whose recent Constitution states that a self-executing provision of a treaty that has been approved by Parliament forms part of the domestic legal system, unless it is inconsistent with the Constitution or an Act of Parliament⁹.

Moreover, the legislative policy of certain countries which are formally dualist leads in practice to results resembling or identical to monism. This includes Belize, a dualist country with an Anglo-Saxon tradition which used a statute to fully incorporate into domestic law the content of all the ILO conventions ratified by the country¹⁰.

³ In many countries, ratification of a treaty must be accompanied by its publication in the official gazette before the international instrument becomes part of the domestic legal system.

⁴ Without seeking to be exhaustive, the European countries with a Roman-Germanic tradition, Russia and the Eastern European countries, the French-speaking African countries and the countries of Latin America fall within the monist system. In addition, Japan, Namibia and the Philippines are also classified as monist.

⁵ Most countries that follow the English legal tradition (with the exception of Namibia) and the Scandinavian countries fall within the dualist system. China also seems to adopt a dualist approach. Finally, as will be stressed, certain countries such as South Africa exhibit characteristics particular to both systems.

⁶ This is not the case with customary international law, which may be applied directly in dualist countries, provided it does not come into open conflict with a provision of domestic legislation.

⁷ Cf. in particular the Constitutions of South Africa, Argentina, Azerbaijan, Colombia, Spain, Ethiopia, Fiji, Peru or Romania. See also along the same lines, the Labour Codes of Albania, Morocco and Lesotho.

⁸ The cases of Austria and the United States, both of which draw on elements of the dualist and monist systems, will also be cited in this module.

⁹ See Article 231(4) of the Constitution of South Africa.

¹⁰ Along the same lines, see in the United Kingdom the full incorporation into domestic law of the European Convention on Human Rights.

Indonesia is another case in point. In this country where neither the Constitution nor legislation expressly indicate the status of ratified treaties in relation to domestic law¹¹, Parliament usually confirms the President of the Republic's ratification of ILO conventions by means of a statute that reproduces the content of the ratified instrument in full. Thus even if in formal terms the international conventions ratified have not been considered to form a direct part of Indonesian domestic law, from the substantive point of view this does not prevent them from being applied directly, since the full content of conventions has been incorporated verbatim into domestic law.

These two examples show that the way ratified treaties are incorporated into domestic law may, to a greater or lesser extent, make it easier for the courts and tribunals of dualist countries to refer to international law, particularly in order to interpret domestic law in accordance with the ratified convention. It will be noted in this respect that ratified treaties may be incorporated in many different ways¹² in dualist countries, as shown below.

**Dualist countries:
different ways of incorporating ratified treaties into domestic law**

- Full incorporation by means of a statute that merely reproduces the text of the treaty in its entirety to transpose it into domestic law.
- Adoption of a statute stating in its preamble or at the beginning of a section that its purpose is to incorporate the provisions of a ratified treaty into domestic law.
- Implicit incorporation of all or part of a treaty by means of a statute based closely on the content of the international instrument.
- Incorporation by means of legislative provisions giving the courts the power to implement the content of a treaty.
- Monist countries also exhibit differences between them which essentially concern the place attributed to ratified treaties in the hierarchy of norms, as shown below.

¹¹ The Indonesian legal system therefore does not expressly indicate whether the country falls within the monist or the dualist system, a silence that raises the question of which system Indonesia belongs to.

¹² These different forms of incorporation may coexist within the same country.

**Monist countries:
different status attributed to ratified treaties in the hierarchy of norms**

- Some monist countries give all ratified treaties a value equal to that of ordinary laws¹³.
- While giving ratified treaties the value of ordinary law, some countries give constitutional status to fundamental human rights treaties¹⁴.
- Many monist countries give supra-legal but infra-constitutional value to ratified treaties, which prevail over contradictory ordinary laws but which are required to comply with the national Constitution¹⁵.
- While giving supra-legal value to ratified treaties, some countries specifically or implicitly give constitutional status to all or part of ratified fundamental human rights treaties¹⁶.
- Finally, under certain conditions some countries attribute supra-constitutional value to ratified international treaties¹⁷.

Such a place in the hierarchy of norms usually arises out of specific provisions in national Constitutions but also, where written laws are silent or imprecise, sometimes out of the jurisprudence of supreme or constitutional courts¹⁸.

¹³ See Ukraine or the Philippines.

¹⁴ See Panama, Colombia or Brazil.

¹⁵ This includes France and many French-speaking African countries, even if the meaning to be given to constitutional provisions that recognize the supremacy of ratified treaties over national legislation is sometimes debatable.

¹⁶ See Argentina, for example.

¹⁷ See the Netherlands, for example.

¹⁸ See the cases of Argentina before the 1994 constitutional reform, and Mexico, Italy, Belgium or Luxembourg, for example.

Chapter 1

Different types of judicial use of international labour law according to the role domestic courts attribute to international law¹⁹

An examination of a number of domestic court judgments that have used international law shows that the role played by international sources in resolving a dispute can vary considerably from one case to another. In this respect domestic courts can be considered to use international law in the following four ways:

- I. to resolve a dispute directly;
- II. to interpret provisions of domestic law;
- III. as a source of inspiration in recognizing a jurisprudential principle;
- IV. to strengthen a decision based on domestic law.

The four types of use presented below are not meant to be absolutely precise, since the boundaries between certain court decisions can be difficult to draw. In view of this Manual's pedagogical objectives, however, we believe this classification will help to make it easier to highlight the different roles international labour law may have to play in domestic proceedings.

I. The use of international labour law to resolve a dispute directly

In this case the domestic courts apply an international provision whose content allows the dispute to be resolved directly without necessitating *a priori* the use of other additional sources of law. The courts therefore use the international provision exactly as they would use an article of a domestic statute, international law being the principal basis for resolving the dispute.

I.A. Different situations involving the direct resolution of a dispute on the basis of international labour law

International labour law provisions can be used to resolve a dispute directly in three types of situation: 1) to fill a gap in domestic law; 2) to set aside a less favourable domestic provision; and 3) to invalidate a domestic provision contrary to the provisions of a ratified treaty.

I.A.1. To fill a gap in domestic law

The use of international labour law provisions to resolve a dispute directly was first noted in situations where, in the absence of specific provisions in domestic law enabling the case to be resolved, the courts referred directly to the content of ratified international instruments to remedy the deficiency.

¹⁹ See X. Beaudonnet: 'L'utilisation des sources universelles du droit international du travail par les juridictions internes', *op. cit.* (available in French only).

Country: Italy

AMSA v. Miglio, Milan Court of First Instance, 28 March 1990

Faced with a lack of specific provisions in domestic legislation making it possible to establish whether overtime worked on a regular basis should be taken into account in calculating the amount of wages awarded during paid holidays, the Court of First Instance referred to the ILO Holidays with Pay Convention (No. 132)²⁰, ratified by Italy. Article 7(1) of the Convention states that the remuneration received during the period of the holiday shall not be lower than the normal or average remuneration received by the worker. On this ground the court ruled that overtime should be included in the calculation, provided it was worked on a regular basis.

I.A.2. To set aside a provision of domestic law less favourable to workers

In a second series of situations, the content of international provisions is used to achieve a solution which is more favourable to workers than would arise from the application of domestic law. This possibility, in accordance with the favourability principle, does not mean that the court invalidates the domestic provision. It is sufficient to set aside its application by opting to implement the source of law providing the most protection. This is important since it allows courts that do not have jurisdiction over constitutional issues to make use of international law in these circumstances.

Country: France

Castanié v. Dame veuve Hurtado, Cour de cassation, Appeals Division, Req. 27 February 1934

In relation to a dispute concerning the right of a foreign worker involved in an industrial accident to obtain compensation equal to that of a French worker, the *Cour de cassation* did not hesitate to set aside the 1898 act on work-injury provisions to apply directly Article 1(1) of the ILO Equality of Treatment (Accident Compensation) Convention (No. 19)²¹. This Article stipulates that each State that ratifies the Convention undertakes to grant to the nationals of a country that has ratified it who suffer personal injury due to industrial accidents the same treatment as it grants to its own nationals.

Country: Brazil

To similar effect in connection with holidays with pay, the Brazilian labour courts give priority to the direct application of Articles 5 and 11 of ILO Convention No. 132²² over the domestic legislation in order to grant holiday pay to workers whose contract concludes within less than one year²³.

I.A.3. To invalidate a provision of domestic law

In monist countries that attribute higher value to international treaties than to domestic legislation, the competent courts can directly base the invalidity or unconstitutionality of a statute or regulation on the violation of a ratified international convention. In this case the failure to comply with international law may either be combined with other grounds for unconstitutionality, or may be the sole source for invalidating the domestic provision.

²⁰ Holidays with Pay Convention, 1970 (No. 132) (revised).

²¹ Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

²² Holidays with Pay Convention (Revised), 1970 (No. 132).

²³ See, for example, *Lacir Vicente Nunes v. Sandoval Alves da Rocha and others*, Regional Labour Tribunal, 7 May 2003, TRT-RO-3951/03.

Country: Costa Rica

Antonio Blanco Rodríguez and others v. the President of the Republic, the Minister for Government and Policy, the Institute for Agrarian Development and the National Commission for Indigenous Affairs, Supreme Court of Justice, Constitutional Division, 11 August 1999, Res. No. 06229-aa, Exp. No. 96-007361-007-CO-C

The Supreme Court of Costa Rica invalidated a decree reducing the size of an indigenous reservation on the sole ground that it violated Article 11 of ILO Convention No. 107²⁴.

Country: Colombia

Constitutional Court of Colombia, 5 February 2000, Case C-385/2000

The Constitutional Court of Colombia declared that an article of a statute limiting foreign workers' access to senior posts in trade unions was unconstitutional, ruling primarily that it violated Article 3 of ILO Convention No. 87²⁵, which, among other things, recognizes trade unions the right to elect their representatives in full freedom.

I.B. Resolving a case directly on the basis of international labour law is nonetheless only legally possible if several conditions are met

Firstly, if international labour law is to be used to resolve a case directly, the international sources used must be recognized to be legally binding in domestic law. This is the case of the provisions of ratified treaties in monist countries and, under certain conditions, the provisions of customary international law in countries adhering to both systems²⁶.

Secondly, direct resolution is only possible if the international provision applied is sufficiently clear and specific to allow the court to resolve the case on that basis alone. This is particularly important in connection with international labour law because the relevant conventions and treaties are often general or programmatic in content.

Most debate in this respect generally focuses on determining whether the international treaty provisions are directly applicable or self-executing²⁷. The meaning of these terms must be specified here before considering whether opportunities for resolving cases directly on the basis of international labour law are limited to self-executing provisions alone.

I.B.1. The notion of directly applicable or self-executing provision

Determining whether an international treaty provision is self-executing is a complex and controversial issue. Its appraisal may vary considerably from one country to another²⁸ and from one court to another, and may also lead to substantial changes in jurisprudence over the years²⁹. This Manual does not aim to analyse the issue exhaustively but merely to suggest

²⁴ Indigenous and Tribal Populations Convention, 1957 (No. 107).

²⁵ Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

²⁶ For dualist countries, the domestic courts seem to be able to resolve a case directly on the basis of customary international law, providing it is not directly contrary to the country's written law.

²⁷ In this Manual the two terms are taken to be synonymous and are used interchangeably.

²⁸ See the analysis by Virginia Leary stressing the differences in approaches between the courts of the United States, the Netherlands, Switzerland and Italy (V. Leary: *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems*, Martinus Nijhoff Publishers, The Hague-Boston-London, 1982 (available in English only).

²⁹ See below, for example, developments in the jurisprudence of the Supreme Court of Argentina from 1992. While the court had always been very reluctant to recognize the direct applicability of the provisions of ratified treaties until that time, it completely reversed its jurisprudence in the Ekmekdjian decision.

several points of reference, particularly in connection with terminology, since the notion can be seen from different perspectives and can therefore give rise to very different definitions.

For the ILO Committee of Experts on the Application of Conventions and Recommendations, self-executing provisions 'in international treaties are those which may be applied directly without the ratifying State having to adopt legislation to give effect to the provisions concerned.' As can be seen from the terms used, in the ILO's view the notion does not primarily concern the judicial applicability of the treaties, but first and foremost the question of establishing whether their provisions require legislative or regulatory measures by the State to allow their content to be specified or their objectives to be attained³⁰.

Having raised this international view of the notion, it appears that at domestic level the term 'self-executing' or 'directly applicable' provision can be used in two connected but different contexts³¹.

Firstly, in countries such as the United States or South Africa³², which simultaneously draw on aspects of both the monist and dualist systems, the notion is used to determine whether a ratified treaty is incorporated directly into domestic law, or whether it requires an implementing statute beforehand to develop its provisions. In this first sense the classification of self-executing therefore first makes it possible to determine how a treaty will be incorporated into domestic law, and then as a consequence to establish whether the courts can apply its provisions directly.

In this first context it is often said that three criteria should be taken into account to determine whether a treaty is self-executing³³:

- 1) the parties' intention to adopt provisions that do not require prior legislation to implement them;
- 2) the accuracy and detail of the terms used by the treaty;
- 3) the courts' power in relation to the subjects covered by the treaty in compliance with the separation of powers.

In purely monist countries the term 'self-executing' is also used in a second sense that concerns the subject of this Manual more directly. An international provision considered to be sufficiently clear and specific to recognize rights which are directly enforceable before the courts is classified as self-executing, even if there is no domestic legislation to develop its content.

In this second sense the stress therefore falls directly on the enforceability of the content of treaties before the courts, the recognition of subjective rights then emerging as the key criterion for determining whether the provisions of an international instrument are self-executing.

³⁰ See ILO: *Equality in Employment and Occupation, Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B), para. 212, endnote 3. In this case the Committee of Experts felt that ILO Convention No. 111 did not contain self-executing provisions. The Committee of Experts therefore did not seek to give an opinion on the judicial applicability of the Convention, but rather to indicate that in order for it to be implemented in full, domestic legislation had to be adopted to develop the content of its provisions.

³¹ See to the same effect C. Thomas, M. Oelz and X. Beaudonnet: 'The use of international labour law in domestic courts: Theory, recent jurisprudence and practical implications', *op. cit.*; I. Brownlie: *Principles of Public International Law*, Fourth edition, Oxford University Press, Oxford, 1994, p. 52.

³² See the introduction to this part above. Another example is Austria. Although it is a monist country, an Act of Parliament ratifying an international treaty may specify whether the instrument must be executed by means of statutes (Article 50(2) of the Austrian Constitution). In this case it is inferred that the courts could not apply the provisions of the treaty concerned directly.

³³ In this respect see V. Leary: *International Labour Conventions and National Law*, *op. cit.*

Country: Germany

Federal Administrative Court, 8 May 1991, 1 C 20.89

In this judgment the German Federal Administrative Court ruled that the wording, objective and content of Article 8(1) of ILO Convention No. 97³⁴ were sufficiently clear to recognize directly individual rights to migrant workers, who could apply to the courts to require them to be applied³⁵.

In practice, however, it appears that the methods used to assess whether a treaty provision does or does not recognize rights which are directly enforceable before the courts may vary substantially from one court to another and may thus lead to very different results.

This Manual does not aim to make a uniform judgment of what criteria should be taken into account here. Several general observations can be made, however, that may prove particularly useful in assessing whether the provisions of international labour and fundamental human rights treaties are directly applicable.

- ***The criterion of the intention of the treaty parties does not appear to apply to the provisions of multilateral treaties adopted in an institutional context such as the United Nations or the ILO***

Because of the variety of systems for incorporating international law into the domestic law of these organizations' member countries, it is not by definition the intention of assemblies that have adopted United Nations and ILO instruments to determine whether their provisions are self-executing in the various countries that will ratify them³⁶.

It may be of interest in this respect to note the following comments made by the Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the due application of the International Covenant on Economic, Social and Cultural Rights³⁷.

³⁴ Migrant for Employment Convention (Revised), 1949 (No. 97). Article 8(1) of Convention No. 97: 'A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.'

³⁵ A recent judgment by the Social and Labour Division of the French *Cour de cassation* dated 26 March 2006 should also be noted. In this judgment the Court held that Article 11 of the Termination of Employment Convention, 1982 (No. 158), recognizing that paid employees are entitled to notice of reasonable duration, was self-executing. For other examples and considerations on developments in the legal appraisal of whether the provisions of ILO conventions are self-executing, see G. W. Von Potobsky: 'Los convenios de la OIT: ¿una nueva dimensión en el orden jurídico interno?', in *Evolución del pensamiento juslaboralista. Estudios en homenaje al Prof. Héctor-Hugo Barbagelata*, Fundación de cultura universitaria, Montevideo, 1997 (available in Spanish only).

³⁶ For an analysis of multilateral treaties as a whole, see V. Leary: *International Labour Conventions and National Law*, *op. cit.*, p. 58.

³⁷ For an analysis leading to a similar conclusion concerning ILO conventions, see G. W. Von Potobsky, 'Eficacia jurídica de los convenios de la OIT en el plano nacional', *op. cit.*

Extract from General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on the 'Domestic application of the Covenant'

The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered 'non-self-executing' were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. (...) It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

Source: UNO Document E/C.12/1998/24, para. 11

- ***It is not possible to determine a priori whether an international treaty as a whole is self-executing***

The same instrument may contain provisions which are very different in content and nature. Each provision must therefore be analysed specifically and individually in order to determine whether it is self-executing or not.

As has just been pointed out, moreover, from an international labour law perspective a comprehensive analysis by instrument is all the less possible insofar as ILO conventions and United Nations covenants do not contain general provisions expressing the parties' intention as to whether their content is self-executing or not.

In this respect, it may prove useful to compare the nature of the following two provisions, both of which are included in the ILO Workers with Family Responsibilities Convention, 1981 (No. 156).

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

C.156, Article 3(1)

Family responsibilities shall not, as such, constitute a valid reason for termination of employment.

C.156, Article 8

- ***An international provision requiring statutory development by the State may nevertheless create rights which are directly applicable to individuals***

This observation underscores the possible confusion that might be engendered by the notion of self-executing provision according to whether it is seen from the perspective of the State's obligation to develop and specify the content of a treaty in domestic law, or from the perspective of the enforceability of its provisions before the courts. International treaty provisions do in fact exist which give subjective rights to individuals and which the latter can therefore enforce directly before the courts, but the State is assumed at the same time to develop and regulate their content.

Country: Argentina

Ekmekdjian, Miguel Angel v. Sofovich, Gerardo and others, Supreme Court of Justice, 7 July 1992

In this decision, Argentina's Supreme Court ruled that Article 14(1) of the American Convention on Human Rights, which gives anyone the right to make a correction or to reply 'under such conditions as the law may establish', is self-executing. The Court declared that the article of the Convention gave a subjective right directly to private individuals, the application of which could be enforced by the latter even if no domestic law regulated its conditions of application. In this respect the Court stated that 'A provision is self-executing when it concerns a real situation in which it can operate immediately without Congress having to implement application mechanisms. In the case of Article 14(1), its drafting is clear and unconditional in that, in the situations it describes, the text grants the right to make a correction or to reply, even though it leaves it to the law to establish the respective details concerning its regulation (...). The interpretation of the text according to which every person 'has the right to...' confirms the existence of the self-executing nature invoked by the complainant. The same cannot be said of the articles of the Convention, which stipulate that "the law shall recognize" (Article 17) or that "shall be [...] punishable by law" (Article 13(5))'.

In conclusion, the notion of self-executing provision should be used with care, since its meaning and definition may vary according to the context in which it is applied. It is particularly important to distinguish whether the notion is used to determine whether the State is required to develop the content of a treaty in domestic law, or whether it is a matter of assessing whether one of its provisions creates subjective rights which are directly enforceable before the courts.

It appears in all cases that provisions classified as self-executing are always deemed to allow the courts to resolve cases on that basis alone. However, international provisions which are not self-executing may also, in certain circumstances, constitute a sufficient legal basis for resolving a dispute directly.

I.B.2. Non-self-executing provisions may allow a case to be resolved directly in certain circumstances

The analysis of several countries' jurisprudence³⁸ shows that international treaty provisions whose aim is not to give private individuals subjective rights may nevertheless allow certain cases to be resolved directly.

Determining whether a treaty provision is sufficient to resolve a dispute in itself does not depend only on the content of the provision concerned, but also on the subject-matter of the case itself. Thus while an article of an international convention may be insufficiently specific in itself to resolve a dispute involving the detailed determination of a private individual's rights, it may on the other hand be sufficiently clear to establish that a provision of domestic law or an administrative decision contradicting the international instrument are invalid or unconstitutional.

To this effect, even 'programmatic' provisions requiring states to implement a general policy and thus requiring legislative and regulatory measures to be adopted can represent a sufficient legal basis for resolving a dispute challenging the validity of an aspect of domestic law that

³⁸ See, for example, *José Manuel Paniagua Vargas and other officials of the National Commission for Indigenous Affairs v. The Ministry for Culture, Youth and Sports and the National Commission for Indigenous Affairs (CONAI)*, Supreme Court of Justice of Costa Rica, Constitutional Division, 16 January 1998, Res: No. 0241-98, Exp: No. 5325-V-97 analysed below; *Dugain and others v. Compagnie Air Madagascar*, Supreme Court of Madagascar, 5 September 2003, Judgment No. 231, or *El-Al Airlines v. Edna Hazin*, National Labour Court of Israel, 1973.

would be directly contrary to the general policy guidelines required by the international instrument³⁹.

Country: Costa Rica

José Manuel Paniagua Vargas and other officials of the National Commission for Indigenous Affairs v. The Ministry for Culture, Youth and Sports and the National Commission for Indigenous Affairs (CONAI), Supreme Court of Justice of Costa Rica, Constitutional Division, 16 January 1998, Res: No. 0241-98, Exp: No. 5325-V-97.

On the basis of Article 4 of ILO Convention No. 169⁴⁰, by virtue of which States undertake to adopt special measures to safeguard indigenous and tribal peoples, the Supreme Court of Costa Rica invalidated the decision to reduce the budget of the National Commission for Indigenous Affairs by 85%.

‘Since Costa Rica has ratified that international instrument, the State of Costa Rica has undertaken to take special measures under the aforesaid Article 4. This commitment must be construed as an on-going activity aiming to safeguard those minority ethnic groups and, inter alia, their institutions, property, labour and environment from the influence of our population and its culture.

Those special measures must signify that it is prohibited for the State to abandon or strand a public institution whose purpose is to become a forum for discussion and initiatives concerning the country’s indigenous affairs.’

Such a line of argument is also valid in connection with international provisions establishing general principles intended to provide guidelines for public authority action. Even if by their nature such provisions have to be developed by domestic law, they may be sufficiently clear to invalidate an act or decision running counter to their purposes.

Country: France

Ms Cinar, Conseil d’Etat, 22 September 1997

‘Whereas under Article 3(1) of the International Convention on the Rights of the Child of 26 January 1990, published by decree on 8 October 1990: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”; it arises out of these stipulations, which may usefully be relied upon in support of ultra vires proceedings, that in exercising its power of appraisal, the administrative authority must give primary consideration to the best interests of children in all actions concerning them (...)

The records for this case showed that neither the child’s father, whom she did not know and who had never provided any support for her education, nor any other close family member, could receive the child in Turkey; in these circumstances the chief administrative officer’s decision to return the young Tolga to Turkey and to separate her, even temporarily, from her mother, violates the best interests of the child and should be considered to be contrary to Article 3(1) of the International Convention on the Rights of the Child’.

NB: Further details on the different types of provision that can be found in ILO conventions and on their greater or lesser capacity to resolve a case directly can be found in *Part 2, Chapter 1* of this Manual, devoted to ILO standards.

³⁹ Besides the example presented below, there are many cases where the ILO Discrimination (Employment and Occupation) Convention, 1958 (No.111) has been applied directly, even though it is often described as a ‘programmatic’ Convention. On this subject, see again, G. W. Von Potobsky: ‘Eficacia jurídica de los convenios de la OIT en el plano nacional’, *op. cit.*

⁴⁰ Indigenous and Tribal Peoples Convention, 1989 (No. 169).

II. The use of international labour law as a guide for interpretation⁴¹

In this second category domestic courts refer to international labour law not to resolve a dispute brought before them directly but to specify the meaning and scope of the applicable domestic provisions. In formal terms the court decision is therefore given on the basis of domestic law. International law only influences the meaning of the judgment indirectly by clarifying the meaning to be given to the provisions of domestic law.

II.A. Different situations involving the use of international labour law as a guide for interpretation

Very succinctly, the use of international sources as a guide for interpretation can make it possible to: 1) resolve an ambiguity in domestic law; 2) clarify the scope of a text drafted in general terms; or 3) assess the constitutionality of a domestic law provision.

II.A.1. Resolving ambiguities in domestic law

Country: Chile

Víctor Améstida Stuardo and others v. Santa Isabel S.A., Supreme Court of Chile, 19 October 2000, Case No. 10.695

The Court had to determine whether the special protection granted to workers' representatives was applicable to workers who had applied to be trade union representatives just before their union was officially registered.

Noting the contradiction between two articles of labour legislation concerning the starting point for granting the status of trade union representative, the Supreme Court of Chile referred to the ILO conventions ratified by the country to determine which of the two solutions should ultimately prevail. The Court referred in particular to Article 3 of ILO Convention No. 87⁴², which gives trade unions the right to elect their representatives in full freedom, and to Conventions No. 98⁴³ and No. 135⁴⁴, which require states to ensure effective and adequate protection against discrimination for workers engaged in trade union activities.

On this basis the Supreme Court ruled that the domestic legislation should have been so construed that persons applying to be representatives were effectively protected against discrimination even when their application was submitted before the union was officially registered.

As regards the use of international law as a guide for interpretation, the Supreme Court held as follows: 'It is clear that, in the light of any doubts our domestic law may raise, the principles of international legislation set down in International Labour Conventions Nos. 87, 98 and 135 should be taken into consideration, taking particular account of the provision in Article 5 of the Constitution of the Republic. (...) Article 3 of the Freedom of Association and Protection of the Right to Organize Convention (No. 87) refers to the autonomy of these organizations, one aspect of which is the freedom to elect their representatives. It seems obvious that if, due to the formation of a trade union and the election of its officials, representatives are dismissed for an undemonstrated presumed need of the company, our legislation will not be consistent with international legislation.'

⁴¹ See v. Thomas, M. Oelz and X. Beaudonnet: 'The use of international labour law in domestic courts: Theory, recent jurisprudence and practical implications', *op. cit.*

⁴² Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

⁴³ Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

⁴⁴ Workers' Representatives Convention, 1971 (No. 135).

II.A.2. Interpretation of provisions drafted in general terms

Country: India

Visbaka and others v. the State of Rajasthan and others, Supreme Court of India, 13 August 1997

In the absence of specific legislation defining and prohibiting sexual harassment at work, the Supreme Court of India referred to the United Nations Convention on the elimination of all forms of discrimination against women, and to the comments of its Supervisory Body. On this basis the Court ruled that the general prohibition of sex discrimination enshrined in the Constitution should also be interpreted as prohibiting cases of sexual harassment as defined internationally.

As regards the use of international law as a guide for interpretation, the Court stated as follows: 'It is now an accepted rule of legal interpretation that attention must be drawn to international conventions and standards to construe domestic law when there is no incompatibility between them and when there is a gap in the domestic law. (...) There is no reason why these international conventions and standards cannot be used to construe the fundamental rights specifically guaranteed by the Constitution of India, which embodies the basic concept of gender equality in all spheres of human activity.'

II.A.3. Appraisal of the constitutionality of a provision of domestic law

Country: Canada

Dunmore v. Ontario (Attorney General), Supreme Court of Canada, 20 December 2001, No. 2001 CSC 94

The Supreme Court of Canada, construing the Canadian Charter of Rights and Freedoms in the light of Article 2 of ILO Convention No. 87⁴⁵, invalidated a provincial act excluding agricultural workers from the guarantees afforded to other workers in the area of freedom of association.

II.B. The potentially very extensive nature of the use of international labour law as a guide for interpretation

While resolving a dispute directly on the basis of international law would appear to be limited only to monist countries and restricted to sufficiently clear and specific provisions of ratified conventions and treaties⁴⁶, its use as a guide is not subject *a priori* to any of these limitations.

II.B.1. The use of international labour law as a guide for interpretation concerns both monist and dualist systems

Since when international labour law is used for interpretative purposes, the court decision is not directly based on international law, such a use is legally possible in both monist and dualist countries.

In monist countries the legal basis allowing courts to use ratified treaties and conventions as a guide is a direct result of the fact that ratified instruments are part of domestic law. The courts are then responsible for construing the domestic legislation correctly by taking into account the

⁴⁵ Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

⁴⁶ It should again be noted here that customary international law could also be used to resolve a dispute directly in both monist and dualist countries (under certain conditions).

different sources of law that are part of the domestic legal system, in accordance with the principle of systematic interpretation.

In dualist countries, even if ratified treaties do not form part of domestic law, their use as a guide nevertheless has an undeniable legal basis in the following situations:

- When the country's Constitution contains a general provision that grants ratified fundamental human rights treaties an interpretative function;
- when there are indications that the legislator intended to respect the content of an international instrument. This is for instance the case when a statute indicates that its aim is to incorporate all or part of a ratified treaty, or when the terms used in a statute show that it implicitly incorporates the content of a ratified treaty into domestic law.

As regards treaties ratified but not incorporated into domestic law, many courts decisions show that under certain conditions the latter may be a valid source for the courts of dualist countries to construe the domestic law. Such a position is clearly expressed in the Bangalore Principles, drafted in 1988 by the judges of 10 Supreme Courts in common law countries, following a conference on the application of international human rights law in domestic law.

Extract from the Bangalore Principles⁴⁷

7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Reference to a treaty that has been ratified but not yet incorporated may be particularly useful when a provision of domestic law can be interpreted in two ways, one being more consistent with the content of the ratified treaty than the other. In this case some courts opt for the interpretation that is most consistent with the treaty, deciding that there is then a presumption that Parliament was unwilling to violate the State's international commitments.

Country: Australia

The Ministry for Immigration and Ethnic Affairs v. Teoh, Australian Supreme Court, 7 April 1995, (1994) 128 A.L.R. 353

'It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. (...) But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law. (...) If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.'

⁴⁷ The Bangalore Principles were drafted to summarize the debates at the legal colloquium on the domestic application of international human rights, Bangalore (India), 24-26 February 1988.

Such guidelines provided by jurisprudence are consistent with the position of the Committee on Economic, Social and Cultural Rights on the role of domestic courts and tribunals in implementing the Covenant of the same name.

Extract from General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on 'The domestic application of the Covenant'

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision-maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.

Source: UNO Document E/C.12/1998/24, para. 15

Finally, as regards cases involving the public administration, several courts in dualist countries have ruled that the existence of a treaty that has been ratified but not incorporated could create a 'legitimate expectation' that the content of the ratified instrument would be taken into account in public administration decision-making⁴⁸.

Country: Australia

The Ministry for Immigration and Ethnic Affairs v. Teob, Australian Supreme Court, 7 April 1995, (1994) 128 A.L.R. 353

'The ratification by the executive of the United Nations Convention on the rights of the child is a positive statement to the national and international community that the Commonwealth recognized and accepted the principles of the Convention. Article 3(1) of the Convention provides that "In all actions concerning children, (...) the best interests of the child shall be a primary consideration". Although noting that the Convention had not been incorporated into Australian law, its ratification provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention. This meant that, in such a context, the parents and children who might be affected by a relevant decision had a legitimate expectation that the Commonwealth decision-maker would act on the basis that the "best interests" of the children would be treated as a primary consideration'.

II.B.2. The use of international labour law as a source of interpretation is not restricted to self-executing provisions alone

Secondly, the very logic of using international law as a guide for interpretation makes it possible to use international provisions whose content would not appear to be sufficiently clear and specific to resolve a case directly without the support of a supplementary source of law. To that effect, provisions of international instruments establishing general principles or objectives or others defining concepts are used by domestic courts to clarify the meaning of their domestic legislation or to confirm their interpretation of it⁴⁹.

⁴⁸ Thus far such a notion seems to have been used essentially in connection with cases relating to the rights of the child and their violation by the expulsion of people in an irregular situation. See S. Fatima: *Using international law in domestic courts*, Hart Publishing, Oxford and Portland, 2005, pp. 371 *et seq.* (available in English only).

⁴⁹ For examples of general provisions of ILO conventions that can be used as a guide for interpretation, see *Part 2, Chapter 1* of the Manual.

Extract from General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on the 'Domestic Application of the Covenant'

The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation (...) It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.

Source: UNO Document E/C.12/1998/24, para. 10

Country: South Africa

Jacques Charles Hoffman v. South African Airways, Constitutional Court of South Africa, 28 September 2000, No. CCT 17/00

Article 2 of ILO Convention No. 111⁵⁰ requires the States parties to pursue a national policy designed to eliminate any discrimination in respect of employment and occupation. This 'programmatic' provision was used by the Constitutional Court of South Africa to strengthen its interpretation of the national Constitution, according to which discrimination in respect of recruitment suffered by someone who is HIV positive would involve the elimination of the discrimination and therefore the hiring of the person concerned.

The above example and the explanations of the Committee on Economic, Social and Cultural Rights thus clearly show that the judicial applicability of international labour law goes beyond the mere use by the courts of international provisions considered to be directly applicable or self-executing.

II.B.3. The use of international labour law as a guide for interpretation is not restricted to legally binding instruments alone

Finally, insofar as the use of international law as a guide for interpretation does not imply that a case will be resolved on that direct basis, courts in many countries, whether monist or dualist, do not hesitate to refer to sources of law which are not binding in domestic law, whether non-ratified conventions or international labour recommendations as well as to sources which binding nature can give rise to debate such as the comments and decisions of the international supervisory bodies.

This comment is particularly useful in light of both the quantitative and the qualitative importance of sources of international labour law which are not legally binding in domestic law.

Country: Spain

Constitutional Court, Second Division, 13 November 1981, No. 38/1981

'By virtue of Article 10(2) of the Constitution, international texts ratified by Spain are valid instruments for determining the meaning and scope of the rights established by the Constitution. (...) ILO recommendations are texts providing guidance which, without being binding, can act as criteria for interpreting or clarifying conventions'.

⁵⁰ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Country: Germany

Constitutional Court of the Federal Republic of Germany, 18 November 2003, 1 BvR 302/96

In this case concerning the validity of a maternity insurance scheme where the employer had to directly pay part of the benefits to the employee, the German Federal Constitutional Court ruled that this method of financing was unconstitutional since in practice it could encourage discrimination against women. In this judgment the Court not only reinforced its thinking by referring to the objectives of ILO Convention No. 111⁵¹, but also referred to Article 6(8) of ILO Convention No. 183⁵², which Germany has not ratified.

III. Establishment of a jurisprudential principle based on international labour law⁵³

Either in legal systems where courts have the faculty to develop the law or in situations where a piece of legislation allows the courts to exercise a degree of flexibility in applying its provisions, judges can decide to develop their jurisprudence on the basis of international law. In the same way as it is used as a guide for interpretation, international labour law then contributes indirectly to resolving a dispute, since in formal terms the court's decision is based on the jurisprudential principle identified thereby rather than on the international provision on which its recognition may have been based.

To the same effect, as pointed out above in relation to the use of international law as a guide for interpretation, even international provisions which are not self-executing or which do not have binding legal effect in the country concerned may, where applicable, be used by the courts as a source of inspiration.

III.A. In the event of a gap in domestic legislation

In both monist and dualist countries the courts, with greater or lesser freedom according to the legal systems involved, may have to close the gaps in domestic written law by recognizing jurisprudential principles. This often results in the creation of 'general principles of law' in Roman-Germanic legal systems, which can be a significant guarantee against denial of justice.

In exercising this "creative power", some domestic courts use international labour law provisions and guidelines as a basis for identifying the existence of a jurisprudential principle enabling the case to be resolved.

⁵¹ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁵² Maternity Protection Convention, 2000 (No. 183). Article 6(8) of Convention No. 183: 'In order to protect the situation of women in the labour market, benefits in respect of the leave referred to in Articles 4 and 5 shall be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer shall not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement except where: (a) such is provided for in national law or practice in a Member State prior to the date of adoption of this Convention by the International Labour Conference; or (b) it is subsequently agreed at the national level by the government and the representative organizations of employers and workers.'

⁵³ See X. Beaudonnet: 'L'utilisation des sources universelles du droit international du travail par les juridictions internes', *op. cit.*

Country: Zimbabwe

Frederick Mwenye v. Textile Investment Company, Industrial Relations Court, 8 May 2001, No. LRT/MT/11/01

Noting the gap in domestic legislation in the area of sexual harassment, the Court of First Instance relied directly on General Recommendation 19 of the Committee on the Elimination of Discrimination against Women⁵⁴ to classify the complainant's conduct as sexual harassment and thus confirm that his dismissal was valid.

III.B. Where the establishment of jurisprudential principles is a 'habitual' source of domestic labour law

In common law countries the courts' "creative power" may go beyond the simple ad hoc closing of gaps in labour legislation and take on a more systematic role in developing labour law. This is particularly true in countries whose labour legislation gives the courts a significant role in determining the rules allowing them to resolve employment disputes, either because they have been given the power to decide on rules of equity, or because the law makes them responsible for ensuring respect for 'fair labour practices', the content of which they must determine⁵⁵.

In these cases, international labour law provisions and guidelines are used by some courts as one of the legal bases of the principles they recognize or as evidence of the existence of such principles.

Country: Botswana

Joel Sebonego v. News Paper Editorial and Management Services (PTY) Ltd, Botswana Industrial Relations Court, 23 April 1999, No. IC 64/98

'As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice or rules of equity as they are sometimes called, when determining trade disputes. These rules of equity are derived from the common law as well as from Conventions and Recommendations of the International Labour Organization (ILO). The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are succinctly stated in Article 4 of ILO Convention No. 158 of 1982, which provides as follows (...)'.

⁵⁴ Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (U.N. Doc. A/47/38).

⁵⁵ Reference can be made here to the established jurisprudence of South Africa, Botswana, Trinidad and Tobago, and to certain judgments in Fiji and Malawi.

Country: Trinidad and Tobago

Bank and General Workers Union v. Home Mortgage Bank, Trinidad And Tobago Industrial Relations Court, 3 March 1998, No. 140, 1997

‘The principles of good industrial relations practice dictate that no worker’s employment may be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or which is founded on the operational requirements of an employer’s business. These principles are enshrined in writing in Convention No. 158 of the International Labour Organization. ILO Convention No. 158 has put in written form long-standing principles of good industrial relations practice and it is of no consequence that the Convention has not been ratified by Trinidad and Tobago. It is not applicable as part of the domestic law of Trinidad and Tobago but as evidence of principles of good industrial relations practice which have been accepted at an international level.’

Finally, it is increasingly accepted that, even in the case of treaties ratified but not yet incorporated, international law may act as a guide for developing the common law, particularly in relation to fundamental human rights. Even though no legal example has yet come to light in connection with employment litigation, certain authors and practitioners⁵⁶ believe that this could be fertile ground in the future.

Country: Australia

The Ministry for Immigration and Ethnic Affairs v. Teob, Australian Supreme Court, 7 April 1995, (1994) 128 A.L.R. 353

‘The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due circumspection when the parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an incorporated convention into Australian law.’

Country: United Kingdom

Reynold v. Times Newspaper Ltd (2001), 2 AC 127 (HL), 223B-D

‘International human rights law, whenever relevant, should have an important part to play in developing the common law’.

Country: United Kingdom

R. v. G (2003) UKHL 50 (2004), 1 AC 1034

‘To disregard the situation of children within the criminal justice system is not acceptable in a modern civil society. It is contrary to Article 40(1) of the United Nations Convention on the Rights of the Child not to take into account, as regards a crime subject to life imprisonment, (...) the age of the child to determine whether the mental criterion has actually been met. (...) The House of Lords cannot ignore the rule created by the Convention. This factor of itself would justify a reappraisal of the *R v. Caldwell* jurisprudence.’

III.C. In applying specific legislative provisions giving domestic courts a degree of flexibility

In both monist and dualist countries, statutes can give courts a degree of flexibility in applying some of its provisions. This is often the case, for example, in relation to the remedies applied for

⁵⁶ See R. Layton: ‘When and how can domestic judges and lawyers use international law in dualist systems’, *op. cit.*

unjustified dismissals. In some countries the courts may be in a position to decide whether workers should be reinstated. Even more commonly, many countries' courts are empowered to modulate the amount of damages to be awarded to an unlawfully dismissed worker. In implementing these faculties granted by the legislation, the courts may base their decision on the provisions and guidelines of international law.

Country: Burkina Faso

Karama, Katénin and Bakouan, Bayomboué v. Société industrielle du Faso, Bobo-Dioulasso Appeal Court, 5 July 2006

Workers had been dismissed because they had taken part in a general strike. Since the Court had classified the strike as legal, it considered the dismissals to be unlawful. Basing its ruling on ILO Convention No. 98⁵⁷ and the decisions of the Freedom of Association Committee, the Court of Appeal decided to strengthen the remedies applicable to dismissals following participation in a lawful strike in order to take full account of the fundamental nature of the right infringed: 'Dismissal on the grounds of a lawful strike constitutes abuse and discrimination in respect of employment; this is why, by application of Article 33(2) of the former Labour Code, the provisions of which are reinforced by the considerations of the ILO Freedom of Association Committee set out in its Digest (...) in paragraphs 590, 591 and 593 [NDR: ILO: *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fourth (revised) edition, Geneva, 1996], the appellants must be reinstated within the enterprise if they so wish; failure to do so, and bearing in mind in this case the infringement of the fundamental rights sanctioned by Article 22 of the Constitution, and their seniority, each appellant shall be awarded the sum of XOF 15 million in damages to remedy their losses.'

IV. Reference to international labour law to strengthen a decision based on domestic law

In this fourth and final category, reference to international law does not modify the meaning of the judicial decision since the case could be resolved on the basis of domestic law alone. Subsidiary reference to international law, however, may either enable a line of reasoning based principally on aspects of domestic law to be strengthened, or allow attention to be drawn to the fundamental nature of a principle or right. Since reference to international law does not govern the meaning of the decision directly, this use of international law has been noted in both dualist and monist countries.

Country: Burkina Faso

Zongo and others v. Manager of the Bataille du Rail Mobil garage, Ouagadougou Labour Court, 17 June 2003, No. 090

To strengthen the principle that the minimum wages established by the domestic Labour Code cannot be lowered, Ouagadougou Labour Court cited ILO Conventions Nos. 26 and 131⁵⁸, which Burkina Faso had ratified. The Court also ruled that by virtue of these conventions, when minimum wage rates were not respected the victim of the infringement was right to seek to recover the sums due, and the employer had to pay the entitlements resulting from such an infringement.

⁵⁷ Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

⁵⁸ Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); Minimum Wage-Fixing Machinery Convention, 1970 (No. 131).

Country: Paraguay

Action for unconstitutionality filed by Central Unitaria de Trabajadores (CUT) and Central Nacional de Trabajadores (CNT) v. Decree No. 16769 adopted by the Executive, Supreme Court of Justice of Paraguay, 23 September 2000, No. 35

In an action for unconstitutionality against a decree adopted by the Executive laying down the rules for electing trade union leaders, the applicants contended that the decree infringed the principle of freedom of association as recognized by the national Constitution. In order to determine whether the provisions adopted by the Executive to govern the election of trade union leaders were unconstitutional, the Supreme Court analysed the national Constitution and referred to ILO Convention No. 87⁵⁹:

‘With the Presidential decree, there is no intention to implement the constitutional provision, but to eliminate rights consecrated in the Constitution itself and in international conventions entered into by Paraguay (Article 97 and counterpart articles of the National Constitution and ILO Convention No. 87, Articles 3, 4, 7). In addition to violating the national Constitution, the Presidential decree in question also contradicts provisions of the ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87).’

⁵⁹ Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

Chapter 2

Possible obstacles to the judicial use of international labour law

The purpose of this chapter is to review certain situations that may obstruct or restrict the judicial use of international labour law. The intention is to examine and assess how far the aspects highlighted in each case effectively prevent or reduce the courts' ability to refer to international law, and how some of the difficulties cited may be overcome.

I. The parties have not referred to international labour standards in their conclusions

Since international labour standards are often a little-known source of law for litigants, the question often arises of establishing whether courts can apply international labour law provisions *ex officio* even when the parties have not raised them. This may be particularly relevant in countries that give the parties a great deal of freedom in conducting civil proceedings. The answer to this question will naturally depend on the rules of civil procedure particular to each country, though the following points should nevertheless be noted.

In countries where Roman-Germanic legal systems prevail, several aspects help to ensure clear recognition of the capacity of courts to apply international labour law provisions *ex officio*.

In these countries, judges are required to settle disputes in accordance with the applicable rules of law, and to attribute the proper legal definitions to facts⁶⁰. When the use of the applicable international sources may influence the meaning of the decision, the courts will then be responsible for making use of it. It should also be noted in addition that international labour standards contains many provisions that domestic law classes as compulsory, in the sense that employers and workers cannot decide to set them aside. This aspect also contributes to their application by courts *ex officio*. In order to respect the adversary principle, however, it will be essential for the judge to allow the parties to take note of and comment on the points of law he or she intends to apply to the case⁶¹.

In countries where Anglo-Saxon legal traditions prevail in which the parties are given complete control over the points of law applicable to the dispute, the judge may opt to inform them of the

⁶⁰ See Article 12 of the new French Code of Civil Procedure, for example:

'The judge settles the dispute in accordance with the rules of law applicable thereto.

He must give or restore their proper legal definitions to the disputed facts and deeds notwithstanding the denominations given by the parties.

However, he may not change the denomination or legal ground where the parties, pursuant to an express agreement and in the exercise of such rights that they may freely alienate, have bound him by legal definitions and legal arguments to which they intend to restrict the debate.'

⁶¹ By way of example, see Article 16 of the new French Code of Civil Procedure:

'In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle.

In his decision, the judge may take into consideration grounds, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. He shall not base his decision on legal arguments that he has raised *sua sponte* without having first invited the parties to comment thereon.'

applicable law and may thus give them the opportunity to refer to the relevant international sources in their conclusions⁶².

II. A ratified treaty has not been published in the official gazette

This situation is of particular interest in monist countries whose Constitution states that treaties will be incorporated into the domestic legal system when they have been duly 'ratified and published'. Based on a provision of this type⁶³, in 1975 the Supreme Court of Senegal rejected the application of ILO Convention No. 87, ratified but not published at the time, in a case relating to the dissolving of a trade union organization by administrative authority, contrary to Article 4 of that Convention⁶⁴.

Several elements should be taken into consideration in order to determine the extent to which failure to publish could prevent the judicial use of the instrument concerned.

Before discussing the subject proper, it should first be remembered that from an international law perspective, a treaty ratified but not published is fully applicable, and that the State is therefore legally bound to respect the obligations arising out of its ratification.

From a domestic law perspective, it is necessary to determine whether publication is a condition for the international instrument to come into force or merely for it to be opposable. In this respect, following the example of the laws adopted by parliament, a teleological analysis⁶⁵ shows that the purpose of publishing ratified treaties is to make litigants and the authorities responsible for applying the law aware of the new text. Publication can then be classed as a condition for making the ratified treaty opposable upon litigants. To this effect it does not appear to be possible to resolve a dispute between private individuals directly⁶⁶ on the principal basis of an unpublished treaty, since the litigants have not been given the opportunity to comply with the text concerned.

However, it appears that the argument that a ratified treaty has not been published to set aside its application could be seriously challenged in connection with disputes opposing the government or public administration and a private individual. If publication is seen as a publicity measure allowing a law to become opposable by bringing it to the public's attention, it would seem to be difficult for a government to plead its absence. Firstly, the latter cannot deny that it is aware of the existence and content of the treaty that it has helped to ratify and in relation to which it is regularly accountable at international level. Secondly, it may seem paradoxical that in the context of a dispute a government may take advantage of its own inertia in failing to publish a ratified treaty in the official gazette.

⁶² In order to correctly interpret and apply the provisions of domestic law on which the parties base their claims, it is nonetheless legitimate to ask whether the judge does not then have the opportunity – or indeed the duty – to refer to the relevant international instruments. For an example of a court judgment in a dualist country based on the ILO Termination of Employment Convention, 1982 (No. 158), for recognizing a general principle when the parties do not appear to have raised that legal basis, see *Modise and others v. Steve's Spar*, Employment Court of Appeal of South Africa, 15 March 2000, No. JA 29/99.

⁶³ Article 98 of the Constitution of Senegal.

⁶⁴ Case No. 39/73, Supreme Court of Senegal, 29 January 1975.

⁶⁵ A teleological analysis seeks to identify the intention of a legal text.

