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Codification Division
United Nations Headquarters
Room No. DC2-0570
New York, NY 10017

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International Law Commission's study of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; selected examples provided by the International Labour Organization

Dear Mr Llewellyn,

I am writing in response to the invitation that the International Law Commission extended at its sixty-seventh session (2015) to States and international organizations to provide "examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty" to assist the Commission in its study of the above topic.[1]

Among the bodies supervising the application of ratified international labour Conventions, the International Labour Organization (ILO) considers that the work of its Committee of Experts on the Application of Conventions and Recommendations (CEACR), established in 1926, is of particular relevance in this context. The CEACR is composed of 20 eminent jurists from different geographic regions, legal systems and cultures, who are appointed by the ILO Governing Body for three-year terms. The Committee's role is to provide an impartial and technical evaluation of the legislative conformity of national laws and regulations with the requirements of ratified ILO Conventions. It examines reports regularly requested from governments of member States who must provide copies of their reports to employers' and workers' organizations, also entitled to provide comments to the CEACR.[2] The

[1] UN doc., A/70/10, 2015, chap. III, para. 26.

[2] In general, reports are requested every two (for the eight fundamental and the four governance Conventions) and five years (for all other Conventions - the technical Conventions). For more information see

Committee prepares comments (direct requests and observations) on the implementation, in law and in practice, of ratified ILO Conventions. The observations are published in the CEACR's annual report while direct requests are available online. In addition, the Committee prepares, on annual basis, a thematic General Survey on the implementation, in law and in practice, of ratified and non-ratified ILO Conventions and Recommendations by member States with a view to identifying obstacles to ratification and the possible need for revision.

The mandate and role of the CEACR are in the core of an on-going discussion concerning the interrelationship, functioning and possible improvement of the ILO's various supervisory procedures following a serious institutional controversy over the question of the recognition and protection of the right to strike under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The Committee's determination in 2012 that the right to strike is a corollary of the principle of freedom of association enshrined in Convention No. 87, which echoes similar views expressed by the Committee of Freedom of Association of the ILO Governing Body, was heatedly debated within the Organization.[3] In particular, it has been questioned whether the CEACR may have any interpretative functions in the light of Article 37 of the ILO Constitution which provides that any question or dispute relating to the interpretation of an ILO Convention shall be referred to the International Court of Justice for decision or to a tribunal (as yet not established) for determination. In the context of that debate, a tripartite meeting was organized in February 2015 on Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at national level. The background document,[4] prepared by the International Labour Office for the purposes of that meeting, contains an overview of the debate around the status and legal value of the ILO principles on the right to strike in the light of the provisions of Convention No. 87, reviews the main findings of the ILO supervisory organs in the last 50 years with respect to the scope of the right to strike and the conditions for its legitimate exercise, and also offers brief explanations on the rules of international law governing treaty interpretation (see, in particular, para. 56 and footnote 14). In its 2013 report, the CEACR specified that its work "required a certain degree of interpretation".[5] As concerns the legal nature of its non-binding analyses and conclusions, the "Committee recalled that [they] could only become authoritative in any 'binding' sense if the international tribunal, or instrument, or the domestic court independently established them as such."[6]

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http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm

[3] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, International Labour Conference, 101st Session, 2012, para. 118 et seq., available at http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1B).pdf

[4] See document GB.323/INS/5/Appendix III of 13 March 2015, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351512.pdf

[5] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 102nd Session, 2013, para. 29, available at http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf

[6] Ibid.

For the purposes of the International Law Commission's present query, the International Labour Office has compiled selected examples where the pronouncements of CEACR have given rise to subsequent practice which may be relevant for the interpretation of a treaty (see attached). The selection of the specific materials and the reference to the views of the Committee should not be deemed to reflect the views of the International Labour Office or of ILO's tripartite constituents.

Finally, the ILO would also like to note that national, international and supranational courts have been relying in their decisions on the pronouncements of the CEACR while referring to international labour standards to settle a dispute. The relevant CEACR's pronouncements concern the scope and meaning of international labour standards (e.g. Federal Court of Australia, The Commonwealth of Australia v. Human Rights & Equal Opportunity Commission, 15 December 2000, [2000] FCA 1854) or are specific comments relating to the application of relevant conventions in given countries (e.g. Supreme Court of Justice of Argentina, Asociación de Trabajadores del Estado (A.T.E.) re. Action of unconstitutionality, 18 June 2013, Case No. A.598.XLIII). Further examples of such rulings can be found in the Compendium of Court Decisions (available at http://compendium.itcilo.org), which contains selected decisions from national, international and supranational courts having relied on international labour standards and the work of ILO supervisory bodies to resolve cases brought before them.

I wish to thank the distinguished members of the International Law Commission for having invited the ILO to share information on this important matter. Hoping that the Commission will find these few indications useful, I remain available to provide additional explanations if needed.