⁶⁶ It is legitimate on the other hand to ask whether absence of publication would obstruct the use of international law as a guide for interpretation with the intention of specifying the meaning and scope of a provision of domestic law.

III. The provisions of a treaty appear to be too general for domestic courts to consider them to be directly applicable

There is no doubt that many international labour treaty provisions make it difficult for the courts to resolve disputes directly on their basis alone. This is particularly true of provisions in ‘programmatic’ or ‘promotional’ ILO conventions that require the governments and parliaments of countries that ratify them to implement a general policy intended to achieve the convention’s objectives. This is therefore an objective limitation on the judicial use of international labour law. Such a limitation is in fact only relevant to monist countries, since in dualist systems it is by definition not possible to resolve a dispute directly on the basis of ratified treaties.

However, the scale of this obstacle to the judicial use of international labour law must be carefully outlined.

As has been highlighted in this part of the Manual, whether the international provision concerned is self-executing or not must first be analysed carefully, taking the following points into account:

- there is no general presumption that the provisions of international conventions and treaties relating to human rights and labour law are not directly self-executing;
- their self-executing nature must be examined provision by provision rather than in relation to an international instrument as a whole.

Secondly, it has already been said with respect to certain types of cases⁶⁷ that provisions which are not self-executing can sometimes be sufficiently clear to allow the legal problem laid before the court to be resolved directly.

Finally, it should be borne in mind that non-self-executing international provisions can nevertheless contribute indirectly but decisively to resolving a dispute by, for example, enabling the applicable domestic provisions to be interpreted.

IV. The content of a ratified treaty is manifestly in breach of a clear and specific domestic provision

Since judges in dualist countries cannot apply the content of ratified treaties directly, if there is an evident incompatibility between international law and domestic legislation that cannot be reconciled by means of interpretation, the ordinary courts will not be able to use international law to resolve the case.

This does not mean, however, that the courts are then totally unable to help to bring domestic law into line with the State’s international obligations. Two possibilities can be explored in this respect.

If the manifest incompatibility concerns fundamental rights recognized by the country’s Constitution, the violation of a ratified treaty may be an important indicator of the unconstitutionality of the legislation concerned. When the legal system makes provision for it, the ordinary courts will be able to defer their judgment and submit the corresponding question of unconstitutionality to the competent court⁶⁸.

⁶⁷ These are essentially cases concerning the validity of domestic law provisions.

⁶⁸ The competent constitutional court may then usefully refer to international law in order to interpret its own constitutional provisions. See, for example, *Dunmore v. Ontario (Attorney General)*, Supreme Court of Canada, 20 December 2001, No. 2001 SCC 94.

Secondly, the courts will always have the opportunity in their judgments to draw the legislator's attention to the need to bring domestic legislation into line with the country's international obligations. The conclusions of two meetings of senior judges concerning the role of domestic courts in applying international human rights norms are interesting in this respect⁶⁹.

Extract from the Bangalore Principles⁷⁰

8. However, where national law is clear and inconsistent with the international obligations of the State concerned in common law countries, the national court is obliged to give effect to national law. **In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.** [Our emphasis]

Extracts from the Arusha Declaration of Commitments⁷¹

Convinced that (...)

2. Judicial officers in both monistic and dualistic legal systems have opportunities to make recommendations for law and policy reforms to the legislative arms of government. (...)

Do hereby make the following declaration of commitments and call upon other judicial officers to do the same: (...)

3. Whenever appropriate, to make recommendations in one's judgments on how domestic law and/or policy might be reformed to bring it in conformity with the State's obligations under the Convention.

In monist countries the solution to this situation will depend on the content of the international provision contradicted by national legislation. If the provision of the ratified treaty is sufficiently clear and specific to resolve the case on its own, the ordinary courts will then be able to set aside the contradictory domestic provision without having to invalidate it, and will then apply the content of the international instrument directly. If, on the other hand, the provision of the treaty infringed is too general to settle the case on that basis alone, if the ordinary court does not have the jurisdiction over the validity or constitutionality of legislative provisions, it must then bring the case before the court that does have such a jurisdiction⁷².

⁶⁹ These conclusions naturally have no normative content. See also M. Kirby: 'The road from Bangalore: The first ten years of the Bangalore principles on the domestic application of international human rights norms', *op. cit.*

⁷⁰ See footnote 47.

⁷¹ The Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level was adopted at the judicial colloquium on the application of international human rights law at the domestic level, held at Arusha (Tanzania), from 9 to 11 September 2003.

⁷² Naturally provided the legislation allows this.

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■ Others

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Arusha Declaration of Commitments on the Role of the Domestic Judge in the Application of International Human Rights Law at the Domestic Level, 2003

Part 2

Sources of international labour law available to judges and legal practitioners

Chapter 1

International labour standards adopted by the ILO

I. Introduction

The purpose of this Chapter is firstly to describe the characteristics of the different types of legal instrument adopted by the International Labour Organization (ILO), and secondly to suggest several points for reflection on the nature of provisions in international labour standards (ILS) in order to determine how appropriate they are for judicial use.

Most of the Chapter is dedicated to International Labour Conventions and recommendations, both of which create obligations for ILO Member States, and which are referred to strictly speaking as ILS. However, other general or more specific ILO instruments (ILO Constitution and declarations in the case of the former and resolutions and Codes of Practice in the case of the latter) may also serve as sources of inspiration for domestic judges and legal practitioners, and will therefore be briefly outlined in this Chapter. The work of the ILO supervisory bodies, which is particularly important for specifying the meaning and scope of the provisions of international labour conventions and recommendations, will be addressed in the following Chapter.

II. Foreword: fundamental principles and rights set down in the ILO Constitution

The ILO Constitution is the founding text to which all the standards adopted by the Organization owe their existence.

The essential purpose of the Constitution's provisions is to define the powers, composition and functioning of the principal bodies making up the ILO. The Constitution is also a substantial source of law, however. The Preamble and the Philadelphia Declaration, incorporated into the text of the Constitution in 1946, set out a number of fundamental principles and rights at work. Recognition of freedom of association¹, the principle of non-discrimination² and the assertion that labour is not a commodity³ should be noted in particular.

On the basis that all ILO Member States have agreed to implement the provisions of its Constitution⁴, ILO bodies have drawn legal consequences from the Constitution's recognition of these principles in several opportunities. On this basis, the special supervisory mechanism on freedom of association applies to all ILO Member countries, including those that have not

¹ See the ILO Constitution, Annex, I (b).

² See the ILO Constitution, Annex, II (a).

³ See the ILO Constitution, Annex, I (a).

⁴ See Article 1(3) of the ILO Constitution, which makes reference to the 'formal acceptance of the obligations of the Constitution of the International Labour Organization'.

ratified the relevant conventions. Note should also be taken of the International Labour Conference's adoption, in 1964, of the declaration condemning the apartheid policy of the Republic of South Africa, even though South Africa had not at that time ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Finally, it was also on the basis of the principles recognized by the ILO Constitution that in 1998 the Conference adopted the Declaration on Fundamental Principles and Rights at Work, by virtue of which all ILO Member States, whether they had ratified the relevant conventions or not, undertook 'to respect, to promote and to realize' the rights and principles of freedom of association and collective bargaining, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation⁵.

III. The nature and principal characteristics of ILO conventions and recommendations

III.A. The legal nature of ILO conventions and recommendations

III.A.1. International labour conventions, international treaties of a particular type

ILO conventions are international treaties which, once they have been adopted by the Conference, are open to ratification by Member States⁶. States that have ratified an ILO convention are therefore legally bound by its content and, according to Article 19(5)(d) of the ILO Constitution, will then take 'such action as may be necessary to make effective the provisions of such Convention'. For a better understanding of the content of that provision, it may be useful to examine it in the light of the relevant Articles of the 1969 Vienna Convention on the Law of Treaties⁷.

Extracts from the Vienna Convention on the Law of Treaties

Article 26. Pacta sunt servanda

Any treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27. Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46⁸.

⁵ See the ILO Declaration on Fundamental Principles and Rights at Work, Article 2.

⁶ See Articles 19 and 20 of the ILO Constitution.

⁷ Article 5 of the Vienna Convention on the Law of Treaties confirms that that Convention clearly applies to ILO conventions 'without prejudice to any relevant rules of the organization'.

⁸ Article 46 of the Vienna Convention on the Law of Treaties:

'1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.'

Drawn up⁹ and adopted on a tripartite basis¹⁰ at the Conference¹¹, ILO conventions are nevertheless international treaties of a particular type. Besides the tripartite nature that will be examined in the following section, the legal regime applicable to international labour conventions exhibit several characteristics that distinguish them from classical international treaties, and that to some extent bring to mind the legislative nature it had been planned to attribute to them when the ILO was founded. In this respect, the following aspects underlining the institutional nature of ILO conventions should be noted:

- The signature of representatives of ILO Member States is not required for the Conference to adopt international labour conventions.
- By ratifying an ILO convention, a State commits itself first of all to the International Labour Organization and then as a consequence to the Organization's other Member States.

From a domestic perspective, this means that the applicability of international labour conventions ratified by a given country cannot be subject to the condition of reciprocity¹², which is often provided for by national constitutions but which only has any meaning when a State undertakes to respect obligations towards another State rather than towards an international organization.

- Under the ILO Constitution, international labour conventions create specific legal obligations for Member States, irrespective of ratification. This is first of all the case of the obligation of submission¹³ under which each State must, within either 12 months or no more than 18 months, submit the conventions and recommendations adopted by the Conference to the authority competent to legislate on the areas covered by the relevant instrument. In relation to conventions, the obligation of submission is designed to allow a national debate on their ratification. Secondly, Member States that have not ratified a convention are also required to draw up reports on their law and practice in relation to their content, and on the prospects for ratification when the Governing Body so decides¹⁴.

These various elements reflect the wishes of the ILO's founders to give international labour conventions a particular effectiveness. The peculiarities of their legal framework also make it clear that the purposes and content of ILO conventions differ from those of traditional international treaties.

It is no longer a case of governing relations between States, but of creating a framework for Member State employment relationships and social policy by creating or fostering the emergence of rights and obligations applicable to the persons to whom they apply. The latter aspect has implications in relation to the possible application of ILO standards by domestic courts.

⁹ For the process of drafting International Labour Standards, see International Labour Office: *Handbook of procedures relating to international labour Conventions and Recommendations*, Geneva, 2006, para. 1-4.

¹⁰ For the tripartite aspect of international labour conventions, see below, *Section B.2*.

¹¹ See Articles 19(2) and 21(1) of the ILO Constitution.

¹² In this respect it will be noted that some ILO conventions on social security make their application subject to a condition of reciprocal ratification. See, for example, Conventions Nos. 19 and 118 on equality of treatment for nationals and non-nationals.

¹³ See Article 19(5) of the ILO Constitution for conventions, and Article 19(6) of the ILO Constitution for recommendations.

¹⁴ Article 19(5)(e) of the ILO Constitution. In practice, these reports on non-ratified conventions are used by the Committee of Experts on the Application of Conventions and Recommendations to draft a general survey each year on the theme chosen by the Governing Body. See below, *Part 2, Chapter 2*, of the Manual.

Finally, before concluding the section on conventions, it should be pointed out that the Conference can adopt protocols in order to revise or partially modify existing conventions. In legal terms, protocols have the same nature and value as conventions. They are therefore only binding on States that have ratified them¹⁵.

III.A.2. International labour recommendations, non-binding instruments¹⁶

International labour recommendations on the other hand, drawn up and adopted by the Conference according to rules identical to those for conventions, are not binding legal instruments¹⁷ and are therefore not open to ratification. Their purpose is not to require Member States to comply with their content, but rather to suggest guidelines for regulating employment relationships and implementing social policy.

According to the case, recommendations are used by the Conference either to accompany the adoption of a convention and complete its provisions, or to address independently an issue which has not been the subject of an international labour convention¹⁸.

In the event of the joint adoption of a convention and a recommendation, the recommendation may, for example, put forward measures to implement the principles set out in the convention¹⁹. In certain situations the recommendation may also suggest that the protection afforded to workers by the corresponding convention should be extended or reinforced²⁰.

As will be seen in the second part of this Chapter, the non-binding nature of international labour recommendations does not, however, preclude the possibility of their judicial use. In certain cases they can in fact represent useful benchmarks for interpreting provisions of domestic law, or sources of inspiration to close any gaps in domestic legislation.

¹⁵ To date the following protocols have been adopted: Protocol of 1995 to the Labour Inspection Convention (No. 81); Protocol of 1990 to the Night Work (Women) Convention (Revised) (No. 89); Protocol of 1982 to the Plantations Convention (No. 110); Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention (No. 147); Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (No. 155).

¹⁶ It is important to avoid any confusion between international labour recommendations adopted by the International Labour Conference, non-binding universal standards, and the recommendations that certain ILO supervisory bodies can address to a particular country in the event of failure to comply with their ILS obligations. The characteristics and legal value of ILO supervisory body comments and recommendations will be examined in the following Chapter of this Manual.

¹⁷ While the content of recommendations is not binding upon Member States, the two types of obligations referred to as regards non-ratified conventions also apply to recommendations: the obligations of submission before the legislative authorities and to present follow-up reports to the ILO also cover recommendations.

¹⁸ See, for example, Communications within the Undertaking Recommendation, 1967 (No. 129), or the List of Occupational Diseases Recommendation, 2002 (No. 194).

¹⁹ For example, in protecting workers' representatives, Recommendation No. 143 completes Convention No. 135. While the Convention establishes that workers' representatives shall enjoy effective protection against any discrimination based on their functions and that they shall be afforded facilities to enable them to carry out their functions, the Recommendation proposes a list of measures making it possible to put these two principles into effect. The following suggestions should be noted as regards effective protection against discrimination: consultation or prior agreement of an independent body before dismissal, reinstatement following unjustified dismissal, attribution to the employer of the burden of proof in the event of a legal action against dismissal, etc.

²⁰ This is the case, for example, in connection with termination of employment. The Termination of Employment Recommendation, 1982 (No. 166) thus proposes to add to the list of grounds for termination prohibited by Convention No. 158, age and the performance of civic obligations such as military service. Along the same lines, the Recommendation proposes to strengthen the assurances provided by Convention No. 158 on the procedure prior to termination by granting the worker the opportunity to be accompanied by a representative during the prior interview.

III.A.3. Other types of instruments adopted by the ILO

Declarations

Although the provisions of the ILO Constitution do not refer to this type of instrument, both the Conference and the Governing Body have adopted declarations²¹. Since they are not subject to ratification, the weight of declarations largely depends on the body that issues them and on the aims of their adoption. In this respect, Conference declarations stand out in particular²². Used on few occasions and always with the aim of expressing or reiterating the Organization's fundamental principles, Conference declarations are therefore of a very solemn nature. Thus even if they are technically non-binding since they are not open to ratification, they may be perceived as an expression of customary international law or of *jus cogens*, i.e. peremptory norms of international law.

The ILO Declaration on Fundamental Principles and Rights at Work

Referring to the ILO Constitution, the Declaration on Fundamental Principles and Rights at Work identifies four categories of principles and rights recognized as fundamental, set out in eight core ILO conventions²³. Based on their acceptance of the content of the Constitution arising out of membership of the Organization, all Member States undertake to respect, to promote and to realise the fundamental principles and rights at work, whether they have ratified the Conventions concerned or not.

The Declaration on Fundamental Principles and Rights at Work is accompanied by a promotional follow-up mechanism designed to support the Member States in ensuring full respect for fundamental principles and rights.

The Declaration on Fundamental Principles and Rights at Work may have a certain impact in the legal systems of countries that have not yet ratified all eight core conventions. In this respect it is interesting to read the following extract from the preamble to the 2004 Labour Code of Morocco, a country which has not yet ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87):

²¹ It should be noted that the Governing Body has only adopted a declaration on a single occasion. This was the 1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

²² The following declarations have been adopted by the Conference: Philadelphia Declaration, 1944; Declaration on Action against Apartheid in South Africa, 1964; Declaration on Equality of Opportunity and Treatment for Women Workers, 1975; Declaration on Fundamental Principles and Rights at Work, 1998.

²³ The four categories of principles and rights and the conventions relating to them are as follows:

- freedom of association and effective recognition of the right to collective bargaining (Conventions Nos. 87 and 98);
- the elimination of all forms of forced or compulsory labour (Conventions Nos. 29 and 105);
- the effective abolition of child labour (Conventions Nos. 138 and 182);
- the elimination of discrimination in respect of employment and occupation (Conventions Nos. 100 and 111).

Extract from the Preamble to the Labour Code of the Kingdom of Morocco

The rights protected, the exercise of which, both within and outside the enterprise, is guaranteed by this Act, comprise the rights contained in ratified international labour conventions on the one hand, and the rights provided for by the principal conventions of the International Labour Organization, which include in particular:

- freedom of association and the effective adoption of the right to organize and collective bargaining;
- the prohibition of all forms of forced labour;
- the effective elimination of child labour;
- the prohibition of discrimination in respect of employment and occupation;
- equal remuneration.

Resolutions

These non-binding instruments, also adopted by the Conference, allow the latter to express its views on the most varied subjects. When they concern the themes covered by certain conventions, resolutions may help in interpreting their content. In connection with freedom of association or equality in employment and occupation, several resolutions are used by ILO supervisory bodies to provide support in assessing Member States compliance with their obligations in this area²⁴. Finally, resolutions have recently been adopted jointly with conventions to provide guidance for States in their application of the latter²⁵.

ILO Codes of Practice

These are technical instruments drawn up during meetings of experts representing workers, employers and governments. The conclusions of these meetings are then endorsed by the Governing Body. While most of the codes concern very specific aspects of hygiene and safety at work, there is also an important Code of Practice on HIV-AIDS²⁶.

Even if they are not legally binding and may appear less formal than the instruments adopted by the Conference, these Codes of Practice nevertheless enjoy strong legitimacy because they are drafted and adopted by tripartite consensus. ILO Codes of Practice may therefore serve as a useful source of inspiration for domestic courts.

Country: South Africa

PFG Building Glass (pty) Ltd v. Chemical Engineering Pulp Paper Wood and Allied Workers' Union (CEPPAWU) and others, Labour Tribunal, 28 March 03, No J90-2003

In this case the ILO Code of Practice on HIV/AIDS and the World of Work was used by the Labour Tribunal to support its position on the validity of anonymous and voluntary testing of workers in an enterprise.

²⁴ The 1952 Resolution concerning the independence of the trade union movement; the 1970 Resolution concerning trade union rights and their relation to civil liberties; the 1985 Resolution on equal opportunities and equal treatment for men and women in employment.

²⁵ See also the resolutions adopted in 2006 jointly with the Consolidated Maritime Convention and the Promotional Framework for Occupational Safety and Health Convention (No. 187).

²⁶ International Labour Office: *ILO Code of Practice on HIV/AIDS and the World of Work*, Geneva, 2001. The following Codes, among others, should also be noted: International Labour Office: *ILO Code of Practice on Managing Disability in the Workplace*, Geneva, 2002; International Labour Office: *ILO Code of Practice on the Protection of Workers' Personal Data*, Geneva, 1997.

III.B. Tripartite and universal nature of ILO instruments

Besides their distinct legal nature, international labour conventions and recommendations and the other instruments adopted by the ILO share two fundamental characteristics: tripartism and universality. These two features explain certain specific elements of the legal regime of conventions and recommendations and are also of interest as regards their possible use by domestic courts.

III.B.1. Tripartite and universal nature of ILO conventions and recommendations

Tripartism

As a consequence of the ILO structure, which brings together governments as well as employers' and workers' organizations, the instruments adopted by the Organization are not the result of intergovernmental action alone. They are on the contrary the result of continuous tripartite dialogue. This is particularly true of international labour conventions and recommendations. Representatives of employers, workers and governments are fully involved in all stages, from the drafting of the standard to the monitoring of its application. Without going into the procedure in detail²⁷, the following elements underscore the extent to which ILS are the result of social dialogue:

- within the Governing Body, employers' and workers' representatives take part in selecting the subjects for which 'standard-setting action' will be taken at the Conference;
- in formulating and drafting the content of the standard, the employers' and workers' organizations participate at two levels: at domestic level first by responding to questionnaires sent by the International Labour Office on what the structure and content of the standard should be, and subsequently at the Conference on technical committees responsible for producing the draft convention or recommendation;
- the employers' and workers' delegates to the Conference vote on the adoption of the standard, which requires a majority of two-thirds of the votes cast by delegates present²⁸;
- the employers' and workers' organizations take part in monitoring the application of standards by means of tripartite bodies: the Conference Committee on the Application of Standards, the Freedom of Association Committee and tripartite committees appointed to consider representations submitted by employers' or workers' organizations under Article 24 of the ILO Constitution.

The importance of the adoption of ILS with a two-thirds majority of the delegates present at the Conference should be noted in particular. This demonstrates that the vast majority of existing ILS are based on tripartite consensus. In practice, the rejection of a standard by one of the three components²⁹ of the Conference in fact very much reduces the possibility of achieving the qualified majority required for adopting a convention or recommendation.

Universality

All ILO instruments are universally applicable. In accordance with the ILO's philosophy and objectives set out in its Constitution, the Organization's various bodies have always ruled out the possibility of accepting the existence of regionally applicable standards within the Organization. As laid down in Article 19(3) of the ILO Constitution, universality presupposes

²⁷ See International Labour Office: *Handbook of Procedures relating to International Labour Conventions and Recommendations*, *op. cit.*

²⁸ See Article 19(2) of the ILO Constitution.

²⁹ It should be noted in this respect that during the votes submitted to the Conference, the workers' and employers' delegates meet in occupational groups, each group adopting a united position.

that in framing the ILS, the variety of situations in the different Member States are taken fully into account.

III.B.2. Consequences of tripartism and universality for ILO conventions and recommendations

ILS, a minimum level of protection for workers

Arising out of a compromise between the representatives of employers, workers and governments of 183 different countries, the content of ILS by definition only guarantees workers a minimum level of protection³⁰ which may then be increased by domestic legislation. In line with the favourability principle, when a country's regulation is more favourable to workers than the provisions of a ratified international convention, the most favourable provision must prevail. This principle is expressed in Article 19(8) of the ILO Constitution.

Extract from the ILO Constitution

Article 19(8)

In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

The inadmissibility of reservations offset by the flexibility provided for by certain conventions³¹

Departing from the general rules for ratifying international treaties, the ratification of ILO conventions cannot be accompanied by reservations. A State therefore cannot choose on a discretionary basis which obligations of a convention it would agree to comply with and those it would exclude from its commitment. The inadmissibility of reservations is not expressly provided for by the ILO Constitution, but arises out of the Organization's constant practice since its foundation. This is based directly and principally on the tripartite nature of international labour conventions. Since the content of these instruments has been discussed, drafted and adopted by the employer, worker and government parties, it would not be consistent with their nature to allow one of the three parties (in this case the ratifying State) to unilaterally reduce the content of the convention applicable in a particular country and thereby modify the balance of the entire instrument negotiated and adopted on a tripartite basis.

The inadmissibility of reservations does not mean, however, that ILO conventions do not have mechanisms giving States some room to determine the extent of the obligations arising out of their ratification. Some ILO conventions in fact contain 'flexibility' clauses granting States certain options, such as the choice of only ratifying a part of the instrument, excluding certain sectors of the economy, certain categories of worker or certain branches of activity from the scope of the convention, or choosing between different levels of protection. Flexibility clauses represent the necessary counterpart to the universality of standards to allow them to be applied

³⁰ To be precise, this should be the minimum level of protection advisable. N. Valticos and G. Von Potobsky: *International Labour Law*, Second revised edition, Kluwer Law and Taxation Publishers, Deventer - Boston, 1995, para. 95.

³¹ Memorandum of the International Labour Office on reservations in connection with multilateral conventions (31 December 1951), *Official Bulletin*, vol. XXXIV, No. 3, pp. 275-315; G. Raimondi: 'Réserves et Conventions internationales du travail', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, International Labour Office, Geneva, 2004 (available in French only).

by countries whose economic, social and cultural situations are very different³². There is an essential difference, however, between these flexibility clauses and the reservations mechanism in that, in the context of the ILO, the State has the power to adjust the content of its obligations only when that possibility is expressly provided for by the text of the convention itself, and in compliance with all the limits laid down thereby³³.

Examples of flexibility clauses are set out below.

Clause allowing only a part of a convention to be ratified
Extract from the Protection of Workers Claims (Employers Insolvency) Convention, 1992 (No. 173)

1. A Member which ratifies this Convention shall accept either the obligations of Part II, providing for the protection of workers' claims by means of a privilege, or the obligations of Part III, providing for the protection of workers' claims by a guarantee institution, or the obligations of both Parts. This choice shall be indicated in a declaration accompanying its ratification.
2. A Member which has initially accepted only Part II or only Part III of this Convention may thereafter, by a declaration communicated to the Director-General of the International Labour Office, extend its acceptance to the other Part.

C.173, Article 3

Clauses allowing a lower level of protection to be accepted for countries whose economy has not achieved a sufficient level of development
Extracts from the Minimum Age Convention, 1973 (No. 138)

The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.

C.138, Article 2(3)

Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the Organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.

C.138, Article 2(4)

³² As regards the impact of the flexibility of certain provisions of ILO conventions on supervising the application of standards, see Nicolas Valticos and Geraldo Von Potobsky, according to whom 'the majority members of the Conference Committee on the application of Conventions and Recommendations considered that diversity of national conditions was a factor to be taken into account at the stage of drafting ILO standards by introducing a certain flexibility, as required by the Constitution of the Organization. However, once a Convention was ratified there could be no room for flexibility beyond what was expressly permitted by the Convention. Evaluation of observance of Conventions must be according to uniform criteria for all countries, because any other approach would leave every State free to interpret its obligation as it saw fit.' (N. Valticos and G. Von Potobsky: *International Labour Law, op. cit.*, para. 705).

³³ N. Valticos and G. Von Potobsky: *International Labour Law, op. cit.*, para. 96-105; C. W. Jenks: 'Flexibility in International Labour Conventions', April 1960; N. Valticos: 'Diversité des situations nationales et unité du droit international du travail', in *In Memoriam Zvi Bar-Niv, Collection of Essays on Labour Law*, Ramot Publishing Co., Tel Aviv, 1987 (available in French only); G. P. Politakis: 'Deconstructing flexibility in international labour conventions', in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos, op. cit.*

As stated above, another form of flexibility is the possibility granted by some conventions, to exclude certain sectors of the economy, certain categories of worker or certain branches of activity from the scope of the instrument.

Clause allowing the exclusion of certain categories of worker from the scope of a convention

Extract from the Termination of Employment Convention, 1982 (No. 158)

In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the Organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

C.158, Article 2(5)

For judges and legal practitioners who may have to refer to ratified conventions making provision for this option, it will therefore be essential to ascertain whether the State has or has not made use of the possibility of restricting the scope of the instrument. It should be noted in this respect that ILO conventions including such an option always make its exercise contingent upon a certain number of conditions and limits which the implementing State must strictly observe. As the example referred to above shows, any use of this type of option must always be preceded by consultations with employers' and workers' organizations. It will be noted in addition, as indicated in the example below, that exclusions from the scope of a convention must be communicated at the time of the first report on the application of the instrument, which the State must submit under Article 22 of the ILO Constitution, subsequent exclusions being inadmissible.

Clause requiring exclusions from the scope of a convention to be communicated in the first report on its application

Extract from the Termination of Employment Convention, 1982 (No. 158)

Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organization any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

C.158, Article 2(6)

ILS, expression of general principles of labour law and social protection

As referred to above, the adoption of conventions and recommendations requires a very broad consensus at the Conference at both occupational and geographic level. This has implications for the very nature of ILS and for the role they can be attributed by certain domestic legal systems. The existence of broad international tripartite consensus gives international labour conventions and recommendations great legitimacy and authority. It is therefore reasonable to assume that such broad consensus can only be obtained in connection with principles which the various occupational groups and countries that make up the Conference perceive to be sufficiently essential. International labour conventions and recommendations thus express

general principles of labour law and social protection that it may be possible to consider when a source of inspiration or interpretation is required in order to resolve labour disputes at domestic level.

The following are examples of labour codes that give ILO conventions (even if not ratified) and recommendations a role in interpreting domestic legislation and resolving disputes.

Extract from the Labour Code of Lesotho

Article 4. Principles used in interpreting and applying the Code

The following principles shall be used in the interpretation and administration of the Code: (...) c) in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organization, and of Recommendations adopted by the Conference of the International Labour Organization.

Extract from the Labour Code of Colombia

Article 19. Additional implementing rules

In the event that a rule applicable exactly to the dispute does not exist, provisions concerning similar cases or matters, the principles arising out of this Code, jurisprudence, custom or usage, doctrine, the conventions and recommendations adopted by the International Labour Organization and Conferences, provided they do not contradict the country's social laws, shall be applied as well as the the principles of common law that do not contradict those of labour law, all in a spirit of equity.

Examples of court decisions considering ILO conventions and recommendations as the expression of general principles are set out below.

Country: Botswana

Joel Sebonego v. News Paper Editorial and Management Services (PTY) ltd, Botswana Industrial Court, 23 April 1999, No. IC 64/98

'As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice or rules of equity as they are sometimes called, when determining trade disputes. These rules of equity are derived from the common law as well as from conventions and recommendations of the International Labour Organization (ILO). The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are succinctly stated in Article 4 of ILO Convention No. 158 of 1982, which provides as follows: (...)'

Country: Trinidad and Tobago

Bank and General Worker's Union v. Home Mortgage Bank, Industrial Court of Trinidad and Tobago, 3 March 1998, No. 140, 1997

'The principles of good industrial relations practice dictate that no worker's employment may be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or which is founded on the operational requirements of an employer's business. These principles are enshrined in writing in Convention No. 158 of the International Labour Organization. ILO Convention No. 158 has put in written form long standing principles of good industrial relations practice and it is of no consequence that the Convention has not been ratified by Trinidad and Tobago. It is not applicable as part of the domestic law of Trinidad and Tobago but as evidence of principles of good industrial relations practice which have been accepted at an international level.'

III.C. The content of ILO conventions: some general indications

Since 1919 the Conference has adopted a great many conventions and recommendations covering most aspects of employment relationships and social policy in general³⁴. Before focusing in detail on how useful they may be to the courts, it should be noted that the nature of the content of ILO conventions may vary substantially according to the type of subject addressed and the aim pursued. In this respect a distinction is often drawn in the literature between standards recognizing fundamental principles and rights, the so-called programmatic or promotional standards, and finally those considered to be technical standards³⁵.

Even though the provisions of ILO conventions recognizing fundamental principles and rights at work are largely formulated along general lines, they are often drafted in a way that is sufficiently clear to grant rights to individuals directly, thus facilitating their use in court. The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), is a very clear example of this type of instrument.

The so-called promotional or programmatic conventions set out different general objectives which the countries that ratify them pledge to pursue, essentially by implementing long-term policies. The provisions of these instruments generally allow States considerable leeway to select measures to be taken to achieve the objectives set. The Employment Policy Convention, 1964 (No. 122), illustrates this type very clearly.

Finally, technical conventions are instruments that seek to regulate very specific subjects to a very precise degree. It is therefore not unusual for some provisions of these conventions to go into a level of detail similar to that of domestic legislation. Numerous conventions on health and safety at work are a good example of this category.

This three-category distinction is purely for explanatory purposes. It has the merit of raising several preliminary points of reference for understanding the nature of the provisions of ILO conventions, and is a starting point for examining their possible use by domestic courts and lawyers. It is a very schematic classification that should be viewed with care, however. Firstly, it would be difficult to place all ILO conventions in one of the three categories referred to. Secondly, the same convention often contains provisions of a very different nature, some, for example, setting very general objectives for States to achieve, others establishing general rights and principles directly applicable to citizens. Finally, it will be seen that when it is a matter of assessing the legal applicability of an international provision, additional criteria and elements must be taken into account.

IV. Judicial applicability of ILO Conventions and Recommendations: several points for reflection

Over and above the conditions governing the judicial use of international law particular to each national legal system³⁶, do the provisions of ILO conventions and recommendations really have a judicial application?

Designed principally to guide the content of the social law and policy of countries in very different circumstances, and therefore seeking neither to replace domestic laws or to render them uniform, it is reasonable to assume that ILO standards would be addressed above all to

³⁴ For a list of subjects covered by International Labour Standards to date, see: <http://www.ilo.org/ilolex/french/subjectF.htm>. Over the years, meanwhile, because of economic and social developments, some of these standards have lost all or part of their relevance. In this respect, in 1995 the Governing Body began work on assessing how up-to-date conventions and recommendations were.

³⁵ J.-M. Servais: *Normes internationales du travail*, LGDJ, Paris, 2004, para. 48-50 and 1110.

³⁶ See above, *Part 1*.

the parliaments and governments of each country and that their provisions would thus be too general to allow the courts to resolve disputes directly on their basis.

Three additional observations are called for in attempting to answer this very pertinent question and observation.

- 1) Not all the provisions in ILS are identical. By their very nature, some of them may allow disputes to be resolved on their basis alone more easily than others.
- 2) Determining whether an international provision is sufficiently clear and specific to resolve a legal dispute naturally depends on the content of the provision concerned, but also on the facts of the case itself. The same provision may therefore be too general to provide a solution to dispute A, but sufficiently clear to provide a solution to dispute B.
- 3) International provisions which are insufficiently specific to resolve a dispute in themselves may, however, be used by the courts as a source of inspiration for domestic law or as a source of inspiration in recognizing jurisprudential principles.

These three points will now be addressed in turn, while bearing in mind that these developments in the judicial applicability of ILS do not prejudice the freedom of each domestic legal system to determine the extent to which the domestic courts may refer to international law or not.

IV.A. The different types of provisions in international labour conventions and their varying 'capacity' to resolve disputes directly

Since the direct resolution of a legal dispute on the basis of international law presupposes the application of legally binding sources of law, this analysis will focus on the provisions of international labour conventions alone.

In drawing attention above to the schematic distinction between programmatic and technical provisions and those recognizing fundamental rights and principles, the idea that the content of ILS was not uniform has already been introduced. The analysis must now be developed by distinguishing the different types of provisions in ILO conventions according to their greater or lesser capacity directly to resolve matters brought before domestic courts. In this respect, on the basis of the work of Geraldo Von Potobsky³⁷, consideration must be given to the type of obligations the provisions of conventions impose upon States, their degree of specificity and their capacity to create or not to create subjective rights that the persons to whom they apply may directly ask the courts to enforce. Based on these criteria, four categories of provisions can be distinguished, starting from those that unconditionally grant clearly determined subjective rights to the persons to whom they apply, to those imposing a general obligation upon States to implement a policy seeking to achieve a certain objective.

These four categories are the following:

- 1) provisions unconditionally granting subjective rights with a clearly determined content;
- 2) provisions granting subjective rights the content of which involves a significant degree of indetermination;
- 3) provisions in the form of directives requiring States to take legislative measures in order to incorporate the rights and principles recognized by the convention into domestic law;

³⁷ See in particular, G. Von Potobsky: *Los convenios de la OIT: ¿una nueva dimensión en el orden jurídico interno?*, in *Evolución del pensamiento juslaboralista. Estudios en homenaje al Prof. Héctor-Hugo Barbagelata*, Fundación de cultura universitaria, Montevideo, 1997 (available in Spanish only), and G. Von Potobsky: *Eficacia jurídica de los convenios de la OIT en el plano nacional*, in *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos, op. cit.* (available in Spanish only).

4) programmatic provisions by means of which a State undertakes to implement a general policy.

While the classification proposed seeks to be neither exhaustive nor absolutely specific, it should nevertheless provide food for thought on the capacity of provisions in ILO conventions to offer an adequate legal basis for the direct resolution of certain disputes brought before domestic courts.

First category: provisions unconditionally granting subjective rights with a clearly determined content³⁸

Several types of provisions can be classified in this first category:

- provisions granting freedom or power to the persons to whom they apply

Extracts from the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

C.87, Article 2

Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

C.87, Article 3(1)

- provisions imposing strict prohibitions

Extract from the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

Workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority.

C.87, Article 4

Extract from the Termination of Employment Convention, 1982 (No. 158)

The following, inter alia, shall not constitute valid reasons for termination:

- a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- e) absence from work during maternity leave.

C.158, Article 5

³⁸ Besides the examples referred to below, and without seeking to be exhaustive, Geraldo Von Potobsky has highlighted provisions unconditionally granting clear and specific subjective rights to the persons to whom they apply in Conventions Nos. 1, 95, 108, 120, 132, 136, 138, 170, 171 and 183.

- provisions granting specific benefits to the persons to whom they apply

Extract from the Maternity Protection Convention, 2000 (No. 183)

On production of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks.

C.183, Article 4(1)

Extract from the Holidays with Pay Convention (Revised), 1970 (No. 132)

The holiday shall in no case be less than three working weeks for one year of service.

C.123, Article 3(3)

Second category: provisions granting subjective rights the content of which involves a significant degree of indetermination

Extract from the Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

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

C.98, Article 1(1)

Third category: provisions in the form of directives requiring States to take legislative measures in order to incorporate the rights and principles recognized by the convention into domestic law³⁹

Extract from the Benzene Convention, 1971 (No. 136)

The use of benzene and of products containing benzene shall be prohibited in certain work processes to be specified by national laws or regulations.

C.136, Article 4(1)

Fourth category: programmatic provisions by means of which a State undertakes to implement a general policy

Extract from the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

C.111, Article 2

³⁹ Geraldo Von Potobsky cites the following texts in relation to this category, without seeking to be exhaustive: provisions concerning hygiene and safety set down in Conventions Nos. 115, 119 and 139; provisions concerning medical services set down in Convention No. 183; provisions concerning the protection of workers against the insolvency of private employment agencies set down in Convention No. 181.

NB: as has already been pointed out in *Part 1* of the Manual, each article and paragraph in ILO conventions must be examined on an individual basis. The same convention can in fact contain provisions of a very different kind.

Compare the following two provisions, both included in the Workers with Family Responsibilities Convention, 1981 (No. 156).

Extracts from the Workers with Family Responsibilities Convention, 1981 (No. 156)

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

C.156, Article 3(1)

Family responsibilities shall not, as such, constitute a valid reason for termination of employment.

C.156, Article 8

These four categories show that the more the provisions of conventions clearly recognize subjective rights, the more it seems possible to use them to resolve a dispute directly. Conversely, the further down the list one goes and the more the provisions require legislative development to complete or implement them, the more difficult it is to settle a case on their basis alone.

To refer to a term analysed in *Part 1*, the first category concerns provisions whose self-executing or directly applicable nature is indisputable. In monist countries it would thus seem to be difficult to question the option a court has to base its judgment directly on these provisions to resolve a dispute.

The following is an example of the direct resolution of a dispute on the basis of a provision falling into the first category.

Country: France

Castanié v. Dame veuve Hurtado, Cour de cassation, Appeals Division, Req. 27 February 1934

The French *Cour de cassation* directly applied Article 1 of the ILO Equality of Treatment (Accident Compensation) Convention (No. 19)⁴⁰ to grant a worker of Spanish nationality the benefits of French legislation on industrial accident and to declare the article of the law providing for a contrary solution to be revoked.

What of the other three categories, however? Can they allow courts to settle certain disputes on their sole basis alone? Even if the possibilities for directly resolving disputes diminish further down the list, it seems that this possibility does not disappear completely, however, since the capacity of an international provision to resolve a dispute directly also depends on the facts of the case concerned.

⁴⁰ Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). Article 1(1) of the Convention reads as follows: 'Each Member of the International Labour Organization which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals'.

IV.B. The capacity of provisions of conventions to settle a dispute directly also depends on the subject of the dispute

This heading may appear to be stating the obvious, but it is rarely brought up in studies of the judicial applicability of ILS. While an article of an international convention may appear to be insufficiently specific on its own to resolve a dispute involving the determination of a worker's rights in detail, the same article may on the other hand be sufficiently clear to assert that a provision of domestic law or an administrative decision contradicting it is invalid or unconstitutional. Certain types of dispute therefore exist in which international provisions requiring legislative development in order to be fully operational, and therefore falling into categories other than the first one, may nevertheless be sufficiently clear to provide a solution. This could concern the following two types of situation in particular: in the event of the absence of a domestic provision specifying the content of a right granted by an international instrument, and in the event of a contradiction between domestic law or practice and international law.

In the event of the absence of a domestic provision regulating the exercise of a right granted by an international instrument, several categories of provisions referred to above could in certain cases allow courts to provide a response to the dispute they are required to settle. This could be the case for second or third category measures granting subjective rights whose content must nevertheless be specified by domestic law. If such a regulation has not been adopted by the State, should the subjective right granted by the international instrument be deemed to remain without effect in domestic law? According to the jurisdiction of the court concerned and according to the rules specific to each legal system, it might be possible to use the international provision directly to grant the benefit of the subjective right to the person to whom it applies⁴¹.

Country: Costa Rica

Supreme Court of Justice, Constitutional Chamber, 8 October 1993, Judgment No. 93-5000

In the absence of an express provision in the Labour Code⁴², the Supreme Court of Justice of Costa Rica based itself on Article 1 of Conventions Nos. 98⁴³ and 135⁴⁴, which require States to ensure effective and adequate protection against anti-union discrimination, in order to recognize a reinforced statute of protection benefitting workers' representatives, including, inter alia, the right to reinstatement in the event of unjustified dismissal.

In the event of a contradiction between domestic law and international law, depending on the powers of the court concerned and the position of international law in the hierarchy of norms at domestic level, the international provisions, irrespective of their category, could be used to invalidate the domestic provision or practice contradicting the State's international obligations.

⁴¹ As regards provisions falling into the fourth category referred to above, in the absence of a domestic provision implementing the measures provided for by an ILO convention, Geraldo Von Potobsky envisages the possibility of rendering the State 'vertically' liable before the competent courts for failing to apply the international convention. This line of thought is based on European Court of Justice jurisprudence. In *Andrea Francovich v. Italian Republic*, the Court ruled that the Italian State was rendered liable by its failure to apply the measures provided for by Council Directive 80/987/EEC of 20 October 1980 relating to the protection of employees in the event of the insolvency of their employer.

⁴² Article 70 of the Labour Code of Costa Rica stated only that the employer could not force workers to leave their trade union organization.

⁴³ Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

⁴⁴ Workers' Representatives Convention, 1971 (No. 135).

In these circumstances, even a programmatic provision is likely to be sufficiently clear to settle the dispute laid before the court⁴⁵.

Country: Costa Rica

José Manuel Paniagua Vargas and other officials of the National Commission for Indigenous Affairs v. The Ministry for Culture, Youth and Sports and the National Commission for Indigenous Affairs (CONAD), Supreme Court of Justice of Costa Rica, Constitutional Division, 16 January 1998, Res: No. 0241-98, Exp: No. 5325-V-97.

On the basis of Article 4 of ILO Convention No. 169⁴⁶, by virtue of which States undertake to adopt special measures to safeguard indigenous and tribal peoples, the Supreme Court of Costa Rica invalidated a decision to reduce the budget of the National Commission for Indigenous Affairs by 85%.

‘Since Costa Rica has ratified that international instrument, the State of Costa Rica has undertaken to take special measures under the aforesaid Article 4. This commitment must be construed as an on-going activity aiming to safeguard those minority ethnic groups and, inter alia, their institutions, property, labour and environment from the influence of our population and its culture.

Those special measures must signify that it is prohibited for the State to abandon or strand a public institution whose purpose is to become a forum for discussion and initiatives concerning the country’s indigenous affairs.’

IV.C. The use of international labour conventions and recommendations as an aid to interpretation or as a source of inspiration

As has been seen in *Part 1* of the Manual, domestic courts may also use international labour law indirectly to resolve a dispute, using it for interpretative purposes, for example, in order to specify the meaning and scope of a provision in the Labour Code, or as a source of inspiration in recognizing jurisprudential principles.

In *Part 1* it was explained that this type of use was not only possible in all legal systems, whether monist or dualist, but that situations that could give rise to such use were probably more numerous than those allowing a dispute to be resolved directly on the basis of international law. Since such contributes indirectly to resolving a dispute, it is sufficient for the international provision to clarify or reinforce the reasoning of the court that will deliver its judgment principally on the basis of another source of law. It is therefore no longer necessary for the provision to be ‘directly operational’, i.e. for its content to be sufficiently specific to allow the dispute to be resolved on its basis alone. All four categories of provisions highlighted in the preceding section may therefore potentially be used for interpretative purposes or as a source of inspiration. What is more, it is also no longer necessary for the international provision used for interpretative purposes or as a source of inspiration to be part of a binding legal instrument, since once again it will not be the direct legal basis of the judgment. Articles of conventions, therefore, whether ratified or not, or recommendations or even codes of practice may be used *a priori*.

⁴⁵ This reasoning can furthermore be considered to be reflected in the content of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). On the one hand, Article 2 establishes a programmatic obligation to implement a general policy to combat discrimination. On the other, according to Article 3(c), this programmatic obligation requires the immediate repeal of any statutory provisions or practices which are inconsistent with the objectives of this policy, a provision that can be deemed to be a sufficiently clear basis for declaring invalid any domestic provisions which are inconsistent with the principles set out in that Convention.

⁴⁶ Indigenous and Tribal Peoples Convention, 1989 (No. 169).

By way of illustration, several non-exhaustive examples of different types of provisions of conventions or recommendations that may indirectly help domestic courts and tribunals to resolve disputes are set out below.

IV.C.1. The possibility of using provisions establishing definitions for the purposes of interpretation or inspiration

Many provisions of ILO conventions and recommendations setting out definitions of legal notions can be used to specify the meaning and scope of those notions when they are used by domestic legislation.

The following are some examples of these provisions.

Extract from the Equal Remuneration Convention, 1951 (No. 100)

For the purpose of this Convention:

a) the term *remuneration* includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;

C.100, Article 1(a)

Extracts from the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

a) For the purpose of this Convention the term *discrimination* includes:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

C.111, Article 1(1)(a)

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

C.111, Article 1(2)

NB: all definitions in ILO conventions and recommendations can be found on the Organization's website⁴⁷.

The following is an example of the jurisprudential use of articles establishing definitions.

Country: Australia

Commonwealth of Australia v. Human Rights and Equal Opportunity Commission, Australian Federal Court, 15 December 2000, [2000] FCA 1854

In this judgment, the Australian Federal Court relied on the definition of the notion of discrimination set out in Article 1(a) of Convention No. 111⁴⁸ and the interpretation of this provision by ILO supervisory bodies to specify that cases of indirect discrimination were prohibited by Australian legislation.

⁴⁷ See: <http://www.ilo.org/ilolex/english/defE.htm>.

⁴⁸ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

IV.C.2. The possibility of using provisions setting out general principles or establishing programmatic objectives for the purposes of interpretation or inspiration

The provisions of ILO conventions and recommendations setting out general principles or establishing programmatic objectives for States, since they can be considered not to be directly operational in themselves, may nevertheless be useful guides for the courts in resolving an ambiguity in domestic law or as a support for assessing the constitutionality of a domestic provision.

The following is an example of the interpretative use of provisions setting out general principles or establishing programmatic objectives.

Country: Germany

Federal Constitutional Court of Germany, 18 November 2003, 1 BvR 302/96

In this case concerning the validity of a maternity insurance scheme partially funded by the employer, the German Federal Constitutional Court ruled that this method of financing was unconstitutional, since in practice it could encourage discrimination against women. In this judgment the Court confirmed its reasoning by referring to the objectives of ILO Convention No. 111, under which the State undertakes to implement a policy intended to ensure equality in employment and occupation, not only in law but also in practice.

IV.C.3. The possibility of using provisions in ILO recommendations suggesting methods of application for the purposes of interpretation or inspiration

Finally, while these illustrations are not intended to be exhaustive, when ILO recommendations suggest ways of ensuring effective observance of principles and rights set out in the corresponding conventions, these provisions may again serve as guides enabling domestic courts to determine the legal arrangements applicable to those rights and principles in domestic law.

Country: Spain

Constitutional Court, Second Division, 23 November 1981, No. 38/1981

In a case relating to the dismissal of applicants for workers representatives, the Constitutional Court had to determine whether the constitutional protection of freedom of association required the attribution of the burden of proof in cases where anti-union discrimination was alleged. To answer this question in the affirmative, the Court relied primarily on paragraph 6(2)(e) of ILO Recommendation No. 143⁴⁹.

The Court ruled that ILO recommendations, even if they were not legally binding, were a source of inspiration for international labour conventions that could therefore be used indirectly to interpret the provisions of the Spanish Constitution on the same rights and principles.

⁴⁹ Workers' Representatives Recommendation, 1971 (No. 143).

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Documents

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ILO Constitution, 1919

ILO Declaration on Fundamental Principles and Rights at Work, 1998

International Labour Office Code of Practice on the Protection of Workers' Personal Data, 1997

International Labour Office Code of Practice on HIV/AIDS and the World of Work, 2001

International Labour Office Code of Practice on Managing Disability in the Workplace, 2002

■ Other

Vienna Convention on the Law of Treaties, 1969

Internet Links

■ ILO

ILO website: www.ilo.org

ILO conventions and protocols: <http://www.ilo.org/ilolex/english/convdisp1.htm>

ILO recommendations: <http://www.ilo.org/ilolex/english/recdisp1.htm>

General Reports of the Committee of Experts on the Application of Conventions and Recommendations: <http://www.ilo.org/ilolex/english/ceacrrepsq.htm>

General Surveys of the Committee of Experts on the Application of Conventions and Recommendations: <http://www.ilo.org/ilolex/english/surveyq.htm>

ILOLEX, database containing the complete texts of ILO conventions and recommendations, lists of ratifications, comments of the Committee of Experts and Freedom of Association Committee, examination of cases by the Conference Committee, complaints, cases, general surveys and many other related documents: <http://www.ilo.org/ilolex/english/index.htm>

Chapter 2

The work of the ILO supervisory bodies

I. Introduction

One of the key features of ILO standards is the supervisory mechanisms that support them. The ILO does not merely develop and adopt international labour conventions and recommendations, it also ensures that they are implemented by means of various supervisory bodies whose work is based more on dialogue and peaceful pressure than on sanctions. From a legal standpoint, there is no international court within the ILO issuing binding judgments on the application of ILO standards by Member States⁵⁰. The work of the supervisory bodies is nevertheless an extremely important legal tool when it comes to using international labour standards (ILS) in court proceedings and ensuring that domestic law conforms to international labour law.

In view of its judicial objective, this Chapter will concentrate more on the outcome of the supervisory bodies' work than on the procedures governing the way they operate. Along the same lines, the Manual will emphasize the work of the ILO supervisory bodies which are more likely to be used as a frequent reference for resolving labour disputes at domestic level. This Chapter will deal mainly with the work of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association. The other ILO supervisory bodies will be described in less detail. The legal nature of the functions of the Committee of Experts, the 'quasi judicial' nature of the Committee on Freedom of Association and the continuity over time of these two organizations has enabled them to establish a body of principles which is both comprehensive and consistent, making them extremely useful for domestic judges and legal practitioners.

The usefulness of the work of the ILO supervisory bodies for a better understanding of the meaning and scope of the provisions of international labour conventions and recommendations

The ILO supervisory bodies are able to specify the meaning and scope of the provisions of international labour standards by monitoring Member State compliance with them. Their findings and decisions are therefore a central source of inspiration and interpretation for judges and legal practitioners in understanding ILO instruments and in applying their own domestic law.

The usefulness of the work of the ILO supervisory bodies in assessing compatibility between domestic and international labour law

Through the comments and recommendations the supervisory bodies address to the various Member States, domestic judges and legal practitioners can identify the elements of their own domestic law which are not entirely consistent with the international instruments applicable to their countries, and can reflect on how to ensure that their domestic law is interpreted as consistently as possible with their country's international commitments.

⁵⁰ Article 37(2) of the ILO Constitution allows for the possibility of setting up a tribunal to which questions regarding the interpretation of international labour conventions and of the ILO Constitution can be submitted. To date, such a tribunal has not been established.

II. ILO mechanisms and supervisory bodies

The ILO has two main types of mechanisms to supervise Member State application of international labour standards. The first is known as ‘regular’ because it is based on an analysis of the reports States must deliver to the ILO from time to time, and mainly concerns the conventions they have ratified⁵¹. The second, known as ‘special’, is based on the submission of representations or complaints submitted to the ILO against a Member State.

II.A. Regular supervision of the application of international labour standards

Obligation to present regular reports on ratified conventions

The regular supervision of the application of international labour standards is based primarily on regular submission by Member States of reports on the conventions they have ratified. Under Article 22 of the ILO Constitution⁵², States are required to inform the ILO on how they give effect to the obligations in the conventions to which they are parties, both in law and in practice. Since 1993, following a decision of the Governing Body of the ILO, these reports must be submitted every two years for 12 fundamental and priority conventions⁵³, and every five years for the others. In practice, it is governments, as representatives of the State to international organizations, which produce these reports for the ILO. It should be noted here that States must include in their reports the relevant judicial decisions by means of which the courts ensure that ratified conventions are complied with.

In addition, on the basis of Article 23(2) of the ILO Constitution⁵⁴, employers’ and workers’ organizations have the right to give their opinion on the government reports and may also send their observations on the application of ratified conventions directly to the ILO.

Obligation to submit reports on certain non-ratified conventions and recommendations

In addition to the obligation to submit regular reports on each ratified convention, Article 19(5) of the ILO Constitution⁵⁵ allows the Governing Body to ask Member States to report on the conventions they have not yet ratified and on international labour recommendations. In practice

⁵¹ It will nevertheless be seen that under Article 19(5)(e) of the ILO Constitution, the Governing Body may also ask States to report on non-ratified conventions and recommendations. This provision is the legal basis for the General Surveys produced each year by the Committee of Experts on a different subject.

⁵² Article 22 of the ILO Constitution: ‘Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request’.

⁵³ Core Conventions due to be reported on every two years: Conventions No. 87 and No. 98 (Freedom of Association and Collective Bargaining); Conventions No. 29 and No. 105 (Forced Labour); Conventions No. 138 and No. 182 (Child Labour); Conventions No. 100 and No. 111 (Equality of Opportunity and Treatment). Conventions regarded as having priority and also due to be reported on every two years: Convention No. 122 (Employment Policy); Convention No. 144 (Tripartite Consultation); Conventions No. 81 and No. 129 (Labour Inspection).

⁵⁴ Article 23(2) of the ILO Constitution: ‘Each Member shall deliver to the representative organizations recognized as such for the purposes of Article 3 a copy of the information and reports sent to the Director-General in pursuance of Articles 19 and 22’.

⁵⁵ Article 19(5)(e) of the ILO Constitution: ‘if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention’.

the Governing Body selects a convention or group of conventions and recommendations on a specific subject each year. Member States that have not adhered to the conventions in question must explain how they will implement the content of these standards, in both law and in practice, and the obstacles preventing their ratification⁵⁶.

Both types of reports described above (ratified conventions/non-ratified conventions and recommendations) are subject to two successive supervisions, one of a legal nature by the Committee of Experts, and the other, based on tripartite dialogue, by the Conference Committee on the Application of Standards. As already pointed out, the Manual will focus mainly on the supervision undertaken by the Committee of Experts.

II.A.1. Committee of Experts on the Application of Conventions and Recommendations

As has already been said, the Committee of Experts is a potentially very useful body for domestic judges and legal practitioners. Since its creation over 80 years ago, the Committee of Experts has been developing a very comprehensive “jurisprudence” with respect to the content of ILO conventions and recommendations. After a short presentation of the structure of this body and its working methods, this Chapter will concentrate on the Committee’s main decisions and documents available to judges and legal practitioners.

II.A.1.a. Composition and mandate of the Committee of Experts

Established in 1926 by the Governing Body following an International Labour Conference resolution, the Committee of Experts is made up of 20 very high-standing independent jurists, such as judges or former judges of the International Court of Justice, Supreme Court judges or eminent professors. These experts are chosen for their technical skill and complete independence and impartiality. They are appointed by the Governing Body on the Director-General’s recommendation. Their mandate is renewable every three years⁵⁷. In addition, to ensure that the Committee of Experts is as all-inclusive as the standards whose implementation it has to monitor, every effort is made to ensure that it is representative of the various legal, social and cultural systems existing in the world.

The Committee of Experts meets once a year for around three weeks to analyse government reports and observations submitted by the social partners concerning the conventions ratified by their countries (Articles 22 and 23 of the ILO Constitution), and those relating to the convention or group of instruments chosen as the subject of a report by the countries that have not yet ratified them (Article 19(5) of the ILO Constitution)⁵⁸. The Committee of Experts is assisted by International Labour Office officials who produce an initial study of the reports received and also provide the experts with additional sources of information⁵⁹.

It must be emphasized that the Committee of Experts’ working methods are based on the general principles of the judicial process such as the adversarial principle. When the Committee of Experts receives a comment from an employers’ or workers’ organization about the application of a ratified convention, it does not give its opinion before it has given the

⁵⁶ As will be shown in more detail later, these reports are subject to an annual examination by the Committee of Experts as part of a General Survey.

⁵⁷ In practice these mandates are generally renewed several times, giving the Committee of Experts experience and stability. Meanwhile, the experts recently voluntarily decided to limit their involvement in the Committee of Experts to a maximum of 15 years, to prevent it losing its vitality.

⁵⁸ In accordance with its mandate, the Committee of Experts is also required to examine the information relating to the submission of conventions and recommendations to the competent national authorities under Article 19 of the ILO Constitution.

⁵⁹ Such as comments from other ILO and UN supervisory bodies or even information gathered by the ILO’s decentralized offices.

government the option of stating its own opinion on the matter. Moreover, the experts do not take part in deliberations relating to their country of origin.

II.A.1.b. The Committee of Experts' most useful decisions and publications for domestic judges and legal practitioners

II.A.1.b.i. Committee of Experts' observations on the application of conventions ratified by Member States

The Committee of Experts addresses two types of comments to governments when it has completed its examination of government reports and observations presented by the social partners relating to ratified conventions: observations or direct requests.

Committee of Experts' observations

Observations are published in the Committee of Experts' Annual Report⁶⁰. In most cases the Committee uses these observations to inform the Member State of the existence of serious or persistent difficulties concerning the application of a ratified convention. The observations may also indicate the progress made by a country in ensuring that the obligations in a convention are observed.

Observation of the Committee of Experts indicating lack of conformity between domestic legislation and the content of a ratified convention

Extract from the 2005 observation of the Committee of Experts on the application of Convention No. 100 by the Philippines

Article 1(b) of the Convention. Work of equal value. For a number of years the Committee had noted that section 5(a) of the 1990 of the Rules implementing Republic Act No. 6725 of 12 May 1989, which defined work of equal value to be 'activities, jobs, tasks, duties or services [...] which are identical or substantially identical', appears to restrict the application of the principle of equal remuneration for men and women workers to jobs which are essentially the same – a concept which is narrower than that required by the Convention. The Committee recalled in this regard that a proposed amendment of section 135(a) of the Labour Code provided for equal remuneration for men and women 'for work of equal value whether the work or tasks are the same or of a different nature'. Noting that the Government merely states in its reply that it has taken note of the Committee's observation, the Committee stresses that, while there is no general obligation to enact legislation, existing legislative provisions that are not fully in conformity with the provisions of the Convention should be amended to bring it into conformity with the meaning of the Convention. It therefore hopes that the Government will make every effort to adopt the proposed amendment to the Labour Code or to amend its regulation, so that it is in conformity with *Article 1(b)* of the Convention.

Source: ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 93rd Session, Geneva, 2005, Report III(1A)

⁶⁰ The Committee of Experts annual report consists of the following three parts: Part I, the General Report, gives an overview of the Committee of Experts' work and draws the attention of the Governing Body, the International Labour Conference and Member States to questions of general interest or special concern; Part II contains the observations on the application of ILS by Member States and on submission of ILS to the competent authorities (report III (1A)); Part III, published as a separate volume, is a General Survey of national legislation and policy relating to the conventions and recommendations subject of the survey under Article 19 of the ILO Constitution (report III (1B)). The Committee of Experts' Annual Report is published every March. It can be obtained from the ILO website.

Observation of the Committee of Experts indicating lack of conformity between certain practices and the content of a ratified convention

Extract from the 2005 observation of the Committee of Experts on the application of Convention No. 29 by Guatemala

For the purposes of the Convention, the expression 'forced or compulsory labour' means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered her or himself voluntarily. The Committee notes that, in the cases of employees in the public sector, refusal to perform work in addition to the normal hours of work gives rise to loss of employment. In the private sector, in the cases of enterprises which determine pay by setting performance targets, the obligation to work beyond the normal working hours is based on the need to be able to earn the minimum wage. In all these cases, the common denominator is the imposition of work or a service and the worker has the possibility to 'free her or himself' from such imposition only by leaving the job or accepting dismissal as a sanction for refusing to perform such work. The Committee noted in its observation last year on these issues that, in theory, workers have the choice of not working beyond normal working hours, but their choice is not real in practice in view of their need to earn at least the minimum wage or to retain their employment, or for both reasons. The Committee considers that in such cases the work or service is imposed under the threat of a penalty. The Committee hopes that the Government will provide information on the measures taken to ensure compliance with the Convention in this respect.

Source: ILO: Committee of Experts Report, 2005, *op. cit.*

Committee of Experts' observations and Member State jurisprudence

Domestic jurisprudence is an important factor in helping the Committee of Experts to determine whether a country's legal system conforms to the provisions of ratified international conventions or not. The Committee of Experts' observations may, depending on the circumstances, emphasize the active part played by jurisprudence in implementing a convention or, on the other hand, indicate that certain court rulings do not appear to be consistent with the obligations arising out of ratified conventions.

Observations of the Committee of Experts emphasizing the active role of domestic courts in relation to ratified conventions

Extract from the 2005 observation of the Committee of Experts on the application of Convention No. 87 by Mexico

With regard to point iii) concerning the prohibition of re-election in trade unions, the Committee notes the Government's indication that the TFCA applies ruling No. CXVII/2000 of the Supreme Court of Justice, which found that section 75 of the Federal Act on State Employees, which prohibits the re-election of trade union leaders, is in contravention of the freedom of association established in article 123 of the Constitution, and that cases of re-election in 20 trade unions have been observed. In this connection, the Committee requests the Government to amend section 75 as indicated by the case law so as to bring it into conformity with the Convention and with current practice.

Extract from the 2005 observation of the Committee of Experts on the application of Convention No. 100 by Madagascar

Articles 1 and 2 of the Convention. Discriminatory provision in collective agreement. The Committee recalls the observations made by the Union of Commercial On-Board Staff (PNC) of Air Madagascar concerning the unequal remuneration arising out of the difference in the retirement age for male and female on-board staff, which is set at 50 years for men and 45 for women by the applicable collective agreement. The Committee has noted that the Arbitration Council of the Court of First Instance of Antananarivo ruled on this issue on 18 November 1997, when it declared the relevant provisions of the collective agreement inapplicable on the ground that they constituted discrimination on the basis of sex. The Committee had shared this conclusion and encouraged the Government to make every effort to resolve the situation in conformity with the principles of equality. In this regard, the Committee notes the Government's indication that its observation had been brought to the attention of Air Madagascar. The Committee also notes that, in the meantime, the Supreme Court of the Republic of Madagascar ruled in its judgment of 5 September 2003 in the case of *Dugain and Others v Air Madagascar* that the courts may annul provisions of collective agreements when they are contrary to public order or to international conventions protecting the rights of women, including Convention No. 111. The case was sent back to the lower court. The Committee welcomes this decision and asks the Government to include in its next report, information on the outcome of these proceedings, including relevant judicial decisions, and the impact on the employment and remuneration situation of the relevant male and female staff.

Source: ILO: Committee of Experts' report, 2005, *op. cit.*

Observation of the Committee of Experts pointing out the difficulties in applying a ratified convention arising out of certain court rulings

Extract from the 2004 observation of the Committee of Experts on the application of Convention No. 98 by Costa Rica

Restrictions on the right to collective bargaining in the public sector, including for employees who are not engaged in the administration of the State, as a result of various court rulings

In its previous observation, the Committee noted that, according to the report of the technical assistance mission which took place in September 2001, there are good grounds for believing, including the opinion expressed by the President of the Constitutional Chamber, that the Chamber's rulings Nos. 2000-04453 of 24 May 2000 and 2000-7730 of 30 August 2000, as well as the Chamber's vote of clarification (No. 2000-09690) of 1 November 2000, totally exclude collective bargaining for all public sector employees with a statutory employment status, including those working in public or commercial enterprises or in independent public institutions. The Committee noted in the context of this case law the recent Decree No. 29576-MTSS of 31 May 2000 (regulations for the negotiation of collective agreements in the public sector), which only excludes from this right public servants of the highest level in the public sector, and that the above regulations, in accordance with the recommendations of the technical assistance provided by the ILO, include certain substantial improvements in relation to the 1993 regulations (for example, abolition of the approval commission, a sufficiently broad scope of application in terms of the persons covered, limitations on bargaining only for the representatives of public bodies) and which were the subject of certain comments by the technical assistance mission in September 2001 with a view to developing future legislation, in which emphasis was placed on certain problems and issues.

Source: ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 92nd Session, Geneva, 2004, Report III(1A)

Committee of Experts' direct requests

Rather than being published in the Committee of Experts' annual report, direct requests are addressed directly to the government concerned⁶¹. Through the direct requests, the Committee has first the possibility to ask governments directly for additional information to determine whether the obligations of conventions are actually being complied with. It can also use direct requests to draw the attention of the Member State to difficulties in applying a convention which might be subject to an observation in the future.

Direct request indicating a difficulty in applying a ratified convention

Extract from the 2005 Committee of Experts' direct request on the application of Convention No. 98 by Burundi

Articles 1, 2 and 3 of the Convention. The Committee noted that the penalties established in the Labour Code for breach of Article 1 (protection of workers against acts of anti-union discrimination) and Article 2 (protection of workers' and employers' organizations against acts of interference by each other) of the Convention were not sufficiently dissuasive to ensure that these provisions were applied. The Committee noted that, according to the Government, the provisions in question were to be amended with cooperation from the social partners. COSYBU, in its comments, reported an absence of effective mechanisms to ensure protection against acts of anti-union discrimination. In its more recent comments, it refers to a number of acts of anti-union discrimination. The Committee hopes that the Government will be able to make the necessary amendments to its legislation in the near future and requests it to keep the Committee informed of any progress in this regard.

⁶¹ Direct requests can be consulted on the ILO website once they have been sent to governments.

Both observations and direct requests illustrate the method of dialogue that typifies the ILO's supervisory mechanisms. The purpose of the Committee of Experts is not to censure States that violate ratified conventions, but to remind them of the nature of their obligations and to suggest the most appropriate measures for them to implement them in full.

In conclusion, Committee of Experts' observations and direct requests are extremely useful for domestic judges and legal practitioners in that:

- they make it possible to determine which points of domestic law are deemed not to be in conformity with the country's international obligations;
- in order to be able to verify whether a convention is being respected or not, the Committee has to pronounce itself on the content of its provisions and in so doing to clarify its meaning and scope. The Committee of Experts' comments are therefore a basic reference source for domestic courts that wish to apply their domestic law in conformity with the international conventions ratified by their country.

II.A.1.b.ii. Committee of Experts' General Surveys following reports supplied by Member States on non-ratified conventions and recommendations

As has already been mentioned, Article 19(5)(e) of the ILO Constitution allows the Organization to ask Member States to provide it with reports on the implementation of conventions they have not ratified and on international labour recommendations.

Based on this, the Governing Body selects one or more conventions or recommendations on a specific subject each year. If the instrument chosen is a convention, only States that have not ratified it are required to submit a report on their legislation and practice in the area, on the measures taken to give effect to the convention and on the obstacles preventing its ratification⁶².

The Committee of Experts produces a General Survey each year on the topic selected by the Governing Body from these reports and those sent on a regular basis by Member States who have ratified the instrument(s) in question under Article 22 of the Constitution⁶³.

The General Surveys enable the Committee of Experts to undertake an in-depth examination of the content of the standards analysed and to take stock of how they are implemented globally, highlighting any difficulties encountered in applying them and various methods that can be used to resolve such difficulties. These surveys are an essential tool in understanding and interpreting the content of international labour conventions and recommendations⁶⁴, and the information set out below can be found in every general survey.

The Committee of Experts examines the various articles of the instruments analysed in each survey and specifies the meaning and scope of the obligations and concepts it contains. It is very useful to read these 'clarifications' in the case of ratified conventions in order to ascertain that the jurisprudence does apply domestic law in conformity with the State's international obligations. Even when the general surveys concern conventions not ratified by a country, the Committee of Experts' analysis of the relevant concepts may be a basis on which domestic judges and legal practitioners can interpret their own domestic law.

⁶² The social partners can also send their own observations to the ILO, as they can with reports dealing with ratified conventions.

⁶³ Electronic versions of general surveys produced since 1985 are available on the ILO website and in the appendix to this Manual.

⁶⁴ Even if under Article 37 of the ILO Constitution, only the International Court of Justice can give a definitive interpretation of international labour conventions, as will be seen below.

Specification of the meaning and scope of a convention article by a Committee of Experts General Survey

Definition of discrimination

Any discrimination – in law or in practice, direct or indirect – falls within the scope of the 1958 instruments. General standards that establish distinctions based on prohibited grounds constitute discrimination in law. The specific attitude of a public authority or a private individual that treats unequally persons or members of a group on a prohibited ground constitutes discrimination in practice.

Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job.

Source: ILO: *Equality in Employment and Occupation. Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B), paras. 25 and 26

As part of its General Surveys, the Committee of Experts also examines the various measures taken by Member States as regards the content of the standards analysed. This enables the Committee to pronounce itself on whether certain domestic legislation and practices are in conformity with the conventions studied and to suggest the most appropriate ways of implementing them.

Analysis of the conformity of certain domestic legislation and practices with the content of the Convention analysed by the General Survey

Penalties

(...) legislation which allows the employer in practice to terminate the employment of a worker on condition that he pay the compensation provided for by law in any case of unjustified dismissal, when the real motive is the worker's union membership or activity, is inadequate under the terms of Article 1 of the Convention. Legislation should also provide effective means for implementing means of compensation, with the reinstatement of the dismissed worker, including retroactive compensation, being the most appropriate remedy in such cases of anti-union discrimination.

Source: ILO: *Freedom of Association and Collective Bargaining, General survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B), para. 224

Analysis of the *jurisprudence* of certain Member States contained in a General Survey

Interpretation of the principle [of equal pay for work of equal value] by the courts

In some countries, progress in the implementation of equal pay has been brought about more by judicial interpretation than legislative action. On the basis of broadly-stated or, in other cases, relatively restrictive constitutional or legal provisions, the courts in a number of jurisdictions have been responsible for developing concepts of “equal pay” and definitions of “remuneration” corresponding to those of the Convention. Mention has already been made of the situation in both the Federal Republic of Germany and in Italy (...) where the application of the principle of equal pay for work of equal value has been made clear by the constitutional courts through a body of jurisprudence based on general constitutional provisions, developed well before the enactment of legislation guaranteeing the enjoyment of the right to equal pay in more detailed terms.

Source: ILO: *Equal Remuneration, General survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 72nd Session, Geneva, 1986, Report III(4B), para. 119

Finally, through the General Surveys, the Committee of Experts can also pronounce itself on certain new practices or situations that could not have been envisaged when the convention analysed was being drawn up, but which could nevertheless be meant to fall within its scope. General surveys are therefore a very useful tool for suggesting a dynamic understanding and application of international labour conventions.

Analysis of new practices or situations that may fall within the scope of the Convention

State of health [Editor's Note: ground for discrimination not expressly envisaged by Convention No. 111]

A worker's state of health should only be taken into consideration by employers with regard to the specific requirements of a particular job, and not be considered automatically as affecting the right to access to employment, or conditions of work within the employment relationship (...) Taking into account the past or present physical or mental state of health of an individual could be a major barrier to applying the principle of equal access to employment. Unless there is a very close link between a worker's current state of health and the normal occupational requirements of a particular job, using state of health as a reason to deny or continue employment contravenes the spirit of the Convention. (...)

Source: ILO: Special survey of the Committee of Experts, 1996, *op. cit.*, para. 255

II.A.2. Conference Committee on the Application of Standards

This International Labour Conference tripartite body, consisting of several hundred delegates, implements the second stage of the regular supervisory system of the application of international labour standards. Following the Committee of Experts' impartial technical examination, the work of the Conference Committee on the Application of Standards gives the representatives of workers, employers and governments the opportunity to carry out a joint examination of how States fulfil their obligations arising out of ILO conventions and recommendations.

The Conference Committee examines and discusses the various elements of the Committee of Experts' report, particularly their observations concerning compliance with conventions ratified by Member States. The Conference Committee uses these observations to draw up a list of the

most serious cases of non-compliance with ratified conventions⁶⁵. Initially the governments concerned can submit written replies to the Conference Committee. Based on these replies the Conference Committee may decide to ask the representatives of certain governments for additional oral information. These representatives must provide explanations to the Conference Committee as a whole and must respond to the many questions raised and comments made by worker, employer and government delegates. Finally, the Conference Committee adopts conclusions in which it expresses its point of view on the Member State's observance of the convention ratified and on the measures it should take. The Conference Committee may in particular invite the Member State to ask for technical assistance from the International Labour Office to help it to implement the convention.

The action of the Committee on the Application of Standards illustrates the spirit and methods underpinning the ILO's supervisory mechanisms, focusing on both the dialogue and the peaceful pressure that obliges Member States to explain themselves before a global forum such as the International Labour Conference.

The Committee on the Application of Standards is clearly not as useful for judges and legal practitioners as the Committee of Experts, due to the more 'political' nature of its work. As one of the State bodies responsible for observing international obligations, however, it is important for members of the judiciary to be informed if their country is included on the Committee's list. If this is the case, it may well be useful for judges and legal practitioners to be aware of their government's position on the measures it intends to take to give full effect to the convention being monitored by the Committee on the Application of Standards.

II.B. Special supervisory mechanisms

Based on the submission of complaints to the ILO for violation of international labour standards, these are more markedly quasi-judicial proceedings. The ILO has three different types of complaints. While two types are examined by ad hoc committees, the special mechanism for complaints concerning freedom of association is brought before a special body established within the Governing Body. This is the Committee on Freedom of Association, whose long existence has enabled it to produce a large corpus of jurisprudence, which is why this Committee will receive most attention.

II.B.1. Complaints before the Committee on Freedom of Association

As stated in the introduction to this Chapter, the Committee on Freedom of Association, together with the Committee of Experts, is one of the two ILO supervisory bodies of potentially the most interest to domestic judges and legal practitioners. Before focusing specifically on the usefulness of the Committee's work, its main features and rules of procedure will be outlined.

II.B.1.a. Origin, composition and mandate of the Committee on Freedom of Association

Establishment

The establishment of the Committee on Freedom of Association by the Governing Body in 1951 followed an agreement between the ILO and the United Nations to establish a special monitoring procedure to verify that Member States were observing the principles of freedom of association. The existence of such a procedure illustrates the importance the ILO attaches to this principle, which is expressly enshrined in its Constitution, and which is both one of the

⁶⁵ This list is drawn up by the employer and worker delegates on the Conference Committee as it would be difficult for government delegates not to be judges and parties. Some twenty cases are selected in this way every year.

basic requirements of the pursuit of social justice and the fundamental basis of the Organization's tripartite structure.

Originally established to assess the receivability of complaints to be sent to the Fact-Finding and Conciliation Commission on Freedom of Association⁶⁶, the functions of the Committee were quickly extended to analysing the content of case files, and the Fact-Finding and Conciliation Commission was only involved on an exceptional basis.

Composition

Unlike the Committee of Experts, the Committee on Freedom of Association is a tripartite body. The Committee is a Governing Body organ and is composed of nine regular members and nine substitutes selected in equal proportion from the worker, employer and government groups of the Governing Body. Since 1978 the Committee has been chaired by an independent figure selected for their impartiality and competence in international law and labour law.

The Committee's tripartite nature⁶⁷ guarantees a balanced examination of complaints and ensures that the position it takes are widely accepted.⁶⁸ The legitimacy derived from the tripartite nature of the Committee's decisions is strengthened by the fact that the Committee has always been able to adopt decisions on a unanimous basis.

The Committee meets three times a year (in March, May-June and November), which means that complaints can generally be dealt with quickly.

Mandate and competence

The Committee is also competent as regards States that have not ratified the freedom of association conventions, in that the respective complaints procedure is based on the ILO Constitution, a text that recognizes freedom of association and whose content has been accepted by all Member States of the Organization.

The Committee's purpose is to secure and promote the right of association of workers and employers. It is not to level charges at or to condemn governments⁶⁹. The Committee restricts itself to examining the situation in each country as regards freedom of association, and to verifying whether the Member State has taken the appropriate measures to secure such freedom in the wake of anti-union measures by Public Authorities or private individuals. The Committee has ruled that 'the facts imputable to individuals involve the responsibility of the

⁶⁶ The Fact-Finding and Conciliation Commission on Freedom of Association was set up by the Governing Body in June 1949 and appointed the following year. It is an ad hoc body consisting of nine independent members elected at the suggestion of the Director-General for their skills and impartiality. Its remit is to investigate complaints submitted by the Governing Body after obtaining the consent of the State concerned when the State has not ratified the relevant conventions. The Fact-Finding and Conciliation Commission has been set up in a limited number of cases (Japan in 1964, Greece in 1965-1966, Lesotho in 1973-1975, Chile in 1974-1975, the United States/Puerto Rico in 1978-1981 and South Africa in 1992). This can be explained in part by the need to obtain the consent of the State concerned when it has not ratified the Freedom of Association Conventions by the very high cost of the process.

⁶⁷ The Committee has been described as a technical body whose members sit on a personal basis without receiving instructions from any party, though they do not disregard the general interests and positions of the sector they represent to the Governing Body as government, employer or worker members. B. Gernigon, A. Otero and H. Guido: "ILO principles concerning the right to strike", in *International Labour Review*, vol. 137, N°4, 1998.

⁶⁸ See N. Valticos: 'Droit, politique, diplomatie et administration: les éléments du contrôle international (à propos de l'expérience de l'OIT)', in *Mélanges André Grisel*, Editions Ides et Calendes, Neuchâtel, 1983, p. 847 (available in French only).

⁶⁹ See ILO: Procedure for the Examination of Complaints Alleging Infringements of Trade Union Rights, Geneva, June 1985, para. 23.

State because of its obligation of due diligence and its duty to prevent violations of human rights⁷⁰.

The Committee has clearly determined that its competence is restricted to examining complaints relating to violations of freedom of association. It has therefore always been very careful not to deal with cases that fall outside its competence, stating, for example, that complaints relating to working conditions, social security legislation, the exercise of occupations and land ownership do not fall within its competence⁷¹.

The Committee has on the other hand considered that complaints which, according to government observations, are political in nature should nevertheless be examined if they raise questions directly concerning the exercise of trade union rights⁷². The Committee's competence also covers the examination of draft legislation, insofar as both the government and the complainant should be made aware of the Committee's point of view before the law in question is enacted⁷³.

The Committee on Freedom of Association and the judiciary

Complaints relating to freedom of association are formally submitted against the government of a country as the international representative of the State. The government is therefore the Committee's interlocutor with direct responsibility for reporting to it on such complaints. This is why the Committee addresses the majority of its recommendations to the government.

The Committee considers, however, that all State powers, including the judiciary, are subject to observance of the principles of freedom of association⁷⁴.

While the Committee is not an international court before which proceedings can be brought against national judicial decisions, it is within the Committee's remit to analyse the judiciary's actions whenever this is necessary to assess whether the principles of freedom of association are being observed in a particular country or not. The Committee may then be required to pronounce itself on the consequences of certain national judicial decisions.

⁷⁰ See, for example ILO: Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fourth (revised) edition, Geneva, 1996, paras. 19 and 754.

⁷¹ See Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, para. 20-23 (available as an Appendix in ILO: Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition, Geneva, 2006).

⁷² *Ibid.*, para. 25.

⁷³ *Ibid.*, para. 27.

⁷⁴ See, for example, Venezuela, Case 1952, 313th Report of the Committee on Freedom of Association (Official Bulletin, Vol. LXXXII, 1999, Series B, No. 1). The report can also be found on LibSynd, the database of cases examined by the Committee on Freedom of Association: <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=11>.

Country: United States

Case No. 2227

Complainant: The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM)

‘(The Committee) wishes to make clear that its task is not to judge the validity of the majority of the Court in Hoffman, which is based upon complex internal legal issues and precedents, but rather to examine whether the outcome of this decision is such as to deny workers’ fundamental right to freedom of association. (...) In light of all of the above considerations, the Committee concludes that the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination⁷⁵.

As will be seen, referral to the Committee is not subject to the exhaustion of national procedures. When the subject of the complaint before the Committee also gives rise to a judicial process at domestic level, therefore, the Committee may decide to state the principles that would apply in the case in point in the hope that the courts responsible for the dispute take them into account.

Country: Republic of Korea

Case No. 1865

Complainant: The Korean Confederation of Trade Unions (KCTU), the Korean Automobile Workers’ Federation (KAWF), the International Confederation of Free Trade Unions (ICFTU) and the Korean Metal Workers’ Federation (KMWF)

‘The Committee requests the Government to inform it of the outcome of the appeal lodged against the court decision which found that the collective agreements signed in 2004 did not apply to workers hired by subcontractors; it trusts that the appellate court will take due account of the freedom of association principles mentioned in the Committee’s conclusions⁷⁶

Country: Burundi

Case No. 2276

Complainant: Trade Union Confederation of Burundi (COSYBU)

‘The Committee trusts that Dr. Hajayandi will be reinstated in his functions without loss of pay. If the court were to decide that a reinstatement is not possible in view of the specific circumstances, in particular due to the lengthy period elapsed since Dr. Hajayandi’s dismissal, the Committee expects that the court will order an appropriate redress, taking into account both the damage incurred by this trade union representative and the need to prevent the repetition of such situations in future, through the imposition of adequate compensation. The Committee requests the Government to keep it informed of developments in this respect and to provide it with a copy of the judgement⁷⁷.

⁷⁵ See ILO: Report of the Committee on Freedom of Association, Case 2227, 332nd report, Official Bulletin, Vol. LXXXVI, 2003, Series B, No. 3, para. 603. To access the report on the Internet, see note 74.

⁷⁶ See ILO: Report of the Committee on Freedom of Association, Case 1865, 340th report, Official Bulletin, Vol. LXXXVIX, 2006, Series B, No. 1, para. 781. To access the report on the Internet, see note 25.

⁷⁷ See ILO: Report of the Committee on Freedom of Association, Case 2276, 335th report, Official Bulletin, Vol. LXXXVII, 2004, Series B, No. 3, para. 411. To access the report on the Internet, see note 74.

II.B.1.b. Procedure

The Committee on Freedom of Association is not an international court, the driving force of its mandate being dialogue and persuasion. Many people nevertheless regard it as a quasi-judicial body, particularly because of its rules of procedure intended to guarantee impartiality. These involve observance of the adversarial principle, the confidentiality of documents, closed meetings and the non-participation of members holding the nationality of the countries involved, or occupying an official position in the organization submitting the complaint while the case is being considered.

Besides the rules established by the Governing Body when the Committee on Freedom of Association was first set up, the Committee sets its own rules of procedure and has been very careful to adapt them where necessary to make them more effective.

The procedure is primarily written, though oral testimony by the parties may be accepted in certain circumstances. Direct contact or on-the-spot visits to meet the parties concerned may also take place.

Receivability of complaints

Receivability as regards the complainant

Complaints may be made by workers' or employers' organizations, or by governments. Complaints submitted by individuals are not receivable.

In the case of an organization, it must be:

- a national organization directly interested in the matter;
- an international organization having consultative status with the ILO⁷⁸; or
- other international organizations where the allegations relate to matters directly affecting their affiliated organizations⁷⁹.

It should be pointed out in this regard that 'The Committee has full freedom to decide whether an organization may be deemed to be an employers or workers organization within the meaning of the ILO Constitution, and it does not consider itself bound by any national definition of the term'⁸⁰.

Receivability as regards the form of the complaint

Complaints must be presented in writing, signed by a representative of a body entitled to present them, and must be as fully supported as possible by evidence of allegations concerning the violation of trade union rights.

⁷⁸ At present the International Organization of Employers, the International Trade Union Confederation, the Organization of African Trade Union Unity and the World Federation of Trade Unions.

⁷⁹ See *Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association*, *op. cit.*, para. 31.

⁸⁰ *Ibid.*, para. 32 et seq.. The fact that an organization may have been dissolved or has gone underground or that the persons representing it may have taken refuge abroad does not make complaints submitted by such organizations inadmissible. This is all the more important because in certain political contexts trade unions do not have any freedom of action. The Committee will not reject any complaint simply because a trade union has not deposited its by-laws, since 'the principles of freedom of association provide precisely that the workers shall be able, without previous authorization, to establish organizations of their own choosing'. Likewise, 'The fact that an organization has not been officially recognized does not justify the rejection of allegations when it is clear from the complaints that this organization has at least a *de facto* existence.'

Non-requirement for national procedures to be exhausted

National procedures do not have to be exhausted for complaints to be receivable. The Committee will take account of any hearings in progress in national courts, however. Thus when a case is also being examined by an independent national court and the Committee considers that the decision to be taken could provide additional information, it will suspend its examination for a reasonable time to await the decision, provided the delay does not prejudice the party whose rights have allegedly been infringed.

Allegations regarding observance of freedom of association in certain companies

During its most recent review of its procedure, the Committee decided that in order to properly guarantee the right of defence when an enterprise is involved, the government will be asked to forward the complaint to it so that it can send the information it regards as relevant through the government⁸¹.

II.B.1.c. Work of the Committee on Freedom of Association and its relevance for domestic judges and legal practitioners

II.B.1.c.i. Reports and recommendations of the Committee on Freedom of Association and their discussion by the Governing Body

Once it has looked into complaints, the Committee can adopt three types of report⁸²:

- a final report in which the Committee may consider the following two options. It may first take the view that the complaint does not call for further examination because the alleged facts do not constitute an infringement of the exercise of trade union rights, or the allegations made are purely political in nature or are too vague. As a second option, it may request the government to take appropriate measures to remedy the anomalies observed or to draw its attention to the importance of certain principles;
- an interim report in which the Committee may ask the government or complainants for additional information, or may ask the government to take appropriate measures to remedy a specific situation and to be kept informed. An interim report may contain both final and interim conclusions while information or action from a government is pending;
- a follow-up report in which the Committee asks to be kept informed of developments in the case and of the measures taken by the Member State to comply with the principles of freedom of association. The information requested may be questions of fact, such as the development of certain procedures or the status of certain people, or points of law, such as the adoption of new acts or their repeal.

The Committee's reports are then submitted to the Governing Body, which to date has always endorsed them without making any changes.

If the Member State concerned has ratified the freedom of association conventions and if the problem involved concerns legislative issues, the Committee on Freedom of Association will notify the Committee of Experts for it to examine the action taken on the recommendations, without necessarily implying that the Committee abandons the follow-up of this case.

⁸¹ *Ibid.*, para. 53.

⁸² In certain cases the Committee on Freedom of Association may also recommend that the case be referred back to the Fact-Finding and Conciliation Commission on Freedom of Association. In this case, if the recommendation is approved by the Governing Body and the government concerned has not ratified the freedom of association conventions, the government's consent will also be required.

II.B.1.c.ii. The relevance of the work of the Committee on Freedom of Association for domestic judges and legal practitioners

- *Applying freedom of association conventions to specific cases*

In order to determine whether the principles of freedom of association were respected in the specific cases brought before it, the Committee must specify the meaning and scope of the provisions of ILO freedom of association conventions.

The following example is a case in which the Committee ruled on the applicability of the principles of freedom of association to foreign workers 'in an irregular situation'.

Country: Spain

Case No. 2121

Complainant: General Union of Workers (UGT)

The subject of this complaint was the adoption of a law making the exercise of foreign workers' union rights dependent on obtaining an entry or residence permit for the country. On the basis of Article 2 of Convention No. 87, the Committee ruled that the Convention did not allow foreign workers in an irregular situation to be excluded from enjoying freedom of association.

'In the light of the above information, the Committee observes that the issue in this case consists of determining whether it is appropriate, as the complainant requests, to interpret broadly the concept of "workers" used in the ILO Conventions on freedom of association. In this context, the Committee recalls that Article 2 of Convention No. 87 recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization. The only permissible exception to Convention No. 87 is that set out in Article 9 concerning the armed forces and the police. Thus, in the Committee's opinion, Convention No. 87 covers all workers, with only this exception. Consequently, as concerns the legislation in question, the Committee requests the Government to take the terms of Article 2 of Convention No. 87 into account. It also emphasizes that unions must have the right to represent and assist workers covered by the Convention with the aim of furthering and defending their interests. (...) The Committee requests the Government, as concerns the legislation in cause, to take into account the terms of Article 2 of Convention No. 87 according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing⁸³.

- *Establishing general principles of freedom of association*

Since it was established in 1951, the Committee has often been required to rule on a series of similar or related cases. The Committee has consequently been able to establish general principles enabling it to maintain the unique nature of its decision-making criteria. A substantial 'body of case law' has therefore gradually been developed and can be regarded as a true international common law on the subject.

NB: These principles are regularly brought together in a digest which is a particularly useful tool for domestic judges and legal practitioners who wish to ensure that their domestic law is in conformity with international law⁸⁴.

⁸³ See ILO: Report of the Committee on Freedom of Association, Case 2121, 327th report, Official Bulletin, Vol. LXXXV, 2002, Series B, No. 1, para. 561. To access the report on the Internet, see note 74.

⁸⁴ ILO: Digest of decisions and principles of the Freedom of Association Committee, 2006, *op. cit.*

Determining situations in which strikes may be restricted or even prohibited

The right to strike may be restricted or prohibited: 1) in the public service only for public servants exercising authority in the name of the State; or 2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).

Source: ILO: *Digest of decisions and principles of the Freedom of Association Committee, 2006, op. cit.* para. 576

Protection against anti-union dismissals:

On the basis of Article 1 of Convention No. 98 stipulating that workers shall enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, the Committee on Freedom of Association has issued the following principles as regards dismissal:

- No one should be subjected to anti-union discrimination because of legitimate trade union activities and the remedy of reinstatement should be available to those who are victims of anti-union discrimination;
- If, given the considerable time that has elapsed since the dismissals, in violation of the principles of freedom of association, it is not practicable to reinstate the workers concerned, the Committee has requested the government to take steps to ensure that the workers receive full compensation without delay;
- The compensation should be adequate, taking into account both the damage incurred and the need to prevent the repetition of such situations in the future.

Source: ILO: *Digest of decisions and principles of the Freedom of Association Committee, 2006, op. cit.* para. 837 *et seq.*

II.B.2. Representations under Article 24 of the ILO Constitution

Under Articles 24 and 25 of the ILO Constitution⁸⁵, industrial associations of employers or workers, whether local, national or international, may refer a matter to the ILO for failure to observe a convention ratified by a Member State. If the conditions for the receivability of the representation are met⁸⁶, the Governing Body appoints an ad hoc tripartite committee consisting of a representative of each of the three groups.

Based primarily on the written evidence provided by the association that has made the representation and by the government⁸⁷, the Committee rules on whether or not the alleged violation took place and on the possible measures the State could take to ensure observance of the ratified convention. The tripartite committee's conclusions and recommendations are subject to the approval of the Governing Body, which may decide to publish the representation.

As has already been said, the various ILO supervisory mechanisms work closely together, which helps to enhance overall effectiveness. In fact, if the representation concerns failure to observe conventions dealing with trade union rights, the Governing Body may refer the case to the Committee on Freedom of Association. In addition, when examining the representation the ad hoc tripartite committees rely primarily on the work of the Committee of Experts in relation to

⁸⁵ See also the Standing Orders concerning the procedure for the examination of representations under Articles 24 and 25 of the ILO Constitution, as revised by the Governing Body at its meeting in November 2004 (Doc. GB.291/9 [rev.]).

⁸⁶ In order to be receivable, the representation must: be communicated to the ILO in writing by an industrial association of employers or workers; make specific reference to Article 24 of the ILO Constitution; concern a Member of the ILO; concern a convention ratified by the State in question; indicate in what respect the State has failed to secure the effective observance of the convention.

⁸⁷ Under the above-mentioned Standing Orders, both the organization that registered the complaint and the government concerned may be heard by the Committee.

the relevant convention. Tripartite committee recommendations also generally give the Committee of Experts responsibility for monitoring the actions taken by the government to put their decision into effect. Finally, failure by the State concerned to implement the recommendations adopted by the tripartite committee and approved by the Governing Body may lead the latter to appoint a commission of inquiry under Articles 26 *et seq.* of the ILO Constitution⁸⁸.

As with the work of the other supervisory bodies, reference to reports adopted following a representation is doubly useful for domestic judges and legal practitioners. The legal experts of the country concerned can acquaint themselves with the Governing Body's position as to the compatibility between their domestic law and practice and the ILO convention in question. Judges and legal practitioners in other countries can find significant details and analyses of the obligations included in the convention and their implementation in the ad hoc tripartite committee's report.

II.B.3. Complaints under Article 26 of the ILO Constitution⁸⁹

Procedure

Articles 26 to 29 and 31 to 33 of the ILO Constitution make provision for another kind of procedure against States that would not fully observe a ratified convention. If the subject of the 'Article 26' complaint is the same as that of the representation, both its conditions or receivability and its procedural rules will differ, as will its consequences. This procedure in fact, which has rarely been used in the ILO history, is generally considered to be the most serious and most formal mechanism for supervising the implementation of international labour standards. It is also the procedure with the most markedly judicial nature.

Complaints may be lodged with the ILO by a Member State if it has itself ratified the convention concerned, and by any delegate to the International Labour Conference. In addition, as mentioned above, the Governing Body may decide to begin the supervisory procedure provided for in Articles 26 *et seq.* of the ILO Constitution on its own initiative.

Once the complaint has been submitted the Governing Body is responsible for assessing whether it is receivable or not. The situation in this case is markedly different from the representations procedure, since the criteria on which the Governing Body bases its decision are not based on legal aspects only but also on opportunity considerations. In other words, the Governing Body may decide on a discretionary basis that the complaints procedure is not the most appropriate way of resolving the problem raised⁹⁰.

⁸⁸ This happened in the case of Germany in 1983 in relation to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁸⁹ See N. Valticos: 'Les commissions d'enquête de l'Organisation internationale du Travail', in *Revue Générale de Droit International Public*, Pedone, Paris, 1987 (available in French only).

⁹⁰ 'Article 26' complaints regarding violation of ILO freedom of association conventions have therefore often been referred to the Committee on Freedom of Association. It should be noted on the other hand that in the case of the Commission of Inquiry established against Belarus, the Committee on Freedom of Association itself suggested in its recommendations regarding a complaint against the Government of that country that the case should be subject to a commission of inquiry under Article 26 of the ILO Constitution: 'j) In these circumstances, and taking into account the complaint under article 26 of the ILO Constitution submitted by a number of Workers' delegates to the 91st Session of the International Labour Conference in June 2003, the Committee recommends that the Governing Body refer the examination of all the pending allegations in this case, along with the complaint submitted in June, to a commission of inquiry'. See ILO: Report of the Committee on Freedom of Association, Case 2090, 332nd report, *op. cit.* To access the report on the Internet, see note 74.

If the Governing Body decides to accept the complaint it appoints a commission of inquiry. Unlike the tripartite committees responsible for examining representations, the commission of inquiry is made up of independent members. The three distinguished figures making up the commission must demonstrate the utmost impartiality and extensive experience in international law and labour law⁹¹.

Since the ILO Constitution does not contain specific provisions in this area, practice dictates that members of the commission of inquiry themselves set the procedural rules to be followed, which are then immediately communicated to the parties involved. Several commissions of inquiry have in fact stressed the judicial nature of the supervisory mechanism of Articles 26 *et seq.* in determining the procedural rules providing a framework for their activities⁹².

In practice the various commissions of inquiry have not been restricted to the parties' written submissions. The various procedures have in fact involved hearing the parties in Geneva and, in many cases, missions by the commission to the country concerned⁹³.

Under Article 28 of the ILO Constitution, when the procedure has concluded the commission of inquiry must draw up a report establishing the facts of the complaint in order to determine whether there has been a violation of the ratified convention or not, and where necessary to make recommendations so that the State concerned can ensure that it complies with its international obligations. The commission of inquiry report is sent to the Governing Body but does not have to be approved by the latter to take effect.

⁹¹ The procedure in this case is similar to selecting the members of the Committee of Experts in that the Director-General submits a list of names to the Governing Body. Commissions of inquiry frequently include members of the Committee of Experts.

⁹² See, for example, the Commission of Inquiry set up to deal with the complaint against Belarus. '40. In determining its procedure, the Commission recalled certain elements which characterized the nature of its work. As earlier commissions of inquiry had stressed, the procedure provided for in articles 26 to 29 and 31 to 34 of the Constitution was of a judicial nature. Thus, the rules of procedure had to safeguard the right of the parties to a fair procedure as recognized in international law'. See ILO, Official Bulletin, vol. LXXXVII, 2004, Series B. The Governing Body itself stressed the judicial nature of this procedure in 1961.