Yours sincerely,

George Politakis
Legal Adviser
Director, Office for Legal Services

Attachment

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The selection of the following materials and the reference to specific views expressed by the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR" or the "Committee of Experts")[7] should not be deemed to reflect the views of the International Labour Office or of ILO's tripartite constituents.

1. Social security

The Equality of Treatment (Workmen's Compensation) Convention, 1921 (No. 19): scope of application

In the context of the supervision of the Equality of Treatment (Workmen's Compensation) Convention, 1921 (No. 19), invoking the general principle of equality of treatment on which the right to social security is premised, the CEACR considered in 2012 that this principle pertains to all persons, irrespective of status and origin, whereas the conventional provision (Art. 1(2)) refers to "foreign workers and their dependants" without further precisions. The Committee of Experts urged the Government of Thailand to ensure rapid and substantial results on the ground in the near future and, that the measures taken effectively eliminate cases of denial of emergency medical care and related benefits to uninsured migrant workers suffering industrial accidents. In its 2015 report, the CEACR took note of the Government's reported commitment to take action with a view to improving the situation of the hundreds of thousands of documented and undocumented migrants working in Thailand and research it had conducted on the development of a social insurance system for inbound and outbound migrant workers.

2. Forced Labour

The Forced Labour Convention, 1930 (No. 29): trafficking in persons

The Forced Labour Convention, 1930 (No. 29) requires ratifying States to suppress all forms of forced or compulsory labour and to ensure that the penalties imposed on perpetrators are really adequate and are strictly enforced. Convention No. 29 provides for a broad definition of forced labour without referring to specific forms of forced labour, such as trafficking in

[7] The reports of the CEACR are available at http://www.ilo.org/public/libdoc/ilo/P/09661/. In addition, the ILO Information System on International Labour Standards (NORMLEX) includes a search engine for comments by ILO supervisory bodies, see at http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:20010::

persons. Nevertheless, for a number of years, the CEACR has been systematically examining the problem of trafficking in persons for the purposes of sexual and labour exploitation.

In 2001, the Committee of Experts adopted a general observation in which it has sought information on the measures taken or envisaged by ratifying States to prevent, suppress and punish trafficking in persons as well as to protect victims. The CEACR pointed out, in particular, that the notion of exploitation of labour inherent in the definition of trafficking in persons allows for a link to be established between the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women (Palermo Protocol) and Convention No. 29, and makes clear that trafficking in persons for the purpose of exploitation is covered by the definition of forced labour provided under Convention No. 29. Another important element of the definition of trafficking in persons is the means of coercion used against an individual, including the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability, which definitely exclude the voluntary offer or consent of the victim.

Since then, the CEACR has noted that a vast majority of countries have introduced into their national legislation specific provisions aimed at criminalizing and punishing trafficking in persons, both for sexual and labour exploitation (see, for example, Azerbaijan, adoption of law No. 314-IVQD of March 2012 and Law No. 609-IVQD of April 2013 which strengthen the anti-trafficking legal framework; Bolivia, adoption of the Organic Law against trafficking and smuggling of persons (Act No. 263 of 31 July 2012); Mali adoption of Act No. 2012-023 of 12 July 2012 on action to combat trafficking in persons and similar practices). With regard to the prevention of trafficking in persons and the protection of victims, which is essential for the effective eradication of human trafficking, the CEACR has noted with interest on numerous occasions that newly enacted laws provide for the adoption of comprehensive anti-trafficking national plans, including the establishment of an entity responsible for the coordination of the various actions carried out by the competent authorities, and for the assessment of the implementation of the measures (see, for example, Costa Rica and the Anti-Trafficking Law, No. 9095, in 2013); Portugal and the adoption in December 2013 of the third National Plan against Trafficking in Human Beings (PNCTSH III); Bangladesh, adoption of the Human Trafficking Deterrence and Suppression Act, 2012).

It should be noted in this regard that, in 2014, the ILO adopted a Protocol which complements Convention No. 29 by specifically requiring member States to adopt measures to prevent forced labour and to provide protection and access to appropriate and effective remedies, such as compensation, to victims. Reaffirming the definition of forced labour contained in Convention No. 29, the Protocol also requires that such measures shall include specific action to combat trafficking in persons for the purposes of forced or compulsory labour.