⁹³ Provided the country subject to the complaint agrees to allow the mission into its territory. This did not happen in the case of Myanmar in 1998 and Poland in 1983.

Significance of commission of inquiry conclusions and recommendations

Three elements provided for under the ILO Constitution give significant weight to commission of inquiry decisions, enabling them, according to Nicolas Valticos⁹⁴, to be regarded as legally binding upon the States concerned.

1. Article 28 specifies that the commission of inquiry report shall specify the time within which the Member State should take the respective steps.
2. Article 29(2) provides that the State subject to the complaint has three months in which to challenge the commission of inquiry's recommendations before the International Court of Justice. Articles 31 and 32 specify that the International Court of Justice may affirm, vary or reverse the findings or recommendations of the commission of inquiry and that the decision of the Court is final.
3. Article 33 provides that if the State subject to the complaint fails to carry out the commission of inquiry's recommendations within the time specified, the Governing Body may recommend to the International Labour Conference such action as it may deem wise to secure compliance therewith.

On this issue, Nicolas Valticos points out that the option of submitting the matter to the International Court of Justice for a final decision proves that commission of inquiry recommendations are indeed decisions that produce legal effects and that they are therefore not merely suggestions. He stresses that the existence of Article 33 shows that States are legally bound to respect commission of inquiry decisions, since the ILO is based on requiring their implementation by taking the appropriate measures to secure compliance with them⁹⁵.

Article 33 of the ILO Constitution was used by the International Labour Conference for the first time in 2000 with respect to Myanmar. Two years previously a commission of inquiry report found that this State had systematically violated the Forced Labour Convention, 1930 (No. 29), and called for it to take immediate steps to end this practice. Noting the Government's failure to do so, the Conference decided to ask all Member States to review their bilateral relations with Myanmar to ensure that the Commission of Inquiry's recommendations were applied in full⁹⁶.

In addition to the judges and legal practitioners of the countries directly affected by commissions of inquiry, the reports adopted by these commissions may be a useful legal benchmark for interpreting the content of international labour conventions and for a better understanding of the scope of the obligations they imply for the States Parties.

The following is an example of a commission of inquiry report specifying the scope of the obligations on the State following ratification of an international labour convention.

⁹⁴ Director of the ILO's International Labour Standards Department (1964-1976), judge at the European Court of Human Rights and ad hoc judge at the International Court of Justice, author of numerous books and articles on international labour standards and considered to be the leading authority on the subject.

⁹⁵ See N. Valticos: 'Les commissions d'enquête de l'Organisation internationale du Travail', *op. cit.*

⁹⁶ See the resolution on the measures recommended by the Governing Body under Article 33 of the ILO Constitution on Myanmar, adopted by the International Labour Conference in 2000 (<http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#II>).

Extract from the report of the Commission of Inquiry appointed under Article 26 of the ILO Constitution to examine the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

The obligation referred to in article 19, paragraph 5(d), of the Constitution is an obligation on the member to make the provisions of the Convention effective, in law and in practice. It is therefore essential, but not sufficient, that statutory provisions should be in full conformity with the requirements of the Convention. It is essential that legislation conforming to the requirements of the Convention should be fully and strictly enforced. This implies the existence of effective administrative law enforcement services and, in particular, of measures enabling thorough inspection by officials who can act with complete independence. It also implies that the provisions of such legislation are brought to the attention of all persons concerned, and that these persons are provided with a clear picture of their resulting rights and obligations, by all appropriate means, including notices displayed at the workplace or national information campaigns. It implies that effective grievance procedures should guarantee workers the right to lodge complaints concerning infringements of the law, in conditions of independence and impartiality, without their having to fear reprisals of any kind, that such infringements should carry adequate sanctions, which are strictly applied and can be relied upon to be so applied.

Where such conditions are complied with, a government cannot be considered as failing in its obligations deriving from a Convention, on the grounds that the provisions of such Convention have been violated by an official or manager of an undertaking, as these persons would be subject to appropriate disciplinary or judicial procedures.

If these conditions are not fully complied with, a government cannot disclaim responsibility for actions or omissions on the part of its agents, or for the behaviour of employers or even of private individuals.

Source: ILO: *Official Bulletin*, Supplement 3, vol. LXXIV, 1991, Series B, paras. 576 to 578

III. The legal value of the work of international supervisory bodies and its possible use by domestic courts

III.A. Considerations on the legal value of the work of international supervisory bodies

The first part of this Chapter has illustrated the importance of ILO supervisory mechanisms in clarifying the meaning and scope of international labour standards. As a matter of fact, it is extremely difficult to use international labour conventions and recommendations in a judicial context, however, without first being acquainted with the relevant work of the supervisory bodies.

Taking into consideration that the international supervisory bodies are not international courts, it is therefore very important to determine the possibility for domestic courts to refer directly to their comments and decisions. In view of the diversity of domestic legal systems, this Manual will merely outline several areas for reflection arising out of international law, supervisory body practice and comparative jurisprudence. Even if reference has as yet only been made to the supervisory bodies of the ILO, the reasoning set out below is also broadly applicable to the work of the supervisory bodies of UN human rights covenants and conventions.

The judicial use of the work of the international supervisory bodies cannot be considered without first seeking to determine its legal standing, a process involving several stages.

Stage 1: are the supervisory bodies' comments and recommendations legally binding, and do they give a definitive interpretation of international labour standards?

With the exception of commission of inquiry reports, whose specific nature has already been mentioned⁹⁷, the binding effect of the comments and recommendations of supervisory bodies vis-à-vis the States concerned cannot be directly inferred from the ILO Constitution or any other ILO text. Additionally, the supervisory bodies are not formally responsible for producing a definitive interpretation of treaties whose application they must examine. The ILO Constitution in fact attributes that function to the International Court of Justice alone⁹⁸.

Stage 2: does the work of the supervisory bodies therefore have no legal value?

At least three factors underline the legal and institutional value of the work of the supervisory bodies and differentiate it from recommendations of a moral nature or from theoretical works.

- Factor 1: the work of the supervisory bodies provides a particularly valid understanding of international labour conventions.

The mandate given to these bodies by the ILO Constituents should be noted. The supervisory bodies must pronounce themselves on the meaning and scope of the instruments whose application they oversee since they are responsible for verifying whether the Organization's Member States are fulfilling their obligations⁹⁹. In order to fulfil their mandate the supervisory bodies are therefore required in practice to interpret ILO standards¹⁰⁰.

To carry out their mission these bodies have several features which give their work a unique importance and legitimacy. Reference must be made at this point to their specialization and to the specialization of the ILO Secretariat that supports them, their international nature, the impartiality and high degree of legal knowledge of the members of the Committee of Experts and commissions of inquiry, and the tripartite nature of the Committee on Freedom of Association and the ad hoc committees.

Their mandate and special nature therefore enable these supervisory bodies to give a particularly valid interpretation of the texts they are responsible for.

- Factor 2: the views on the supervisory bodies are valid until proven otherwise

Should some Member States fail to accept the supervisory bodies' views as to the meaning given to international labour conventions, the ILO Constitution gives States the option of referring to the International Court of Justice for a definitive interpretation.

As long as States do not make use of this option, it seems logical to assume that Member States tacitly accept the supervisory bodies' interpretation of the conventions and that it is therefore regarded as being internationally valid¹⁰¹.

The Committee of Experts has clearly pronounced itself to that effect.

⁹⁷ See above.

⁹⁸ See Article 37(1) of the ILO Constitution. It should be remembered that the option provided for in paragraph 2 of the same Article of establishing a special tribunal with responsibility for resolving matters of interpretation has not been implemented so far.

⁹⁹ See the position of the Committee of Experts on this subject in ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 77th Session, Geneva, 1990, Report III(1A), para. 7.

¹⁰⁰ A relative similarity can be seen here between the ILO and UN supervisory bodies on the one hand and domestic courts on the other. While in most countries the judiciary is not formally responsible for the authentic interpretation of laws passed by parliament, this does not prevent the courts from having to interpret domestic legislation in order to resolve disputes submitted to them.

¹⁰¹ The option afforded by Article 37(1) of the ILO Constitution has only been used once in relation to an ILO Convention, in 1932, in connection with the Night Work (Women) Convention.

The Committee has examined the views expressed in the Conference Committee on the Application of Standards, at its 76th Session (1989), by the Employer members and certain Government members as regards the interpretation of Conventions and the role of the International Court of Justice in this connection. The Committee has already had occasion to point out that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution of the ILO. Nevertheless, in order to carry out its function of determining whether the requirements of Conventions are being respected, **the Committee has to consider and express its views on the content and meaning of the provisions of Conventions and to determine their legal scope, where appropriate. It therefore appears to the Committee that, in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognised.** The situation is identical as regards the conclusions or recommendations of commissions of inquiry which, by virtue of article 32 of the Constitution, may be affirmed, varied or reversed by the International Court of Justice, and the parties can only duly contest the validity of such conclusions and recommendations by availing themselves of the provisions of article 29, paragraph 2, of the Constitution. **The Committee considers that the acceptance of the above considerations is indispensable to maintenance of the principle of legality and, consequently for the certainty of law required for the proper functioning of the International Labour Organisation.** [our emphasis]

Source: ILO: Committee of Experts Report, 1990, *op. cit.*, para. 7

- Factor 3: respecting and performing international treaties in good faith

As expressed in Article 26 of the Vienna Convention on the Law of Treaties, once a State has ratified an international convention, it undertakes to respect and perform it in good faith. For States that have agreed to submit to supervision by the supervisory bodies by ratifying ILO conventions, it can be argued that the performance of these instruments in good faith requires the State, including its judiciary, to consider the supervisory bodies' observations and recommendations.

Even if they are not addressed to the supervisory bodies of the ILO, it is interesting to note the remarks of the UN High Commissioner for Human Rights regarding the concluding observations of the Committee on Economic, Social and Cultural Rights¹⁰².

(...) While the Committee's concluding observations, in particular suggestions and recommendations, may not carry legally binding status, they are indicative of the opinion of the only expert body entrusted with and capable of making such pronouncements. **Consequently, for States parties to ignore or not act on such views would be to show bad faith in implementing their Covenant-based obligations.** [our emphasis]

Source: OHCHR: *Fact sheet No. 16 (rev. 1): the Committee on Economic, Social and Cultural Rights*, section 6

¹⁰²The body responsible for supervising the implementation of the International Covenant on Economic, Social and Cultural Rights. See below, *Part 2, Chapter 3*, regarding United Nations instruments.

In short, even if the binding nature of the supervisory bodies comments and recommendations can give rise to discussion¹⁰³, they still undeniably have a fundamental legal value, since they establish the conditions which allow States to fully respect the treaties and conventions that they have ratified. This clearly distinguishes them from simple theoretical works or from guidelines of a moral nature.

Finally, in practical terms the first section of this Chapter showed that the work of the supervisory bodies is not only an essential tool for understanding and applying international labour standards, but may also be an important basis for interpreting domestic law.

These legal and practical grounds increasingly seem to lead both domestic and international courts to refer to the work of the ILO and UN supervisory bodies in their decisions, mostly for the purposes of interpretation. It is interesting to note that national decisions referring to such work come from countries with legal systems as diverse as those of South Africa, Argentina, Australia, Colombia, Chile, Spain, India, Peru or Zimbabwe.

III.B. Examples of the judicial use of the work of international supervisory bodies

Several cases are outlined below where domestic or international courts have specifically relied on the work of ILO or UN supervisory bodies.

¹⁰³ Always excepting commission of inquiry recommendations. A highly controversial judgment by the Constitutional Court of Colombia should also be noted here, in which the Court recognized not only the binding nature of the decisions of the Committee on Freedom of Association, but also awarded them a place in the 'block of constitutionality' of Colombia. See *Sindicato de los Trabajadores de las Empresas Varias de Medellín v. Ministry of Employment and Social Security, Ministry of Foreign Affairs, Medellín City Council and Empresas Varias de Medellín E.S.P.*, Constitutional Court of Colombia, Fourth Appellate Supervisory Chamber, 10 August 1999, Case No. 206 360. This judgment was confirmed by two subsequent decisions of the Constitutional Court of Colombia. See also the *Sintrava-Avianca* judgment, 18 September 2000, T-1211/2000 and a judgment of 23 July 2003, T-603/2003.

Judicial use of the work of ILO and UN supervisory bodies by domestic courts

Country: Australia

The Commonwealth of Australia v. Human Rights & Equal Opportunity Commission, Australian Federal Court, 15 December 2000, [2000] FCA 1854

The Australian Federal Court relied on the definition of discrimination in Article 1(a) of ILO Convention No. 111¹⁰⁴ and on the interpretation of that provision by the ILO supervisory bodies to specify that cases of indirect discrimination were indeed prohibited under Australian law.

In its ruling it said:

‘The definition of “discrimination” in the Act should be construed in accordance with the construction given in international law to the term “discrimination” in ILO Convention No. 111. (...) There appears to be powerful support, certainly in the various expressions of opinion by the Committee of Experts, including that of 1996¹⁰⁵, but also in the report by the Commission of Inquiry regarding Romania, (...) that the definition of “discrimination” in ILO Convention No. 111, and therefore in article 3(1) of the Act, does extend to indirect discrimination.’

Country: South Africa

NUMSA v. Bader Pop, Constitutional Court of South Africa, 13 December 2002, Case No. CCT 14/02

In this decision concerning the right of action of minority unions, the Constitutional Court of South Africa based its decision on the work of the Committee of Experts and the Committee on Freedom of Association. The Court emphasized the importance it attached to the work of these two bodies:

‘decisions (of these bodies) are therefore an authoritative development of the principles of freedom of association contained in the ILO Conventions. The jurisprudence of these Committees will be an important resource in developing the labour rights contained in our Constitution. (...) These principles culled from the jurisprudence of the two ILO Committees are directly relevant to the interpretation both of the relevant provisions of the Act and of the Constitution.’

¹⁰⁴ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹⁰⁵ The Court is referring here to the 1996 Special Survey of the Committee of Experts on Equality in Employment and Occupation, and more specifically to paragraphs 25 and 26 of that Survey (ILO: Special Survey of the Committee of Experts, 1996, *op. cit.*).

Country: Argentina

Aquino, Isacio v. Cargo Servicios Industriales SA s/accidentes Act 9688, Supreme Court of Argentina, 21 September 2004¹⁰⁶

In this judgment the Supreme Court of Argentina ruled that an article of the law limiting the amount of compensation that could be obtained by victims of industrial accidents was unconstitutional.

To analyse the legal problem submitted to it, the Court referred repeatedly to the work of the Committee on Economic, Social and Cultural Rights, the body responsible for supervising the implementation of the United Nations Covenant of the same name:

'The work of the Committee on Economic, Social and Cultural Rights should be noted **as it is the authorized interpreter of the International Covenant on Economic, Social and Cultural Rights at international level**. It should be stressed that this Committee acts, under the conditions of application of the Covenant, to recall the words of Article 75(22) of the Constitution'. [our emphasis]

Country: Peru

Toquepala workers union and others, Constitutional Court, 17 April 2006, Exp. N° 4635-2004-AA/TC

In this decision the Constitutional Court of Peru declared the hours of work set by the collective agreement of a mining company to be invalid. To do so, the Court referred to several international instruments, including ILO Convention No. 1¹⁰⁷, as well as to the observations made by the Committee of Experts to Peru under that Convention.

'In this respect, it should be emphasized that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization, in its individual observation concerning Convention No. 1 - Hours of Work (Industry) 1919 (Ratification 1945), Document No. 062002PER001, of 2002, estimated that the 14 x 7 work procedure used in Peru does not comply with the provisions of Article 2 of ILO Convention No. 1, since the average weekly number of working hours over three weeks is 56 hours per week and exceeds the limit prescribed by Article 2(c) (48 hours per week)'.

¹⁰⁶ For an analysis of this judgment, see G. Von Potobsky: 'La jurisprudencia de los órganos de control de los instrumentos internacionales – el caso del Convenio n° 87 de la OIT sobre la libertad sindical', in *Revista Derecho del Trabajo, La Ley*, Buenos Aires, August 2006 (available in Spanish only).

¹⁰⁷ Hours of Work (Industry) Convention, 1919 (No. 1).

Judicial use of the work of the supervisory bodies of the ILO by international courts

Baena Ricardo and others, Inter-American Court of Human Rights, 2 February 2001¹⁰⁸

In this judgment relating to Panama, the Inter-American Court of Human Rights ruled that the dismissal of 270 public sector workers taking part in a strike, under a law specifically adopted for that purpose, was contrary to the principle of freedom of association recognized by Article 16 of the American Convention on Human Rights. The Court then ruled that, in accordance with the principle of full compensation recognized by international law, employees dismissed under the law should be reinstated in their jobs and should receive any wages lost following their dismissal. To reinforce its argument, the Court relied on the recommendations of the ILO Committee on Freedom of Association, before which the matter had been brought, and also on the observations of the ILO Committee of Experts.

Applications No. 55480/00 and 59330/00 relating to restrictions on employment for some former KGB agents, European Court of Human Rights, 27 July 2004¹⁰⁹

In this judgment the European Court of Human Rights ruled that sections of a Lithuanian law barring access to certain posts in the private sector to people who had worked for the KGB in the past were discriminatory. The Court considered that the measures were too broad in their scope and wording, and were not proportionate to the desired aim, even though they were legitimate. To support its argument, the Court referred to ILO instruments and in particular to the observations of the ILO Committee of Experts on the application of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by Latvia, a country which has adopted legislation similar to that which was the subject of the case.

¹⁰⁸ Judgment in Spanish available at: http://www.corteidh.or.cr/docs/casos/articulos/Seriec_72_esp.pdf.

¹⁰⁹ Judgment available at: <http://www.echr.coe.int/Fr/press/2004/juillet/Arr%C3%AAAtdechambreSidabresetDziautasLituanie27704.htm>.

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Documents

■ ILO

Constitution of the ILO, 1919

Internet Link

■ ILO

ILO website: www.ilo.org

ILO conventions and protocols: <http://www.ilo.org/ilolex/french/convdisp1.htm>

ILO recommendations: <http://www.ilo.org/ilolex/french/recdisp1.htm>

Committee of Experts on the Application of Conventions and Recommendations, General Reports: <http://www.ilo.org/ilolex/french/ceaccrepsq.htm>

Committee of Experts on the Application of Conventions and Recommendations, General Surveys: <http://www.ilo.org/ilolex/french/surveyq.htm>

ILOLEX, database containing the complete texts of ILO Conventions and Recommendations, ratification lists, comments of the Committee of Experts and the Committee on Freedom of Association, examination of cases by the Conference Committee, representations, complaints, General Surveys and numerous related documents:
<http://www.ilo.org/ilolex/french/>

APPLIS, database containing ratification information, comments of the Committee of Experts and State obligations on the submission of Reports:
<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=fr>

LibSynd, database on freedom of association cases:
<http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=FR&hdroff=1>

■ United Nations

OHCHR website: <http://www.ohchr.org/>

Treaty body documents: <http://tb.ohchr.org/default.aspx>

Chapter 3

United Nations sources of international labour law

I. Introduction

Sources of international labour law other than those adopted by the ILO: UN and regional instruments

As explained in *Chapters 1 and 2* of this Part, the principal sources of international labour law consist of the standards adopted by the ILO. However, a number of instruments adopted by other organizations – the United Nations and several regional bodies such as the Council of Europe, the European Union, the Organization of American States and the Organization of African Unity – concern labour issues.

Although the UN does not deal with employment issues as such, and although it recognizes the ILO as the specialized agency responsible for taking action to achieve the objectives set out in its Constitution¹¹⁰, some core UN human rights instruments also cover labour issues, either directly or indirectly. These instruments can be useful reference sources for domestic courts and legal practitioners dealing with employment issues.

Far from being exhaustive, this Chapter will only refer briefly to a selection of UN instruments covering labour issues. The relevant provisions of the International Bill of Human Rights – consisting of the Universal Declaration of Human Rights and the two UN human rights covenants – will be examined first, followed by the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. A brief introduction to each of these instruments and the respective supervisory body will be followed by a short summary of the provisions of particular relevance to judges and legal practitioners. Extracts from the general comments and recommendations issued by the supervisory bodies will also be quoted to underscore their value for domestic judges and legal practitioners¹¹¹. Finally, examples of domestic court decisions based on these instruments and on the work of the supervisory bodies will be given.

It should be noted that despite their importance, the various sources of international labour law adopted at regional level are not cited in this Manual, which will focus on universal sources alone.

Links between ILO and United Nations human rights instruments

ILO and UN human rights instruments must be seen as interdependent and complementary, since they share the same values and aim to achieve common objectives. This complementarity is expressly recognized in the two UN human rights covenants¹¹² and is put into practice on a regular basis by the supervisory bodies of both institutions.

¹¹⁰ See the agreement reached in 1946 between the United Nations and the International Labour Organization at: <http://www.ilo.org/public/english/bureau/leg/agreements/nu.htm>.

¹¹¹ A compilation of general comments and recommendations issued by the UN supervisory bodies is produced and updated on a regular basis.

¹¹² For a general perspective, see Articles 5(2) of both Covenants. On freedom of association in particular, see Article 22(3) of the International Covenant on Civil and Political Rights and Article 8(3) of the International Covenant on Economic, Social and Cultural Rights.

In light of the above and in accordance with Articles 5(2) of the two UN human rights covenants, the various international human rights instruments – including rights at work – should be used in an ‘integrated’ manner favouring the application of provisions that better protect human and workers’ rights¹¹³.

UN human rights instruments and their relevance to labour judges and legal practitioners

Although ILO standards are the principal sources of international labour law, UN human rights instruments can help domestic judges and legal practitioners for at least two reasons that facilitate their judicial use at domestic level.

Firstly, some UN human rights treaties have been widely ratified¹¹⁴. Their content is therefore legally binding in many countries and can prove useful, especially where ILO conventions have not yet been ratified. Secondly, in recent years there has been a growing tendency to include references to UN human rights instruments in national constitutions that give them a constitutional status in the domestic legal system, whether explicitly or implicitly. As the following examples show, these references have taken different forms.

a) Provisions including a general commitment to respect UN human rights instruments

Extract from the Preamble to the Constitution of the Republic of Mali

The Sovereign People of Mali, fortified by their traditions of heroic struggle, committed to remain faithful to the ideals of the victims of repression and the fallen martyrs killed in battle for the advent of the rule of law and of pluralist democracy, (...)

subscribe to the Universal Declaration of the Rights of Man of December 10, 1948 and to the African Charter of the Rights of Man and the People of June 27, 1981, (...)

b) Provisions giving a constitutional hierarchy to UN human rights instruments

Extract from the Preamble to the Constitution of the Republic of Benin

(...) reaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples’ Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986 and whose provisions make up an integral part of this present Constitution and of Beninese law and will prevail over domestic legislation; (...)

¹¹³ Articles 5(2) of both Covenants read as follows: ‘There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent’.

¹¹⁴ This is the case, for example, of the International Covenant on Civil and Political Rights (164 ratifications as of 23 June 2009), the International Covenant on Economic, Social and Cultural Rights (160 ratifications as of 23 June 2009), and the Convention on the Elimination of All Forms of Discrimination against Women (186 ratifications as of 23 June 2009).

Extract from the Constitution of the Argentine Nation

Article 75(22)

(...)Treaties and concordats have a higher hierarchy than laws.

The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its implementing Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; under their current conditions of application, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. (...)

(c) Provisions giving an interpretative status to UN instruments as regards constitutional provisions on fundamental principles, rights and freedoms

Extract from the Constitution of Peru

Fourth final and transitory provision

Norms relating to the rights and freedoms recognized in the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and with international treaties and agreements on those rights ratified by Peru.

Extract from the Constitution of Romania

Article 20(1)

Constitutional provisions concerning citizens' rights and freedoms shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with the covenants and other treaties Romania is a party to.

II. International Bill of Human Rights

The International Bill of Human Rights is a term used to refer collectively to three general human rights instruments drafted by the UN Commission on Human Rights and adopted by the UN General Assembly. These instruments are:

- the Universal Declaration of Human Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the International Covenant on Civil and Political Rights and its two Optional Protocols¹¹⁵.

¹¹⁵ The origins of the term 'International Bill of Human Rights' date back to 1945, when at the San Francisco Conference, held to draft the Charter of the United Nations, a proposal to embody a 'Declaration on the Essential Rights of Man' was put forward but was not examined because it required more detailed consideration than was possible at the time.

The Commission on Human Rights was established in early 1946 by the Economic and Social Council with the drafting of an international bill of human rights as the first priority. In 1947 the Commission decided to apply the term 'International Bill of Human Rights' to the series of documents under preparation: a declaration and a convention (renamed 'covenant'). The Declaration was adopted unanimously by the General Assembly, by Resolution 217 A (III) of 10 December 1948. It took more than a decade to complete the preparation of the two Covenants that were adopted unanimously by the General Assembly by Resolution 2200 A (XXI) of 16 December 1966.

The International Bill of Human Rights lays down a comprehensive set of rights to which all persons are entitled. Although it is drafted in general terms and its provisions on labour are often less specific and less detailed than those in ILO instruments, the Bill establishes universal fundamental principles and standards which apply to all human rights. They may therefore prove useful when dealing with labour issues.

II.A. Universal Declaration of Human Rights

Adopted in 1948 against the background of the horrors of the Second World War, the Universal Declaration of Human Rights was the first attempt by all States to agree on a comprehensive catalogue of the rights of the human person in a single document. Although not legally binding *per se*, the Universal Declaration of Human Rights contains principles considered to be legally binding upon States by virtue of customary international law¹¹⁶ or general principles of law¹¹⁷.

Provisions of the Declaration relating to labour issues

The Universal Declaration of Human Rights contains a number of provisions applying specifically to labour issues. These are:

- the right to freedom from slavery and servitude (Article 4);
- the right to social security (Article 22);
- the right to work, to free choice of employment and to protection against unemployment (Article 23(1));
- the right to equal pay for equal work (Article 23(2));
- the right to just and favourable remuneration ensuring an existence worthy of human dignity for workers and their families (Article 23(3));
- the right to form and to join trade unions (Article 23(4));
- the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Article 24).

General provisions of the Declaration relevant to labour judges and legal practitioners

Article 2 of the Universal Declaration of Human Rights sets out the principle of non-discrimination in the enjoyment of its content, stating that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (...)'

Article 8 recognizes the right to an effective remedy by the competent national tribunals for acts violating fundamental rights.

Some examples of the relevance of the Declaration for labour judges and legal practitioners

As the following example shows, the Universal Declaration of Human Rights may inform on the fundamental nature of certain rights at work recognized in domestic legislation, thus making possible to grant them the appropriate status in the domestic legal system.

¹¹⁶ Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way' (see R. Shabtai: Practice and Methods of International Law, Oceana Publications, 1984, p. 55.)

¹¹⁷ Some legal theory also considers the Universal Declaration of Human Rights to be the authentic interpretation of the human rights clauses of the UN Charter.

Country: Azerbaijan

On the conformity of Article 143.1 of the Labour Code of the Republic of Azerbaijan with Articles 25, 37 and 149.1 of the Constitution of the Republic of Azerbaijan, Constitutional Court of the Republic of Azerbaijan, 23 February 2000

The Labour Code of the Republic of Azerbaijan provided that in the event of termination of the contract of employment, workers were entitled to the days of paid holidays which they had not yet taken. This provision did not apply, however, when the termination resulted from the liquidation of the company or failure by a worker to comply with responsibilities or obligations. The President of the Supreme Court referred the case to the Constitutional Court for a decision on the constitutionality of the provision.

The Court found this restriction to be contrary to the provisions of the Constitution and to various instruments of international law and, to demonstrate the fundamental nature of the right to paid holidays, referred, *inter alia*, to Article 24 of the Universal Declaration of Human Rights.

The Declaration may moreover be relied upon in particular where binding international instruments, for instance the two UN human rights covenants or ILO conventions, have not yet been ratified.

Country: New Zealand

Van Gorkom v. Attorney General and another, Supreme Court of New Zealand, 10 February 1977, [1977] 1 NZLR 535

The provisions of administrative regulations provided for the refund of removal expenses only in the case of married men. The Supreme Court of New Zealand found that in this case this difference in the treatment of men and women was neither in conformity with national law nor compatible with the spirit of the Universal Declaration of Human Rights and the Declaration on the Elimination of Discrimination against Women, thus recognizing that these instruments played a role in the interpretation of national law. At that time, New Zealand had not yet ratified the two UN human rights covenants.

II.B. International Covenant on Civil and Political Rights

Adopted by the General Assembly in 1966 and coming into force 10 years later¹¹⁸, the International Covenant on Civil and Political Rights (ICCPR), together with the International Covenant on Economic, Social and Cultural Rights, forms the cornerstone of human rights international treaties covering a broad variety of rights and freedoms¹¹⁹.

The Human Rights Committee (HRC) is the body that monitors the implementation of the ICCPR by its States Parties. Established in 1976, the Committee consists of 18 independent human rights experts. All States Parties are required to submit regular reports to the HRC on

¹¹⁸ By Resolution 2200 A (XXI) of 16 December 1966, the General Assembly also adopted the First Optional Protocol, recognizing the competence of the Committee 'to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant'. As of 23 June 2009, this Optional Protocol had been ratified by 111 States. By Resolution 44/128 of 15 December 1989, the General Assembly adopted the Second Optional Protocol to the Covenant aiming at the abolition of the death penalty. As of 23 June 2009, this Protocol had been ratified by 71 countries.

¹¹⁹ For further information on the ICCPR, see OHCHR Fact Sheet No. 15: Civil and Political Rights: The Human Rights Committee (Rev. 1) (http://www.ohchr.org/english/about/publications/docs/fs15rev.1_en.pdf).

how the rights are being implemented¹²⁰. The HRC examines the reports and addresses its concerns and recommendations to the States Parties in the form of concluding observations. In addition to the reporting procedure, Article 41 of the ICCPR provides for the Committee to consider complaints between States¹²¹. The HRC also publishes its interpretation of the Covenant's provisions, known as general comments. HRC general comments can prove useful to judges and legal practitioners as a source of inspiration and interpretation, in that they clarify the meaning and scope of ICCPR provisions¹²².

ICCPR provisions relating to labour issues

Article 8 of the ICCPR provides for the right to freedom from slavery, servitude and forced or compulsory labour.

Article 22(1) recognizes in general terms, in the wider framework of freedom of association, the right to form and join trade unions. Article 22(2) contains a clause authorizing the restrictions which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The same provision also authorizes restrictions on members of the armed forces and of the police¹²³.

General provisions of the ICCPR relevant to labour judges and legal practitioners

Article 2 of the ICCPR requires the States Parties to ensure that any person whose rights or freedoms are violated has an effective remedy, and to develop the possibilities of judicial remedy.

Articles 12(3), 18(3) and 19(3) allows but at the same time circumscribes the possibility to restrict the exercise of the fundamental rights they enshrine, under certain conditions. These rights are:

- the right to liberty of movement and freedom to choose residence¹²⁴;
- the freedom to manifest one's religion or beliefs¹²⁵; and
- the right to freedom of expression¹²⁶.

¹²⁰ States should report initially one year after acceding to the Covenant, and then whenever requested by the HRC (usually every four years).

¹²¹ Furthermore, the First Optional Protocol to the Covenant empowers the Committee to examine individual complaints regarding alleged violations of the Covenant by States Parties to the Protocol. The Committee's full competence extends to the Second Optional Protocol to the Covenant on the abolition of the death penalty with regard to States that have accepted the Protocol.

¹²² The general comments issued by the HRC can be found at:
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹²³ Article 22(2) of the ICCPR: 'No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right'.

¹²⁴ Article 12(3) of the ICCPR: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.

¹²⁵ Article 18(3) of the ICCPR: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

¹²⁶ Article 19(3) of the ICCPR: 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals'.

Article 26 sets out the general principle of equality before the law and equal protection of the law, without any discrimination. It specifies that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', thus providing protection, as pointed out in HRC General Comment No. 18, from discrimination on any ground¹²⁷. This definition of the principle of equality allows protection from discrimination related to grounds other than those explicitly mentioned, such as health, disability or age¹²⁸.

An example of the relevance of the ICCPR for labour judges and legal practitioners

The ICCPR may be used to address new grounds of discrimination which are not explicitly mentioned either in Article 1(1)(a) of ILO Convention No. 111, or in national legislation.

Country: Romania

Constitutional Court of Romania, 25 February 1993, Decision No. 6

In this case, the Constitutional Court of Romania held that the constitutional provisions on the grounds for discrimination must be complemented with international human rights instruments with a view to giving an authentic legal dimension to the principle of equality. In that light, the Court referred to Article 26 of the International Covenant on Civil and Political Rights and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which contains similar provisions, stating as follows: 'The non-discrimination criteria are set out in Article 4(2) of the Constitution: race, nationality, ethnic origin, language, religion, sex, opinions, political affiliation, property and social origin. It must be stressed in this context, however, that the provisions of the Constitution must be complemented with international human rights instruments, since this is the only way for the principle of equal rights to have an authentic legal dimension. Consequently, the provisions of Article 26 of the International Covenant on Civil and Political Rights, which came into effect on 23 March 1976, shall be applicable in this instance'.

II.C. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was also adopted in 1966, after almost 20 years of drafting debates, and came into force in 1976¹²⁹.

The body supervising the implementation of the Covenant is the Committee on Economic, Social and Cultural Rights (CESCR). Created in 1987 to carry out the supervising functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant, it is composed of 18 independent human rights experts. The CESCR will be able to consider individual complaints as soon as the optional protocol to the Covenant, adopted on 17 December 2008, enters into force. All States Parties must report to the CESCR on how the rights are being implemented¹³⁰. The Committee's concerns and recommendations are addressed to the States Parties in the form of concluding observations. Since 1988 the Committee has also been publishing its interpretations of the provisions of the International Covenant on Economic, Social and Cultural Rights, known as General Comments on thematic issues or on its working methods. CESCR General Comments can prove useful to domestic

¹²⁷ See: Human Rights Committee, General Comment No. 18: Non-discrimination (1989), paragraphs 11-12.

¹²⁸ See below, Part 3, Chapter 2, on equality of opportunity and treatment in employment and occupation.

¹²⁹ For further information on the ICESCR, see OHCHR Fact Sheet No. 16: The Committee on Economic, Social and Cultural Rights (Rev. 1).

¹³⁰ States must submit a report within two years of ratifying the Covenant, and every five years thereafter.

judges and legal practitioners as a source of inspiration and interpretation, in that they clarify the meaning and scope of the provisions of the International Covenant on Economic, Social and Cultural Rights¹³¹.

ICESCR provisions relating to labour issues

Article 6 of the ICESCR recognizes the right to work, which includes the right to freely choose or accept employment. It calls on the States Parties to take steps to achieve the full realization of this right, specifying that it 'shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.

Article 7 recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- fair wages and equal remuneration for work of equal value and a decent living for themselves and their families;
- safe and healthy working conditions;
- equal opportunities;
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, and remuneration for public holidays.

Article 8 recognizes the right to freedom of association, explicitly including the right to strike, which is to be exercised under the conditions laid down by national legislation. The same provision permits those limitations on the right to form and join trade unions and the right of trade unions to function freely 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 others¹³². Article 8 also permits limitations as regards members of the armed forces, the police or the administration of the State.

Article 8(3) contains a saving clause referring to the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87). This provision specifies that 'nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention'. This reference to ILO Convention No. 87 shows that the various international human rights instruments are to be applied according to an integrated approach, giving precedence to the most protective provisions. Furthermore, in countries that have ratified ILO Convention No. 87 and where the ICESCR enjoys constitutional status, Article 8(3) can be interpreted as extending that status to ILO Convention No. 87¹³³.

Article 9 guarantees the right to social security, including social insurance.

¹³¹ CESCR general comments can be found on the website of the Office of the United Nations High Commissioner for Human Rights at: <http://www.ohchr.org/english/bodies/cescr/comments.htm>

¹³² Article 8(1)(a) of the ICESCR: 'The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right 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.'

Article 8(1)(c) of the ICESCR: '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'.

¹³³ See the jurisprudence of the Supreme Court of Argentina.

Article 10 provides that 'special protection should be accorded to mothers during a reasonable period before and after childbirth', and that 'during such period working mothers should be accorded paid leave or leave with adequate social security benefits'.

Article 12 recognizes the right to the highest attainable standard of health.

The relevance of the work of the ICESCR supervisory body for labour judges and legal practitioners

Article 2 of the ICESCR binds the States Parties to progressive implementation of the rights recognized by this instrument, a reference that could cast doubt on its judicial applicability. In this regard, CESCR General Comments Nos. 3 and 9¹³⁴ provide interesting insights on how domestic courts and tribunals could use the content of the Covenant to settle disputes. In particular, in these comments the CESCR expresses the view that many provisions of the Covenant are self-executing, i.e. capable of immediate application by courts and tribunals without further elaboration¹³⁵.

Extract from General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the 'Nature of States parties obligations'

(...) In addition, there are number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3¹³⁶, 7 (a)(i)¹³⁷, 8¹³⁸, 10(3), 13(2)(a), (3) and (4) and 15(3), which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

Source: UN Document E/1991/23, para. 5

Extract from General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on the 'Domestic Application of the Covenant'

The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered 'non-self-executing' were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

Source: UN Document E/C.12/1998/24, para. 11

¹³⁴ See General Comment No. 3, Committee on Economic, Social and Cultural Rights: The nature of States parties obligations, 1990; and General Comment No. 9, Committee on Economic, Social and Cultural Rights: The domestic application of the Covenant, 1998.

¹³⁵ These general comments have already been analysed in the various modules of this Manual.

¹³⁶ Equality between men and women in the enjoyment of the rights set out in the ICESCR.

¹³⁷ Remuneration providing all workers with fair wages, equal remuneration for work of equal value and a decent living for themselves and their families.

¹³⁸ Freedom of association, including the right to strike.

In General Comment No. 18 on the right to work¹³⁹, the CESCR qualifies the right to work as a fundamental one that includes not only the right not to be discriminated against in employment and occupation, but also the right not to be deprived of work unfairly¹⁴⁰. Article 7 of the ICESCR may therefore be relied upon as a legal basis in countries where domestic legislation does not expressly specify the right not to be unfairly deprived of employment.

Extract from General Comment No. 18 of the Committee on Economic, Social and Cultural Rights on the ‘The right to work’

Normative content of the right to work

(...) the right to work includes (...) the right not to be unfairly deprived of employment.

Violations of the obligation to respect

(...) Such retrogressive measures include, inter alia, denial of access to employment (...) An example would be (...) the abrogation of legislation protecting the employee against unlawful dismissal. Such measures would constitute a violation of States parties’ obligation to respect the right to work.

Violations of the obligation to protect

(...) They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal.

Source: UN Document E/C.12/GC/18, para. 6, 33 and 35

Some examples of the relevance of the ICESCR for labour judges and legal practitioners

The ICESCR may prove useful in that it explicitly guarantees the right to strike and delimits the grounds for restricting that right.

Country: Russian Federation

On the case concerning the constitutionality of Article 12 of the USSR Act of 9 October, 1989 ‘On the Order of Settlement of Collective Labour Disputes’, Constitutional Court of the Russian Federation, 17 May 1995

In this case the Constitutional Court of the Russian Federation relied on the International Covenant on Economic, Social and Cultural Rights to determine the extent to which the restrictions on the right to strike set by national law were valid: ‘(...) proceeding from the provisions of the International Covenant on Economic, Social and Cultural Rights, the prohibition of the right to strike is admissible with regard to persons who are members of the armed forces, police or the administration of the State (Article 8(2)), and with regard to other persons the restrictions are possible if they 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 (Article 8(1)(c)). In addition, international human rights instruments attribute the regulation of the right to strike to the sphere of domestic legislation. This legislation must not go beyond restrictions permitted by these international instruments, however’.

The ICESCR may also prove useful because it establishes the general principle of equal pay ‘for work of equal value’, not limiting its application to the distinction between men and women.

¹³⁹ Committee on Economic, Social and Cultural Rights: General Comment No. 18, The right to work, 2005. (UN Document A/47/38).

¹⁴⁰ See below, *Part 3, Chapter 3*, on termination of employment on the employer’s initiative.

Country: Philippines

International School Alliance of Educators v. Hon Leonardo A. Quisumbing and others, Supreme Court of the Republic of the Philippines, 1 June 2000, No. 128845

An international school in the Philippines employed both local and foreign workers, the latter receiving higher wages and other benefits. The Filipino employees instituted legal proceedings arguing that there was discrimination.

After relying on the national Constitution, the Supreme Court of the Philippines referred to international instruments and, in particular, to Article 7(a) of the International Covenant on Economic, Social and Cultural Rights, to point out the fundamental nature of the principle of equal remuneration.

The Supreme Court found in this instance that the differences in treatment between Filipino and foreign employees were discriminatory, but that the foreign workers could continue to enjoy the benefits relating to their nationality, such as payment of their removal expenses.

The following is an example in which the ICESCR has been used to interpret constitutional provisions addressing working time and its link with health and safety.

Country: Peru

Toquepala workers union and others, Constitutional Tribunal, 17 April 2006, Exp. N° 4635-2004-AA/TC

'For this reason, the 12 hour day for mineworkers, Articles 209, 210, 211 and 212 of Supreme Decree No. 003-94-EM and any provision that imposes a working day on mineworkers of more than the customary eight hours, are incompatible with Articles 1, 2(22), 7, 25 and 26(1) and (2) of the Constitution, and with Articles 7(d) of the International Covenant on Economic, Social and Cultural Rights, and 7(g) and (h) of the Additional Protocol to the American Convention on Human Rights in relation to economic, social and cultural rights (Protocol of San Salvador), given that they violate human dignity, the right to a working day of reasonable hours, the right to rest and leisure, and the right to health and protection of the family, recognized in the Constitution and in the international human rights treaties ratified by Peru, to which the decision has made extensive reference'.

III. Other UN human rights instruments relevant to labour disputes

Other UN human rights instruments contain provisions relevant to labour issues, and may therefore be relied upon by domestic judges and lawyers dealing with labour issues. This section refers to:

- the Convention on the Elimination of All Forms of Discrimination against Women; and
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

III.A. Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly in 1979. Often described as an international bill of rights for women, the CEDAW provides a comprehensive definition of the term 'discrimination against women' and sets an agenda for national action to put an end to such discrimination¹⁴¹.

¹⁴¹ For further information on the Convention on the Elimination of All Forms of Discrimination against Women, see OHCHR Fact Sheet No. 22: Discrimination against Women: the Convention and the Committee (<http://www.ohchr.org/english/about/publications/docs/fs22.htm>).

The States Parties to the Convention are required to submit national reports on measures they have taken to comply with their treaty obligations¹⁴². Since 1982, the Committee on the Elimination of Discrimination against Women has monitored the implementation of the CEDAW by its States Parties. The Committee consists of 23 independent experts. At its tenth session in 1991, the Committee decided to adopt the practice of issuing general recommendations on specific provisions of the Convention and on the relationship between Convention provisions and cross-cutting themes. Following this decision, the Committee has been issuing a series of detailed and comprehensive General Recommendations which offer guidance on the application of the Convention in particular situations¹⁴³.

CEDAW general provisions relevant to labour judges and legal practitioners

Article 1 of the CEDAW defines 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. Such a definition, it should be emphasized, is analogous to that contained in ILO Convention No. 111¹⁴⁴.

CEDAW provisions relating to labour issues

CEDAW provisions relating either directly or indirectly to labour can be found in Article 10, which deals with equality of men and women in the field of education, Article 11, which covers equality in the field of employment and the right to work, and Article 14, which concerns women working in rural areas and in the informal economy.

After stating clearly that women must enjoy the right to work as an 'inalienable right of all human beings', Article 11 specifies the areas in which equality in employment must be achieved. These areas are:

- the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service;
- the right to vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value and in the evaluation of the quality of work;
- the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work; and
- the right to protection of health and to safety at work.

The same provision also requires States Parties to take measures to prohibit dismissal on the grounds of pregnancy or of maternity leave, and discrimination in dismissals on the basis of marital status.

Article 14, which concerns rural women, requires States Parties to eliminate discrimination against women in rural areas by ensuring them, for instance, equal access to training and education, both formal and non-formal, as well as to credit and loans.

¹⁴² Reports should be submitted at least every four years.

¹⁴³ The Committee's general recommendations can be found at: <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.

¹⁴⁴ See *Part 3, Chapter 2*, on equality of opportunity and treatment in employment and occupation.

The relevance of the work of the supervisory body of the CEDAW for labour judges and legal practitioners

Commenting on the principle of equality in employment set out in Article 11, the CEDAW Committee published a definition of 'sexual harassment'¹⁴⁵.

Extract from CEDAW Committee General Recommendation No. 19 on violence against women:

Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Source: UN Document A/47/38, para. 18

An example of the relevance of the CEDAW for labour judges and legal practitioners

The CEDAW and General Recommendation No. 19 on violence against women may prove useful where the concept of 'sexual harassment' has to be defined.

Country: India

Vishbika and others v. the State of Rajasthan and others, Supreme Court of India, 13 August 1997

In this case, the Supreme Court of India held that the right to equality enshrined in the national Constitution includes protection from sexual harassment. To interpret the constitutional provision, the Court relied on the Convention on the Elimination of All Forms of Discrimination Against Women and CEDAW Committee General Recommendation No. 19.

Country: Zimbabwe

Frederick Mwenye v. Textile Investment Company, Industrial Relations Court, 8 May 2001, No. LRT/MT/11/01

A senior manager, dismissed due to allegations of sexual harassment against him, challenged the decision and brought the case to court. In the absence of a definition of sexual harassment in national legislation, the Labour Relations Tribunal developed a definition based principally on CEDAW Committee General Recommendation No. 19.

III.B. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted by the General Assembly in 1990¹⁴⁶. It lays down several minimum standards on human rights that States Parties should apply to all migrant workers and members of their families, irrespective of their legal status. It further sets

¹⁴⁵ Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 19, Violence against women (U.N. Doc. A/47/38).

¹⁴⁶ As of 23 June 2009, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families had 41 States Parties.

out additional rights which should be granted to those migrant workers and their families who are documented or in a regular situation¹⁴⁷.

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) monitors the States Parties' implementation of the Convention. It is the most recent treaty body and held its first session in March 2004. The Committee is composed of 10 independent human rights experts. All States Parties must report to the CMW at regular intervals on how the Convention rights are being implemented¹⁴⁸. The CMW examines each report and addresses its concerns and recommendations to the State Party in the form of 'observations'. Under certain circumstances, the Committee will be able to consider individual complaints or communications from individuals claiming that their rights under the ICRMW have been violated when 10 States Parties have accepted this procedure in accordance with Article 77 of the Convention. The CMW also publishes general comments on thematic issues.

ICRMW general provisions relevant to labour judges and legal practitioners

Article 7 of the ICRMW sets out the principle of non-discrimination with respect to rights. It makes provision for States Parties to respect and to ensure the rights provided for in the Convention 'without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'.

ICRMW provisions relating to labour issues

The ICRMW grants a broad series of rights to all migrant workers – including workers who are non-documented or in an irregular situation – and members of their families.

Article 11 states that no migrant worker or member of his or her family shall be held in slavery or servitude.

Article 25 establishes that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions of work.

Article 26 recognizes the right of all migrant workers and members of their families to take part in meetings and activities of trade unions, and to join them freely.

Article 27 stipulates that, with respect to social security, migrant workers and members of their families shall enjoy the same treatment in the State of employment as that granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties

As referred to above, the ICRMW attributes additional rights to migrant workers and members of their families who are documented or in a regular situation, including the right to form associations and trade unions (Article 40). Furthermore, documented migrant workers and members of their families are entitled to equality of treatment with nationals in the exercise of their remunerated activity (Article 55), in the choice of that remunerated activity (Article 52), and in respect of protection against dismissal and unemployment benefits (Article 54).

¹⁴⁷For more information on the ICRMW, see OHCHR Fact Sheet No. 24: The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their families and its Committee (Rev. 1) (<http://www.ohchr.org/english/about/publications/docs/fs24rev1.pdf>).

¹⁴⁸Reports should be submitted initially one year after acceding to the Convention, and every five years thereafter.

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Part 3

The content of international labour standards on specific subjects and their interest for judges and legal practitioners

Chapter 1

Freedom of association and collective bargaining

I. Introduction¹

The principle of freedom of association

International human rights law in general and ILO standards in particular recognizes freedom of association as a basic human right. The ILO believes that freedom of association for workers and employers is a fundamental tool for protecting many other rights enshrined in international labour standards. In particular, freedom of association and collective bargaining allow the social partners to establish rules concerning working conditions, to set wages and to promote more general claims. Their significance, which has been underscored since the Organization was founded in 1919, has been confirmed on a permanent basis in various international instruments adopted since then.

The Preamble to the ILO Constitution already considered the principle of freedom of association to be a means of improving the situation of workers and of securing peace. The 1944 Declaration of Philadelphia – which forms an integral part of the ILO Constitution – states that ‘freedom of expression and of association are essential to sustained progress’, and affirms that this is one of the ‘fundamental principles on which the Organization is based’. In June 1998 the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-up, according to which ‘all Members, even if they have not ratified the Conventions [in question], have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights (...)’. These principles include freedom of association and the effective recognition of the right to collective bargaining.

Relevance for judges and legal practitioners

The courts play a leading role in protecting freedom of association. Through the various stages of the existence of trade unions or employers’ organizations, from their foundation to their dissolution, , the courts have a key role to play in guaranteeing that freedom. The supervisory bodies of the ILO have regularly called for the possibility of appealing to the

¹ This Chapter is based on the article ‘Libertad sindical y negociación colectiva’, by B. Gernigon, A. Otero and H. Guido, published in *Derechos fundamentales en el trabajo y normas internacionales del trabajo*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2003 (available in Spanish only).

judiciary against any administrative decision concerning the situation of a trade union or employers' organization². The courts also perform a fundamental function in protecting workers who have suffered anti-union discrimination or any violation of civil liberties arising out of their exercise of freedom of association. In some countries a specialized judicial authority also fulfils administrative authority functions, such as trade union registration, the designation of the most representative organization, the examination of claims in collective bargaining procedures, etc.

To perform these tasks, a knowledge of the various international instruments relating to freedom of association and of the associated principles formulated by the supervisory bodies of the ILO is undoubtedly very useful for legal practitioners. Against a background of globalization in which the notion of interference in the internal affairs of States in connection with human rights has been reduced to its simplest terms, judges are increasingly less isolated in their chambers and must be able to refer to international standards, particularly in order to fill gaps in legislation and to obtain guidance in resolving ambiguities in provisions, or to specify the scope of texts drafted in general terms. The ILO's vast experience in this area and the detailed body of principles formulated by the supervisory bodies, particularly the highly specialized Committee on Freedom of Association, will therefore be a valuable tool for judges and legal practitioners that will allow them, in the context of their legal system, to take decisions or draft conclusions that best observe the relevant international Conventions and principles.

In this respect, it should be added that in many countries the progress achieved in protecting rights concerning freedom of association have been possible thanks to the decisive contribution of decisions delivered by the courts.

International sources in respect of freedom of association

Numerous international sources are available in respect of freedom of association, which is a universally recognized principle. It has been incorporated, for example, into texts in the form of declarations, the most widely accepted being the 1948 Universal Declaration of Human Rights, Article 23(4) of which recognizes the right to form and to join trade unions.

² The Freedom of Association Committee has stated that 'an appeal should lie to the courts against any administrative decision concerning the registration of a trade union. Such a right of appeal constitutes a necessary safeguard against unlawful or ill-founded decisions by the authorities responsible for registration'. See International Labour Office: *Freedom of association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition*, Geneva, 2006, para. 300.

In the context of binding United Nations instruments, this right has also been recognized both in the International Covenant on Civil and Political Rights³ and in the International Covenant on Economic, Social and Cultural Rights⁴.

Similarly, as has already been said, this principle is part of the Constitution of the ILO, entailing legal consequences for Member States, particularly as regards the procedure for lodging complaints with the Committee on Freedom of Association alleging violations of freedom of association, a procedure that does not require the State concerned to have ratified the relevant Conventions⁵.

As far as other instruments intended to impose legal obligations upon States are concerned, the two freedom of association Conventions the ILO considers to be core instruments should be noted: the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), which had 150 and 160 ratifications respectively by 23 June 2009, making Convention No. 98 one of the most ratified ILO Conventions. Other Conventions regulate the exercise of freedom of association in relation to specific issues or certain sectors in particular, and these are also very important for judges and legal practitioners. They are the Right of Association (Agriculture) Convention, 1921 (No. 11), the Workers' Representatives Convention, 1971 (No. 135), the Rural Workers' Organizations Convention, 1975 (No. 141), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

There are also non-binding texts which are intended to set guidelines for States, such as the Recommendations that accompany some of the Conventions referred to⁶, and two International Labour Conference resolutions. The latter, adopted in 1952 and 1970 respectively, are the

³ Article 22 states that: '1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right'.

⁴ Article 8 of which stipulates that: '1) The States Parties to the present Covenant undertake to ensure: a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right 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. b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations. c) 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. d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. 2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. 3) Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention'.

⁵ See the explanations concerning this procedure in *Part 2, Chapter 2*.

⁶ These are in particular the Workers' Representatives Recommendation, 1971 (No. 143), the Rural Workers' Organizations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Recommendation, 1978 (No. 159), the Collective Bargaining Recommendation (No. 163), the Collective Agreements Recommendation, 1951 (No. 91), and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92).

Resolution concerning the independence of the trade union movement and the Resolution concerning trade union rights and their relation to civil liberties.

Finally, in their many observations and decisions the ILO's supervisory bodies have built up a considerable corpus of interpretations on the scope of the principles applicable in connection with freedom of association and the way in which they should be applied. This corpus is largely the result of the work of two bodies: firstly, the Committee of Experts on the Application of Conventions and Recommendations, whose individual observations and general surveys, while not definitive interpretations of the Conventions – a prerogative of the International Court of Justice alone – are recognized as valid and generally accepted⁷. Legal practitioners will therefore find it very useful to familiarize themselves with and consult the 1994 General Survey on freedom of association⁸. The second body is the Committee on Freedom of Association, whose Recommendations on over 2,500 cases examined since its foundation in 1951 have been systematically brought together in a Digest of Decisions and Principles. Judges and legal practitioners who are anxious to take international labour law into account in resolving matters brought before them will undoubtedly find this work to be an important reference source⁹. It should be noted that the corpus of principles compiled by the Committee is not restricted to specifying the scope of the freedom of association Conventions. Due to the variety of cases examined, the Committee has been called upon to pronounce itself on situations that were not expressly provided for in the Conventions, and has thus formulated interpretations which have completed and broadened the content of these principles in several respects.

The content of ILO standards and principles in respect of freedom of association

As has been pointed out, freedom of association is fundamentally protected by Conventions Nos. 87 and 98. While the essential objective of the former is to protect the autonomy and independence of trade unions and employers' organizations in relation to the public authorities, both in their founding and in their functioning and dissolution, the second essentially seeks to protect such organizations from reciprocal interference, to promote collective bargaining and to ensure that workers are not prejudiced in carrying out trade union activities because of anti-union discrimination. These various aspects will be examined in detail by following the articles of the Conventions as a whole and by taking account of the principles formulated by the Committee of Experts and the Committee on Freedom of Association on the basis of those articles. As in the other Chapters, examples will be given of judgments delivered by domestic courts that illustrate different ways of applying international labour law in the area under study. Finally, attention will be drawn to a number of cases dealt with by the Committee on Freedom of Association, the content of which illustrates the practical application of these Conventions.

Trade union rights and civil liberties

Both the International Labour Conference, in the above-mentioned 1970 Resolution concerning trade union rights and their relation to civil liberties, and the Committee of Experts have highlighted the interdependence between the exercise of freedom of association and observance of fundamental civil liberties such as the right to life, freedom of assembly, freedom of opinion, the right not to be subjected to arbitrary detention and the right to a fair hearing, among others. The Committee of Experts has stated in this regard that "the guarantees set out in

⁷ N. Valticos: 'Les méthodes de la protection internationale de la liberté syndicale', in *Recueil des cours de l'Académie de droit international*, A.W. Sijthoff, The Hague, 1975, p. 89. See on this point *Part 2, Chapter 2* of this Manual on the supervisory bodies of the ILO (available in French only).

⁸ ILO: *Freedom of Association and Collective Bargaining. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B).

⁹ ILO: *Digest of decisions and principles of the Freedom of Association Committee*, *op. cit.*

the international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments (...) are genuinely recognized and protected (...)'¹⁰.

In the same vein the Committee on Freedom of Association has considered that a democratic system is fundamental for the free exercise of trade union rights, and that a genuinely free and independent trade union movement can only develop where fundamental human rights are respected¹¹.

II. Fundamental ILO instruments on freedom of association and collective bargaining

II.A. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

II.A.1. Scope of the Convention

The guarantees in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), must apply without distinction to all workers and employers. Article 2 of the Convention accordingly recognizes that workers and employers, without distinction whatsoever and without previous authorization, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing.

The only possible exceptions provided for by the Convention concern the armed forces and the police¹². These clauses have been interpreted strictly by the supervisory bodies of the ILO, however. This is the spirit in which the Committee on Freedom of Association has established that armed forces civilian staff, firefighters, prison staff and customs officers should benefit from freedom of association.

Provisions that bar certain categories of workers from the right of association, such as civil servants and public sector employees, managerial staff, domestic workers, agricultural workers, workers employed in export processing zones, workers in cooperatives, self-employed workers or seafarers, among others, are incompatible with the provisions of the Convention.

On this point the Committee of Experts has also indicated that the free exercise of the right to organize should be guaranteed without distinction or discrimination of any kind as to race, nationality, sex, civil status, age, membership of political groups and participation in their activities, both in law and in practice¹³.

It should be noted that judges should also enjoy the right of association.

¹⁰ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 43.

¹¹ See ILO: *Digest of decisions and principles of the Freedom of Association Committee*, *op. cit.*, para. 32 and 33.

¹² Article 9(1) of Convention No. 87 establishes that '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'.

¹³ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 45.

Right of association of managerial employees

It is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to establish their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership.

Source: ILO: *Digest of decisions and principles of the Freedom of Association Committee, op. cit.*, para. 247

Country: Canada

Dunmore v. Ontario (Attorney General), Supreme Court of Canada, 20 December 2001, No. 2001 CSC 94

This case concerns the right of association of agricultural workers. The Act under examination did not prevent agricultural workers from unionizing, but it failed to grant them the protection recognized for other workers, notably against anti-union practices. In this light the Supreme Court of Canada emphasized the fundamental nature of the principle of non-discrimination in the effective recognition of freedom of association. To support its recognition of the positive obligation upon the State to extend the scope of protection of freedom of association to agricultural workers, the Court referred to various ILO Conventions, particularly to Articles 2 and 10 of Convention No. 87, and to Conventions Nos. 11 and 141.

II.A.2. Right to organize, autonomy of organizations and non-interference by the authorities

Besides the scope of application of the convention, two other specific aspects arise out of Article 2 of Convention No. 87: the right to establish organizations without previous authorization and the right of workers and employers to establish and to join organizations of their own choosing.

II.A.2.a. Right to establish organizations without previous authorization

This right does not mean that legislation cannot lay down certain formalities intended to ensure publicity and respect for public order so as to allow organizations to be established. On this subject, however, the Committee of Experts has declared that 'the formalities required, such as those intended to ensure publicity, must not be so complex or lengthy as to give the authorities in practice discretionary power to refuse the establishment of organizations. Provision should be made for the possibility of a judicial appeal against any administrative decision of this kind to an independent and impartial body which would re-examine the substance of the case'¹⁴.

Particular note should be taken of Article 7 of Convention No. 87, according to which the acquisition of legal personality by workers' and employers' organizations must not be made subject to conditions of such a character as to restrict the right to establish organizations without previous authorization.

¹⁴ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 106.

Country: Colombia

Constitutional Court of Colombia, 9 July 2008, C-695/08

Article 372 of Colombia's Labour Code stipulates that workers' organizations must register their constitution and rules with the Ministry of Labour in order to enjoy the rights granted to unions by national law. The validity of that provision was questioned before the Constitutional Court for its alleged violation of Article 2 of Convention No. 87 of the ILO and Article 39 of the Colombian Constitution, which recognizes freedom of association. It was alleged that the registration process was in fact a prior authorization due to the extensive control over the content of the trade unions constitutions and rules exerted by the Ministry.

After recalling that Convention No. 87 of the ILO was part of the "Block of Constitutionality" (Bloque de Constitucionalidad), the Court drew on Article 2 of the Convention and on Article 39 of the Constitution to declare the constitutionality of the impugned article conditional "on the understanding that that registration has only a publicising function, and does not authorize the Ministry in question to exercise prior control of the contents of the trade unions constitutions and rules".

II.A.2.b. Right of workers and employers to establish and to join organizations of their own choosing

The right of workers and employers to establish organizations of their own choosing implies, *inter alia*, the possibility to take freely the following decisions: choice of the structure and composition of organizations, the establishment of one or more organizations in any company, occupation or branch of activity, and the establishment of federations and confederations.

Concerning the freedom of workers' organizations and employers' organizations to choose their own structure and composition, we can examine the following decision by the Committee on Freedom of Association.

Country: Colombia

Case No. 2556

Complaint filed by: General Confederation of Labour

A group of workers in Colombia's pharmaceutical and chemical sector decided to set up an industrial union called *Unitraquifa*. As indicated in its statutes, the union covers both workers employed directly by companies in the sector and workers from private employment agencies placed at the service of chemical or pharmaceutical companies. The Ministry of Social Protection of Colombia denied *Unitraquifa* registration as an industrial union on the grounds that not all members had contracts of employment with companies in the sector. Faced with this refusal, the General Confederation of Workers of Colombia filed a complaint with the Committee on Freedom of Association, which decided as follows:

"(...) the Committee recalls that the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions. In the present case, the UNITRAQUIFA workers should have the right to establish an industrial organization as they see fit, in as much as all of them are working within pharmaceutical companies, irrespective of the type of relationship they have with those companies. Although the workers from "Servimos", "Temporales" and "TyS" who have joined UNITRAQUIFA have no direct employment relationship with the pharmaceutical companies, Shering Plough SA and Carboquímica, they have been sent to perform work in the sector and therefore may wish to become part of a trade union organization representing the interests of the workers in that sector at country level. The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities. [...] In these circumstances, the Committee requests the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee, and to keep the Committee informed in this respect."¹⁵

Although the Convention does not aim to impose trade union pluralism, such pluralism must be possible in every case, even in those cases where trade union unity was once adopted by the trade union movement. As a result, systems of trade union unity or trade union monopoly must not be imposed by law.

Although the requirement for a minimum number of members is an acceptable condition for establishing a trade union, the Committee of Experts has indicated that provisions requiring an excessively high number of members are incompatible with Article 2 of Convention No. 87¹⁶.

Country: Israel

Markovich, Leon v. Histadruth, National Labour Court, Israel (1975), 6 P.D.A.

In this case the Israeli Labour Court relied on ILO Conventions Nos. 87 and 98 to invalidate the refusal to register a new trade union in addition to those that already existed in an enterprise.

II.A.3. Free functioning of organizations

According to Article 3 of Convention No. 87, workers' and employers' organizations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and their activities and to formulate their programmes. The public

¹⁵ See ILO: Report of the Committee on Freedom of Association, Case 2356, 349th Report, Official Bulletin, Vol. XCI, Series B, No. 1.

¹⁶ *Ibid.*, para. 107.

authorities must refrain from any interference that would restrict this right or impede its lawful exercise. Each of these aspects will be examined in detail.

II.A.3.a. Right to draw up constitutions and rules

The Committee of Experts has stressed that two basic conditions must be met for this right to be fully guaranteed: firstly, national legislation should only lay down formal requirements as regards trade union constitutions; secondly, the constitutions and rules should not be subject to prior approval at the discretion of the public authorities¹⁷.

Similarly, the possibility to appeal before a Court the administrative decisions concerning the creation of trade unions is not a sufficient guarantee in itself to protect this right. In the light of Convention No. 87, therefore, the courts must be competent to re-examine the substance of the case and the grounds on which the administrative decision is based.

Judges and legal practitioners may find the following case brought before the Committee on Freedom of Association to be of interest here.

Country: Turkey

Case No. 2366

Complaint presented by: the Confederation of Public Employees' Trade Unions (KESK) and Education International (EI)

The complainant organizations alleged that the Attorney General of Ankara filed a lawsuit asking the courts to order the dissolution of the Trade Union of Public Servants in the Education Branch (Egitim Sen) because its constitution provided as one of the trade union's purposes the defence of 'the right of all citizens to education in their mother tongue and the development of their culture', which was supposed to be contrary to constitutional and legislative provisions prohibiting the teaching of any language other than Turkish as the mother tongue.

In this regard, the Committee on Freedom of Association recalled that "in accordance with Convention No. 87, ratified by Turkey, trade unions should have the right to include in their statutes the peaceful objectives that they consider necessary for the defence of the rights and interests of their members. To fully guarantee the right of workers' organizations to draw up their constitutions and rules in full freedom, national legislation should only lay down formal requirements as regards trade union constitutions, and the constitutions and rules should not be subject to prior approval by the public authorities." The Committee expressed "serious concerns that references in a union's by-laws to the right to education in a mother tongue have given and could give rise to the call for dissolution of the trade union".

¹⁷ *Ibid.*, para. 109.

II.A.3.b. Right to elect representatives in full freedom

The autonomy of organizations can be effectively guaranteed only if their members have the right to elect their representatives in full freedom. The public authorities should therefore refrain from any interference which might restrict the exercise of this right, whether as regards the holding of trade union elections, conditions of eligibility or the re-election or removal of representatives.

Procedural regulations and methods of electing trade union officials should by priority be left to the constitutions of trade union organizations. As the Committee of Experts has indicated, public authority interference in connection with this right must not go beyond provisions to promote democratic principles within trade unions or to ensure the proper conduct of the election process, with respect for members' rights, so as to avoid any dispute as to their outcome¹⁸.

As regards restrictions on conditions of eligibility, it should be noted by way of example that the Committee on Freedom of Association has declared that legislation should be made more flexible so as to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country¹⁹.

The role of the judicial authority in protecting the right to choose representatives in full freedom has been highlighted by the Committee on Freedom of Association, which has argued that measures taken by the administrative authorities when election results are challenged run the risk of being arbitrary. Hence, and in order to ensure an impartial and objective procedure, matters of this kind should be examined by the judicial authorities. Similarly, in order to avoid the danger of serious limitation on the right of workers to elect their representatives in full freedom, complaints brought before labour courts by an administrative authority challenging the results of trade union elections should not – pending the final outcome of the judicial proceedings – have the effect of suspending the validity of such elections²⁰.

Country: Paraguay

Action of unconstitutionality raised by the Central Unitaria de Trabajadores (CUT) and the Central Nacional de Trabajadores (CNT) v. Decree No. 16769 adopted by the Executive, Supreme Court of Justice of Paraguay, 23 September 2000, No. 35

In its decision the Supreme Court of Paraguay declared unconstitutional Decree No. 16769 of 1992 regulating trade union elections and setting conditions on the registration of organizations and on the recognition of their officials, which it deemed to be contrary to Article 3 of ILO Convention No. 87.

Country: Romania

Sentina Civila, Court of First Instance, Brasov, 30 March 2001

In this case the Court of First Instance, Brasov, relied on ILO Convention No. 87 to declare without effect a provision of Law No. 54/1991, considering the requirement for all the officials of a trade union to be employed in their respective enterprises to be contrary to the Convention.

¹⁸ See ILO: 1994 General Survey of the Committee of Experts, , para. 114.

¹⁹ See ILO: *Digest of decisions and principles of the Freedom of Association Committee*, , para. 420.

²⁰ *Ibid.*, para. 440 and 441.

II.A.3.c. Right of trade unions to organize their administration

The right of workers' and employers' organizations to organize their administration without public authority interference includes in particular their autonomy and financial independence and the protection of their assets and property.

Problems of compatibility with Convention No. 87 arise when domestic legislation establishes minimum trade union dues, specifies the proportion of union funds that have to be paid to the various federations or requires certain financial operations, such as the receipt of funds from abroad, to be approved by the public authorities.

Problems of compatibility also arise where the administrative authorities have the exclusive power at any time to examine registers of minutes, account books and any other documents of an organization, to conduct an investigation and to demand information, including when that power is exercised by the single central workers organization expressly designated by the law.

The freedom to organize their administration is not restricted to purely financial operations: it also includes the full right to dispose of all their fixed and movable assets and the right to the inviolability of their premises, correspondence and communications.

II.A.3.d. Right of organizations to organize their activities in full freedom and to formulate their programmes

This right includes in particular the right to hold union meetings, the right of union officers to have access to workplaces, to communicate with the company management, to exercise certain political activities specific to trade unions, such as to set out the union's position on the economic and social policy of the government and the right to strike, and more generally, any activity involved in defending members' rights.

II.A.3.d.i. Right to strike

Although this right is not expressly set down in the texts of the freedom of association Conventions, it has been recognized by the supervisory bodies of the ILO as an essential means available to workers and an inseparable corollary of freedom of association²¹. In fact, over the years, the ILO's Committee on Freedom of Association has developed an extensive body of principles concerning the right to strike, outlined below.²²

The peaceful exercise of the right to strike must be recognized as a general right for all trade unions, federations and confederations, both in the public and in the private sector. The only exceptions (or important limitations) on this right concern the members of the armed forces and the police, public servants exercising authority in the name of the State, workers in essential

²¹ In particular, the Committee's reasoning is based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87): the Committee considers that the ordinary meaning of the word 'programmes' includes strike action and considers this right to be one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. See ILO: 1994 General Survey of the Committee of Experts, , para. 147-151.

²² Those principles are exhaustively set out in ILO: Digest of Decisions of the Committee on Freedom of Association, *op. cit.*, paras. 520-676.

services in the strict sense of the term (the interruption of which could endanger the life, security or health of any or part of the population)²³, or acute situations of national crisis.

When the law sets conditions for a strike to be legal, they must be reasonable and not be a major constraint on action by workers' organizations.

Country: Colombia

Union of Empresas Varias de Medellín v. Ministry of Labour and Social Security, Ministry of Foreign Affairs, Municipality of Medellín and Empresas Varias de Medellín ESP, Constitutional Court of Colombia, Sala Cuarta de Revisión de Tutelas, 10 August 1999, file No. 206,360

In this case, to determine whether dismissal for taking part in a strike that had been declared illegal by the administrative authorities constituted anti-union dismissal, Colombia's Constitutional Court applied Conventions Nos. 87 and 98 of the ILO, and held that, since the strike had been declared illegal by the administrative authorities and not by the judicial authorities, the workers had been deprived of the guarantee of impartiality and protection against anti-union discrimination.

The Committee on Freedom of Association affirms that in the areas in which the right to strike can validly be restricted or forbidden, workers must be assured of compensatory guarantees. The Committee notes that limitations on strikes must be accompanied by conciliation and arbitration procedures that are adequate, impartial and quick, in which those affected participate at all stages, and in which the decisions handed down are implemented fully and promptly.²⁴

Moreover, when the strike is accompanied by the provision of minimum services, the Committee considers that organizations of the employers and workers concerned should be involved in determining what those are. If there is no agreement on the content of such minimum services, legislation should provide for such disagreement to be resolved by an independent body and not by the Ministry of Labour or the ministry or public enterprise concerned.²⁵

II.A.4. Dissolution and suspension of organizations

According to Article 4 of Convention No. 87, workers' and employers' organizations are not liable to be dissolved or suspended by administrative authority. Such methods seriously violate the principles of freedom of association and constitute extreme forms of interference by the authorities in the activities of organizations, against which workers and employers must enjoy all the necessary guarantees.

These guarantees include the need for an ordinary judicial procedure that must have suspensive effect on the suspension or dissolution. In this regard the Committee on Freedom of Association has maintained that if the principle that an occupational organization may not be subject to suspension or dissolution by administrative decision is to be properly applied, it is not sufficient for the law to grant a right of appeal against such administrative decisions: such decisions should not take effect until the expiry of the period set by the legislation for lodging an

²³ The Committee considered for instance the following activities to be essential services: the hospital sector; electricity services; water supply services; the telephone service; the police and the armed forces; fire-fighting services; public or private prison services; the provision of food to pupils of school age and the cleaning of schools; air traffic control. See ILO: *Digest of decisions and principles of the Freedom of Association Committee, op. cit.*, para. 585.

²⁴ *Ibid.*, para. 596.

²⁵ *Ibid.*, paras. 612 and 613.

appeal, without an appeal having been entered, or until the confirmation of such decisions by a judicial authority²⁶.

II.A.5. Right of workers' and employers' organizations to establish and to join federations and confederations

Article 5 of Convention No. 87 stipulates that workers' and employers' organizations must have the right to establish federations and confederations of their own choice, which must have the right to benefit from all the rights recognized to the first level organizations, particularly as regards their freedom to operate and the freedom to organize their activities and programmes.

The international solidarity of workers and employers also means that their federations and confederations must be able to organize and to act freely at international level.

II.B. Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

The Right to Organize and Collective Bargaining Convention, 1949 (No. 98), drafted to complete certain aspects of Convention No. 87, establishes protection against discrimination and interference and the obligation for ratifying States to promote collective bargaining.

II.B.1. Scope of the Convention

While Convention No. 87 applies in general to all workers and employers, without distinction whatsoever, with the sole possible exception of the armed forces and the police, Convention No. 98, in addition to reiterating this possibility of exclusion, establishes in Article 6 that it does not cover the public servants engaged in the administration of the State.

The Committee of Experts has adopted a restrictive approach to this exception, drawing a distinction between, on the one hand, public servants who carry out functions particular to the administration of the State (in some countries for example, civil servants in government ministries and other comparable bodies, plus ancillary staff), who may be excluded from the scope of the Convention, and, on the other, all other persons employed by government, public enterprises or autonomous public institutions, who should benefit from the guarantees provided for in the Convention²⁷.

II.B.2. Protection against anti-union discrimination

The protection afforded to workers and trade union officials against acts of anti-union discrimination is an essential aspect of freedom of association, since such acts may result in practice in the denial of the guarantees laid down in Convention No. 87.

Article 1 of Convention No. 98 stipulates that 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.

Workers must therefore enjoy adequate protection both at the time of taking up employment and in the course of employment, including when the employment relationship is terminated, against any measures of anti-union discrimination connected to union membership or the performance of legitimate union activities. The protection of the Convention is particularly important for union officials and representatives, who must have the guarantee that they will not be prejudiced on account of their trade union office.

²⁶ *Ibid.*, para. 703.

²⁷ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 200.

The existence of general legislative provisions prohibiting anti-union discrimination is inadequate if such provisions are not coupled with rapid, effective and inexpensive procedures guaranteeing their application in practice, and with sufficiently dissuasive sanctions²⁸. This protection can be guaranteed by various means adapted to national law and practice, provided they can effectively remedy anti-union discrimination. Clearly the reinstatement of the dismissed worker, including retroactive compensation, is the most appropriate remedy in these cases²⁹.

As regards the content of the remedy, the Committee of Experts has indicated that legislation which allows the employer in practice to terminate the employment of a worker on condition that he pay the compensation provided for by law in any case of unjustified dismissal, when the real motive is the worker's union membership or activity, is inadequate under the terms of Article 1 of Convention No. 98.

Country: Chile

Victor Améstida Stuardo and others v. Santa Isabel S.A., Supreme Court of Chile, 19 October 2000, Case No. 10.695

The Supreme Court of Chile relied on ILO Conventions Nos. 87, 98 and 135 to protect several trade union representatives who had been dismissed, and who it had recognized as such since they were elected, even though the employer had not been officially informed and the union had not been officially registered yet. On the basis of these Conventions the Court considered that in order for the right to organize to be fully effective, the trade union privilege granted to union representatives must necessarily apply to the period immediately prior to the official establishment of the trade union, since otherwise it is the right of association itself that would not be recognized.

Country: Costa Rica

Supreme Court of Justice, Constitutional Chamber, 8 October 1993, Judgment No. 93-5000

Basing its argument essentially on Article 1 of ILO Conventions Nos. 98 and 135³⁰, in the absence of any provisions specifically laid down in the Labour Code³¹, the Supreme Court of Costa Rica recognized the existence of reinforced protection to the benefit of workers' representatives, including, among other things, the right to reinstatement in the event of unfair dismissal.

Country: Peru

Sindicato Unitario de Trabajadores de Telefónica del Perú S.A. y FETRATEL, Constitutional Court, Case No. 1124-2001-AA/TC³²

In relation to anti-union dismissals, bearing in mind the provisions in ILO Conventions Nos. 87, Article 2, and 98, Article 1(2)(b), the Constitutional Court of Peru ordered union member complainants who had been dismissed from the company to be reinstated, ruling that trade union membership had been used as a criteria for dismissal.

²⁸ See ILO: *Digest of decisions and principles of the Freedom of Association Committee*, *op. cit.*, para. 820.

²⁹ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 224.

³⁰ Article 1 of Convention No. 135: 'Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements'.

³¹ Article 70 of the Labour Code of Costa Rica stated only that an employer was prohibited from undertaking any action whatsoever to oblige workers to withdraw from trade unions.

³² The full text of the decision in Spanish can be found at:

http://www.eft.com.ar/boletin.asp?arch=boletineft/2006/febrero/boletin_eft_febrero_0018b.htm.

II.B.3. Protection against interference

Under Article 2 of Convention No. 98, workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or by each other's agents or members in their establishment, functioning or administration. Acts of interference are basically considered to be measures designed to promote the establishment of workers' organizations which are under the control of employers or an organization of employers, or to support workers' organizations by financial or other means, with the objective of placing such organizations under the control of employers or employers' organizations.

Legislation should explicitly establish rapid remedies and effective and sufficiently dissuasive sanctions to protect workers' and employers' organizations from such action.

II.B.4. Promotion of collective bargaining

According to Article 4 of Convention No. 98, measures appropriate to national conditions must be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements. This Article refers in particular to the obligation to promote collective bargaining, and to its free and voluntary nature. Certain provisions of the Labour Relations (Public Service) Convention, 1978 (No. 151), the Collective Bargaining Convention, 1981 (No. 154) and the Collective Agreements Recommendation, 1951 (No. 91) are also applicable in this area.

The following case, examined by a national court and the Committee on Freedom of Association, may be of interest in relation to the requirement to promote collective bargaining.

Country: Peru

*Cámara Peruana de la Construcción (CAPECO) v. Judgment of the Fifth Civil Chamber of the Supreme Court of Justice of Lima, p. 427, 11 November 2002, Constitutional Court, Case No. 0261-2003-AA/TC*³³

The Constitutional Court of Peru rejected an extraordinary petition filed by Cámara Peruana de la Construcción against legislation requiring collective bargaining in the construction sector to be carried out at the branch level. The Court relied among other things on Article 4 of ILO Convention No. 98, according to which the State must not only guarantee the right to collective bargaining, but must also promote its development. The Court considered that this provision allowed the State to impose 'more protection' when that is the only way to make collective bargaining possible. The Court ruled that the specific characteristics of this sector, particularly the very high level of rotation of workers between various building sites and enterprises, made it impossible in practice to establish a trade union organization at enterprise level, so that collective bargaining at the branch level is the only way the Peruvian civil construction federation can make its constitutional right to collective bargaining viable.

³³ The full text of the decision in Spanish can be found at:
<http://www.tc.gob.pe/jurisprudencia/2003/00261-2003-AA.html>.

Country: Peru

Case No. 2375

Complaint filed by: the International Organization of Employers (IOE), the National Confederation of Private Employers' Institutions (CONFIEP) and the Peruvian Chamber of Construction (CAPECO)³⁴

The situation outlined above has also been considered by the Committee on Freedom of Association following a complaint by the Peruvian Chamber of Construction. The employers' organization argued that both the aforementioned decision by the CC and Article 46 of Law No. 27912³⁵ violated the principle of free and voluntary bargaining by imposing bargaining by branch of activity in the construction sector.

The Committee on Freedom of Association found that the problem raised by the complaint had to be read in conjunction with another provision of Peruvian law, Article 45 of Legislative Decree No. 25593 of 1992, applicable to all economic sectors except construction, which had the effect of unilaterally imposing bargaining at company level in cases of disagreement between the parties on the level of bargaining.³⁶

For both provisions, the Committee recalled that, under the principle of free and voluntary bargaining recognized by Article 4 of Convention No. 98, the most appropriate system for setting the level of negotiation was agreement among the parties or, failing that, an impartial mechanism for resolving conflicts, for example a body of independent persons acting with the trust of the parties. Accordingly, the Committee called for the repeal of both Article 45 of Legislative Decree No. 25593 of 1992 and Article 46 of Law No. 27912, and for the above principles to be applied not only in the construction sector, where negotiation by branch prevails, but in all other sectors of the Peruvian economy where, failing agreement, negotiation at the enterprise level is imposed.

II.B.4.a. Definition and object of collective bargaining

In ILO instruments, collective bargaining is seen as a process leading to the conclusion of a collective agreement. Under paragraph 2 of Recommendation No. 91, this definition applies to 'all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other'.

The text adds that collective agreements should bind their signatories and those on whose behalf the agreement is concluded, and that stipulations in individual contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. At the same time, stipulations in contracts of employment which are more favourable to workers than those prescribed by a collective agreement should be observed. Recommendation No. 91 thus

³⁴ See ILO: Report of the Committee on Freedom of Association, Case 2375, 343rd Report, *Official Bulletin*, vol. LXXXVIX, 2006, B Series, No. 3, para. 181. This Report can also be consulted using the database of cases submitted to the Committee on Freedom of Association (LibSynd) on the Internet. See: <http://webfusion.ilo.org/public/db/standards/norms/libsynd/index.cfm?Lang=SP&hdroff=1>

³⁵ Article 46 of Law No. 27912: "If there is a defined level of bargaining in a certain branch of activity, this continues to be valid."

³⁶ Article 45 of Legislative Decree No. 25593 of 1992 on collective labour relations: "Unless a collective agreement already exists at any level among those mentioned in the previous article, the parties shall mutually agree the level at which to set the first meeting. Failing agreement, negotiation shall be at the company level." "If there is agreement on a level, then to negotiate at a different level, as an alternative or as a complement, has as a prerequisite the agreement of the parties, and may not be imposed by administrative act or arbitration. (...)"

affirmed in 1951 the principle of the binding nature of the collective agreement and that of its primacy over individual contracts of employment, though the provisions of contracts of employment which are more favourable to workers than those prescribed by the collective agreement should not be deemed to be contrary to the collective agreement.

Convention No. 154 specifies the concept of collective bargaining even more clearly by establishing in Article 2 that this expression 'extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations on the one hand, and one or more workers' organizations 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 organizations and a workers' organization or workers' organizations'.

II.B.4.b. Subjects of collective bargaining

Collective bargaining is a right of employers and their organizations on the one hand, and workers' organizations on the other (first-level trade unions, federations and confederations), non unionized representatives of the workers concerned being able to conclude collective agreements only where such organizations are absent. In these terms, Article 5 of the Workers' Representatives Convention, 1971 (No. 135), stipulates that appropriate measures must be taken to ensure that 'the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives'.

In order for trade unions to be able to achieve their objective of 'promoting and defending the interests of workers' by collective bargaining, they must be independent and must have the right to organize their activities without any interference from the public authorities that would limit or to impede the legal exercise of that right. They must in addition not be under the control of an employer or an employers' organization.

The following case, examined by the Committee on Freedom of Association, may be of interest in this respect.

Country: France

Case No. 2233

Complaint submitted by: Syndicat national des huissiers de justice (SNHJ)

The complainant organization alleged that there was a restriction on the right to free and voluntary collective bargaining by bailiffs, in their capacity as employers, because of obligatory membership of the National Chamber of Bailiffs and its exclusive competence in respect of collective bargaining. The Committee on Freedom of Association asked the Government to amend the legislation so that as employers, bailiffs could freely choose the organizations representing their interests in the collective bargaining process and so that the organizations in question were exclusively employers' organizations which could be considered to be independent of the public authorities in that their membership, organization and functioning had been freely chosen by the bailiffs themselves³⁷.

³⁷ See ILO: Committee on Freedom of Association Report, Case 2233, 332nd Report, *Official Bulletin*, vol. LXXXVI, 2003, Series B, No. 3, para. 646. To consult this Report on the Internet, see footnote 34.

The following case, which was brought before a domestic court, may also be of interest.

Country: South Africa

NUMSA v. Bader Pop, Constitutional Court of South Africa, 13 December 2002, No. CCT 14/02

Because of a gap in the Labour Code, the Constitutional Court of South Africa adopted an interpretation based on ILO Conventions Nos. 87, 98, 135 and 154³⁸, recognizing that minority trade unions can defend certain workers' rights through collective bargaining and, where the latter would be unsuccessful, to have recourse to the right to strike.

II.B.4.c. Recognition of trade union organizations and preferential rights

In the case of legislation establishing systems of 'compulsory' recognition where the employer, under certain conditions, must recognize the existing union or unions for the purposes of collective bargaining, according to the Committee of Experts it is important for the determination of the trade union in question to be based on objective and pre-established criteria so as to avoid any opportunity for partiality or abuse. Furthermore, when national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents, certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed³⁹.

Similarly, the Committee on Freedom of Association has recommended that where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in the unit, at least on behalf of their own members⁴⁰.

II.B.4.d. Principle of free and voluntary bargaining

The voluntary nature of collective bargaining is a fundamental aspect of freedom of association principles. As the International Labour Conference acknowledged when formulating Convention No. 154, the duty to promote collective bargaining excludes the imposition of coercive measures⁴¹. In this respect the Committee of Experts declared that the existing machinery and procedures should be designed to facilitate bargaining between the two sides of industry, leaving them free to reach their own settlement⁴². The involvement of legislative or administrative authorities the effect of which is to annul or to amend the content of freely concluded collective agreements, including with respect to wage stipulations, are contrary to the principle of voluntary collective bargaining.

³⁸ It should be noted that the Constitutional Court's decision referred to Conventions Nos. 135 and 154, but was not directly based on the latter since they had not been ratified by South Africa.

³⁹ See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 240.

⁴⁰ See ILO: *Digest of decisions and principles of the Freedom of Association Committee*, *op. cit.*, para. 976.

⁴¹ ILO: *Provisional minutes*, International Labour Conference, 67th Session, Geneva, 1981, No. 22, para. 49.

⁴² See ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 248.

The following case, which was examined by the Committee on Freedom of Association, may be of interest in this regard.

Country: Romania

Case No. 2149

Complaint submitted by: the Romanian Employers' Confederation (CPR)

In this case the Committee on Freedom of Association considered that Article 4 of Convention No. 98 in no way placed a duty on the Government to make collective bargaining compulsory, nor would it be contrary to this provision to oblige the social partners, with a view to fostering and promoting the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The Committee recalled, however, that the public authorities should refrain from any undue interference in the negotiating process⁴³.

II.B.4.e. Freedom to decide the level of negotiation

In this respect the Collective Bargaining Recommendation, 1981 (No. 163), sets that 'measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels'⁴⁴. The Committee on Freedom of Association argued along the same lines when it stressed that the determination of the bargaining level was essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority⁴⁵. As noted above, in cases of disagreement over the level of negotiation, an impartial mechanism for resolving conflicts, for example a body of independent persons who have the trust of the parties, shall be called for.

II.B.4.f. Principle of good faith

The Committee on Freedom of Association has indicated that it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement. Moreover, genuine and constructive negotiations are a necessary component for establishing and maintaining a relationship of confidence between the parties⁴⁶.

II.B.4.g. Voluntary procedures: bodies intended to facilitate negotiations

The conciliation and mediation imposed by legislation in the framework of the collective bargaining process are admissible, provided reasonable deadlines are established. Compulsory arbitration, on the other hand, when the parties do not reach agreement is in general contrary to the principle of voluntary collective bargaining. It is exclusively admissible: 1) in essential services in the strict sense of the term; 2) as regards public servants engaged in the administration of the State; 3) when it is clear, after prolonged and unsuccessful negotiations, that the deadlock in negotiations cannot be overcome without an initiative by the authorities, and 4) in the case of an acute national crisis. Any voluntary arbitration accepted by the two parties is always legitimate.

⁴³ See ILO: Committee on Freedom of Association Report, Case 2149, 328th Report, *Official Bulletin*, vol. LXXXV, 2002, Series B, No. 2, para. 581. To consult this Report on the Internet, see footnote 31.

⁴⁴ See para. 4(1) of Recommendation No. 163.

⁴⁵ See ILO: *Digest of decisions and principles of the Freedom of Association Committee*, *op. cit.*, para. 988.

⁴⁶ *Ibid.*, para. 935.

Country: Iceland

Case No. 2170

Complaint submitted by: The Icelandic Federation of Labour (ASÍ) and the Merchant Navy and Fishing Vessel Officers Guild (FFSI), supported by the International Confederation of Free Trade Unions (ICFTU) and the International Transport Workers' Federation

In this case the Committee on Freedom of Association recognized, like the Committee of Experts on the Application of Conventions and Recommendations, that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified in stepping in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. That being said, the Committee is of the view that the mere existence of a deadlock in a collective bargaining process is not in itself a sufficient ground to justify an intervention from the public authorities to impose arbitration on the parties to the labour dispute. Public authorities' intervention in collective disputes must be consistent with the principle of free and voluntary negotiations; this implies that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis except where there is an acute national crisis⁴⁷.

III. Freedom of association provisions in other ILO instruments

III.A. Protection and facilities to be granted to workers' representatives

The Workers' Representatives Convention, 1971 (No. 135), completes the provisions of Convention No. 98 in terms of anti-union discrimination. The latter does in fact refer to the protection workers or members should benefit from, but it does not specifically address the protection of workers' representatives or the facilities required for them to carry out their functions.

Under Convention No. 135, by virtue of national legislation or practice such representatives may be appointed or elected by the unions or by representatives freely elected by workers in the undertaking. In this respect the Convention provides that where both trade union representatives and elected representatives exist in the same undertaking, appropriate measures must be taken 'to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives', and, at the same time, 'to encourage cooperation on all relevant matters between the elected representatives and the trade unions concerned and their representatives'⁴⁸.

As regards the protection of workers' representatives in the undertaking, the Convention stipulates that 'workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements'⁴⁹. In this respect the Workers' Representatives Recommendation, 1971 (No. 143), lists examples of various means of effective protection against decisions considered to be unjustified: detailed and precise definition of the reasons justifying termination of employment; a requirement of consultation with, an advisory opinion from, or the agreement of an independent or a joint body; a special recourse procedure; in respect of the unjustified termination of employment of workers'

⁴⁷ See ILO: Committee on Freedom of Association Report, Case 2170, 330th Report, *Official Bulletin*, vol. LXXXVI, 2003, Series B, No. 1, para. 888. To consult this Report on the Internet, see footnote 31.

⁴⁸ See Article 5 of Convention No. 135.

⁴⁹ See Article 1 of Convention No. 135.

representatives, an effective remedy which, unless this is contrary to basic principles of the law of the country concerned, should include the reinstatement of such representatives in their job, with payment of unpaid wages and with maintenance of their acquired rights; provision for laying upon the employer the burden of proving that such action was justified; recognition of a priority to be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce.

By virtue of this Recommendation, the protection established by this Convention should also apply to workers who are candidates or who have been elected to represent the workers.

The Convention also provides that such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently. In this connection account should be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned. The Convention stipulates that the granting of such facilities should not impair the efficient operation of the undertaking concerned⁵⁰.

III.B. Right to organize of rural workers' organizations

Under the Right of Association (Agriculture) Convention, 1921 (No. 11), ratifying States undertake to secure 'to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture'⁵¹. Due to the limited scope of the protection afforded by this Convention, a specific instrument for rural workers had to be drawn up.

The Rural Workers' Organizations Convention, 1975 (No. 141), stipulates that rural workers should be associated with economic and social development action if their conditions of work and life are to be permanently and effectively improved. The Convention applies to all kinds of rural workers' organizations, including organizations not restricted to but representative of rural workers, rural workers and wage earners or, under certain conditions, tenants, sharecroppers or small owner-occupiers, even if they are self-employed.

Convention No. 141 establishes the right of rural workers to establish and to join organizations of their own choosing, notably with a view to participating in economic and social development and in the resulting benefits. These organizations must be independent and voluntary in character and must remain free from all interference, coercion or repression. States must facilitate the growth of strong and independent organizations and the elimination of any discrimination.

III.C. Trade union rights in the public administration

The Labour Relations (Public Service) Convention, 1978 (No. 151), was adopted because Convention No. 98 does not cover certain categories of public employees and because the Workers' Representatives Convention (No. 135) applies exclusively to workers' representatives in undertakings.

Convention No. 151 applies to all persons employed by the public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to

⁵⁰ The Workers' Representatives Recommendation, 1971 (No. 143), lists various facilities that can be afforded to workers' union representatives: time off from work, without loss of pay or social and fringe benefits; access to all workplaces, to the management of the undertaking and to management representatives empowered to take decisions; collection of trade union dues; posting of trade union notices on the premises of the undertaking; distribution of union documents among the workers of the undertaking; such material facilities and information as may be necessary for the exercise of their functions.

⁵¹ See Article 1 of Convention No. 11.

them. National legislation, however, must determine the extent to which the guarantees provided for in the Convention apply to: 1) high-level employees whose functions are normally considered as policy-making or managerial; 2) employees whose duties are of a highly confidential nature; 3) the armed forces and the police.

Convention No. 151 contains provisions similar to those in Convention No. 98 as regards protection against anti-union discrimination and acts of interference, and to those in Convention No. 135 as regards the facilities afforded to the representatives of recognized public employees' organizations as may be appropriate to enable them to carry out their functions promptly and efficiently. Convention No. 151 also establishes that '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'⁵².

As has been said, with regard to collective bargaining Convention No. 98, adopted in 1949, does not cover public employees engaged in the administration of the State. Convention No. 151, however, has taken an important step in requiring States to promote negotiating procedures or any other methods allowing representatives of public employees to participate in the determination of their conditions of employment⁵³. The Collective Bargaining Convention, 1981 (No. 154), was then adopted, promoting collective bargaining both in the private sector and in the public administration, with the exception of the armed forces and the police, with the sole reservation that in the public administration 'special modalities of application of this Convention may be fixed by national laws or regulations or national practice'. States that ratify this Convention cannot restrict themselves to the consultation method, but must promote collective bargaining in order to determine, *inter alia*, conditions of work and employment. Such collective bargaining may clearly be subject to special modalities.

III.D. Other categories of workers

The Migration for Employment Convention (Revised), 1949 (No. 97), establishes the principle of non-discrimination against migrant workers as regards 'membership of trade unions and enjoyment of the benefits of collective bargaining'⁵⁴.

The Indigenous and Tribal Peoples Convention, 1989 (No. 169), affirms that governments must do everything possible to prevent any discrimination as regards 'the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organizations'⁵⁵.

The Plantations Convention, 1958 (No. 110), reaffirms the principles set out in Conventions Nos. 87 and 98.

The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), commits ratifying States to verifying that the provisions of the legislation adopted with respect to vessels which are registered on their territory are 'substantially equivalent to the Conventions or articles of Conventions referred to in the Appendix' to the Convention and which include Conventions Nos. 87 and 98.

⁵² See Article 9 of Convention No. 151.

⁵³ Article 7 of Convention No. 151 stipulates that 'measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters'.

⁵⁴ See Article 6(a)(ii) of Convention No. 97.

⁵⁵ See Article 20(2)(d) of Convention No. 169.

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Chapter 2

Equality of opportunity and treatment in employment and occupation

I. Introduction

The principle of equality of opportunity and treatment

The implementation of the human right to equality of opportunity and treatment in employment is a core objective of the International Labour Organization. The 1944 Declaration of Philadelphia, which forms part of the Constitution of the ILO, affirms the right of all human beings, irrespective of race, creed or sex, to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity⁵⁶. A series of international labour standards adopted subsequently enabled the content of the principle of equality of opportunity and treatment in employment and occupation to be specified. In 1998 the ILO Declaration on Fundamental Principles and Rights at Work reaffirmed the fundamental nature of the principle of equality and committed the ILO and each of its Member States to taking measures to eliminate any discrimination in employment and occupation.

Equality of opportunity and treatment in employment and occupation means that all individuals, both men and women, who are working or looking for work are treated according to their capabilities and their merit. Discrimination arises when equality of opportunity is denied, and when some people are treated unfavourably because of characteristics such as ethnic extraction, sex, religion or political opinion. Discrimination in employment violates human dignity and social justice and has far-reaching negative consequences. It does not only have a negative effect on the life of male and female workers and their families: it has an equally negative impact on the workplace and the company, and on society as a whole⁵⁷.

The workplace is a privileged access point for combating discrimination and for promoting equality, which in their turn help to boost social cohesion, peace and stability. This is why the elimination of discrimination and the promotion of equality in the world of work is a key aspect of the ILO's Decent Work Agenda.