3. Equality and non-discrimination

a) The Equal Remuneration Convention, 1951 (No. 100): Concept of equal value and objective job evaluation methods

In the context of the Equal Remuneration Convention, 1951 (No. 100) the CEACR has provided guidance on the meaning of the concept of equal value (general observation of 2007 and General Survey of 2012, paras. 673-675). The CEACR has indicated that legislation on equal pay should not only provide for equal remuneration for equal, the same or similar work, but also address situations where men and women perform different work that is nevertheless of equal value. In this regard, the CEACR noted progress in the adoption of legislation (whether in labour codes, non-discrimination legislation or equal pay laws) referring expressly to "work of equal value", including in Albania, Australia, Bangladesh, Bosnia and Herzegovina, Croatia, Cyprus, Djibouti, Estonia, Kenya, Malta, Peru, Poland, Republic of Moldova, Romania, Saudi Arabia, Saint Lucia, Slovenia, Togo, Turkey, United Kingdom (Gibraltar) and Zimbabwe (2012 General Survey, para. 676). Recent examples of collective agreements also provide for equal remuneration for work of equal value, including in Belgium, Grenada, Romania, Singapore and Uruguay.

Further, the implementation of job evaluation exercises has been shown to have a measurable impact on gender pay differentials, and the CEACR has provided guidance on the scope of comparison (2012 General Survey, paras. 697-699) and methods of objective job evaluation free from gender bias (2007 general observation and 2012 General Survey, paras. 695, 700-701). It has considered that the concept of "equal value" requires some method of measuring and comparing the relative value of different jobs. There needs to be an examination of the respective tasks involved, undertaken on the basis of entirely objective and non-discriminatory criteria to avoid the assessment being tainted by gender bias. While the Convention does not prescribe any specific method for such an examination, Article 3 of Convention No. 100 presupposes the use of appropriate techniques for objective job evaluation, comparing factors such as skill, effort, responsibilities and working conditions. Recent progress has been noted in a number of countries, including Algeria, Barbados, Belgium, Czech Republic, Ghana, Lithuania, Netherlands, New Zealand, Panama, Papua New Guinea, Portugal, Saint Lucia, Switzerland, Togo, Trinidad and Tobago, South Africa and Zimbabwe. Canada, Sweden, Switzerland, Czech Republic and Ghana have developed comprehensive analytical job evaluation methods free from gender bias. In a number of countries, legislation (labour codes, equality or equal pay legislation) defines equal value or specifically refers to criteria for job evaluation, including in Angola, Indonesia, Panama and Togo. In other countries, including in Algeria, Belgium and Iceland, collective agreements include clauses on objective job evaluation (see 2012 General Survey, paras. 702-705).

b) The Discrimination (Employment and Occupation) Convention, 1958 (No. 111): sexual harassment - indirect discrimination

Over the years, the CEACR has consistently expressed the view that sexual harassment, as a serious manifestation of sex discrimination and a violation of human rights, is to be addressed

within the context of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The CEACR, in a 2003 general observation (and its 2012 General Survey), highlighted the importance of taking effective measures to prevent and prohibit sexual harassment at work, which should address both quid pro quo and hostile environment sexual harassment. The general observation provides guidance on the elements that should cover these forms of sexual harassment.

Progress has been noted in a number of countries that have adopted legislative measures regarding sexual harassment. For example, Dominican Republic, Honduras, Mexico and Namibia have adopted provisions in the labour codes, whereas others, such as Costa Rica, Israel, Peru, Philippines, Rwanda, South Africa and Uruguay, have adopted specific legislation on sexual harassment in keeping with the 2003 general observation and the 2012 General Survey. In Austria and East Timor, legislation also provides for both quid pro quo and hostile work environment as constitutive elements of sexual harassment. The Human Rights Act and the Employment Relations Act of New Zealand provide for a broad scope of employer liability and protect all employees from sexual harassment, including home workers and persons intending to work. Other legislation, for example in the Netherlands, Romania and Uganda, imposes an obligation on employers to take measures to prevent sexual harassment at the workplace. Other countries have elaborated codes of conduct or guidelines applicable both in the private and the public sectors (see, for example, Indonesia: Guidelines on Sexual Harassment at the Workplace, 2011; Lesotho: Code of good practice on sexual harassment in the workplace, 2003; Italy: Codes of conduct on sexual harassment, 2003; Sri Lanka: Code of conduct and procedures to address sexual harassment in the workplace, 2007). Fiji developed a national policy on sexual harassment in the workplace in consultation with the tripartite social partners (2012 General Survey, paras. 791-794).

Article 1(1)(a) of Convention No. 111 refers to the "effect" of any distinction, exclusion or preference, which includes the direct and indirect discrimination. The Convention does not contain an explicit definition and especially the concept of indirect discrimination does not appear to be well understood and recognized in some regions and some countries. In its General Surveys of 1988, 1996 and 2012), the CEACR has consistently provided guidance on the definitions of direct and indirect discrimination. (see, for example, the 2012 General Survey, paras. 944-946). In some cases, national courts have been guided by the Convention in determining the meaning of indirect discrimination. The CEACR has welcomed initiatives explicitly prohibiting and defining direct and indirect discrimination in national legislation and considerable progress has been made in countries which are also member States of the European Union in light of the relevant European Council Directives on equality, as well as in countries including Fiji, Iceland, Kenya, Namibia, Norway and the former Yugoslav Republic of Macedonia.