Eliminating discrimination: the crucial role of judges and legal practitioners

Judges and legal practitioners have a crucial role to play in eliminating discrimination and promoting equality. With their function and duty being to apply abstract rules to specific situations, they give concrete expression to the principle of non-discrimination and make equality a reality in the life of women and men who are working or looking for work.

The resolving of discrimination-related disputes by judicial means is an important aspect of any strategy that seeks to promote and to ensure equality of opportunity and treatment in employment and occupation. Effective judicial mechanisms are required in order to ensure justice for victims, prevent further discrimination and provide workers, employers and

⁵⁶ ILO Constitution, Annex, Article II (a).

⁵⁷ See ILO: *Time for Equality at Work. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 91st Session, Geneva, 2003, Report I(B), pp. 25-27.

decision-makers with guidelines on the meaning and practical implications of non-discrimination legislation. The use of such mechanisms has often encouraged and contributed to the adoption and implementation of new measures to promote equality for all. Besides resolving disputes, legal practitioners may address equality issues in connection with the formulation of public policies, legal drafting, collective bargaining, human resources management or the teaching of law.

According to each domestic legal system, discrimination and equality issues may arise in the context of a broad range of cases, e.g.: those concerning individual or collective employment disputes, disputes under civil law or the law of contracts, actions for the violation of constitutionally protected rights in administrative procedures⁵⁸, or in connection with enforcement when discrimination is penalized by criminal law. Certain discrimination issues may also arise when the judiciary is competent to determine the validity of domestic legislation and regulations.

International labour law on equality: its usefulness for judges and legal practitioners

International labour law concerning equality is set out in a substantial series of ILO and United Nations instruments, the most important of which are presented in this Chapter. Two fundamental ILO Conventions in this area are the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). These instruments establish the basic principles, concepts and legal definitions on equality of opportunity and treatment at work that ratifying States must take into account when adopting or introducing legislation, policies or other measures with a view to implementing these Conventions. Conventions Nos. 100 and 111⁵⁹, two of the most ratified ILO Conventions, have shaped and influenced the legislation of many countries.

Courts, tribunals and other institutions supervising the implementation of and ensuring respect for labour law and non-discrimination legislation are responsible for examining the provisions of international labour law applicable to equality and non-discrimination, in order to ensure that the interpretation and implementation of national constitutions and legislation conforms to the international obligations of the country concerned. While possibilities for the judicial use of international law may vary according to the legal system, it is nevertheless possible in many circumstances to refer to international labour law to fill any gaps at domestic level. In some legal systems the judiciary is explicitly mandated to examine the compatibility of domestic legislation with the obligations imposed by international law. In other countries, laws contrary to international obligations are deemed to be unconstitutional. When the relevant ILO Conventions are not in force in a particular country, international obligations concerning the principle of non-discrimination may arise out of other sources, such as United Nations human rights treaties (see below), regional instruments, general principles of law or customary international law.

The ILO Declaration on Fundamental Principles and Rights at Work states that Member States have the obligation to respect, to promote and to realize the principles relating to fundamental rights, including those covered by Conventions Nos. 100 and 111. Non-binding instruments such as the Recommendations adopted by the International Labour Conference⁶⁰ or codes of practice also provide valuable guidance.

⁵⁸ Before civil service commissions, the labour inspectorate, mediators or bodies specializing in the field of equality, for example.

⁵⁹ By 23 June 2009, Conventions Nos. 100 and 111 had been ratified by 166 and 168 ILO Member States respectively.

⁶⁰ In particular, the Equal Remuneration Recommendation, 1951 (No. 90), and the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).

The provisions in Conventions Nos. 100 and 111 and in other relevant instruments may be useful to courts and tribunals in various situations, e.g.:

- when domestic legislation does not include provisions on non-discrimination and equality at work;
- when the provisions of national constitutions and legislation on discrimination and equality are less detailed or more restrictive than those in international instruments;
- when the provisions of national legislation are unclear or can be interpreted in various ways.

Observations, conclusions and Recommendations in the comments and reports of the supervisory bodies of the ILO⁶¹ or other international supervisory bodies provide useful guidance on the meaning and scope of international labour law provisions in connection with equality and non-discrimination. This is particularly helpful when domestic legislation is drawn up in line with terminology used in the provisions of international instruments.

The Committee of Experts on the Application of Conventions and Recommendations (hereinafter the Committee of Experts) has frequently underscored the crucial role played by courts and tribunals in applying equality-related international labour standards. The Committee systematically asks governments to include information on how their courts and tribunals implement the principles of the applicable Conventions and legislation in connection with non-discrimination, and to provide the text of relevant legal judgments. The latter are an important indicator of the application of Conventions at domestic level, and of the existence of an effective domestic system for promoting equality of opportunity and treatment.

In some countries, progress in the implementation of equal pay has been brought about more by judicial interpretation than legislative action. On the basis of broadly-stated or, in other cases, relatively restrictive constitutional or legal provisions, the courts in a number of jurisdictions have been responsible for developing concepts of 'equal pay' and definitions of 'remuneration' corresponding to those of the Convention [No. 100].

Source: ILO: *Equal remuneration. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 72nd Session, Geneva, 1986, Report III(4B), para. 119

II. Fundamental ILO instruments on equality of opportunity and treatment in employment and occupation

II.A. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Convention No. 111 is the most exhaustive ILO instrument in respect of discrimination. Its objective is to eliminate discrimination in all aspects of employment and occupation on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin, or any other criteria prohibited at domestic level.

⁶¹ See above, *Part 2, Chapter 1*.

II.A.1. What obligations do States that ratify this Convention have?

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

C.111, Article 2

Convention No. 111 is a flexible instrument in that States in which it is in force have considerable latitude to conceive and implement their domestic policy as envisaged under Article 2. This policy must respect and promote the principle of equality of opportunity and treatment as defined in the Convention, however. It must also take into consideration the obligations set out in Article 3, which are, *inter alia*:

- to repeal and modify any discriminatory statutory provisions and administrative instructions or practices and enact appropriate legislation;
- to promote educational programmes favouring that policy, including in connection with training and awareness-raising on equality issues;
- to ensure observance of the policy as regards public employment, vocational training and guidance and placement services;
- to cooperate with employers' and workers' organizations.

This policy must be formulated and applied to enable progress to be made in eliminating discrimination. When anti-discrimination provisions are adopted, for example, they must be applied effectively. Since no society can hope to be free of all discrimination, the Convention requires action to be taken to ensure that its objectives are achieved progressively. It requires regular evaluations⁶² of the results obtained in implementing domestic policy in favour of equality so that existing measures and strategies can be continually scrutinized and adjusted.

⁶² Article 3(f) of Convention No. 111 envisages that the action taken in line with domestic policy seeking to promote equality and the results secured by such action must be indicated in reports to the ILO under Article 22 of the ILO Constitution.

Extracts from the Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Romania of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

43. (...) National policy to establish equality of opportunity and treatment must first be expressed explicitly, which implies that programmes in the widest sense of the term should be or have been promulgated. Secondly, the policy must be applied, which presupposes the implementation by the State concerned of appropriate measures, the principles of which are listed in Article 3 of the Convention. In order to safeguard the flexibility indispensable to its application, the Convention does not give any specific indications regarding the content of the measures which could be adopted for the effective promotion of equality of opportunity and treatment in employment and occupation. It allows the ratifying States to determine the content of these measures in the light of the objectives of the Convention.

44. However, the content of the national policy must be based on the principles of the Convention: promotion of equality of opportunity and treatment by the elimination of all distinctions, exclusions or preferences in law and practice; the application to all the discriminatory grounds expressly covered (...); implementation of the principle of equality in the various aspects of employment and occupation. (...) An equal opportunity policy consists of offering everyone, without discrimination based on race, national extraction, political opinion, religion or social origin, comparable means and opportunities for training and employment, whereas an equal treatment policy can be limited to the formulation and application of the principle of equality before the law, in the general sense of the term. In the cases in which equality has been altered concerning one of the grounds covered by the Convention, the situation of the person(s) affected by this alteration should be corrected or put right according to the principle of equality of opportunity. Article 2 of the Convention makes provision for the combination of these two aspects of a single equal opportunity and treatment policy. Beyond the form taken by the measures of application (inclusion in the text of the Constitution, adoption of specific legislation, declarations of general policy, etc.), the criterion of the application of the Convention must be that of the unequivocal results obtained in the pursuit of equal opportunity and treatment in employment and occupation without any unlawful discrimination.

Source: ILO: *Official Bulletin*, Supplement 3, vol. LXXIV, 1991, Series B

The following examples will be examined, in which courts have taken into account the international obligations imposed on their countries under the Convention to give rulings on cases raising discrimination and inequality issues:

Country: South Africa

Jacques Charles Hoffmann v. South African Airways, Constitutional Court of South Africa, 28 September 2000, No. CTT 17/00

In this case the applicant was refused a job by the defendant in a discriminatory fashion. In order to give a ruling on the appropriate relief, in addition to the national Constitution the Constitutional Court of South Africa relied on Articles 1 and 2 of ILO Convention No. 111, stating that the need to eliminate discrimination and its consequences did not arise out of the Constitution alone, but also out of international obligations. The Court therefore ruled that to effectively eliminate discrimination, the appropriate relief was to direct the defendant company to employ the appellant, rather than merely to provide him with compensation in the form of damages.

Country: Germany

Federal Constitutional Court of Germany, 18 November 2003, 1 BvR 302/96

Under the German Constitution the State is required to promote the effective realization of equality between men and women at work with a view to abolishing present disadvantages. The case concerned the constitutionality of a maternity benefits scheme funded essentially by employers' contributions. The Constitutional Court of Germany declared this method of funding to be unconstitutional because it encouraged discrimination against women. This decision was supported by references to international standards, including ILO Convention No. 111, which seeks to secure equality not only in law but also in practice.

II.A.2. Scope of the Convention

Scope as regards individuals: all workers

The objective of Convention No. 111 is to protect all persons against discrimination in employment and occupation. No provision in the instrument restricts its scope to individuals, groups or categories of workers. All workers must therefore be protected against discrimination.

- Domestic, casual or agricultural workers must have the right to equality of opportunity and treatment as defined by the Convention.
- Non-nationals and nationals must be protected against discrimination on the grounds covered by the Convention. This is particularly relevant for protecting migrant workers against discrimination based on grounds such as race, colour, sex, national extraction or religion.

Substantive scope: discrimination in employment and occupation

Convention No. 111 seeks to eliminate discrimination 'in employment and occupation'.

For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

C.111, Article 1(3)

The scope of the Convention is very broad, since it extends to all sectors of activity and covers all occupations⁶³ and all jobs in both the public and private sectors. While it refers to the promotion of equality of opportunity and treatment in employment and occupation, the Convention does not only address access to wage-earning employment, but also to self-employment.

Convention No. 111 and the accompanying Recommendation No. 111 make provision for the principle of equality of opportunity and treatment to be applied to all aspects of employment and occupation. The following provisions give an overview of the most important areas in which this principle must be implemented.

⁶³ 'Occupation' means the trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which he or she belongs or of his or her professional status (ILO: *Equality in Employment and Occupation. Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B), para. 79).

Education, vocational guidance and training

‘[The Convention] covers also access to training, for without such access any real possibility of entering an employment or occupation would be nugatory, inasmuch as training is the key to the promotion of equality of opportunities’⁶⁴.

‘The term “vocational training” applies to all forms of employment and occupations; it should not be interpreted in a narrow sense such as apprenticeship or technical education. In so far as the completion of certain studies is necessary to obtain access to any given employment or occupation, or to some specialized form of vocational training, the problems relating thereto should not be overlooked in the application of the 1958 instruments’⁶⁵.

Access to employment and to particular occupations

‘According to the terms of this definition [Article 1(3)], the protection provided for in the Convention is not only applicable to the treatment accorded to a person who has already gained access to employment or to an occupation but is extended expressly to the possibilities of gaining access to employment or to the occupation (...)’⁶⁶.

Equality of opportunity and treatment in access to employment and occupation includes, *inter alia*, equality of access to placement services and treatment by such services (and other employment promotion measures), non-discrimination and equality of opportunity in selection and recruitment procedures, and equality of access to particular occupations.

Conditions of employment

The concept of ‘conditions of employment’ to which the Convention refers is explained in Recommendation No. 111, which provides that any individual, without discrimination, must enjoy equality of opportunity and treatment in respect of:

- advancement;
- security of tenure of employment;
- remuneration for work of equal value;
- conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

Access to workers’ and employers’ organizations and collective bargaining

Recommendation No. 111 also provides that in collective negotiations and industrial relations, the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment. The Recommendation also states that employers’ and workers’ organizations should not practice or countenance discrimination in respect of admission, retention of membership or participation in trade union affairs.

The extent of the substantive scope of Convention No. 111, as defined above, may allow the principle of equality of opportunity and treatment to be taken into consideration in cases where

⁶⁴ ILO: *Equality in Employment and Occupation. Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 75th Session, Geneva, 1988, Report III(4B), para. 76.

⁶⁵ ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 70.

⁶⁶ ILO: 1988 General Survey of the Committee of Experts, *op. cit.*, para. 76.

domestic legislation in the area is narrower or lacks clarity in respect of its scope. This is the case, for example, when:

- Labour Code provisions do not clearly specify whether job applicants are protected by anti-discriminatory provisions;
- legislation regulating the activities of employment services or agencies is silent on non-discrimination principles.

II.A.3. What is discrimination?

Definition of the principle

A basic definition of what constitutes discriminatory treatment is set out in Article 1 of the Convention.

For the purpose of this Convention the term ‘discrimination’ includes (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

C.111, Article 1(1)(a)

There are three elements to this definition:

- a factual element (the existence of a distinction, exclusion or preference originating in an act or omission) which constitutes a difference in treatment;
- a ground on which the difference in treatment is based (see below); and
- the objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment).

When a situation involves these three elements, discrimination is recognized. It does not have to be intentional.

Definition of discrimination

A job offer establishes recruitment criteria (factual element). One of the criteria is that applicants must belong to a particular sex or age group (ground). Persons who do not belong to the sex or age groups specified are therefore excluded from competing for the job solely because such criteria have been used (objective result).

NB: the difference in treatment involved in each of these three elements may not be considered to be discriminatory if it arises out of one of the exceptions set down in the Convention (see below).

Discrimination in law and in practice

Unequal treatment based on a prohibited ground established by general rules, such as laws or regulations, is discrimination in law. Acts or omissions of a public service or of private individuals or bodies which treat individuals or members of a group unequally on prohibited grounds constitute discrimination in practice.

The following examples of discrimination will be considered:

Country: Bulgaria

Ruling No. 8, Constitutional Court of the Republic of Bulgaria, 27 July 1992, Constitutional Case No. 7

This case concerned a law that barred former high-ranking Communist Party officials from positions of responsibility in banks. The Constitutional Court ruled that the legislative provisions in question were unconstitutional and inconsistent with ILO Convention No. 111 (discrimination in law).

Country: Burkina Faso

Savadogo Zonabo v. Grand Moulins du Burkina, Labour Court of Ouagadougou, 10 September 2002, Judgment No. 140

The first woman appointed to a managerial post had not been promoted to a higher employment category, contrary to established but not explicitly admitted practice. The Labour Court of Ouagadougou relied directly on ILO Conventions Nos. 100 and 111 (discrimination in practice).

Direct and indirect discrimination

The definition of discrimination given by the Convention applies both to direct and indirect discrimination.

Direct discrimination arises when less favourable treatment is explicitly or implicitly based on one or more prohibited criteria. It is explicit when the act or omission concerned is openly and evidently based on a prohibited criterion, such as in the above example. It is implicit when the circumstances demonstrate that a distinction is made on the basis of a prohibited criterion, even when the act or omission is not explicitly referred to.

Direct discrimination (implicit)

A collective agreement establishes two salary scales, one for 'skilled work', the other for 'unskilled work'. The agreement defines both these types of task. Assigning a female worker to the salary scale applicable to unskilled work, despite the fact that she actually carries out skilled work, is direct discrimination based on sex; it is implicit in that it arises out of factual circumstances rather than an explicit declaration indicating that the gender of the worker concerned is the basis for the treatment they are subjected to.

The concept of indirect discrimination is important in cases of identifying and dealing with situations in which a certain treatment is applied equally to each person but leads to discriminatory results for a particular group protected by the Convention, such as women or ethnic or religious groups. The Convention clearly applies to indirect discrimination, since Article 1(1)(a) makes reference to the 'effect' of the offending treatment (see above).

The Committee of Experts has described and defined indirect discrimination as follows:

'Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job'⁶⁷.

⁶⁷ ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 26.

Indirect discrimination (based on sex)

- A factory only employs workers over 1.60 metres in height. This criterion applies to all workers. This rule may be indirectly discriminatory towards women, since they are more often less than 1.60 metres in height. It can be demonstrated, however, that this specific height requirement is inherent to the job (a certain height is required, for example, to use the type of machinery in the factory).
- In a case where an undertaking's part-time workers could only benefit from its occupational pension scheme if they had worked for at least 15 years over a total period of 20 years, the European Court of Justice ruled that this constituted discriminatory treatment towards women, as a far greater number of whom than men were affected by this exclusion from the occupational pension scheme, unless the undertaking could show that the exclusion was based on objectively justified factors unrelated to any discrimination on grounds of sex⁶⁸.

Indirect discrimination (based on ethnic origin)

A government requires all employees in the civil service to have a perfect command of the country's official language. Most of the people belonging to an ethnic minority living in the country cannot fully meet this requirement. This situation may constitute indirect discrimination, since a perfect command of the official language cannot be an inherent requirement of all public sector jobs.

When domestic legislation does not cover or does not explicitly define what constitutes indirect discrimination, it is particularly relevant to rely on Convention No. 111 and on the comments of ILO supervisory bodies.

Country: Australia

The Commonwealth of Australia v. Human Rights and Equal Opportunity Commission, Federal Court of Australia, 15 December 2000, [2000] FCA 1854

In this case the question was raised of whether the provision prohibiting discrimination laid down in the domestic legislation applied to indirect discrimination. The Federal Court of Australia ruled that the legislation should be interpreted in accordance with the definition of discrimination set out in ILO Convention No. 111, and relied on the positions of the Committee of Experts and of an ILO commission of inquiry to rule that Convention No. 111 encompassed indirect discrimination.

II.A.4. The criteria of discrimination

Convention No. 111 explicitly refers to seven criteria on the basis of which no distinction, exclusion or preference can be made in respect of employment and occupation (Article 1(1)(a)). The prohibited grounds of discrimination are race, colour, sex, religion, political opinion, national extraction or social origin. The supervisory bodies of the ILO provide guidance on the meaning of these terms and concepts, as shown in the following sections.

Race and colour

The terms 'race' and 'colour' refer to distinctions arising out of a person's belonging to an ethnic or racial group. They also apply to discrimination based on a person's belonging to a tribal or indigenous population. Differential treatment based on the language spoken by an ethnic group may also constitute discrimination based on race and colour.

⁶⁸ *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, 13 May 1986, C-170/84, ECR, 1607.

While colour is one and often the most apparent ethnic characteristic, this term also covers distinctions between persons with different coloured skin who may in fact belong to the same ethnic or racial group.

Sex/gender

Sex discrimination arises when people are treated unequally because they belong to the male or female sex. It includes unequal treatment based on biological characteristics. Distinctions on the basis of pregnancy, confinement and related medical conditions may therefore constitute discrimination against women on the grounds of their sex. Discrimination based on sex also encompasses unequal treatment arising out of socially established roles and responsibilities assigned to a particular sex from a gender perspective.

What 'sex' and 'gender' should be taken to mean

There are both biological and also social differences between men and women. The term 'sex' relates to biologically determined differences, while the term 'gender' refers to differences in social roles and relations between men and women. Gender roles are learned through socialization and vary widely within and between cultures. Gender roles are affected by age, class, race, ethnicity and religion, and by the geographical, economic and political environment.

Source: ILO: An ILO code of practice on HIV/Aids and the world of work, Geneva, 2001, para. 3.2

Sexual harassment is a form of discrimination based on sex. In a General Comment on sexual harassment published in 2003 in connection with Convention No. 111, the Committee of Experts noted that most definitions of sexual harassment contain the following elements⁶⁹:

- conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men, and which is unwanted, unreasonable and offensive to the recipient, and a person's rejection of such conduct on the part of employers or colleagues is used explicitly or implicitly as a basis for a decision which affects that person in respect of employment (*quid pro quo* harassment); or
- conduct which creates an 'intimidating, hostile or humiliating environment' for the recipient (harassment due to a hostile working environment).

Country: India

Vishaka and others v. State of Rajasthan and others, Supreme Court of India, 13 August 1997

In this case the Supreme Court of India declared that the right to equality enshrined in the Constitution included protection against sexual harassment. In its interpretation of the Constitution, the Court was guided by the Convention on the Elimination of All Forms of Discrimination against Women and by Committee on the Elimination of Discrimination against Women General Recommendation No. 19 on the elimination of all forms of discrimination against women in relation to violence against women⁷⁰.

⁶⁹ See the 2003 General Observation of the Committee of Experts, published in connection with Convention No. 111.

⁷⁰ Para. 18 of General Recommendation No. 19 of 1992 reads as follows: 'Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.

Country: Zimbabwe

Fredrick Muenye v. Textile Investment Company, Industrial Relations Tribunal, 8 May 2001, No. LRT/MT/11/01

A senior manager, dismissed following allegations of sexual harassment against him, disputed the decision and brought the case to court. In the absence of a definition of sexual harassment in national legislation, the Labour Relations Tribunal developed a definition based principally on General Recommendation No. 19, issued by the Committee on the Elimination of Discrimination against Women, 1992⁷¹.

Religion

Discrimination on the basis of religion arises when persons are treated unequally because they do or do not profess a particular religion, faith or creed. This ground encompasses religious expressions or events.

Political opinions

This criterion enables protection to be ensured against unequal treatment based on political beliefs. It encompasses activities expressing or manifesting opposition to the established political system and involvement in particular political organizations or parties.

Country: Bulgaria

Ruling No. 8, Constitutional Court of the Republic of Bulgaria, 27 July 1992, Constitutional Case No. 7

Members of Parliament sought to have legislation that barred former high-ranking Communist Party officials from managerial posts in banks declared unconstitutional and incompatible with international obligations. Since ratified treaties form part of domestic legislation under the Constitution, the Constitutional Court of Bulgaria ruled that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and ILO Convention No. 111 have primacy over domestic legislation. The Court concluded that the offending restriction was discriminatory on the basis of political opinion in relation to access to a particular occupation within the meaning of Article 1 of Convention No. 111. The legislation was declared unconstitutional and incompatible with the above-mentioned international treaties.

National extraction

The concept of national extraction applies to distinctions based on the foreign origin of a person, their birthplace or their ancestors' birthplace. It does not apply to distinctions based on nationality (citizenship). It is therefore discriminatory on the basis of national extraction to restrict access to the civil service to naturalized citizens. The supervisory bodies of the ILO have also applied the prohibition of this criterion to situations in which the population of a particular country is made up of citizens of different 'nationalities' (for example, the citizens of Haiti may be of Haitian or Dominican extraction).

Social origin

This criterion applies to distinctions made on the basis of an individual's belonging to a class, socioeconomic category or caste. Discrimination based on social origin includes treatment that bars the individuals concerned from certain types of activity or jobs, or which exclusively

⁷¹ *Ibid.*

assigns such individuals to certain jobs. The Committee of Experts has classified the treatment relating to employment and occupation applied to descendants of former slaves on the basis of their social origin as unfavourable. It has also commented on the situation of people belonging or perceived to belong to lower castes in South Asia.

Other criteria of discrimination

Besides the seven criteria of discrimination referred to above, Article 5(2) of Convention No. 111 refers to age, disablement, family responsibilities and social and cultural status. It also offers countries the possibility of expanding the list of prohibited criteria of discrimination (see Article 1(1)(b)).

It is important in this respect to consider other ILO instruments and human rights treaties that provide protection against discrimination, in that the applicable provisions and principles they contain can be used by domestic courts and tribunals to encompass forms of discrimination neither explicitly referred to in Article 1(1)(a) of Convention No. 111, nor in domestic legislation.

ILO instruments

A number of other ILO instruments refer to criteria of discrimination other than those set out in Article 1(1)(a) of Convention No. 111⁷². These include, for example:

- the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), which covers anti-union discrimination (see *Part 3, Chapter 1* of this Manual);
- the Workers with Family Responsibilities Convention, 1981 (No. 156), which provides for equality of opportunity and treatment irrespective of family responsibilities (see below);
- the Termination of Employment Convention, 1982 (No. 158), which refers to marital status, family responsibilities and pregnancy (Article 5(d)) (see *Part 3, Chapter 3* of this Manual);
- the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), which establishes the principle of equality of opportunity between disabled workers and workers in general (see below);
- the Migration for Employment Convention (Revised), 1949 (No. 97), which provides for equal treatment between nationals and non-nationals in a number of areas (Article 6);
- the Older Workers Recommendation, 1980 (No. 162), which addresses equality of opportunity and treatment for all workers, irrespective of their age.

United Nations instruments

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also include language, property and birth as grounds of discrimination. The anti-discriminatory provisions in these two Covenants establish a non-exhaustive list of prohibited criteria (see below). Domestic courts may therefore rely on them when hearing cases of discrimination based on criteria not expressly covered in domestic legislation.

With a view to the coherence of international human rights law, the Committee of Experts has stressed that it would be desirable to take the protection against discrimination offered in other international human rights treaties into account when applying Convention No. 111⁷³.

⁷² A complete list of the applicable instruments can be found in the 1996 Special Survey (ILO: Special Survey of the Committee of Experts, 1996, *op. cit.*, para. 243).

⁷³ *Ibid.*, para. 244.

Country: Romania

Decision No. 6, Constitutional Court of Romania, 25 February 1993

After examining the clause of the Constitution relating to equality, which establishes nine prohibited grounds of discrimination, the Constitutional Court of Romania stated that constitutional provisions should be interpreted in relation to the relevant provisions of international human rights instruments (the Court referred to Article 26 of the International Covenant on Civil and Political Rights and to Article 2(2) of the International Covenant on Economic, Social and Cultural Rights), and declared that such provisions completed the prohibition of grounds referred to in the Constitution.

Country: Philippines

International School Alliance of Educators v. Hon Leonardo A. Quisumbing and others, Supreme Court of the Republic of the Philippines, 1 June 2000, No. 128845

The dispute concerned whether it was admissible to make a distinction regarding the salaries paid to teachers on the basis of their nationality. The Supreme Court of the Philippines relied on the principle of non-discrimination as a general principle of law which is one of the sources of international law set out in Article 38 of the Statute of the International Court of Justice. It referred to several United Nations treaties to show that the principle of non-discrimination was a general principle of law which therefore formed an integral part of the positive law of the Philippines. As a result, distinctions based on nationality were not authorized.

Judgment No. 2120 of 15 July 2002, Administrative Tribunal of the ILO⁷⁴

When examining a human resources measure taken by a United Nations agency, the Administrative Tribunal of the ILO ruled that 'the provision improperly discriminates between candidates for appointment based on their marital status and family relationship (...). Discrimination on such grounds is contrary to the Charter of the United Nations, general principles of law and those which govern the international civil service, as well as international instruments on human rights. The principles of Article 26 of the International Covenant on Civil and Political Rights (1966), although not strictly binding on the Agency, are relevant.'. It also ruled that: 'The list [of prohibited grounds in Article 26] by its very terms is not limitative ("... any ground such as ...") and all forms of improper discrimination are prohibited. What is improper discrimination? It is, at least in the employment context, the drawing of distinctions between staff members or candidates for appointment on the basis of irrelevant personal characteristics'.

In its General Surveys on Convention No. 111, the Committee of Experts analyzes a number of criteria which are not explicitly set out in Article 1(1)(a). The following example concerning discrimination based on health will be examined:

The worker's state of health should only be taken into consideration by employers with regard to the specific requirements of a particular job, and not be considered automatically as affecting the right to access to employment, or conditions of work within the employment relationship. (...) Taking into account the past or present physical or mental state of health of an individual could be a major barrier to applying the principle of equal access to employment. **Unless there is a very close link between a worker's current state of health and the normal occupational requirements of a particular job, using state of health as a reason to deny or continue employment contravenes the spirit of the Convention.** [our emphasis]

Source: ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 255

⁷⁴ The full text of this decision can be found on the TRIBLEX database (<http://www.ilo.org/public/french/tribunal/fulltext/2120.htm>).

Discrimination on multiple grounds

It should not be forgotten that the same individual may be subject to discrimination on more than one ground (multiple discrimination). This arises out of the fact that criteria recognized as grounds of discrimination are personal identity traits which correlate and interweave with each other. Women in particular may suffer the combined effects of discrimination on multiple grounds. Indigenous women, for example, are often subject to discrimination on the basis of their sex and their indigenous origin.

II.A.5. In what cases does discrimination within the meaning of the Convention not arise?

Convention No. 111 refers to three types of differential treatment in relation to one of the prohibited grounds which are not deemed to be discriminatory:

- distinctions based on the inherent requirements of a particular job (Article 1(2));
- special measures of protection or assistance, including temporary special measures (Article 5); and
- measures designed to protect the security of the State (Article 4).

Differential treatment based on the inherent requirements of a particular job

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

C.111, Article 1(2)

Article 1(2) of Convention No. 111 is a *lex specialis* of international labour law expressing the more general rule of international law according to which treatment based on a prohibited ground is not equivalent to discrimination if it has an objective justification and if the means employed are proportionate to the justification for differentiation⁷⁵.

Several elements highlighting the implications of Article 1(2) of the Convention can be found in the work and documents of the supervisory bodies of the ILO⁷⁶:

Article 1(2) should be interpreted restrictively;

- a specific requirement for a particular job may be justified if it is necessary because of the characteristics and nature of the job, in proportion to its inherent requirements;
- the systematic application of requirements giving rise to one or more grounds of discrimination is inadmissible, since the concept of 'particular job' refers to a specific and definable job, function or duty; each individual case must therefore be carefully examined.

The following extract from an ILO commission of inquiry report helps clarify the meaning and scope of the Convention provision referring to a particular job's inherent requirements.

⁷⁵ I. Brownlie: *Principles of Public International Law*, fourth edition, Clarendon, Oxford, 1990, p. 599 (available in English only).

⁷⁶ ILO: 1988 General Survey of the Committee of Experts, *op. cit.*, para. 124-133; ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 118-122.

Extract from the report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany

531. (...) distinctions, exclusions or preferences affecting an individual in employment or occupation are to be considered as not constituting discrimination if they are based on the inherent requirements of a particular job. The word 'inherent', which is used in the English text, is defined in the Oxford English Dictionary in the following terms: 'existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something; intrinsic, essential'. A corresponding idea is expressed by the words used in the French text ('*qualifications exigées*'). Accordingly, any limitation which it is sought to bring within the scope of the exception provided for in Article 1, paragraph 2, must be necessary because of the very nature of the job in question. The notion of 'necessity' is widely resorted to in international human rights instruments as a criterion restricting exceptions to the rights recognised therein. Moreover, in considering whether a particular limitation can be justified as necessary, it is not sufficient to address only the question whether circumstances exist in which action may be called for to meet a purpose for which limitations are authorized by the provision in question. One must also consider whether the form and extent of the measures actually provided for or taken are commensurate with the exigencies of the situation. In other words, the limitation must be proportionate to the aim pursued.

Source: ILO: *Official Bulletin*, Supplement 1, vol. LXX, 1987, Series B

The inherent requirements of a particular job⁷⁷

- Distinctions based on sex can be made in respect of jobs perceived to involve particular physical intimacy (for example, setting aside a certain number of airport police jobs for female officers to carry out body searches on female passengers).
- Political opinions may, in certain limited circumstances, be a bona fide qualification for certain senior administrative posts, such as those involving special responsibilities for the development of government policy, for example.

⁷⁷ For guidance and further examples, see ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 118-122.

The following cases brought before the courts of Madagascar will be examined:

Country: Madagascar

Dugain and others v. Compagnie Air Madagascar, Supreme Court of Madagascar, 5 September 2003, Judgment No. 231

A collective agreement applicable to cabin crew fixed the retirement age for female cabin crew at 45 years of age and for male cabin crew at 50, the earlier retirement causing an important drop in women earnings. In this case the Supreme Court of Madagascar directly applied ILO Convention No. 111 and the Convention on the Elimination of All Forms of Discrimination against Women. The Supreme Court quashed the Appeal Court's decision and referred the matter back to the lower court, ruling as follows: 'within the meaning of these international standards it is not per se discriminatory to stipulate an age limit or a restriction based on sex, but that such stipulation could only be justified if the employer can prove that the sex of the employee is an inherent requirement of the job'. In the case in point the Court ruled that the employer should have shown that the early retirement of female cabin crew was justified on safety grounds, which it was not able to prove.

Country: Madagascar

Ramiranjatovo Jean-Louis v. Fitsaboana Maso, Antsirabe Labour Court of First Instance, 7 June 2004, No. 58

In this case Antsirabe Labour Court applied ILO Convention No. 111 to rule that the dismissal of an employee by a religious institution was discriminatory. The worker concerned, employed as a statistician, had been dismissed for changing his religion after marrying a woman of another faith. The Court relied on Article 1(2) of Convention No. 111 to rule that religion was not an inherent requirement for a job as a statistician. The dismissal was therefore declared to be discriminatory.

Special measures of protection or assistance

Any Member may (...) determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

C.111, Article 5(2)

Some ILO Conventions and Recommendations require or recommend special measures in favour of indigenous or tribal peoples, the disabled or elderly, or workers with family responsibilities, for example, or measures designed to protect maternity. Such measures may also be determined at domestic level, after consultation with workers' and employers' organizations (Article 5).

The concept of special measures is a dynamic one. The needs – or the perceived needs – of measures of protection change over time and often accompany scientific and technological development and changes in social attitudes.

Restrictions on overtime for women

In 2001 the Committee of Experts noted that a general restriction on overtime applicable to all women, without being tied to the protection of maternity provided for in the Labour Standards Act of the Republic of Korea, could have an influence on the full application of the Convention, since it appeared to unduly penalize women on the labour market. In a 2006 observation, following amendments to the legislation, the Committee noted with satisfaction that the Labour Standards Act, as amended, limited overtime work for women who had given birth for only one year following delivery⁷⁸.

It may sometimes be difficult to determine whether the measures of protection are justified in the light of the demands and needs of the people and groups they are supposed to protect, or whether such measures are in fact equivalent to discrimination.

The courts can be called upon to determine the lawfulness of protection measures. In similar cases, the following extract from the 1996 Special Survey of the Committee of Experts is of particular interest:

'Because of the aim of protection and assistance which they are to pursue, these special measures must be proportionate to the nature and scope of the protection needed or of the existing discrimination. A careful re-examination of certain measures may reveal that they are conducive to establishing or permitting actual distinctions, exclusions or preferences falling under Article 1 of the Convention. (...) Once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and remain effective'⁷⁹.

Temporary special measures

Certain special measures are introduced to put an end to existing discrimination or to remedy past discrimination. These measures are sometimes called 'temporary special measures', 'positive measures' or 'measures in favour of disadvantaged groups'. Some countries, for example, have introduced preferential treatment for women in recruitment to the civil service until a certain gender equality objective is achieved. The Committee of Experts has stressed the following:

'It should be borne in mind that such measures are clearly of a temporary nature inasmuch as their objective is to compensate for imbalances resulting from discrimination against certain workers or certain sectors'⁸⁰.

The Committee on the Elimination of Discrimination against Women has published a general Recommendation on temporary measures seeking to achieve gender equality⁸¹.

Measures intended to guarantee the security of the State

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

C.111, Article 4

⁷⁸ See the 2006 observation of the Committee of Experts, Convention No. 111, Republic of Korea.

⁷⁹ ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 136.

⁸⁰ *Ibid.*

⁸¹ General Recommendation No. 25 (2004) of the Committee on the Elimination of Discrimination against Women on 'Temporary special measures'.

Article 4 allows States to take certain measures to protect their security without coming into conflict with the principle of non-discrimination. In terms of the supervision exercised by the ILO, this provision has mainly been raised in relation to the prohibited criterion of political opinion. The supervisory bodies have established a number of principles that should be borne in mind when this provision is being applied⁸²:

- as an exceptional clause, Article 4 must be applied strictly in order to avoid unjustified limitations on the protection the Convention seeks to ensure;
- Article 4 applies to measures affecting an individual on account of activities he or she is justifiably suspected or proven to have undertaken. The individual's mere membership of a particular group or community is not sufficient to justify its application;
- Article 4 applies to activities which are proved or which are justifiably suspected because of concurring and precise presumptions;
- the measures justified under Article 4 must be sufficiently well defined and delimited.

In commenting on Judgment No. 8 of 27 July 1992 of the Constitutional Court of Bulgaria, the Committee of Experts recalled that 'the application of measures intended to protect the security of the State must be examined in the light of the bearing which the activities concerned may have on the actual performance of the job, tasks or occupation of the person concerned. Otherwise, there is a danger, and even likelihood, that such measures will entail distinctions and exclusions based on political opinion or religion, which would be contrary to the Convention'⁸³.

Besides the fundamental conditions referred to above, Article 4 provides that the person concerned must have the right to appeal to a competent body. The Committee of Experts has provided the following clarifications concerning the content of this right:

'[It] is important that the appeals body be separate from the administrative or governmental authority and offer a guarantee of objectivity and independence. It must also be competent to hear the reasons for the measures taken against the appellant and to afford him or her the opportunity to present his or her case in full'⁸⁴.

II.A.6. Burden of proof

The legal protection offered by provisions on equality of opportunity and treatment is dependent on whether effective judicial procedures exist that may be invoked by persons who believe they have been discriminated against. The fact that the applicable procedural rules often require the party alleging discrimination to prove that it actually existed has been recognized as a major obstacle in resolving discrimination cases. This is particularly true when the discrimination is in its most subtle form, such as cases of indirect or implicit discrimination (see above)⁸⁵.

To overcome this difficulty, an increasing number of countries have introduced procedural rules that reverse the burden of proof to allow victims of discrimination effectively to assert their rights. In some legal systems the rule is that if the complainant is able to establish *prima facie* evidence, the burden of proof should be transferred to the respondent, who will then have to show that the difference of treatment was based on objective considerations unrelated to any prohibited ground of discrimination.

⁸² See ILO: 1988 General Survey of the Committee of Experts, *op. cit.*, para. 134-138; ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 123-129.

⁸³ *Ibid.*, para. 197.

⁸⁴ *Ibid.*, para. 129.

⁸⁵ ILO: 1988 General Survey of the Committee of Experts, *op. cit.*, para. 224-225.

Transfer of the burden of proof

- European Union law applicable in this area provides that when persons who consider themselves wronged by a breach of the principle of equal treatment establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of that principle⁸⁶.
- According to South African legislation, there is an assumption of discrimination if the complainant shows that there has been differential treatment. It is then for the respondent to establish that the differential treatment was justified⁸⁷.

The issue of the burden of proof is less crucial in procedures where the body giving the decision is responsible for establishing whether there has been discrimination through its own inquiries. This is regularly the case in administrative procedures, including those applicable to factory inspections or which are conducted before bodies specializing in equality issues.

ILO instruments addressing the burden of proof

The issue of the burden of proof is explicitly dealt with in ILO standards on termination of employment, the protection of workers' representatives and the protection of maternity, three areas in which problems of discrimination often arise.

The Termination of Employment Convention, 1982 (No. 158), provides that race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin cannot be valid reasons for dismissal. It affirms the principle according to which the employee should not have to 'bear alone the burden of proving that the termination was not justified' (Article 9)⁸⁸.

The Workers' Representatives Recommendation, 1971 (No. 143), suggests that measures seeking to ensure the effective protection of workers' representatives could include 'provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified' (paragraph 6(2)(e)).

The Maternity Protection Convention, 2000 (No. 183), provides that '[t]he burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer' (Article 8).

Both the Committee of Experts and the Committee on Freedom of Association consider the reversal of the burden of proof in discrimination cases to be an important measure for ensuring effective protection against discrimination in employment and occupation, as required by ILO equality and freedom of association Conventions⁸⁹.

⁸⁶ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁸⁷ See the Employment Equity Act, 1998, section 11.

⁸⁸ See ILO: *Protection against unjustified dismissal. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 82nd Session, Geneva, 1995, Report III(4B), para. 196-217.

⁸⁹ As regards the Committee of Experts, see ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 230 and 231; ILO: *Freedom of Association and Collective Bargaining. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B), para. 217-218. Concerning the Freedom of Association Committee, see ILO: Committee on Freedom of Association Report, Case No. 673, 130th Report, *Official Bulletin*, vol. LV, Supplement, 1972, para. 65.

In the absence of specific legislation in this area, the courts in several countries have taken the initiative to reverse the burden of proof in cases of alleged discrimination in employment and occupation.

Country: Spain

Constitutional Court of Spain, Second Chamber, 23 November 1981, Ruling No. 38/1981

The Constitutional Court of Spain, referring to ILO Recommendation No. 143 and ILO Committee on Freedom of Association decisions, ruled that the effective protection of the constitutional right to freedom of association required the burden of proof to be transferred to the employer in cases of alleged anti-union discrimination.

II.A.7. Suitable remedies for the effective elimination of discrimination

One of the duties of courts that deal with discrimination cases is to decide on suitable remedies. In some legal systems a court's classification of an act or omission as discrimination will automatically entail the application of certain legal consequences (when legislation or jurisprudence has established that measures or provisions in individual contracts or collective agreements are null and void, for example). When the discriminatory acts, omissions or situations are persistent, an order must be given for them to cease. The court may also decide to have the consequences of the discriminatory act or omission annulled (retroactive payment of wages, for example). Domestic legislation and practice may vary considerably in this respect, particularly as regards damages and reinstatement in the event of dismissal.

From an international labour law perspective, two important aspects must be taken into account in deciding on the redress:

- 1) the discriminatory consequences of the discrimination in employment and occupation must be eliminated;
- 2) the penalties must have a dissuasive effect on potential perpetrators of discrimination.

[The] victims of discrimination should benefit from suitable remedies which should also have a dissuasive effect upon those who may consider engaging in discriminatory practices. It should be kept in mind that by instituting such procedures a worker is taking both material and moral risks. For example, legislation which includes protective provisions, but which allows the employer in practice to terminate the employment of a worker who has been the victim of discrimination, on the condition of simply paying compensation, does not provide sufficient protection. [our emphasis]

Source: ILO: 1996 Special Survey of the Committee of Experts, *op. cit.*, para. 233

The remedies provided for unjustified dismissal under Convention No. 158 are reinstatement or adequate financial compensation. When the unjustified dismissal is discriminatory and therefore violates one of the worker's fundamental rights, the Committee of Experts considers that simple compensation would not be a suitable remedy for the prejudice, the best solution being reinstatement. If reinstatement is not possible or desired by the worker, employers must be urged to refrain from any discrimination. When the law does not explicitly allow the possibility of reinstatement, it may nevertheless provide for the discriminatory dismissal to be annulled, which should entail the worker's reinstatement⁹⁰.

⁹⁰ See ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 218-232.

[The] Committee considers that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. (...) When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination.

Source: ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 232

Country: South Africa

Jacques Charles Hoffmann v. South African Airways, Constitutional Court of South Africa, 28 September 2000, No. CTT 17/00

In this case the Constitutional Court of South Africa ordered the respondent to employ a person who had previously been rejected on discriminatory grounds. Relying on Article 2 of ILO Convention No. 111, the Court ruled that this was the appropriate relief for eliminating the discrimination suffered.

II.B. Equal Remuneration Convention, 1951 (No. 100)⁹¹

The objective of Convention No. 100 is to ensure equal remuneration for men and women for work of equal value.

Overall, women as a group continue to receive lower remuneration than men. A number of factors are responsible for the continuation of this wage differential, many of which are related to discrimination.

The causes of the wage differential

- Difference in the duration of employment – many women interrupt their employment to care for children and family members.
- Women are often not appointed to better paid managerial and leadership positions.
- Many women earn less than men because they are in casual or part-time work.
- Jobs with a higher percentage of women are paid less than jobs with a higher percentage of men.
- Women's skills are often undervalued because they are regarded as natural feminine characteristics rather than work skills.
- Women's jobs and skills are less valued, especially in care work, nursing, childcare and education.
- Women often do not receive as much as men in benefits or entitlements such as housing supplements or bonuses.
- Women often receive a lower level of bonus or additional allowances.

Source: adapted from PSLAE, Wage equity awareness raising modules, 2002

Factual situations giving rise to equal remuneration disputes can vary a great deal. They often involve complaints filed by certain female workers or groups of female workers on the grounds

⁹¹ To avoid any confusion on the scope of this instrument, it should be noted that Convention No. 100 covers equal remuneration between male and female workers for work of equal value, as indicated in its complete title. This Convention therefore does not cover differentiations in remuneration based on other criteria such as race or colour, national extraction, etc. Such situations could on the other hand be addressed by means of Convention No. 111.

that their remuneration has been fixed or paid in a discriminatory fashion, since they perform the *same work* as male colleagues.

The number of equal remuneration cases continues to rise in situations where men and women have jobs involving *different tasks or functions*, but where equal value is nevertheless claimed. The principle of the Convention makes these two types of action possible. The second type of action is crucial for achieving equal remuneration since wage discrimination between men and women often results from the discriminatory under-evaluation of jobs held by women.

The provisions of the Convention and the work and documents of the ILO's supervisory bodies may be of help, for example, when:

- legislation does not contain provisions on discrimination in employment and occupation;
- legislation includes a general prohibition on discrimination, but there are no specific provisions concerning equal remuneration;
- provisions concerning equal remuneration are less detailed, unclear or more restrictive than the principle of the Convention; or finally
- the applicable legislation excludes certain categories of worker.

II.B.1. What obligations do States that ratify this Convention have?

Article 2(2) specifies that the principle of equal remuneration for work of equal value may be applied by means of:

- national laws or regulations;
- legally established or recognized machinery for wage determination;
- collective agreements between employers and workers; or
- a combination of these means.

Under Article 2 of the Convention, governments must ensure the application of the principle of equal remuneration for men and women at work in sectors where they are in a position to exercise a direct or indirect influence on wage levels. This is the case when the State is the employer or controls the activity by other means, or when it is in a position to intervene in the wage-fixing process. The latter case arises, for example, when pay rates are controlled by the public authorities or legal regulations, or when equal remuneration legislation has been established.

When the State is unable to ensure the application of the principle of equal remuneration, it must encourage its application. This is the case, for example, when the right to collective bargaining excludes the State from the wage-fixing process, or when pay is subject to an individual agreement between workers and employers. In this case the State may introduce legislation imposing equal remuneration for work of equal value. Where such legislation is in force, it must ensure that it is correctly applied.

The position of the Committee of Experts on the importance of equal pay legislation with respect to the Convention will be examined below.

While there is no general obligation to enact legislation under the Convention, (...) it follows from Article 2, paragraph 1 that any existing legislative provision which violates the principle of equal remuneration must be amended so as to comply with the Convention. Furthermore, legislative action by the State for the protection of equality may extend the government's competence to intervene in the field of wages and, hence, widen the scope for ensuring application of the principle under Article 2, paragraph 1 of the Convention.

Source: ILO: 1986 General Survey of the Committee of Experts, *op. cit.*, para. 28

There is also an obligation to cooperate with workers' and employers' organizations to give effect to the provisions of the Convention (Article 4).

II.B.2. Scope of the Convention

Scope as regards individuals: all male and female workers

Convention No. 100 seeks to protect all male and female workers against discrimination in respect of remuneration based on sex. It does not include any provisions limiting its scope to particular persons, groups or categories of workers.

The Convention can be relied upon when national legislation excludes certain groups or categories of workers or jobs from the protection ensured by the applicable national legislation.

Substantive scope: all aspects of remuneration

The Convention lays down equal treatment in respect of all aspects of remuneration, and defines 'remuneration' as broadly as possible:

[The] term '**remuneration**' includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

C.100, Article 1(a)

The 'additional emoluments' may include: overtime, tips, bonuses, uniforms, tools, equipment, compensation, employer-funded social security benefits, housing allowances and fringe benefits, etc.

The Convention's definition of remuneration may be of particular interest in the following situations:

- when national legislation only provides for equality in respect of basic remuneration or wages, but not in respect of 'additional emoluments'; or
- when national equal remuneration legislation does not define the concept of remuneration and when the issue arises of whether a certain component forms part of the worker's remuneration.

II.B.3. Content of the principle of equal remuneration for work of equal value

[The] term *equal remuneration for men and women workers for work of equal value* refers to pay rates established without discrimination based on sex.

C.100, Article 1(b)

In wage equality cases the courts must decide whether remuneration for work of equal value is paid without discrimination based on sex. This involves comparing the work performed and the remuneration received by men and women. Differences in remuneration are only admissible when objective factors unrelated to sex justify such differences (see below).

As in the case of discrimination at work in general, gender-based discrimination in respect of remuneration may be direct or indirect (see above with regard to Convention No. 111). The following Committee of Experts' comments on indirect discrimination in connection with Convention No. 100 are particularly relevant:

Extract from the Committee of Experts' observation (2005) on the application of Convention No. 100 by Japan

The Committee (...) [emphasizes] that, in the context of the Convention [No. 100], the concept of indirect discrimination refers to apparently neutral situations, regulations or practices which result in unequal treatment with regard to remuneration of men and women performing work of equal value. It occurs when the same condition, treatment or criterion is applied equally to men and women, but results in a disproportionately adverse impact on persons of one sex, and is not based on an objective job-related justification. The Committee shares the view that the use of part-time, temporary and wage-based workers, as well as two-track career management systems, may not be discriminatory per se. However, it points out that where workers employed in such categories are paid lower pay rates than regular workers for performing work which is of equal value and where these categories are dominated by one sex (in this case women), the question of indirect sex discrimination does arise and should be examined in the light of the particular circumstances and the reasons given for the differential treatment. Unless there is an objectively justifiable, job-related reason for such differential treatment, then indirect discrimination will be found to occur.

Source: ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 93rd Session, Geneva, 2005, Report III(1A)

The text of the Convention and the work of the supervisory bodies of the ILO may be particularly useful when legislation does not establish specific provisions on equal remuneration, such as when the respective legal provisions are more restrictive than the principle set out in the Convention, or authorize a more restrictive interpretation, e.g.:

- when the legislation does not explicitly recognize or use the concept of work of equal value;
- when the legislation does not provide for the application of the principle of equal remuneration for work of equal value beyond enterprise or establishment level.

Work of equal value

By virtue of the Convention, any work of equal value must be equally remunerated. To decide whether a difference in remuneration received by men and women constitutes discrimination, the 'value' of the work must be compared. While the Convention does not include a definition of value, it envisages the objective appraisal of jobs on the basis of the work to be performed as a method of differentiating wages according to the principle of equality, thus emphasizing the content of the job to determine the value of the work (see below).

The concept of 'work of equal value' requires equal remuneration to be paid to men and women when they perform the same or identical work, but also when they perform work which is different yet nevertheless of equal value.

As is apparent from the indications provided earlier in this report, the notion of paying men and women in accordance with the value of their work necessarily implies the adoption of some technique to measure and compare objectively the relative value of the jobs performed. **Such a technique is moreover essential in determining whether jobs involving different work may none the less have the same value for the purposes of remuneration. Because men and women tend to perform different jobs, a technique to measure the relative value of jobs with varying content is critical to eliminating discrimination in the remuneration of men and women.** [our emphasis]

Source: ILO: 1986 General Survey of the Committee of Experts, *op. cit.*, para. 138

Country: Canada

Human and Youth Rights Commission v. Université Laval, Quebec Human Rights Tribunal, 2 August 2000, No. 200-53-000013-982, 2000 IJCan3 (QCT T.D.P)

In the terms of the Quebec Charter of Rights and Freedoms, 'every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place'. The Human and Youth Rights Commission argued that the system of remuneration in place maintained a discriminatory wage differential between the female-dominated clerical group employees and the male-dominated trades and services group employees. The Quebec Human Rights Tribunal relied on ILO Convention No. 100 and Recommendation No. 90 and on the applicable United Nations treaties, ruling that national laws should be interpreted in accordance with the State's international commitments. The principle of equal remuneration, as set out in Convention No. 100, imposes a comparison of the remuneration received by men and women, even if they perform different tasks. The Tribunal held that the University had violated the clerical group's rights to equality by not granting them the same remuneration as their colleagues in the trades and services group, since they performed tasks of equal value.

Legislation in certain countries provides for equal remuneration for 'the same work', 'substantially identical work' or 'similar work'. Commenting on this legislation, the Committee of Experts has repeatedly emphasized that the equal treatment required under the Convention is not limited to situations in which men and women perform the same or similar work. Such provisions should not be reduced to comparing the remuneration received by men and women in identical or similar jobs or who perform identical or similar work. According to the Convention, the provisions mentioned above must be seen as requiring equal remuneration for work which is the same or similar in terms of its value. In Ireland, for example, the scope of the notion of 'similar work' has been defined as ranging from the 'same work' to work of the same value, having regard to what it may demand in areas such as skills, physical or mental effort, responsibility and working conditions.

Country: Israel

Elite Israel Sweets and Chocolate Industry Ltd v. Lederman, National Labour Tribunal, 5 March 1978

After examining the interpretation given to the concept of equal remuneration for 'the same work or substantially identical work', the National Labour Tribunal ruled that the law should be interpreted on the assumption that the legislator intended to ensure respect for ILO Convention No. 100, which had been ratified by Israel.

The legislation may furthermore provide that equal remuneration must be paid to men and women who perform their work in 'the same working conditions' or with 'the same output'. Commenting on these provisions, the Committee of Experts declared that if criteria such as working conditions, skills or productivity could be used to determine the level of remuneration, reference to such factors should not restrict the application of the principle of equal remuneration for work of equal value⁹². According to the Convention, reference to the 'same working conditions' should not be seen as requiring equal remuneration only where the work performed by men and women is identical or performed in the same working conditions. It should be seen instead as referring to comparable working conditions as regards the effort demanded of the worker.

⁹² 2006 Direct Request of the Committee of Experts, Convention No. 100, Congo.

The case of the Labour Code of Burkina Faso

Until 2004, the Labour Code of Burkina Faso read as follows: 'For the same working conditions, vocational qualifications and output, the wage shall be the same for all workers irrespective of their origin, sex, age and status'. In order to ensure the application of Convention No. 100, Article 175 of the revised Labour Code adopted in 2004 included the following sentence: 'When determining wages, particularly the setting of rates of remuneration, the principle of equal remuneration for men and women for work of equal value shall be respected'.

The Committee of Experts also sounded a note of caution regarding the fact that if 'performance appraisal criteria such as skill and output and their equivalents are not discriminatory in themselves as a basis for wage differentiation, they must be applied *bona fide*', and 'has drawn attention (...) to historical experience that insistence on "equal conditions as regards work, skill and output" can be taken as a pretext for paying women lower wages than men'⁹³.

Application of the principle beyond company level

It is crucial to apply the principle of equal remuneration beyond company level, since the remuneration paid by each employer is often based on rates fixed through conditions and procedures that go beyond the enterprise considered in isolation (collective agreements, public sector pay scales, minimum wage instruments). The comparison between pay in female-dominated occupations or sectors and pay in male-dominated occupations and sectors is an important way of detecting discriminatory wage differentials.

While labour legislation often requires equal remuneration to be paid within the same establishment or company, the Committee of Experts has stressed that measures must be taken to ensure the application of the principle of the Convention beyond company level:

'In applying the principle of the Convention (...) the reach of the comparison between jobs performed by men and women should be as wide as allowed by the level at which wage policies, systems and structures are co-ordinated'⁹⁴.

When courts and tribunals can rule on the validity or lawfulness of collective agreements, minimum wage decisions, public sector wage schemes or other wage-fixing instruments, account must be taken of the fact that the Convention does not limit the extent of the comparison of male and female pay to the same enterprise or establishment.

II.B.4. Objective appraisal of jobs

The Convention makes provision for promoting the principle of equal remuneration through an 'objective appraisal of jobs' (Article 3(1)). This expression refers to mechanisms or procedures intended to examine the content of jobs ('job appraisal') so as to classify them according to their value, usually with a view to establishing wage rates. Job appraisal is separate from the assessment of each worker's productivity or performance.

Job appraisal is an important tool for ensuring that remuneration is set on the basis of job content rather than according to the worker's gender or other personal characteristics, which must not be a factor.

The use of job appraisal methods and the existence of classes of jobs and salary or wage scales does not automatically mean that equal remuneration for men and women is ensured in accordance with the Convention. Vigilance must be exercised to ensure that job appraisal and classification are not discriminatory and are free of gender-driven bias or prejudice linked to

⁹³ ILO: 1986 General Survey of the Committee of Experts, *op. cit.*, para. 54.

⁹⁴ *Ibid.*, para. 22.

ethnic, cultural or social origin. The various factors taken into account or their respective importance, for example, may be marked by partiality when they do not take sufficient account of qualities deemed to be 'feminine' (e.g. manual dexterity) compared to qualities traditionally attributed to typically 'masculine' tasks (e.g. physical strength).

The concept of 'work of equal value' requires the courts to examine the content of the tasks actually performed. Petitioners or respondents may submit job descriptions or other evidence on the basis of which courts can appraise the nature and value of the work concerned. When specific job appraisal methods are used, the parties can submit the respective results to the courts in support of their arguments. To the extent possible, the courts must hear evidence from experts when the latter determine whether the tasks to be compared in a specific case are equal in value.

Country: Australia

AMWU v. HPM Industries, Australian Industrial Relations Commission, 4 March 1998, No. 239333, 1995

Female process workers and packers claimed wages equal to those received by male general hands and store persons. In the absence of any agreement between the parties concerning the job appraisal method to be used, the Australian Industrial Relations Commission, among others, ruled that the appropriate method would involve applying the criterion of the value of the work. In its decision, which referred to Articles 2 and 3 of ILO Convention No. 100, it stressed that it had reached its conclusion on the basis of the terms of the Convention itself and on subsequent ILO Committee of Experts' reports.

Country: India

WP (C) No. 2794 1989, Supreme Court of Delhi, 13 August 2004⁹⁵

A cooperative employed a certain number of women as 'packing cleaners' and a group of men as 'packers'. The packers had been taken on at higher rates of pay. The women had filed a complaint under the law on equal remuneration, which required the employer to ensure equal remuneration for men and women who perform the same or similar work. The court of first instance ruled that the respondent was not able to provide evidence that the tasks performed by the men and women were different and held that the petitioners had therefore been discriminated against on the basis of their sex. The appeal court held that the court of first instance had wrongly assumed that the petitioners were 'packers' rather than 'packing cleaners'. The petitioners thus referred to the Supreme Court of Delhi, which, besides the law on equal remuneration, relied on the jurisprudence established by the Supreme Court of India in *Mackinnon Mackenzie Ltd v. Audrey D'Costa and another*, on ILO Convention No. 100 and on the Convention on the Elimination of All Forms of Discrimination against Women. The Court held that only the nature of the work rather than its designation was important. The decision of the court of first instance was therefore upheld.

II.B.5. Acceptable wage differentials

Article 3(3) of the Convention completes the definition in Article 1(b) by specifying that differential rates between workers which correspond, without regard to sex, to differences, as determined by an objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for work of equal value.

The other factors that may legitimately justify differential pay include differences connected to productivity, experience or skill, provided they are not applied in a way which is directly or indirectly discriminatory with respect to men or women.

⁹⁵ The complete text of the decision in English can be found at: <http://delhidistrictcourts.nic.in/aug/2794.htm>.

III. Provisions on equality of opportunity and treatment in employment and occupation in other ILO instruments

III.A. The Workers with Family Responsibilities Convention, 1981 (No. 156) and Recommendation (No. 165)

The Workers with Family Responsibilities Convention, 1981 (No. 156), and Recommendation (No. 165) seek to promote equality of opportunity and treatment in employment 1) for men and women with family responsibilities, and 2) between workers who have family responsibilities and those who do not.

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

C.156, Article 3(1)

In the context of Convention No. 156, the term ‘discrimination’ refers to discrimination in employment and occupation as defined in Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

The Convention applies to ‘men and women workers with responsibilities in relation to their dependent children’, and ‘in relation to other members of their immediate family who clearly need their care or support’ (Article 1(1) and (2)).

Article 8 provides that family responsibilities must not, as such, constitute a valid reason for termination of employment. Paragraph 16 of Recommendation No. 165 sets out in more general terms that marital status, family situation or family responsibilities should not, as such, constitute valid reasons for refusal or termination of employment.

Article 9 provides that ‘[the] provisions of this Convention may be applied by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions (...)’.

In 1993 the Committee of Experts published a General Survey on Convention No. 156 and Recommendation No. 165. The Survey contains useful advice on the meaning and scope of the provisions in these instruments⁹⁶.

III.B. Maternity Protection Convention, 2000 (No. 183)

The Maternity Protection Convention, 2000 (No. 183), contains a number of provisions for protecting women against discrimination based on maternity. Article 8 prohibits an employer from terminating the employment of a woman during her pregnancy, during her maternity leave, or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. As indicated, the burden of proving that the grounds for dismissal are unrelated to the pregnancy or birth of the child and its consequences or nursing falls upon the employer.

⁹⁶ ILO: *Workers with family responsibilities. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 80th Session, Geneva, 1993, Report III(4B).

More generally, appropriate measures must be adopted to ensure that maternity is not a source of discrimination in employment, including access to it. These measures must include a prohibition on requiring a woman who is applying for employment to agree to a pregnancy test or to a certificate of such a test, except where required by national laws or regulations in respect of work that is: *a*) prohibited or restricted for pregnant or nursing women under national laws or regulations; or *b*) where there is a recognized or significant risk to the health of the woman and child (Article 9).

III.C. The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)

The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) seeks to ensure that ratifying Member States adopt and implement a national policy for the vocational rehabilitation and employment of disabled persons (Article 1). The aim of this policy is to ensure that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and to promote employment opportunities for disabled persons in the labour market (Article 3).

[The national policy on vocational rehabilitation and employment of disabled persons] shall be based on the principle of equal opportunity between disabled workers and workers generally. Equality of opportunity and treatment for disabled men and women workers shall be respected. Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.

C.159, Article 4

The General Survey of the Committee of Experts on Convention No. 159 provides detailed explanations on the meaning and scope of the provisions in the Convention⁹⁷.

III.D. ILO code of practice on managing disability in the workplace

The objective of the ILO code of practice on managing disability in the workplace (2002) is to put forward practical advice on managing problems raised by disability at work in order to ensure, among other things, that disabled people benefit from equal opportunity in the workplace.

This code of practice defines 'equal opportunity' as equal access to employment, vocational training and particular occupations for all, without discrimination (point 1.4). The principle of non-discrimination should be respected throughout the recruitment process, to ensure maximal benefit to the employer and equitable opportunities for candidates with and without disabilities (point 4.1.1). The competent authorities should periodically review all rules and regulations governing employment, job retention and return to work in public and private sectors, to ensure that they do not contain elements of discrimination against people with disabilities (point 2.2.3).

III.E. ILO code of practice on HIV/AIDS and the world of work

HIV/AIDS is a workplace issue, not only because it affects the workforce, but also because the workplace has a key role to play in limiting the spread and effects of the epidemic.

⁹⁷ See ILO: *Vocational Rehabilitation and Employment of Disabled Persons. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 86th Session, Geneva, 1998, Report III(1B).

The objective of the ILO code of practice on HIV/AIDS and the world of work (2001) is to provide a set of guidelines to address the HIV/AIDS epidemic in the world of work and within the framework of the promotion of decent work. A number of fundamental principles set out in the code of practice are particularly appropriate for combating discrimination based on HIV status. They can be summarised as follows:

Key principles

1. Recognition of HIV/AIDS as a workplace issue

HIV/AIDS is a workplace issue not only because it affects the workforce, but also because the workplace has a key role to play in limiting the spread and effects of the epidemic.

2. Non-discrimination

There should be no discrimination or stigmatization against workers on the basis of real or perceived HIV status.

3. Gender equality

More equal gender relations and the empowerment of women are vital to prevent the spread of HIV infection and enable women to cope with HIV/AIDS.

4. Healthy work environment

The work environment should be healthy and safe and adapted to workers' state of health and capabilities.

5. Social dialogue

Cooperation and trust is required between employers, workers and government to ensure the successful implementation of HIV/AIDS policies and programmes.

6. Screening for purposes of exclusion from employment and work

HIV/AIDS screening should not be required of job applicants or persons in employment and screening should not be carried out at the workplace, except in the conditions provided for in the code of practice.

7. Confidentiality

Access to personal data relating to a worker's HIV status should be bound by the rules of confidentiality consistent with the ILO's code of practice.

8. Continuation of employment relationship

HIV infection is not a cause for termination of employment. Persons with HIV-related illnesses should be able to work for as long as medically fit in appropriate work.

9. Prevention

The social partners are in a unique position to promote prevention efforts particularly in relation to changing attitudes and behaviours through the provision of information and education.

10. Care and support

Solidarity, care and support should guide the response to HIV/AIDS in the workplace. All workers are entitled to affordable health services and to benefits from statutory social security programmes and occupational schemes.

Source: ILO: ILO code of practice on HIV/AIDS and the world of work, *op. cit.*, para. 4

IV. Relevant provisions in certain United Nations human rights instruments

IV.A. International Covenant on Economic, Social and Cultural Rights

Article 6 of the International Covenant on Economic, Social and Cultural Rights contains provisions relating to the right of everyone to the opportunity to gain his living by work, while General Comment No. 18 adopted by the Committee on Economic, Social and Cultural Rights establishes the implications of that right⁹⁸. One of the fundamental obligations concerning the right to work is to ensure non-discrimination in employment and occupation and equality in the protection of employment.

Article 7 of the Covenant recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- remuneration which provides all workers with equal remuneration for work of equal value, with a decent living for themselves and their families;
- safe and healthy working conditions;
- equal opportunity for everyone to be promoted;
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 2(2) of the Covenant requires States Parties to undertake to guarantee that the right to work – and all the other rights set out in the Covenant – ‘be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The use of the words ‘other status’ indicates that the list of prohibited grounds of discrimination in this Article is an open list.

This provision may allow courts and tribunals to rule that the general prohibitions on discrimination apply equally to cases of discrimination connected to criteria other than those which are explicitly referred to in national legislation, such as health, including HIV status, disablement or age.

IV.B. International Covenant on Civil and Political Rights

The principle of equality before the law and equal protection of the law without any discrimination is laid down in Article 26 of the International Covenant on Civil and Political Rights. This provision also specifies that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. Like Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, Article 26 of this Covenant is also intended to provide protection against discrimination based on *any* unjustified ground or criterion.

IV.C. International Convention on the Elimination of All Forms of Racial Discrimination

‘Racial discrimination’ as defined in the International Convention on the Elimination of All Forms of Racial Discrimination means ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human

⁹⁸ General Comment No. 18 (2005) of the Committee on Economic, Social and Cultural Rights on ‘The right to work’ (UN Document E/C.12/GC/18).

rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (Article 1). The Convention requires States Parties to prohibit and eliminate racial discrimination, and to guarantee the right of everyone, without distinction, to equality before the law. This also applies to the right to work (Article 5).

IV.D. Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women defines the term 'discrimination against women' as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (Article 1).

The most relevant provisions concerning equality of men and women in employment are set out in Article 10, which deals with education and training, and in Article 11, which lists the specific areas in which equality of men and women must be achieved, i.e.:

- the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service;
- the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- the right to protection of health and to safety in working conditions.

Article 11 also requires States Parties to take measures to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. The Convention also establishes a number of obligations seeking to promote equality of men and women in rural areas and in the non-monetized sectors of the economy. It also calls for equality of men and women as regards the right to equal access to credit and loans, and the right to receive all types of training and education, formal and non-formal (Article 14).

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Chapter 3

Termination of employment at the initiative of the employer

I. Introduction

Allegations of unfair or unjustified termination by employers are among the complaints most often lodged in specialised labour courts and other judicial bodies, such as High Courts. Along with wage claims, dismissal cases touch the very heart of labour relations. Their settlement by labour tribunal and arbitration panel decisions may bring direct relief to the complainant, or the accused enterprise, but can also send a strong message to the world of work about a country's commitment to decent work and social justice through its dismissal law and jurisprudence.

It is therefore important for judges and legal practitioners to be fully informed of the complete range of international instruments they can draw upon when ruling on termination of employment by the employer. This Chapter presents the main international labour law instruments covering termination of employment⁹⁹, focusing in particular on ILO standards and the associated work of the supervisory bodies¹⁰⁰ before outlining United Nations instruments in this area.

The importance of international legal instruments on termination of employment has increased as a result of globalization, which has led some countries to amend their legislation to make it more flexible and to allow companies to adapt more quickly to economic and financial developments. In such cases it is often the judicial system that is responsible for reconciling the new legal framework with the observance of basic labour rights.

⁹⁹ As in other parts of this Manual, regional sources of international labour law will not be described. Readers interested in this area are invited to refer to the following European Directives: Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies; Council Directive 2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses; and European Parliament and Council Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

¹⁰⁰ Particular note should be taken here of the 1995 General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the Termination of Employment Convention, 1982 (No. 158) (ILO: *Protection against unjustified dismissal. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 82nd Session, Geneva, 1995, Report III(4B)). Other General Surveys also contain information on dismissal, in particular ILO: *Freedom of Association and Collective Bargaining. General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B); ILO: *Equality in employment and Occupation. Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B). The Annual Reports of the Committee of Experts on the Application of Conventions and Recommendations are a source of up-to-date information on the various relevant Conventions ratified by Member States. In addition, various representations alleging non-observance of Convention No. 158 by Member States that have ratified it have been submitted under Article 24 of the Constitution of the ILO: Venezuela (in 1991 and 1996), Brazil (in 1996, which then denounced Convention No. 158), Turkey (in 1996 and 2000), Bosnia-Herzegovina (in 1998), Ethiopia (in 1998) and France (in 2005).

Whatever the approach adopted, all those affected by employment issues agree that a clear regulatory framework can protect both employers and workers against costly appeal procedures, which, conversely, could arise from failings in the legal framework of termination of employment¹⁰¹.

The tripartite nature of ILO standards on this subject means that they try to strike a balance between economic efficiency and flexibility and the protection of workers' rights. In this respect they can be a useful source of reference for judges and legal practitioners.

The Termination of Employment Convention (No. 158), adopted by the ILO in 1982, is the main international instrument in this area. In a general Observation in 2001, the Committee of Experts on the Application of Conventions and Recommendations emphasized that Convention No. 158 reconciles the need to protect workers against unjustified termination of employment with the need to guarantee labour market flexibility by leaving Member States considerable latitude to determine, in consultation with employers' and workers' organizations, the conditions of implementation¹⁰². In another general observation in 2009, the Committee of Experts confirmed its previous position and stressed the importance of the principles contained in the Convention in the context of the international economic and financial crisis. In addition, the Committee recalled that the influence of Convention No. 158 went far beyond the number of ratifications, and pointed out that most countries, whether or not they had ratified the Convention, had provisions in their national legislation that conformed to some or all essential requirements of the Convention. The Committee noted that the Convention's principles were an important source of law for the labour courts and labour tribunals in the countries that had ratified it, and even in those that had not done so.¹⁰³

Although Convention No. 158 is not among the most widely ratified ILO instruments, there have been a significant number of ratifications¹⁰⁴. In fact, few instruments adopted by the ILO in the 1980s and 1990s (Convention No. 154 to Convention No. 181) have been ratified by more than 30 countries. One of the interesting aspects of this Convention is that it has been ratified by countries with widely differing legal traditions¹⁰⁵.

Although labour law in many countries covers termination of employment in more detail, Convention No. 158 and the other relevant international instruments as well as their interpretation by international supervisory bodies may be a useful source of reference for domestic courts, irrespective of whether the countries in question have ratified the Convention.

¹⁰¹ For a comparative approach to the law on termination of employment applicable in many ILO Member States, see ILO: *Termination of Employment Digest*, Geneva, 2000 (available in English only). The Digest covers legislation and practice in 72 countries. It can be found on the ILO website at: http://www.ilo.org/public/english/dialogue/ifpdial/publ/publ_emp.htm. For a regional outline, see A.S. Bronstein: 'Labour Law Reform in Latin America: Between State protection and Flexibility', in *International Labour Review*, vol. 136, No. 1 (Spring), 1997.

¹⁰² See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 89th Session, Geneva, 2001, Report III(1A).

¹⁰³ See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (1A), ILC, 98th Session, Geneva, 2009.

¹⁰⁴ Convention No. 158 had been ratified by 34 countries by 23 June 2009.

¹⁰⁵ These include, for example, countries whose legal tradition is Anglo-Saxon (Australia, Antigua and Barbuda), European (France, Luxembourg, Portugal, Republic of Moldova), African (Gabon, Malawi, Niger, Zambia), Asian and Pacific (Papua New Guinea) or Latin American (Venezuela).

As a matter of fact, a significant number of court rulings concerning termination of employment disputes make reference to international sources¹⁰⁶. Recourse to international employment law has ensured effective protection against discriminatory termination of labour, recognition of the obligation to provide a valid reason for such termination, and helped specify the conditions for procedures prior to termination to be fair.

Before analysing Convention No. 158, its accompanying Recommendation No. 166 and other relevant international instruments, several terminological clarifications are required. For the purpose of Convention No. 158, the term 'termination of employment' means termination of employment at the initiative of the employer¹⁰⁷. This limits the substantive scope of this Chapter to this particular form of termination. It therefore does not cover termination of employment due to resignation, the death of either the worker or the employer, breach of contract, voluntary retirement or the completion of a contract for a specified period of time or a specified task.

In addition, irrespective of terminological differences between countries, terminations infringing any domestic law provisions or principles will invariably be qualified as unlawful, whatever the nature of the irregularity ascribed to them.

II. ILO instruments on termination of employment

II.A. Termination of Employment Convention, 1982 (No. 158)

Before labour legislation was created and consolidated¹⁰⁸, termination of employment was characterised by a symmetry of rights between the employer and the worker. Either could end the employment relationship simply by giving notice without any requirement to give a reason, and without any restrictions or procedural limits. However, although this state of affairs could seem fair at first glance, the impact of termination disturbs the balance; workers are generally more adversely affected by loss of employment, which means that they are deprived of their means of subsistence than employers are by the departure of an employee. Moreover, employers usually have more bargaining power, which allows them better to protect their interests when setting the conditions for the termination of employment. From a legal perspective, in the event of termination at the initiative of the employer, the above-mentioned imbalance may be offset by the requirement for a valid reason for termination by the employer. In other words, there must be a reason why the contract should not continue which ensures a legal basis for unilateral termination of employment by the employer. This is the option taken by the Termination of Employment Convention (No. 158), adopted to counter the above-mentioned imbalance.

Convention No. 158 has 14 substantive provisions and is divided into three parts: I. Methods of implementation, scope and definitions; II. Standards of general application; III. Supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons.

Article 1 allows ratifying Member States to choose how to apply the Convention according to national practice and in light of the differences in how countries regulate employment

¹⁰⁶ In the Compendium of domestic courts decisions compiled by the International Training Centre of the ILO, decisions from South Africa, Botswana, Canada, Costa Rica, Croatia, Spain, Estonia, Lesotho, Madagascar, Malawi and Trinidad and Tobago (ITC-ILO: *Use of International Law by Domestic Courts. Compendium of Court Decisions*, Turin, December 2007).

¹⁰⁷ Article 3 of Convention No. 158.

¹⁰⁸ For a background history, particularly on the previous Termination of Employment Recommendation, 1963 (No. 119), see E. Sims: 'Employment Security', in ILO: *International Labour Standards: A Global Approach*, preliminary version, Geneva, 2001, pp. 259-268.

relationships. Court decisions therefore have to play a central role in countries that do not have written regulations on termination of employment or that only have general regulations, the courts then being required to interpret the law and to create principles of jurisprudence to resolve disputes referred to them.

II.A.1. Scope of the Convention

Scope as regards individuals: all employed persons

Article 2 clearly indicates that the Convention applies to all branches of economic activity and to all employed persons.

Although very broad in scope, the Convention is also very flexible as it allows ratifying Member States to exclude specific types or categories of workers from its provisions. These are primarily¹⁰⁹:

- workers engaged under a contract of employment for a specified period of time or a specified task;
- workers serving a period of probation or a qualifying period of employment of reasonable duration;
- workers engaged on a casual basis for a short period.

Article 2(3), however, states that adequate safeguards must be provided against recourse to contracts of employment for a specified period of time, the aim of which would be to avoid the protection resulting from the Convention.

Moreover, Article 2(4) and (5) authorize the exclusion of certain additional categories of workers, after consultation with the employers' and workers' organizations concerned:

- categories of workers whose terms and conditions of employment are governed by special arrangements that as a whole provide protection that is 'at least equivalent' to the protection afforded under the Convention;
- categories of workers in respect of which protection is difficult because special problems of a 'substantial nature' arise in light of the particular conditions of employment of the workers concerned or the size and nature of the respective undertaking (very small companies, for example).

Article 2(6) provides that each ratifying Member State must list in the first report any categories that have been excluded in pursuance of paragraphs 4 and 5¹¹⁰. Member States must also indicate in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given (or is proposed to be given) to the Convention in respect of such categories¹¹¹.

Substantive scope: termination of employment at the initiative of the employer

As stated above, Article 3 stipulates that the Convention only covers termination of employment at the initiative of the employer. In this respect, two clarifications by ILO supervisory bodies on the scope of the rules covering termination are very important.

¹⁰⁹ Article 2(2) of Convention No. 158.

¹¹⁰ A subsequent exclusion from the scope of the Convention of the categories of workers referred to in Article 2(4) and (5) would therefore not be admissible.

¹¹¹ Thus in the Direct Request addressed to Venezuela in 2002, the Committee of Experts urged the Government to continue to provide information on the situation in law and in practice with regard to the categories excluded and to indicate any changes relating to the scope of the Convention. The Direct Request can be found on the ILOLEX database (<http://www.ilo.org/ilolex/english/index.htm>).

First, the rules of protection governing termination must not be circumvented by the use of different terminology. If rather than dismissal the termination of the employment relationship, though really at the employer's initiative, is wrongly designated by the employer as resignation, breach of contract, retirement, changes to the contract, force majeure or judicial termination, for example, the courts can play an important role by ensuring that such false descriptions do not negate the protection prescribed by the Convention.

Second, certain changes to working conditions introduced by the employer which do not arise out of genuine operational requirements might place the worker under pressure to give up his or her job. In such cases the competent administrative authorities or the courts must verify whether there is a 'forced resignation' which really amounts to a disguised dismissal, in that the termination is then at the employer's initiative within the meaning of Convention No. 158.

If, instead of dismissal, the termination of the employment relationship though really at the initiative of the employer is wrongly labelled by him for example as resignation, breach of contract, retirement, modification of the contract, force majeure or judicial termination, the rules of protection governing termination might apparently seem not to apply; but the use of such terminology should not enable the employer to circumvent the obligations with regard to the protection prescribed in the event of dismissal. Certain changes introduced by the employer, in particular as concerns conditions of employment and which do not arise out of genuine operational requirements, might place the worker under pressure either to accept such changes or to give up his job or incur the risk of being sanctioned for having disregarded the employer's instructions. It is therefore necessary to be able to verify whether a situation does not constitute a disguised dismissal or a real termination of the relationship instigated by the employer in the sense of the Convention, since otherwise the worker concerned would de facto or de jure be unduly deprived of the protection provided by the Convention.

Source: ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 22

The fundamental protection relating to the justification for termination of employment, prior or concomitant procedures, appeal, notification, severance allowances and similar benefits are set out in Articles 4 to 12. The Convention has a double objective: to protect workers against unjustified termination of employment and to preserve the right of employers to end a contract of employment for (recognized) valid reasons.

II.A.2. Protection against unjustified termination of employment

Requirement of a valid reason

Article 4 stipulates that for the termination to be lawful there must be a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

It should be noted that in several common law countries that have not ratified Convention No. 158 and in which the principle of the justification of termination is not expressly laid down by national legislation, the domestic courts have relied on the Convention to recognize it.

Country: Botswana

Joel Sebonego v. News Paper Editorial and Management Services (PTY) Ltd, Industrial Court of Botswana, 23 April 1999, No. IC 64/98

‘As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice or rules of equity as they are some times called, when determining trade disputes. These rules of equity are derived from the common law as well as from Conventions and Recommendations of the International Labour Organization. The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are succinctly stated in Article 4 of ILO Convention No. 158 of 1982’.

Country: Trinidad and Tobago

Bank and General Workers Union v. Home Mortgage Bank, Trinidad and Tobago Industrial Court, 3 March 1998, No. 140 of 1997

‘The principles of good industrial relations practice dictate that no worker’s employment may be terminated except for a valid reason connected with his capacity to perform the work for which he was employed or which is founded on the operational requirements of an employer’s business. These principles are enshrined in writing in International Labour Organization Convention No. 158. ILO Convention No. 158 has put in written form long standing principles of good industrial relations practice and it is of no consequence that the Convention has not been ratified by Trinidad and Tobago. It is not applicable as part of the domestic law of Trinidad and Tobago but as evidence of principles of good industrial relations practice which have been accepted at an international level’.

The more general the national legislation on termination of employment, the more the Committee of Experts is attentive to definitions in jurisprudence of what are considered to be valid reasons for it. In order to appreciate the extent to which the reasons considered in practice to justify termination correspond to the valid reasons referred to in the Convention, it is therefore important for ratifying countries to communicate relevant judicial decisions or to indicate how the provisions are applied in practice. Thus in the Direct Request made to Luxembourg in 2005¹¹², for example, the Committee of Experts asked the Government to indicate the manner in which the courts continued to develop the notion of ‘loss of confidence’, the meaning of which did not seem to have been defined clearly and precisely, and to indicate how the dismissal without given reasons was in conformity with Article 4 of the Convention.

In an observation to Gabon in 2006, the Committee of Experts also pointed out that in the absence of any other valid reason, the ‘gabonization’ of jobs by the Government to promote the employment of Gabonese nationals could not be relied on as a valid reason for terminating the employment of foreign workers within the meaning of the Convention.

¹¹² To consult the Direct Request on the Internet, see footnote 12.

Extract from the 2006 Observation of the Committee of Experts on the application of Convention No. 158 by Gabon

3. For many years the Committee has been commenting on the policy of 'gabonization' of jobs and the need for its implementation to be consistent with the provisions of the Convention. The Committee noted that, according to Article 2, the Convention applies to all employed persons and according to Articles 8 and 9 applies to foreigners as well as nationals. The Committee stressed that, in order for implementation of the 'gabonization' policy to be in conformity with the provisions of Article 4, there must be a valid reason for termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

4. The Committee points out that in the absence of any other valid reason, the 'gabonization' of jobs may not be relied on as a valid reason for termination within the meaning of the Convention. The Government is asked to include practical information in its next report on the application of the provisions of the Convention, in particular the number of appeals against termination filed by foreign workers and national workers, the outcome of such appeals, the nature of the remedies awarded and the average time taken for the appeals to be processed, and on the number of terminations, if any, connected to the implementation of the new employment policy (Part V of the report form). [our emphasis]

Source: ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 94th Session, Geneva, 2006, Report III(1A)

Reasons not considered valid

Article 5 of the Convention provides a non-exhaustive list of five reasons for termination which are not considered to be valid:

- a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours
- b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- c) the filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- e) absence from work during maternity leave.

Example of non-observance of Article 5 of Convention No. 158

In the context of the representation alleging non-observance by Ethiopia of Conventions Nos. 111 and 158, made under Article 24 of the ILO Constitution in 1998, it was alleged in particular that Article 5(d) of Convention No. 158 had been violated. After a border dispute led to confrontations between Ethiopia and Eritrea in May 1998, many Ethiopian citizens of Eritrean origin and Eritreans legally established in Ethiopia who were employed by public or nationalized enterprises were summarily dismissed and deported. It was alleged that the terminations were not connected to the capacity or conduct of the workers, or to the operational requirements of the enterprise, but that the Eritrean workers had in fact been dismissed because of their race, political opinion, national extraction or social origin. The representation also indicated that at no stage had the workers been given the opportunity to appeal against their dismissal and deportation, as required under Articles 8, 9 and 10 of the Convention. The tripartite committee responsible for examining the representation concluded that insofar as the deportations, which resulted in the constructive dismissal of the persons concerned, were based on national extraction and/or political opinion, they constituted a violation of the provisions governing termination of employment set out in Convention No. 158¹¹³.

Article 6 gives a sixth reason that cannot be considered valid for termination: temporary absence from work because of illness or injury. The Article adds that the definition of 'temporary absence from work', the extent to which medical certification will be required and possible limitations to the application of the Article will be determined in accordance with national practice through legislation, court decisions, collective agreements, etc. This once again illustrates the importance of the role of the courts in this area.

The clarifications made by the Committee of Experts on the application of Article 6 of Convention No. 158 may be useful to domestic judges and legal practitioners in connection with the following three points.

1) Provision of a medical certificate

A medical certificate is generally required for absence of more than a specified number of days (...). In general, the worker must quickly inform the employer of his absence due to illness or injury, and send him a medical certificate within a certain period. (...) The Committee notes that sometimes a worker has only a very short period of time to inform his employer (...). It would be advisable that this period be reasonable, in keeping with the means of communication available to the worker and not be interpreted restrictively if the worker is clearly acting in good faith or if force majeure has prevented him from notifying his employer within the prescribed period.

Source: ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 140 and 141

2) Termination of employment of workers with serious illnesses

The Committee of Experts has pointed out firstly that the simple fact of being affected by a serious illness (HIV/AIDS, for example) is not a cause for termination of employment as long as the worker is medically fit for work¹¹⁴. In this respect, judges and legal practitioners may also refer to the ILO code of practice on HIV/AIDS and the world of work (2001). One of the code's ten key principles states that HIV infection is not a cause for termination of employment. As

¹¹³ See the Report of the Committee set up to examine the representation alleging non-observance by Ethiopia of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No.158).

¹¹⁴ See ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 142.

with all workers suffering from other illnesses, persons with HIV-related illnesses should be able to work for as long as medically fit in appropriate work.

The Committee of Experts has meanwhile also given its opinion on the situation of workers who may frequently leave the workplace because they require regular treatment for a serious illness but who remain medically fit for their work or for work that is appropriate to their state of health. If the employer considers that absences of this kind disturb the smooth running of the company, there may be difficulties in reconciling the right of ill workers to protection and the efficient operation of the company. In cases where regular treatment is necessary (for cancer, for example), the Committee of Experts recommends careful evaluation of the repercussions that absences of this kind may have in practice on the operation of the company, bearing in mind the difficult consequences that termination of employment can entail for the worker¹¹⁵.

3) Alleged breach of contract following absence due to illness shall be qualified as termination of employment

It should also be mentioned that breach of contract following extended leave due to illness or injury if permitted by national law should be seen as a termination that would normally give rise to severance allowances and other similar benefits, and not as a breach of contract by the employed person.

Source: ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 137

II.A.3. Procedure prior to termination

In the case of individual terminations, workers must be given the right to defend themselves against allegations that they are incapable of performing their work, or according to which their conduct is such as to justify termination (Article 7). It is important for workers to have the opportunity to defend themselves prior to termination so that the detrimental effect on them and the employment relationship is reduced to a minimum should it be shown that the accusations are unfounded. As the Committee of Experts stated in a Direct Request to Venezuela in 2002, the application of these measures after dismissal is insufficient within the meaning of this provision of the Convention¹¹⁶.

In its General Survey on unjustified termination, moreover, the Committee of Experts stresses that the worker must have an opportunity to defend him or herself against the allegations made, which 'presupposes that the latter should be expressed and brought to his [or her] attention before the termination'¹¹⁷.

However, Article 7 recognizes that there might be exceptional circumstances in which it is acceptable for the employer not to provide the worker with the opportunity to be heard prior to termination. This exception must be used sparingly, and in practice, cases justifying non-observance of a worker's right to be heard prior to termination are very rare. This could occur, for example, in the case of serious allegations of physical violence at the workplace leading to the immediate arrest of the worker. In this case it would be reasonable for the employer to hand the worker over directly to the police rather than hearing him or her.

In the absence of specific legislation on termination procedures, several national courts have referred to ILO instruments to judicially define the conditions for a fair termination procedure. It is interesting to note that the two examples below are from countries that have not ratified Convention No. 158.

¹¹⁵ *Ibid.*

¹¹⁶ To consult the Direct Request on the Internet, see footnote 12.

¹¹⁷ See ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 146.

Country: Trinidad and Tobago

Bank and General Workers Union v. Public Service Association of Trinidad and Tobago, Trinidad and Tobago Industrial Court, 27 April 2001, No. 15, 2000

‘The effect of those and numerous other judgments of this Court (...), as well as ILO Convention 158 (...), is to establish that in our system of industrial relations, every worker has the right to a fair opportunity to defend himself against any charge or allegation made against him, as well as to be heard in mitigation of any possible penalty (especially dismissal) by the person/s in management responsible for taking such decisions, before they are effected. This is not a trifling matter to be taken lightly or viewed as a mere technicality. It is a fundamental principle of good industrial relations’.

Country: South Africa

Modise and others v. Steve’s Spar, Labour Appeal Court, 15 March 2000, No. JA 29/99

The South African courts have also referred to ILO Convention No. 158 when domestic legislation on the termination of employment procedure was not clear on the obligation upon the employer to ensure that the dismissal was preceded by an interview. In particular, the Labour Appeal Court ruled that in the event of an illegal strike the employer nevertheless had to comply with the rule of hearing the workers or their representatives before terminating contracts of employment. In order to recognize the obligation of hearing the workers prior to the dismissal despite the absence of domestic provisions in this regard, the Court relied on Article 7 of Convention No. 158, although it had not been ratified by South Africa:

‘The audi approach is in keeping with international standards. This cannot be said of the no audi approach. I say this because, quite clearly, the ILO Convention on Termination of Employment No. 158 of 1982 contains a general rule that an employer must not dismiss a worker for reasons based on conduct or work performance without having first given such worker an opportunity to defend himself against the allegations made against him. In this regard the Convention does not say this does not apply to cases where workers are dismissed for striking. On the contrary it should apply also to the dismissal of strikers because those would fall under dismissals for reasons based on the employee’s conduct. The Convention makes provision for one exception which is broad enough to refer to all the exceptions that normally apply to the audi rule. The no audi approach is either directly contrary to the convention or at least it is inconsistent with it’.

II.A.4. Right of appeal against termination and compensation for unjustified dismissal

Article 8 of the Convention states that a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator. Article 8(2) provides that the right of appeal may be varied according to national law and practice if termination has been ‘authorized by a competent authority’. This provision, however, does not permit the worker’s right to appeal to an impartial body against termination of employment to be impaired¹¹⁸.

Article 8(3) provides that ‘a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination’.

Article 9 lays down the essential principle that the supervisory bodies responsible for determining appeals against termination ‘shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified’. Similarly, and in respect of terminations for economic reasons, Article 9(3) of the Convention states that the bodies competent to determine appeals

¹¹⁸ See ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 179.

against termination must be empowered to determine whether the termination was indeed based on the operational requirements of the undertaking.

The two points highlighted here are very important because they empower domestic courts to examine whether the reasons given by the employer for the termination, even if they have a basis in fact, are in reality a pretext for a discriminatory termination of employment.

Burden of proof

Article 9 introduces the principle that the worker should not alone bear the burden of proving that a termination is not justified¹¹⁹, and offers Member States two options:

- either the burden of proving the existence of a valid reason for the termination rests on the employer;
- or the impartial body is empowered to reach a conclusion having regard to the evidence provided by the parties and, where appropriate, information gathered by the body itself by means of the investigatory power provided for in national law and practice¹²⁰.

Compensation for unjustified termination

Article 10 of the Convention states that compensation for workers in the event of unjustified termination consists of: (i) either order or propose to reinstate the worker ; (ii) or, payment of adequate compensation or such other relief as may be deemed appropriate. The wording of Article 10 clearly shows that the Convention favours annulment of the termination and reinstatement as compensation for unjustified dismissal. When the courts do not have the power or do not consider it possible to annul the termination, however, they can order appropriate financial compensation to be paid.

The problem of what constitutes adequate compensation for unjustified termination frequently comes before domestic courts. The position of the ILO supervisory bodies may provide important guidance on this issue. The Committee of Experts considers that compensation in the case of a termination impairing a fundamental right should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement in his or her job with payment of unpaid wages and maintenance of acquired rights.

¹¹⁹ See the Direct Request of the Committee of Experts addressed to Luxembourg in 2005, available on the Internet.

¹²⁰ See ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 116 *et seq.*

In the light of the above, the Committee considers that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination. The Committee notes in this respect that in one country the upper limit on compensation that can be awarded in respect of sex or racial discrimination has been repealed and the courts are empowered to award interest on compensation. The removal of this limit on compensation resulted in a large number of appeals being filed, in particular by women who had had their employment terminated in certain public services as a result of pregnancy. Average compensation is rising and substantial compensation has been awarded by some courts.

Source: ILO: 1995 General Survey of the Committee of Experts, *op. cit.*, para. 232

The following is an example of the judicial use of Convention No. 158 in connection with sanctions for illegal terminations.

Country: Spain

Constitutional Court, 18 January 1993, Judgment 14/93

In this decision the Constitutional Court of Spain referred to Article 5(c) of ILO Convention No. 158 to support its argument according to which a dismissal decided following an employee's claim must lead to the dismissal being invalidated and the reinstatement of the worker, the simple payment of financial compensation not being a suitable remedy in this case.

An assessment of what constitutes adequate compensation for unjustified termination can also be found in some recent decisions in Great Britain, where, even though Convention No. 158 was not cited, the particularly demeaning way in which the contract of employment was terminated resulted in the creation of a new head of damages¹²¹.

II.A.5. Period of notice and compensation for termination

Period of notice

Article 11 of the Convention states that employers must give the worker a reasonable period of notice or compensation in lieu, unless the worker is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue their employment during the notice period.

The following is an example of a domestic court decision recognizing the directly applicable nature of Article 11 of Convention No. 158.

¹²¹ See, by way of example, *Dunnachie v. Kingston upon Hull City Council*, [2004] IRLR 287 (CA).

Country: France

Decision No. 906, Cour de Cassation, Social Chamber, 29 March 2006, Appeal No. 04-46.499

An employee dismissed without notice three months after being taken on entered a claim for compensation for period of notice despite the fact that the French Labour Code only makes the period of notice obligatory for employees with at least six months of service. In support of his claim the worker referred to ILO Convention No. 158, ratified by France. Considering the case on appeal, the Court accepted the employee's claims. The employer challenged this decision before the Supreme Court.

To settle the dispute the Court first established the legal provisions applicable to the dispute: 'Article 1, Article 2(2)(b) and Article 11 of ILO Convention No. 158 on termination of employment at the initiative of the employer, adopted in Geneva on 22 June 1982 and which entered into force in France on 16 March 1990, are directly applicable before domestic courts (...)'.

The Court then took up the question of whether the provisions of the Labour Code subordinating the right to a period of notice to a minimum employment of six months were or were not in accordance with the provisions of ILO Convention No. 158. After pointing out that Article 2(2)(b) of the Convention permitted States parties to exclude certain categories of workers from the scope of all or part of the Convention, namely those not having the required period of employment under the condition that the length of that employment is reasonable and set in advance, the Court considered that employment of six months provided for in the Labour Code constituted a reasonable period.

Severance allowance

Article 12 of the Convention provides that workers whose employment has been terminated shall be entitled to a severance allowance, benefits from unemployment insurance or other forms of social security. Compensation for termination must take length of service into account.

Finally, Article 12 allows Member States to make provision for loss of entitlement to a severance allowance in the event of termination of employment for serious misconduct.

II.A.6. Collective terminations

In the event of collective terminations of employment by the undertaking, establishment or service for operational reasons, Articles 13 and 14 of the Convention provide for information procedures and prior consultation with workers' representatives and notification to the competent administrative authorities.

The employer must provide workers' representatives, in good time, with relevant information on the terminations contemplated so that they can go into consultations with the information necessary for them to table ideas on measures to be taken. For such consultation to be positive, the Convention provides that it must take place as early as possible to allow the unhurried consideration of potential measures. The Convention refers to the objective of consultation, i.e. identification of the measures required to avert or minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned, such as finding alternative employment. Once again, the Convention provides a certain flexibility that allows the difficulties facing employers to be taken into account. The application of Article 13 may in fact be limited to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

Article 14 states that employers must notify the competent authority as early as possible of any restructuring that may lead to layoffs or redundancies. It also stipulates that a certain amount of relevant information and data must accompany the notification: a written statement of the reasons, the number and categories of workers likely to be affected and the period over which the terminations are to be carried out. In addition, the employer must notify the competent authority of the terminations a minimum period of time before carrying them out, as specified by national law. Article 14(2) of the Convention introduces a certain amount of flexibility by taking into

account the potential administrative burden these information requirements may represent for very small undertakings. It states that 'national laws or regulations may limit the applicability of (...) this article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce'. From a more general perspective, this provision assists judges and lawyers in evaluating the genuineness of the measure taken by the employer, since it leads to an examination of economic data and forecasts and possible mitigation strategies..

II.B. Termination of Employment Recommendation, 1982 (No. 166)

The Termination of Employment Recommendation, 1982 (No. 166), strengthens and completes a number of essential provisions of Convention No. 158 and may also be a useful source of inspiration for domestic judges and legal practitioners.

First, the Recommendation makes several practical suggestions as to what a fair termination of employment procedure should include: a written statement of the reason for termination, recourse to a procedure of conciliation before or during appeal proceedings against termination of employment, a reasonable amount of time off without loss of pay for the purpose of seeking other employment during the period of notice, the possibility of a 'second chance' for workers to improve the quality of their work, etc.

In addition, the Recommendation adds age and absence from work due to compulsory military service (paragraph 5) to the list of reasons that are not valid for terminating employment.

It also suggests courses of action in the event of employers satisfying all their obligations but nevertheless being forced to contemplate collective terminations. Paragraph 21 of the Recommendation lists important measures that should be taken to avert or minimise terminations: restriction of hiring, spreading the reduction of the workforce over a certain period of time to permit its natural reduction, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

Finally, paragraph 24 states that workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature should be given priority of rehiring, within a given period of time, if the employer again hires workers with comparable qualifications. Employers should also assist the workers affected in seeking suitable alternative employment, for example through direct contacts with other employers.

II.C. Provisions concerning termination of employment in other ILO instruments

With regard to termination of employment disputes, the contribution of ILO instruments that do not deal mainly with this issue basically covers protection against discriminatory termination. Reference to these instruments and to the accompanying work of the supervisory bodies may be especially useful for judges and legal practitioners on four different counts.

II.C.1. Prohibition of discriminatory termination of employment

Further to Article 5 of Convention No. 158, a series of ILO Conventions prohibit termination of employment on the following discriminatory grounds:

- union membership or participation in union activities¹²²;
- the holding of a mandate to represent workers¹²³;

¹²² See the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). The Rural Workers' Organizations Recommendation, 1975 (No. 149), should also be noted. The text proposes that governments provide effective protection against dismissal for rural workers who seek to establish organizations for their economic and social welfare.

¹²³ See the Workers' Representatives Convention, 1971 (No. 135).

- race, colour, sex, religion, political opinion, national extraction or social origin¹²⁴;
- family responsibilities¹²⁵;
- disability¹²⁶;
- maternity¹²⁷.

Article 5 of Convention No. 158 already includes some of the reasons for termination of employment listed above. In addition to the prohibition of supplementary grounds of discrimination, however, reference to the above-mentioned instruments may be particularly useful for judges and legal practitioners in countries that have yet to ratify this Convention.

Finally, with regard to the reasons for termination of employment that various ILO instruments consider to be discriminatory, it is useful to highlight once again the importance of the ILO code of practice on HIV/AIDS and the world of work (2001). The code of practice states that infection by HIV/AIDS is not a reason for termination of employment and that persons infected with this virus should be able to work for as long as they are medically fit in appropriate work¹²⁸.

II.C.2. Burden of proof in appeals against discriminatory termination of employment

It is important, particularly for courts and tribunals in countries that have not ratified Convention No. 158, to be aware that several ILO Conventions and Recommendations provide a legal basis for reversing the burden of proof in cases of allegations of discriminatory termination of employment.

Article 8(1) of Convention No. 183 stipulates that the burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth or its consequences or nursing shall rest with the employer.

Similarly, with regard to workers' representatives, paragraph 6(2)(e) of Recommendation 143¹²⁹ suggests that employers should be responsible for the burden of proving that the dismissal of a workers' representative is justified.

II.C.3. Sanctions for discriminatory termination of employment

ILO Conventions and Recommendations on freedom of association and their interpretation by ILO supervisory bodies are an extremely important legal basis for the courts concerned to be able to impose effective and dissuasive sanctions against anti-union dismissals¹³⁰.

Article 1 of Conventions Nos. 98 and 135 require Member States to ensure effective and adequate protection against dismissal based on trade union or workers' representation activities.

In this respect the Committee of Experts considers 'that legislation which allows the employer in practice to terminate the employment of a worker on condition that he pays the compensation provided for by law in all cases of unjustified dismissal, when the real motive is his trade union membership or activity, is inadequate under the terms of Article 1 of the Convention [No. 98], the most appropriate measure being reinstatement. (...) Where reinstatement is impossible, compensation for anti-union dismissal should be higher than that prescribed for other kinds of dismissal'¹³¹.

Similarly, reinstatement is expressly suggested by paragraph 6(2)(d) of Recommendation No. 143 in respect of the unjustified termination of employment of workers' representatives.

¹²⁴ See the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹²⁵ See the Workers with Family Responsibilities Convention, 1981 (No. 156).

¹²⁶ See the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).

¹²⁷ See the Maternity Protection Convention, 2000 (No. 183).

¹²⁸ See paragraph 4.8 of the code, 'Continuation of Employment Relationship'.

¹²⁹ Workers' Representatives Recommendation, 1971 (No. 143).

¹³⁰ See above, *Chapter 1* of this Part concerning freedom of association.

¹³¹ ILO: 1994 General Survey of the Committee of Experts, *op. cit.*, para. 220 and 221.

The following is an example of the judicial use of the above-mentioned instruments to ensure effective protection against discriminatory termination of employment.

Country: Spain

Constitutional Court of Spain, 23 November 1981, No. 38/1981

In this decision the Constitutional Court of Spain referred to ILO instruments concerning freedom of association to reinforce the protection of workers against anti-union dismissals. On the basis of Conventions Nos. 98 and 135, Workers' Representatives Recommendation No. 143 and decisions of the Freedom of Association Committee, the Court ruled that the effective protection of freedom of association meant that:

- the burden of proof in allegations of anti-union dismissals lay with the employer; and
- applicants to the position of workers' representative who had been dismissed because of their application must be reinstated in their posts, simple financial compensation not constituting sufficient protection of a constitutionally recognized freedom.

To conclude this section on protection against discriminatory termination of employment, paragraph 6(2)(f) of Recommendation No. 143 also suggests that the protection of workers' representatives against termination of employment should be strengthened by giving them priority with regard to their retention in employment in the event of a reduction in the workforce.

II.C.4. Contribution of ILO instruments concerning other aspects of protection against termination of employment

With respect to part-time workers, Article 7(b) of Convention No. 175¹³² stipulates that Member States must ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in the event of termination of employment.

Finally, Article 6(d) of the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), places the severance pay due to workers on termination of their employment among the claims protected by a privilege in the event of an employer's insolvency.

III. Relevant provisions in a number of United Nations human rights instruments

Recognition of the right to work and its implications in respect of termination of employment

The analysis of ILO Convention No. 158 has shown that the basic principle of ILO standards on this issue is to protect workers against unjustified termination of employment. Although the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights do not specifically express this principle, they recognize that everyone has the right to work¹³³.

According to the recent General Comment of the Committee on Economic, Social and Cultural Rights¹³⁴ on the right to work, recognition of this right requires Member States to protect

¹³² Part-Time Work Convention, 1994 (No. 175).

¹³³ Article 23(1) of the Universal Declaration of Human Rights recognizes that 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and obliges the States Parties to take steps 'to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.

¹³⁴ The supervisory body of the International Covenant on Economic, Social and Cultural Rights.

workers against unjustified dismissal¹³⁵. Considering the very high number of ratifications of the Covenant¹³⁶, this interpretation is important as it may provide courts in countries that have not ratified Convention No. 158 but which are party to the Covenant with a legal basis on which to recognize the ban on unjustified dismissals¹³⁷.

Extracts from General Comment No. 18 of the Committee on Economic, Social and Cultural Rights on 'The right to work'

Normative content of the right to work: (...) the right to work (...) also implies the right not to be unfairly deprived of employment.

ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal.

Violations of the obligation to respect: (...) An example would be the institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal. Such measures would constitute a violation of States parties' obligation to respect the right to work.

Violations of the obligation to protect: (...) Violations of the obligation to protect include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal.

Source: UNO Document E/C.12/GC/18, para. 6, 11, 34-35

Prohibition of certain reasons for termination of employment

Employment issues are also covered by the scope of the International Convention on the Elimination of All Forms of Racial Discrimination¹³⁸ and the Convention on the Elimination of all Forms of discrimination against Women.

Article 11(1)(b) and (c) of the Convention on the Elimination of all Forms of discrimination against Women covers the general obligation to grant the same employment opportunities to women 'including the application of the same criteria for selection in matters of employment', thereby covering not only the criteria for appointment and promotion but also those applicable to dismissal.

Finally, and more explicitly, Article 11(2)(a) of the Convention calls on Member States to take appropriate measures 'to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'¹³⁹.

¹³⁵ General Comment No. 18 (2005) of the Committee on Economic, Social and Cultural Rights on 'The right to work' (UNO Document E/C.12/GC/18).

¹³⁶ A total of 160 ratifications by 23 June 2009.

¹³⁷ See above, *Part 2, Chapter 3* of this Manual.

¹³⁸ Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination uses general terms referring to 'just and favourable conditions of work'.

¹³⁹ Finally, it will be noted that other UN international declarations and treaties, notably relating to the rights of disabled persons, also refer to the economic and social rights of men and women, particularly job retention.

Resources

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Documents

■ ILO

Instruments on termination of employment:

Termination of Employment Convention, 1982 (No. 158) and Recommendation (No. 166)

Other relevant instruments:

Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Workers' Representatives Convention, 1971 (No. 135) and Recommendation (No. 143)

Workers with Family Responsibilities Convention, 1981 (No. 156)

Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)

Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)

Part-Time Work Convention, 1994 (No. 175)
Maternity Protection Convention, 2000 (No. 183)
Termination of Employment Recommendation, 1963 (No. 119)
Rural Workers' Organizations Recommendation, 1975 (No. 149)
ILO code of practice on HIV/Aids and the world of work, 2001

■ United Nations

Relevant instruments:

Universal Declaration of Human Rights, 1948
International Covenant on Economic, Social and Cultural Rights, 1966
International Convention on the Elimination of All forms of Racial Discrimination, 1965

Relevant comments of the supervisory bodies:

General Comment No. 18 (2005) of the Committee on Economic, Social and Cultural Rights on 'The right to work'

■ European Union

Relevant Directives:

Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, Official Journal No. L 48 of 22/02/1975
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Internet links

■ ILO

ILO website: www.ilo.org

ILO Conventions and Protocols: <http://www.ilo.org/ilolex/english/convdisp1.htm>

ILO Recommendations: <http://www.ilo.org/ilolex/english/recdisp1.htm>

General Reports of the Committee of Experts on the Application of Conventions and Recommendations: <http://www.ilo.org/ilolex/english/ceacrepsq.htm>

General Surveys of the Committee of Experts on the Application of Conventions and Recommendations: <http://www.ilo.org/ilolex/english/surveyq.htm>

ILOLEX, database containing the complete texts of ILO Conventions and Recommendations, lists of ratifications, comments of the Committee of Experts and Committee on Freedom of Association, examination of cases by the Conference Committee, complaints, cases, general surveys and many other related documents: <http://www.ilo.org/ilolex/english/>

APPLIS, database containing information on ratifications, comments of the Committee of Experts and States' obligations on the submission of reports:

<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=en>

■ United Nations

OHCHR website: <http://www.ohchr.org/>

Treaty body documents: <http://tb.ohchr.org/default.aspx>

Teaching aims, time required and training methods

Preliminary Part

Background to the study of the judicial use of international labour law

Teaching aims, time required and training methods

Teaching aims

At the end of this part, participants will be able to:

- understand the factors that help to explain why the judiciary increasingly cares about international human rights law;
- understand the importance of legislative action for implementing international labour law at domestic level; and
- describe the origin, mandate, principal functions and structure of the International Labour Organization.

Time required and training methods

Two 90 minute sessions for the trainer to present the subject.

Part 1

When and how domestic courts can use international labour law

Teaching aims, time required and training methods

Teaching aims

At the end of this part, participants will be able to:

- understand why the judicial use of international labour law is a growing phenomenon;
- distinguish the different roles international labour law can play in resolving disputes;
- identify the situations and legal conditions in which the various types of judicial use of international labour law can be implemented; and
- determine opportunities for the judicial use of international labour law within the framework of their countries' legal systems.

Time required and training methods

Four 90 minute sessions organized as follows:

- a first session in the form of a workshop for sharing experiences on the place of international labour law in domestic law and the judicial use of international labour law (see Activity No. 1);

- two sessions in which the trainer presents the subject; and
- a fourth session on a practical case highlighting the judicial use of international labour law (see Activity No. 2).

Part 2

Sources of international labour law available to judges and legal practitioners

Chapter 1

International labour standards adopted by the ILO

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- understand the principal characteristics of international labour conventions and recommendations;
- distinguish the different types of provisions in ILO conventions; and
- consider the extent to which the different types of provisions referred to above may give rise to judicial use.

Time required and training methods

Two 90 minute sessions for the trainer to present the subject, including the reading and examination of extracts from ILO conventions and recommendations.

Chapter 2

The work of the ILO supervisory bodies

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- describe the functions and working methods of the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee;
- assess the importance of the supervisory bodies' work in order to understand the meaning and scope of ILO standards; and
- handle the debatable aspects of the legal value of the observations and recommendations of international supervisory bodies.

Time required and training methods

Four sessions organized as follows:

- 90 minutes for the trainer to present the subject, including the reading by participants of extracts from the work of the ILO supervisory bodies;

- a 60 minute presentation and discussion of the legal value of the observations and recommendations of the ILO supervisory bodies; and
- 90 minutes for resolving a practical case involving the use of a Committee of Experts' General Survey (see Activity No. 3).

Chapter 3

Sources of international labour law from the United Nations

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- identify the relevant employment provisions in the principal United Nations human rights instruments;
- understand the complementarity between United Nations human rights instruments and ILO standards; and
- assess the importance of the work of international supervisory bodies to understand the meaning and scope of United Nations human rights instruments.

Time required and training methods

A 90 minute session for the trainer to present the subject. The session will include the reading and examination by participants of provisions taken from United Nations human rights covenants to emphasise their complementarity with ILO standards.

Part 3

The content of international labour standards concerning certain specific subjects and their interest for judges and legal practitioners

Chapter 1

Freedom of association and collective bargaining

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- master the content of ILO Conventions Nos. 87 and 98;
- understand the contribution of the work of the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee on the content of these Conventions;
- understand the contribution of other relevant ILO instruments on freedom of association and collective bargaining;
- understand how the above-mentioned international sources may provide support in resolving disputes at domestic level; and

- identify the aspects of domestic law relating to freedom of association and collective bargaining in relation to which the use of international sources could be useful.

Time required and training methods

Four 90 minute sessions organized as follows:

- two and a half sessions (1h30 + 1h30 + 45 minutes) for the trainer to present the subject. To achieve the above objectives this presentation must include: the reading and examination of extracts from the 1994 General Survey of the Committee of Experts on the Application of Conventions and Recommendations and the Digest of Decisions and Principles of the Freedom of Association Committee; the reading and examination of recent observations and direct requests by the Committee of Experts and any recent decisions of the Freedom of Association Committee concerning participants' countries; and references to cases from domestic jurisprudence that have used international instruments concerning freedom of association and collective bargaining;
- One and a half sessions (45 minutes + 1h30) to resolve a practical case concerning freedom of association and collective bargaining (to be selected between Activity No. 4 and Activity No. 5).

Chapter 2

Quality of opportunity and treatment in employment and occupation

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- master the content of ILO Conventions Nos. 100 and 111;
- understand the contribution of the work of the Committee of Experts on the Application of Conventions and Recommendations on the content of these Conventions;
- understand the contribution of other relevant ILO and United Nations instruments on equality of opportunity and treatment in employment and occupation;
- understand how the above international sources may provide support in resolving disputes at domestic level; and
- identify the aspects of domestic law concerning equality of opportunity and treatment in employment and occupation in relation to which the use of such international sources could be useful.

Time required and training methods

Four 90 minute sessions organized as follows:

- two and a half sessions (1h30 + 1h30 + 45 minutes) for the trainer to present the subject. To achieve the above objectives this presentation must include: the reading and examination of extracts from General Surveys by the Committee of Experts on the Application of Conventions and Recommendations; the reading and examination of recent observations and direct requests by the Committee of Experts on equality of opportunity and treatment in employment and occupation concerning participants' countries; and references to cases in domestic jurisprudence that have used international sources concerning equality of opportunity and treatment in employment and occupation;

- one and a half sessions (45 minutes + 1h30) to resolve a practical case concerning equality of opportunity and treatment in employment and occupation (to be selected between Activity No. 6 and Activity No. 7).

Chapter 3

Termination of employment at the initiative of the employer

Teaching aims, time required and training methods

Teaching aims

At the end of this Chapter, participants will be able to:

- master the content of ILO Convention No. 158 and its accompanying Recommendation No. 166;
- understand the contribution of the work of the Committee of Experts on the Application of Conventions and Recommendations on the content of these instruments;
- understand the contribution of other ILO instruments that could be relevant to termination of employment;
- understand how the above international sources could provide support in resolving disputes at domestic level; and
- identify the aspects of domestic law relating to termination of employment in relation to which the use of these international sources could be useful.

Time required and training methods

Three 90 minute sessions organized as follows:

- one and a half sessions (1h30 + 1h30 + 45 minutes) for the trainer to present the subject. To achieve the above objectives this presentation must include: the reading and examination of extracts from the 1995 General Surveys of the Committee of Experts on the Application of Conventions and Recommendations; the reading and examination of any recent observations and direct requests by the Committee of Experts on termination of employment concerning participants' countries; references to case studies from domestic jurisprudence that have used international sources concerning termination of employment;
- one and a half sessions (45 minutes + 1h30) on resolving a practical case involving termination of employment (see Activity No. 8).

Activities

Activity 1. Exchange of experience on the place of international law in domestic law and the judicial use of international labour law

Objectives

To allow participants to reflect interactively on:

- the place of international treaties in domestic law;
- the possible existence of judgments by their country's courts that have used international labour law;
- the possibility for their country's courts to refer to international labour law.

Approximate duration

- 60 minutes at least to exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

Participants must answer the following questions in small groups:

1. Once international treaties have been ratified and published, do they directly form part of your domestic law? If not, show how they are incorporated into domestic law.
2. What place does international law have in the hierarchy of norms at domestic level?
3. How do or would your country's courts resolve cases where domestic law is incompatible with ratified international treaties?
4. Can you cite cases, related to human rights or labour issues, in which your country's courts have used international law to resolve a case directly?
5. Can you cite cases, related to human rights or labour issues, in which your country's courts have used international law to interpret a provision of your domestic law? If not, do you think it would be possible for your country's courts to use international law in this way?
6. In your opinion, are there any legal obstacles that would prevent at the national level a greater use of international labour law by judges and lawyers (for instance rules of incorporation of international law, rules of statute interpretation, rules of statute's constitutional review, non self-executing nature of treaties provisions, etc.)?
7. Are there any specific legal questions in connection with which your country's judges and lawyers could refer to international labour law as a useful way to make it easier to resolve certain disputes¹?

¹ At the beginning of a seminar, participants often find it difficult to answer this question because most of them will probably not yet have had the opportunity to study the content of international labour law. However, it is useful to get participants to reflect on the aspects of their domestic labour law which they believe it would be useful to complete by means of other sources of law. Participants will have the opportunity to go over the content of this question during the synthesis workshop that closes the activity (see below).

Comments for trainers

Trainers are strongly advised to send this questionnaire to participants well in advance of the seminar so that they can begin to reflect beforehand on the judicial use of international law and can consult the jurisprudence in order to be able to answer the questions.

Activity 2. Case study on the judicial use of international labour law

Objectives

- To encourage participants to reflect further on opportunities for domestic courts to rely on international labour law.
- To introduce participants to potential obstacles in this area.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups, participants must examine and discuss the situation described below, acting as the competent court to determine the case. Each group must present its report in plenary, referring to the sources of international labour law applicable to the case.

The facts

Mr P works as a seafarer on a vessel owned by a company whose registered office is in country A. Several days after setting up a union to defend the interests of the workers on his vessel, he is dismissed on the grounds of "loss of confidence". Mr P believes his dismissal is a clear violation of the principle of freedom of association and that the termination of his contract of employment is therefore illegal.

His employer, on the other hand, does not consider the termination of his contract to be illegal because in country A, seafarers' contracts of employment are governed not by the Labour Code but by the Maritime Code, no provision of which specifically states that seafarers enjoy freedom of association. In order to assert his rights, Mr P decides to challenge his dismissal before the courts and demand his reinstatement. Since he does not have access to the ILO Conventions ratified by his country, he bases his claim solely on sources of domestic law.

Relevant provisions and information

■ Relevant provisions of country A

Article 10 of the Constitution

This Constitution respects individual rights and fundamental freedoms.

Article 12 of the Constitution

The right to set up and join a trade union shall be guaranteed, subject to respect for the relevant legislation.

Article 28 of the Constitution

Courts shall stay proceedings when the resolution of the case raises a question of the unconstitutionality of laws, which shall then be resolved by the Constitutional Court.

Article 1 b) of the Labour Code

The Labour Code shall not apply to seafarers, whose conditions of work and employment shall be governed by the Maritime Code.

Article 132 of the Labour Code

Dismissals on the grounds of trade union activity are unfair and shall give rise to the payment of damages not exceeding three months' wages.

■ Other relevant information

Country A has ratified and published the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

NB: Groups of participants from monist countries will assume that country A is a monist country; groups of participants from dualist countries will assume that country A is a dualist country.

References

- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- *Freedom of Association and Collective Bargaining, General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B)
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On the impossibility of excluding seafarers from the scope of freedom of association

- See Article 2 of ILO Convention No. 87 and, *a contrario*, Article 9(1).
- See also the following judgments:
 - Court of Appeal, San Pedro Sula (Honduras), 11 October 2006;
 - Supreme Court of Canada, *Dunmore v. Ontario (Attorney General)*, 20 December 2001, no 2001 SCC 94, on the exclusion of certain workers from the right to freedom of association.

On the use of international law to interpret the silence of the law

- See the following judgments:
 - Supreme Court of India, *Vishaka and others v. State of Rajasthan and others*, 13 August 1997; and
 - Supreme Court of Botswana (Court of Appeal), *Attorney General v. Dow*, 3 July 1992, 1992 BLR 119 (CA).

Remedies for anti-union dismissals

- See Article 1 of ILO Convention No. 98 and paragraphs 221 *et seq.* of the 1994 General Survey of the Committee of Experts, which specifies what constitutes adequate protection against anti-union dismissals.
- See also the following judgments:
 - National Court of Appeal, Argentina, Fifth Chamber, *Parra Vera Maxima v. San Timoteo SA conc.*, *Appeal against violation of fundamental rights and freedoms*, 14 June 2006, no 144/05 s.d. 68536;

- Supreme Court of Justice of Costa Rica, Constitutional Chamber, 8 October 1993, Decision No. 5000-93;
- Spanish Constitutional Court, Second Chamber, 23 November 1981, No. 38/1981.

Comments for trainers

- An important aspect of the exercise was the fact that the Maritime Code did not specifically preclude freedom of association. If country A were a monist country, such silence would allow ILO Convention No. 87 to be applied directly to seafarers. Like the national Constitution, this Convention recognizes the right to freedom of association generally. In dualist countries Convention No. 87 could also be used to interpret the provisions of the national Constitution in connection with freedom of association and thus to confirm that all workers, including seafarers, were clearly covered by that principle. In order to encourage reflection on opportunities for the judicial use of international labour law, when each group's work has been presented it might be useful to ask participants how they would have resolved the case if the Maritime Code had expressly precluded freedom of association.
- During the discussion the possibility for the courts to apply international labour standards automatically when they have not been raised by the parties should be addressed (in this respect see *Chapter 2, Part 1*).
- Finally, time permitting, it might be interesting to ask participants to reflect on whether Article 132 of the Labour Code complies with ILO Conventions Nos. 87 and 98 and with the national Constitution².

² Although in light of the aspects of the case, this Article, like the Labour Code as a whole, did not apply to seafarers.

Activity 3. Case study on the use of the ILO supervisory bodies documents

Objectives

- To familiarize participants with the Committee of Experts' work on the application of Conventions and Recommendations.
- To make participants aware in a practical way of the importance of the work of the ILO's supervisory bodies so that they understand the meaning and scope of international labour standards and are in a position to apply them.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups the participants must examine and discuss the situation described below, acting as the competent court to determine the case. Each group must present its report in plenary, referring to the sources of international labour law applicable to the matter, and in particular to the paragraphs in the 1996 Committee of Experts' Special Survey specifying the meaning and scope of the relevant provisions of ILO Convention No. 111.

The facts

Computer shop B has adopted a dynamic training policy to ensure that its staff are always up to date with the latest technological developments in the IT sector. To avoid prejudicing the company's commercial activity, training is systematically organized after the shop has closed, i.e. from 18.30. At the same time, in order to ensure that training is available for genuinely motivated staff and that the constraints affecting employees with family responsibilities are taken into account, the training is not compulsory.

After several months, Mrs M, an employee of company B, complains to the management that the policy discriminates against women. She points out that in practice a very limited number of female employees take part in the training because of the family responsibilities that most of them have. The management replies that the company's training policy is not discriminatory since it makes no distinction between men and women, the same rules applying to both. Mrs M then decides to challenge the company's policy in the courts.

References

- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Workers with Family Responsibilities Convention, 1981 (No. 156)
- *Equality in Employment and Occupation, Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B)
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On the notion of 'indirect discrimination'

- See Article 1 of ILO Convention No. 111 and paragraphs 25 and 26 of the 1996 Special Survey of the Committee of Experts to determine whether 'indirect discrimination' is covered by the above-mentioned Convention.
- See also the judgment of the Federal Court of Australia in *the Commonwealth of Australia v. Human Rights & Equal Opportunity Commission*, 15 December 2000, [2000] FCA 1854.

On sex discrimination

- See paragraphs 35, 37 and 53 of the above-mentioned Special Survey to determine whether sex discrimination also covers distinctions based on the different roles traditionally attributed to men and women, such as family responsibilities.

On discrimination based on family responsibilities

- Male employees with family responsibilities may also be affected by the late timing of the training. See ILO Convention No. 156 on this issue.

Activity 4. Role play on the use of international labour standards concerning freedom of association and collective bargaining

Objectives

- To familiarize participants with the content of international labour standards on freedom of association and collective bargaining, and with the work of the supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to freedom of association and collective bargaining.

Approximate duration

- 60 minutes at least to examine and discuss the situation in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In three groups representing workers, the company and the court respectively, participants must examine and discuss the situation described below, completing the following tasks:

1. the group representing workers must prepare a claim, drawing their arguments both from domestic law and the relevant sources of international law;
2. the group representing the company must prepare to refute the submissions in writing, based on sources of international law;
3. the group acting as the court must rule on the case by deciding how far the court could rely on sources of international law, identifying the sources concerned.

The facts

Following a broad range of unsatisfied claims concerning a wage rise, overtime payments and improvements in safety and hygiene conditions, among other things, the union representing workers in the public postal service provider in country Z decided to organize a strike. The strike was called in accordance with the applicable legislation and was followed by virtually the entire labour force. On the morning of the fourth day of the strike, the administrative authorities, considering postal services to be essential to the safety and security of persons and property and citing the need to guarantee the continuity of public services, ordered striking postal workers to be requisitioned.

The union leaders objected to the requisition order and called on the workers to continue the strike. On the following day the strike was declared illegal, the employer took on casual workers to replace the strikers, and all the union leaders were dismissed.

The union members who were dismissed brought a claim to ask the court to:

- a. set aside the administrative declaration that the strike was illegal;
- b. set aside the dismissals and reinstate the workers concerned;
- c. award damages for loss of earnings and non-pecuniary damages;
- d. penalize the employer for violating freedom of association, infringing the right to strike and anti-union discrimination.

Relevant provisions and information

■ **Relevant provisions of country Z:**

Article 64 of the Labour Code:

Strikes held in breach of the above provisions shall be deemed to be illegal (...)

Article 68 of the Labour Code:

The competent administrative authority may at any time requisition workers in private undertakings and public services and establishments who occupy posts essential to the safety and security of persons and property, the maintenance of public order, the continuity of public services or the meeting of the nation's essential needs.

The list of posts so defined shall be established by decree³.

■ **Other relevant information**

Country Z has ratified the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

References

- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- *Freedom of Association and Collective Bargaining, General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B)
- *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition*, ILO, Geneva, 2006
- Bangalore Principles on the Domestic Application of International Human Rights Norms, 1988
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On the implicit recognition of the right to strike given by ILO Convention No. 87

- See paragraphs 142 and 145-151 of the 1994 General Survey of the Committee of Experts and paragraph 523 of the Digest of Decisions and Principles of the Freedom of Association Committee.

On the definition of essential services

- See paragraphs 581-594 of the above-mentioned digest, particularly paragraph 587 concerning postal services.

On the administrative declaration that the strike is illegal

- See paragraphs 628-630 of the above-mentioned Digest.
- See also the judgment of the Constitutional Court of Colombia, Fourth Appellate Supervisory Chamber, *Sindicato de las Empresas Varias de Medellín v. Ministry of Labour*

³ At the time of the facts of this case the Decree had not yet been adopted.

and Social Security, the Ministry of Foreign Relations, the Municipality of Medellín and Empresas Varias de Medellín E.S.P., 10 August 1999, Case No. 206.360.

On the replacement of striking workers

- See paragraphs 632 and 633 of the above-mentioned Digest.

On the dismissal of striking workers

- See Article 1 of ILO Convention No. 98, paragraphs 661 and 662 of the Digest of Decisions and Principles of the Freedom of Association Committee, and paragraphs 220 and 221 of the 1994 Committee of Experts' General Survey.

Comments for trainers

An important aspect of the exercise was the lack of a decree defining essential services.

To encourage reflection on techniques that allow participants to use international law, the three following aspects at least could be considered:

- the principle of interpretation in conformity with international law, by virtue of which the courts must ensure that domestic law is interpreted in such a way that the State does not violate its international obligations;
- the possibility of questioning the constitutionality of the article in the Labour Code relating to strikes;
- in the case of a dualist country where the content of domestic law would be considered to be irreconcilable with international law, judges' responsibility to draw attention in their judgment to the violation of international law (cf. Bangalore Principles on the Domestic Application of International Human Rights Norms).

Activity 5. Case study on the use of international labour standards concerning freedom of association and collective bargaining

Objectives

- To familiarize participants with the content of international labour standards relating to freedom of association and collective bargaining, and with the work of the supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to freedom of association and collective bargaining.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups, participants must examine and discuss the situation described below, acting as the competent court to determine the case. Each group must present its report in plenary, referring to international labour standards and to the work of the ILO's supervisory bodies applicable to the case.

The facts

Trade union federation S in the foodstuffs sector is challenging the decision of the government of its country (country T) to enact a law making the award of wage rises conditional upon the signing of agreements on increasing the productivity of labour. To express this protest, the leaders of the federation unanimously decide to join a 10-day strike called by a 'multi-sectoral' association (an ad hoc association made up of various social organizations and political parties). The objective of the strike, scheduled for the Monday of the following week, is to support various political, economic and social demands (including the above-mentioned imposing of conditions on wage rises). The federation's rules refer to the possibility of providing support to national or international political parties or other civil society organizations whose action could help to improve the economic and social conditions of workers represented by the federation, or to prevent the implementation of public policies affecting their interests.

By application of positive domestic law, the Ministry of Labour declares it illegal. A significant number of workers affiliated to trade union federation S are dismissed for joining the strike.

The workers concerned go to court to challenge their dismissal and seek reinstatement.

Relevant provisions and information

■ **Relevant provisions of country T**

The *national Constitution* specifically enshrines the right to freedom of association, although it does not specify its content.

The *Constitution* also states that the treaties ratified are a direct part of domestic law and accords them a value equal to domestic laws⁴.

The *Industrial Relations Act*:

- gives the Ministry of Labour the power to determine and declare whether collective actions are legal or illegal;
- prohibits trade unions ‘... from dedicating themselves to or taking part in political, religious or profit-making activities...’. In the case of federations, the law requires participation in a strike to be subject on the one hand to a vote by secret ballot and to approval by at least 50% of the workers affiliated to the federation’s member unions, and on the other to 30 days’ notice being given of the strike;
- establishes that the administrative declaration that the strike is legal or illegal can only be reviewed by the courts if the decision is clearly and materially arbitrary.

The *Individual Employment relationships Act* recognizes that workers who are dismissed without valid reason are entitled to compensation; if the dismissal is discriminatory or anti-union, workers may demand and are entitled to be reinstated.

■ Other relevant information

Country T has ratified the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

References

- Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
- Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- *Freedom of Association and Collective Bargaining, General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 81st Session, Geneva, 1994, Report III(4B)
- *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (revised) edition, ILO, Geneva, 2006
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On the validity of the objective of the strike

- See paragraphs 526-531 of the Digest of Decisions and Principles of the Freedom of Association Committee.

On the question of trade union political activity

- See paragraphs 130-134 of the 1994 Committee of Experts’ General Survey.

On the question of voting requirements for strikes

- See paragraphs 555-563 of the Digest of Decisions and Principles of the Freedom of Association Committee, particularly paragraph 561.

⁴ This aspect will be modified according to the position accorded to international law by the legal system of participants’ countries.

On the validity of the obligation to give prior notice of a strike

- See paragraphs 552-554 of the above-mentioned Digest.

On the administrative declaration that a strike is illegal

- See paragraphs 628-631 of the above-mentioned Digest.
- See also the judgment of the Constitutional Court of Colombia, Fourth Appellate Supervisory Chamber, *Sindicato de las Empresas Varias de Medellín v. Ministry of Labour and Social Security, the Ministry of Foreign Relations, the Municipality of Medellín and Empresas Varias de Medellín E.S.P.*, 10 August 1999, Case No. 206.360.

On the dismissal of striking workers

- See Article 1 of ILO Convention No. 98, paragraphs 661 and 662 of the Digest of Decisions and Principles of the Freedom of Association Committee, and paragraphs 220 and 221 of the 1994 Committee of Experts' General Survey.

Activity 6. Case study on international labour standards concerning equal opportunities and equal treatment in employment and occupation⁵

Objectives

- To familiarize participants with international labour standards on equal opportunities and equal treatment in employment and occupation, and with the work of the supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to equal opportunities and equal treatment in employment and occupation.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups, participants must examine and discuss the situation described below, acting as the competent court to determine the case. Each group must present its report in plenary, referring to international labour standards and to the work of the ILO's supervisory bodies applicable to the case.

The facts

Mr Y was taken on as a statistician by a religious organization whose purpose is to publicize and spread its religious faith. The organization's internal rules state that its staff must share the institution's faith.

When he was taken on, Mr Y fulfilled that condition. Several months later, however, he met a young girl who was a member of another religion. In order to be able to marry her, Mr Y had to change his religion.

A short time later Mr Y's employer found out about the situation. He then decided to dismiss Mr Y on the ground that he was untrustworthy. Mr Y brought a case before the courts to challenge the validity of his dismissal, which he considered to be discriminatory.

References

- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- *Equality in Employment and Occupation, Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B)
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

⁵ Trainers may also decide to use this case as an activity in connection with the work of the ILO's supervisory bodies (see above, Activity 3).

Approaches to a solution

In order to determine whether different treatment based on religion could be considered to be justified in this particular case, participants may refer to the following:

- ILO Convention No. 111, Articles 1(1)(a) (definition of ‘discrimination’) and 1(2) (limits of the definition).
- To specify the meaning and scope of the above-mentioned Article 1(2), see paragraphs 117-121 of the 1996 Committee of Experts’ Special Survey.
- See also paragraphs 42 and 190 of the above-mentioned Special Survey, specifying the meaning and scope of the prohibition of discrimination based on religion raised by Article 1(1)(a).

Comments for trainers

- The interpretation of Article 1(2) of ILO Convention No. 111 is crucial to resolving the case. As indicated by the Committee of Experts in its Special Survey, it is therefore a matter of determining whether the proper performance of the statistician’s job requires that he has to share the institution’s religious faith. In this respect some participants could argue that more information would be required on the exact content of the job concerned to be able to resolve the case appropriately.
- The case is based on the judgment of the Antsirabé Labour Court (Madagascar), *Ramiaranjatovo Jean-Louis v. Fitsaboana Maso*, 7 June 2004, No. 58. On concluding the exercise, the summary of the court’s judgment ruling that the dismissal was discriminatory could be read and commented on.

Activity 7. Case study on international labour standards concerning equal remuneration between men and women

Objectives

- To familiarize participants with international labour standards on equal remuneration between men and women, and with the work of the supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to equal remuneration between men and women.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups, participants must examine and discuss the situation described below, acting as the competent court to resolve the case. Each group must present its report in plenary, referring to international labour standards and to the work of the ILO's supervisory bodies applicable to the case.

The facts

In a textile company in country S, most employees are engaged either in cutting or in sewing. The cutters must handle cutting equipment, and their work is physically more demanding than the work of the sewers. More errors are likely to be made in sewing operations, however, because of the demanding requirements of the customers, which the company must comply with. All the sewers are women, while the cutters are virtually all men.

Cutters' hourly wages are 40% higher than sewers' wages. The management justifies this pay policy by referring on the one hand to the fact that the cutters have to handle heavy equipment in their work, and on the other to the hazardous nature of that work.

The Labour Code of country S states with respect to remuneration that for equal work carried out in the same working conditions and producing the same output, men and women should receive the same wages irrespective of gender.

Relevant provisions and information

- **Relevant provisions of country S:**

Article 18 of the Labour Code

For equal or similar work carried out in the same conditions, workers shall receive the same remuneration without distinction based on sex, race, social origin, political opinion or religious beliefs.

- **Other relevant information**

Country S has ratified the ILO Equal Remuneration Convention, 1951 (No. 100).

References

- Equal Remuneration Convention, 1951 (No. 100)

- Equal Remuneration Recommendation, 1951 (No. 90)
- *Equal Remuneration, General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 72nd Session, Geneva, 1986, Report III(4B)
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On the use of ILO Convention No. 100

- To discuss the applicability of ILO Convention No. 100 in cases where men and women perform different jobs, see Articles 3(1) and 3(3) of the Convention and paragraphs 19, 21, 22 and 138 of the 1986 Committee of Experts' General Survey.
- Paragraphs 39, 119 and 123 of the same General Survey could be used to discuss the possibility for domestic courts to interpret domestic legislation on equal remuneration in the light of ILO Convention No. 100.

On the objective methods courts may use to evaluate jobs

- For an introduction to objective evaluation methods, see paragraph 138 of the above-mentioned General Survey. On the possibility for the court to use an expert on occupational analysis, see paragraph 123 of the General Survey.

On implementing the principle of equal remuneration as regards different jobs

- See the examples referred to in paragraph 143 of the above-mentioned General Survey.
- See also the following two judgments:
 - Quebec Human Rights Tribunal, *Human Rights and Youth Rights Commission v. University of Laval*, 2 August 2000, No. 200-53-000013-982, 2000 IJCan 3 (QC T.D.P.); and
 - Supreme Court of India, *Mackinnon Mackenzie v. Audrey D'Costa and another*, 26 March 1987, No. 1265, 1987.

Comments for trainers

- Participants should indicate that they need further information in order to assess the value of the two jobs objectively (the need for an expert could be cited).
- Some participants might raise the argument that, by virtue of ILO Convention No. 100, it is not mandatory to adopt equal remuneration legislation, and that by virtue of Article 2 the State would only be required to promote equal remuneration in the private sector. Reference should be made in this respect to paragraph 28 of the General Survey on Equal Remuneration to stress that, since the principle of equal remuneration is enshrined in domestic law, that law must adopt a definition of the principle which is as broad as that provided for by the Convention.

Activity 8. Case study on international labour standards concerning termination of employment⁶

Objectives

- To familiarize participants with international labour standards on termination of employment, and with the work of the supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to termination of employment.

Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

Tasks

In small groups, participants must examine and discuss the situation described below, acting as the competent court to resolve the case. Each group must present its report in plenary, referring to international labour standards, to the work of the supervisory bodies and to the other sources of international labour law applicable to the case.

The facts

Mr X has worked for five years as the public relations manager of a company in country F. Some three years ago he found out that he was HIV-positive. Up to a short time previously, only the company doctor was aware of the situation. After an indiscretion by an assistant recently recruited to assist the doctor, his employer finds out that Mr X is HIV-positive. The employer asks Mr X's doctor about his employee's condition, and is told that he is still capable of doing his job.

Rumours start to go round, however, and some of Mr X's colleagues begin to express reluctance to work with him. One of the company's customers even asks the director of the company if the rumour going round about Mr X is really true. In order to ensure that the company continues to run smoothly, the employer arranges an interview with Mr X during which he informs him that, in light of the circumstances, he has decided to transfer him to another department where he will be more independent because he will have no direct contact with customers, and much less contact with his colleagues. The new post should also allow Mr X to get time off more easily for medical visits, should the need ever arise. Finally, his boss reassures him that the transfer will have no effect whatsoever on his pay and other benefits.

After a day's consideration, Mr X informs his employer that he refuses to accept the transfer, which he classifies as an unjustified unilateral change in his contract of employment. He points out that he has always been highly rated, and that his work is not affected in any way by the fact that he is HIV-positive, as evidenced by the medical certificate he presents to his employer. Despite the intervention of the company's union representative, the employer decides to uphold his decision for an immediate transfer on the grounds, he claims, of his wish to re-establish the smooth running of his company rather than because of Mr X's HIV status.

⁶ Because of the facts involved, the exercise may also be used in sessions on equal opportunities and equal treatment in employment and occupation.

Mr X steadfastly refuses to take up the new post assigned to him. After two weeks he receives a letter from his employer stating that the company has taken formal note of his resignation. Mr X brings the case before the courts to demand to be reinstated in his original post.

Relevant provisions and information

■ Provisions of country F:

Article 3 of the Constitution

Any discrimination based on sex, race, political opinion, religion or trade union membership shall be prohibited.

Article 6 of the Labour Code

In the context of employment relationships, discrimination based on sex, race, political opinion, religion, trade union membership and age shall be prohibited.

Article 28 of the Labour Code

Dismissals based on trade union membership shall be automatically void.

■ Other relevant information

Country F has ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Termination of Employment Convention, 1982 (No. 158), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

References

- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Termination of Employment Convention, 1982 (No. 158)
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- ILO Code of Practice on HIV/AIDS and the world of work, 2001
- *Protection against Unjustified Dismissal, General Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 82nd Session, Geneva, 1995, Report III(4B)
- *Equality in Employment and Occupation, Special Survey of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 83rd Session, Geneva, 1996, Report III(4B)
- *Use of International Law by Domestic Courts. Compendium of Court Decisions*, ITC-ILO, Turin, December 2007

Approaches to a solution

On defining termination of the contract of employment

- See paragraph 22 of the 1995 Committee of Experts' General Survey on Protection against Unjustified Dismissal, which refers to the need to subject terminations of the contract of employment caused by or at the initiative of the employer, irrespective of the formal terminology used to describe the termination, to the rules on dismissals.

On the prohibition of discrimination based on state of health or HIV-AIDS

- To establish the prohibition of these grounds for discrimination, see:
 - Article 26 of the International Covenant on Civil and Political Rights, which includes an open definition of discrimination by means of a non-restrictive list of grounds;
 - paragraph 255 of the 1996 Committee of Experts' Special Survey on Equality in Employment and Occupation, and paragraphs 60 and 264 specifically concerning workers affected by HIV-AIDS;
 - paragraphs 4.2 and 4.8 of the ILO Code of Practice on HIV/AIDS and the world of work.
- The employer's decision based on HIV-AIDS may also be considered in the light of Article 4 of Convention No. 158, which defines as valid reasons for termination those connected to the employee's capacity or conduct, or the undertaking's operational requirements. In this respect, Article 4 must be read in the light of paragraph 142 of the 1995 Committee of Experts' General Survey stating that HIV infection is not a valid cause for termination of employment.

On the justification for a change in post imposed by the employer

- This is a matter of knowing whether the employee's HIV status was a qualification required for the job of public relations manager within the meaning of Article 1(2) of ILO Convention No. 111. In order to stress that HIV-AIDS should only be taken into account in connection with jobs objectively involving a risk of transmitting the virus, see paragraphs 117 *et seq.* and 264 of the 1996 Committee of Experts' Special Survey.

On the compensation to be awarded to the employee: reinstatement or financial compensation?

- As a source of inspiration, consult the work of the Committee of Experts indicating that the penalties imposed on discriminatory treatment and on dismissals breaching fundamental rights in particular must have the effect of actually eliminating the discriminatory situation and ensuring that the prejudice suffered by the worker is fully compensated. In the case of discriminatory dismissal, this reasoning assumes that redress will not be restricted simply to financial compensation, but will also involve seeking to ensure the employee's reinstatement. See in this respect paragraph 232 of the 1995 Committee of Experts' General Survey and paragraph 233 of the 1996 Committee of Experts' Special Survey.
- Although it concerns the refusal to take on a person suffering from HIV-AIDS, see the judgment of the Constitutional Court of South Africa, *Jacques Charl Hoffman v. South African Airways*, 28 September 2000, No. CCT 17/00.

Other aspects that could be referred to in resolving the case

- Violation by the employer of his duty of confidentiality (cf. paragraph 5.2(g) of the ILO Code of Practice on HIV/AIDS and the world of work).
- Obligation on the employer to train employees on the real risks engendered by HIV-AIDS and on managing the disease in the enterprise (cf. paragraph 5.2(c) of the ILO Code of Practice on HIV/AIDS and the world of work).

Comments for trainers

The resolution of the case could prove to be more complex if the company were to experience real economic difficulties (which was not the case in the situation under discussion) after customers became disaffected when the rumour concerning Mr X's HIV-positive status spread. It might be useful to discuss this assumption.

Some participants might then consider the termination of Mr X's contract of employment to be justified on economic grounds. They might also feel that the protection of the company's employees as a whole requires a compromise solution involving the award of compensation to Mr X, but without allowing him to return to his original post.

In this respect the trainer could suggest the two following lines of reasoning:

- even assuming customer disaffection, it does not appear to be legally correct to classify the termination of Mr X's contract of employment as a dismissal on economic grounds. The latter would require a direct causal link between Mr X's disease and the company's economic difficulties. If there is a link between these two factors, it is due solely to the erroneous prejudices of the company's clients towards HIV-AIDS. It is these discriminatory prejudices which are the real cause of the company's economic difficulties. In this context, taking these prejudices into consideration to terminate Mr X's contract would continue to be discrimination;
- recognition of fundamental human rights does not only seek to protect individuals, but also ensures broader protection of society as a whole by making peaceful coexistence between its different members possible. In this case, giving priority to the interests of the company (and its employees) over the principle of non-discrimination implies an acceptance of the exclusion of people suffering from HIV-AIDS, thereby favouring the spread of the epidemic and adversely affecting the interests of the country as a whole.

Synthesis workshop on the judicial use of international labour law

Objective

To allow participants to draw practical conclusions on opportunities for the judicial use of international labour law.

Approximate duration

- 30 minutes at least to answer the question raised individually;
- 2 hours to exchange views in groups and draft a joint report;
- 10 minutes to present the report in plenary.

NB: It is suggested that each group should draft its report on computer so that the synthesis reports can be inserted in the final report on the seminar.

Tasks

Through the various areas examined during the seminar, participants are asked to determine the specific aspects of international labour law that their countries' judges and legal practitioners could actually use to make it easier to resolve certain legal issues and thereby consolidate their domestic jurisprudence in the area of labour.

For each point raised, participants are asked to state precisely what legal problem would be resolved, what international sources could be used (e.g. articles of Conventions or Recommendations, paragraphs from General Surveys), and how those sources could be used in each case (direct application, interpretive use, use of international law as a source of inspiration for recognizing a principle of jurisprudence, etc.).

References

All the documents distributed during the seminar.

Comments for trainers

- When presenting the workshop, trainers should stress how important it is for the work groups to be very precise, both in determining the aspects of international labour law that could be used by domestic courts and as regards legal techniques that would allow courts to make effective use of each aspect identified (direct resolution of the case based on international labour law, interpretive use of international law, use of international law as a source of inspiration, etc.).
- Trainers could also stress that the synthesis workshop should be seen not as an end but as the beginning of a process, the *raison d'être* of the activity being to allow participants to take the content of international labour law into account throughout their professional careers.

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